



# WHITEBOOK 2016

**TRADE/INVESTMENT ISSUES  
& RECOMMENDATIONS**

**8<sup>th</sup> edition**



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## ABOUT EUROCHAM

Since its establishment with only 60 members in 1998, the European Chamber of Commerce in Vietnam (EuroCham) has grown to represent more than 870 European businesses, counting among its supporters many of the world's leading enterprises. With offices in both Hanoi and Ho Chi Minh City, EuroCham's mission is to represent the business interests of our members in Vietnam and to improve the business environment in Vietnam for the benefit of all players.

As the lead organisation representing European business interests in Vietnam, EuroCham works in partnership with the Belgian Luxembourg Chamber of Commerce in Vietnam (BeluxCham), the Central and Eastern European Chamber of Commerce in Vietnam (CEEC), the Dutch Business Association Vietnam (DBAV), the French Chamber of Commerce and Industry in Vietnam (CCIFV), the German Business Association in Vietnam (GBA), the Italian Chamber of Commerce in Vietnam (ICham), the Hanoi chapter of the Nordic Chamber of Commerce Vietnam (Nordcham) and the Spanish Business Group in Vietnam (SBG).

EuroCham is a member of the European Business Organisation Worldwide Network ASBL (EBOWWN) representing European businesses in more than 30 countries across the globe and addressing common trade and investment related issues to the European Commission. Regionally, EuroCham is a member of the EU ASEAN Business Council. Since the end of 2015, EuroCham is the implementing partner of the South East Asia IPR SME Helpdesk providing free of charge advice and support on intellectual property protection when entering and expanding in the ASEAN market.

*For more information on EuroCham,  
visit the Chamber's website at [www.eurochamvn.org](http://www.eurochamvn.org)*

*To download the Whitebook,  
visit the Whitebook section at <http://www.eurochamvn.org/Whitebook>*





**Nicola Connolly**  
*Chairwoman  
European Chamber of  
Commerce in Vietnam*

## MESSAGE FROM THE CHAIRWOMAN

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On behalf of the EuroCham Board of Directors, its Sector Committees and EuroCham's members, I am pleased to present the 'Whitebook 2016: Trade/ Investment Issues and Recommendations'. As previous years, the 8th edition of the Whitebook collects and presents key concerns and recommendations from the European business community in Vietnam. The Whitebook is the joint expression of the views of our member companies, which operate in a wide range of industries. This publication therefore provides a consolidated, first-hand assessment of the current business, economic and regulatory environment in Vietnam.

EuroCham and its industry working groups, the so-called Sector Committees are growing. At the time of writing, EuroCham now has 14 such Committees. As new ones are forming, the Whitebook correspondingly covers a greater scope of business concerns. EuroCham wishes to continue its close cooperation with the Vietnamese authorities, to inform on Government policies for the benefit of companies, investors and society at large. With this in mind, the members of our Sector Committees have been asked to identify the top three issues they believe the Government should prioritise in 2016. As with previous years, each chapter of the Whitebook discusses these issues and the associated potential gains/concerns as well as solutions and recommendations proposed by our members.

2015 has been a year in which Vietnam continued to integrate into the global economy. Regionally, the ASEAN Economic Community is becoming a reality, Vietnam has committed to the TPP and of utmost importance to us is that the EU and Vietnam have concluded the negotiation of the EU-Vietnam Free Trade Agreement. This treaty will bolster trade and investment by 25-35% between the two markets. We believe that the negotiations have led to a comprehensive and mutually beneficial agreement for the respective parties and look forward to the future implementation of the treaty.

EuroCham will continue to work closely with the EU Delegation in Vietnam to ensure that the issues raised in the 8th edition of the Whitebook are addressed. We are most grateful for the strong relationship with the Delegation and hope that the Whitebook 2016 will continue to serve as a strong tool for constructive dialogue between the European business community and the Vietnamese authorities.



**Bruno Angelet**

*Head of the Delegation  
of the European Union  
to Vietnam*

## MESSAGE FROM THE AMBASSADOR

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The year 2015 marked the 25<sup>th</sup> anniversary establishing diplomatic relations between the European Union and Vietnam. It also witnesses the conclusion of the negotiations of a bilateral EU-Vietnam Free Trade Agreement (EVFTA), an important milestone in the bilateral commercial, economic and investment links between Vietnam and the European Union, as agreed by the top leaders of both sides.

Vietnam has made tremendous achievements over the past three decades since it officially launched its reform process. The economic panorama today reflects the results of the right steps taken by Vietnam in its aspiration to become a fully integrated member of the international economic system. In order to achieve this, it is crucial for Vietnam to continue its integration into global economy with dedicated partners like the European Union. Over the years, the EU has demonstrated its serious commitment to support the transition of Vietnam in many ways and continue to be a pivotal source of foreign investment. European businesses were instrumental in providing knowledge and technical expertise for Vietnam.

The EU constitutes one of the most important overseas markets for Vietnam. Yet, in order to further deepen the trade relations with the EU and to attract high-quality investment from the EU, Vietnam has to focus on providing increased added value and accelerate its restructuring efforts. In this respect, the recommendations in the Whitebook 2016 from the European business community are invaluable in this process. They shed light on the business climate in Vietnam where obstacles to both local and foreign investors are identified, new policies are suggested and synergetic cross-sectoral approach is presented to the government of Vietnam for their consideration.

The year 2016 will be an important period with great opportunities and challenges for the business community. EuroCham has proven its proactive role in working closely with the Delegation of the European Union to Vietnam in a wide range of trade and investment issues. As the EVFTA is concluded, I look forward to EuroCham's continued fruitful cooperation to ensure that this ambitious 21<sup>st</sup> century trade deal would bring about benefits for the business and economies of Vietnam and Europe.

## MESSAGE FROM THE BUSINESS ASSOCIATIONS

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**Guy Balza**  
Chairman of BeluxCham



BeluxCham's main activities and objectives include:

- Promoting Belgian-Luxembourg-Vietnamese trade relations.
  - Providing services to Members and non-Members relating to economic, legal, technical, financial, market and other business issues in Belgium and Luxembourg and Vietnam.
  - Raising the profile of Vietnam in Belgium or Luxembourg, the business community and the profile of Belgium or Luxembourg in the Vietnamese business community.
  - Complementing the bilateral activities carried out by missions and/or business organisations.
  - Assisting in the development of the Vietnamese economy through the internationalisation of Vietnamese companies in Belgium or Luxembourg.
- 



**Marko Moric**  
Chairman of CEEC



In March, 2015, the Central and Eastern European Chamber of Commerce in Vietnam (CEEC), an independent non-profit organisation, was formed with the purpose of promoting the cooperation between businesses as well as individuals from 15 Central and Eastern European countries (Austria, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Montenegro, Poland, Romania, Serbia, Slovak Republic, Slovenia) and Vietnam. It is expected to enhance the cooperation, develop the relations in term of economic, finance, commerce, investments and trade promotion between Vietnam and these above stated countries.

CEEC provides services in Vietnam for any CEE related business: from CEE companies trying to get a foothold in Vietnam; business professionals keen to expand their business across borders; Vietnamese businesses seeking opportunities of collaborating with CEE; to CEE and Vietnamese nationals collaborating in diverse areas. CEEC is its members' info-hub in terms of events, regulatory questions etc. in Vietnam. Its services include: networking, business-matchmaking, market analysis, translation; recommendation, introduction and company visits to reliable suppliers/vendors both in Hanoi and HCMC including follow-ups; Public events such as business breakfasts and luncheons, seminars and workshops with industry experts sharing their knowledge and experience with CEEC members; community building both in Hanoi and Ho Chi Minh City, with members able to share experiences, expand their network, find new jobs/colleagues and business partners; insight on CEE country specific backgrounds, knowledge and languages – we provide info in all CEE languages, such as Polish, Bulgarian, Hungarian, Croatian, etc.

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**Remco Gaanderse**  
Chairman of DBAV



The Dutch Business Association (DBAV) has been active in Vietnam's business community since its establishment in 1999. Our membership comprises many large Dutch multinational companies, medium-sized enterprises and smaller, entrepreneurial outfits focused on local or regional markets. Our aim is to serve our great variety of members with a very personal and customised touch so that each one benefits from our network, know-how and platform.

The DBAV organises a variety of networking opportunities, such as Ned Drinks and our annual Dutch Open golf tournament, as well as informative events on developments and trends in Vietnam affecting the business community, such as sector-specific luncheons and factory tours. We also closely cooperate with the Vietnam Chamber of Commerce in the Netherlands to provide a full scope of service to Vietnamese-Dutch affiliated communities in both countries.

As a participant to EuroCham, the DBAV has established strong connections with government institutions and chambers of commerce in Vietnam. Through this network, DBAV creates a platform through which the Dutch business community is a fundamental part of the larger business community in Vietnam. The DBAV maintains close links with the Consulate General of the Netherlands in Ho Chi Minh City and the Royal Netherlands Embassy in Hanoi in order to better assist new or expanding companies to acquire information on the Vietnamese market, policies and relevant local government ministries.



**Nicolas du Pasquier**  
Chairman of CCI France Vietnam



The French Chamber of Commerce in Vietnam (CCIFV) is non-profit organisation created in 1989. It gathers 270 members and offers its services in Hanoi as well as in Ho Chi Minh City. CCIFV is part of a worldwide network which is composed of 113 French Chambers in 83 countries. The missions of the CCIFV are:

- Drive the French business community in Vietnam, in particular by helping the share of information and experiences between its members.
- Promote the image of France in Vietnam and facilitate the exchange of goods, services and capital between the two countries.
- Help the French companies along each step of their development projects in Vietnam by offering practical support and operational solutions such as market survey, partner search, HR and incubation services
- Support Vietnamese companies willing to approach the French market via business missions and visit of major trade fairs in France.





**Jens Ruebbert**  
Chairman of GBA



The German Business Association (GBA), founded in 1995, approved and licensed by the People's Committee of Ho Chi Minh City in 1998, is the voice and advocate of German businesses in Vietnam, fostering bilateral socio-economic relations between the two countries. GBA is one of the longest established business associations and a founding-member of EuroCham in Vietnam. It represents more than 180 German corporations and works for the best possible market environment and operating conditions for German companies in the country. It acts as a competence centre for its members, facilitating helpful information on business in Vietnam and establishing new contacts within the local community. In 2015 the GBA decided to merge with the future German Chamber of Commerce. By joining forces the two institutions will be able to even better serve German business interests in the country and thus actively encourage and support further German investment in Vietnam. GBA regularly creates opportunities for professional as well as social exchange, among others an annual German Ball and Oktoberfest in both Hanoi and Ho Chi Minh City as highlight events. For the full range of activities and membership benefits please have a look at the GBA website.



**Michele D'Ercole**  
Chairman of ICham



The Italian Chamber of Commerce in Vietnam (ICham) has started its activities at the end of 2008 and is now in its seventh year of operation. The Chamber currently has 2 offices based in Ho Chi Minh City and Hanoi with more than 50 members, among which are well-known Italian names: ENI, Generali, Ariston, Intesa Sanpaolo, Unicredit, BNP Paribas, Piaggio, Datalogic, Bonfiglioli, Perfetti Van Melle, Danieli, CAE, Carvico, Tenova, Dezan Shira, Interglobo, Cigisped, Savino del Bene, etc.

ICham has the main purpose of undertaking activities to support commercial exchanges with Italy, including facilitating the activities of its members; organizing trade missions, workshops, seminars; developing the contacts and cooperation with the institutions in Italy and with the European Union, as full member of EuroCham and partner of European Vietnam Business Network (EVBN) and networking with the Chamber of Commerce and with business associations. ICham has also cooperated with the Vietnamese Embassy in Italy to activate Desk Vietnam in Emilia-Romagna, providing information and support for local companies interested in Vietnam by conducting commercial feasibility reports, organising institutional and business missions to Vietnam, cooperating with the Italian Embassy in Hanoi and the General Consulate in Ho Chi Minh City and also interacting with local business associations and to promote the 'Made in Italy' products to Vietnam.



**Anders Smedberg**  
Chairman of  
NordCham Hanoi



On behalf of the Nordic Chamber of Commerce in Hanoi (Nordcham Hanoi) and the Nordic business community in Vietnam, I am glad to see that EuroCham is publishing its eighth edition of the Whitebook.

Through the work of EuroCham's Sector Committees this comprehensive publication annually identify and advice on many issues of common concern to European businesses. The Whitebook also address many issues of particular concern to Nordic businesses present in Vietnam, including sectors such as Industrial Products & Engineering, Information Technology, Pharmaceutical & Healthcare and Sustainability.

The needs of Nordic businesses reach beyond our nations. The Nordic nations have relatively small domestic populations and are highly developed economies. Nordic SMEs as well as global Nordic brands are therefore dependent on the world market for their growth and continued success. In Vietnam Nordic businesses and indeed the Nordic nations have long been present. As the Vietnamese market develops and as it further integrates in the world economy through treaties like the AEC, the EVFTA and the TPP, the Nordic chamber wish to express our support to Vietnam's chosen policy of trade and globalisation.

We believe that the eighth edition of EuroCham's Whitebook will be well received and offer valuable support, offering the authorities of Vietnam a communication channel with a sizable portion of European investors in the market.



**Juan del Casar Ximenez**  
Chairman of SBG



The Spanish Business Group (SBG) was an initiative of a group of Spanish companies established in Vietnam since the early 90s. It gathers 20 members currently with a big portion of them being members of EuroCham too. The SBG is a first step as a group to create an official Chamber of Commerce. The SBG actively promotes Vietnam as a hub in Asia although Vietnam has been a market discovered recently for Spanish enterprises and individuals. The missions of the SBG are: to serve as a bridge of networking and communication with the Spanish Business community in Vietnam, especially by serving the members on understanding the way of doing business in the country; support all Vietnamese companies to start business cooperation with European companies, and particularly promoting the Spanish ones. We are proud to welcome any company with interest in Spain as a nation or any business opportunity where the Spanish language is used. We also wish to promote the image of Spain, the institutions, and to serve as a bridge with the Trade Commission office in Vietnam in HCMC and the Embassy of Spain in Hanoi, to be the first contact point to any Spanish company that wants to establish itself in Vietnam and to cooperate with the Trade Commission office of the European Union and of Spain to offer market information, market surveys or HR policies.



## South-East Asia IPR SME HELPDESK

### Free South-East Asia IPR advice for European SMEs

- ❖ The South-East Asia IPR SME Helpdesk provides **free information and services** in the form of **jargon-free first-line confidential advice on intellectual property and related issues, plus training, materials and online resources.**
- ❖ The Helpdesk raises **awareness** about IPR matters in South-East Asia affecting European SMEs, and helps them make **informed IPR decisions.**

Available to all EU SMEs, the Helpdesk *co-operates with European SME networks, chambers of commerce and industry associations to offer these services free of charge:*



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Individual SMEs and SME intermediaries can submit IPR enquiries directly to the Helpdesk via phone, email or in person, getting access to a panel of experts to receive **free and confidential first-line advice** within **3 working days.**



#### Training Materials

Industry and business-focused guides and training materials address IPR issues in the South-East Asia region by:

- **IP specific guides**, e.g. patents & trade marks
- **Country IP factsheets**: IP overviews of each of the 10 South-East Asia countries
- **Industry specific guides**, e.g. textiles, machinery, creative industries
- **Business guides**, e.g. technology transfer, manufacturing

The Helpdesk can also supply intermediaries with **articles** about IPR in the South-East Asia region written by IP experts for partners' newsletter content or other publications.



#### Online Services

- The **multi-lingual** online portal provides easy access for all EU SMEs to Helpdesk information and services, including Helpdesk **guides, event information, and webinar recordings**
- Users can subscribe to our **blog *Your IP Insider***, our **project newsletter**, and our **Twitter, Facebook and LinkedIn** feeds, to stay up to date on project activities and South-East Asia IPR news.



#### Training Events and Webinars

The Helpdesk organises **training events and webinars** in Europe and South-East Asia on **South-East Asia IPR protection and enforcement**, tailored to the needs of SMEs:

- **General IPR issues**, including IP registration and establishing an IP enforcement strategy.
- **Practical business challenges**, e.g. choosing business partners, attending trade fairs, licensing.
- **Industry specific trainings**
- **One-to-one sessions**: free 20 minute one-on-one consultations with an IP expert are available at most training events.
- **Webinars**: 45 minute online presentations + 30 minute live Q&A, from the convenience of your own office or home. All recordings are available for free download from our website post-session.

#### Working together

For more information and to discuss how we can work together, please contact us:  
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## USER'S GUIDE

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The structure of this Whitebook is designed to provide a concise view of the issues affecting European businesses in Vietnam. In line with this objective, EuroCham has asked members to focus on the discussion of a maximum of three (3) key issues they believe the Vietnamese Government should address with priority. The Whitebook 2016 also assesses how these concerns specifically affect Vietnam for example through impact on trade, growth or employment. Finally, the chapters put forward specific recommendations to help improve the current situation or resolve relevant challenges. Each chapter is thus organised as follows:

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### KEY ISSUE

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**Issue description:** summary of the key concerns

**Potential gains/concerns for Vietnam:** summary of the potential benefits or hindrances to the Vietnamese economy/growth/employment etc.

**Recommendations:** specific recommendations to achieve improvements or help resolve the issues

There are twenty four (24) chapters in total, three (3) introductory, ten (10) cross-sectoral and eleven (11) sectoral. The cross-sectoral and sectoral chapters are organised in alphabetical order.

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## DISCLAIMER

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The European Chamber of Commerce in Vietnam (EuroCham) is grateful for all contributing members of the Sector Committees for the input and support making this 8th edition of the EuroCham Whitebook (Whitebook) possible. The Whitebook is a collective expression of the views of EuroCham's members, represented by the Sector Committees, on specific aspects of the business environment in Vietnam. It does not explicitly represent the views of one or more individual companies. The information and views put forward in the Whitebook are solely intended to promote a constructive dialogue and offer recommendations for the improvement of European – Vietnamese business relations. Furthermore, the Whitebook is strictly intended for the use of EuroCham's members and other interested parties, and not for a particular company and/or institution.

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# OVERVIEW



# CONTEXTUAL INTRODUCTION

## OVERVIEW

2015 has been a determining year for Vietnam and its integration in the international arena. Starting by the implementation of key laws on the domestic level, the conclusion of the negotiations of the European Union-Vietnam Free Trade Agreement (EVFTA), the Trans Pacific Partnership (TPP), the upcoming ASEAN Economic Community (AEC) and the free trade agreement with South Korea, Vietnam enters the year 2016 under a promising framework that also calls upon many significant changes.

For EuroCham members and more generally for EU-Vietnam relations, the official conclusion of the free trade agreement negotiations, in the year of celebration of the 25 years of diplomatic relations between the EU and Vietnam is a significant step for the future of EU-Vietnam business relations and will provide an array of new opportunities. We believe that the negotiations have resulted in a comprehensive, mutually beneficial and balanced agreement.

## VIETNAM'S RAPID TRANSITION

Vietnam is widely recognised as a success story in terms of international development. Since the process of reform (Doi Moi) triggered in 1986, Vietnam has managed to turn from a country with a gross domestic product (GDP) per capital of USD 100 to a lower middle income country with a per capita income of USD 2200 at the end of 2014.<sup>1</sup> With a growth rate of 6.4% throughout the 2000s, Vietnam managed to overcome the slowdown of the 2008 financial crisis and is predicted a 6.5% growth in 2015.<sup>2</sup> Moreover, by improving its macroeconomic stability, Vietnam has also seen improvements in poverty alleviation with less than 3% of its population living in extreme poverty.<sup>3</sup> In the same light, Vietnam has showed a strong will to reach the Millennium Development Goals (MDGs) by achieving in 2015 its targets for infant mortality of under 5 years old as well as reaching almost 100% of primary school enrolment.<sup>4</sup> Efforts remain to be seen in terms of access to universal reproductive health, maternal health and environment sustainability.<sup>5</sup>

Vietnam benefits from several positive characteristics making it an attractive investment destination. With a population of over 90 million people of which 25% are between 10 and 24 years old, it can be said that Vietnam is in a 'demographic golden age'.<sup>6</sup> Additionally, Vietnam has a high literacy rate and high education levels, providing a dynamic and low wage labour force. Finally, its geographic location and proximity to the Association of South East Asian Nations (ASEAN) neighbours puts Vietnam in a beneficiary position in terms of being an attractive investment destination.

Vietnam's opening was also encouraged by its accession to the World Trade Organisation (WTO) in 2007, which forced Vietnam to comply with a variety of international standards. The gradual opening of most service sectors under Vietnam's WTO commitments schedule that began in 2007 was completed in 2015. Domestic law has expanded market access in some sectors beyond those of Vietnam's WTO commitments. For example, foreign shareholding in public companies that was previously capped at 49% is now generally open for to up 100%

<sup>1</sup> 'Overview (Vietnam)', *The World Bank*, 05/10/15. Available at <<http://www.worldbank.org/en/country/vietnam/overview>>

<sup>2</sup> 'ADB raises Vietnam GDP forecasts to 6.5%', *Vietnam News*, 23/09/15. Available at <<http://vietnamnews.vn/economy/276160/adb-raises-vn-gdp-forecast-to-65.html>>

<sup>3</sup> *The World Bank*, *op. cit.*,

<sup>4</sup> 'Vietnam, Country Strategy Partnership', *Asian Development Bank*, 2012, p.1. Available at <<http://www.adb.org/sites/default/files/institutional-document/33620/files/cps-vie-2012-2015-r.pdf>>

<sup>5</sup> *The World Bank*, *op. cit.*,

<sup>6</sup> 'Vietnam; from golden age to golden oldies', *UK FOC*, 07/01/15. Available at <<https://www.gov.uk/government/publications/vietnam-from-golden-age-to-golden-oldies/vietnam-from-golden-age-to-golden-oldies>>



foreign ownership. Vietnam also grants investment incentives including tax breaks in areas such as high-tech, environmental technology, and agriculture, where European businesses are global leaders.

As Vietnam continues its path of development, the Government of Vietnam has set the objective of making Vietnam a modern industrialised nation by 2020 under the umbrella of the Socio-Economic Development Strategy (SEDS) 2011-2020.<sup>7</sup> With this in mind, SEDS has put the focus on structural reforms, environmental sustainability, social equity, and emerging issues of macroeconomic stability requiring changes in the banking system, market institutions as well as State Owned Enterprises (SOEs).<sup>8</sup>

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## 2016: A NEW HORIZON FOR VIETNAM AND ITS TRADE RELATIONSHIP WITH THE WORLD

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After a slowdown in world trade growth at the end of the 2000s, in 2015 world trade growth reached 5.3%.<sup>9</sup> As trade movements continue to expand with the impact of globalisation, developing countries such as Vietnam are fully engaged in the internationalisation and liberalisation of trade and capital markets. With an accelerated movement of people and goods, interaction and communication is heightened. As a result of this trend, a movement of deeper integration and internationalisation has been triggered with the formation of regional institutions like the EU, Mercosur and ASEAN.

2015 was important for Vietnam and its further opening to the international markets with the various trade agreements successfully agreed. Mirroring this trend, domestically, Vietnam has seen key regulatory changes for foreign investors. Starting with the new Law on Investment and the new Law on Enterprises, which replace the old Investment and Enterprise Laws of 2005, foreign investors have more favourable conditions for their investment as well as an improved protection of their interests.<sup>10</sup> Additionally, the new Law on Real Estate Business and the new Law on Residential Housing have also triggered some changes for foreigners in Vietnam, as foreigners are now allowed to buy property in the country.

### ASEAN and the EU

In the region, major changes have been set in motion. Since the creation of ASEAN in 1967, ASEAN has expanded to include new countries and has established itself as a significant regional organisation. In 2014, ASEAN had a total GDP of USD 2,573,589 million and a foreign direct investment (FDI) flow of USD 136,181 million. In terms of international trade, ASEAN has reached USD 2,528,917 million in 2014.<sup>11</sup> ASEAN has also become an important partner for the EU as both organisations have grown to become regional trade blocs. In May 2015, the High Representative of the EU for Foreign Affairs and Security Policy, along with the European Commission adopted a Joint Communication entitled 'The EU and ASEAN: A partnership with a strategic purpose', a document that highlights the EU's will to further the EU-ASEAN relationship.<sup>12</sup> ASEAN is the EU's largest trading partner outside of Europe with more than EUR 235 billion of trade in goods in 2013. Similarly, the EU is ASEAN's third largest trading partner after China and Japan. The relationship between the EU and ASEAN is also mirrored by the European FDI flow aimed at the ASEAN region as between 2011-2013, Europe was the largest FDI investor averaging more than EUR 70 billion. In 2013, the EU accounts for 22% of ASEAN's FDI, making it the first FDI provider in the region.<sup>13</sup>

<sup>7</sup> 'Vietnam, Country Strategy Partnership, *Asian Development Bank*, 2012, p.4. Available at <<http://www.adb.org/sites/default/files/institutional-document/33620/files/cps-vie-2012-2015-r.pdf>> and 'Vietnam's socio-economic development strategy for the period of 2011 -2020 – Vietnam Government, *Economica*, 2011. Available at <<http://www.economica.vn/Portals/0/MauBieu/1d3f7ee0400e42152bdcaa439bf62686.pdf>>

<sup>8</sup> 'Overview (Vietnam); *The World Bank*, 05/10.2015. Available at <<http://www.worldbank.org/en/country/vietnam/overview>>

<sup>9</sup> Walker, A, 'WTO: Global trade to gain speed in 2014 and 2015'; *BBC News*, 17/04/14. Available at <<http://www.bbc.com/news/business-27025011>>

<sup>10</sup> Massmann, O; 'Breaking News – Vietnam – Brand new investment law and enterprise law – what you must know'; *Duane Morris*, 27/11/14. Available at <<http://blogs.duaneandmorris.com/vietnam/2014/11/27/breaking-news-vietnam-brand-new-investment-law-and-enterprise-law-what-you-must-know/>>

<sup>11</sup> 'Selected basic ASEAN indicators'; *ASEAN*, 2015. Available at <[http://www.asean.org/images/2015/September/selected-key-indicators/Summary%20table\\_as%20of%20Aug%202015.pdf](http://www.asean.org/images/2015/September/selected-key-indicators/Summary%20table_as%20of%20Aug%202015.pdf)>

<sup>12</sup> 'Association of South East Nations, ASEAN'; *EEAS*, 2015. Available at <[http://eeas.europa.eu/asean/index\\_en.htm](http://eeas.europa.eu/asean/index_en.htm)>

<sup>13</sup> 'The EU-ASEAN relationship in facts & figures'; *EEAS*, 19/05/15. Available at <[http://eeas.europa.eu/factsheets/news/eu-asean-relationship\\_factsheet\\_en.htm](http://eeas.europa.eu/factsheets/news/eu-asean-relationship_factsheet_en.htm)>

In the same light, several projects illustrate the on-going cooperation between the two regional blocs:

- The yearly EU-ASEAN Business Summit (AEBS) promoting business opportunities was organised in August 2015;
- The ASEAN Regional Integration Support Programme (ARISE), an EU assistance programme that helps ASEAN harmonise and implement its policies in regulation, especially for the completion of the AEC;
- The ASEAN-EU Policy Dialogue on Connectivity held on 24-28 February 2014 in Brussels and Luxembourg. The Dialogue welcomed the establishment of an EU mechanism to engage the ASEAN Connectivity Coordinating Committee (ACCC) in supporting the Master Plan on Connectivity (MPAC) and enhancing ASEAN-EU cooperation in connectivity. The inaugural ASEAN Connectivity Coordinating Committee (ACCC) - EU meeting was held on 11 September 2014 in Nay Pyi Taw;
- The 22<sup>nd</sup> ASEAN-EU Joint Cooperation Committee (JCC) held in February 2015; the ASEAN-EU Ministerial Meeting held in Brussels on 23 July 2014; and the informal ASEAN-EU Leaders' meeting held in Milan in October 2014;
- Following the JCC, the EU and ASEAN discussed the plans up until 2020 of European development aid to ASEAN which will substantially increase its financing for cooperation from EUR 70 million to EUR 170 million for 2014-2020. With the new funding, the EU will continue to fund an Enhanced-Regional EU-ASEAN Dialogue Instrument (E-READI) which includes many types of development cooperation from education, to technology and food safety;<sup>14</sup> and
- The EU also currently provides funding support to the Institutional Capacity Building for ASEAN Monitoring and Statistics (2013-2017), an EU Support to Higher Education in ASEAN Region (2014-2019), the ASEAN Project on the Protection of Intellectual Property Rights (IPR) (2009-2018).

### ASEAN Economic Community

From a regional point of view, the first major change for Vietnam is the establishment of the ASEAN Economic Community completed by the end of 2015 and starting January 2016 which represents a key step for regional integration on all levels. According to a study by KPMG this year, the AEC is defined by four pillars: creating a single market and production base, increasing competitiveness, promoting equitable economic development, and further integrating ASEAN with the global economy.<sup>15</sup> By integrating the region's economies, the AEC will combine 600 million people and a GDP of USD 2.4 trillion.<sup>16</sup> By allowing the free flow of goods, services, investments, and skilled labour, and the free movement of capital across the region, an Asian Development Bank (ADB) Institute study has shown that with the establishment of the AEC, the ASEAN region could see its per capita income triple by 2030 and therefore witness a strong improvement in the quality of life, reaching the same level as that of the OECD member countries.<sup>17</sup>

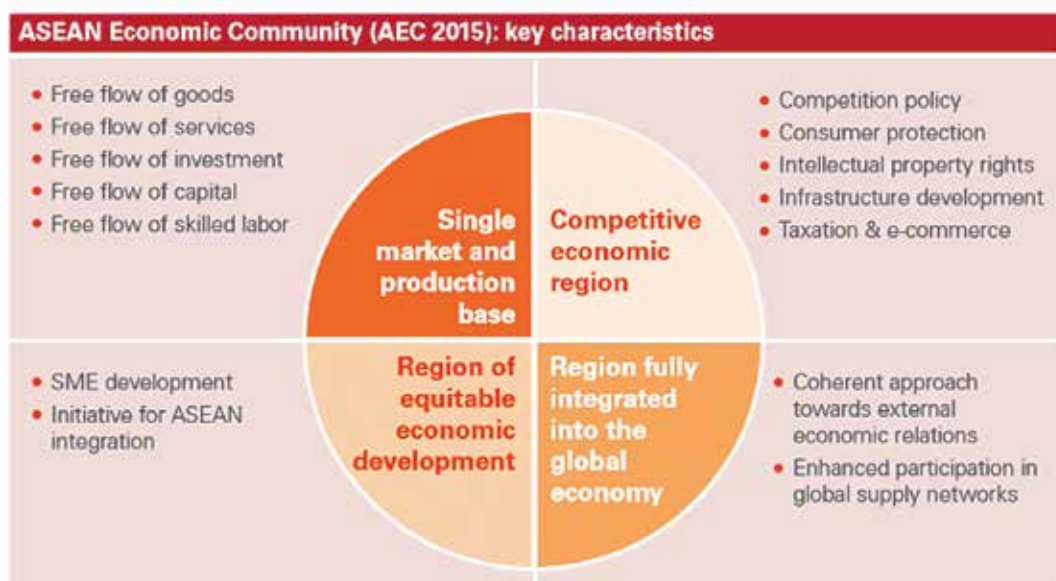
<sup>14</sup> Joint Press Release, 22<sup>nd</sup> ASEAN-EU Joint Cooperation Committee (JCC) meeting convenes in Jakarta (05/02/15); *EEAS*, 2015. Available at <[http://eeas.europa.eu/delegations/indonesia/press\\_corner/all\\_news/news/2015/20150205\\_03\\_en.htm](http://eeas.europa.eu/delegations/indonesia/press_corner/all_news/news/2015/20150205_03_en.htm)>

<sup>15</sup> 'The ASEAN Economic Community 2015, on the road to real business impact', *KPMG*, p.4, 2015. Available at <<https://www.kpmg.com/SG/en/Issue-sAndInsights/ArticlesPublications/Documents/Tax-Itax-The-ASEAN-Economic-Community-2015.pdf>>

<sup>16</sup> Palatino, M, 'Who Will Benefit from the ASEAN Economic Community', *The Diplomat*, 05/05/15. Available at <<http://thediplomat.com/2015/05/who-will-benefit-from-the-asean-economic-community/>>

<sup>17</sup> 'ASEAN Economic Community: 12 things to know', *Asian Development Bank*, 18/08/14. Available at <<http://www.adb.org/features/asean-economic-community-12-things-know>>

Figure 1: ASEAN Economic Community (AEC 2015): key characteristics



Source: 'The ASEAN Economic Community 2015', KPMG, 2015, p.4.<sup>18</sup>

### Trans Pacific Partnership

On 5 October 2015, the Trans Pacific Partnership (TPP) including twelve countries (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam and the US) was signed in principle.

The TPP will have a strong impact on Vietnam as it is estimated that in one decade, Vietnam's GDP will increase by 11% and as Vietnam's economy relies on exports and trades enormously with the US<sup>19</sup> and with over 18.000 tariffs, it is estimated that exports will rise by 28% with a 50% increase in apparel and textile.<sup>20</sup> As such, Vietnam will be able to tap into new markets to which it does not yet have access to. Nonetheless, many obstacles will also arise as Vietnam will have to comply with new complex standards of packing, labour conditions, design, antibiotic residues etc.<sup>21</sup> Moreover, entering into the TPP will force Vietnam to comply with new standards of labour unions and IPR as well as no preferential treatment to SOEs which will trigger changes in the overall Vietnamese economy.<sup>22</sup>

<sup>18</sup> KPMG, *op. cit.*,

<sup>19</sup> Panda, A, 'Trans-Pacific Partnership: Do it for Vietnam', *The Diplomat*, 28/04/15. Available at <<http://thediplomat.com/2015/04/trans-pacific-partnership-do-it-for-vietnam/>>

<sup>20</sup> Boudreau, J, 'The biggest winner from TPP trade deal may be Vietnam', *Bloomberg*, 09/10/15. Available at <<http://www.bloomberg.com/news/articles/2015-10-08/more-shoes-and-shrimp-less-china-reliance-for-vietnam-in-tpp>>

<sup>21</sup> 'Vietnam enters new playground after TPP negotiation ends', *VietNamNet*, 07/10/15. Available at <<http://english.vietnamnet.vn/fms/special-reports/143286/vietnam-enters-new-playground-after-tpp-negotiation-ends.html>>

<sup>22</sup> Lai, T, 'What Vietnam Must Do Now', *New York Times*, 06/04/15. Available at <[http://www.nytimes.com/2015/04/07/opinion/what-vietnam-must-now-do.html?\\_r=1](http://www.nytimes.com/2015/04/07/opinion/what-vietnam-must-now-do.html?_r=1)>

## THE EU, VIETNAM AND THE EU-VIETNAM FREE TRADE AGREEMENT

On 2 December 2015, the EU and Vietnam officially concluded the negotiations of the free trade agreement in Brussels in the presence of Prime Minister Nguyen Tan Dung and EU high representatives, Jean-Claude Juncker, President of the European Commission, Donald Tusk, President of the European Council as well as Martin Schulz, President of the European Parliament. On this occasion, Mr. Juncker stated that 'today's signature is not the end of our relations but the beginning of far more ambitious ties', highlighting the constant development of EU-Vietnam relations over the years.<sup>23</sup> A few months earlier, on 4 August 2015, in the midst of celebrations of EU-Vietnam's 25 diplomatic relations anniversary and after almost three years of negotiations, EU Trade Commissioner Cecilia Malmström and Vietnamese Minister of Industry and Trade Vu Huy Hoang had agreed in principle on a comprehensive and ambitious trade and investment agreement.

This free trade agreement is significant for Vietnam and for the EU as the EU is an important market for Vietnam in terms of trade. In 2014, two way trade between the EU and Vietnam expanded by 8.8% as the EU is Vietnam's largest trading partner after China, enjoying a surplus of USD 2 billion in 2014. Vietnam's prominent exports include textiles, electronic items, footwear, coffee, seafood and furniture. Moreover, Vietnam has benefited from the EU's Generalised Scheme of Preferences (GSP) which provides preferential tariffs to Vietnamese exports into the EU.<sup>24</sup>

**Figure 2: Total goods: EU trade flows and balance, annual data 2005-2014**



Source: 'EU, Trade in goods with Vietnam', European Commission DG Trade, p.3.<sup>25</sup>

As a result of its entry into force, it is estimated that Vietnam's GDP could rise by over 15% and that the value of its exports to the EU could increase by almost 35%.<sup>26</sup> Vietnam and the EU have reached a comprehensive agreement that touches upon all domains of trade and cooperation including sustainable development and environment protection, a strong commitment to a high level of protection of IPR and a level playing field between SOEs and

<sup>23</sup> 'EU, Vietnam sign free trade deal', *Tuoi Tre News*, 03/12/15. Available at <<http://tuoitrenews.vn/business/32000/eu-vietnam-sign-free-trade-deal>>

<sup>24</sup> 'EU-Vietnam economic and trade relations', *EU Delegation to Vietnam*, 2015. Available at <[http://eeas.europa.eu/delegations/vietnam/eu\\_vietnam\\_trade\\_relation/index\\_en.htm](http://eeas.europa.eu/delegations/vietnam/eu_vietnam_trade_relation/index_en.htm)>

<sup>25</sup> 'European Union, Trade in goods with Vietnam', *European Commission DG Trade*, 25/10/15, p.3. Available at <[http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_113463.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113463.pdf)>

<sup>26</sup> 'European Commission's Services' Annex on Vietnam to the Position Paper on the Trade Sustainability Impact Assessment of the Free Trade Agreement between the EU and ASEAN', *European Commission DG Trade*, 2013. Available at <[http://trade.ec.europa.eu/doclib/docs/2013/may/tradoc\\_151230.pdf](http://trade.ec.europa.eu/doclib/docs/2013/may/tradoc_151230.pdf)>

private enterprises when SOEs are engaged in commercial activities. Moreover, with 99% of all tariffs eliminated, Vietnam will liberalise 65% of its import duties for exports originating from the EU at entry into force and the rest over the next 10 years. EU duties will be eliminated over a seven year period.<sup>27</sup> Vietnamese consumers will enjoy a wider range of products originating from the EU at a much more affordable price for products ranging from wine & spirits to automotive and motorcycles.

The numerous changes attached to the EVFTA will not only facilitate trade but will also allow for an improvement in safety and quality standards for Vietnam. Increased FDI from the EU will also bring new skills, a transfer of knowledge and technology, helping Vietnam avoid the so-called 'middle income trap'. Furthermore, in addition to the EVFTA, the EU will continue to promote development and cooperation with Vietnam. With the multi-indicative programme 2014-2020, the EU will invest EUR 400 million for a comprehensive socio-economic development plan focusing on energy, governance and the rule of law.<sup>28</sup> In areas such as renewable energies, pharmaceuticals, food safety and medical devices, the EU can provide considerable support for Vietnam to comply with the requested standards of the EU.

Vietnam has planted the roots for a continued and successful development. However, it is also important to highlight that the implementation of free trade agreements also calls for a significant effort in terms of legal framework, transparency and removal of protectionist measures. From a logistical point of view, increased trade will also call for new potential infrastructure projects involving public-private partnerships and international and regional transport hubs as a result of the intense activities between the two regions.

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## CONCLUSION

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Vietnam has put in place key changes in the past year which affect all of EuroCham's members. As the country continues its path to further international integration and promotion of itself as an attractive FDI destination, this year's Whitebook will not only describe the progress made in each industry since last year's edition but it will also highlight the key issues that remain an obstacle for the European business community.

Indeed, 2015 has seen major changes in terms of trade and competitiveness for businesses in Vietnam. Once again, we would like to thank the Government for the efforts made and for the successful trade agreement between the EU and Vietnam which paints a positive picture for the upcoming years. Nevertheless, some challenges remain to improve Vietnam's competitiveness, especially at a time when neighbouring countries will also challenge Vietnam's competitive advantages in the region.

We therefore invite and encourage the Vietnamese Government to address the issues outlined in this Whitebook and to comfort the expectations of the European business community in Vietnam. Please note that our suggestions in this Whitebook are made on behalf, and in the interest of our members, the European business community in Vietnam. However, it is clear that in the vast majority of cases these suggestions are clearly in the long term interest of the Vietnamese Government and the Vietnamese people.

We sincerely hope that our suggestions will help the Vietnamese Government reach its goals and EuroCham will continue to assist wherever possible. We are therefore looking forward to working with the Government of Vietnam and all our members and partners, both Vietnamese and European, to enhance Vietnam's competitiveness.

## ACKNOWLEDGEMENTS

Laura Chan-Aramendi, Whitebook Editor, EuroCham

<sup>27</sup> 'Facts and Figures: Free Trade Agreement between EU and Vietnam', *European Commission*, 04/08/15. Available at <[http://europa.eu/rapid/press-release\\_MEMO-15-5468\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5468_en.htm)>

<sup>28</sup> 'Development Cooperation', *EU Delegation to Vietnam*, 2015. Available at <[http://eeas.europa.eu/delegations/vietnam/eu\\_vietnam/tech\\_financial\\_cooperation/index\\_en.htm](http://eeas.europa.eu/delegations/vietnam/eu_vietnam/tech_financial_cooperation/index_en.htm)>

# FOREIGN DIRECT INVESTMENT

## A BRIEF OVERVIEW

Vietnam is undergoing fundamental changes to form the basis for its attractiveness and competitiveness in preparation for the ASEAN Economic Community (AEC), the upcoming implementation of several trade agreements including the EU-Vietnam FTA (EVFTA) and the Trans-Pacific Partnership Agreement (TPP).

Since July 2015, a number of new laws and regulations governing foreign investment, enterprises, real estate and foreign ownership limits have come into effect. For example, the new Law on Investment and the new Law on Enterprises are intended to:

- (i) clarify definitions of foreign-invested enterprises;
- (ii) facilitate Merger & Acquisition (M&A) activities;
- (iii) reduce the number of prohibited and conditional business sectors;
- (iv) reduce statutory business licensing times;
- (v) provide more flexibility with regard to corporate governance (such as multiple legal representatives and lower voting thresholds); and
- (vi) create more favourable conditions for shareholder lawsuits.

In addition, new laws and regulations affecting foreign ownership of real estate have come into effect. Foreigners can now own an apartment and for the first time buy a house. They are now also permitted to sublease and inherit real estate.

With the coming into effect of several international trade agreements and more particularly, the EVFTA, EuroCham members are looking forward to the positive changes that will be implemented and that will further business incentives as well as contribute to Vietnam's growth.

## VIETNAM AS AN ATTRACTIVE FDI DESTINATION

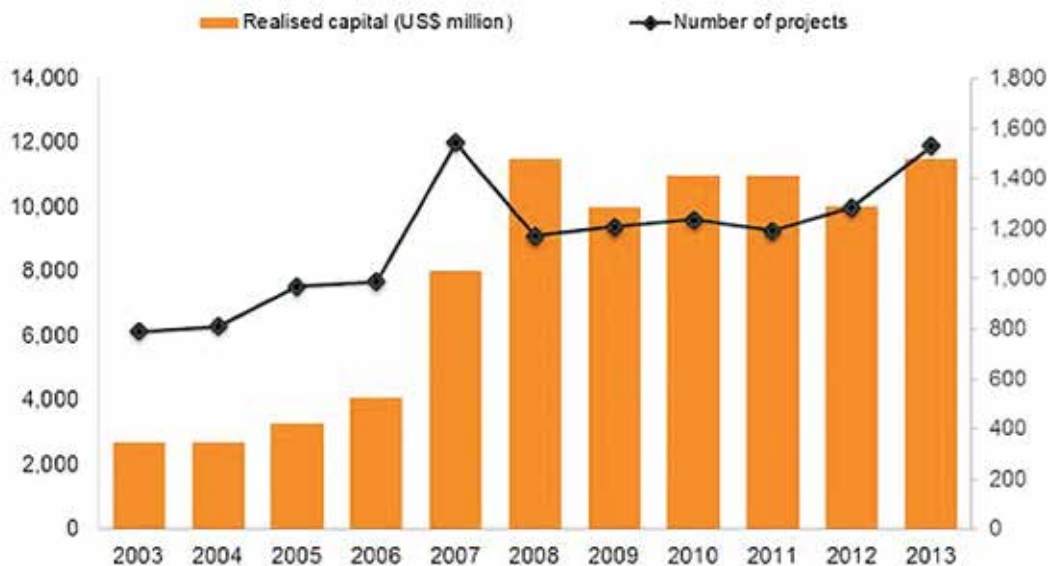
In addition to the numerous legal changes, Vietnam has fundamental elements that participate to its continued growth. For instance, Vietnam is in a demographic golden age, with 25% of its 90 million people population between 10 and 24 years old. GDP per capital is increasing drastically as Vietnam has the fastest-growing middle class in South East Asia – (12.9% per annum over the period 2012-2020).<sup>1</sup> Along with a high literacy rate and education levels, comparatively low wages, connectivity and central location within ASEAN, more and more foreign investors choose Vietnam as their hub to service the Mekong region and beyond.

Vietnam's attractive profile is reflected in its generally welcoming of foreign direct investment (FDI) in manufacturing activities. The gradual opening of most service sectors under Vietnam's WTO commitments schedule that began in 2007 has been completed in 2015. Domestic law has expanded market access in some sectors beyond those of Vietnam's WTO commitments. For example, foreign shareholding in public companies that was previously capped at 49% is now, notwithstanding some exceptions, generally open for to up 100% foreign ownership. Vietnam also grants investment incentives including tax breaks in areas, such as high-tech, environmental technology, and agriculture, where European businesses are global leaders.

<sup>1</sup> 'Vietnam; from golden age to golden oldies', UK FOC, 07/01/15. Available at <<https://www.gov.uk/government/publications/vietnam-from-golden-age-to-golden-oldies/vietnam-from-golden-age-to-golden-oldies>>

Furthermore, in 2014, Vietnam recorded USD 21.92 billion in FDI with a total of 1843 investment licenses for foreign invested projects with a registered capital of USD 16.5 billion, representing a 14% increase from the previous year.<sup>2</sup> Among the foreign investors, the EU is an increasingly important source of FDI for Vietnam as 'according to the Foreign Investment Agency of the Vietnamese Ministry of Planning and Investment, investors from 23 out of 28 Member States of the EU injected a total committed FDI worth USD 19.1 billion into 1566 projects over the course of the past 25 years (by 15 December 2014)'. With this strong activity, in 2014, the EU positioned itself as fifth in the top FDI partners of Vietnam with a combined committed FDI of USD 587.1 million.<sup>3</sup>

**Figure 3: Foreign Direct Investment in Vietnam**



Source: 'Vietnam's logistics market: Exploring the opportunities, Hong Kong Trade Development Council (HKTDC)<sup>4</sup>

In addition to FDI, the EU-Vietnam's strong trade relationship can be seen through programmes like the Multilateral Trade Assistance Project (MUTRAP) which accounts for over EUR 35.12 billion. MUTRAP has been instrumental in supporting Vietnam's negotiating efforts during the WTO accession process and now continues to assist Vietnam in the implementation of trade commitments.<sup>5</sup> In terms of trade, both the EU and Vietnamese businesses are expected to benefit under the EVFTA. The FTA will gradually eliminate tariffs for over 99% of goods and services besides other mechanisms to support bilateral trade. On 2 December 2015, the EU and Vietnam officially concluded the negotiations of the free trade agreement in Brussels in the presence of Prime Minister Nguyen Tan Dung and EU high representatives, Jean-Claude Juncker, President of the European Commission, Donald Tusk, President of the European Council as well as Martin Schulz, President of the European Parliament. It is clear that this agreement will encourage further FDI into the country.

<sup>2</sup> 'Report revises 2014 FDI figures' *Viet Nam News*, 18/03/15. Available at <<http://vietnamnews.vn/economy/267704/report-revises-2014-fdi-figures.html>>

<sup>3</sup> 'Investment -EU-Vietnam economic and trade relations', *Delegation to the European Union to Vietnam*, 2015. Available at <[http://eeas.europa.eu/delegations/vietnam/eu\\_vietnam/trade\\_relation/index\\_en.htm](http://eeas.europa.eu/delegations/vietnam/eu_vietnam/trade_relation/index_en.htm)>

<sup>4</sup> 'Vietnam's logistics market: Exploring the opportunities', *Hong Kong Trade Development Council (HKTDC)*, 20/01/15. Available at <<http://economists-pick-research.hktdc.com/business-news/article/Research-Articles/Vietnam-s-Logistics-Market-Exploring-the-Opportunities/rp/en/1/1X-000000/1X0A0XQJ.htm>>

<sup>5</sup> 'Trade - EU-Vietnam economic and trade relations', *Delegation of the European Union to Vietnam*, 2015. Available at <[http://eeas.europa.eu/delegations/vietnam/eu\\_vietnam/trade\\_relation/index\\_en.htm](http://eeas.europa.eu/delegations/vietnam/eu_vietnam/trade_relation/index_en.htm)>

Table 1: Vietnam's top trading partners 2014

Imports			Exports			Total trade		
Partner	Value Mio €	% World	Partner	Value Mio €	% World	Partner	Value Mio €	% World
World	105,486	100.0	World	104,378	100.0	World	209,864	100.0
1 China	32,011	30.3	1 USA	20,910	20.0	1 China	42,888	20.4
2 South Korea	15,861	15.0	2 EU 28	20,364	19.5	2 EU 28	26,854	12.8
3 Japan	9,420	8.9	3 China	10,877	10.4	3 USA	25,496	12.1
4 Taiwan	8,089	7.7	4 Japan	10,730	10.3	4 South Korea	21,074	10.0
5 EU 28	6,489	6.2	5 South Korea	5,213	5.0	5 Japan	20,150	9.6
6 Thailand	5,195	4.9	6 Hong Kong	3,797	3.6	6 Taiwan	9,771	4.7
7 Singapore	4,982	4.7	7 United Arab Emi...	3,377	3.2	7 Thailand	7,731	3.7
8 USA	4,586	4.3	8 Australia	2,912	2.8	8 Singapore	7,122	3.4
9 Malaysia	3,060	2.9	9 Malaysia	2,868	2.7	9 Malaysia	5,928	2.8
10 India	2,286	2.2	10 Thailand	2,536	2.4	10 Hong Kong	4,554	2.2
5 EU 28	6,489	6.2	2 EU 28	20,364	19.5	2 EU 28	26,854	12.8

World trade: excluding intra-region trade

Top partners: excluding region member states

% Growth: relative variation between current and previous period

Source: 'European Union, Trade in goods with Vietnam', European Commission DG Trade.<sup>6</sup>

Finally, the EU's strong commitment to support Vietnam in its modernisation and integration in the world economy is mirrored by the aid programmes. In line with Vietnam's 2020 socio-economic plan, the EU has increased its aid by 30 % reaching EUR 400 million via its multi-annual indicative programme for the period of 2014-2020 focusing – among other things – on the development of clean energy in Vietnam.<sup>7</sup>

## FURTHER IMPROVEMENTS NECESSARY

It is clear that Vietnam's development and its attractiveness to foreign investors are undeniable as Vietnam is constantly improving its business environment.

However, as of this writing, sufficient guiding regulations for many new laws have still not been published, and investors are experiencing delays in the processing of applications. We expect processing times to improve once the new implementing regulations come into effect and officials get accustomed to the changes.

Another issue that has been highlighted by our members is that many foreign investors still face significant challenges when dealing with Vietnam's bureaucracy. Tax filing, customs clearance, business registration and licensing, and other administrative procedures are often delayed, outcomes can be unpredictable, and businesses find themselves spending resources on administration that they would prefer to invest in expanding their core activities.

Despite remaining hurdles, the national government of Vietnam has expressed an understanding of the issues surrounding foreign investment. Providing foreign investors increased access to its market, the stream of FDI is expected to continue. For many foreign investors the positive economic development of the country and its fundamentals substantially outweigh potential risks.

<sup>6</sup> 'European Union, Trade in goods with Vietnam', European Commission DG Trade, 10/04/15, p.9. Available at <[http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_113463.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113463.pdf)>

<sup>7</sup> 'Development Cooperation', Delegation of the European Union to Vietnam, 2015. Available at <[http://eeas.europa.eu/delegations/vietnam/eu\\_vietnam/tech\\_financial\\_cooperation/index\\_en.htm](http://eeas.europa.eu/delegations/vietnam/eu_vietnam/tech_financial_cooperation/index_en.htm)>



In this light, EuroCham wishes to present the key issues that our members face in their activity in Vietnam along with some key recommendations. EuroCham hopes to engage in a constructive dialogue and increasing cooperation with the relevant authorities on all the issues presented in this edition in order to improve the business environment for all enterprises in Vietnam and contribute to the country's fast modernisation.

## **ACKNOWLEDGEMENTS**

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Manfred Otto, Associate, Duane Morris Vietnam LLC

## EXECUTIVE SUMMARY

### OVERVIEW OF VIETNAM'S BUSINESS CLIMATE

EuroCham members acknowledge the efforts conducted by the Vietnamese Government to address a number of the issues raised in last year's edition of the Whitebook. Amongst the many changes, we highlight the new Law on Investment, the new Law on Enterprises, the new Law on Real Estate Business and the new Law on Residential Housing.

Nonetheless, some obstacles for European businesses still remain and EuroCham members wish to work with the Government to develop an efficient legal framework and a positive business environment for the benefit of Vietnam, Vietnamese citizens and European businesses.

In terms of overall global competitiveness, Vietnam ranks 56<sup>th</sup> out of 144 economies according to the 2015-2016 World Economic Forum (WEF) Report, an improvement of 12 places compared to last year's placement at number 68.<sup>1</sup> However, exploring the various indicators of the study, it is important to underline that some key issues, relevant to Vietnam's business environment still need some improvement. For example, the weakness of auditing and reporting standards (130<sup>th</sup>) and the tedious procedures for setting up a business (116<sup>th</sup>) still indicate some impediments for foreign investors.

**Table 2: Vietnam's global competitiveness ranking in selected areas**

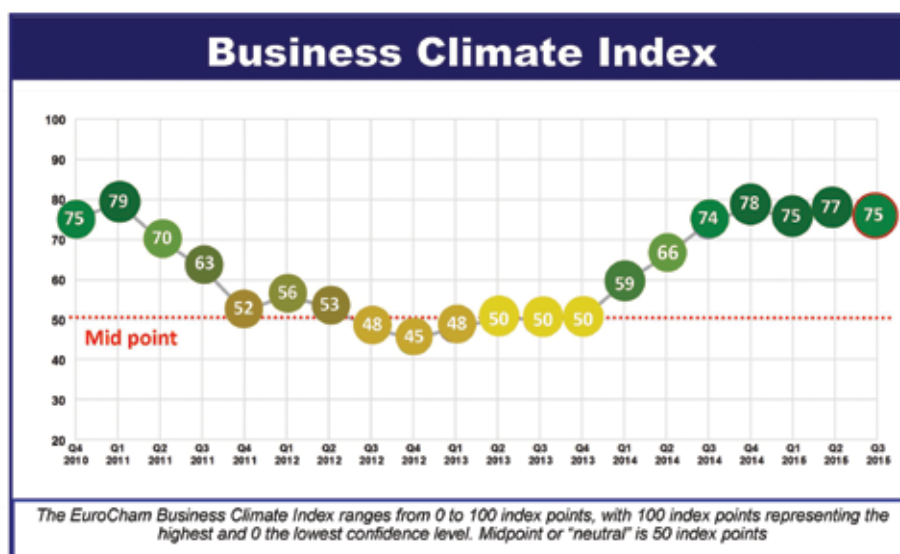
Index parameter	2014-2015 Ranking	2015-2016 Ranking	Changes in ranking 2015-2016
Burden of government regulation	101	90	+11
Efficiency of legal framework in settling disputes	89	69	+20
Strength of auditing and reporting standards	132	130	+2
Quality of education system	94	78	+16
No. of procedures to start a business	118	116	+2
Intellectual property protection	105	88	+17
Availability of financial services	104	103	+1
Availability of latest technologies	123	112	+11
Quality of scientific research institutions	96	95	+1
Quality of overall infrastructure	112	99	+13
<b>Overall ranking</b>	<b>68</b>	<b>56</b>	<b>+12</b>

Source: WEF Global Competitiveness Report 2015-2016, rank out of 140 economies in 2015-2016 and 144 in 2014-2015.<sup>2</sup>

<sup>1</sup> 'The Global Competitiveness Report 2015-2016', *World Economic Forum*, 2015, p.366. Available at <[http://www3.weforum.org/docs/gcr/2015-2016/Global\\_Competitiveness\\_Report\\_2015-2016.pdf](http://www3.weforum.org/docs/gcr/2015-2016/Global_Competitiveness_Report_2015-2016.pdf)>

<sup>2</sup> 'The Global Competitiveness Report 2015-2016', *op.cit.*, p. 367

Figure 4: Business Climate Index Development



Source: Business Climate Index, EuroCham, Q3 2015

EuroCham welcomes the positive results of the latest BCI. However, as reflected in this Whitebook, European companies still face challenges in doing business in Vietnam. The main concerns and recommendations expressed by the European business community are summarised in the following sections.

## SUMMARY OF KEY ISSUES AND RECOMMENDATIONS

### 1. Increasing the livelihood of the people

**a. Safe medical access and pharmaceuticals:** one of the key issues for the Government in the coming years will be to find the right balance between ensuring quality and affordability. The Ministry of Health is in the process of reviewing the Government procurement scheme (i.e. a new tender circular and tender lists) in line with the regulations of the Law on Bidding, which entered into force on 1 July 2014. In this process, a number of issues need to be effectively addressed. As foreign companies are currently not allowed to directly participate in pharmaceutical tenders in Vietnam, some of the newly proposed initiatives, such as price negotiations, would be very difficult to implement in practice.

In 2015, 40,000 Vietnamese people went abroad for medical treatment, amounting to at least a total of USD 1 billion per year. This trend illustrates the need for further improvement to respond adequately to people's medical needs in Vietnam by improving hospitals, hiring qualified staff and replacing out-dated medical equipment. The medical devices market is expected to keep growing, reaching USD 1.4 billion in 2018.<sup>3</sup> This market is important for European firms because Vietnam currently imports over 90% of its devices as its own manufacturing industry cannot, in its present form, satisfy national needs.

<sup>3</sup> 'Vietnam Medical Devices Market', *Espicom Business Intelligence*, 11/06/14. Available at <<http://www.espicom.com/vietnam-medical-device-market.html>>

- b. Food safety and toddlers' nutrition:** with this year's major changes in terms of free trade agreements (FTAs) and the entry into force of the ASEAN Economic Community (AEC), Vietnam has new possibilities to export its agricultural products. With regard to infant and child nutrition, it has been observed that the newly imposed price ceilings have affected consumers' behaviour, while the actual modest rise in prices of economy-tier products suggests that the State's policy may not have succeeded in its stated humanitarian objective of lowering prices for low-income consumers.
- c. Energy and electricity:** in the past few years, energy demand has been growing by 15% per year.<sup>4</sup> To meet such a demand, Vietnam currently still prioritises low-cost sources of power generation, including coal fired power plants and hydropower which are power sources that nearly take a decade to plan, construct and operate. This is in a context where Vietnam has an excellent potential for development of renewable energy generation.

Following the previous point related to energy, it is important to highlight the current key decisions that have to be made regarding the environment and the protection of our planet more generally. As Vietnam moves into more capital intensive industries to increase local content, the Government can focus its industrial policy of completing the supply chain and increasing local content with processes that are environmentally friendly or have adequate recycling facilities, as Vietnam is one of the countries most exposed to global climate change and where pollution is directly proportional to the economic growth. Furthermore, import of fuel from abroad will create major pressure on the logistics as well as on the balance of payments of the country.

For these reasons, EuroCham offers to the Vietnamese Government the example and support of the European experience and technology in energy conservation and efficiency, in renewable energy, and in clean production. Western governments and consumers are becoming more selective in terms of the products they accept to buy, and they choose the ones produced with processes that are environmentally friendly and where labor practices are most comparable to the home standards. Renewable sources of energy may have a smaller scale than other alternatives but they have a much faster implementation time, and do not constrain the country to a long-term commitment to the same source of energy, as for example coal fired plants built in BOT require.

### Recommendations

- We believe that there is an inherent need to ensure a level playing field in public tenders through the direct participation of foreign companies, instead of relying on local partners – replicating the level playing field offered in other ASEAN countries. Furthermore, a level playing field will provide procurement agencies with more choice in terms of price and quality, contributing to the improvement and efficiency of expenditures on State budgets and health insurance funds.
- We would recommend strong involvement in the improvement of medical devices in the form of training of staff and in the establishment of an official document creating a legal corridor for the management of production and circulation of medical devices.
- It becomes even more important that the following issues are addressed: food safety<sup>5</sup>, export of high-end manufactured products (not only commodities), diversification of products, commercialisation of by-products and the correct use of pesticides, antibiotics and fertilisers.<sup>6</sup> Further attention also needs to be paid to labelling requirements<sup>7</sup> and to mechanisation, modernisation and restructuring of the agriculture.<sup>8</sup>
- We are concerned that this will in the future impact directly and negatively the goals under the National

<sup>4</sup> 'Vietnam Hydro Project to Help Meet Growing Energy Demand While Avoiding 1 Million Tonnes of CO2 Emissions', *The World Bank*, 26/04/11. Available at <<http://www.worldbank.org/en/news/press-release/2011/04/26/vietnam-hydro-project-help-meet-growing-energy-demand-avoiding-1-million-tonnes-co2-emissions>>

<sup>5</sup> 'Food safety vital to win EU Market', *Vietnam Plus*, 10/06/2015. Available at <<http://en.vietnamplus.vn/food-safety-vital-to-win-eu-market/78465.vnp>> and 'Producers, traders blamed for substandard food safety', *Viet Nam News*, 25/11/2014. Available at <[vietnamnews.vn/society/263169/producers-traders-blamed-for-substandard-food-safety.html](http://vietnamnews.vn/society/263169/producers-traders-blamed-for-substandard-food-safety.html)> and 'Asian importers apply EU standards to seafood imports from VN', *The Saigon Times*, 08/07/2015. Available at <[english.thesaigontimes.vn/41839/Asian-importers-apply-EU-standards-to-seafood-imports-from-Vietnam.html](http://english.thesaigontimes.vn/41839/Asian-importers-apply-EU-standards-to-seafood-imports-from-Vietnam.html)>

<sup>6</sup> See chapter 3.1 Agribusiness and Food Safety of *EuroCham Whitebook 2015*. Available at <<http://www.eurochamvn.org/Whitebook>> and 'Annual report spotlights enterprise role in agriculture', *Vietnam Plus*, 15/04/2015. Available at <[en.vietnamplus.vn/Home/Annual-report-spotlights-enterprise-role-in-agriculture/20154/64259.vnplus](http://en.vietnamplus.vn/Home/Annual-report-spotlights-enterprise-role-in-agriculture/20154/64259.vnplus)>

<sup>7</sup> See chapter 3.4 Fast Moving Consumer Goods of *EuroCham Whitebook 2015*. Available at <<http://www.eurochamvn.org/Whitebook>>

<sup>8</sup> 'Industrialising agriculture: The only solution for Vietnam', *Vietnam Net*, 05/05/2015. Available at <[english.vietnamnet.vn/fms/special-reports/129352/industrializing-agriculture--the-only-solution-for-vietnam.html](http://english.vietnamnet.vn/fms/special-reports/129352/industrializing-agriculture--the-only-solution-for-vietnam.html)>

Nutrition Strategy on improving Vietnamese children's health status.

- With a clear policy framework, the wind power sector in Vietnam will be able to attract substantial private investments, from both foreign as well as domestic capital – investments that the public sector won't have to make.

## 2. Increasing Consumer's choice

**a. Wine and Spirits:** our Wine and Spirits Sector Committee is concerned about further changes to the Special Consumption Tax (SCT) on wine and spirits, as discussed during the 10<sup>th</sup> Session of the 13<sup>th</sup> National Assembly of Vietnam. In the current draft, which would be the second amendment to the SCT Law in a very short time, the taxable value will change from import prices to import prices and resale prices. As a result, the SCT will increase, which would nullify and impair the benefits of any tariff cut negotiated under the EVFTA on imported spirits. The sudden and significant increase of SCT on imported spirits will inevitably lead to sharp increases in resale prices followed by a decrease in demand and a subsequent negative impact on Government revenue.

**b. Mobility:** for the motorcycle and automotive industry, tax impediments remain a concern. For motorcycles, pursuant to the new Law No. 70/2014/QH13<sup>9</sup>, the SCT rate for motorcycles with a capacity of over 125cc is still 20%.<sup>10</sup> For the automotive industry, concerns of road congestion have also imposed high fees on cars such as the high registration tax.

## Recommendations

- The industry strongly believes that keeping the current system fully consistent with international practices will be in the interest of all parties.
- We strongly recommend the relevant authorities to reconsider the issue in the process of its amendment/issuance of a revised or new Law on SCT; and
- For the automotive industry, we recommend that commitments are undertaken with the aim of eliminating all customs duties on cars (Complete Built Up and Complete Knock Down vehicles). When this is not feasible, we recommend the immediate, progressive and reciprocal reduction of all customs duties in accordance with a clear schedule.

## 3. Legal Framework

The year 2015 has been a decisive year in terms of regulations. Several new laws and regulations governing foreign investment, enterprises, real estate and foreign ownership limits have come into effect, such as the new Law on Investment and the new Law on Enterprises. These laws are expected to mark a new positive milestone for the legal framework for M&A activities in Vietnam. In addition, new laws and regulations affecting foreign ownership of real estate have come into effect. Under certain conditions, foreigners can now own apartments, buy houses and are permitted to sublease and inherit real estate. Although both laws have developed from previous legislation, there are still several shortcomings regarding bank guarantees for off-the-plan real estate, house ownership of foreign individuals as well as conditions for transferring investors' real estate projects.

Among other things, Vietnam needs to prioritise the protection of IPR to encourage foreign investment in Vietnam. Even though Vietnam has improved its legal framework and enforcement of IPR in recent years, infringements and the enforcement of IPR laws remain a concern for European and Vietnamese businesses alike.

Where the value of a contract is substantial, foreign investors in Vietnam generally choose to provide for dispute resolution by international arbitration. Although international arbitration may be costly and time consuming, an international arbitral award is generally enforceable in most jurisdictions around the world under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'NYC 1958'), of which Vietnam is a member. The vast majority of member states properly apply the provisions of the NYC 1958 in practice and duly recognise and enforce foreign arbitral awards within their own jurisdictions.

<sup>9</sup> New Law No. 70/2014/QH13 amending some articles of Law No. 27 (Law on Special Consumption Tax (SCT) No. 27/2008/QH12) and effective from 1 January 2016

<sup>10</sup> Cubic centimetres refers to engine capacity

## Recommendations

- EuroCham therefore recommends the Vietnamese Government to step up its efforts in guaranteeing an effective protection of IPR in order to develop technologically-advanced industries, promote innovation, attract more foreign investment and stop risky counterfeit products in sectors such as agriculture and pharmaceuticals
- Our members have found that it is extremely difficult in practice to achieve the recognition and enforcement of foreign arbitral awards through the Vietnamese courts. The main difficulties encountered are the reversal of the burden of proof in respect of objections to applications for recognition and enforcement of foreign arbitral awards, and the rejection of applications by the Vietnamese courts for reasons that are not consistent with the NYC 1958.
- In addition to that, introducing a more detailed and robust corporate governance framework for Vietnam would facilitate the transition towards a more compliant corporate governance culture as a standard part of business practice.

## 4. Increasing Vietnam's competitiveness

Vietnam's active efforts to further integrate into the competitive international market in 2015 have resulted into several key new trade deals. With the TTP, the FTA with South Korea, the completion of the AEC and the EVFTA, Vietnam is increasing its competitiveness in the region and in the world. With the successfully completed negotiations of the EVFTA, EuroCham members are looking forward to the new regulatory and business framework that will encourage further FDI into Vietnam.

- a. Taxation:** while there have been many positive developments in the tax laws as well as in reducing the time it takes taxpayers to comply with their tax obligations, we have observed that the practical implementation of the laws in general appears to have become more challenging. As an example, while Vietnam has an extensive tax treaty network with over 60 active treaties and new treaties continuing to be signed, the practical implementation of the benefits under tax treaties has recently become more difficult. In addition, it seems like non-compliance with non-tax rules and regulations, even where these may not be clear is often used by tax authorities as a basis to either increase taxable income, impose withholding tax, deny a tax deduction, deny a VAT input credit or reject a VAT refund.
- b. Information Technology:** the more the IT industry and internet usage advance in Vietnam, the more crucial it becomes to have a stable and uninterrupted access to the internet. The stability of worldwide connections is key, not only for all business sectors but also because it affects people's lives.
- c. Human Resources:** although the training of the Vietnamese workforce is increasing annually and improvements are made, Vietnam still lacks a skilled workforce in primary industries and in sectors that are key to achieve rapid growth and a higher comprehensive workforce. With the completion of the AEC and the other integration activities in which Vietnam is participating, further reform is necessary.
- d. Tourism:** travel and tourism is a major contributor to both employment and to the GDP of Vietnam. In comparison to other major contributors, however, this seems to be often sadly neglected. In Vietnam, direct contribution of travel and tourism was at 4.6% of GDP in 2014. Furthermore, in 2014, more than 2 million jobs were created directly by the tourism industry, figures that are expected to keep increasing.<sup>11</sup> There are several key issues that we continue to believe need to be addressed in order for the travel and tourism industry to achieve its full potential and for Vietnam to achieve its goals as set out in the National Development Strategy for Tourism to 2020 with a vision to 2030.<sup>12</sup>

<sup>11</sup> 'Facts and Figures about the tourism industry in Vietnam', *VietNamNet*, 11/06/15. Available at <<http://english.vietnamnet.vn/fms/business/132189/facts-and-figures-about-the-tourism-industry-in-vietnam.html>>

<sup>12</sup> 'Strategy on Viet Nam's Tourism Development until 2020, Vision 2030', *Viet Nam Government Portal*, 2015. Available at <<http://chinhphu.vn/portal/page/portal/English/strategies/strategiesdetails?categoryId=30&articleId=10051267>>

- e. Infrastructure:** rapid economic growth and urbanisation are driving high demands for roads, power, ports, waste and water treatment, hospitals, and other public infrastructure for goods and services. On 14 February 2015, the Government promulgated the long-expected PPP Decree, which took effect on 10 April 2015.<sup>13</sup> Together with a new Decree on tendering for investors for PPP projects, which became effective on 5 May 2015, the PPP Decree replaced the previous regulatory framework relating to BOT projects and pilot PPPs.<sup>14</sup> Although the new PPP Decree constitutes an important legal development, this, of itself, will not translate into a series of successful privately invested infrastructure projects.
- f. In terms of transport and logistics,** with the advent of the European Union Vietnam Free Trade Agreement (EVFTA), the need to create a regional transport hub in Cai Mep has never been as great as now. The resultant increase in trade (and therefore container traffic in and out of Vietnam) is now expected to far exceed the previously expected growth of 7% to 8% from now until 2020.

### Recommendations

- In our view, the most appropriate consequence for the non-compliance rules should be an administrative penalty.
- In the wake of the implementation of international FTAs such as the EVFTA and the TPP, we believe that the frequent lack of a stable connection to the outside world will drastically affect investments from foreign enterprises as outage of Vietnam's internet mainline decreases the trust and confidence of foreign business in being able to conduct business sustainably in Vietnam.
- Improving training, education and the legal system governing the management of labour, will help meet the demand for skilled workforce, promote a competitive and healthy investment environment for the transfer of knowledge and more generally for the development of Vietnam's economy.
- We would recommend the introduction of a more flexible and simple visa policy, by expanding the list of visa exempted countries and introducing a true e-visa where visitors can get their visa online and print for processing at immigration. We also believe that the current visa exemption period should be expanded from 15 to 30 days and to allow visitors to return within those 30 days if they can show their corresponding departure flight.
- EuroCham wishes to highlight the need for a further coordination amongst related Government agencies, as well as the need to adopt further detailed implementing regulations, including with respect to the allocation and procedures for utilising viability gap funding for the emergence of successful and visible projects.
- Trade between the EU and Vietnam has on average increased by 23.1% between 2010 and 2014<sup>15</sup> and in order to maximise the further increase in trade volumes that the EVFTA will undoubtedly bring to Vietnam, it is essential that an efficient deep sea container terminal exists to cater for such a demand. The current reliance on the HCMC terminals is not sustainable both from an operational and a commercial point of view.

<sup>13</sup> Decree No. 15/2015/ND-CP dated 14 February 2015.

<sup>14</sup> Decree No. 30/2015/ND-CP dated 17 March 2015.

<sup>15</sup> Eurostat COMEXT, 10 April 2014.







# **CROSS-SECTORAL ISSUES**

## **PART ONE**

# CHAPTER 1 CORPORATE GOVERNANCE

## OVERVIEW

Corporate governance is the framework that regulates the internal practices and processes of companies to support the interests of both public and private stakeholders. In developing economies, implementing effective corporate governance systems has been historically challenging. However, establishing such structures is critical to the growth of companies, increased competitiveness and successful participation in the global economy.

According to the Organisation for Economic Co-operation and Development (OECD)<sup>1</sup>, the quality of local corporate governance critically affects a country's ability to achieve sustained real productivity, growth and the success of its long-term development efforts. The rigours of political and economic transition create dramatic change, which can generate difficulties for a growing economy. Corporate Governance establishes systems for accountability and transparency, critical to supporting dynamically changing business environments.

The 2012 Vietnam Corporate Governance Scorecard indicated that there is room for improvement in corporate governance practices in Vietnam, with scores across 100 listed Vietnamese companies averaging 42.5% for overall corporate governance, versus companies with benchmark good corporate governance practice achieving an overall score of between 65% and 74%.<sup>2</sup> The Scorecard covered sub categories including overall corporate governance performance, rights of shareholders, equitable treatment of shareholders, role of stakeholders, disclosure and transparency and responsibilities of the board. All sub-category scores were below 60%.<sup>3</sup>

Overall, the conclusion from the Vietnam Corporate Government Scorecard is that corporate governance practices in Vietnam are not at the foreground of decision making. Assistance from the regulators in introducing a more detailed and robust corporate governance framework for Vietnam will facilitate the transition towards a more compliant corporate governance culture as a standard part of business practice.

### Corporate Governance Regulatory Framework in Vietnam

The key Laws and Regulations on Corporate Governance in Vietnam are as follows:

- Law No. 68/2014/QH13 of the National Assembly on Enterprises dated 26 November 2014 (the Law on Enterprises); and
- Circular No. 121/2012/TT-BTC of the Ministry of Finance on Corporate Governance of Public Companies dated 26 July 2012 (Circular 121).

The new Law on Enterprises was passed on 26 November 2014 by the National Assembly of Vietnam, and came into effect on 1 July 2015, which introduced positive developments towards improving corporate governance in Vietnam. The Law on Enterprises applies to all corporate entities in Vietnam.

However, whilst improvements have been made, some challenges have emerged, leading to difficulties in operation. On 19 October 2015, the Government passed Decree No. 95/2015/ND-CP to implement the Law on Enterprises. However, this decree does not further elaborate matters of corporate governance in Vietnam.

This section will aim to highlight the corporate governance challenges in Vietnam that still exist today and suggest recommendations for the Government to address these challenges with the aim of improving corporate governance in enterprises in Vietnam.

<sup>1</sup> OECD Policy Brief No 23, Corporate Governance in Developing, Transition and Emerging-Market Economies, OECD, 2003. Available at <<http://willembuiter.com/oecd.pdf>>

<sup>2</sup> Corporate Governance Scorecard 2012, International Finance Corporation Vietnam, 2012. Available at <<http://www.ifc.org/wps/wcm/connect/4e9e9c804ddfd39ab2ba7a9dd66321/Scorecard+2012++Eng.pdf?MOD=AJPERES>>

<sup>3</sup> *Ibid.*

## I. DIRECTORS' DUTIES AND ENFORCEMENT

Relevant Ministries: Ministry of Planning and Investment (MPI), Ministry of Finance (MOF), State Securities Commission

### Issue description

Under the Law on Enterprises, directors have a responsibility to exercise their rights and discharge their duties in good faith and in a professional manner. Furthermore, directors have an obligation to act honestly, with due diligence and due care, and in the best interest of the company.

The Law on Enterprises also stipulates that directors have a duty of loyalty to the interests of the enterprise and cannot use information, know-how, business opportunities, assets of the company or his/her position to seek personal benefits or for the benefit of other organisations or individuals. The Law, model charter and the corporate governance regulations fail to provide further expansion as to the concept of the director's duty of loyalty.

Whilst the Law on Enterprises stipulates guidelines for the overriding conduct of directors, it does not provide comprehensive guidance as to how directors should behave or the specific steps that should be taken when acting in the capacity of a director. The notions of good faith, professionalism, honesty, due diligence, due care, loyalty and acting in the best interests of the company are arguably subjective measures. On a practical level, the Law on Enterprises in its current form does not offer sufficient guidance as to what the law requires of directors.

Enforcement of directors' duties in respect to non-listed companies under the Law on Enterprises is difficult since there is no uniform regulator or enforcement agency having jurisdiction over non-listed companies. The scope of local level Departments of Planning and Investment (DPI) is generally limited to facilitating enterprise registration and licensing requirements; DPIs have very limited involvement in enforcing matters of corporate governance.

Whilst online databases, searches for local enterprises have recently been available, they provide limited information, particularly for foreign-owned enterprises and thus hinder the enforcement process due to the lack of transparency.

Government entities such as the DPIs, the State Securities Commission of Vietnam (SSC) for public companies and the State Bank Vietnam (SBV) for credit institutions face capacity and understaffing issues. This has also led to difficulties in enforcement, as efforts are concentrated on other areas such as regulatory compliance and registration.

### Potential gains/concerns for Vietnam

As the Vietnamese economy grows, corporate governance in Vietnam will become increasingly important in generating robust corporate entities and stimulating foreign investor interest in local companies. Organisations with strong corporate governance procedures in place will be perceived as lower risk investments and will thereby have the opportunity to achieve higher levels of foreign investment and/or higher sale prices. As sound corporate governance practices are increasingly introduced in Vietnam, organisational quality will improve and it stands to reason that good corporate governance is good business practice.

### Recommendations

- › The SSC, the Stock Exchanges and the key business associations in Vietnam work together to develop a Code of Conduct setting out best practices in order for directors to exercise their duties that not only comply with law but also serve as a model for good corporate citizenship.
- › Establish a dedicated regulator (or division in an existing Government body) for this purpose, with a focus on both listed and non-listed enterprises. We further recommend that the Authorities support the business community in establishing a Vietnamese institute for company directors which will promote best practice corporate governance, facilitate corporate governance training and be driven by the business community. The establishment of a uniform framework for corporate governance, such as the OECD Principles of Corporate Governance and the IFC Vietnam Corporate Governance Manual, introduced as best practice guidelines for all

enterprises, would assist in moving towards a practical application of sound corporate governance practices in Vietnamese enterprises.

- › Improve the scope and role of independent audit committees;
- › Create robust internal controls and internal audit practices;
- › Establish practices to nominate and duly appoint appropriately qualified and experienced board members;
- › Generate high quality financial and non-financial reporting, to IFRS standards and global best practice; and
- › Generate a culture of transparency and accountability.

## II. SHAREHOLDER PROTECTION

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 Ministry of Planning and Investment (MPI), Ministry of Finance (MOF), State Securities Commission  
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### Issue description

Vietnamese shareholders rarely take board members or the general director to court for a breach of the duties of those officers. In particular, minority shareholders also rarely take the company to court for oppressive conduct. There are a number of reasons for this. One reason is a cultural one. Vietnamese in general are keen to settle matters on a consensus basis and would prefer that matters be dealt on a mutual basis before airing issues in public. However, one of the key reasons is that a shareholder under law does not have standing to bring directors to account for a breach of their duties. It would appear that a company can only bring its directors or board members to account for a breach of duty. Therefore, it would be very difficult for a minority shareholder to commence such actions without the other majority shareholder agreeing to take action under a resolution of the general meeting of shareholders.

We recognise that under the Law on Enterprises there are a number of provisions that have the purpose of protecting shareholders. For example:

- › shareholders owning 10% or more of the charter of a shareholding company may file a complaint to the court to reverse a shareholders' resolution if the resolution was improperly passed or if the resolution breached a law or a charter provision.
- › an officer of the company executing a related party transaction without the requisite approval is liable for the loss caused and must return any gains to the company.
- › a general director acting illegally or not within the provisions of the charter or his terms of employment may be liable to the company for any loss.

However, the language is not clear under law to give shareholders standing to sue the company or the officers for breach of duties or law. It would appear that the company would need to bring action against the officers on behalf of the shareholders.

There are also no direct provisions under the Enterprise Law that deal with the oppression of shareholders or conduct that is unfairly prejudicial to a shareholder. A number of conducts that could amount to oppression include:

- › transferring substantial assets of the company to another company to achieve the purpose proposed by the majority of shareholders.
- › not declaring dividends in order to 'starve' a shareholder of any benefits of a company.
- › providing insufficient information about a transaction to shareholders.

- › issuing shares for the dominant purpose of diluting the minority voting rights.
- › allowing differential share subscription pricing for a majority shareholder.

Many of these conducts are dealt with in company law legislation in many other jurisdictions, such as Singapore and Australia, but have yet to be adopted by Vietnam. Of course, if the above conduct is made illegal there would need to be sufficient remedies to protect minority shareholders. These may include requiring the majority to buy out the minority shareholders at a price determined by an independent expert as ordered by a court and taking into account a range of factors including the control premium. The court can order certain specific performance (e.g. unwinding a capital raising or a transaction).

### Potential gains/concerns for Vietnam

Board members and officers of the company will more likely act in the interest of their shareholders and perform their duties better if they know that shareholders can have specific standing to hold the offers to account. If shareholders are given greater opportunities to take judicial recourse then the standard of board members will need to improve so that shareholders are not given an opportunity to enforce their rights against directors who do not act in the interest of shareholders and the company as a whole.

New regulations protecting minority shareholders should be adopted to identify cases where there is oppressive or unfairly prejudicial conduct to a shareholder or shareholders. Many jurisdictions, such as Australia and Singapore, have set out a number of remedies to protect minority shareholders if such oppressive conduct is being practiced. Vietnam should consider these measures as an arsenal of measures to give greater protection to minority shareholders.

### Recommendations

- › The Government should introduce a decree to further elaborate the mechanisms on shareholder protection, including clear guidelines on filing proceedings against an officer of the company for breach of directors' duties.
- › The Government should also consider introducing measures that protect minority shareholders from oppressive conduct as existing laws do not give protection to minority shareholders if the majority shareholders are oppressive.

## III. TENDER OFFERS

Relevant Ministries: Ministry of Planning and Investment (MPI), Ministry of Finance (MOF), State Securities Commission

### Issue Description

The Law on Securities and Decree 58 have legislated in respect of mandatory tender offers that apply to public companies with 100 or more shareholders. Generally, an investor who proposes to acquire 25% or more of the total circulating shares of a public company must carry out a mandatory tender offer set out under the legislation. There have only been a handful of tender offers in Vietnam. The rules in relation to tender offers remain unclear and the provisions that protect minority shareholders are even less clear. The uncertainties in the legislation dilute the corporate governance framework that protects shareholders. We identify below the key corporate governance issues in the tender offer and conclude by making a few recommendations for improvement.

The Law on Securities sets out a number of exceptions to the requirement asking to conduct a mandatory tender offer. These include:

- › If the offer is part of a share issuance plan already approved by the general meeting of shareholders (e.g. pursuant to a private share placement or a public share placement).

- › If the transfer to the investor is approved by the general meeting of shareholders.
- › If the transfer to the investor is approved by the court.
- › If the transfer is between companies in a parent-subsiary structure.

There are no details under the law on how these exceptions may be exercised. For instance, if an investor acquires 50% of the shares from a shareholder of a public company and such transfer is approved by the general meeting of shareholders, what would the voting threshold be to approve the transfer? Can the transferor approve the transaction or must the resolution only be passed by the remaining unrelated shareholders with a certain prescribed majority? The details are not written in law and therefore, it is difficult for an investor to utilise the exemptions to a mandatory tender offer.

Under a mandatory tender offer, the board of management is required to present an opinion to the State Securities Commission of Vietnam on whether to accept or reject the offer made by the investor; the opinion must also be made public. A board member who presents an opinion which is different to the majority of the board must also make public his or her opinion. Boards in Vietnam are restricted from issuing new shares to investors unless it is approved by the general meeting of shareholders. Therefore, it is difficult for the board to wage a defensive strategy to a potential takeover of a company.

Under Decree 58, an investor making a tender offer can only withdraw its offer under five prescribed scenarios. They include: if the target increases or decreases in share capital or if there are insufficient number of shareholders who would sell their shares in the tender offer. Outside the five prescribed scenarios, the regulation does not appear to allow other withdrawal right. For example, if the investor is unable to obtain funding for the tender offer. This makes leverage buy-outs in Vietnam almost impossible to achieve.

Decree 58 also provides that if an investor acquires more than 80% of the circulating shares of a public company, it must continue to acquire all of the shares of the company. However, there is no process in place to sweep up the existing shareholders and there are no processes that ensure that all the remaining shareholders must sell their shares to the investor. For example, a court mandated process that gives the court the ability for an investor to buy out all the minority shareholders at a price determined by the court or an independent expert.

### Potential gains/concerns for Vietnam

A well-defined and clear takeovers and mandatory tender offer process gives certainty to investors who want to expand their business in Vietnam and to build the Vietnamese economy. This will also provide shareholders a fair process in order to make a decision on whether to allow an investor to acquire a substantial interest in the company and ensure that shareholders are fairly compensated. In particular, there should be a regime that allows an investor to sweep up all existing shareholders when they elect to acquire all or almost all of the shares of a company.

### Recommendations

- › Mandatory tender rules be strengthened and many of the uncertainties be clearly defined by law. It would be useful to define how the exemptions to the mandatory tender offer could be exercised in practice.
- › The Government should encourage leverage buy-outs in a mandatory tender offer by giving the opportunity for an investor to withdraw from a tender offer if the requirements of the lenders to fund the acquisition are not met.
- › The law should be further improved in respect to investors who buy more than 80% of a public company and to set out a process to ensure that existing minority shareholders can fairly exit the target company and sell their shares to the investor.

## ACKNOWLEDGEMENTS

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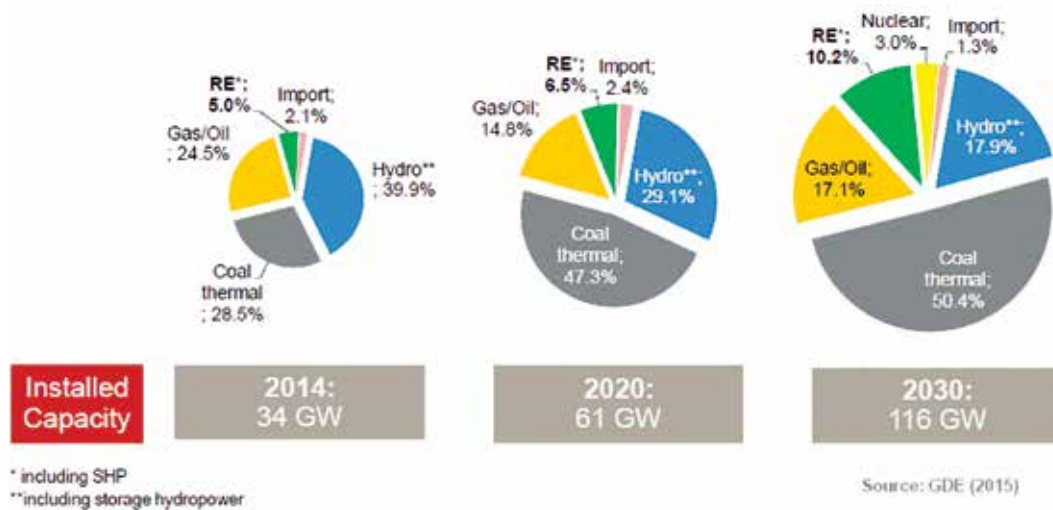
## CHAPTER 2 ENERGY AND ELECTRICITY

### OVERVIEW

Reliable and affordable energy and electricity are key pillars of Vietnam's development and sustainable economic growth. In this context, we congratulate the Government of Vietnam for ensuring adequate power supply in 2015, amid record droughts in Southern Vietnam and prolonged heat waves during the summer in northern Vietnam.

EuroCham members however, do raise concerns about the uncertain outlook of power supply as Vietnam is becoming a net energy importer with estimated 31%<sup>1</sup> of its energy resources imported as of 2020 as a result of increased demand, especially for electricity.

Figure 5: Growth of sector – revised PDP VII



Source: GDE (2015)<sup>2</sup>

In the past few years, energy demand has been growing by 15% per year.<sup>3</sup> In 2014, it increased again by more than 10% per year.<sup>4</sup> To meet such an increase in demand, Vietnam currently still prioritises low-cost sources of power generation, including coal fired power plants and hydropower. However, these power sources take nearly a decade to plan, construct and operate. This is in a context where Vietnam has an excellent potential for development of renewable energy generation.

<sup>1</sup> 'Opening remarks', MOIT Vice Minister Hoang Quoc Vuong at Inception Workshop EU Support to the Development of Sustainable Energy in Viet Nam, 15/04/15. Available at <[http://eeas.europa.eu/delegations/vietnam/documents/press\\_corner/2015/20150415\\_energy\\_seminar\\_en.pdf](http://eeas.europa.eu/delegations/vietnam/documents/press_corner/2015/20150415_energy_seminar_en.pdf)>

<sup>2</sup> Frick, A, 'Design features for an effective wind energy policy for Viet Nam', in an Expert Workshop organised by the German Embassy in Vietnam, 14-15/05/15. Available at <[http://www.renewableenergy.org.vn/index.php?mact=Uploads,mb58be,getfile,1&mb58beupload\\_id=412&mb58bereturnid=102&page=102](http://www.renewableenergy.org.vn/index.php?mact=Uploads,mb58be,getfile,1&mb58beupload_id=412&mb58bereturnid=102&page=102)>

<sup>3</sup> 'Vietnam Hydro Project to Help Meet Growing Energy Demand While Avoiding 1 Million Tonnes of CO2 Emissions', The World Bank, 26/04/11. Available at <<http://www.worldbank.org/en/news/press-release/2011/04/26/vietnam-hydro-project-help-meet-growing-energy-demand-avoiding-1-million-tonnes-co2-emissions>>

<sup>4</sup> 'Nuclear power plans delayed as electricity demand lower than predicted', VietNamNet, 02/03/15. Available at <<http://english.vietnamnet.vn/fms/science-it/124198/nuclear-power-plans-delayed-as-electricity-demand-lower-than-predicted.html>>

In this Whitebook contribution, EuroCham aims to make tangible recommendations for practical implementations of energy-related policies that are essential to meet the energy demand in the future. While at the same time maintaining energy access for all at an affordable price, reducing carbon emissions and the sector's environmental impact and in the long run, maintain a sustainable growth for Vietnam.

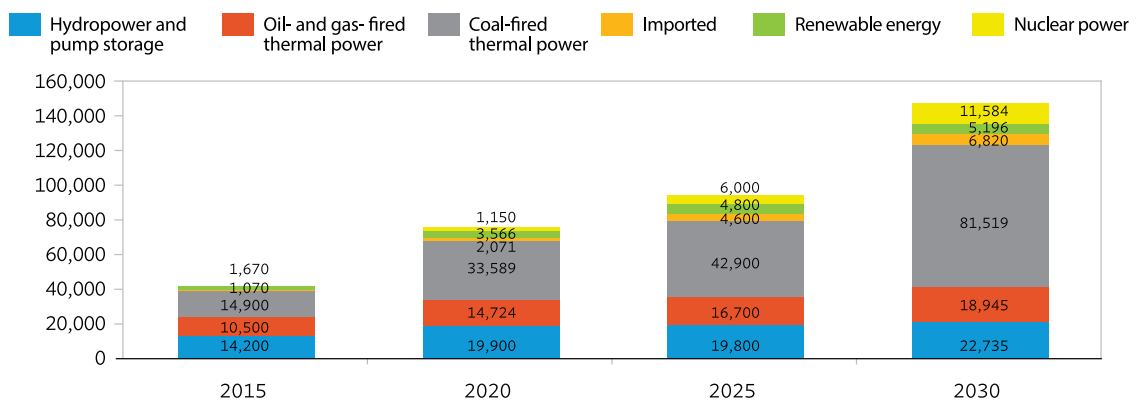
## I. DEVELOPMENT OF RENEWABLE ENERGY

Relevant Ministries: Ministry of Industry and Trade (MOIT), Ministry of Planning and Investment (MPI), Ministry of Finance (MOF), Office of the Government

### Issue description

Vietnam has an excellent potential for renewable energy generation, but at the same time one of the lowest adoption of these technologies in the region. Apart from clean energy supply using abundant Vietnamese resources, the decentralised nature of renewable energy generation typically also has a beneficial effect on job creation and infrastructure development in the region where the plant is located. Major foreign direct investment projects are waiting to be implemented all over the Southeast Asian region but, despite its huge potential, most renewable energy generation resources are still untapped in Vietnam.

**Figure 6: Development Plan for Electricity Generation (MW)**



MW = megawatt.

Sources: Prime Minister. 2011. 7th National Power Development Master Plan, 2011–2020, and General Directorate of Energy (2014b).

Source: *Assessment of Power Sector Reforms in Vietnam*, Asian Development Bank, 2015.<sup>5</sup>

Primary barriers preventing renewable energy from developing in Vietnam:

- There is currently no 'renewable energy law' that regulates the development of the sector. There is also no specific plan for the development of renewable energy, apart from the targets in the overall Power Master Plan.<sup>6</sup>
- Individual support policies have been issued for wind, hydropower, biomass and waste-to-energy. Recently the government has issued Circular No. 32/2015/TT-BCT, dated 8 October 2015 guiding the implementation of waste-to-energy projects. We also eagerly await a similar circular for biomass energy projects under decisions

<sup>5</sup> 'Assessment of Power Sector Reforms in Vietnam, Country Report', *Asian Development Bank*, 2015. Available at <<http://www.adb.org/sites/default/files/institutional-document/173769/vie-power-sector-reforms.pdf>>

<sup>6</sup> Decision No. 1208/QĐ-TTg of July 21, 2011, approving the national master plan for power development in the 2011–2020 period, with considerations to 2030.



No. 31<sup>7</sup>, so that currently pending projects can be implemented. Apart from the circulars, we also encourage further guidance to support other incentives, such as taxation. At the moment, project developers cannot take full advantage of such tax incentives as customs and tax authorities have no guidelines on how to accommodate them.

- Implementing solar based energy solutions, such as solar water heaters and solar panels, allow commercial building owners and industrial users to save more than 60% of energy.<sup>8</sup> However, high investment costs have so far held back substantial adoption of these technologies.
- A transparent and robust support mechanism, such as tax incentives during purchase or operation of solar energy solutions, is expected to greatly benefit the sector. One suggested tax incentive is to allow the full cost of solar power and thermal installations to be claimed against taxable profits in the year of installation of the power equipment.
- Capital investment costs are currently claimed against taxes by way of depreciation over the lifetime of the asset, on a schedule determined by the government depending on the asset type (typically 10 to 20 years for solar power equipment). Accelerating the tax benefit to the first year of operation would provide corporate power users with an incentive to switch to their own generation of power, reducing the pressure on the grid system and helping balance energy demand against available supply.
- This would also further increase the attractiveness of Vietnam to manufacturing and service industries, and remove one of the significant risks identified by foreign investors<sup>9</sup>, which is the reliability of future energy supply and the potential for significant increases in unit power costs from the grid supply.
- At the moment, it is impossible for a power producer to sell directly to an offtaker. Power has to be sold to the only wholesale power buyer in Vietnam, Electricity of Vietnam (EVN). Allowing and regulating decentralised energy supply, such as the ability of energy producers to sell directly to off-takers or concepts such as Energy Service Companies (ESCOs), are additional measures that can support the development of renewable energy in locations where it is most needed.<sup>10</sup>
- ESCO models may also help to avoid environmental impacts (e.g. locally available biomass resources for energy generation). Regulations to protect ESCOs, including on the risk of non-payment by off-takers and on the ownership of ESCO's equipment installed in the facilities of the end-user, can help attract more investment in these models. We do not consider the establishment of a proper decentralised energy supply due to Decision No. 8266/QĐ-BTC issued on 10 August 2015 where 5 regional power buying corporations, to be established to be within the legal structure of EVN.

To address these constraints, we have prepared a number of recommendations which are further elaborated in the sections below.

### Potential gains/concerns for Vietnam

From the perspective of socio-economic development and the perspective of Vietnam as a country on the trajectory from a developing country towards an industrialised economy, great benefits can be achieved from a prospering sustainable energy sector, which go beyond energy generation alone.

With a clear policy framework, the wind power sector in Vietnam will be able to attract substantial private investments, from both foreign as well as domestic capital – investments that the public sector does not have to make. At the same time, if capacities and skills are built up at all levels, there will first a great number of jobs created by the renewable energy industry. In the beginning, this will certainly involve construction, as well as operation and maintenance but once the market has been established, it will also move up to the step of building up manufacturing capacities.

<sup>7</sup> *Ibid.*

<sup>8</sup> 'SolarBK officially announced its '60% energy saving' pledge for commercial water heater systems', *SolarBK*, 19/10/13. Available at <<http://bit.ly/1igBpEc>>

<sup>9</sup> '2013 Global Manufacturing Competitiveness Index', *Deloitte*, 2012. Available at <<http://www2.deloitte.com/us/en/pages/manufacturing/articles/2013-global-manufacturing-competitiveness-index.html>>

<sup>10</sup> 'One-to-one deal touted for renewables', *Vietnam Investment Review*, 16/06/14. Available at <<http://www.vir.com.vn/one-to-one-deal-touted-for-renewables.html>>

## Recommendations

- A number of specific recommendations are stated below, which will allow for a comprehensive application of renewable energy in Vietnam.
- Tariff reform and power purchase agreement for wind and solar power;
- Effective implementation of detailed regulations for all renewable energy sources, spearheaded by biomass power;
- Information to investors and consumers about the long-term future price of retail power which means the predictability and re-establishment of a power price roadmap; and
- A guarantee to support EVN's liabilities in the power purchase agreement to a developer of renewable energy projects.

Below we elaborate these recommendations in more detail:

### 1. Tariff reform and power purchase agreement (PPA) for wind and solar

Decision No. 37/2011/QĐ-TTg dated 29 June 2011 on the promulgation of support mechanisms for the development of wind power projects in Vietnam has been issued but has so far failed to incentivise the market for wind power. Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) has been working with MOIT on this and has first recommended a revision of the policy in 2010.<sup>11</sup>

We therefore recommend the approval by the Government of Vietnam and implementation by MOIT of GIZ's recommendations of as described in the June 2014 Revised Plan for Wind Power with:

- An increased FIT of 11.5 cents or more (sufficient to meet the 1000 MW target).
- Revision of the structure of the PPA.

### 2. Effective implementation of detailed regulations for biomass power;

The Government of Vietnam has in recent years released a set of support mechanisms for biomass power and waste-to-energy as contemplated in last year's decisions issued by Prime Minister Nguyễn Tấn Dũng, namely Decision No. 24/2014/QĐ-TTg dated 24 March 2014 (Decision 24) and Decision No. 31/2014/QĐ-TTg dated 5 May 2014 (Decision 31).<sup>12</sup> The support mechanisms contain an encouraging set of measures to promote investment in power generation from these resources and are a positive start.

EuroCham's understanding is that new projects in these sectors will not be able to proceed without a Standard Power Purchasing Agreement (SPPA) as defined in article 2.9 of Decision 24 and article 2.8 of Decision 31 respectively and Articles 11.2 of Decisions 24 and Decision 31.

Unfortunately, investors are still facing legal uncertainty, as required SPPAs have not been issued yet. We also understand that the draft versions of these documents presented at the GIZ-MOIT Consultation workshop on 27 May 2015 in Hanoi could not be used in the meantime. We therefore humbly recommend MOIT to promulgate as soon as possible the required templates of such SPPAs according to Article 16.1(c) of Decision 24 and Article 15.1(c) of Decision 31. EuroCham would be pleased to assist with drafting such SPPAs and/or to meet relevant MOIT's persons in charge to discuss the topic.

Additional pieces of legislation were passed this year, including a steady progress towards a competitive power market<sup>13</sup>, which could further strengthen the framework for development of renewable energy but the current issues with the Decision 8266/QĐ-BCT of the Ministry of Industry and Trade dated 10 August 2015 have to be addressed separately further below.

<sup>11</sup> Cattelaens, P; 'Up-scaling of Wind Power in Vietnam', GIZ, 30/06/15. Available at < <https://www.giz.de/fachexpertise/downloads/peter-cattelaens-giz-iv-windenergie.pdf>>

<sup>12</sup> Decision No. 31/2014/QĐ-TTg dated May 5 2014 and issued by the Prime Minister and Decision No. 24/ 2014/QĐ-TTg dated 24 March 2014 issued by the Prime Minister

<sup>13</sup> Decision 8266/QĐ-BCT of the Ministry of Industry and Trade dated 10 August 2015

We encourage the government of Vietnam to continue the development of detailed guidance for implementing agencies and investors of renewable energy projects. Clear guidelines for securing incentives such as those for land, tax and (pre)power purchase agreements are additional keys to secure the financing and development of those projects.

## II. THE COMPETITIVE ELECTRICITY WHOLESALE MARKET

Relevant Ministries: Ministry of Industry and Trade (MOIT), Ministry of Planning and Investment (MPI), Ministry of Finance (MOF)

### Issue description

EuroCham welcomes the decision approving a detailed design for the competitive electricity wholesale market (CWM) by Decision 8266/QD-BCT of the Ministry of Industry and Trade dated 10 August 2015. Nevertheless, the full implementation determination to be 2019 indicated that the CWM is neither an urgent priority nor targeted to meet the required private investments in the energy market until then.

In addition, EVN remains the monopoly buyer of power, whose creditworthiness is not guaranteed. 'Direct' power purchase agreements, a tool which has enabled e.g. Mexico to increase its share of renewable energy substantially in a very short period of time, have not been foreseen. The same goes for all renewable energy resources that are simply and – in our view – without a good ground excluded from the CWM.

### Potential gains/concerns for Vietnam

An essential element of a functioning open market for power is that the key players operate independently of each other and their relationships are governed by commercial contracts that are transparent. This would not only attract substantial foreign direct investments (FDI) into the energy market in Vietnam, but would also fulfill Vietnam's WTO and EVFTA commitments. It would furthermore provide the country with the benefits of best practice example for functioning market economy which also fully respect the socio-economic development goals.

Consequently, a proper deregulation of the electricity market in Vietnam would stimulate economic growth, enable sustainable energy supply and attract a great number of FDI to Vietnam. Vietnam's socio-economic development goals would be achieved; electricity prices forecasted and kept lower than in the case of importing resources like coal (as sources for renewable energy are completely indigenous resources) and would contribute to a resource efficient, low carbon economy and a sustainable development of the country.

### Recommendations

With the publication of the Decision 8266/QD-BCT, EuroCham also recommends that the MOIT consider the following enhancements:

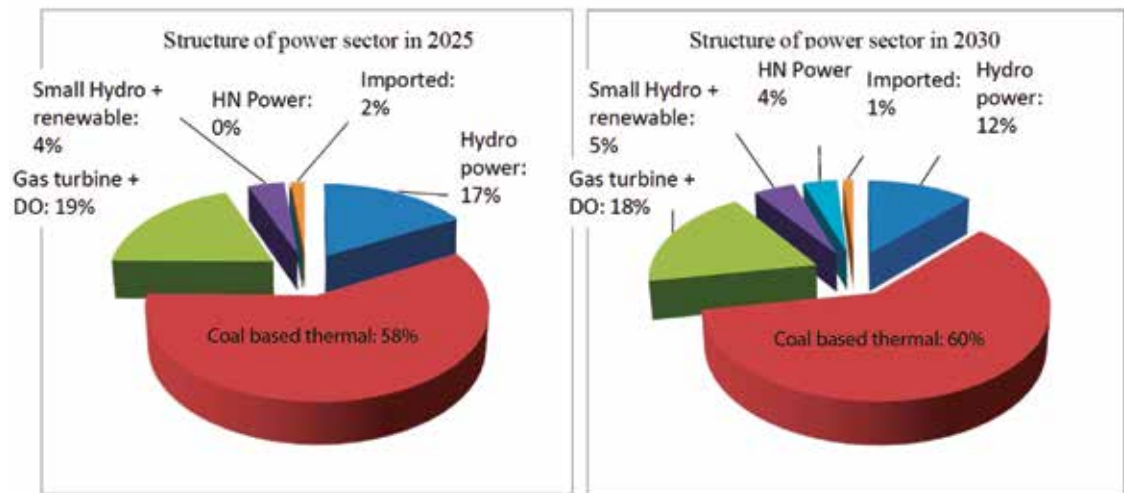
- Acceleration of the implementation of the CWM to 2017 to urgently accelerate the introduction of private investment to the energy market;
- Reconsider the exclusion of renewable energy projects (especially solar and wind power projects) from the CWM. Including renewable energies into the CWM would encourage private investors to invest in the wind power market which has so far developed in an ineffective and costly manner increasing the cost of energy to power consumers;
- Provide urgently definitions of the 'requirements' that a big power user must fulfil to enter the CWM as a buyer of power; and
- For CWM to be successful, it is necessary to have a fully independent Energy Regulator that would support ERAV in becoming an entity independent of the Ministry of Industry and Trade.

### III. DEVELOPMENT OF RENEWABLE ENERGY

Relevant Ministries: Ministry of Industry and Trade (MOIT), Ministry of Planning and Investment (MPI), Ministry of Finance (MOF), Office of the Government

According to the Power Development Plan 7 (2011-2030) (PDP7; Decision 1208/QĐ-TTg of 21 July 2011) and the circulated drafts of the revised Masterplan VII, Vietnam plans to increase its power production capacity seven-fold over the period 2011-2030 with 75,000 MW installed coal thermal power capacity by 2030. This counts for a 50% share of the total projected power generation capacity. The Power Development Plan is currently under revision as its targets are impossible to be met under the current conditions.

**Figure 7: Power share to 2030 of revised Power Master Plan VII**



Source: Vietnam Energy Policy, Ministry of Industry and Trade, 2015.<sup>14</sup>

Vietnam plans to import half of its 2030 coal consumption for power generation. The Government of Vietnam needs to acknowledge that the coal-fired power generation capacity that is being built and planned will lock-in air pollutants such as NO<sub>x</sub>, SO<sub>2</sub> and fine particulate matter and greenhouse gas (GHG) emissions for decades after 2030.

Such an option not only poses a tremendous risk to climate and public health but also builds up a vicious circle of challenges for the Government and the economy. The climate change accelerator, coal will continue to be the predominant source of energy until 2030.

Consequently, EuroCham Green Growth Sector Committee strongly advises the Government of Vietnam to alter the current 'climate change accelerator power development plans' towards more ambitious goals for energy efficiency and renewable energy, as well as a properly deregulated electricity market.

Based on the latest draft of the revised Masterplan, we note that the Masterplan fails to identify by name or location any of the renewable energy projects, either wind power plants, solar power plants, biomass power plants or small hydro power plants. This strongly suggests that finance, developers, sites and business licenses for these projects are not secured yet.

<sup>14</sup> 'Vietnam Energy Policy', Ministry of Industry and Trade, 08/15. Available at <Vietnam Energy Policy – General Directorate of Energy, Ministry of Industry and Trade, <https://eneken.iej.or.jp/data/6238.pdf>>

A strong commitment, long awaited energy market reforms and significant investments are essential to meet the electricity demand in the future, maintain energy access for all at affordable prices, provide a stable electricity supply for the growing economy and middle-class, but also reduce or at least stabilise carbon emissions and their environmental impact.

Given the current status, the World Bank is working on an Alternative Masterplan for Vietnam, which seems very much in line with our analysis and recommendations.

## ACKNOWLEDGEMENTS

EuroCham Green Growth Sector Committee

## CHAPTER 3 GREEN GROWTH

### OVERVIEW

Recognising the increasingly serious effect of climate change and its threat to modernisation and economic growth in Vietnam, the Government of Vietnam has positioned sustainable urban development as an important policy item in the National Strategy on Climate Change and the Green Growth Strategy 2012. Among other things, the Green Growth Strategy and Action Plans (2014) address the advancement of greener urban development master plans as vital targets.<sup>1</sup>

These policies and strategies are developed in a context where more information and policy guidance (and enforcement) towards 'eco' cities are needed. Nevertheless, the slow speed of practical implementation, or lack of it, is colliding with the rapid growth of urban development throughout the country. This remains an issue especially when it comes to the real impact of areas including waste treatment, low carbon development, resource efficiency, urban infrastructure, energy and energy efficiency measures. For instance, energy and electricity are essential issues but a strategy for sustainable power supply without devastating health and climate change effects is not apparent at the moment.

Despite available technologies, know-how and willingness to invest in clean technology and green growth sector, the application of business solutions remain marginal. Our view is that lost opportunities are due to a set of reasons with the major ones addressed below:

#### **Lack of indirect measures to create a sustainable power sector, e.g. by increasing energy efficiency**

Energy efficiency in (green) buildings: enforcement and implementation of relevant building codes. Many of the further below stated subsectors and issues are being focused and affected by the broad term green buildings, if implemented properly. Thus, a separate sub-chapter is dedicated for sustainable buildings.

Energy efficiency in industrial processes: most industrialists expect energy prices to remain low and for supply to be guaranteed due to government reassurances. Therefore, there is no or little incentive to invest in energy efficient measures that would be standard in other countries where power prices are higher.

For instance, current regulations requiring waste heat recovery in the cement industry is a clear example of a common discrepancy between policy, policy enforcement and implementation.<sup>2</sup> While all cement plants should have a Waste Heat Recovery System (WHR) a recent study of the International Finance Corporation (IFC) shows that only 4 cement plants have installed WHR thus far.<sup>3</sup>

#### **Fresh water supply and wastewater discharge system**

Fresh water supply is currently still affected by a tremendous water-loss-rate of 37%<sup>4</sup>, which experts recommend should be reduced to 15% ideally by 2025. This would still remain too high given the upcoming climate change challenges with respect to stable fresh water supply.

On the side of wastewater treatment, plans and implementations for waste water treatment in a larger scale are currently not sufficient to meet current demand, with experts estimate that only 10% of the household wastewater is treated.<sup>5</sup>

<sup>1</sup> 'Vietnam National Green Growth Strategy', 2012. Available at <<http://www.greengrowth-elearning.org/pdf/VietNam-GreenGrowth-Strategy.pdf>>

<sup>2</sup> Decision 1488/QĐ-TTg dated 29 August 2011 signed by DPM Hoang Trung Hai requires that all new cement plant projects with 2,500 ton of clinker per day must install WHR while other operational cement plants must install the same system by 2015.

<sup>3</sup> 'Waste Heat Recovery for the Cement Sector: Market & Supplier Analysis', *International Finance Corporation (IFC)*, 06/14, p.68. Available at <<http://www.ifc.org/wps/wcm/connect/a87be50044581e9889678dc66d9c728b/IFC+Waste+Heat+Recovery+Report.pdf?MOD=AJPERES>>

<sup>4</sup> 'Vietnam Urban Wastewater Review', *World Bank and Australian Aid*, 2013, p.7. Available at <<http://www.worldbank.org/content/dam/Worldbank/document/EAP/Vietnam/vn-urbanwastewater-summary-EN-final.pdf>>

<sup>5</sup> *Ibid.*,

Recent reports also indicate that industries around the country generate more than 1 million cubic meter of wastewater every day. 75% of this wastewater is being discharged untreated into Vietnamese water bodies.<sup>6</sup> In other countries these companies would not be able to operate.

### Environmental technologies – Air quality

There is an urgent need for an air quality control, as Yale University has listed Vietnam among the top 9 countries with the worst air quality in the world.<sup>7</sup> In addition, Vietnam's greenhouse gas emissions are growing rapidly and will likely triple by 2030.<sup>8</sup> Sulfur dioxide, dust, dioxide, carbon monoxide and nitrogen dioxide are emitted from transportation, industry and construction. The current lack of clarity on government policies with specific policy targets on air quality control have to be urgently addressed.

## SUSTAINABLE BUILDINGS AND ENERGY EFFICIENCY

Relevant Ministries: Ministry of Industry and Trade (MOIT), Ministry of Planning and Investment (MPI), Ministry of Finance (MOF), Ministry of Construction (MOC)

### Issue description

Buildings are and will remain the largest consumers of electricity. The rapid development of the middle class and its associated lifestyle, which includes air conditioning use, accounts for a considerable proportion of the energy consumption growth in the main cities of Vietnam. Proper building design can reduce this growth for the next 25 years of a building's lifetime. The development of green buildings in Vietnam is still at an infancy stage with approximately 40 buildings certifications in Vietnam, the majority of these being in the industrial sector. Due to a lack of enforcement of regulations, global corporate guidelines seem to currently be the only drivers. As there is no need to reduce operating expenses due to low energy prices, the green building investments remain far too low to address the current environmental concerns.

### Potential gains/concerns for Vietnam

The recent pickup of the real estate market is a great opportunity to take act on the design of future buildings, while limiting the growth of energy demand. The Energy Efficiency Building Code (EEBC), published in 2013 by the Ministry of Construction (MOC)<sup>9</sup>, is a positive move. However, its application is challenged by the lack of enforcement. Office buildings and the hospitality sector would attract premium rates and stand out in the saturated markets if following a Green Building Code.

### Recommendations

Our recommendations are based on four actions:

- › Educate building designers to sustainable building design.
- › Integrate sustainability work at concept stage of building design.
- › Implement a reward/sanction based electricity price policy; and
- › Create showcases.

<sup>6</sup> 'Over 1 mln cu.m of industrial wastewater dumped every day in Vietnam', *VietNamNet*, 03/12/15. Available at <<http://english.vietnamnet.vn/fms/environment/148243/over-1-mln-cu-m-of-industrial-wastewater-dumped-everyday-in-vietnam.html>>

<sup>7</sup> Air Quality, Environmental Performance Index', *Yale University*, 2014. Available at <<http://epi.yale.edu/epi/issue-ranking/air-quality>>

<sup>8</sup> 'Reduction of Greenhouse Gas Emissions in Vietnam to improve lives of rural farmers', *International Food Policy Research Institute (IFPRI)*, 26/03/12. Available at <<http://www.ifpri.org/news-release/reduction-greenhouse-gas-emissions-vietnam-improve-lives-rural-farmers>>

<sup>9</sup> 'MOU aims to boost energy efficiency', *Vietnam News*, 25/05/2013. Available at <<http://vietnamnews.vn/economy/239852/mou-aims-to-boost-energy-efficiency.html>> and National Technical Regulation on Energy Efficiency Buildings, QCVN 09:2013/BXD, Available at <[http://www.vgbc.org.vn/index.php/resources/download/QCVN\\_09-2013\\_BXD%20-%20ENG.docx](http://www.vgbc.org.vn/index.php/resources/download/QCVN_09-2013_BXD%20-%20ENG.docx)>.

### 1. Education

Education and awareness have to be improved in order to improve capacities towards green buildings but also change habits and waste-of-resources behaviour. Europe has a worldwide leading position in the field of sustainable buildings and human comfort. This know-how can be shared with Vietnamese counterparts, adapted to the Vietnamese market and climate, and spread to the community. It includes building related faculties in the field of architecture, urbanism, mechanical and civil engineering such as the Institute of Tropical Architecture University in Hanoi, the Vietnam National Institute of Architecture, the Vietnam Institute for Urban and Rural Planning, the Vietnam Association of Civil Engineering Environment.

### 2. Integrated building design

Closely linked to the educational point, it is important to highlight that the building design method currently applied in Vietnam is outdated. A sustainable building cannot be designed after a building has been approved by the authorities or by the client. Architects, engineers and the client should work as a team from the first day in order to optimise the design at concept stage. The ideal and most economical results are not obtained by efficient machines, but by buildings that do not need those. For instance, buildings that produce little spoiled water need little water treatment afterwards. Buildings consuming little energy will not need much outside energy either, whether it is renewable or not. Such integrated building optimisations have a double positive impact both on the green growth and on a resource efficient economy.

### 3. Supportive electricity price policy

The current low electricity prices are a disincentive in promoting energy efficiency. Electricity of Vietnam (EVN) could impose a tariff scheme that rewards low energy consumption buildings with lower prices and impose higher prices to high consumption buildings to new commercial and residential building. The policy could be established on benchmarks based on climatic environment, type of building usage, quality grade and occupation. It would create a bottom-up and large scale movement that will naturally create more interests in sustainable buildings.

### 4. Showcase

The priority for EEBCs should be put on the construction in every main city and thus reducing electricity use as much as possible, while offering the same or a better comfort level but allowing longer durability and higher rents or revenues. Government or State Owned Enterprise (SOE) buildings should also be considered as they would directly affect the current and future constant expenses.

## ACKNOWLEDGEMENTS

EuroCham Green Growth Sector Committee



## CHAPTER 4 HUMAN RESOURCES AND TRAINING

### OVERVIEW

Over the past years, we have seen significant efforts and progress made by the Government in terms of improved regulations regarding labour and employment, including increased dialogue and consultation with the business community, issuance or draft of a number of relevant regulations reflecting positive changes and developments. We highly appreciate all the valuable support in creating a better investment and working environment in Vietnam.

Although the training of the Vietnamese workforce is increasing annually, Vietnam still lacks the skilled workforce in primary industries and sectors that are key to achieve rapid growth and a higher comprehensive workforce. The Vietnam's Socio-Economic Development Strategy (SEDS) 2011-2020<sup>1</sup> defines promoting human resources/skills development as one of the three breakthrough areas. Improving training, education and legal systems on managing labour will help meet the demand for a skilled workforce, promote a competitive and healthy investment environment for the progress of transfer of knowledge and more generally for the development of Vietnam's economy.

Some issues that were addressed in last year's Whitebook edition remain of concern to us:

**1. Overtime:** On 23 June 2015, the Ministry of Labour, Invalids and Social Affairs (MOLISA) issued the Circular 23/2015/TT-BLĐTBXH (Circular 23) providing – inter alia – detailed guidance and specific formulae for overtime calculation. Nevertheless, there is no development in the regulation on the capped number of overtime hours. We strongly suggest the Government to re-consider this matter as our recommendations in the Whitebook 2015 (section 2.3.2):

- Develop an agreement between the employer and employee on probation period, capped by a new length limit.
- Consider the modification of overtime, especially for manufacturing and production.

**2. Work permits:** The recent draft amendments to the current Decree 102/2013/ND-CP of the Ministry of Labour, War Invalids and Social Affairs (MOLISA) relating to the management of foreign nationals working in Vietnam demonstrate the positive developments on work permits. We are glad that the Government and MOLISA have considered our recommendations and comments in this regard. The Human Resources & Training Sector Committee would like to express our sincere appreciation for this, and we hope that the draft amendments will soon be promulgated. We would highly recommend the Government and MOLISA to continue to consider the following primary aspects for further development:

- Be consistent on the requirements and implementation of legalisation of documents issued overseas for work permit exemption cases.
- Enlarge the subjects of work permit exemptions to support the free flow of skilled labour in the ASEAN Economic Community (AEC).

<sup>1</sup> Main content of the Socio-Economic Development Strategy (SEDS) 2011-2020, Ministry of Foreign Affairs, 14/12/15. Available at <<http://www.mofahcm.gov.vn/vi/mofa/nr091019080134/nr091019083649/ns111003074416>>

## I. LABOUR SUBLEASING

Relevant Ministries: Ministry of Labour, Invalids and Social Affairs (MOLISA)

### Issue description

The concept of a new form of work 'subleasing' was introduced with the entry into force of the Labour Code of Vietnam on 1 May 2013 and is further governed by Decree No. 55/2013/ND-CP effective from 15 July 2013. Research conducted by the Vietnam Employment Agencies Federation (VEAF) in 2013 has shown that the top ten private employment agencies employ over 13,500 people and generate revenues of over EUR 42 million (VND 1.12 trillion). The VEAF believes that the industry was worth over EUR 100 million (VND 2.67 trillion) in revenue in 2014 and will continue to grow.

Various organisations, including the International Labour Organisation (ILO) under Convention No. 181, recognised that private employment agencies contribute to the functioning of the labour market as a whole.<sup>2</sup> The Ministry of Labour, Invalids and Social Affairs (MOLISA) stated in the Vietnam Labour Report Q1 2014 that along with the economic recovery, labour market trends were positive. Economic participation in the labour market increased and the share of the labour force with technical expertise expanded. Moreover, job quality improved overall as reflected in the rising share of wage workers, a continued shift in employment out of low productivity agriculture and increasing wages and earnings. To this end, employment services and recruitment centers played an important role in connecting labour demand and supply and facilitating labour market adjustments.<sup>3</sup>

The lack of quality human resources and skilled workforce is recognised as one of the biggest challenges to Vietnam's economy. Agency work would be an entry point into the labour market and to longer lasting employment. According to the Economic Report 2015 Edition of the International Confederation of Private Employment Agencies (CIETT) workers are able to stay employed up to 12 months after their agency work assignment has ended. This is particularly relevant to Vietnam as agency work will offer many first time employments and will allow for an up-skilling of the workforce. According to the CIETT Economic Report 2015, twelve million people globally are employed as agency workers, with a penetration rate of 1.6% on average of the working population in 2013. People, who start doing agency work will often not return to unemployment after their assignment. Although there are significant differences between countries, agency work is a stepping stone out of unemployment into work. In Brazil for example, only thirty percent (30%) of agency workers return to unemployment after their assignment.<sup>4</sup> It is clear that people use the experience and skills they obtain while working as an agency worker to make their next move on the labour market. This has yet to be achieved in Vietnam and we believe this is partly due to the constraints under Decree No. 55/2013/ND-CP.

As the regulations currently stand, labour subleasing is permitted for seventeen jobs categories and the contract term must not exceed twelve months. The types of subleased job categories covered by the Decree 55/2013/ND-CP do not reflect the exact nature of the work currently requested by user enterprises, which normally involve some form of outsourcing or a managed service. The lack of flexibility in this area has caused major operational and compliance issues for market participants and does not meet the requirements of user enterprises in the market.

### Potential gains/concerns for Vietnam

By allowing private employment agencies to offer a full range of services, including temporary work, contingency staffing, out-sourcing and managed business services, Vietnam would be better equipped to fill the gaps of a changing labour market. Opening up the sector to allow for a temporary staffing model under the guidance of the MOLISA and working with the VEAF would ensure full protection of employees' rights, statutory insurances and would allow self-governance in the industry. We believe that Vietnam needs to have less restrictive regulations on agency work which will help reduce the size of undeclared work. Agency work offers companies and workers

<sup>2</sup> 'Convention C181 Private Employment Agencies Convention 1997', *International Labour Organisation (ILO)*, entry into force 2000. Available at <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312326](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312326)>

<sup>3</sup> 'Economic Report 2015 edition', *International Confederation of Private Employment Services (CIETT)*, 2015, p.45. Available at <[http://www.ciett.org/fileadmin/templates/ciETT/docs/Stats/Economic\\_report\\_2015/CIETT\\_ER2015.pdf](http://www.ciett.org/fileadmin/templates/ciETT/docs/Stats/Economic_report_2015/CIETT_ER2015.pdf)>

<sup>4</sup> 'Economic Report 2015 edition', *op.cit.*, p.47

a decent alternative to undeclared work and a direct correlation can be seen between the level of regulation on agency work and the incidence of undeclared work.<sup>5</sup>

Moreover, these measures would allow the young workforce to gain valuable experience and build up their skills set. This would also allow Vietnam to be more attractive to foreign direct investment that requires a flexible workforce.

### Recommendations

- › Recognise the VEAF as the industry governing body in Vietnam;
- › Allow a range of flexible workforce solutions in addition to subleasing (e.g. contingency staffing, outsourcing, and managed business services as suggested by the CIETT);
- › Remove the imposed maximum term of the labour sublease agreement which requires enterprises to change workers every twelve months; and increase the job categories listed;
- › Private employment agencies should be allowed to decide the market value of services to be charged, the service fee should be based on the complexity and nature of the service being offered to clients. To be able to deliver these services and facilitate market competitiveness, private employment agencies should ensure that all workers are protected under the Labour Code;
- › MOLISA should opt for internationally recognised principles governing private employment agencies, for example as laid down in Convention 181 and the internationally recognised CIETT Code of Conduct<sup>6</sup>; and
- › Enforce penalties against the operation of rogue agencies (which do not adhere to regulations and fail to meet their obligations or safeguard workers' rights).

## II. STATUTORY SOCIAL INSURANCE

Relevant Ministries: Ministry of Labour, Invalids and Social Affairs (MOLISA)

### 1. Salary used as the base for social insurance contribution

#### Issue description

The new Law on Social Insurance No. 58/2014/QH13 adopted by the National Assembly on 20 November 2014 and taking effect on 1 January 2016 (New Law on Social Insurance) will replace the previous Law on Social Insurance No. 71/2006/QH11 adopted by the National Assembly on 29 June 2006 (2006 Social Insurance Law). The new Law provides, among other major changes, a new definition of salary used as the basis for social insurance calculation.

By law, the current monthly salary used as the basis for social insurance contribution is the salary specified in signed labour contracts.<sup>7</sup> However, as a matter of practice, the Social Insurance Authorities normally interpret that the salary used as the basis for social insurance calculation only includes base salary specified in the signed labour contracts and should not include any allowances.

However, the New Law on Social Insurance gradually broadens the definition of the salary used as the basis for social insurance contribution.<sup>8</sup> In particular:

- › from 1 January 2016 (upon the effectiveness of the New Law on Social Insurance) until 31 December 2017, the

<sup>5</sup> *Ibid.*

<sup>6</sup> 'CIETT Code of Conduct', *International Confederation of Private Employment Services (CIETT)*, 2015. Available at <[http://www.ciett.org/fileadmin/templates/ciett/docs/Corporate\\_literature/CiETT\\_Code\\_Conduct\\_-\\_2015.pdf](http://www.ciett.org/fileadmin/templates/ciett/docs/Corporate_literature/CiETT_Code_Conduct_-_2015.pdf)>

<sup>7</sup> Current Law on Social Insurance, Article 94.

<sup>8</sup> New Law on Social Insurance, Article 89.2.

salary used as the basis for social insurance contribution will include salary level<sup>9</sup> and salary allowances.<sup>10</sup>

- › from 1 January 2018 onwards, the salary used as the basis for social insurance contribution will include salary level, salary allowances, and other supplementary amounts.<sup>11</sup>

### Potential gains/concerns for Vietnam

The broadening of the definition of salary used as the basis for social insurance contribution (as mentioned above) will lead to increases in social insurance premiums as well as in the costs of labour in general.

Many enterprises have shown concern about the sudden changes in legislation and the resulting significant increases in labour costs.

### Recommendation

- › The Government of Vietnam should consider the extension of the application of the salary concept under the New Law on Social Insurance so that employers may gradually adapt to the new legislation. Furthermore, the Government should also be careful in reviewing the increase in regional minimum wages.

## 2. Social Insurance and Health Insurance for Non-Vietnamese Employees

### Issue description

Currently, foreign nationals working in Vietnam with a '3-month and above' employment contracts are subject to health insurance contribution. Furthermore, starting from 1 January 2018, foreign nationals working in Vietnam, who have been granted a work permit or practice certificates or practice licenses are subject to compulsory social insurance contribution as defined in chapter 1, article 2.2 of Law on Social Insurance No. 58/2014/QH13.

### Potential gains/concerns for Vietnam

In practice, a certain number of foreign nationals maintain social security contributions in their home countries and/or enter the private global health care programs. In this case, the contribution to statutory social and health insurance will result in additional costs for the employees or/and employers.

### Recommendation

- › Provide an exemption for statutory social insurance and health insurance contribution in the case that employers and foreign nationals working in Vietnam can prove that private health care program and/or continuation of social security in home country are maintained.

## 3. Legislative Articles Which Require Special Review

### Issue description

In reviewing the Law on Social Insurance No. 58/2014/QH13, certain articles have been identified as areas requiring more guidance to ensure consistent implementation. The areas are as follows:

In reference to chapter 5, article 86 of the Law on Social Insurance No. 58/2014/QH13, starting from 2016, employers are not allowed to keep 2% of salary fund contributing to social insurance on a monthly basis. As employers do

<sup>9</sup> Salary level (in Vietnamese, '*Mức lương theo công việc hoặc chức danh*') means the salary amount determined under the salary table and salary scale of the employer as required by law. The salary level is commonly referred to as 'base salary' in practice; and may not be lower than the regional minimum salary prescribed by the Government (Labour Code, Article 90, Decree No. 05/2015/ND-CP, Article 21; Circular No. 23/2015/TT-BLĐTBXH, Article 3).

<sup>10</sup> Salary allowances (in Vietnamese, '*Phụ cấp lương*') mean the amounts paid as compensation for the working conditions, the living conditions, the complexity and the poor attraction of the job, which are not fully covered by the salary level (Labour Code, Article 90, Decree No. 05/2015/ND-CP, Article 21; Circular No. 23/2015/TT-BLĐTBXH, Article 3).

<sup>11</sup> Other supplementary amounts (in Vietnamese, '*Các khoản bổ sung khác*') mean the payment amounts in addition to salary level and salary allowances, which must be related to the job or the title prescribed in labour contracts. However, the 'other supplementary amounts' do not include, bonuses, payment for shift meal, supporting payment to the employees upon their relatives' death, marriage or birthday, allowance to the employees who face difficulties due to labour accidents and occupational diseases, and other supporting payments and allowances of the employer which do not relate to the job or the title prescribed in the labour contract ('Exceptional Amounts') (Labour Code, Article 90, Decree No. 05/2015/ND-CP, Article 21; Circular No. 23/2015/TT-BLĐTBXH, Article 3).

not have operating funds on this, it is hard for them to ensure timely payments to employees for the entitled benefits. On the other hand, employers cannot ensure that all claimed benefits will be fully approved by the social insurance department, which may cause time, efforts and costs at a later stage in case of mismatch.

In reference to chapter 5, article 85.3 of Law on Social Insurance No. 58/2014/QH13, a resigned employee will contribute to social, health and unemployment insurance until the last day of the month before the last working month if the total unpaid and non-working days of the last working month are 14 days and above. However, it is not clearly defined whether the resigned employee will only be entitled to health insurance benefits until this cut-off day. In this case, the employee will normally keep his/her health insurance card until the last working day and the employer won't be able to return the health insurance card to the social insurance office as per the defined timeline. This will bear additional costs to the health insurance contribution funds because of the late submission.

In reference to chapter 5, article 88.2 of Law on Social Insurance No. 58/2014/QH13, when the employee is in temporary detention, the employer and employee will be released from contribution to social insurance temporarily and will contribute back when the employee is confirmed to have suffered a miscarriage of justice by the competent authority. As the period for temporarily detention cannot be defined in advance and the employee does not work under such conditions, the coverage of social insurance contribution will cause hassle for both employer and employee.

When claiming sickness benefits, '24-days' is used as the standard monthly working days for benefit calculation as defined in chapter 3, article 28.4 of Law on Social Insurance No. 58/2014/QH13. This will cause a loss of income for employees whose standard working days are less than 24 days per month.

### Potential gains/concerns for Vietnam

Providing clearer guidelines with flexible approaches within agreed standards will result in a more consistent implementation across all companies and insurance offices, a reduction of administrative procedures for employers and public officers and more benefits for employees.

### Recommendations

- Clearly identify the responsibility of the Social Insurance Department to make timely payments to employees for their social insurance benefits;
- Define the cut-off timeline of health insurance benefits in line with the contribution cut-off for proper administrative coordination;
- Waive the social insurance contribution for the period in which the employee is under temporary detention. However, we strongly suggest the Government to consider to ensure the continuing entitled benefits for employees who suffer from the temporary detention; and
- Allow employers to use their own monthly standard working days to calculate the claims of social insurance benefits for their employees.

## 4. Administrative Burden

### Issue description

Chapter 7, section 2 of Law on Social Insurance No. 58/2014/QH13 and in particular article 102 provides guidance on the timeframe for submission, reviewing and approval for benefit claims of the employees. It is defined that, within a standard number of days or working days depending on the nature of benefits, the employers must submit claimed documents of employees to social insurance departments. However, in practice, these departments in different provinces set their own rules (e.g. an employer can only submit claimed documents one time or twice a month). Furthermore, an unclear definition of days (i.e. calendar day or working day) causes confusion and inconsistency in operating control. In addition, the obligation that the claimed documents must be submitted or received in person by a representative of the employer is a time-consuming process.

An employee, suffering from an illness or a disease and requiring long-term treatment, will be exempted from health insurance contribution. In practice, the employer needs to wait for the approval of the claimed benefits

granted by the social insurance before making the reduction request even though the reduction of social and unemployment has already been reported and approved – it takes a lot of time and efforts in monitoring and reporting.

It is defined that within 30 days before the end of the valid date of the current health insurance cards, the employer has to submit the application of new card issuance based on the list of clinics or hospitals defined by the social insurance department. In practice, the social insurance department keeps changing the list after the new insurance card has been granted. The employers take time to coordinate amongst employees and the social insurance department to re-issue the health insurance card.

The changes of legislation or operational topics require considerable efforts from employers to find accurate information via all the different channels.

### Potential gains/concerns for Vietnam

The above operational rules are time-consuming, cause administrative pressure, and increase operational costs for both companies and public officers.

### Recommendations

- Define consistently ‘working day’ as timeline for handling claims of social insurance benefits. In the meantime, social insurance departments must accept the dossiers during working hours instead of the limited schedule.
- Accept the scanned documents submitted via email for reviewing and approving claimed requests. Employers are responsible for submitting all original claimed documents once per month or once per three months, subject to agreement in advance with the social insurance department.
- A copy of the claimed documents of disease requiring long-term treatment to be accepted for reduction of the health insurance.
- As all health insurance cards will be normally renewed on an annual basis, the entitled list of clinics or hospitals for health insurance should be updated by 15 November for further implementation.
- Social insurance departments to establish an official email address and notify/highlight changes to employers in a timely manner.

## III. TRADE UNION

Relevant Ministries: Ministry of Labour, Invalids and Social Affairs (MOLISA)

### Issue description

Recently, many enterprises are encountering difficulties in carrying out basic labour management functions. This is because under the Labour Code No. 10/2012/QH13 dated 18 June 2012 (Labour Code), employers are now required to consult with the immediate ‘upper level trade unions’ (usually the district level trade union) in the event that they lack a corporate trade union to complete basic labour management steps, such as the formulation of internal labour regulations (ILRs), the formulation of a salary scale and table and the application of disciplinary measures, among others. Under the former labour code, an employer was not required to consult with such a trade union if it lacked a corporate one. While many enterprises attempt to follow the law and request the Immediate Upper Level Trade Unions to consult with them as required under the Labour Code, there have been many cases where these unions have refused. As a result, many enterprises have been unable to undertake basic labour management functions.

The Labour Code and the Law on Trade Union No. 12/2012/QH13 dated 20 June 2012 (Union Law) state that Immediate Upper Level Trade Unions are the representative organisations of the labour collective at enterprises where corporate trade unions have not been established.<sup>12</sup> Accordingly, the Labour Code requires enterprises lacking their own corporate trade unions to consult with, and in some cases reach an agreement with Immediate Upper Level Trade Unions for any matters related to labour regulations or employee benefits. As the Labour Code and Union Law clearly specify that Immediate Upper Level Trade Unions must act as the representative of employees at enterprises without corporate trade unions, they have the right and obligation to fulfil this role and engage in the consultation process.

The refusal of the Immediate Upper Level Trade Unions to cooperate with enterprises has severely impeded their business. For example, many enterprises have been unable to register their ILRs because, by law, a consultation letter with the Immediate Upper Level Trade Unions regarding the ILRs must be included in their registration dossier, and without it, the registration of the ILRs will be refused. However, the Human Resources & Training Sector Committee receives reports from its members stating that some district-level labour unions (e.g., the Labour Union of Tan Binh District and the Labour Union of District 11, both in Ho Chi Minh City) have refused to comment on the ILRs of enterprises lacking their own corporate trade unions. Verbally, these trade unions have stated that commenting on the ILRs is not part of their function and that an enterprise must establish their own corporate trade union to review its ILRs. Some have even stated that they have been instructed by the provincial-level People's Committee and the provincial-level Labour Federation to refuse to review ILRs. While Immediate Upper Level Trade Unions have verbally provided the foregoing explanations, they have refused to issue any written response.

### **Potential gains/concerns for Vietnam**

The approach of the above-mentioned Immediate Upper Level Trade Unions is contrary to the Labour Code and the spirit of the Union Law, and also negatively impacts business, potentially making Vietnam less attractive for investors.

### **Recommendation**

- › In view of the above, we kindly request the Government to coordinate with the Vietnam General Confederation of Labour to request Immediate Upper Level Trade Unions nation-wide to properly implement their legal rights and obligations in accordance with the law.

## **ACKNOWLEDGEMENTS**

EuroCham Human Resources and Training Sector Committee

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<sup>12</sup> Articles 3.4, and 188.3 of the Labour Code; Article 17 of the Union Law.

## CHAPTER 5 INTELLECTUAL PROPERTY RIGHTS

### OVERVIEW

Vietnam's system for protection of intellectual property rights has been in place for about 25 years and is thus, still very young compared to that of more developed countries. Since the issuance of the country's first ever Law on Intellectual Property (IP Law)<sup>1</sup>, as amended in 2009<sup>2</sup>, its entry into the WTO in 2007 and the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Vietnam has made considerable improvements in this area and has developed a relatively comprehensive system of protection of intellectual property rights (IPR) in the country covering the most important aspects of IPR. Still, with the ever growing international agreements like the EVFTA and the TPP, Vietnam needs continuous efforts to promote awareness and improve its legal framework in order to address the new emerging challenges in the upcoming years as Vietnam will have to comply with international standards.

A strong IPR system is an essential factor for promoting innovation capability which is determined by the World Bank as one of the four key pillars for building a knowledge-based economy.<sup>3</sup> This is also a determining factor for Vietnam to successfully implement its sustainable growth strategy for the period of 2011-2020<sup>4</sup>. Such a strong IPR system would benefit both foreign players and Vietnamese businesses, helping the latter's competitive edge in global markets, and would have significant potential advantages for the society at large as it protects consumers from counterfeit products that may not meet the required health and safety standards. As a win-win solution, IPR protection, especially IPR enforcement, should clearly be the focus for Vietnam's development.

The IPR Sector Committee (IPR SC) is a committee representing several law firms and the industry. Since 2012, the IPR SC is a platform where members can share and exchange ideas on the improvement of IPR protection in Vietnam and establish further cooperation with the relevant authorities to improve IPR in Vietnam for all industries. In light of the urgent need for a strong IPR system for Vietnam, we will address three issues in this chapter that we consider emerging and welcome the opportunity to strengthen our dialogue with the Vietnamese authorities.

### I. ONLINE INTELLECTUAL PROPERTY RIGHTS

Relevant State authorities: Ministry of Science and Technology (MOST), National Office of Intellectual Property (NOIP), Ministry of Industry and Trade (MOIT), Ministry of Culture, Sports and Tourism (MCST), Ministry of Information and Communications (MIC)

#### Issue description

Vietnam ranks 14<sup>th</sup> globally in the number of internet users. Internet penetration has reached 44% of the population.<sup>5</sup> E-commerce is booming and is expected to generate USD 4 billion in 2015.<sup>6</sup> As the number of internet users continues to grow, infringements in the online environment are on the rise. Enforcement remains difficult, especially, against illegal trading in copyrighted works ('online piracy'), infringing goods, intellectual property right

<sup>1</sup> Law No. 50/2005/QH11 of 29 November 2005, on Intellectual Property (promulgated by the Order No. 28/2005/L-CTN of 12 December 2005, of the President of the Socialist Republic of Vietnam). Available at: <<http://www.wipo.int/wipolex/en/details.jsp?id=12011>>.

<sup>2</sup> Law No. 36/2009/QH12 of 19 June 2009, amending and supplementing a Number of Articles of the Law on Intellectual Property (promulgated by the Order No. 12/2009/L-CTN of 29 June 2009 of the President of the Socialist Republic of Vietnam). Available at <<http://www.wipo.int/wipolex/en/details.jsp?id=6566>>.

<sup>3</sup> Derek H. C. Chen and Carl J. Dahlman. *The Knowledge Economy, the Kam Methodology and World Bank Operations*, 2006. Available at: <[http://siteresources.worldbank.org/WBI/Resources/The\\_Knowledge\\_Economy-FINAL.pdf](http://siteresources.worldbank.org/WBI/Resources/The_Knowledge_Economy-FINAL.pdf)>.

<sup>4</sup> The issue of developing a knowledge economy in Vietnam in recent years', NCEIF, 2015. Available at <<http://www.ncseif.gov.vn/sites/vie/Pages/vandephattrienkinhte-nd-15965.html>>

<sup>5</sup> Vietnam's Mobile Revolution Catapults Millions into the Digital Age', *Wall Street Journal*, 12/06/15. Available at <<http://www.wsj.com/articles/vietnams-mobile-revolution-catapults-millions-into-the-digital-age-1434085300>>consulted on 12 August 2015.

<sup>6</sup> *Ibid.*



infringements on websites, as well as abusive domain name registration or maintenance ('cybersquatting').

It appears that an increasing number of online content providers are now offering licensed content, to some extent.<sup>7</sup> Generally, the awareness of copyright protection online, of both the public and the authorities seems to have increased. However, online infringement is still a central issue for IPR owners. Several administrative complaints of copyright infringement were lodged recently against a number of websites and a civil action was filed against an online content provider.<sup>8</sup> Regarding domain name disputes, a case involving a cybersquatter that could not be located was successfully brought to court – this is the second civil case relating to domain names to be heard in Vietnam.

However, there are many areas where the protection and enforcement of IPR could be improved. Online copyright infringements remain widespread and involve all kinds of content (software, music, movies, books, etc.) whereas administrative fines are still low.<sup>9</sup> Also, infringing goods are massively available in the online environment, both on internet websites and mobile websites. Yet the Law on Intellectual Property, which was issued back in 2005, is now out-dated and makes enforcement in online environment extremely difficult. On a related point, enforcement against intermediary service providers is still limited and practically impossible to pursue.<sup>10</sup> 'Notice and take down' measures still have not been introduced in the law. Domain name disputes are almost impossible to resolve through administrative actions, particularly as a recent conflict between competent authorities has currently deprived right holders from obtaining forcible revocation of domain names by administrative agencies. It is expected that a joint circular between two relevant ministries will be issued in November 2015<sup>11</sup> to resolve this problem. In addition, administrative enforcement against registrants that are not identified or located in Vietnam is unavailable. Civil actions still require tremendous amounts of time and effort and outcomes remain uncertain.

### Potential gains/concerns for Vietnam

- E-commerce: significant increase in revenue in the past several years.
- Online copyright: promotion of creation and innovation, subsequent increase of tax revenue.
- Infringing/counterfeit goods: increased protection of consumers, including against counterfeits that may pose health risks.
- Domain names: quicker domain name recovery and response against cybersquatting acts.

### Recommendations

We would like to make the following recommendations:

- Amend the Law on Intellectual Property and its subordinate regulations to accommodate enforcement of IPR in the online environment;
- Increase the levels of administrative fines against individuals committing copyright infringements<sup>12</sup>;
- Strengthen enforcement efforts against infringing websites and implement Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL dated 19 June 2012; Amend such Joint Circular to incorporate 'notice and take down' measures;
- Ministry of Science and Technology and Ministry of Information and Technology to issue a joint circular in facilitating the revocation of domain names resolved via administrative actions;

<sup>7</sup> '2014 Special 301: Vietnam', 2014 Special 301 Report on Copyright Protection and Enforcement', *International Intellectual Property Alliance*, 7/02/14, p. 78.

<sup>8</sup> 'Top Vietnamese music site faces lawsuit over copyright infringement', *Thanh Nien News*, 31/07/14. Available at <<http://www.thanhniennews.com/entertainment/top-vietnamese-music-site-faces-lawsuit-over-copyright-infringement-29292.html>> and 'Recording assoc. seeks to fight copyright violation', *Vietnam Net Bridge*, 26/12/13. Available at: <<http://english.vietnamnet.vn/fms/science-it/92334/recording-assoc--seeks-to-fight-copyright-violation.html>>

<sup>9</sup> 'Report on Intellectual Property Rights in the Socialist Republic of Vietnam', *American Chamber of Commerce Vietnam*, 08/02/2013 and 'Regarding administrative sanctions, the new Decree No. 131/2013/ND-CP on Sanctioning Administrative Violations of Copyright and Related Rights, dated 16 October 2013 even reduced the level of fines against individuals for certain infringements.

<sup>10</sup> Few actions have been taken based on Joint Circular No. 07/2012/TTLT-BTTTT-BVHTTDL on Stipulations on the Responsibilities for Intermediary Services Providers in the Protection of Copyright and Related Rights on the Internet and Telecommunications Networks dated 19 June 2012.

<sup>11</sup> This chapter was finalised on 9th October 2015.

<sup>12</sup> Decree No. 131/2013/ND-CP dated 26 October 2013 on sanctioning administrative violations of copyright and related rights. Available at <[http://www.itpc.gov.vn/investors/how\\_to\\_invest/law/Decree\\_No.131\\_2013/view](http://www.itpc.gov.vn/investors/how_to_invest/law/Decree_No.131_2013/view)>.

- Adopt a Uniform Domain-Name Dispute-Resolution Policy (UDRP)-type system for resolution of ‘.vn’ domain name disputes, or amend the law for administrative agencies to settle cases more effectively – including against absent registrants; and
- Continue to raise public awareness of online protection of all types of IPR.

## II. COPYRIGHT

Relevant Ministries: Ministry of Culture, Sports and Tourism (MCST), Copyright Office of Vietnam (COV)

### Issue description

#### 1. Registration procedure

We are aware that the Copyright Office requires copyright authors and owners to submit copies of their identification documents and provide their residential addresses when filing applications for copyright registration in Vietnam. The Copyright Office also publishes their names and addresses, and numbers and dates of their identification documents in the free online copyright database that is available for public access on the website of the Copyright Office.

#### 2. Copyright assessment

The IP Law provides for the right of State agencies to request intellectual property assessment when handling IPR enforcement cases, and the right of IPR holders and other organisations and individuals to request intellectual property assessment to protect their legitimate rights and interests.<sup>13</sup> However, until now, after 10 years, there is no professional agency in Vietnam which effectively provides assessment of copyright matters.

#### Potential gains/concerns for Vietnam

These issues have created deep concerns among copyright authors and holders, practitioners and the public. It practically causes enormous difficulties for copyright enforcement in Vietnam. We are aware that many copyright owners, especially, foreign owners, have refrained from filing applications for copyright registration in Vietnam not wishing to disclose the required personal information. Lack of copyright registration certificates and professional agencies capable of assessing copyright matters have badly impacted copyright enforcement in Vietnam.

#### Recommendations

- Remove unreasonable requirements regarding provision of personal information and identification documents of copyright owners and authors when applying for copyright registration; and
- Set up agencies that are able to provide copyright assessment.

## III. REGISTRATION OF PATENTS AND TRADEMARKS

Relevant Ministries: Ministry of Science and Technology (MOST), National Office of Intellectual Property (NOIP)

### Issue description

We recognise Vietnam’s efforts to improve the regime of registration of industrial property rights which is recognised as reasonably comprehensive.<sup>14</sup> Nevertheless, many issues remain uncertain and need further

<sup>13</sup> Article 201 of Law on Intellectual Property No. 50/2005/QH11.

<sup>14</sup> *The Intellectual Property Office of UK. Intellectual Property Rights in Vietnam*. April 2013. Available at <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/456371/IP\\_rights\\_in\\_Vietnam.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/456371/IP_rights_in_Vietnam.pdf)>.

guidance and clarification. We will discuss these issues in the following part including those addressed in our previous publications. By re-addressing these issues in this publication we hope that they will receive urgent attention and actions from the Vietnam Government and relevant authorities.

## 1. Transparency

We have noticed that despite the achievements in creating and maintaining the NOIP's online database of industrial property applications and registrations which for a while was proved to be a truly useful tool for checking on trademark applications and registrations, the database has become very difficult to access, out-dated and remains lacking of important information including appeal and cancellation records. Additionally, it remains to wish that the database include the NOIP's decisions and conclusions regarding opposition, appeal and cancellation matters that would allow right holders and practitioners to familiarise themselves with the reasoning of those decisions and conclusions, and to encourage examiners' consistency in their decisions and conclusions.

## 2. Registration of patents

### a. *Non-patentable subject matters*<sup>15</sup>

- i. Computer programs: Computer programs are not patentable under Vietnamese law. However, in the examination practice, some patent examiners in Vietnam may accept this subject for patent protection when it is re-formatted or re-worded as, e.g., a method to operate a conventional device, a device installed to perform a method, a medium containing a program for performing a method. Especially, a computer program is patentable in Vietnam when being re-worded as a medium readable on computers containing computer programs. Meanwhile, it is noted that other examiners may not share this position and may refuse such reformatted or re-worded subject matters.
- ii. Processes of manufacturing plants, animals which are mainly biological in nature, but not microbiological: The concept of 'microbiological process' and 'biological nature' are not defined under Vietnamese law. At the moment, in practice, Vietnamese examiners check whether there is a biological nature through determining whether the technical intervention of man causes the result or effectiveness of the whole process. The evaluation and recognition of a microbiological process will very much depend on whether microorganisms such as fungi, bacteria, viruses are involved in the claimed process. The process of manufacturing plants, animals is patentable if the answers to these questions are affirmative.
- iii. 'Use' claim: Although not explicitly stated in any legislation, Vietnamese examiners tend to reject 'use' claims for patent protection. Until now, it remains controversial and inconsistent in the way to treat a use claim. E.g., in certain applications, the re-wording 'a compound for use' in replacement of 'use of a compound' is considered patentable, while this may be rejected in other similar cases. It is important to note that in general, the use claim of a known compound has never been recognised, despite many different re-wordings. The common reason for the rejection is that the use is considered as a function feature of the known compound and thus it does not contribute to the novelty of the compound claim. This reasoning does not seem convincing and to some extent, is contrary to the regulations.<sup>16</sup>

### b. *Secondary divisional application*<sup>17</sup>

It is still vague whether there is a right to file a secondary divisional application based on a pending primary divisional application if a patent or a decision of rejection has been issued for the parent application. This is essential, especially to the applicants who have to decide whether to file many divisional applications at once or in order to have more time to consider, submit one application first, amending the first one and then proceed with the secondary divisional ones. From our experience, both options are feasible.

<sup>15</sup> Article No. 59 of Law on Intellectual Property No. 50/2005/QH11

<sup>16</sup> Article 25.5.d (i) and (ii) of Circular No. 01/2007/TT-BKHCHN.

<sup>17</sup> Article 17.2 of Circular No. 01/2007/TT-BKHCHN.

c. *Amending granted patent*<sup>18</sup>

Apart from correcting the specification under certain categories, patent owners can only request to reduce the number of claims in a granted patent. In the meantime, in international practice, a request to narrow the protection scope of a claim can be accepted.

d. *Cancellation of a granted patent*<sup>19</sup>

The validity of a patent shall be cancelled if the patented invention does not meet the protection conditions. However, the law provides for general conditions for patent protection only, namely: novelty, level of innovation and industrial applicability<sup>20</sup> and does not provide further details for these general conditions, leaving this important issue uncertain and unclear.

### 3. Registration of trademarks

a. *Well-known trademarks*

Well-known trademarks are literally protected in Vietnam pursuant to Article 74.2(i) of the Law on Intellectual Property. The general criteria for their protection are set forth in Article 75 of the Law. It remains unclear in practice to what extent a mark should have been used to enjoy this protection and who is the person deciding whether a mark is well-known. The current practice suggests that the person is the authority or court which considers that matter. We recommend that Vietnam issues detailed guidance for assessment of well-known marks and publishes cases of this nature to make this issue transparent.

Another issue that the NOIP has dismissed is trademark oppositions by owners of well-known trademarks reasoning that the more well-known a mark is, the better the recollection of the mark remains in the consumer's mind, therefore, the consumer would be in a better position to distinguish a similar junior mark from a senior mark if the latter is well-known. This strange interpretation has narrowed the scope of protection of well-known trademarks because it promotes a dangerous position that the more well-known a mark is, the narrower the scope of its protection becomes. We would appreciate reconsideration of this conclusion by the NOIP and the MOST.

b. *Dishonesty/Bad faith*

Although 'dishonesty' (or bad faith) is mentioned briefly in Article 96.3 of the IPR Law, its wording may, however, lead to a different interpretation on whether or not 'dishonesty' can be an independent ground for invalidation of a trademark registration and for refusal of a trademark application. Although the NOIP has confirmed in a meeting with EuroCham last year that 'dishonesty' can be an independent ground for invalidation of a trademark registration and for refusal of a trademark application, we remain uncertain whether other authorities and courts share the NOIP's position in this issue. Also, it remains unclear what can be considered as 'dishonesty'. While there is no definition, the European Union (EU) and the US, through court rulings, seem to have an open approach and rule a broad range of actions to be 'bad faith/bad intention.' We recommend that Vietnam adopt the EU and the US' approach for this issue and include literal provisions for this issue in the next amendment of the IP Law. For ease of reference, the following are among acts that have been considered bad faith by the EU and US courts:

Knowledge of a third party's prior right, including business relations with the third party; intention to misappropriate the reputation of a third party's prior right; intention to prevent a third party's entry onto the market; multi-filings of other's marks, warehousing marks and domain names; intent to circumvent the use requirement (repeat filings); registration primarily to disrupt a competitor's business; failing to submit a timely response; intent to sell the mark/domain name; intent to divert consumer from the mark owner's online location to the infringer's website; providing false contact information when applying for the registration.

This list is not exhaustive and will evolve with time due to the complexity of the infringers' acts.

<sup>18</sup> Article 17.1 of Circular 01/2007/TT-BKHCHN.

<sup>19</sup> Article 96 of Law on Intellectual Property No. 50/2005/QH11.

<sup>20</sup> Article 58 of Law on Intellectual Property No. 50/2005/QH11.

### *c. Registration of pharmaceutical trademarks*

We have observed an enormous number of closely similar pharmaceutical marks currently existing on the National Trademark Register. A general impression is that a much more relaxed degree of similarity is adopted in examination of pharmaceutical marks despite the fact that any confusion in respect to pharmaceutical products may result in serious consequences on consumers' health. We believe that a reasonable concept for the examination for pharmaceutical marks should be adopted in order to raise confidence of manufacturers of pharmaceutical innovative products and to promote a fair and healthy competition environment in the country.

#### **Potential gains/concerns for Vietnam**

An improved registration regime for patents and trademarks would effectively promote the protection of businesses in Vietnam. With the present limitations of IPR enforcement capabilities, a comprehensive patent and trademark registration regime would be viewed as a great help for IPR enforcement authorities. With the increasing awareness of IPR among the public, especially among businesses, the need for a full and effective patent and trademark registration system has become more and more urgent and such a system would in its turn promote business and investment.

#### **Recommendations**

We would recommend the Vietnamese authorities to ensure the following improvements of the current system of the patent and trademark registration in Vietnam:

- › Publish texts of IPR conclusions and decisions by the court, MOST, NOIP and other authorities;
- › Keep the online patent and trademark databases updated and easy to access;
- › Issue detailed guidance on determining non-patentable subject matters and exceptions if any;
- › Make detailed regulations on the matters of the divisional patent application, amendment of patents, and cancellation of patents;
- › Issue detailed guidelines for assessing well-known trademarks and maintain a list of well-known trademarks;
- › Acknowledge market surveys as a method for proving whether a mark is well-known and provide detailed guidance for the implementation of this provision;
- › Issue regulations for refusal and cancellation of trademarks which have been filed or registered in bad faith;
- › Ensure reasonable approaches in examination of pharmaceutical trademarks; and
- › Issue comprehensive trademark examination manuals to serve as guidelines for examination of trademarks.

## **ACKNOWLEDGEMENTS**

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## CHAPTER 6 JUDICIAL RECOURSE

### OVERVIEW

In last year's edition of the Whitebook, we introduced a chapter on judicial recourse in Vietnam because many of our members reported serious obstacles in trying to enforce their rights in Vietnam. Foreign investors in Vietnam usually prefer to settle disputes by arbitration rather than in national courts. There are several issues arising in respect to the use of both domestic and international arbitration that we would like to highlight in this chapter. Among other things, we will assess whether any progress has been made since last year on the following three topics: the Vietnamese Courts, arbitration in Vietnam, and the recognition and enforcement of foreign arbitral awards in Vietnam.

### I. THE VIETNAMESE COURTS

Relevant State bodies: Ministry of Justice (MOJ), Supreme People's Court, Supreme People's Procuracy, National Assembly – Economic Committee

#### Issue description

The perceived lack of independence of the judiciary is one of the main reasons why foreign investors tend to avoid using the Vietnamese Courts to settle their disputes. In the World Economic Forum's annual Global Competitiveness Report, Vietnam consistently ranks low (with very limited progress) on both judicial independence and on the efficiency of the legal framework in settling disputes. In the 2014-2015 edition of this comparative study, Vietnam ranked 92 out of 144 participating countries in the 'institutions' category, which includes among other things: (intellectual) property rights, judicial independence, favouritism in decisions of Government officials, efficiency of the legal framework in settling disputes and in challenging regulations and transparency of Government policymaking.<sup>1</sup>

**Table 3: Vietnam's competitiveness according to the World Economic Forum**

Year	Judicial Independence	Efficiency of the Legal Framework in Settling Disputes	Institutions
2012-2013	# 87 out of 144	# 74 out of 144	# 89 out of 144
2013-2014	# 89 out of 148	# 93 out of 148	# 98 out of 148
2014-2015	# 88 out of 144	# 89 out of 144	# 92 out of 144

Source: K. Schwab, *World Economic Forum*.<sup>2</sup>

The Vietnamese court system is currently being revised in accordance with Law No. 62/2014/QH13 on the Organisation of the People's Courts. Among other things, this new law is intended to clarify the functions, duties, powers and organisational structure of the Vietnamese judiciary, with one of the key changes being the introduction of a fourth level in the court system: the Superior People's Court. Unfortunately, despite the continued efforts of the Vietnamese Government to reform its judicial system in line with its Judicial Reform Strategy for

<sup>1</sup> K. Schwab, 'The Global Competitiveness Forum 2014-2015', *World Economic Forum*, 2014, pp. 384-5. Available at [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2014-15.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf)

<sup>2</sup> *Ibid.*

2020 with a Vision to 2030<sup>3</sup>, and despite further international cooperation in this field<sup>45</sup>, foreign investors are still reluctant to make use of the Vietnamese Courts.

Furthermore, the permitted scope of legal services for foreign law firms remains uncertain after the adoption of Decree No. 123/2013/ND-CP guiding the Law on Lawyers of 2012. As the law currently stands, a fully qualified Vietnamese lawyer cannot represent clients before the Vietnamese Courts if he or she is working for a foreign law firm. It remains to be seen whether the various free trade agreements that are currently being negotiated or concluded by Vietnam can help remove some of the limits on the scope of services that Vietnamese lawyers employed by foreign law firms can provide.

### Potential gains/concerns for Vietnam

In the words of Věra Jourová, EU Commissioner for Justice, Consumers and Gender Equality: 'effective justice systems play a key role for an investment friendly environment, providing greater regulatory predictability and thereby contributing to sustainable growth'.<sup>6</sup> When planning to invest abroad, the availability of an efficient and transparent judicial system is one of the factors that foreign investors take into account. We therefore believe that further judicial reform in Vietnam will lead to increased confidence among investors, which could in turn boost Vietnam's economy.

### Recommendations

- ▶ The Vietnamese Government has made substantial efforts to improve access to effective judicial recourse in Vietnam but we believe that more can be done to improve Vietnam's judicial system and increase the confidence of foreign investors in the Vietnamese court system.
- ▶ Among other things, more training could be provided to the judiciary based on best practices from other countries and with more support from foreign experts. As judicial reform continues to be implemented all around the world, Vietnam could learn from, for example, the experience in the European Union; and
- ▶ Last year we recommended that more action should be taken to publish court decisions in order to increase the transparency of the Vietnamese courts. In a positive step in this direction the Supreme People's Court, supported by the EU, Denmark and Sweden under the 'Justice Partnership Programme', recently launched the publication of a selection of court judgments. Mr. Bui Ngoc Hoa, Deputy Chief Justice of Vietnam, said that 'it provides directions for judges in deciding similar cases and promotes predictable decisions for the public'.<sup>7</sup> EuroCham acknowledges the progress that has been made so far, and encourages the Vietnamese Government to continue and step up its efforts in the field of judicial reform.

<sup>3</sup> As approved by the Prime Minister under Decision No. 338/QĐ-TTg dated 19 January 2013.

<sup>4</sup> 'Slovakia, Vietnam share judicial experience', *VietNamNet*, 08/07/2015. Available at <<http://english.vietnamnet.vn/fms/government/135351/slovakia--vietnam-share-judicial-experience.html>>

<sup>5</sup> 'Vietnam, RoK supreme courts promote cooperation', *VietnamPlus*, 20/08/15. Available at <<http://en.vietnamplus.vn/vietnam-rok-supreme-courts-promote-cooperation/80510.vnp>>

<sup>6</sup> 'Foreword in 'The 2015 EU Justice Scoreboard', *European Commission*, 2015. Available at <[http://ec.europa.eu/justice/effective-justice/files/justice\\_scoreboard\\_2015\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf)>

<sup>7</sup> 'Judgements made public in bid to improve transparency', *Viet Nam News*, 28/05/2015. Available at <<http://vietnamnews.vn/society/270941/judgements-made-public-in-bid-to-improve-transparency.html>>

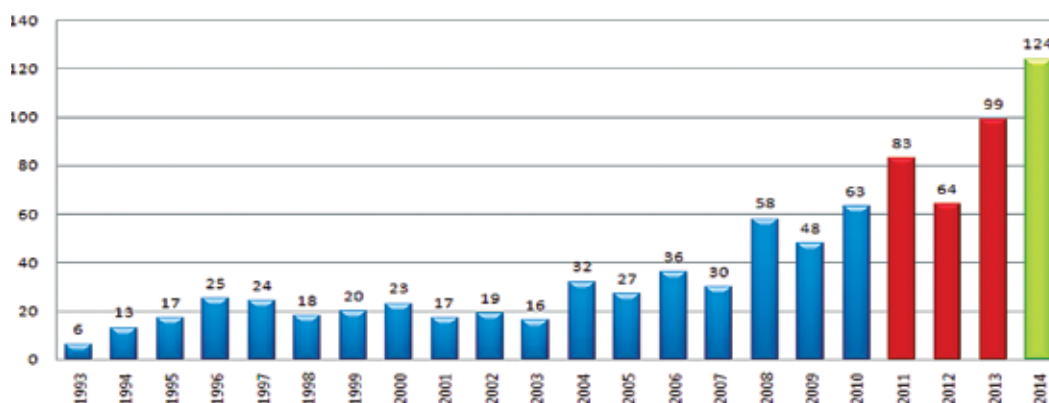
## II. ARBITRATION IN VIETNAM

Relevant State bodies: Ministry of Justice (MOJ), Supreme People's Court, Supreme People's Procuracy, National Assembly (Economic Committee)

### Issue description

Recent statistics released by the Vietnam International Arbitration Centre (VIAC) show that dispute settlement through arbitration (or mediation) in Vietnam is increasingly popular, with 124 new cases being registered in 2014.<sup>8</sup> The biggest portion of all disputes that are being settled at VIAC are related to sales contracts.<sup>9</sup> We have also noticed that arbitration is being considered and/or encouraged in various sectors of Vietnam's economy, for example in the banking sector.<sup>10</sup> To compare these statistics with two of Asia's largest arbitration institutions, in 2014, the Singapore International Arbitration Centre (SIAC) handled a total number of 222 new disputes<sup>11</sup> whereas the Hong Kong International Arbitration Centre (HKIAC) dealt with a total number of 477 new disputes in that same year.<sup>12</sup>

Figure 8: Number of new cases being registered at VIAC from 1993 to 2014



Source: 'Numbers of disputes in VIAC over 17-year-period from 1993 to 2014', VIAC.<sup>13</sup>

Unfortunately, the reasons for the increased popularity of VIAC may be more related to the disadvantages of other dispute settlement mechanisms available to investors in Vietnam, such as the Vietnamese Courts (see section 2 above) or international arbitration (see section 4 below), rather than to the effectiveness of arbitration at VIAC itself.

Generally speaking, foreign investors consider that arbitration at VIAC is more flexible, efficient and faster than proceedings at the Vietnamese courts. Other comparative advantages include the fact that proceedings usually take place behind closed doors, and the possibility for parties to choose one or more arbitrators who possess the required skills in order to settle the more technical and complex disputes. Compared to international arbitration, proceedings at VIAC have the potential to be more efficient in terms of time and costs, which is particularly relevant for disputes where the amount at stake is relatively low. Furthermore, the procedure of enforcement of a VIAC arbitral award is more straightforward than the procedure of recognition and enforcement of foreign arbitral

<sup>8</sup> 'Number of disputes in VIAC over 17 year period from 1993 to 2014', *Vietnam International Arbitration Centre (VIAC)*, 29/10/14. Available at <<http://eng.viac.vn/statistical/numbers-of-disputes-in-viac-over-17-year-period-from-1993-to-2014-a274.html>>

<sup>9</sup> 'Types of disputes', *Vietnam International Arbitration Centre (VIAC)*, 20/10/14. Available at <<http://eng.viac.vn/statistical/types-of-disputes-a277.html>>

<sup>10</sup> Arbitration could solve dispute fast', *Viet Nam News*, 20/06/15. Available at <<http://vietnamnews.vn/economy/271985/arbitration-could-solve-disputes-fast.html>>

<sup>11</sup> 'Case Management- Annual Report 2014', *Singapore International Arbitration Centre (SIAC)*, p.8. Available at <[http://www.siac.org.sg/images/stories/articles/annual\\_report/SIAC\\_Annual\\_Report\\_2014.pdf](http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2014.pdf)>

<sup>12</sup> 'Case statistics-2014', *Hong Kong International Arbitration Centre (HKIAC)*. Available at <<http://www.hkiac.org/en/hkiac/statistics/39-hkiac/statistics>>

<sup>13</sup> 'Numbers of disputes in VIAC over 17-year-period from 1993 to 2014', *Vietnam International Arbitration Centre (VIAC)*, 29/10/14. Available at <<http://eng.viac.vn/statistical/numbers-of-disputes-in-viac-over-17-year-period-from-1993-to-2014-a274.html>>



awards in Vietnam (see also Section 4 below). In last year's edition of the Whitebook, we listed several issues that were raised by our members in relation to proceedings at VIAC. Unfortunately, we have found that most of these issues are still applicable this year.

## Potential gains/concerns for Vietnam

### 1. Court interventions during arbitration in Vietnam

One of the main concerns relates to the intervention by the Vietnamese Courts during VIAC proceedings. As an example, there are cases where the respondent in VIAC proceedings has raised an unfounded objection to the jurisdiction of the VIAC tribunal. When the tribunal issued a decision to confirm its jurisdiction, the respondent successfully applied to a Vietnamese court to have the decision overturned. Since the decision of the Vietnamese court on this issue is final and binding, and since there is no right of appeal against the court's decision, the court decision resulted in the termination of the VIAC proceedings.

It goes almost without saying that the ease with which the Vietnamese courts can intervene to terminate VIAC proceedings, without valid grounds and without the possibility of appeal, continues to represent a major obstacle for foreign investors who are seeking the fair and transparent resolution of their claims in Vietnam.

Another concern is that VIAC awards are sometimes set aside on flawed grounds. The example that we used last year concerned proceedings in which the parties had unanimously agreed to conduct the hearing in the Vietnamese language for reasons of convenience. Once VIAC had issued an award against the respondent, the latter successfully petitioned the Vietnamese court to set aside the award on the grounds that the arbitration agreement provided for the arbitration to be conducted in English and therefore holding the arbitration hearing in Vietnamese was inconsistent with the agreement of the parties. The court accepted the petition even though the respondent's lawyers and representatives had also fully agreed to conduct the hearing in Vietnamese and despite the fact that the language of the hearing was completely immaterial to the reasoning of the tribunal and the validity of the award. We are also aware of cases in which arbitral awards were set aside by the Vietnamese courts based on an alleged contradiction with the so-called 'fundamental principles of Vietnamese law', which is obviously a concept that leaves room for interpretation.

Examples such as the ones mentioned above can result in the termination of arbitration proceedings before an award is issued or to the setting aside of an award once it has been issued by a VIAC tribunal. Regardless of where arbitration proceedings take place, there is always a role for the national courts, for example, to uphold or enforce arbitral awards or to support the arbitral process. There is, however, a fine line between the helpful assistance of the courts and the abuse of the judicial remedies that are available during arbitration proceedings.<sup>14</sup> In Vietnam, it is fair to say that the extent and ease with which the Vietnamese Courts are intervening in domestic arbitration proceedings is not in line with international best practice. In Singapore, for example, the courts tend to apply a pro-arbitration approach with minimal intervention, while they seem able to ensure the legitimacy and integrity of the arbitral process at the same time.<sup>15</sup>

### 2. Procedural issues regarding arbitration in Vietnam

A second issue that we pointed out last year and which is still applicable relates to the fact that arbitral tribunals in practice often apply the Vietnamese Civil Proceedings Code to direct that only original or notarised copies of documents shall be accepted as valid evidence in the proceedings. If the documents in question have been issued by competent authorities in a foreign country, such documents are required to go through a lengthy procedure of notarisation and legalisation by the Vietnamese embassy in the country of issuance. Consequently, the preparation of evidence can represent a significant time and cost burden for the foreign party to arbitration proceedings in Vietnam.

<sup>14</sup> C. Muriel-Bedoya and P. Bustamante & Ponce, 'Constitutional Review of Arbitral Awards: Between Protectionism and Interventionism', *Kluwer Arbitration Blog*, 04/03/15. Available at <<http://kluwerarbitrationblog.com/blog/2015/03/05/constitutional-review-of-arbitral-awards-between-protectionism-and-interventionism/>>

<sup>15</sup> P. Pillao and U. Chaudhry, 'The Singapore Approach to Scrutiny of Arbitral Awards', *Kluwer Arbitration Blog*, 24/12/14. Available at <<http://kluwerarbitrationblog.com/blog/2014/12/24/the-singapore-approach-to-scrutiny-of-arbitral-awards/>>

Even though arbitral tribunals have the power to summon witnesses to attend a hearing at the request of a party or to request the assistance of the court in the collection of evidence, in practice, the courts do not actively or effectively support arbitration proceedings. Similarly, it is rare for parties in arbitration proceedings to make use of expert witnesses as experts who are qualified and experienced to give evidence are hard to find in Vietnam. Additionally, the lack of case precedents, case law reporting and a developed body of academic analysis is a further disadvantage for parties to settle a dispute at VIAC.

### Recommendations

Unfortunately, most of the issues that our members raised last year, are still applicable today.

- We believe in the potential of arbitration at VIAC to become a good option for the settlement of commercial disputes in Vietnam. It seems, however, that this potential is somewhat overshadowed by procedural issues as well as the extent of court intervention in arbitral proceedings. Last year, the Council of Judges of the Supreme People's Court of Vietnam issued Resolution 01/2014/NQ-HDTP. Among other things, the resolution provided that when faced with a request to set aside an arbitral award, the courts cannot reconsider the merits of the dispute but may only determine if there is a valid ground to set aside the award as provided in the Law on Commercial Arbitration. Despite this step in the right direction, we believe that there is still room for further improvement; and
- For example, we believe that the Supreme People's Court and the Chief Justice could provide more and/or better instructions to lower level courts to limit court interventions during arbitration proceedings. The introduction of a right of appeal to first instance court decisions on jurisdiction or on the validity of an arbitral awards, as well as learning from best practices in the region (e.g. SIAC and HKIAC), could further contribute to making dispute settlement through arbitration in Vietnam more popular because of its own merits.

## III. RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

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 Relevant State bodies: Ministry of Justice (MOJ), Supreme People's Court, Supreme People's Procuracy, National Assembly – Economic Committee  
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### Issue description

Foreign investors in Vietnam generally choose to provide for dispute resolution by international arbitration where the value of the contract is substantial. Although international arbitration is often costly and time consuming, an international arbitral award is generally enforceable in most jurisdictions around the world under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter the NYC), of which Vietnam is a member.

The vast majority of member states properly apply the provisions of the NYC in practice and duly recognise and enforce foreign arbitral awards within their own jurisdictions. However, our members have found that it is extremely difficult in practice to achieve the recognition and enforcement of foreign arbitral awards through the Vietnamese courts. The main difficulties encountered are the reversal of the burden of proof in respect of objections to applications for recognition and enforcement of foreign arbitral awards, and the rejection of applications by the Vietnamese courts for reasons that are not consistent with the NYC, as discussed further below.

### Potential gains/concerns for Vietnam

#### 1. Reversed burden of proof

Under the provisions of the NYC, if the award debtor raises any objection to the enforcement of a foreign arbitral

award, then the award debtor is required to provide evidence to prove its objection. However, in practice the Vietnamese courts reverse the burden of proof and require the award creditor to prove that any objections raised by the award debtor are invalid or not applicable. This practice encourages award debtors to raise as many objections as possible, sometimes frivolous, which the award creditor is required to disprove. This imposes a significant cost and time burden on the award creditor.

## 2. Rejection of arbitral awards for reasons not consistent with the NYC

The NYC provides for very limited exceptions where an application for recognition and enforcement can be rejected. These exceptions include, for example, cases where a party to the arbitration agreement was, under the law applicable to it, under some incapacity and therefore lacked authority to sign the agreement or cases where a party was not given proper notice of the arbitration proceedings, which must be determined pursuant to rules of the relevant arbitration institution and the governing law of the arbitration agreement.

However, it appears that the Vietnamese courts have often issued decisions to reject applications for the recognition and enforcement of foreign arbitral awards for reasons not consistent with the NYC. For example, in many cases, the Vietnamese courts have determined that the foreign party to the arbitration agreement lacked capacity to sign a contract by wrongly referring to the Vietnamese law instead of applying the relevant law governing the foreign party, even where evidence has been presented to the court demonstrating that the foreign party had full capacity to sign such contract as a matter of its applicable law. In other cases, the Vietnamese courts have determined that notices were not properly served on the respondent by wrongly applying Vietnamese law and not referring to the rules of arbitration governing the proceedings and the governing law of the arbitration agreement.

### Recent developments

In July 2014 the Supreme People's Court issued Letter No. 246/TANDTC-KT on the settlement of requests for the recognition and enforcement in Vietnam of foreign business and commercial arbitral awards (Letter 246). This guidance was intended to ensure that the Vietnamese courts properly applied the provisions of the NYC and, for example, prohibited judges from applying Vietnamese law to determine issues that must be applied by reference to the applicable foreign law and/or the rules of the relevant arbitration institution. Unfortunately it seems that Letter 246 has not been followed in practice. A new Civil Proceedings Code is now in the drafting process. It is hoped that the new law will directly address the concerns that have been raised above.

### Recommendations

- To further improve the recognition and enforcement of foreign business and commercial arbitral awards, we recommend Vietnam to follow international best practices with regard to this matter. The new Civil Proceedings Code should provide for the strict application of the provisions of the NYC including the clear requirement that the burden of proof rests with the award debtor if it claims that a valid objection to enforcement exists; that the award creditor is only required to provide to the court the valid award and the valid arbitration agreement in support of its application and that the Vietnamese court is strictly prohibited from re-opening the merits of the case; and
- Another suggestion to encourage the recognition and enforcement of foreign arbitral awards in Vietnam would be to introduce the automatic referral to the relevant Appeal Court of all cases where an application has been rejected by the courts of first instance. Furthermore, seminars and training courses could be organised by the Supreme People's Court for all judges of the provincial People's Courts and the Appeal Courts to ensure that judges are properly trained in dealing with applications for recognition and enforcement of foreign arbitral awards in accordance with Vietnamese law and the NYC.

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## CONCLUSION

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Our members seek an efficient and transparent justice system when conducting business with Vietnamese partners and when investing in Vietnam. They want to ensure that business commitments will be performed as agreed and that proper recourse will be available in the event of any breach or dispute.

Foreign investors may lose confidence in doing business in Vietnam and they may feel insecure about the protection of their investments if the current system of judicial recourse in Vietnam is not improved. In line with its international commitments, Vietnam should indeed ensure access to justice and fair and equitable treatment for foreign investors. Even though we acknowledge the progress that has been made since last year's edition of the Whitebook, we believe that much more can be done.

We therefore hope that our concerns and recommendations as mentioned in this chapter will be taken into account by the Vietnamese Government. At the same time, EuroCham and our members will continue to offer expert support and cooperation in order to find solutions to the issues that are currently at stake and to improve the system of judicial recourse in Vietnam.

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# CHAPTER 7 MERGERS AND ACQUISITIONS

## OVERVIEW

Effective from 1 July 2015, Vietnam's Law on Investment 2014 (LOI) and Law on Enterprises 2014 (LOE) have become the legal backbone regulating mergers and acquisitions (M&A) activities in Vietnam, replacing the preceding legislations enacted in 2005. These laws are expected to mark a new positive milestone for the legal framework for M&A activities in Vietnam. A new wave of M&A is set to hit Vietnam, as Vietnam is still perceived as an attractive investment market. The M&A market has witnessed a robust year in 2014, with USD 4.2 billion in size, which rose 15% over 2013.<sup>1</sup> M&A in Vietnam is further expected to reach a deal value of USD 20 billion in 2015-18, with engagement from both local and international companies.<sup>2</sup>

Nevertheless, the new legal framework for M&A activities is in its infant stage of implementation and still needs further guidance or clarification from the Government of Vietnam. A great number of dialogues between relevant State bodies of Vietnam, e.g. the Ministry of Planning and Investment (MPI), People's Committees at provincial level, and the investment community have been held recently to collect public comments on draft implementing regulations for the LOI and LOE with the aim to tackle outstanding M&A related issues, such as the licensing process, investment conditions and requirements.

We much appreciate that the recent development of Vietnam's corporate and investment laws highlighted the endeavour of the Government on easing the procedures of M&A activity in Vietnam. Some of our recommendations of the previous Whitebook have been addressed and reflected in the new LOE and LOI. However, hindrances are still there and we hope that the Government commits stronger on the improvement of M&A regulatory framework to re-ignite M&A activity in Vietnam.

We would like to note, hereafter, legal impediments to M&A in Vietnam and our recommendations for the Government on how to address these shortcomings. We welcome the opportunity to work alongside the regulators to facilitate growth and efficiency in the M&A market.

We would like to address these top recommendations for M&A in Vietnam:

- › Clarify rules on investment conditions applicable to foreign investors;
- › Clarify the impact of the changes under the LOI on the industry-specific laws, in particular in terms of treatment between 'domestic' and 'foreign-invested' enterprises.
- › Clarify rules on the new regime of foreign-ownership cap in public companies;
- › Clarify the basis for calculating the market share of a potential target company in relation to an economic concentration;
- › Harmonise the interpretation of transfer price;
- › Clarify and improve the regulatory framework on tax liabilities arising from M&A transactions; and
- › Ensure that decisions taken by the Vietnam Competition Administration Department (VCAD) are made quicker.

<sup>1</sup> 'Vietnam M&A deal market to touch \$20b between 2015-2018', *DealStreetAsia*, 18/07/15. Available at <[www.dealstreetasia.com/stories/vietnam-ma-deal-market-to-touch-20b-between-2015-2018-9231/](http://www.dealstreetasia.com/stories/vietnam-ma-deal-market-to-touch-20b-between-2015-2018-9231/)>

<sup>2</sup> 'Overview', *M&A Forum Vietnam*, 2015. Available at <<http://mavietnamforum.com/en/>>

## I. MARKET ACCESS AND LICENSING PROCESS

Relevant Ministries: Ministry of Planning and Investment (MPI)

### Issue description

Foreign M&A of local companies may face market access barriers with respect to a number of business sectors. Particularly, foreign investors' acquisitions of local targets with wide business scopes do not always go smoothly. This even occurs when each business activity is open to foreign investment under Vietnam's WTO commitments, such as distribution, or not restricted under Vietnamese law, such as education. Another issue is that the law is sometimes silent on foreign investment in other sectors, such as printing or publishing, which leaves room for discretionary judgment of the licensing authorities. Recently, Appendix 4 to the LOI sets out 267 'conditional business sectors' and the business community is waiting for clear and specific guidance on the conditions applicable to foreign investors.

Under the LOI, the ownership ratio will decide the licensing procedures for investment projects of foreign investors. Simply put, a 'foreign-invested economic organisation' with foreign-owned capital of less than 51% is subject to investment conditions and formalities applicable to a domestic investor. It is unclear if this new understanding under the LOI would impact the way industry-specific laws treat 'foreign-invested' enterprises (a term under the old investment law still widely used in other areas of Vietnamese law) (for instance: for determining the right to distribute pharmaceutical products or for determining the scope of land-use rights).

We appreciate the recent positive change effective from 1 September 2015 with respect to the foreign ownership cap in public companies, including listed companies or companies with 100 shareholders or more with contributed equity of VND 10 billion or more. Accordingly, the business community's understanding is that, with respect to public companies in non-conditional industries in which there is no limitation of foreign ownership by Vietnamese law or by any international agreements, the foreign ownership ratio is unrestricted (i.e. foreign investors can acquire up to 100% of the equity capital of the target company). Under the guidance of Vietnam's Ministry of Finance (Circular 123/2015/TT-BTC effective from 1 October 2015), public companies are required to determine their own foreign ownership limit. Additionally, it appears that such determination will need to be reported to and confirmed by the State Securities Commission before the relevant public company can announce its applicable foreign ownership cap and foreign investors may acquire shares in such public company at the permitted level. The lack of clarity on the list of foreign ownership limits and conditions for foreign investment (as mentioned above), may hinder the implementation of such process in practice. It is also not clear how this requirement affects existing listed companies, which were subject to the 49% foreign ownership cap under the old regulations.

In addition to statutory foreign ownership cap (if any), a public company is now permitted to reduce its foreign ownership cap by way of setting it out in its charter. Local majority shareholders may utilise this possibility to pass a decision on the foreign ownership cap in the charter with an aim to squeeze out minority foreign shareholders. Vietnamese law does not appear to offer any specific protection for minority foreign shareholders in this case.

### Potential gains/concerns for Vietnam

Other countries in the region with similar advantages to Vietnam, such as a young and cheap labour, are competing for investors. Therefore it is important that Vietnam remains attractive by offering a clear, simple and efficient licensing process. This would help boost the M&A market and consequently attract capital inflows, foster synergies and create economies of scale. It would also serve to reduce the administrative burden on enterprises and licensing authorities alike.

Furthermore, the MPI highlighted that the need for an 'investment registration certificate' (equivalent to an 'investment certificate' under the old investment law) is consistent with international practice in selected industries. However the regulations in developed economies such as Singapore, Australia and the UK do not generally require this.

## Recommendations

- › The adoption of a set of detailed guiding regulations concerning M&A would be, in our opinion, essential at this stage. These regulations must of course closely adhere to Vietnam's WTO commitments on the service sector and reflect the good intent of the LOI. This means creating a level playing field for foreign and domestic investors.
- › The current legal framework must be clear regarding the licensing process and it must regulate specific circumstances of foreign acquisition. We understand that the Government is now in the process of drafting the implementing decree for the LOI, and it is likely that such decree will be issued by the Government very soon.<sup>3</sup> We believe that the decree, when officially issued and implemented will in practice, impact dramatically the investment environment of Vietnam and re-ignite M&A activities in Vietnam.

Our specific recommendations are:

- › Clarify rules on investment conditions applicable to foreign investors;
- › Clarify the impact of the changes under the LOI on the industry-specific laws, in particular in terms of treatment between 'domestic' and 'foreign-invested' enterprises;
- › Clarify rules on the new regime of foreign-ownership cap in the public companies.

## II. TRANSFER PRICE AND TAX

Relevant Ministries: Ministry of Finance (MOF), Ministry of Planning and Investment (MPI)

### Issue description

In an acquisition, the transfer price is, in principle, negotiable. Unfortunately, if that price is agreed to be less than the face value of the sellers' capital contribution to the charter capital (equity)<sup>4</sup> of the target, the licensing authority may not accept the acquisition and refuse to approve the acquisition. The acquisition may subsequently also be examined by the tax authority who may review the transfer price again to ensure that it reflects the 'market price' or the above 'book value' of equity. If the tax authority concludes that the market price or book value has not been reflected appropriately, it may refer to another transfer price it deems fit for tax management purposes. Exceptions can be made for a local company that has suffered from large losses. In our view, it is important that the law clarifies that the licensing authority cannot 'review' the transfer price, which is per se a purely commercial issue; and that only the tax authority may do so for taxation purposes. It should be clear that a transfer price determined not to reflect the market price or book value cannot be a ground for the licensing authority to block the transfer by refusing the issuance of its approval.

Moreover, tax liabilities arising from any M&A transaction also create concerns to the investor. Generally, any assignment of capital is subject to the standard capital gain tax rate (i.e. 22% corporate income tax of the profit derived from such assignment) while the sale of assets is subject to Value-added Tax (VAT) (at a default 10% rate) in most of cases. The personal income tax of the individual seller may be applied with various tax rates of between 5% and 20% for capital investment and capital assignment depending on the types of taxable income and taxpayer. The gain from the shares transfer in a public company may also be subject to tax at 0.1% of the gross sales proceeds.

Vietnamese tax regulations are also not clear on the capital gain tax (if any) applicable to an offshore acquisition (i.e. transfer between offshore seller and buyer of equity interest in an offshore target company which holds capital contribution in a Vietnamese company). The position of Vietnam's General Tax Department (GTD) has once been that no Vietnam's capital gain tax is applicable if all the following conditions are met: (i) the acquisition is entirely offshore, (ii) the capital of the offshore target in the onshore subsidiary remains intact, (iii) the offshore target and

<sup>3</sup> This chapter has been finalised on the 5/10/2015.

<sup>4</sup> Charter capital refers to the capital contribution by shareholders or members of a company as outlined in the company charter.

the onshore subsidiary do not receive any income from the acquisition and (iv) the investment certificate of the onshore subsidiary does not change. For example: see Official Letter 2268/TCT-CS of the GTD dated 28 June 2012. However, under a recent development of Vietnam's tax law (in particular Decree 12/2015/ND-CP effective from 1 January 2015), the GTD has opined in some of its recently guidance (for instance Official Letter 1595/TCT-DNL of the GTD dated 24 April 2015) that offshore acquisitions may also be subject to Vietnam's capital gain tax. There has not been any specific guidance on how this application of Vietnamese capital gain tax is implemented in practice.

### Potential gains/concerns for Vietnam

Capital gain tax is important for planning the structure of an M&A transaction. This lack of clarity regarding whether taxes are applicable, how they are applicable and/or the applicable tax rates creates uncertain financial obligations for investors. In practice, due to these ambiguities, transfer prices are often frozen for long periods of time.<sup>5</sup> This impacts on the planned timescale of transactions and could lead to deals being stopped.

Furthermore, the ambiguous tax regulatory frameworks and the sole discretion of tax authorities on the tax liabilities lead the M&A parties to face difficulties in determining risks levels on this matter or even to the risk of tax arrears or accusations of tax evasion after the conclusion of an M&A.<sup>6</sup>

### Recommendations

We would like to make the following recommendations:

- Harmonise the interpretation of transfer price; and
- Clarify and improve the regulatory frameworks on tax liabilities arisen from M&A transaction.

## III. ANTI-TRUST RESTRICTIONS

Relevant Ministries: Ministry of Planning and Investment (MPI), Ministry of Industry and Trade (MOIT)

### Issue description

Pursuant to the Competition Law, a transaction is prohibited if an 'economic concentration' is formed. This means that the companies involved in the transaction would have a combined market share of more than 50% of the relevant market. If the parties to an M&A deal have a combined market share of between 30% and 50% of the relevant market, they are required to notify the VCAD 30 days before the proposed economic concentration. The proposed economic concentration can only be carried out once written confirmation has been issued by the VCAD confirming the transaction's legitimacy.

### Potential gains/concerns for Vietnam

Though concepts such as 'relevant market' and 'market share' have been legally defined, the basis for calculating 'market shares' remains ambiguous and controversial. This lack of clarity causes VCAD to spend several months investigating and confirming individual cases, leading to severe delays in the overall progress of an acquisition. Better defined rules in this area would also serve to further protect the market from potential 'economic concentrations'.

### Recommendations

It is critical for the Competition Law and its guiding regulations to be clearer on key points, including the factors required calculating 'market share' and the 'relevant market'. Furthermore, the actual reviewing process by the VCAD should be substantially shortened to ensure the overall progress of an acquisition.

<sup>5</sup> 'What's stopping Japanese M&A?', *Vietnam Investment Review*, 12/08/13. Available at <[www.vir.com.vn/whats-stopping-japanese-mas.html](http://www.vir.com.vn/whats-stopping-japanese-mas.html)>

<sup>6</sup> 'Tax evasion in capital transfer deals remains a hot potato for MOF', *Vietnamnet*, 15/01/2014. Available at <<http://english.vietnamnet.vn/fms/business/93788/tax-evasion-in-capital-transfer-deals-remains-a-hot-potato-for-mof.html>>



We would like to make the following recommendations:

- › Clarify the basis for calculating the market share of a potential target company in relation to the concept of 'economic concentration'; and
- › Ensure that the VCAD can come to conclusions and make decisions in a more efficient and timely manner.

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## CHAPTER 8 PUBLIC-PRIVATE PARTNERSHIPS

### OVERVIEW

Modern, efficient infrastructure is vital to continued economic growth and lowers the costs of doing business for all investors in Vietnam. Rapid economic growth and urbanisation is driving high demands for roads, power, ports, waste and water treatment, hospitals, and other public infrastructure for goods and services. However, the State budget is estimated to be able to meet only about 50% of Vietnam's infrastructure needs, which are estimated at USD170 billion from 2011-2020.<sup>1</sup> The balance would need to come from other sources, including from private investments in the form of Public-Private Partnerships (PPPs).

In the last five years, the Government of Vietnam has conducted a rigorous legal reform process aimed to increase foreign and private investment in the country. On 14 February 2015, the Government promulgated the long-expected Decree 15<sup>2</sup> on PPPs, which took effect on 10 April 2015. This new 'PPP Decree', together with the new Decree 30<sup>3</sup> on tendering for investors for PPP projects, which became effective on 5 May 2015, replaced the previous regulatory framework relating to Build-Operate-Transfer (BOT) projects and pilot PPPs.

Over the past 20 years, there has been some limited success in implementing a handful of power projects under previously existing BOT regimes. The project contracts for a number of current power projects are currently under discussion between the Ministry of Industry and Trade and various groups of sponsors taking into account the new PPP regime.<sup>4</sup> However, successful private investment in the less economically public infrastructure sector has been almost inexistent, particularly in PPP form. Due to difficulties with the PPP regime, investors have, in several cases, simply either (i) relied on constituting an investment project under the Law on Investment or (ii) implemented build-transfer (BT) projects, whereby the construction of public infrastructure, most often expressways, is rewarded by the State granting the investor rights to implement a private project, usually for urban development or real estate development.<sup>5</sup>

Although the new PPP Decree constitutes an important legal development, this will not by itself translate into a series of successful privately invested infrastructure projects. In this chapter, we will discuss the following recommendations to promote the PPP program in Vietnam:

- Develop a pipeline of visible projects.
- Improve the capacity and coordination amongst related Government agencies; and
- Adopt further detailed implementing regulations, including with respect to the allocation and procedures for utilising viability gap funding (VGF).

<sup>1</sup> 'Strengthening Public-Private Partnerships', *VCCI News*, 16/04/14. Available at <[http://vccinews.com/news\\_detail.asp?news\\_id=30318](http://vccinews.com/news_detail.asp?news_id=30318)>

<sup>2</sup> Decree 15/2015/ND-CP dated 14 February 2015

<sup>3</sup> Decree 30/2015/ND-CP dated 17 March 2015

<sup>4</sup> 'Overcoming the delay situation of implementing the BOT and IPP Power Project', *Vietnam Energy*, 21/04/15. Available at <<http://nangluongvietnam.vn/news/en/electricity/overcoming-the-delay-situation-of-implementing-the-bot-and-ipp-power-projects.html>>

<sup>5</sup> For example, the project to construct the Pham Van Dong Road in HCM city connecting Tan Son Nhat airport to industrial zones in Binh Duong and Dong Nai. The government entered into an agreement with the investor (GS Engineering & Construction) in which the investor finances and develops the infrastructure in exchange for the development rights and land use rights of certain lots of land in Districts 2, 9 and 10 for real estate developments

## I. DEVELOPING A PIPELINE OF VISIBLE PROJECTS

Relevant Ministries: Ministry of Planning and Investment (MPI), authorised State bodies, and other related authorities

### Issue description

The success of the PPP Decree and the robust legal reform process of Vietnam in the last 5 years will largely depend on the government's ability to bring about and promote viable projects. In order to boost the credibility of Vietnam as a potential destination for PPP investment, in particular due to the absence of implementation of any PPP project under the previously existing pilot PPP regime under Decision 71<sup>6</sup>, it is, in our view, essential that a small number of PPP projects be identified and prioritised for tendering to the market rapidly.

Last year the Government issued Decision 631,<sup>7</sup> which lists 127 national projects seeking foreign investments, approximately 35 of which are specified to be developed under the PPP regime. The Ministry of Planning and Investment recently stated that the Government will announce an updated list of PPP projects in the roads, urban infrastructure, energy, water supply and waste treatment sector. While lists of these types shed some light on the Government's priorities, in order for a Government led PPP program to be successful, individual projects first need to be carefully studied for technical and financial feasibility before they are introduced to the market. These projects need not necessarily be the largest and most high profile; they should be those projects which could be technically and financially viable, allowing an investor to recoup costs and an attractive enough return on its investment after taking into account finance costs.

One helpful tool for developing a pipeline of projects will be the Project Development Facility (PDF), a facility sponsored by the Asian Development Bank and Agence Française de Développement to assist the authorised State agencies in preparing and assessing potential PPPs. The PDF will be administered by the Ministry of Planning and Investment, which is currently drafting with the Ministry of Finance a joint Circular providing guidance for management of the PDF. According to the latest draft Circular, the PDF will be a revolving fund to be reimbursed by the winning investors of projects before the signing of the project contracts (i.e., the winning bidder will be expected to cover the costs of preparing the project).<sup>8</sup>

### Potential gains/concerns for Vietnam

Having tangible projects identified and announced to the market is of the highest priority to maintain the momentum of Vietnam's PPP program. Although the new PPP Decree has been a good start for the government to develop a visible project pipeline, an effective and rapid implementation process with support and coordination amongst all related authorities is now crucial to the success of the program.

### Recommendations

- Prioritise the projects slated as PPPs on the official lists issued by Governmental agencies, such as Decision 631.
- Make use of the PDF and put potential projects through a rigorous assessment (with the help of international technical and financial consultants) involving homogenous international standard screening procedures; and
- Submit selected projects to a competitive, transparent tender as contemplated under the new Law on Public Procurement and its implementing Decree 30.

<sup>6</sup> Decision 71/2010/ND-CP dated 9 November 2010 of the Prime Minister on pilot program for investment in PPP form

<sup>7</sup> Decision No. 631/QĐ-TTg dated 29 April 2014

<sup>8</sup> Draft circular on Management of the PDF (unclear planned issuance date). Available at <<http://ppp.mpi.gov.vn/Pages/tinbai.aspx?idTin=31>>

## II. IMPROVE CAPACITY AND COORDINATION AMONGST GOVERNMENT AGENCIES

Relevant Ministries: Ministry of Planning and Investment (MPI), authorised State bodies, and other related authorities

### Issue description

The lack of capacity, coordination and a unified approach amongst Vietnamese government authorities is most frequently cited by potential international project investors and sponsors as a major difficulty for doing PPP projects in Vietnam.

This issue is compounded by the fact that although BOT, BT and BTO regimes have been in place for nearly 20 years, the legal framework for carrying out PPP projects is not yet fully developed. The new PPP Decree, in particular, does not fully address a number of key risk allocation and commercial issues (including, for example, the issues relating to taking security over real estate and convertibility risk) and also fails to provide detailed procedures for contract/project assignment rights (including lender step in) resulting in uncertainty for the implementing authorities and, in turn, delay in project contract conclusion and practical project implementation. There are also only very limited precedents of financed and completed privately invested projects. The government authorities, therefore, often do not have sufficient legal and practical guidance to smoothly manage the implementation of projects.

It appears that there is often some confusion on the side of authorities discussing projects with foreign investors between the traditional public investment and the PPP regime. The former focuses more on input elements instead of outputs, does not require a sophisticated project assessment process and a rigorous risk management and allocation mechanism. Government authorities therefore often appear not to have sufficient experience and/or understanding of the commercial drivers concerning private investors, such as elements relating to the financial viability of a project and risk sharing mechanisms between the private and public sector. In addition, limited exposure to international practice has also led to a substantial gap in approach between government authorities and foreign parties in PPP projects, the former appearing more concerned with internal administrative procedures and the latter with practical and commercial realities.

Finally, the lack of coordination amongst related authorities has also caused confusion to investors. Although the new PPP Decree contemplates a centrally-monitored program for managing PPP projects, there is work to be done to unify the practice of central and provincial government authorities. Different industry sectors under separate authorities are beginning to develop differing PPP investment practices. Provincial governments, especially in more remote provinces, continue to be left outside the reform process.

### Potential gains/concerns for Vietnam

The institutional and practical capacity and coordination issue will, in our view, outside the commercial and economic realities of individual PPP projects, continue to be the single most important factor reducing the competitiveness of Vietnam's PPP program. It will continue to cause delay and it will increase costs for projects when compared with projects in other jurisdictions, including in ASEAN, potentially resulting in a loss of investor patience and interest in the Vietnamese PPP program. Given the robust PPP program in some other markets in Southeast Asia (such as Thailand, Indonesia and the Philippines), failing to address this issue will make it even more difficult for Vietnam to develop a competitive and visible project pipeline. We understand, however, that work is being undertaken on some of these aspects with some of Vietnam's development institutions and this is very encouraging.

### Recommendations

- Organise regular and quality workshops and capacity building sessions for the related government authorities, especially officials at provincial levels.
- Continue to develop implementing regulations as well as project manuals to assist the authorised State agencies in carrying out projects.

- › Develop (with the help of international consultants with experience in other markets) sets of approved bidding documents, including project contracts containing internationally acceptable risk allocation models as a basis for bidding to reduce the potential for delay.
- › Bring in tangible projects in line with international best practice to provide the authorised State agencies with hands-on experience; and
- › Require a participative implementing process with involvement of all key Ministries and authorities for a unified practice in developing projects.

### III. PROMULGATING DETAILED IMPLEMENTING REGULATIONS

Relevant State authorities: Ministry of Planning and Investment (MPI), authorised State bodies, and other related authorities

#### Issue description

Further implementing regulations are required to provide detailed guidance for the interpretation and application of the PPP Decree. To date, a new government Decree on the Ministry of Justice's legal opinions<sup>9</sup> and a Circular of the Ministry of Industry and Trade on BOT power projects<sup>10</sup> have been adopted to support the PPP program. The Ministry of Planning and Investment has also circulated for public consultation several draft Circulars providing guidance on the implementation of the PPP Decree regarding project screening procedures, model contracts and the regulations on management of the PDF.

However, a number of current outstanding issues need official clarification from the Government. Confirmation from the State Bank of Vietnam and the Ministry of Natural Resources and Environment is crucial to determine the ability of foreign lenders to take security over real estate assets of the project companies. Investors are also keen to have official guidance from the Ministry of Finance and the State Bank of Vietnam on a solution to foreign currency convertibility. Moreover, having the confirmation in practice that foreign law can be applied to project contracts, which may also be submitted to foreign arbitration, would also be needed in order to provide sufficient comfort to investors and lenders to overcome certain uncertainties inherent in Vietnamese law pending further legal and judicial development.

#### 1. Viability Gap Funding (VGF)

The fact that viability gap funding (VGF) for projects implemented under the new PPP Decree 15 is uncapped is a very encouraging step forward for foreign participants in the PPP market. For future PPP projects, the Government is reported (although it is unconfirmed) to have set aside a Viability Gap Fund of up to USD1 billion to support projects that would not otherwise be financially viable.<sup>11</sup> There is no detailed guidance to date on the management of and eligibility to VGF. Transparent and clear procedures must be in place in a way that assure project sponsors and lenders that the funding will be available in accordance with project needs as part of the launching of any new PPP project on the market.

#### 2. Existing 'brownfield' projects

In addition, the government has recognised that the involvement of the private sector in operating and investing in existing, constructed projects, would help mobilise funds to the State for developing future projects. Private and foreign investors have expressed interest in the government's plans to transfer operating rights in a number of completed infrastructure projects from the State to private investors, especially in the transport sector including roads, seaports and airports. It is important that detailed regulations are adopted to set out a transparent legal framework for these projects, which may involve foreign bidders with significant knowledge and experience of the relevant sector. Regulations on how to 'transform' publicly funded infrastructure projects into PPP projects are also awaited to this end.

<sup>9</sup> Decree 51/2015/ND-CP dated 26 May 2015

<sup>10</sup> Circular 23/2015/TT-BCT dated 13 July 2015

<sup>11</sup> 'Vietnam promotes public-private partnerships in infrastructure', USAID, 06/09/2015. Available at <<https://www.usaid.gov/results-data/success-stories/vietnam-promotes-public-private-partnerships-infrastructure>>

### 3. Developing detailed procedures

At the authorised State agencies' level, project manuals setting out detailed step-by-step guidelines for preparing and developing projects are also needed to assist the agencies in familiarising with the new legal concepts and practice. The Ministry of Planning and Investment has set up a specialised PPP portal dedicated to the PPP program.<sup>12</sup> The portal is intended to provide legal and practical guidance on how to implement PPP projects as well as to publish information about pipeline projects. However, to date, the portal still requires substantial work to enrich the database and provide more useful information to interested stakeholders.

### 4. Transitional provisions

Last but not least, the lack of an effective transition mechanism between the former BOT regime and the new PPP Decree has been a concern for investors of on-going projects. Delay has happened to negotiations due to the authorised State agencies' reluctance to take actions before comprehensive implementing regulations are in effect. In addition, the lack of sufficient implementing regulations for the new Law on Investment<sup>13</sup> and Law on Enterprises<sup>14</sup> has almost frozen the foreign direct investment and company incorporation licensing process. Hence, the need for detailed guidance from the government during this transition stage is compelling.

#### Potential gains/concerns for Vietnam

The urgent need for a broad legal reform in this transition stage is a unique opportunity for the government to develop a comprehensive legal solution to promote PPP investment. This process will allow the government to hear from all stakeholders and to create changes in most of major laws that regulate or affect the PPP program. On the other hand, delay in putting into place effective implementing regulations may undermine the on-going momentum of the entire program and make it difficult for investors to take the risk of deciding to invest in PPPs in Vietnam in the context of other robust PPP programs being promoted in other neighbouring jurisdictions.

#### Recommendations

- Continue to develop detailed policies and guidelines related to PPPs that are attractive to foreign investors looking to invest in infrastructure in the country, in cooperation with the Government of Vietnam as a whole, focussing on certain key elements such as the availability and disbursement of VGF.
- Elaborate the legal procedures for transferring operating rights in completed projects or for implementing operation and maintenance PPP projects.
- Test these regulations with actual projects so that investors can get comfortable with how they will be interpreted in the context of developing a PPP.
- Developing project manuals (in addition to normative legal texts) which can be tested and adjusted based on the actual issues encountered in practice; and
- Develop sets of approved bidding documents, including project contracts containing internationally acceptable risk allocation models in areas where the regulations are silent.

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<sup>12</sup> 'Public-Private Partnerships', *Ministry of Planning and Investment*, 2015. Available at <<http://ppp.mpi.gov.vn/en/Pages/default.aspx>>

<sup>13</sup> Law on Investment 67/2014/QH13 dated 26 November 2014

<sup>14</sup> Law on Enterprises 68/2014/QH13 dated 26 November 2014

## CHAPTER 9 TAXATION

### OVERVIEW

The EuroCham Taxation and Transfer Pricing Sector Committee continues to recognise the many positive developments to Vietnam's tax laws and regulations. In 2015, a number of significant changes became effective, several of which were raised in earlier editions of the Whitebook. These include, amongst others, the removal of the cap on deductibility of advertising and promotional expenses, the reintroduction of incentives for business expansions and for enterprises located in industrial zones, as well as a number of positive personal income tax (PIT) and VAT (Value Added Tax) changes. In addition several measures were implemented to reduce filing requirements for all taxes.

While there have been many positive developments in the tax laws, as well as in reducing the time it takes taxpayers to comply with their tax obligations, we have observed that the practical implementation of the laws in general appears to have become more challenging. As an example, while Vietnam has an extensive tax treaty network with over 60 active treaties and new treaties continuing to be signed, the practical implementation of the benefits under tax treaties has recently become even more difficult.

In addition, it seems like non-compliance with non-tax rules and regulations, even where these may not be clear, is often used by tax authorities as a basis to either increase taxable income, impose withholding tax, deny a tax deduction, deny a VAT input credit or reject a VAT refund, while in our view, the most appropriate consequence should be an administrative penalty.

This focus on form rather than substance also extends to documentation requirements, which are not always known in advance. They can differ between tax auditors, and can be so onerous that they are extremely difficult to comply with in practice.

Generally, taxpayers wish above all to comply with their tax obligations. If the imposition of taxation in Vietnam begins to be perceived as arbitrary and uncertain, companies may consider that it is not worth continuing to do business in Vietnam, particularly if they are at the early stages of development.

We understand that resources have been re-allocated within the tax authorities to tax audit and investigation but we would respectfully suggest that more resources also be applied to assist in educating taxpayers and clarifying tax matters so that they can correctly meet their tax obligations.

Several of the issues we raise this year relate to the practical implementation of the laws, and their interpretation rather than to the provisions of the laws themselves. Given that taxation is such a wide topic we have not in general repeated the issues that have been raised in the 2015 Whitebook unless there has been a further development in the intervening period.

### I. CORPORATE INCOME TAX

Relevant State bodies: Ministry of Finance (MOF), Ministry of Industry and Trade (MOIT), General Department of Taxation, State Auditor

#### 1. Tax Incentives

*a. Reinstatement of tax incentives for industrial zones*

##### Issue description

The Corporate Income Tax Law (CIT) of 2013 and its guiding regulation Circular 78/2014/TT-BTC as amended

reinstates the tax incentives for new projects located in industrial zones. In fact, tax incentives were formerly granted to new investment projects in industrial zones but were abolished from 2009 onward. With this Circular 78, enterprises that carry out new investment projects in industrial zones (except for industrial zones located in localities with favourable socio – economic conditions) are entitled to a tax incentive scheme of two years of tax exemption and four subsequent years of 50% tax reduction.

Such tax policy reform reflects the Government's efforts to attract foreign investment, support growth and stimulate the economy.

### Potential gain/concerns for Vietnam

Although the change is explicitly beneficial to enterprises with projects newly established in industrial zones from 1 January 2014 onwards, the newly-granted incentive scheme is less favourable to taxpayers than for those operating in industrial zones based on the regulations prevailing in the period prior to 2009, especially 2007-2009 (i.e. three years of tax exemption, seven subsequent years of 50% reduction and twelve years of preferential CIT rates 15% since the commencement).

### Recommendation

- It is recommended that a more favourable and substantial tax incentive scheme be granted to enterprises located in industrial zones, i.e. at least equal to what was granted in the past and for all industrial zones including those in favourable socio – economic locations as currently. This would help reinforce the continuous support of the Government for manufacturing enterprises which comprise a significant part of Foreign Direct Investment in Vietnam.

*b. Re-assessment of tax incentives during 2009-2013*

### Issue description

Tax incentives for business expansion were suspended during the 2009-2013 period. Although the definition of business expansion remains a grey area, the authorities, in practice, view any increase in value of fixed assets as a business expansion based on the increase ratio of fixed assets to determine the non-incentivised income generated from business expansion activities in the event that taxpayers don't separately record the income generated from the initial investment and that of business expansion activities.

### Potential gain/concerns for Vietnam

Recently, there have been cases for EuroCham member companies where the newly purchased or replaced fixed assets during this 2009-2013 period were deemed to be business expansions although there was no increase in investment capital nor was the source of investment from the original investment capital. As a result, the additional tax liability sought to be collected from such expansions caused investors' concerns on the stability of the regulations upon their investment, the application of regulations by the authorities and the trend of the Vietnamese Government towards inward investment encouragement.

### Recommendation

- Increase of investment capital or increase of fixed assets over years should not be the sole consideration in determining a business expansion. Instead, the authorities should consider other factors e.g. purpose of capital increase, capital source used to purchase new fixed assets, purpose of purchase of new fixed assets, fixed assets purchased for replacement.

## 2. Deduction of Advertising & Promotion (A&P) Expenses

### Issue description

Law No. 71/2014/QH13 removes the 15% cap on total deductible expenses for A&P expenses. This means that A&P expenses are fully deductible for corporate income tax (CIT) purposes starting from 1 January 2015. This change marks a milestone in the tax policy reform that has been continuously conducted by the Government in an effort to assist enterprises, making Vietnam an increasingly more attractive destination for investment.



### Potential gains/ concerns for Vietnam

Although the cap is removed, the deductibility of A&P expenses, e.g. for promotion campaigns, which fall under the governance of the commercial regulations, may be rejected by the tax authorities if the administrative procedures (registration/ notification of the promotion activities with the competent authorities) are not complied with by enterprises.

In addition, the current commercial regulations (e.g. Decree No. 37/2006/ND-CP) sometimes require enterprises to conduct unfeasibly comprehensive registration/notification procedures, e.g. a nationwide promotion campaign to giving free products to customers must be notified to all 64 provincial departments of Industry and Trade throughout the country, creating an excessive administrative burden on enterprises which actually want to comply.

### Recommendations

- EuroCham strongly recommends that any non-compliance in registration/ notification in the execution of A&P activities should be subject to only administrative penalties; while the A&P expenses should be fully deductible provided that the enterprises can provide sufficient legitimate supporting documentation as required under tax regulations.
- Furthermore, EuroCham suggests the MOF may work with the MOIT to consider simplifying the procedural requirements for registration/notification of A&P activities in order to release the administrative burden from enterprises.

## II. PERSONAL INCOME TAX

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 Relevant State bodies: Ministry of Finance (MOF), General Department of Taxation, State Auditor  
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### Substantiation of non-tax residency

#### Issue description

Under Circular 111/2013/TT-BTC dated 15 August 2013, as amended, in a tax assessment period, if an individual spends less than 183 days in Vietnam and has a Vietnam residential address of 183 days and more but can prove tax residency of another State, he/she shall be considered a non-tax resident of Vietnam for that tax year. Eligible supporting document(s) to prove the tax residency of another State could be (i) the official Tax Residency Certificate (TRC) or (ii) a copy of the individual's full passport to prove the period of residing in case the other State has an in force Double Tax Agreement (DTA) with Vietnam and does not have a scheme available to issue the aforementioned TRC.

The relevant legal documents however provide no detailed guidance on whether such supporting document(s) should be officially submitted to the governing tax authority or maintained at the Vietnam income-paying entity/ by the individual tax payer in order to be presented upon request in the event of a tax audit.

Given the lack of specific guidance, a few local tax departments have been requesting a full dossier similar to a DTA application (including the TRC and other supporting documents) to be submitted in case that the individual is assessed as a non-tax resident of Vietnam as mentioned above and declares PIT at a flat rate of 20% accordingly. Even though this provision was welcomed as a positive development, intended to clarify and simplify the requirements for non-residency status, the practical implementation by a few local tax departments has in fact had the opposite effect and made the process a lot more difficult and burdensome than it ever was previously.

### Potential gains/concerns for Vietnam

We understand that the application of DTAs in Vietnam for individuals is only applicable in the case that the individual is considering a tax refund or a tax exemption under an effective and relevant tax treaty.

The practice requesting a full DTA application package just to prove an individual to be a Vietnam tax non-resident

has added burdensome administrative work and procedures for both the individuals and their Vietnamese employers. There is an unnecessary mixing of the tax treaty requirements, which apply only to the application of the treaties, to overlay what is a Vietnam domestic tax rule of non-residency in Circular 111.

In an environment of global economic integration where more and more employees are sent on overseas assignment (both inbound and outbound Vietnam), the number of individuals to whom this issue is relevant is increasing. Not all employers or individuals are aware of the requirement of some local tax offices as the request is not officially informed in writing and thus, applications are not consistent.

### Recommendation

- › In line with the current trend of simplification of the tax administrative process in Vietnam, we recommend that such requirements of lodging full package of DTA application in order to prove an individual is a non-resident of Vietnam should be re-considered and replaced by a simple procedure, e.g. a simplified notification letter to the relevant tax authorities of the tax payer's residency status; or filing the TRC at tax payer's site and supplement upon request/ in case of tax audit only. In addition, an official guidance from the General Taxation Department should be in place for a consistent application in all tax offices nationwide.

## III. VAT-RELATED ISSUES

Relevant State bodies: Ministry of Finance (MOF), General Department of Taxation, State Auditor

### 1. Non-VAT claw-back on failed oil and gas (O&G) upstream projects

#### Issue description

The tax authorities initially took an interpretation that in the case a Petroleum Sharing Contract (PSC) is surrendered without reaching commercial production, such PSC would not be eligible for a VAT credit and all input VAT that has been refunded would be subject to claw-back in an official ruling issued in 2012.<sup>1</sup> Subsequently, another official ruling was issued in late 2014<sup>2</sup> which expressed the view that no VAT claw-back on O&G projects would be required in the event of non-commercial discovery. However, while it would appear there is no change in this policy with respect to O&G projects, a provision in a recently issued Circular effective 2015<sup>3</sup>, which refers, in general to investment projects not going into operations has left it unclear if O&G projects would be excluded from VAT claw-back requirements without commercial discovery.

#### Potential gains/concerns for Vietnam

The non-VAT claw-back for O&G projects should be put in the context of the particular nature of upstream O&G projects undertaking petroleum activities which may not always result in commercial discovery. Given the well-known high risk of such projects in the upstream O&G sector, foreign companies with participating interests in PSCs in Vietnam would potentially adversely be affected by such tax claw-back, if applied, which may represent a further cost to and therefore discourage potential investors in the strategic O&G sector of Vietnam.

#### Recommendation

- › We request that further clarification be provided to the effect that upstream O&G contractors who surrender their PSCs without reaching commercial production are not subject to the VAT claw-back requirements that are applicable to general (non-O&G) companies that liquidate. We believe that upstream O&G investors who have fulfilled their financial commitments under the PSCs but unfortunately did not have commercial discoveries should not be required to return and/or be penalised in relation to any VAT refunds they have previously claimed. We request that there is specific confirmation that this treatment continues under the current law to remove any uncertainty.

<sup>1</sup> Official Letter No. 4606/TCT-KK issued by General Department of Taxation on 21 December 2012

<sup>2</sup> Official Letter No. 15495/BTC-TCT issued by Ministry of Finance on 27 October 2014

<sup>3</sup> Circular No. 26/2015/TT-BTC issued by Ministry of Finance on 27 February 2005

## 2. VAT exempt treatment of the right to use a trademark

### Issue description

Some tax authorities have taken a view that payments for the right to use trademark would not be considered as royalties for VAT treatment (subject to VAT exempt). Instead, they would be treated as a service provision (subject to 5% VAT). This view was initially expressed via an official ruling issued in 2014 and was then interpreted by a local tax department in another official ruling that in case of offshore payment for the right to use a trademark, withholding tax rates would be 5% VAT (as for service provision) and 10% CIT (assumingly as for royalties).

### Potential gains/concerns for Vietnam

The definition of royalties in the withholding tax regulations is very broad including ‘incomes in any form being paid for the use right, transfer of intellectual property rights and technology transfers [...]’.<sup>4</sup> Accordingly, the right to use a trademark would generally fall within the above definition and hence be subject to withholding tax at 10% CIT and VAT exempt. This new tax treatment/interpretation is inconsistent with the tax practice that has been applied since the introduction of the withholding tax and VAT rules in 1998/1999 that royalties for brands/trademarks were VAT exempt. Although 5% VAT would generally be creditable and is therefore only a cash-flow issue, this uncertain treatment is of concern to both companies who are entering the Vietnamese market as well as those who have been operating in Vietnam for many years and have accepted the longstanding treatment that royalties were exempt from VAT.

### Recommendation

- › Clarifications should be provided as to the right to use trademark in terms of VAT and withholding tax rates as to treatment of royalties or service provision consistently. Given past practice, VAT exempt treatment should continue to apply.

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Thomas McClelland, Chairman of Taxation & Transfer Pricing SC, Tax & Business Advisory Services, Deloitte Vietnam

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<sup>4</sup> Circular No. 103/2014/TT-BTC issued by Ministry of Finance on 6 August 2014

## CHAPTER 10 TRANSPORT AND LOGISTICS

### OVERVIEW

The Transportation and Logistics Sector Committee first sends its appreciation to the Government for its continued support for the development of a regional transport hub in the Cai Mep region. In addition, appreciation is given to the significant progress and improvements that have been made on customs reform and modernisation including the passing of the new customs law and the implementation of customs computerisation using the Vietnam Automated Cargo Clearance System/Vietnam Customs Intelligence Information System.<sup>1</sup>

The Sector Committee wishes to continue to focus on the following areas in the upcoming year.

**1. The Regional Transport Hub:** the importance of creating a domestic and international transshipment hub in Cai Mep remains a priority, since this will not only contribute to solving the excessive demand/supply container terminal imbalance in South Vietnam. It will also, as a direct consequence, create the necessary scale to operate the required deep sea terminal for Vietnam and for all of the concerned importers and exporters.

Whilst it is recognised that the drive towards this ambition is well known within the Ministry of Transport and the Ministry of Planning and Investment, this chapter draws the support from a number of previous reports and recommendations together with current information, sourced from Government Departments as well as the port and the shipping industries.

**2. Free Trade Zones and Customs:** the European Union – Vietnam Free Trade Agreement (EVFTA), the establishing of Free Trade Zones close to Cai Mep and the future Long Thanh airport site would in no doubt improve the competitiveness of Vietnam versus other ASEAN countries. In line with the changes of customs' processes and regulations that are taking place, the Transport and Logistics' Sector focuses on the key areas of the required customs' reform. This focus and action is fundamental if Vietnam is to remain competitive vis-à-vis other ASEAN countries, particularly in view of the completion of the ASEAN Economic Community (AEC) on 31 December 2015.

**3. Customs:** the last part of the chapter of this report focuses solely upon the important issues related to customs reform. This chapter aims to bring together the recommendations of these different Government departments, organisations and business communities in order to demonstrate that the overall aims of such groups are in fact the same. This would indicate that with such common support, there lies a large opportunity for the Vietnamese Government to make a small number of decisions, in order to create significant positive impact for Vietnamese importers and exporters, thereby boosting the country's competitiveness. In order to create this scale, it is essential first to create a competitive environment in which to operate the container terminal.

### I. REGIONAL TRANSPORT HUB

Relevant Ministries: Ministry of Transport (MOT), Ministry of Planning and Investment (MPI), Ministry of Finance

#### Issue description

The following organisations, presentations and reports have been consulted and they have all, within the past 2 years, advocated the creation of a regional transport hub of sufficient scale in South Vietnam. In order to achieve this, the solving of the 2 items above is deemed essential for progress.

These include, the Report to Deputy Prime Minister Hai, 6 August 2013 on the value of the Hub, The Transport

<sup>1</sup> 'Vietnam Steps Up Reform for Integration', *Vietnam Breaking News*, 03/10/15. Available at <<http://www.vietnambreakingnews.com/2015/10/vietnam-customs-steps-up-reform-for-integration/>>

and Logistics' Sector Committee of EuroCham which describes the issue in the Whitebooks of 2013, 2014 and 2015, the 'Efficient Logistics' Report written by The World Bank and published 2014 (Efficient Logistics, The Key to Vietnam's Competitiveness), the Transport and Logistics Partners Quarterly Meeting (TLPQM) which is a group conceived in February 2014 comprising of the Department of Transport and Industry Leaders and finally, the Ports' and Shipping Sub Group (Vietnam Business Forum - March 2015) focusing on Shipping Lines: Maersk Line, Societe Generale Maritime (CMA CGM), Mediterranean Shipping Company (MSC), American President Lines (APL) and container terminals Cai Mep International Terminal (CMIT) and International Terminal Stevedoring Services of America (SSIT).

### 1. Value of a Hub

Report to Deputy Prime Minister Hai – on 6 August 2013, a report was written to the Deputy Prime Minister Hai. The report summarised the value of creating a hub in Cai Mep. Since then, the Operating Cooperation Contract was signed between Cai Mep International Terminal (CMIT) and Saigon Newport. Whilst it has still to be implemented, this was seen as a good step forward, as the hub concept is developed. Whilst some of the figures in the report are now out of date, it was clear even then that the reduction of port dues and the relaxing of the cabotage regulations are two vital ingredients if the hub creation is to materialise.

### 2. Whitebooks (EuroCham) – 2014 and 2015

In relation to separate reports written by EuroCham, through its Whitebooks of 2014 and 2015, it has been made clear that the reduction of port charges and the relaxing of the Cabotage Law (Section 2.8.2 Whitebook 2014) and similar recommendations in the 2015 Whitebook (Section 2.9.2), are necessary actions if the hub is to be created.<sup>2</sup>

### 3. Efficient Logistics: The World Bank – 2014

Published in 2014, the World Bank presented the extensive report entitled 'Efficient Logistics – A Key to Vietnam's Competitiveness'. In that report (Chapter 3, pages 71 and 79) it is recommended that Vietnam needs to relax its Cabotage regulations. In addition, also in Chapter 3, pages 80 to 82, there are a number of recommendations in relation to the need to improve the Customs' Regulations (see issue number 2). Both aspects have the direct link to the development of the hub in Cai Mep.<sup>3</sup>

### 4. Transport and Logistics Partners Quarterly Meeting

In conjunction with the World Bank, the Ministry of Transport has established the Transport and Logistics Partners Quarterly Meeting (TLPQM). The main purpose of the TLPQM is to facilitate an effective interaction between the Ministry of Transport and the transport/logistics stakeholders. This will assist all TLPQM participants to better understand the common issues that relate to Government policies. Therefore it will pave the way to pragmatic and workable solutions to any concerns that may exist with the logistics industries of Vietnam. Central to the aims of the TLPQM is the creation of a hub in South Vietnam and this will require the customs procedures to be made more efficient, cabotage regulations to be relaxed and port dues to be reduced (please refer to further input on customs policies and regulations in the subsequent section).

### 5. Input from the Ports' and Shipping Sub Group of the Vietnam Business Forum

The comments that are made below, related to the potential gains have been made and brought to the attention of the Transport and Logistics' Sector Committee. All comments have been made from Shipping Lines and Port Operators.

#### Potential gains/concerns for Vietnam

With the advent of the EVFTA, the need to create such a terminal has never been as great as now. The resultant increase in trade (and therefore container traffic in and out of Vietnam) is now expected to far exceed the previously

<sup>2</sup> Whitebook 2015, *EuroCham*, 2015. Available at <[http://www.eurocham.vn.org/sites/default/files/uploads/Documents/whitebook/Whitebook2015\\_EN\\_EUC%20WEBSITE.pdf#overlay-context=node/12569](http://www.eurocham.vn.org/sites/default/files/uploads/Documents/whitebook/Whitebook2015_EN_EUC%20WEBSITE.pdf#overlay-context=node/12569)>

<sup>3</sup> Blancas, L.C, Isbell, J and M, Joo Tan, H and Tao, W, 'Efficient Logistics- A key to Vietnam's competitiveness', *The World Bank*, 2014. Available at <[http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/11/27/000461832\\_20131127115422/Rendered/PDF/830310PUB0978100B0x379862B00PUBLIC0.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/11/27/000461832_20131127115422/Rendered/PDF/830310PUB0978100B0x379862B00PUBLIC0.pdf)>

expected growth<sup>4</sup>. Trade between the EU and Vietnam has on average increased by 23.1% between 2010 and 2014<sup>5</sup> and in order to maximise the further increase in trade volumes that the EVFTA will undoubtedly bring to Vietnam, it is essential that an efficient deep sea container terminal exists to cater for such a demand. The current reliance on the HCMC City Terminals is not sustainable both from an operational and a commercial point of view.

The first gain for Vietnam is the significant cost saving from reducing feeder services to/from hubs in Singapore and Hong Kong. The weekly cost of running an 1100 TEU sized vessel is around USD 136,000, implying an annual cost of around USD 7 million. The weekly cost of running a 1700 TEU vessel is around USD 208,000, implying an annual cost of around USD 10 million. Another reason is that there will be additional income to Vietnam if Cai Mep attracts additional mainline calls. If port dues' charges are set at USD 20,000 per call, additional income to Vietnam per year per additional mainline call would be USD 1 million. Potentially, through the creation of a hub, it is estimated that at least 10 mainline calls can be attracted, generating a further USD 10 million per year.

Furthermore, there will be less pollution for Ho Chi Minh City by diverting the truck flow within HCMC into Cai Mep as well as less traffic and less risk of port congestion, since there will be a far greater port capacity in the Cai Mep region. The consequence of having less inner-city traffic will be an improvement in safety and less risk of cargo delay and therefore improving the satisfaction of overseas buyers through the reliability of the timeliness of export cargo from Vietnam which, in turn, would lead to enhanced competitiveness for Vietnam's exports. The river could be deployed for tourism purposes with river tours and river activities thus attracting greater revenue for Vietnam; a similar approach to that successfully adopted in Bangkok.

### Recommendations

- ▶ Create the regional transport hub now, thus establish sufficient capacity to cater for the growth of the EVFTA.
- ▶ Reduce port dues for certain sized vessels. Note that in reducing the port dues per vessel, a greater number of vessels will call in Vietnam, with the resultant increase in overall income for the country.
- ▶ Relax cabotage regulations. Whilst it is understood that there is a reluctance to carry out a relaxation, the current local services on offer are not of the required standard and they are currently prohibitively priced, which on both counts, are blocking the progress. It is of course only a requirement to relax such a regulation in and out of Cai Mep. In this way, a more competitive environment will be created as Vietnam aims to take market share away from other hubs such as Hong Kong and Singapore; and
- ▶ Consolidate the deep sea terminals to cater for larger vessels; thus reducing unit costs and making it more worthwhile for direct call services. As long as Vietnam continues to rely on river ports, cargo will rather find its way on feeders to connect over other established hubs in the region, such as Singapore and Hong Kong. This adds cost, increases inefficiency and reduces the competitiveness of Vietnam. For as long as river ports remain an option for intra-Asia trade, carriers will find it difficult to run a more optimal 'panama size' service (larger vessels) into Cai Mep, given the concerns with shipper/consignee acceptance.

## II. FREE TRADE ZONES

Relevant Ministries: Ministry of Planning and Investment (MPI), Ministry of Finance (MOF), Ministry of Industry and Trade (MOIT)

### Issue description

Currently, Vietnam has not grasped the notion of a Free Trade Zone (FTZ) that would be comparable to its regional neighbours. There are export processing zones, but the concept of offering a fully-fledged FTZ to all interested players in a designated area, has yet to be realised. A FTZ normally allows receiving, manipulating, handling, storing, manufacturing, reconfiguring and exporting of goods without the intervention of customs authorities as

<sup>4</sup> 'EU-Vietnam free trade accord', *HSBC Global Research*, 07/08/15, pp.3-7. Available at <[http://static1.vietstock.vn/edocs/4777/20150810\\_ENG\\_Hiep\\_dinh\\_FTA\\_Vietnam\\_Nam\\_EU\\_PUBLIC.pdf](http://static1.vietstock.vn/edocs/4777/20150810_ENG_Hiep_dinh_FTA_Vietnam_Nam_EU_PUBLIC.pdf)>

<sup>5</sup> Eurostat COMEXT, 10/04/2014.

long as goods do not leave the designated area to enter the country. Import into the FTZ and export from the FTZ to overseas are thus free but import into the domestic market (e.g. selling to local Vietnamese customers) will be subject to payment of duties and taxes as per Vietnamese law. FTZs are most often created for labour-intensive work and thus would allow Vietnam to play on its strengths in this area.

### Potential gains/concerns for Vietnam

Establishing such a FTZ would help to grow Vietnam into a regional hub for transportation, storage and processing. It would turn Vietnam into a Logistics Regional base, taking market shares from Shanghai, Hong Kong, Singapore and Malaysia.

### Recommendation

- › In terms of FTZ, immediately establish a FTZ close to the Cai Mep terminals and at the site of the future Long Thanh airport site, as pilot projects.

## III. CUSTOMS

Relevant Ministries: Ministry of Planning and Investment (MPI), Ministry of Finance (MOF), Ministry of Industry and Trade (MOIT)

### Issue description

In terms of customs, the EU business community supports the changes to the customs' law as well as the latest implementation of computerisation. It commends the General Department of Vietnam Customs for conducting comprehensive stakeholder consultations both on the new Customs Law as well as its implementing regulations and procedures. We would encourage further reforms in line with international best practices and in line with the principles outlined in Customs Law No. 54/2014/QH13 dated 23 June 2014 (Customs Law). With the application of VNACCS, Customs should be able to further progress with implementation of an appropriate risk management system. This would ensure that customs controls are focused on the highest-risk consignments, which would strengthen the ability to target smuggling and other illicit trade. At the same time, it would allow low-risk consignments by compliant traders to enjoy faster customs clearance procedures. Customs will also retain control, since Customs will always retain the right to perform random examinations on any consignment. It also means that Customs controls at the border are reduced, but controls are imposed either prior to importation or post importation. This ensures a smoother flow of shipments at the border, which in turn means lower cost for the business community. This would especially help small and medium-sized enterprises (SMEs) and would be in line with Article 7.4 of the WTO Agreement on Trade Facilitation.

In terms of border coordination, there are currently significant licensing requirements and restrictions imposed by a handful of agencies creating redundancies in licensing requirements such as: Minimum Energy Efficiency Certificate (Decision 11039/QD-BCT), formaldehyde certificate (Circular 32/2009/TT-BCT); Censorship license (Circular 16/2015/TT-BTTTT, Circular 07/2012/TT-BVHTTDL). This impedes the facilitation of trade administrative coordination. Another issue is that importers frequently face arbitrary uplifts of customs values and frequent imposition of values found on the internet for their imports. European companies seem to find this contradictory with the Agreement on the Implementation of Article VII of the GATT 1994. Conversely, failing to create the FTZ and failing to act upon the Customs changes in a timely manner will by default put Vietnam in a disadvantageous position compared to its competitors.

### Potential gains/concerns for Vietnam

Creating an open and transparent Customs' environment will enable Vietnam to compete more effectively with other countries in South East Asia. The adoption and maintenance of separate procedures for so-called 'express customs' would recognise the unique needs of express delivery services and of its customers, many of whom rely on just-in-time deliveries to increase their competitiveness and keep down their business costs, such as holding costs for inventory. These procedures to be adopted should include the recognition of 4 categories of clearance:

documents, low value duty exempt (i.e. de minimis), low value dutiable and high value. Low value categories would have simplified clearance procedures. We believe that Vietnam would greatly benefit from raising its de minimis to at least USD 100. Vietnam has currently a de minimis threshold of USD 50 (Decision 78/2010/QD-TTg). This would lower the cost of doing business for Vietnam's many SMEs and thereby supporting Vietnam's thriving e-Commerce sector. It would also free up resources for Customs, which would be able to focus more of its resources on high-risk consignments. A study has shown that raising the de minimis threshold to USD 100 would imply net economic benefits amounting to at least USD 6.9 million per year for Vietnam<sup>6</sup>. The Decision of the Prime Minister No. 31/2015/QD-TTg dated 4 August 2015 allows tax exemption for gifts for individuals up to VND 2 million or more than VND 2 million, but on which total amount of tax liability is less than VND 200,000 shall be exempted from export and import duty as well as from value-added tax. This threshold should be consistently applied to all shipments.

Furthermore, traders would benefit from the prevention of arbitrary imposition of fees and penalties and from new opportunities to mount challenges to measures that are potentially disproportionate. It would also ensure that unintentional errors in customs declarations, due to administrative, clerical mistakes, are voluntarily disclosed by traders. These principles are included in the Customs Law and we encourage Customs to implement these principles on the ground, in order to align processes and procedures with international best practices. Moreover, along with the concern for transparency and objectivity, the acceptance of copies, particularly electronic copies of supporting documents, would reduce duplicative paperwork submission requirements, and help enhance clearance speed and efficiency. Customs will still retain control, since Customs can always request to verify the original during post-clearance audits.

### Recommendations

- Penalties to be imposed only on persons responsible for a breach of law or regulations and guard against conflicts of interest in the assessment and collection of penalties and duties.
- Customs to ensure due care and internal compliance processes and controls as mitigating factors for any potential compliance infractions.
- It is also proposed to expand the existing fee regime to include a formal regime of fees for overtime (outside of office hours and during weekends) and a payment per air waybill (to drive productivity) so that there is full transparency and official accountability of all charges for services accorded by Customs. This is in line with Article 6 of the WTO Agreement on Trade Facilitation.
- It is recommended to have simplified clearance procedures for low value exports. This is in line with Article 7.8 of the WTO Agreement on Trade Facilitation, and the WCO Guidelines on the Immediate Release of Consignments.
- Customs should implement 100% paperless clearance with the introduction of computerisation (VNACCS). This means hardcopy paperwork should only be requested if necessary for high risk consignments. Currently, customs dossiers that need to be submitted to Customs Office (shipments falling into lane 2 and 3) still require wet signature and company chop, which is very time consuming in case there is a need to transfer documents from one city to another.
- Simplify and avoid redundancy in licensing requirements with the view to facilitate trade. All other import licenses and permits can be made automatic, i.e. subject to a simple, online registration procedure, with is importer specific for a period of e.g. one year or more.
- Delegate some authority to Customs authorities to undertake inspections rather than require presence of officials from line agencies to be present at the border for clearance. Where this is not possible, joint inspections between Customs and other Government agencies should be conducted in order to reduce clearance time.

<sup>6</sup> 'De Minimis Thresholds in APEC', Report prepared for the Conference of Asia Pacific Express Carriers, *ITS Global Asia Pacific* and the Centre for Customs and Exercise Studies at the University of Canberra, September 2012.



- › Full single window implementation be progressed further to include all Government agencies would be beneficial in the medium term. This should include streamlined and automated approval processes at the back-end. This would allow Vietnam to fully integrate into the ASEAN Single Window. This is in line with Article 8 of the WTO Agreement on Trade Facilitation.
- › Customs should ensure that all valuation issues be managed centrally, and issue clear guidelines which specify the powers of frontline Customs on customs valuation determination, as well as the rights of importers to dispute or appeal against arbitrary uplifts. This would also be aligned with the Customs Law.
- › Increase the de minimis threshold; and
- › Establish binding directions for traffic police on: when just to take a license plate, when to stop a vehicle, when to impound a driver's license – in order to ensure compliance with rules and consistent application.

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# **SECTORAL ISSUES**

## **PART TWO**

# CHAPTER 11 FOOD, AGRI AND AQUA BUSINESS SECTOR

## OVERVIEW

The export goal for agricultural products in 2015 has been set at USD 32 billion, an anticipated increase of almost 2 billion compared to 2014, which was already 12% higher than in 2013.<sup>1</sup> Even though the first ten months of 2015 have shown a decrease in agriculture exports, we are convinced that this objective can be reached.<sup>2</sup> For a large number of products, Vietnam still ranks in the top five of exporting countries. Nevertheless, compared to products from other exporting countries, Vietnamese products are still perceived as of lower quality and value; a perception that needs to be changed as it does not do justice to the Vietnamese products and in our view limits export opportunities.<sup>3</sup> In this respect branding and promotion of geographical indications are also important as well as voluntary certifications as fair trade or organic.<sup>4</sup> This will distinguish Vietnamese products from those of the competing countries.<sup>5</sup>

With this year's major changes in terms of Free Trade Agreements (FTAs) and the formation of the ASEAN Economic Community, Vietnam has new possibilities to export its agricultural products. Currently Vietnam exports only a relatively small quantity of agricultural products to neighbouring countries such as Thailand, Indonesia, etc., while it imports numerous products from these countries. It is therefore important to obtain market access for new and existing markets (European Union (EU) and neighbouring countries).

Especially with the focus of the EU-Vietnam FTA (EVFTA) on the agri-food sector and the other structural changes in mind, it becomes even more important that issues are addressed. We think in particular of the following issues, as mentioned already in last year's Whitebook: food safety,<sup>6</sup> export of high-end manufactured products (not only commodities), diversification of products, commercialisation of by-products and correct use of pesticides, antibiotics and fertilisers.<sup>7</sup> Further attention also needs to be paid to label requirements<sup>8</sup> and to mechanisation, modernisation and restructuring of the agriculture<sup>9</sup>.

The notifications overview in the Rapid Alert System for Food and Feed (RASFF) of the European Union (EU) shows that from January 2015 till 1 September 2015 more than 25 products coming from Vietnam have been rejected and entry permission for about 40 other products is pending.<sup>10</sup> In 2014, as many as 126 products could not be imported immediately into the EU.<sup>11</sup> Currently, agricultural products from Vietnam are frequently rejected

<sup>1</sup> 'Agricultural export revenues set new record of US \$30.8 billion', *Nhan Dan*, 31/12/14. Available at <en.nhandan.org.vn/business/economy/item/3044802-agricultural-export-revenue-sets-new-record-of-us\$30-8-billion.html>

<sup>2</sup> 'Agriculture growth lowest in 5 years', *Vietnam Economic Times*, 7/11/15. Available at <vneconomicstimes.com/business/agriculture-growth-lowest-in-5-years>. 'Farm exports may miss mark', 9/10/15, *MARD*. Available at <www.mard.gov.vn/en/Pages/news\_detail.aspx?NewsId=1137>. 'VN produce losing their edge', *Viet Nam News*, 10/06/15. Available at <vietnamnews.vn/economy/271524/vn-produce-losing-their-edge.html>

<sup>3</sup> See footnote 1 and 'Expanding export markets for Vietnamese farm produce', *Vovworld*, 27/08/14. Available at <vovworld.vn/en-US/Economy/Expanding-exports-markets-for-Vietnamese-farm-produce/266152.vov> and 'Promoting export to optimise market opportunities', *Vietnam Business Forum*, 27/04/15. Available at <vccinews.com/news\_detail.asp?news\_id=32038> and 'Bright prospects for agriculture', *Vietnam Investment Review*, 19/11/14. Available at <www.vir.com.vn/bright-prospects-for-agriculture.html>

<sup>4</sup> 'VN companies advised to work more on branding', *Vietnam News*, 4/11/15. Available at <vietnamnews.vn/economy/278020/vn-companies-advised-to-work-more-on-branding.html>. 'Vietnamese tea needs to have world certification', *Voice of Vietnam*, 29/6/2015. Available at <english.vov.vn/Economy/Market/Vietnamese-tea-needs-to-have-world-certification/295588.vov>

<sup>5</sup> 'AEC integration no 'magic bullet' for Vietnam agriculture', *Voice of Vietnam*, 24/6/2015. Available at <english.vov.vn/Economy/Market/AEC-integration-no-magic-bullet-for-Vietnam-agriculture/295245.vov>

<sup>6</sup> 'Food safety vital to win EU Market', *Vietnam Plus*, 10/06/15. Available at <http://en.vietnamplus.vn/food-safety-vital-to-win-eu-market/78465.vnp> and 'Producers, traders blamed for substandard food safety', *Viet Nam News*, 25/11/14. Available at <vietnamnews.vn/society/263169/producers-traders-blamed-for-substandard-food-safety.html> and 'Asian importers apply EU standards to seafood imports from VN', *The Saigon Times*, 08/07/15. Available at <english.thesaigontimes.vn/41839/Asian-importers-apply-EU-standards-to-seafood-imports-from-Vietnam.html>

<sup>7</sup> See chapter 3.1 Agribusiness and Food Safety of *EuroCham Whitebook 2015*. Available at <http://www.eurochamvn.org/Whitebook> and 'Annual report spotlights enterprise role in agriculture', *Vietnam Plus*, 15/04/15. Available at <en.vietnamplus.vn/Home/Annual-report-spotlights-enterprise-role-in-agriculture/20154/64259.vnplus>

<sup>8</sup> See chapter 3.4 Fast Moving Consumer Goods of *EuroCham Whitebook 2015*. Available at <http://www.eurochamvn.org/Whitebook>

<sup>9</sup> 'Industrialising agriculture: The only solution for Vietnam', *VietnamNet*, 05/05/15. Available at <english.vietnamnet.vn/frms/special-reports/129352/industrializing-agriculture--the-only-solution-for-vietnam.html>

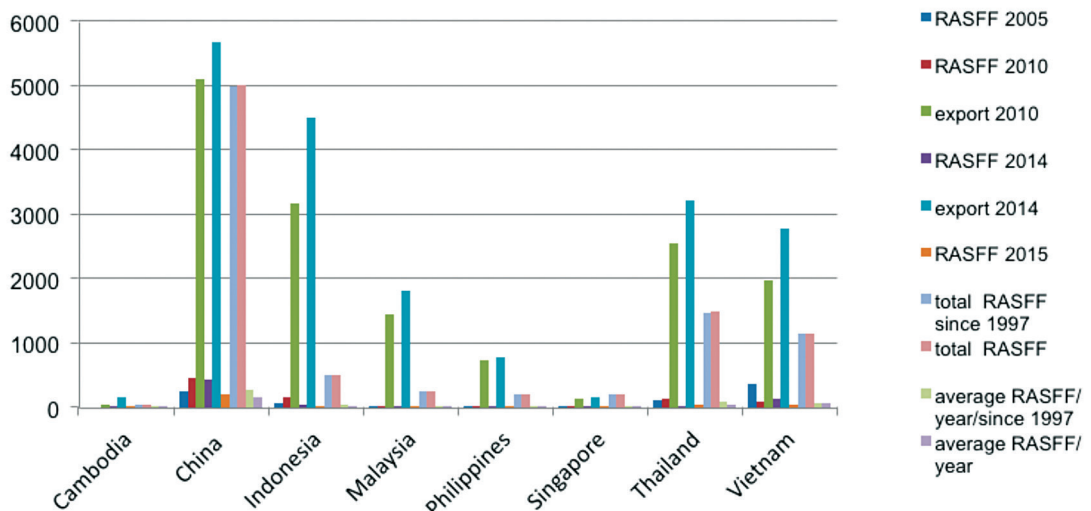
<sup>10</sup> <https://webgate.ec.europa.eu/rasff-window/portal/?event=SearchForm&cleanSearch=1>, search country Vietnam as per 27/8.

<sup>11</sup> *Ibid.*

by importing countries because of excessive residue levels of for example antibiotics, pesticides, heavy metals, hormones, bacteria, virus, moulds or other prohibited substances.<sup>12</sup> This is why in 2014 and 2015 the EU, Australia, South-Korea, Japan and the United States issued warnings to Vietnam about products exceeding the permitted levels.<sup>13</sup>

The graph hereafter illustrates the number of notifications<sup>14</sup> in RASFF and the quantity of exports to the EU from Vietnam and neighbouring countries (in million euros).<sup>15</sup> As no figures are available for the quantity of product involved for a certain notification, it is not possible to express a percentage of the notifications in relation to the export figure. The figures for Vietnam are comparable to neighbouring countries but it is still too much and it damages the reputation of Vietnamese products.<sup>16</sup>

**Figure 9: Export to the EU and notifications in RASFF**



Source: EU DG Trade and RASFF.<sup>17</sup>

Despite efforts of the Government and producers to address the before-mentioned issues, they are still problematic.<sup>18</sup> We would like to underline the importance of these issues and offer again our commitment in supporting the Government in its efforts to tackle them. We are also willing to help and support Vietnamese companies and Government Ministries and agencies in meeting requirements needed to facilitate export through workshops or other ways of support. We believe that if these issues are addressed, the export figure can be reached and even increased.

<sup>12</sup> See footnote 4.

<sup>13</sup> 'EU warns Vietnamese seafood exporters', *Bizhub*, 19/12/15. Available at <[bizhub.vn/news/9125/eu-warns-vietnamese-seafood-exporters-about-antibiotics-residue.html](http://bizhub.vn/news/9125/eu-warns-vietnamese-seafood-exporters-about-antibiotics-residue.html)> and 'Warnings against residue of banned substance on tra fish', *The Saigon Times*, 20/11/14. Available at <<http://english.thesaigontimes.vn/37976/Warnings-against-residue-of-banned-substance-on-tra-fish.html>>

<sup>14</sup> From the notification, the quantity the product blocked it is not visible.

<sup>15</sup> The export figure needs to be multiplied by EUR 1 million.

<sup>16</sup> 1997 has been picked as that is when the first notification for Vietnam was registered in RASFF, Start of notifications in RASFF: Cambodia 2006, China 1984, Indonesia 1981, Malaysia 1980, Philippines 1999, Singapore 1999, and Thailand 1980.

<sup>17</sup> See footnote 10

<sup>18</sup> See note 7 and 'EU, VN agree on free-trade after three year talks', *Bizhub*, 05/08/15. Available at <[vn/news/12423/eu-vn-agree-on-free-trade-after-three-year-talks.html](http://vn/news/12423/eu-vn-agree-on-free-trade-after-three-year-talks.html)>, and 'Vietnam produce exports should meet food hygiene, safety requirements in overseas markets: ministry', *Tuoi Tre News*, 15/05/15. Available at <[tuoitrenews.vn/business/28078/vietnam-produce-exports-should-meet-food-hygiene-safety-requirements-in-overseas-markets-ministry](http://tuoitrenews.vn/business/28078/vietnam-produce-exports-should-meet-food-hygiene-safety-requirements-in-overseas-markets-ministry)>

## I. FOOD SAFETY - IMPORTANCE OF TRACEABILITY AND LEGAL ENFORCEMENT

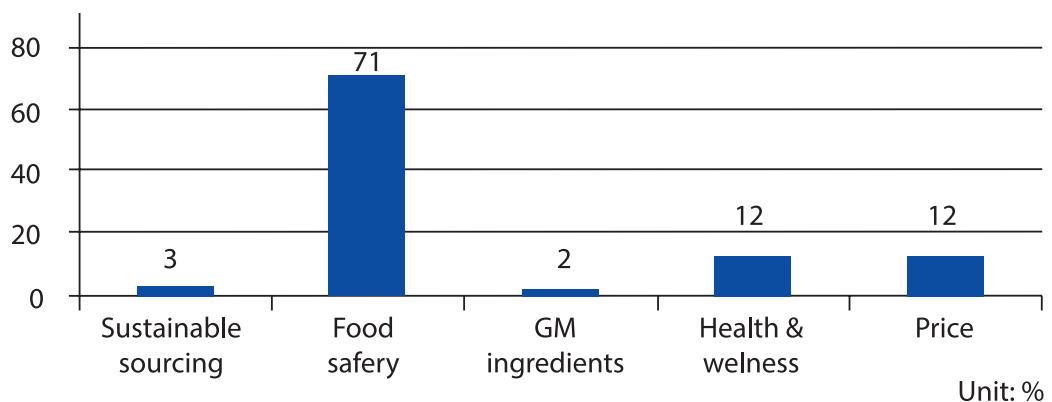
Relevant Ministries: Ministry of Agriculture and Rural Development (MARD), Ministry of Health (MOH), Ministry of Industry and Trade (MOIT), Ministry of Science and Technology (MOST)

### Issue description

As mentioned in the introduction, too often it happens that Vietnamese products are rejected because of food safety issues, while we are of the view that some of these issues can be addressed quite easily.

In an opinion poll conducted by Food Industry Asia (FIA) on 16 April 2015, food safety ranked on top as the issue that would have the greatest impact on consumer preference in Asia in 2015/2016.<sup>19</sup>

**Figure 10: Which issue will have the biggest impact on consumer preferences in 2015-2016?**



Source: Food Industry Asia 2015.<sup>20</sup>

Considering the events organised by the various Vietnamese ministries and agencies, it is clear that food safety is an important topic for the Government, but further focus is necessary as food safety could be the solution to agricultural growth.<sup>21</sup> As mentioned in the introduction for this it is also important that producers are encouraged to use voluntary certifications such as organic and fair trade as well as geographical indications. It would also help if a marketing campaign will be put in place to promote the agri, aqua and food products.

One way of addressing food safety is through traceability, a track-and-trace system that allows companies and authorities to know where products have gone at all stages of the supply-chain. It is not only useful in case of a product recall but it can also reduce food fraud, unintentional or intentional adulteration, it can help with disease management and is useful in case of environmental emergencies.<sup>22</sup> Traceability is also important as sometimes counterfeit or illegal products can be used, without the user even being aware of it, but it could lead to rejection of the produce by food companies or importing countries due to prohibited residues. This damages the reputation of Vietnamese products and also may pose risks to farmers' and consumers' health.

A lack of enforcement and unclear regulations also allow for some products (such as potassium bromate) that are

<sup>19</sup> 'Food Safety – Key to Consumer Preference in Asia', *Foodindustry.asia*, 2015. Available at <[foodindustry.asia/food-safety-key-to-consumer-preference-in-asia](http://foodindustry.asia/food-safety-key-to-consumer-preference-in-asia)>

<sup>20</sup> *Ibid.*,

<sup>21</sup> 'Food Safety – optimal solution to agricultural growth', *VOV*, 13/11/14. Available at <[english.vov.vn/Economy/Food-safety-optimal-solution-to-agricultural-growth/283734.vov](http://english.vov.vn/Economy/Food-safety-optimal-solution-to-agricultural-growth/283734.vov)>

<sup>22</sup> 'The Importance of Food Traceability', *Food Safety Magazine*, 17/03/15. Available at <[www.foodsafetymagazine.com/enewsletter/the-importance-of-food-traceability/](http://www.foodsafetymagazine.com/enewsletter/the-importance-of-food-traceability/)>

forbidden in other countries to be used in Vietnam.<sup>23</sup> It might be just one producer or exporter, who does not follow the rules or is not conscious of products not meeting requirements, but the reputation of all Vietnamese products is at stake and all Vietnamese products will be scrutinised in detail. On the other hand, products that can be legally used in other countries cannot be imported in Vietnam.<sup>24</sup> For example, a wax from the EU could be used to better present a locally cultivated fruit destined to be exported. This wax can be legally used within the EU. However, documents needed, according to Vietnamese law to approve the import of this by the MOH cannot be obtained from the EU member State because such a document is not issued there. This means that the MOH will not approve, and the locally cultivated fruit is – compared to fruits produced elsewhere and treated with this wax – less attractive for export.<sup>25</sup>

The Government is making efforts to improve this situation but the lack of consequences for violators continues to have an impact on the economy and the health of the population in Vietnam. The lack of enforcement of existing regulations causes more food safety issues than necessary. In May 2015, the FAASC organised a dialogue on the importance of traceability and legal enforcement for food safety. A large number of Government officials as well as representatives of businesses and international and Vietnamese organisations attended.<sup>26</sup> We would like to continue this dialogue.

### Potential gains/concerns for Vietnam

We believe that part of the food safety issues can be solved through a clear legal framework and stricter enforcement of existing regulations on traceability to track ingredients and products. Traceability and legal enforcement will help improve food safety and avoid or mitigate health and economic impacts. It will also regain consumer confidence by providing information on the origin of products in the supply chain.<sup>27</sup> In our opinion, the centralised Food Safety Agency as described in Chapter 3 of Whitebook 2015 could play an important role in this. All these measures will result in exporting more with less risk of rejections, thus improving the reputation of Vietnamese products.

### Recommendations

- Establish a working group consisting of representatives of relevant ministries/agencies, the FAASC and other organisations active in this sector to continue the dialogue on relevant topics for the food, agri, aqua business sector (including food safety, improvement of quality and image of agri-food products).
- Enforce Vietnamese and international laws and standards on banned or counterfeit substances and additives.
- Allow products that can be legally used in, for example the EU, to be imported into Vietnam without additional documents (example: fruit wax).
- Promote the use of voluntary certifications (organic, fair trade) and of geographical indications.
- Start a marketing campaign to improve the image and reputation of Vietnamese agri, aqua and food products.
- Amend the Law on Food Safety No. 55/2010/QH12 and create a centralised Food Safety Agency under the responsibility of one ministry.

<sup>23</sup> Paragraph 3.1.5 on Legal Framework, Coordination and Enforcement of *EuroCham Whitebook 2015*. Available at <<http://www.eurochamvn.org/Whitebook>> and 'Banned substances threaten the livestock industry' *Vietnamnet*, 24/09/15. Available at <<http://english.vietnamnet.vn/fms/business/142092/banned-substances-threaten-the-livestock-industry.html>>

<sup>24</sup> *Ibid.*

<sup>25</sup> See note 19 'Paragraph 3.1.5 on Legal Framework, Coordination and Enforcement of *EuroCham Whitebook 2015*, p.91. Available at <<http://www.eurochamvn.org/Whitebook>>

<sup>26</sup> 'Dialogue on Food Safety: the importance of traceability and legal enforcement – 27 May 2015', EuroCham event. Available at <[www.eurochamvn.org/node/14649](http://www.eurochamvn.org/node/14649)>

<sup>27</sup> See footnote 18 and 'The Importance of traceability in your Supply Chain', *Foodmag.com*, 07/12/12. Available at <<http://www.foodmag.com.au/features/the-importance-of-traceability-in-your-supply-chain>>

## II. FOOD SAFETY: IMPORTANCE OF LABORATORIES (LABS) AND TESTING

Relevant Ministries: Ministry of Agriculture and Rural Development (MARD), Ministry of Health (MOH), Ministry of Industry and Trade (MOIT), Ministry of Science and Technology (MOST)

### Issue description

In light of the conclusion of various FTAs, it is especially important to detect maximum residue levels (MRLs) as competition will be fiercer and products need to be up-to-standard if Vietnam wishes to increase exports.<sup>28</sup> In our view, the quality of seafood and fish exports is quite good but other products such as pepper, tea and coffee still need improvement.

Even with a good traceability system and a strict legal enforcement, Vietnamese laboratories and laboratory tests are not yet up to standard to guarantee safe food and therefore do not inspire confidence.<sup>29</sup> A broad spectrum analysis of active ingredients would easily detect MRLs but unfortunately cannot be performed in Vietnam. Furthermore, the current testing method for heavy metal presence needs to be amended and should focus only on those types of heavy metals that actually affect human, animal and plant health. Besides this, an issue is that the results can differ per test and per laboratory, which harms the trust people have in the Vietnamese laboratories.

Another issue is that test results from foreign laboratories (in or outside Vietnam) are still not accepted in the same way as test results from local laboratories, even when laboratories in Vietnam are accredited according to VILAS standards.<sup>30</sup> In our view VILAS accreditation should be enough to accept test results by all Ministries and agencies. No further accreditation should be needed, especially if VILAS requirements are audited regularly. With the EVFTA recently concluded, it is important that laboratories adjust to global standards so results will be accepted and trusted when products are exported. It is also likely that it will be no longer necessary to perform another test in Vietnam if a document of an EU-lab can be submitted for imports into the country.

The FAASC organised a dialogue on 4 November 2015 on the importance of laboratories and testing for food safety in relation to import and exports.<sup>31</sup> The dialogue was about exchanging ideas and views on how to improve the performance of laboratories and testing between Government officials and representatives of private businesses.<sup>32</sup> It was also about the different requirements by different ministries and the different working methods. We would very much like to continue the dialogue on this topic and with regard to Sanitary and Phytosanitary (SPS) requirements in general. In our view it is important that on both national and local level the relevant authorities are made aware of the SPS requirements in the EVFTA. It would also be helpful if a special working group consisting authorities, experts and representatives of the (international) laboratories would be created to address both the issue about labs and testing; and the SPS requirements. This group can for example prepare a road map and needs analysis to improve the products for export.

### Potential gains/concerns for Vietnam

An improvement of the current system following our recommendations will be cheaper for companies. This could lead to lower consumer prices and will also result in higher food safety. This means that the competitiveness and reputation of Vietnamese products will increase and consequently, so will exports. We believe that it is paramount to improve the quality of laboratories and that testing methods need to be modernised and brought to international standards. In our view the Government should also make certain tests, such as broad spectrum analysis, mandatory to improve food safety and the quality of products.

### Recommendations

<sup>28</sup> 'Agriculture sector faces tough times ahead', *Vietnamnet*, 24/09/15. Available at <<http://english.vietnamnet.vn/fms/business/141921/agriculture-sector-faces-tough-times-ahead.html>>

<sup>29</sup> See paragraph 3.1.4 on Quality of Laboratories and Testing in *EuroCham Whitebook 2015*. Available at <<http://www.eurochamvn.org/Whitebook>>

<sup>30</sup> VILAS follows the ISO 17025 norm.

<sup>31</sup> Note that this chapter was finalised on 25 September 2015.

<sup>32</sup> See for more information at <[www.eurochamvn.org/](http://www.eurochamvn.org/)>



- › Amend requirements so that the damaging heavy metals can be detected through a ‘speciation analysis’.
- › Encourage the upgrading of testing methods and facilities to be in accordance with modern, international standards (for example ISO or national organisations for standardisations) to ensure accurate, quick, impartial and fair testing results.
- › Continue the dialogue on labs and testing with the relevant authorities in particular with regard to the implementation of the SPS commitments included in the EVFTA.
- › Create a working group consisting of authorities, experts and representatives of the laboratories that will prepare a roadmap and a needs analysis in order to improve Vietnam’s potential to export products.
- › Encourage cooperation between the different Ministries involved in food safety issues to ensure coordination and consistency.
- › Improve the reputation of VILAS and accept test results on food safety of foreign laboratories that are VILAS accredited.

### III. MODERNISATION, MECHANISATION AND RESTRUCTURING

Relevant Ministries: Ministry of Agriculture and Rural Development (MARD), Ministry of Industry and Trade (MOIT), Ministry of Science and Technology (MOST)

#### Issue description

Another issue that prevents Vietnam from being an overall key-player on the agricultural export market is the lack of sustainability, part of which is stemming from the fact that there are mainly small-holders in agriculture.<sup>33</sup> The latter one prevents the use of machines – which can improve the quality and quantity – as the investment costs cannot be borne by a single small-holder and as the size of land is too small to use machines. The Government has realised that this issue needs to be addressed and is taking measures to attract foreign direct investment to modernise and mechanise agriculture. It is developing hi-tech agricultural areas and putting programs in place which will make borrowing money to modernise and mechanise farming much easier.<sup>34</sup> We are aware that mechanisation will increase unemployment in rural areas as many people depend on agriculture for their daily income and we support the idea of building factories in rural areas in order to sustain employment in the concerned areas. We believe that the Government should create incentives that will encourage farmers to cooperate through an organised compulsory system for example. Businesses can also play a role by introducing incentives to encourage farmers to further cooperate by, for instance, starting a new type of branding for their products, adding value through the use of – the already mentioned – certifications and other forms of recognition such as geographical indications.<sup>35</sup> Further to what is already being done, we believe the Government should also try to attract more (EU) investment in technology and equipment.

<sup>33</sup> See footnote 3, and ‘Agricultural restructuring focuses on scientific application, production’, *VOV*, 1/1/15. Available at <english.vov.vn/Economy/Agricultural-restructuring-focuses-on-scientific-application-production/286519.vov> and ‘Farmers reap benefits from innovations’, *Viet Nam News*, 25/10/14. Available at <vietnamnews.vn/society/261897/farmers-reap-benefits-from-innovations.html>, ‘Why Vietnam’s agriculture industry is unsustainable’, *VOV*, 23/02/15. Available at <english.vov.vn/Economy/Why-Vietnams-agriculture-industry-is-unsustainable/287883.vov> and ‘Vietnam rice loses to Thailand and Cambodia’, *VietnamNet*, 21/09/15. Available at <http://english.vietnamnet.vn/fms/special-reports/141623/vietnam-rice-loses-to-thailand-and-cambodia.html>

<sup>34</sup> ‘Farmers reap modern farming gains’, *Viet Nam News*, 06/12/14. Available at <vietnamnews.vn/society/263713/farmers-reap-modern-farming-gains.html>

<sup>35</sup> We will work closely with the EU delegation to use input with regard knowledge and expertise in relation to for example attracting EU investment in technology and equipment.

### Potential gains/concerns for Vietnam

A modernised and mechanised agriculture will result in an improved quantity and quality of agricultural produce.<sup>36</sup> This in return will put Vietnamese agricultural products on equal footing with products from other exporting countries.<sup>37</sup> We hope that the farmers benefiting from these changes will improve their living conditions and that agriculture will become more sustainable.

### Recommendations

- › Continue to create easier access to financing for farmers and put incentives in place to stimulate farmers who are willing to modernise and mechanise and facilitate alliances with EU investors.
- › Support farmers leaving the profession to find another job by encouraging construction of factories in rural areas.

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Marieke van der Pijl, Vice Chairwoman, Legal Consultant of the FAASC; Knowledge and Business Development Manager at Gide Loyrette Nouel

<sup>36</sup> 'How reach millions poor farmers scaling agricultural technology', *Feed the future*, 27/4/14. Available at <[www.feedthefuture.gov/article/how-reach-millions-poor-farmers-scaling-agricultural-technology](http://www.feedthefuture.gov/article/how-reach-millions-poor-farmers-scaling-agricultural-technology)> and 'OECD Food and Agricultural Reviews Agricultural Policies in Viet Nam 2015', *OECD*, 2015, page 79. Available at <<https://books.google.nl/books?id=YCekCgAAQBAJ&printsec=frontcover>>, and 'FTAs provide plentiful of opportunities for agriculture', *Voice of Vietnam*, 31/1/15, Available at <[english.vov.vn/Economy/FTAs-provide-plentiful-opportunities-for-agriculture/287500.vov](http://english.vov.vn/Economy/FTAs-provide-plentiful-opportunities-for-agriculture/287500.vov)> and 'Ministry helps modernise farm production' *Viet Nam News*, 14/12/13. Available at <[vietnamnews.vn/society/248960/ministry-helps-modernise-farm-production.html](http://vietnamnews.vn/society/248960/ministry-helps-modernise-farm-production.html)>

<sup>37</sup> 'Vietnam Agriculture: Restructuring Challenges', *VCCI*, 15/10/2015. Available at <[vccinews.com/news\\_detail.asp?news\\_id=32379](http://vccinews.com/news_detail.asp?news_id=32379)>

## CHAPTER 12 INFORMATION TECHNOLOGY

### OVERVIEW

Information Technology (IT) plays a significant and important part of both our business lives and our personal lives. Internet usage all over Vietnam has increased in recent years to more than 40 million users.<sup>1</sup> While there is still a discrepancy in internet usage between cities and rural areas, a 2014 Nielsen study pointed out that more than half of the rural population uses the Internet more frequently than they did a year ago, especially the young population with an Internet penetration in rural areas at 30 per cent amongst the 18 to 24 year olds.<sup>2</sup> The international market research agency BMI forecasts that Vietnam's IT industry will continue to grow at a (slightly decreased) 11.6% rate between 2015 and 2019.<sup>3</sup>

We welcome that Vietnam's Ministries are eager to listen to concerns from the IT industry not only from the global players, but also to support the local startup ecosphere. With the recent meeting attended by several Ministries including Deputy Prime Minister Vu Duc Dam and central figures from the local startup community, Vietnam clearly has understood the importance of innovation for the Vietnamese market as well as showed its commitment to help Vietnam develop from a low cost outsourcing destination to a country providing value added development and its own products.<sup>4</sup>

Vietnam's ICT industry is increasingly getting worldwide attention especially for its outsourcing potential and the increased offering of more value added tasks for international digital marketing organisations. These reactions reflect Vietnam's potential of to become a regional IT powerhouse as a result of its demography and location in South East Asia<sup>5</sup>.

However such growth in the IT industry results in tough challenges to provide a safe and secure digital landscape for all internet users. We have pointed out in past editions of the Whitebook the importance of data protection and privacy and we acknowledge the efforts made in recent legislation highlighting cyber security, data protection and privacy. However, whilst being introduced already in 2013, the industry is still worried about the lack of binding implementation circulars as well as governing institutions and authorities to execute the introduced procedures until now. Furthermore, while Vietnam's IT industries are stepping up the value chain and offering more value added work, we believe that the education and training of IT staff are an obstacle to scale. In recent Whitebook editions we highlighted the lack of practical application and soft skills, which need to be tackled to help Vietnam grow to be the regional IT powerhouse it aspires to be (please refer to last year's Whitebook for detailed recommendations).

<sup>1</sup> 'Vietnam internet users', *Internetlivestats*, 2015. Available at <<http://www.internetlivestats.com/internet-users/vietnam/>>

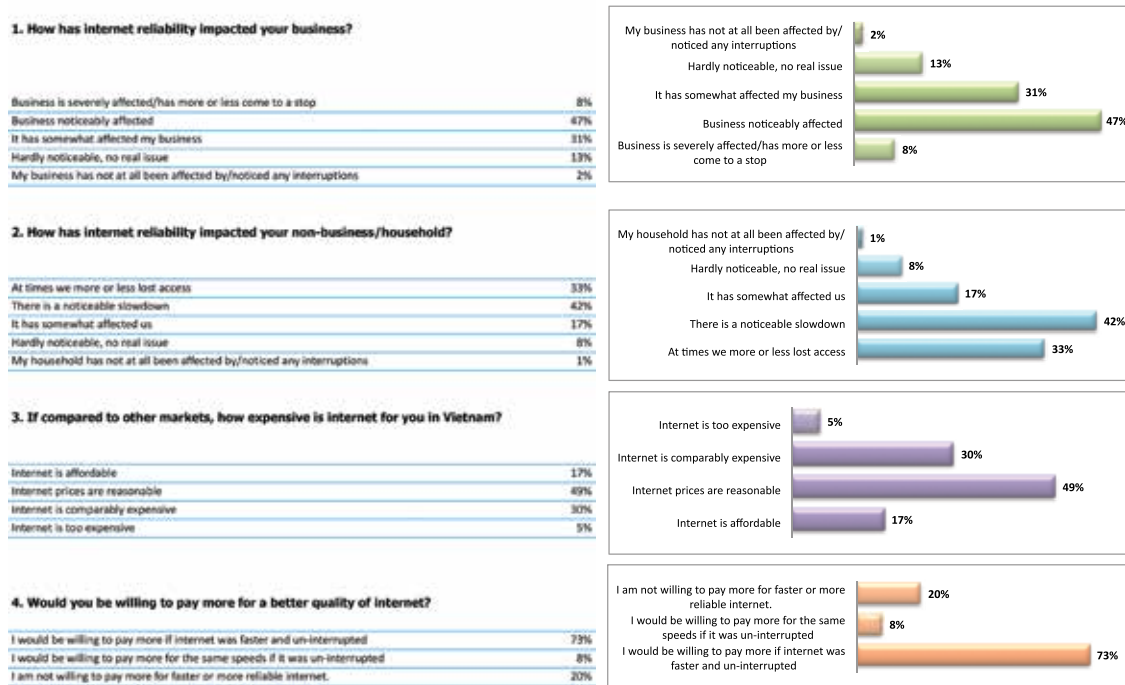
<sup>2</sup> 'Demystifying rural Vietnam: how well do you know Vietnam's rural consumers?', *Nielsen*, 07/05/14. Available at <<http://www.nielsen.com/apac/en/insights/reports/2014/demystifying-rural-vietnam.html>>

<sup>3</sup> 'Vietnam Information Technology Report Q3 2015', *MarketResearch*, 2015. Available at <<http://www.marketresearch.com/Business-Monitor-International-v304/Vietnam-Information-Technology-Q3-9163143/>>

<sup>4</sup> A-H. Do, 'Vietnam's deputy Prime Minister just got serious about startups', *Tech in Asia*, 13.08.2015. Available at <<https://www.techinasia.com/vietnams-deputy-prime-minister-startups/>>

<sup>5</sup> 'Vietnam IT services climb the value chain', *Forbes*, 09/12/14. Available at <<http://www.forbes.com/sites/teconomy/2014/12/09/vietnam-it-services-climb-the-value-chain/>> and 'Outsourcing to Vietnam', *Forbes*, 15/03/10. Available at <<http://www.forbes.com/2010/03/12/vietnam-china-labor-business-manufacturing-outsourcing-oxford.html>> and 'Vietnam's IT workers value passion over pay', *Forbes*, 03/03/15. Available at <<http://www.forbes.com/sites/teconomy/2015/03/05/vietnams-it-workers-value-passion-over-pay/>>

Figure 11: EuroCham Business Climate Index (Quarter 2 2015)



Source: EuroCham Business Climate (quarter 2 2015 focus on: internet connection)

EuroCham members, when asked how the internet reliability has affected their business the largest group of participants at 47%, replied that their business has been 'notably affected', with the second largest group of participants at 31% stating that it has 'somewhat affected' their business. Only 2% of users said they noticed 'no interruption' at all. 13% said the interruptions were 'hardly noticeable' and 8% said their business was 'severely affected'. The more the IT industry and internet usage advance in Vietnam, the more crucial it becomes to have a stable and uninterrupted access to the internet. The stability of worldwide connections is a key - not only for all business sectors, but also because it affects people's lives. We believe that the frequent lack of a stable connection to the outside world will drastically affect investments from foreign enterprises not only into Vietnam's IT sector but in Vietnam's market in general as all business sectors today rely and demand stable uninterrupted internet connections. With increased globalisation, big enterprises have a need to be connected with their main offices and small and medium enterprises connected with their clients all over the world. Outage of Vietnam's internet mainline decreases the trust and confidence for foreign business in being able to conduct business sustainably in Vietnam – especially in the wake of the implementation of international free trade agreements such as the EVFTA and the TPP.

While the trend of the World Economic Forums Network Readiness Index is positive for Vietnam, it still lost one position compared to last year and finds itself behind other regional countries such as Indonesia, Malaysia, Thailand and the Philippines.<sup>6</sup> Such slippage needs to be reversed especially as Vietnam gets ready to face further regional competition with the new ASEAN Economic Community (AEC) which would allow for free movement of labour.

Over the past few years, Vietnamese regulators have issued a number of regulations and draft regulations including:

<sup>6</sup> 'Network readiness index', *World Economic Forum*, 2015. Available at <<http://reports.weforum.org/global-information-technology-report-2015/network-readiness-index/>>

- › Decree 52/2013/ND-CP on e-commerce
- › Decree 72/2013/ND-CP on content/games/social media
- › Draft circular on mobile e-commerce services
- › Draft circular on the cross-border supply of public information
- › Draft circular on OTT services
- › Draft decree on IT services and draft circular on the list of covered IT services
- › Draft Law on Information Security
- › Draft circular on medical activities in a network environment

These existing and proposed regulations form a rapidly evolving regulatory framework for Vietnam's IT sector and provide some indication of regulatory trends to watch.

In this Chapter we give further details on related concerns, which we feel the Government should prioritise to help reach its targets as set out in the National ICT Strategy signed in Decision No. 1755/QĐ-TTg, dated 22 September 2010, including internet connection stability as well as the current regulatory framework. We also provide our views and recommendations for necessary changes and possible improvements. These were selected by our members, through a careful process of deliberation and discussion.

## I. OUTDATED REGULATORY SYSTEM, A HINDRANCE TO BRINGING ONLINE / INTERNET COMPANIES ON-SHORE

Relevant Ministries: Ministry of Information and Communications (MIC)

### Issue description

In general, changes to Vietnamese regulations, enacted and proposed, show that the Vietnamese government is interested in bringing online businesses onshore. The Ministry of Information and Communications (MIC) has shown, through recent discussions around regulatory developments that it wants internet companies to come on-shore so that they may be better monitored, regulated and have their revenues taxed in Vietnam. There is also a growing recognition at the highest levels of the Vietnamese government of the value of a vibrant start-up ecosystem that encourages innovation and job creation in Vietnam's IT sector. Among the proposals discussed were regulatory reforms to encourage foreign investment in Vietnamese start-ups to grant fledgling companies access to essential foreign capital, technologies and know-how.

While incentives for foreign investments continue, the existing regulatory framework, including regulations on market access, commerce and advertising, has not been up-to-speed with rapid developments in e-commerce and activities of internet companies and is creating obstacles to bringing Internet companies onshore.

### Potential gains/concerns for Vietnam

The Vietnamese economy would obviously benefit from bringing online business onshore, in terms of increased foreign direct investment, employment, tax revenue, improved opportunities for employee training and greater technology transfer. However, increased regulation of online businesses (for example, requirements for local servers, presence or agents in Vietnam) will likely discourage online businesses from moving onshore. Additionally, new requirements fail to address the problems that online businesses face in terms of classifying their business activities to allow them to come onshore as 100% foreign-owned businesses. As a result, many online businesses that Vietnamese authorities would like to see come onshore have adopted a 'wait-and-see' approach before bringing their innovative online business onshore.

Many requirements that online businesses must meet in order to come onshore appear onerous to many online businesses and thus reduce Vietnam's regional competitiveness in attracting foreign direct investment from online companies. Not surprisingly, MIC has adopted a cautious approach to bringing Internet businesses to Vietnam. However, it is also important that regulators are motivated to bring such businesses on-shore, which creates an opportunity for dialogue with regulators to explore market access options for Internet business activities.

Market access restrictions remain a serious impediment to online businesses moving onshore. For example, because many online businesses engage in advertising activities, they are subject to Vietnam's WTO Commitments, which require a Joint Venture (JV) for 'advertising services.' Although Vietnamese local law does not codify this requirement and Vietnamese authorities have the discretion to not require a JV, in practice they would be unlikely to contradict the WTO Commitments. In general, an online business seeking to establish a commercial presence in Vietnam must find creative ways to align its registered business activities with Central Product Classifications (CPCs) for which foreign investment is allowed. This exercise is complicated by the fact that the existing CPCs are poorly matched to the many different functions performed by innovative and constantly evolving online businesses.

In practice, over the past two years, there has been a trend of increased foreign participation in online business lines in Vietnam, typically through increased foreign capital investment in joint ventures. The registered business lines used to describe the actual products and services provided by online businesses are quite varied, reflecting a certain degree of flexibility by licensing authorities. However, 100% foreign owned online businesses remain uncommon and market access for innovative online businesses remains problematic.

### Recommendations

- ▶ Vietnamese authorities should adopt and apply to online business, a broader interpretation of the Central Product Classification (CPC) that takes into account the more recent CPC such as CPC 2.2 which better categorises online businesses, noting that the CPC used in the WTO is the CPC Provisional; and
- ▶ The Advertising Law should be amended to clearly define the scope of 'advertising,' for example to clearly indicate which online activities should be considered as 'advertising' and which activities are not advertising but rather part of a sale-and-purchase transaction.

## II. CODIFIED PAYMENT PROCESSING REGULATIONS

Relevant Ministries: Ministry of Information and Communications (MIC)

### Issue description

For Vietnam's online economy to run smoothly and grow, non-cash payment for products and services must be convenient, efficient, and safe. Many off-shore and on-shore online businesses are finding it difficult to engage in payment processing activities that are central to their business models and that are typically permitted in the other jurisdictions where they operate. Approvals for non-credit institutions to provide payment services are being granted only on a case-by-case basis. However, there are some encouraging signs that Vietnamese payment processing regulations may be changing for the better.

### Potential gains/concerns for Vietnam

Under Decree 64/2001/ND-CP, a pilot program was established that allowed companies to apply for special approval from the State Bank of Vietnam (SBV) to engage in payment processing. In 2012, this pilot program was replaced by Decree 101/2012/ND-CP (Decree 101) which codified the general provisions for approval for non-cash payment by non-financial institutions on a case-by-case basis by the SBV (Art. 14.4). Although Decree 101 does not specify the requirements or procedures for this case by case approval (instead tasking the SBV to do so) the adoption of a formal framework for non-financial institutions to engage in payment services is a positive development.

In practice, a number of non-credit institutions have already obtained SBV approval to conduct authorised money collection/transfer. Encouragingly, at least one foreign-invested enterprise has obtained SBV approval to engage in

Payment Services - VietUnion, which provides 'Payoo' and in which the Japanese investor, NEC, has an ownership stake. These developments suggest that other international online businesses should consider whether or not they may obtain SBV approval and register their payment services as 100% foreign-owned entities.

The development of a modern regulatory regime for payments processing would support the growth of Vietnamese e-commerce, contributing to greater economic efficiency in the retail sector while boosting employment, tax revenues and foreign direct investment.

### Recommendations

- › The SBV should provide detailed guidance regarding the procedures required for the case by case approval for non-financial institutions to engage in payment processing services - as it is tasked with doing under Decree 101; and
- › The SBV should clarify that this case by case approval allows non-financial institutions to engage in both cash and non-cash payment processing services for their customers.

## III. REGULATING ONLINE BUSINESSES LIKE THEIR TRADITIONAL EQUIVALENTS

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 Relevant Ministries: Ministry of Information and Communications (MIC)  
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### Issue description

The Draft Circular on OTT (Over-The-Top) Services indicates that Vietnamese regulators are considering regulating online businesses under the existing regulatory structure for their brick and mortar analogues.

### Potential gains/concerns for Vietnam

If passed in its current form, the Draft Circular on OTT Services would heavily regulate providers of OTT voice and text messaging services, effectively undermining their technological advantage. For example, if passed in its current form, the Draft Circular on OTT Services would subject OTT voice and messaging services to the pricing regime for Vietnamese telecoms services - effectively eliminating the primary benefit provided by OTT services and undermining e-commerce more generally by raising transaction costs in the online environment. Co-operation and dialogue between OTT service providers and Vietnam telecom companies has not resulted in any solution but rather has resulted in Vietnam telecom companies creating their own OTT services. An unamended Draft Circular would continue to cause uncertainty to OTT service providers which could result in foreign OTT service providers adversely amending their Vietnam entry strategies. At our current time of writing, Viber Vietnam has recently closed their Vietnam offices.

### Recommendation

- › The regulators should reconsider their approach in regulating OTT voice and text messaging as telecommunications services under Vietnamese law. This approach is not appropriate on both factual and technological grounds. The OTT circular should not be passed in its current form. Co-operation, collaboration and dialogue between OTT service providers and Vietnam telecom companies should be encouraged. A level playing field framework for all OTT service providers should be enabled via an amended Draft Circular.

## ACKNOWLEDGEMENTS

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Andrew Fitanides, Associate at Baker & McKenzie

## CHAPTER 13 LIFE INSURANCE

### OVERVIEW

Life Insurance Industry in Vietnam was established with 5 life insurers in the late 1990s and has extended to 17 insurers as of mid-2015, with approximately 300 products and 300,000 agents. The market (new business premium income) has been growing by more than 25% p.a. in recent years, in which the year on year growth in mid-2015 was above 50% compared to the same period of last year. Despite this strong growth, in comparison with other Asian countries such as Singapore, Malaysia, Thailand, Taiwan, etc., Vietnam's life insurance industry is still in a stage of infancy. More specifically, the penetration rate remains very low as less than 7% of the Vietnamese population has life insurance. Today, total premium income from life insurance industry represents about 0.7% of GDP (compared to 3.3% in Malaysia; 4.1% in Thailand & 5.3% in Singapore as at 2014).<sup>1</sup> Therefore, there is huge potential for the market to grow in the future.

In the context of this fast growing market and the increasing demand for support from life insurers so far, the life insurance regulator (the Insurance Supervisory Authority under the Ministry of Finance) has done a great job in creating favourable conditions and providing the necessary resources to support the industry to grow and thus, for the life insurers to better perform. Yet, there remain challenges to the market that the concerned stakeholders should jointly address with the Ministry of Finance to ensure that the market continues to grow at its full potential.

EuroCham as the representative of European businesses in Vietnam is honoured to align itself closely with the Ministry of Finance (MOF) to propose and implement initiatives that will address the current challenges present in the market. In the context of EuroCham's Whitebook 2016, we would like to propose a number of initiatives and recommendations to be considered by the relevant Government authorities.

### I. INCREASE OF PRODUCT APPROVAL COMPLICATIONS AND TURNAROUND TIME UPON APPLICATION OF DECISION 35/2015/QD-TTG

Relevant Ministries: Office of the Prime Minister, Ministry of Industry and Trade (MOIT), Ministry of Finance (MOF)

#### Issue description

On 20 August 2015 the Prime Minister issued Decision 35/2015/QD-TTg, according to which life insurance businesses are supplemented to 'the list of essential goods and services for which contract forms and general transaction conditions must be registered'. This Decision took effect from 15 October 15, 2015, and since, all life contract forms and terms and conditions must be registered with the Ministry of Industry and Trade (MOIT).

The current regulator of life insurance industry is the Ministry of Finance that approves all products, including the contract forms and terms and conditions. With this Decision, the product documents will also need to be approved by the MOIT. This will duplicate the approval processes and significantly increase the turnaround time for approving life insurance products, taking into account the fact that life insurance contracts and materials contain technical information that is quite different from other commodities. This will be time consuming for the review and approval process of the MOIT.

<sup>1</sup> 'Potential implications of the ASEAN Economic Community for the Life Insurance industry', *Milliman Research Report*, 07/2015, p.5. Available at <[http://www.milliman.com/uploadedFiles/insight/2015/20150724\\_Potential%20implications%20of%20the%20ASEAN%20Economic%20Community.pdf](http://www.milliman.com/uploadedFiles/insight/2015/20150724_Potential%20implications%20of%20the%20ASEAN%20Economic%20Community.pdf)>



### Potential gains/concerns for Vietnam

The potential benefits from not having this additional regulation includes: significantly reducing the time and efforts for product approval processes and helping life insurers deliver the product developments more effectively and efficiently to meet the increasing demand of the market.

### Recommendations

- Withdraw the life insurance business from ‘the list of essential goods and services for which contract forms and general transaction conditions must be registered’ or
- The MOIT will issue a joint rule/ instruction for life insurance product approval process (from Ministry of Finance’s side) together with registration of life insurance policy form process (from Ministry of Industry and Trade’s side) in order to simplify the approval process and not increase expenses and administrative procedures as well as avoid interrupting life insurance product distribution.

## II. VOLUNTARY PENSION PRODUCTS

Relevant Ministries: Ministry of Finance (MOF), General Tax Department, Ministry of Industry and Trade (MOIT), Prime Minister Office, National Assembly

### Issue description

Voluntary pensions have been introduced to provide an alternative solution for building retirement funds. Yet, the tax regulation specified under Decree 12/2015/ND-CP dated 12 February 2015 is not encouraging this business to grow from both the employee and employer perspectives.

From the employee side, the current tax deduction for employees is VND 1,000,000 per month per person. This tax incentive is a benefit for pensions compared to other life insurance products but is considered inadequate to justify the pension product restrictions compared to other life products. From the employer’s side, for pension payments up to VND 1,000,000 per month per employee, the company tax deduction is similar to other company expenses. For pension payments in excess of VND 1,000,000, it is a non-deductible company expense, which puts it at a disadvantage to other company expenses. This presents an obstacle and should be revised in order to ensure that all pension contributions are deductible in the same way as other company expenses. With Vietnam’s fast aging population, quick actions need to be taken in order to release the societal on the long term.

### Potential gains/concerns for Vietnam

For the Government, favourable tax incentives are an investment into the economy that will bring benefits in the long run. The savings in pension will go into the economy, creating more jobs and tax revenue for the Government in a sustainable way. In addition, this will help prevent and release the burden for the social welfare system in the future as a result of the fast aging population.

For businesses, favourable tax incentives will make pensions more attractive for the employees and will help businesses design attractive retention plans to keep good talented people. The concern for brain drain is becoming even more prevalent as Vietnam is entering the final stages of the completion to the ASEAN Economic Community (AEC) and has opened up to the international market with the European Free Trade Agreement (EVFTA) and the Trans Pacific Partnership (TPP).

### Recommendations

- For employees, a more material tax incentive such as a reduced marginal tax rate for pension contributions would be a positive influence on increasing employee pension contributions.
- For employers, additional tax benefits or tax credits relative to other types of staff expenses should be considered (e.g. all pension purchased for employees should be tax deductible). More specifically, the following

options are proposed for the relevant Government authorities to consider:

Option 1: Deduction amount to be increased from VND 1 million currently to VND 3 million month / person for both PIT and CIT.

Option 2: Contribution amount is deductible based on basic salary for paying compulsory social insurance:

- CIT: The contribution of employers to be deducted maximum VND 4.14M month/person (VND23M x 18%)
- PIT: The contribution of the employee to be deducted maximum VND1.84M month/person (VND23M x 8%).

Option 3: Not limit contribution amount.

## ACKNOWLEDGEMENTS

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## CHAPTER 14 MEDICAL DEVICES AND DIAGNOSTICS

### OVERVIEW

With a population of over 90 million people, a fast growing middle class and a promising economic growth in the upcoming years, the medical devices market in Vietnam will continue to expand. Furthermore, with an increasing openness to the international market mirrored by the several trade agreements like the EU-Vietnam Free Trade Agreement (EVFTA) and the Trans Pacific Partnership (TPP) signed, there is no doubt that Vietnam will see an increase in health spending. In 2013, it is estimated that around 30.000 Vietnamese went abroad for treatment, representing at least USD 1 billion per year, a situation that needs to be changed.<sup>1</sup>

Vietnamese authorities are aware that public healthcare is in need of improvement and drastic modernisation and the budget has therefore increased for this sector. However, issues remain as many hospitals do not have enough qualified staff to deal with the overcrowded facilities and cannot provide adequate attention to all patients. Moreover, medical equipment is out-dated and needs replacement especially when it comes to surgery and intensive care units.<sup>2</sup>

The medical devices market reached USD 465.4 million and is expected to keep growing reaching USD 1.4 billion in 2018.<sup>3</sup> This market is important for European firms because Vietnam currently imports over 90% of its devices. Moreover, Vietnam encourages the market of medical devices because the local production cannot meet the demand of the national healthcare system.<sup>4</sup> Currently, Vietnam has about 50 firms making 600 products that are officially licensed by the Ministry of Health (MOH).<sup>5</sup> In 2013, the USA, Japan, China and Singapore represented over 50% of the import market. However, Vietnam is building its status as a low cost manufacturing base and therefore Vietnamese exports are increasingly growing. In 2013, the US represented 24.3% of total exports.<sup>6</sup>

In order for Vietnam to continue its efforts in the improvement of its citizens' health and access to healthcare, some issues need to be addressed. EuroCham's Medical Devices and Diagnostics Sector Committee remains available for further dialogue and cooperation with the MOH and relevant authorities.

### I. PROMOTION AND REIMBURSEMENT FOR MEDICAL DEVICES WITH PROVEN MEDICO-ECONOMIC BENEFITS

Relevant Ministries: Ministry of Health (MOH), Ministry of Finance (MOF)

#### Issue description

Caring for wounds after a surgery, an injury or a disease is an essential part of the recovery process. Not only will proper wound care prevent infection and other complications, it will also help the wound heal faster and better, and allow a better aesthetic result. Modern wound care also called Advanced Wound Care (AWC), relies on protocols that require health practitioners' training and dedication, the continuity of care until complete healing, as well as the use of adequate medical devices with proven advantages compared to traditional wound care.

Currently, the cost of wound care treatment is borne almost exclusively by patients. Indeed, cost reduction

<sup>1</sup> 'Vietnam Market for Medical Devices', *US Commercial Service*, June 2014, p.1. Available at <[http://www.export.gov/vietnam/build/groups/public/@eg\\_vn/documents/webcontent/eg\\_vn\\_076824.pdf](http://www.export.gov/vietnam/build/groups/public/@eg_vn/documents/webcontent/eg_vn_076824.pdf)>

<sup>2</sup> *ibid*

<sup>3</sup> 'Vietnam Medical Devices Market', *Espicom Business Intelligence*, 11/06/14. Available at <<http://www.espicom.com/vietnam-medical-device-market.html>>

<sup>4</sup> 'US Commercial Service', *op.cit.*, p.2.

<sup>5</sup> *ibid*

<sup>6</sup> 'Espicom Business Intelligence', *op.cit.*

guidelines led most hospitals to exclude AWC products from their tender lists and/or to drastically limit their usage. Even when AWC products are available in a hospital, their cost is only marginally covered by wound treatment reimbursement packages which include all wound care supplies for a specific treatment. This cost issue strongly impacts and often limits the choices of treatments by healthcare practitioners, who often have to settle for less efficient traditional basic wound care products (greasy gauze etc.) that are covered by reimbursement or are more affordable to patients.

As a result, many patients are deprived of treatment protocols and products that would significantly improve their quality of life and lead to a faster and better healing outcome.

### Potential gains/concerns for Vietnam

AWC products improve the comfort and quality of life of patients along the treatment (reduction in the duration of treatment acts, reduction of pain, positive psychological impact...) and allow them to return faster to a normal life.

AWC products also reduce the frequency of dressing changes and make the work of healthcare professionals easier and faster, thus relieving healthcare professionals' workload.

More importantly, the use of AWC protocols and products is proven to reduce the total cost of treatment in comparison with traditional wound care. Their superiority is recognised by wound care professionals in Vietnam.

AWC products can reduce the frequency of dressing changes and therefore the costs of staff and equipment associated with each dressing change.

AWC protocols can reduce the length of treatment, allowing for earlier discharge of patients, thus relieving hospital bed overloading and generating saving in hospitalisation costs.

AWC protocols reduce the risk of infection, complication and relapse thus reducing bed overloading and saving additional costs of hospitalisation, medicine and medical devices.

### Recommendations

We would respectfully recommend the MOH to support the use of AWC protocols through:

- The communication and promotion to decision makers of the advantages of AWC products over traditional wound care.
- The creation of an incentive system for hospitals and healthcare professionals to select and use the best quality/cost of care solution rather than the cheapest, less efficient products; and
- The creation of special reimbursement packages for AWC products with proven medico-economic benefits for specific wounds, starting with the prevention and treatment of pressure ulcer, treatment of burn and Diabetic Foot Ulcer (DFU).

## II. HOMECARE

Relevant Ministries: Ministry of Health (MOH)

### Issue description

Given the limited bed capacity of Vietnamese hospitals, patients whose condition is no longer judged critical are often discharged after only a few days. In the absence of professional and organised homecare services provided by skilled healthcare professionals, patients will take care of themselves, will be taken care of by their family or may stop the treatment. The observance and quality of treatment after discharge is therefore difficult to follow-up. We can estimate that a large part of discharged patients do not receive optimal medical and wound care at home, resulting in relapse and complications that will lead to a new hospitalisation. These complications will in turn

worsen the overload of hospitals and induce additional costs for the healthcare system. Some complications may even tragically result in amputation or death.

### Potential gains/concerns for Vietnam

We believe that Vietnam should trigger and support the creation and development of professional homecare services by trained and specialised healthcare professionals who could ensure the continuity and quality of care after hospital discharges.

Professional homecare services would greatly improve the quality of life of discharged patients and their families.

Professional homecare would also reduce the probability of relapse and complications thus relieving hospital bed overloading and allowing savings on avoided additional treatment costs and costs to society.

Ultimately, homecare could allow an earlier discharge of some patients from hospitals as early stages of the treatment can be performed by healthcare professionals at the patient's home.

### Recommendations

We would respectfully recommend the MOH to support the development of homecare continuity of treatment through:

- › Patients and patient families education programs promoting the continuity of treatment and the appropriate care protocols;
- › Training professionals (nurses, pharmacists, etcetera) to be relays of care outside the hospitals;
- › Supporting the creation of an official and organised system of homecare by trained professionals with adapted training, material and protocols; and
- › Financial support to homecare patients and their families.

## III. REGULATION ON MEDICAL DEVICE MANAGEMENT

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 Relevant Ministries: Ministry of Health (MOH)  
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### Issue description

Medical devices represent a special kind of goods with a direct impact on human health. Medical devices are the key factor determining the effectiveness, quality of medical practices, enabling doctors to diagnose and treat patients in a precise, swift, safe and effective manner. However, medical devices are characterised by its diverse types, constant absorption of new scientific and technological advancements, and ever-changing technology. As a result, medical devices require strict management based on the product life-cycle approach, starting from production, trials, circulation on the market to use and warranty.

Currently there is a lack of consistent documents governing the management of issues related to medical devices. In addition, the management regulations fail to include some aspects such as clinical trials, circulation of medical devices, origin tracing and medical device inspection. Although import licenses are issued covering only 50 types of medical devices, in fact the quantity and types of medical devices imported are much larger. The regulations on management of medical devices in import practices have not complied with the regional and international standards.<sup>7</sup>

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<sup>7</sup> Official Statement from the Minister of the MOH to the Government dated 8 May 2015

### Potential gains/concerns for Vietnam

The majority of medical devices in Vietnam are imported. In the country, there is only a small number of medical device producers and the products provided are limited in types and low in quality. The business, import and export system has not been properly established given the lack of veteran experts on this type of goods. Moreover, a large part of medical devices currently used by medical facilities has not been calibrated, maintained and repaired on a regular basis due to lack of investments and the fact that many localities cannot afford spare parts.

In Vietnam, there is also a lack of regulations on specific conditions for independent entities specialising in assessment of medical devices. Consequently, gaps remain unfilled regarding: risk-classification, definitions and categorisation of medical devices, common technical documents for medical devices, registration procedures for circulation and regulations on the alert marketing surveillance for defective or unsafe device. This is due to improper development and failure to comply with the international requirements and practices.

### Recommendations

- Given the foregoing premises, it is necessary to promulgate a document governing management of medical devices in order to create a legal corridor for import, production and circulation of medical devices in Vietnam.
- We appreciate the working attitude of the MOH and the drafting Committee in this regard and expect that the drafting Committee will accelerate the finalisation of the draft Decree in light of the comments by the Standing Committee for its enactment and enforcement as soon as possible in 2016. We understand that the Ministry of Health has been preparing the draft Decree on medical device management and had the draft delivered to ministries, agencies, domestic and international medical device companies in Vietnam for comments. The draft Decree has also been approved by the Government in accordance with the existing legislation. In a most current move, the Standing Committee of the National Assembly agreed on the promulgation of the Decree to govern the management of medical device in its 41<sup>st</sup> meeting on 17 September 2015. The drafting Committee and the National Assembly Committee on Social Affairs as the appraisal body will consolidate the draft taking into account the comments by the Standing Committee and have the final version submitted to the Standing Committee for consideration in the next meeting.<sup>8</sup>

## ACKNOWLEDGEMENTS

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Ho Linh Lan, Regulatory and Government Affairs Manager, Roche Vietnam Co., Ltd

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<sup>8</sup> TTXVN dated 17 September 2015

## CHAPTER 15 MOBILITY

The European motorcycle and automotive industry in Vietnam is separated into companies assembling in Vietnam and the companies importing from Europe. In terms of their representation, companies who assemble in Vietnam are a minority.

There are several associations representing the car and motorcycle industry like the Vietnam Automotive Manufacturers' Association (VAMA) or the Vietnam Association of Motorcycle Manufacturers (VMM). Nevertheless, amongst Europeans themselves, no clear structure representing the industry exists. However, with the upcoming implementation of the EU-Vietnam Free Trade Agreement (EVFTA), there will be a shift in these dynamics with an increase in EU imports into the country. This is why the formation of a Mobility Sector Committee under EuroCham's umbrella is key. As a strategic EU industry, the mobility sector will support the implementation of the EVFTA and bring the EU experience into Vietnam for further cooperation with Vietnam whilst respecting the EU firms who have already invested in Vietnam.

Furthermore, EuroCham members of the automotive industry a wider objective. With the representation of EU companies, passenger cars and commercial vehicles, motorbikes but also suppliers and producers of parts involved in the industry, the Sector Committee will work as a forum for dialogue on topics such as rules and mechanisms for good imports, road safety and general improvement in Vietnam's connectivity.

In terms of the Whitebook 2016, the mobility sector wishes to present the following issues to the Government by having one part dedicated to motorcycles and another one to the automotive industry.

## CHAPTER 15A AUTOMOTIVE

### OVERVIEW

The Vietnamese automotive market can be divided into domestic assembly of Complete Knock-Down (CKD) vehicles – grouped under the Vietnam Automotive Manufacturers' Association (VAMA) – and the import of Complete Built Up (CBU) vehicles by official importers. Some companies in Vietnam are involved in both assembly and import. There are currently 13 foreign-invested businesses and 42 domestic businesses involved in automobile manufacturing and assembly, with a potential capacity of around 460,000 vehicles per year according to VAMA. European passenger cars brands represented in Vietnam are from Germany (Audi, BMW, Mercedes-Benz, Porsche and Volkswagen), France (Peugeot and Renault), the United Kingdom (Bentley, Jaguar, Land Rover, Mini and Rolls-Royce) and Italy (Fiat and Lamborghini).

While the Ministry of Industry and Trade (MOIT) has been making efforts to develop the automotive industry, the Ministry of Transport (MOT) and the Ministry of Finance (MOF) have been concerned about road congestion and have therefore imposed high taxes and fees on cars. Despite high prices, the automotive market demonstrated a remarkable growth rate from 2007 until 2012, when it crashed by 50% due to the 10% - 20% increase of the registration tax.<sup>1</sup> In 2014, the Vietnamese market for new vehicles reached 157,810 CKD and CBU imported passenger cars and commercial vehicles. From January to August 2015, the passenger car market in Vietnam has kept growing strongly with a growth of 54% and 67% for CKD and CBU respectively.<sup>2</sup> CKD and new CBU represent 74% and 26% respectively of the new automotive passenger car and commercial vehicle market.<sup>3</sup>

Automotive parts are playing an important role in driving the country's economy. Vietnam is integrating into the Asia-Pacific automobile industry supply chains.<sup>4</sup> Generating two-thirds of the automotive market and providing employment to Vietnam as a socio-economic benefit, VAMA estimates that its assembly members contributed approximately USD 1 billion in taxes to the State budget in 2013. According to a calculation by representatives of official importers, new CBU imports, which represent a third of the volume are estimated to have generated over USD 1 billion in tax collection from January to September 2015.<sup>5</sup>

According to VAMA, domestic auto production and sales should remain on an uptrend throughout 2016 as local carmakers expand output to meet higher demand. Further banking sector reforms and the improving macroeconomic outlook as well as infrastructure status should continue to benefit Vietnam with annual vehicle sales. ASEAN+3 (China, Japan, Korea) will facilitate tax reduction on car imports for Vietnam. From 2014, the CBU car tariff on imports from ASEAN has been cut to 50% and it is planned to further shrink down to 0% by 2018 giving CBU imports from within ASEAN a momentum.

Since 2007, Vietnam committed to import tax reduction under the framework of the World Trade Organisation (WTO). In 2015, Vietnam concluded the negotiations for a free trade agreement with the European Union (EVFTA), which will result in cars imported from EU countries having their import duties reduced. In addition, Vietnam negotiated the Trans-Pacific Partnership (TPP) reducing import tax by 2016 and eliminating it wholly by 2026. Successful FTA tariff agreement implementations will depend on the complexity in certifying the country of origin of the vehicles, possible reciprocity requirements between countries, customs practice and other non-tariff barriers.

<sup>1</sup> Since 15 Oct. 2011, registration fee increased by 10%-20%. Circular 124/2011-BTC-TT dated 31 August 2011

<sup>2</sup> 'Sales Report, December 2014', VAMA, 10/01/1, p.1. Available at < <http://vama.org.vn/Data/upload/files/Document/Thang12-2014/Cover%20Letter%20Sales%20report%20-%20Dec%202014.pdf>>

<sup>3</sup> 'Sales Report, August 2015', VAMA, 08/08/15, p.3. Available at < <http://vama.org.vn/Data/upload/files/Document/Thang8-2015/Cover%20Letter%20Sales%20report%20-%20August%202015.pdf>>

<sup>4</sup> 'Vietnam ASEAN Client Forum', Baker & McKenzie, 13/03/2015, Ho Chi Minh City, Vietnam

<sup>5</sup> Calculation based on the average CIF (*Cost, Insurance and Freight*) value of USD 16,950 for 35,921 CBU vehicles - VAMA data Jan-Sep 2015 –applying 70% import tax, 50% Special Consumption Tax and 10% VAT and excluding gross margin and CIT (Corporate Income Tax).



Given the rapid economic growth in the region, there is significant development potential for the industry as less than 3% of the population currently owns a car. According to the Ministry of Trade and Industry (MOIT), Vietnam's automotive industry almost meets domestic demand as 80% of the demand for passenger cars and 60% of the demand for trucks are met domestically. However, the Government expects that by 2030 out of the 863,000 vehicles, 452,000 will be passenger cars, as the switch from motorbikes to cars is now on going.<sup>6</sup> Environmentally-friendly vehicles will enjoy a more favourable tax regime but the definition of 'environmentally-friendly' needs to be clearly defined and achievable for both passenger cars and commercial vehicles.

In order to provide clear direction to Vietnam's automotive industry, Prime Minister Nguyen Tan Dung on 16 July 2014 approved a strategy on the development of the industry by 2025 with a vision for 2035. This strategy mentioned the target of: 227,500 domestically produced vehicles by 2020, increasing to 466,400 vehicles in 2025 and 1,531,400 vehicles in 2035.<sup>7</sup> The Government also underlined the benefits of commercial vehicles to the country's industrial development by focusing more strongly on the demand of the domestic market for trucks, buses and specialised vehicles. Trucks are considered a means of transport supporting domestic production with no limitation usage and are not subject to Special consumption tax (SCT). Current average CKD import tariff is 10%-12% (PxP), tariffs for complete built trucks  $\geq 10$  tons is up to 30%, and for  $< 10$  tons, it stands between 50%-70%. The low registration fee of 2% (while rather high for passenger cars with 10% to 12%) makes trucks more affordable in Vietnam.

Related to public transport operation and bus production, Prime Minister Nguyen Tan Dung recently approved Decision No. 13/2015/QĐ-TTg dated 5 May 2015 for urban bus development.<sup>8</sup> This could be a solution to develop public transport in Vietnam. According to the decision, bus operators are offered subsidies and the production of urban buses for public transport projects is entitled to free import duty for components. In general: buses  $> 24$  seats are SCT free while those of 16-23 seats pay up to 15%, CBU import tariff is 70% and registration fee is 2%.

The Government underlined the need for a supporting industry development. The Government also acknowledged the need for urban and infrastructure planning to meet the automobile use of the people, and the development of transport infrastructure as well as environmental protection.

EuroCham welcomes the fact that a number of the recommendations made since the automotive section was introduced in our 2011 Whitebook have been implemented. The 2016 edition will focus on some important new issues at stake.

## I. ADMINISTRATIVE REQUIREMENTS

Relevant Ministries: Ministry of Industry and Trade (MOIT), Ministry of Finance (MOF), Ministry of Transport (MOT)

### 1. Lead time for temporary goods release

#### Issue description

Vietnam Customs stipulates a maximum of 30 days for temporary goods' release to the importers' warehouses. It is a very tight time slot for businesses in the South of Vietnam to finish their homologation process for CBU cars imported (new models). Usually, without any unexpected arising matters, it takes 32 days (24 working days) to get the national quality test report/certificate of conformity for the full homologation process for one new model of CBU car.

<sup>6</sup> Master Plan to develop the automotive industry in Vietnam up to 2020, with a vision 2030.

Decision 1121/QĐ-TTg dated 24 July 2014

<sup>7</sup> Prime Minister's Decision No. 1168/QĐ-TTg dated 16 July 2014, approving the strategy to develop Vietnam's auto-industry up to 2025 with a vision towards 2035.

<sup>8</sup> Prime Minister's Decision No. 13/2015/QĐ-TTg dated 05 May 2015 on policies to encourage the development of public transportation by bus.

### Potential gains/concerns for Vietnam

We understand that Vietnam is developing the National Single Windows program, and that E-Customs is a part of this program. We highly appreciate and welcome that effort of administrative reform, which will benefit businesses in Vietnam. However, since the project has not yet been fully performed, there remains a risk of overdue penalty from Customs to businesses.

### Recommendation

- › We would suggest Vietnam Customs to extend the lead time to another 30 days for necessary homologation procedures during transition time of the switch to the National Single Window program.

## 2. Harmonised System codes applied to the product during custom declaration

### Issue description

There are cases of mistranslation of Harmonised System (HS) codes between importers and customs officers.

### Potential gains/concerns for Vietnam

During custom declaration, the HS code is decided even though there is no precedence/database for importers' reference. In fact, in case of mistranslation, a third party will be appointed by Customs to examine the case and decide the HS codes, a process that is not only costly but also time consuming.

### Recommendation

- › Support the importers in defining proper HS codes and import duty. We recommend Vietnam Customs to open a database for reference about similar cases. We would also appreciate customs officers to open to proofs and explanation from the examination party when determining the HS codes.

## 3. Expired trucks & buses

### Issue Description

According to the Vietnam Registry, by January 2016 there will be about 21,000 units of trucks and buses expiring. Looking at the accumulated figures from the end of 2014 up to January 2016, the total expired vehicles will be 118,550 units. In compliance with Government regulation, owners of these vehicles will have to submit registration books and number plates to the authorities. From the expiration date onwards, vehicles are not allowed to circulate on public roads.<sup>9</sup>

### Potential gains/concerns for Vietnam

These uncertified vehicles pose a major risk to the public as they are prone to creating traffic accidents and excessive environmental pollution.

### Recommendation

- › We would appreciate the simplification of procedures to check expired vehicles on Vietnam's Register's official website. On this issue, we recommend continuing efforts by the Government as well as strong legal enforcement.

<sup>9</sup> 'How to avoid for expired cars to be on the road', *Journal of Transport*, 06/10/15. Available at <[http://www.vr.org.vn/tintuc/chitiectin.aspx?id\\_news=4314&id=DBO](http://www.vr.org.vn/tintuc/chitiectin.aspx?id_news=4314&id=DBO)>

## II. TAXATION ISSUES

Relevant Ministries: Ministry of Finance (MOF), Ministry of Industry and Trade (MOIT), Ministry of Transport (MOT)

### 1. Special Consumption Tax - New Calculations Base

#### Issue description

In early 2015, local assemblers queried the Vietnam Tax Authorities on their special consumption tax (SCT) calculation for imported CBUs versus CKD locally assembled vehicles for equal treatment. In mid-2015, Vietnam Authorities decided to change the calculations by applying the SCT not only at the importer level but also at the dealer level on the retail price if the dealer is a dependent entity of the importer. However by October 2015, the precise new calculation mode is still unclear to official importers whereas the new calculations are to be effective as early as of the 1 of January 2016.

#### Potential gains/concerns for Vietnam

The absence of clear SCT new calculation guidelines prevents importers from calculating by the end 2015, a reliable retail price to customers wishing to order cars for delivery before Tết in 2016. The leading time for imported CBU models between customer order and delivery is at least four months and thus the lack of clear SCT calculations establishing a reliable retail price due to the immediate implementation in January 2016 is a hindrance to regular business practice during the most auspicious sales period.

#### Recommendation

- The representative of official Importers at the 2015 Vietnam International Motor Show (VIMS) recommended the Vietnam Tax Authorities to delay the implementation of the SCT new calculations to July 2016 when the new SCT rates are also due to change. This will be easier for all stakeholders to implement and leave sufficient time for the Vietnam tax Authorities to exchange with both official importers and local assemblers to fine tune the SCT calculations and implementation. For instance, in 2012 the registration tax was increased in North Vietnam from 15% to 20% of the vehicle value. Such 5% registration tax increase resulted in the local market to shrink by 50%. The tax collection was minimal over the year necessary to recover.

### 2. Special Consumption Tax - Proposed Tax Rate

#### Issue description

The SCT rates that were proposed for discussion in the Vietnam National Assembly (NA) meeting session in October 2015 were as follows:

Table 4: Special Consumption Tax

	Segment	Current SCT law	Government Proposal to NA		
			From 1/7/2016	From 1/1/2018	From 1/1/2019
Car under 24 seats (Diesel & gasoline fuel)	Under 9 seats				
	? 1.5l (*)				
	? 1.0L	45%	40%	30%	20%
	? 1.5L		40%	35%	25%
	>1.5L to ?2.0L		45%	40%	30%
	> 2.0L to ?2.5L	50%	50%		
	> 2.5L to ?3.0L	50%	50%	55%	60%
	Above 3.0L				
	? 4.0L		90%		
	? 5.0L	60%	110%		
	? 6.0L		130%		
	>7.0L		150%		
	From 10 seats to 15 seats	30%	15%		
	From 16 seats to 23 seats	15%	10%		
	Vehicle both carrying passenger & goods				
? 2.5L	15%	15%			
? 3.0L		20%			
>3.0L		25%			
Car under 24 seats (mixed fuel/electric car)	Car use gasoline together with electric, bio fuel	70% of rate applied for the same type	70% of rate applied for the same type		
	Bio fuel car	50% of rate applied for the same type	50% of rate applied for the same type		
	Electric car				
	PC ? 9 seats	25%	15%		
	Bus from 10-15 seats	15%	10%		
	Bus from 16-23 seats	10%	5%		
Car carrying both passengers & goods	10%	10%			
Motor home vehicle	per engine capacity & seats	70%	75%		

Source: Website of the Vietnam National Assembly<sup>10</sup>

According to the proposal, Vietnam Authorities are clearly supporting an easier access to cars with engines below 2.0 litres considered more fuel efficient and environmentally friendly.

### Potential gains/concerns for Vietnam

In a context of decreasing import duties following the various Free Trade Agreements, the industry is afraid that the Vietnam Authorities will seek to increase SCT to compensate for lower import tax collection. This would go against the spirit of the FTA Agreement and benefits stemming thereof. Although the proposal has not yet been decided, investors are concerned about the stability and predictability of Vietnam's tax policy. Official importers of premium brands importing mostly cars with an engine capacity of over 3.0 litres will face unfair competition from 'used' cars grey importers who are able to clear at Customs similar models at a much lower price to minimise their tax payment. This will not contribute to Vietnam Authorities' original objective of tax collection increase. In the worst case scenario, such official importers of high standards premium brands may even face bankruptcy.

<sup>10</sup> Project submission for approval to the 10<sup>th</sup> session of the National Assembly, XIII, October 2015, *National Assembly Vietnam*, 2015. Available at <[http://duthaonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_LUAT/View\\_Detail.aspx?ItemID=1150&LanID=1175&TabIndex=1](http://duthaonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=1150&LanID=1175&TabIndex=1)>

## Recommendations

- Taking into account the increasing number of vehicles circulating in Vietnam in the future and to incentivise the implementation of new technologies for further environmental protection, the representative of official Importers at the VIMS 2015 recommends that the Vietnam Authorities to apply to electric passenger cars the same favourable SCT as for cars with engines below 1.0 litre.
- To keep a growing automotive tax contributor within a viable business environment, the SCT increase should be only moderate for vehicles with an engine capacity of over 3.0 litres. Used cars import taxes should be increased strongly for those vehicles.
- As 16-23 seated buses are considered relatively efficient with road conditions in Vietnam, we recommend to reduce the SCT to 5% as the initial proposal of Ministry of Finance; and
- For timing the business plan, we would like to extend effective date by 1 year upon approval of the revised law.

## III. THE EFFECTS OF ASEAN AUTO GROWTH ON VIETNAM'S COMPLETE KNOCK-DOWN VEHICLES AND PARTS INDUSTRY

Relevant Ministries: Ministry of Industry and Trade (MOIT), Ministry of Finance (MOF), Ministry of Science and Technology (MOST), Ministry of Transport (MOT)

### 1. CKD product and localisation

#### Issue description

According to the Boston Consulting Group (BCG)<sup>11</sup>, the path in the value chain for car manufacturers to expand follows five steps in localisation: from 'home players' (i.e. no sourcing, no R&D, no production) to 'exporters' (i.e. no R&D, simple parts sourcing, small CKD production), 'explorers' (i.e. no R&D, one large fully-fledged plant, sub modules sourcing), 'settlers' (i.e. minor local R&D, several plants, wide array of products sourcing, regional office with cross-market sales) and 'global players' (i.e. major R&D, worldwide network, several large plants serving other regions).

Depending on the localisation topic, the car industry in ASEAN consists of 'exporters' and 'explorers' for sourcing. This is the case in Vietnam where the localisation ratio for automobiles assembled in Vietnam is low.

ASEAN rules have an effect on the CKD and parts industry. In order to qualify for the ASEAN preferential import tariffs under the ASEAN Trade in Goods Agreement, a regional value content of 40% or more is required.

#### Potential gains/concerns for Vietnam

For the Vietnamese authorities, it will remain a 'catch 22 situation' to issue generic standalone incentives, with the expectation that they suit undisclosed individual strategies of geographical integration from foreign-owned assemblers.

#### Recommendations

- In order to make domestic assembly more attractive in Vietnam, we would recommend the Vietnamese Government to put in place incentives, such as tax rebates, export rights, goods in transit zones for kits, vehicles and parts for vehicle production, favorable conditions for investment in plants and equipment, and employee training.
- As the automotive industrial landscape is not only national but includes ASEAN, China, South Korea and Japan, Vietnamese authorities should encourage CKD assemblers to disclose their principals' regional strategy for a

<sup>11</sup> 'Beyond BRICs: Winning the rising auto markets', *Boston Consulting Group*, 22/10/13. Available at <[https://www.bcgperspectives.com/content/articles/automotive\\_globalization\\_beyond\\_bric\\_winning\\_rising\\_auto\\_markets/](https://www.bcgperspectives.com/content/articles/automotive_globalization_beyond_bric_winning_rising_auto_markets/)>

win-win customised negotiation with the Vietnamese authorities. Manufacturers who proactively organise intelligent parts sourcing amongst ASEAN countries to reach 40% local ASEAN content will benefit from this and so will Vietnam thanks to its low-cost base. The BCG quotes one such Original Equipment Manufacturer (OEM) deploying an intelligent sourcing network within ASEAN countries making Diesel engines and steering columns in Thailand, transmission and constant velocity joints in the Philippines, petrol engines in Indonesia, as well as steering gear and control unit in Malaysia. When the aforementioned is not feasible, EuroCham recommends that commitments are undertaken in the EVFTA with the aim of eliminating all customs duties on components with the immediate, progressive and reciprocal reduction of all customs duties, in accordance with a clear schedule; and

- Hold an open discussion between the Vietnamese Government and the private sector/assemblers to proactively organise that intelligent parts sourcing amongst ASEAN countries in order to reach the 40% ASEAN regional value content could benefit from the opportunities within the ASEAN+3 trade area. In the long run, Vietnam will benefit from increased investment and trade activity within the CKD sector.

## 2. Importation of re-manufacture Parts

### Issue description

Currently, there is no regulation providing a definition of so-called 're-manufactured' parts. Decree 187/2013/ND-CP<sup>12</sup> (Decree 187) provides general guidelines for import/export activities and prohibits used automotive parts from being imported into Vietnam. In accordance with Circular No. 38/2015/TT-BTC<sup>13</sup> providing detailed instructions for carrying out customs procedure for commercial goods, the Vietnam Customs interpret any part which is not 'brand new' as a 'used part' and hence make importation of re-manufactured parts impossible.

### Potential gains/concerns for Vietnam

Re-manufacturing saves energy, cuts CO<sup>2</sup> emissions, conserves resources and benefits customers and consumers in Vietnam. Furthermore, re-manufacturing saves a ton of precious raw materials and many tens of thousands of megawatt hours of electricity. In brief, re-manufacturing reduces the burden on the environment. Every European country and most Asian countries have understood the importance and environmental significance of re-manufactured parts and therefore allow the importation and trading of such parts.

### Recommendations

- Allow the import of re-manufactured parts subject to clear definitions; and
- Genuine re-manufactured parts meet the same quality standards as brand new parts. They are produced according to strict quality requirements and undergo final quality examination with exactly the same standards as brand new parts. Furthermore, genuine re-manufactured parts are supplied by car makers with the same warranty as for new parts, and are more cost effective for customers and they align with environmental protection trends.

## ACKNOWLEDGEMENTS

EuroCham members of the automotive industry and in particular for this chapter:

Michael Behrens, General Director, Mercedes-Benz Vietnam

<sup>12</sup> Decree No. 187/2013/ND-CP dated 20 November 2013

<sup>13</sup> Circular No. 38/2015/TT-BTC dated March 2015

## CHAPTER 15B MOTORCYCLE

### OVERVIEW

Motorcycles have consistently been serving, on average, over 60% of travel needs in Vietnam. According to statistics there are now over 39 million motorcycles in the country.<sup>1</sup> Vietnam is also currently the 4<sup>th</sup> largest market for motorbikes in the world (after China, India and Indonesia) and it is still growing strongly and steadily, both in terms of size and quality.<sup>2</sup> Whilst in many other neighbouring countries, the demand for motorbikes is saturated, the demand for motorcycles in Vietnam is expected to remain high in the future. According to statistics, more than 2.7 million motorcycles were sold in Vietnam in 2014, almost a 5% decrease from 2.8 million sales in 2013, but a staggering 20% increase compared to the 2.26 million sales in 2009.<sup>3</sup> The decrease, due to economic difficulties has resulted in lower consumption needs and strong actions from the Government to resolve traffic jams in big cities. Taxes and fees increases on motorcycles have also discouraged new purchases.

According to the Ministry of Planning and Investment (MPI), there are more than 60 enterprises engaged in the industry, of which about 50 are directly involved in production, while the remaining ones are assemblers.<sup>4</sup> However, only about 10 of those are strong enough to compete in the market, including giant players from Japan (Honda, Yamaha, and Suzuki), Italy (Piaggio), and Taiwan (SYM). As income rises, so does the demand for motorbikes as there is currently a move towards more modern and fashionable motorcycles such as scooters. New models with additional functions and modern designs are launched in a much shorter time than previously and investment in Research and Development (R&D) by manufacturers is increasing.<sup>5</sup>

An engine manufacturing plant with full-capacity of 300,000 units annually has been put into operation since early 2013.<sup>6</sup> Moreover, with USD 120 million, Honda Vietnam opened in November 2014, the third manufacturing plant with an annual production capacity of 500,000 units.<sup>7</sup> Such investments and commitments have brought a great contribution to the local economy by generating jobs for the local population, transferring technology and know-how as well as increasing revenues. The Vietnamese motorcycle market will remain a promising industry for manufacturers with high growth rates both in terms of revenue and consumption in the future, particularly if supported by a clear and transparent development strategy from the Vietnamese Government.

Regarding social contribution, the motorcycle industry has employed and created a huge number of jobs for local employees. Furthermore, the motorcycle industry has also been conducting various social activities contributing to the development of society such as activities aimed at improving road traffic safety in Vietnam<sup>8</sup>.

Nonetheless, we wish to highlight the following issues to the Government:

<sup>1</sup> Hansen, A, 'Hanoi's Looming Traffic Nightmare', *The Diplomat*, 08/09/14/ Available at <<http://thedi diplomat.com/2014/09/hanoi-loom ing-traffic-nightmare/>>

<sup>2</sup> 'Motorcycle makers try to revive market', *Viet Nam News*, 30/07/14. Available at <<http://vietnamnews.vn/economy/258141/motorcycle-makers-try-to-revive-market.html>>

<sup>3</sup> 'Manufacturers unworried about plans to limit motorbikes', *Thanh Nien News*, 25/04/13. Available at <<http://www.thanhni ennews.com/index/pag es/20130425-vietnam-manufacturers-unworried-about-plans-to-limit-motorbikes.aspx>>

<sup>4</sup> 'Vietnam to become a major motorcycle exporter', *Uni-Bros*, 06/01/08/ Available at <[http://www.uni-bros.com/en/news.php/vietnam\\_to\\_become\\_a\\_major\\_motorcycle\\_exporter?id=4821&cid=4](http://www.uni-bros.com/en/news.php/vietnam_to_become_a_major_motorcycle_exporter?id=4821&cid=4)>

<sup>5</sup> 'How the Vespa Became Vietnamese', *Forbes*, 08/11/11. Available at <<http://www.forbes.com/sites/stephenwunker/2011/11/08/how-the-vespa-became-vietnamese/>>

<sup>6</sup> 'Piaggio launches motorcycle engine plant in Vietnam', *The Saigon Times*, 04/03/2012. Available at <<http://english.thesaigontimes.vn/22145/Piaggio-launches-motorcycle-engine-plant-in-Vietnam.html>>

<sup>7</sup> 'Honda Vietnam inaugurates 3<sup>rd</sup> motorbike plant at cost \$120 million', *TuoiTreNews*, 11/11/2014. Available at <<http://tuoitrenews.vn/business/23967/honda-vietnam-inaugurates-third-motorbike-plant-at-a-cost-of-120mn>>

<sup>8</sup> 'Numbers of Registered Bikes Exceeds 2020 Vision', *The Saigon Times*, 06/02.2015. Available at <<http://english.thesaigontimes.vn/39463/Number-of-registered-bikes-exceeds-2020-vision.html>> and Le Fevre, J, 'Honda Vietnam Seeks to Protect Kids with 30.000 Free Helmets', *The Establishment Post*, 30/06/2015. Available at <<http://www.establishmentpost.com/honda-vietnam-seeks-to-protect-kids-30000-free-helmets/>>

## I. ENSURE THE STABILITY AND PROTECTION OF FOREIGN INVESTMENT IN VIETNAM

Relevant Ministries: Prime Minister, Ministry of Finance (MOF), Ministry of Planning and Investment (MPI)

### Issue description

The Ministry of Finance (MOF), as the competent authority, is currently conducting several inspections related to tax incentives described in the Investment Certificate of certain foreign owned companies. After the completion of an inspection, the relevant authority is empowered to issue a decision to withdraw that company's tax incentives and ask the company to pay for taxes from previous years. The justification given for this claim is that the tax incentives indicated in the Investment Certificate are not compliant with the existing and applicable laws and regulations. This approach creates a lack of trust and an unstable environment for foreign investors who may feel that their investments in Vietnam are not protected.

### Potential gains/concerns for Vietnam

When investing in Vietnam, companies receive their Investment Certificate (or Investment Registration Certificate) under the new Law on Investment with the detail of their tax incentives which have already been approved by the license issuing body, based on the current law and regulations. Such records should be conclusive evidence that an investment satisfies the required conditions for incentives. This follows not just from the detailed review to which all investment applications are subjected to by the licensing authorities but also for policy reasons. Without it, an investor would not be able to rely on its investment certificate, which would have a negative impact on investment certainty. If the incentives in an investment certificate could always be trumped by law, such certificates would lose their meaning for investors.

### Recommendations

- Ensure that the regulation is clear and transparent so that incentives already granted to foreign invested projects through an Investment Certificate are secured; and
- Ensure that laws and regulations comply with Vietnam's international commitments and ambitions as well as contribute to a conducive business environment.

## II. TAX ISSUES

Relevant Ministries: Ministry of Finance (MOF), National Assembly, Ministry of Planning and Investment (MPI)

### 1. Special Consumption Tax

#### Issue description

According to the Law on Special Consumption Tax (SCT) No. 27/2008/QH12 passed by the National Assembly on 14 November 2008 and effective from 1 April 2009, a SCT of 20% was introduced for motorcycles with a capacity of over 125cc.<sup>9</sup> In addition, pursuant to the new Law No. 70/2014/QH13 amending some articles of Law No. 27 and effective from 1 January 2016, the SCT rate for motorcycles with a capacity of over 125cc remains 20%. This has had a significant negative impact on manufacturers which offer over-125cc motorcycles. Since 2008 until now, the economic and social conditions of Vietnam have developed and under the current economic and social conditions, a motorcycle, especially a 150cc motorcycle, is not considered a luxury good but just a popular private means of transportation. We note that the use of a 150cc scooter is not much different from that of a 125cc scooter and no difference is made in the driver's license.

<sup>9</sup> Cubic centimetres refers to engine capacity



Motorcycles with 150cc cylinders are considered by manufacturers and customers as a comfortable transportation means with advanced technology. However, since the SCT has been applied, customers have become less willing to buy 150cc scooters which are, in fact, ergonomically suitable for the Asian community.

### Potential gains/concerns for Vietnam

We feel that the application of the SCT law puts pressure on locally produced vehicles and domestic manufacturers. This impacts the industry's growth and development potential. Furthermore, Vietnamese manufacturers will also be discouraged to invest in and develop this business segment of modern and high technology.

### Recommendation

- Given the above developments, we strongly recommend the National Assembly/Ministry of Finance to reconsider the issue in the process of its amendment/issuance of a revised or new Law on SCT, so that the SCT does not apply to motorcycles of 150cc.

## 2. Foreign contractor tax (FCT) regarding trademark license fee

### Issue description

Before 3 March 2014, it was clear that the transfer of the use of trademark was an activity that was not subject to value added tax. This was confirmed by Official letter No. 26948/CT-HTR dated 22 October 2012 of the Hanoi Tax Department; Official letter No.4153/TCT-CS dated December 2 2013 of the General Department of Tax. However, contrary to the guidance in those letters, the General Department of Taxation issued the Official Letter No. 631/TCT-CS on 3 March 2014 confirming that the transfer of the use of trademark is an activity that involves the transfer of the right to use Intellectual Property but not the transfer of the ownership of Intellectual Property rights. Therefore, this activity is not considered a 'VAT-exempted' activity and is subject to a value added tax rate of 5% applicable for 'activities related to Intellectual Property Rights' in accordance with Point 15, Article 10 of Circular No. 219/2013/TT-BTC dated 31 December 2013 on VAT. However, at the moment, the value added percentage applied to the transfer of the use right of trademark has not been specifically guided in any available tax regulation nor in any official letter of the tax authorities.

### Potential gains/concerns for Vietnam

The above conflict and unclear guidance in the regulation make it difficult for companies' tax compliance implementation. In addition, different tax authorities/tax officers have different interpretations for the tax collection process leading to inconsistencies in the implementation amongst enterprises and making the investors confused about the tax policy.

Circular 60/2012/TT-BTC dated 12 April 2012 providing guidance on tax and applicable to foreign organisations/ individuals doing business in Vietnam/ earning income from Vietnam was effective from 27 May 2012 to 30 September 2014. With a rate of 30% of value added percentage applied to the business sector 'transportation, manufacture and other business, it is, in our opinion, the most appropriate percentage for the transfer of the use right of trademark under the agreement signed during the applicable period of Circular 60/2012/TT-BTC. This activity cannot be classified as 'services' because it will conflict with the CIT rate, since the CIT rate for 'services' is only 5%, instead of 10% as regulated for trademark license fee. Also, in terms of the nature of this transaction, it is the transfer of the use right of trademark but not the provision of services of foreign contractors which is subject to foreign contractor tax.

Similarly, under the current Circular No. 103/2014/TT-BTC dated 6 August 2014 and effective since 1 October 2014, the VAT rate of 2% applied to 'other business activities' is more reasonable. Without clear guidance, there may be an inconsistent tax declaration and tax treatment among tax payers and local tax authorities.

### Recommendation

- › We strongly recommend the MOF to release official guidance to all the tax payers and tax departments on the application of FCT to the transfer of the use right of trademark. In addition, given the previous unclear and conflicting regulation as mentioned above, it is suggested that the treatment provided in such official guidance should be effective only from its signing date. Furthermore, any tax payer, who may already have declared the VAT as a part of FCT for the fee for transfer of the use right of trademark, should not be subject to the tax recapture, as a result from that official guidance, or charged interest on late payment of tax or administrative penalty up to the date of such official guidance of the MOF.

## III. ABILITY TO ACCESS TO REGISTRATION FIGURES FROM POLICE TRAFFIC DEPARTMENT

Relevant Ministries: National Assembly, Ministry of Public Security

### Issue description

Motorcycle manufacturers would greatly benefit from the obtention of registration figures from the Traffic Police Department. In light of this data, each company could design a plan and strategy of compliance with the government policy regarding the limitation of motorcycles circulating. However, the data from the Vietnam Traffic Police registration record system is not synchronised in the 63 provinces and therefore, it is very difficult for the motorcycle industry to obtain official and reliable figures.

### Potential gains/concerns for Vietnam

Even though, the motorcycle industries are aware of Decision No. 356/QĐ-TTg dated 25 February 2013 (Road Transportation Plan) providing a limitation of the number of motorcycles circulating on road (also referred to as 'Units in Operation' or 'UIO' motorcycles) to 36 million units by 2020, manufacturers find it difficult to adjust their development plan and strategy to comply with government policy due the confidential nature of the registration data. As such, accessing this information remains very tedious and thus, action plans remain limited and incomplete. This regulation has created obstacles for the motorcycle industry's stable development and future strategic orientation. In some countries (like Japan, Taiwan, Italy, Spain, France, such information is public or managed by competent authorities. This allows enterprises to access it by paying a service fee. They can then use the data to their company's advantage.

### Recommendations

- › Registration data should be removed from national confidential lists since motorcycle manufacturers are willing to pay a service fee to access such data; and
- › Consider having a third party collect the data from provinces' Traffic Police Departments and then customise it according to customer's request. Motorcycle manufacturers will then be able to obtain synchronised and centralised data.

## ACKNOWLEDGEMENTS

Piaggio Vietnam Company Limited

## CHAPTER 16 NUTRITION AND MILK FORMULA PRODUCTS

### OVERVIEW

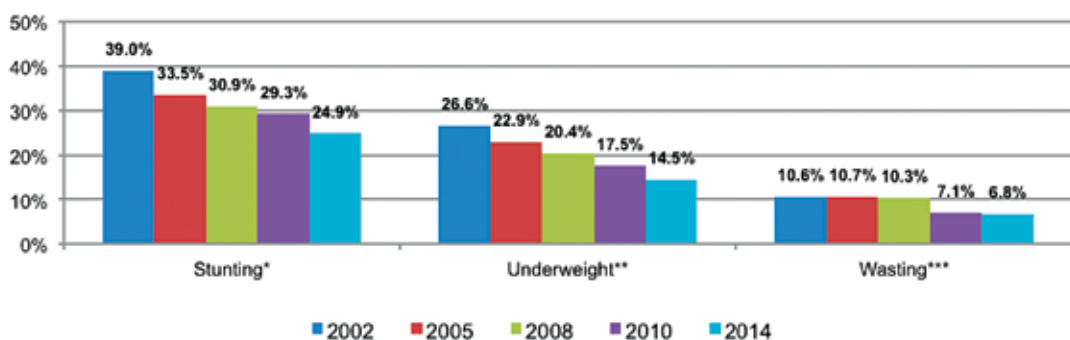
The EuroCham Nutritional Foods Group (NFG) is the non-profit, non-Governmental representative body of six of the world's leading multi-national dairy companies operating in Vietnam. NFG's mission is to improve the nutritional well-being of the Vietnamese people. Together with the Government, NGOs, and civil society partners, we work to make a positive impact on Vietnam's nutritional profile.

NFG members continuously work with key stakeholders in the Vietnamese Government to promote science-based nutrition and develop effective policies and practices that ensure that Vietnamese consumers have access to quality nutritional and milk formula products. NFG members are committed to upholding international industry best practices and complying with relevant Vietnamese laws and regulations to cultivate a responsible and sustainable market for milk and nutritional products in Vietnam. NFG strives for the following objectives:

1. Promotion of science-based nutrition knowledge and development of effective policies and practices on safe nutrition for Vietnamese consumers;
2. Promotion of highest food quality standards;
3. Fostering of robust business ethics in the dairy and nutrition sector through observation of strict and comprehensive self-regulation policies;
4. Contribution to the development of science-based regulations governing the industry; and
5. Participation in open discussions with the Government and relevant stakeholders to facilitate broad-based industry support for efforts to improve nutritional outcomes for the Vietnamese people.

Our presence and products have substantially and directly contributed to Vietnam's continued socio-economic development and have helped empower Vietnam to meet - and even exceed - most of the goals set out in the 2001-2010 National Nutrition Strategy.

**Figure 12: Malnutrition prevalence among children under five (%)**



Source: Summary Report: General Nutrition Survey 2009-2010, National Institute of Nutrition – Ministry of Health in cooperation with UNICEF; Statistical data on Child malnutrition in 2014, National Institute of Nutrition.<sup>1</sup>

<sup>1</sup> Summary Report: General Nutrition Survey 2009-2010, National Institute of Nutrition – Ministry of Health in cooperation with UNICEF; Statistical data on Child malnutrition in 2014, National Institute of Nutrition

\* Stunting refers to inadequate height for age as defined by the World Health Organisation (WHO)

\*\* Underweight refers to inadequate weight for age as defined by the WHO

\*\*\*Wasting refers to acute under nutrition (children who suffer from this face a markedly increased risk of death) as defined by the WHO

In the past 3 years alone, we have carried out over 20 Corporate Social Responsibility (CSR) and philanthropic programs of varying sizes across the country. Our contributions can be detailed as follows:

- ▶ Fostering of economic growth and employment – We have invested hundreds of millions of dollars in manufacturing and distribution in Vietnam. As of today, NFG members together provide direct full-time employment for over 8,000 people in Vietnam, as well as job opportunities to tens of thousands of additional Vietnamese workers and professionals through our distribution network of over 50,000 retailers across the country;
- ▶ Promotion of nutritional education – Between 2013 and present, NFG members have partnered with the National Institute of Nutrition, the Ministry of Education and Training, primary schools and other state agencies and organisations to improve the nutrition knowledge of over 15,000 children and their families;
- ▶ Capacity-building for the healthcare systems – NFG members have worked alongside the Ministry of Health and other Vietnamese healthcare stakeholders to provide trainings and capacity-building activities for nearly 3,000 healthcare professionals and nutrition experts on the topics of breastfeeding, clinical nutrition and congenital metabolic disorders. Furthermore, together with the Vietnam’s Women’s Union, we have distributed educational materials and engaged more than 150,000 people to provide essential breastfeeding information;
- ▶ Improved income and capacity-building for farmers – To support Vietnam’s agricultural sector and help it achieve sustainable development, NFG members have provided assistance to poor farmers by donating pedigree cows to Vietnam Red Cross’ Cow Bank project as well as provided trainings and high-yielding coffee varieties subsidies to over 21,000 coffee farmers in the Central Highlands; and
- ▶ Support for underprivileged children – Between 2013 and now, NFG member countries have donated more than 500,000 milk gifts to over 100,000 underprivileged Vietnamese children. We have also sponsored computer rooms for over 10 primary schools in 5 provinces, and led fundraising for tuition fees and annual medical insurance premiums. Through our medical and health programs, NFG has been able to save the lives of over 100 infants with congenital metabolic disorders.

We look forward to continuing our discussions with the Ministry of Health (MOH) and other related stakeholders to continue to build on the progress that has already been made in the battle against childhood malnutrition in Vietnam. NFG will continue partnering with relevant Government agencies and NGOs to carry out research, training programs for healthcare professionals, local health propagandists, as well as awareness-raising activities for mothers and caregivers on the optimal nutritional diet for their children.

## I. IMPROVING THE IMPLEMENTATION OF REGULATIONS ON MARKETING FOR NUTRITIONAL PRODUCTS FOR YOUNG CHILDREN

Relevant Ministries: Ministry of Health (MOH)

### Issue description

Since the year 2000, the Vietnamese Government has issued and amended many legal regulations concerning the advertisement and marketing of nutritional products for young children. Specifically, the Law on Advertisement of 2012 and Decree 100/2014/ND-CP on 6 November 2014 (Decree 100) regulating the trade and use of nutritional products for young children, feeding bottles and artificial dummies have extended the advertising ban on 'breast-milk substitute milk products' for children up to 24 months of age. It has also introduced more restrictions on the advertisement and marketing for nutritional products for young children, potentially limiting access to information by parents and caregivers.<sup>2</sup>

<sup>2</sup> See Article 6 and Article 11.b of Decree 100

### Potential gains/concerns for Vietnam

Responsible marketing and distribution practices enable consumers, health workers and the wider public to obtain accurate, science-based information. They also support parents' decisions to choose nutritious and healthy foods for their children and promote safe and appropriate use of nutritional products for infants who are not exclusively breastfed.

While Decree 100 is aimed at strengthening constructive management of the industry, it has had several unintended consequences that could disadvantage consumers. For instance, with regards to breast-milk substitute milk products, basic information (information to which consumers are entitled) has sometimes been categorised as advertisement and has not been made available for consumer reference on the traders' websites. Because of the lack of basic product information, Vietnamese consumers have few other official sources of information through which to assess product quality and learn about usage instructions.

NFG member companies are committed to satisfying in full both local and international regulations regarding responsible marketing practices, including the International Code of Marketing of Breast-milk Substitutes adopted by the World Health Organisation. NFG's efforts are underpinned by our own Code of Conduct, which was originally issued in 2012.<sup>3</sup> NFG updated its Code of Conduct and compliance practices when Decree 100 was promulgated on 6 November 2014 to replace the previous Decree 21/2006/ND-CP with effect from 1 March 2015.

NFG has played a constructive role in industry self-regulation and compliance. Through the NFG Code of Conduct, member companies have cross-monitored and encouraged each other to comply with local regulations via the internal self-regulatory mechanism. Experience from the past 3 years has shown that the Code of Conduct has played a significant role in promoting responsible business and marketing practices by member companies. The Code of Conduct has brought about encouraging results and has helped raise awareness and understanding among member companies of relevant regulations and policies governing the industry.

### Recommendations

NFG members would like to propose the following:

- We encourage industry-wide adoption of best practices along the example provided by our own Code of Conduct and compliance standards.
- Competent Government agencies should closely monitor the trajectory of malnutrition among infants and young children to ensure that the implementation of Decree 100 is effective and does not generate negative impacts as a result of restrictions of essential product information.
- In order to strengthen access to basic product information, relevant Government agencies should develop and facilitate an official information channel to ensure that pertinent official product information, including data on quality and usage instructions, is available to consumers and does not violate advertising rules.

## II. PRICE STABILISATION OF MILK PRODUCTS FOR CHILDREN UNDER 6 YEARS OF AGE

Relevant Ministries: Ministry of Finance (MOF)

### Issue description

Since the year 2010, the Vietnamese Government has issued many legal regulations meant to control market prices. Most recently, the Ministry of Finance issued Decision 1079/QD-BTC dated 20 May 2014 detailing the imposition of price stabilisation measures for milk products for children under 6 years of age (Decision 1079). The measures were

<sup>3</sup> 'EuroCham Nutritional Foods Group Sector Committee', *EuroCham*, 2015. Available at <[http://www.eurochamvn.org/Sector\\_Committees/Nutritional\\_Foods\\_Group](http://www.eurochamvn.org/Sector_Committees/Nutritional_Foods_Group)>

prolonged for further 18 months through Decision 857/QĐ-BTC dated 12 May 2015 amending and supplementing some articles of Decision 1079. According to these two Decisions, price ceilings will be imposed on milk products for children under 6 years old from 1 June 2014 through 31 December 2016 inclusive.

### Potential gains/concerns for Vietnam

The State's interventions in the business activities of enterprises through administrative measures such as price ceilings run counter to the Government's aspirations to achieve a full market economy. We are concerned that such measures not only impact the business performance of enterprises in the short- to medium-term, but also affect long-term trade and investment prospects in general. The Government's interference in the business decisions of enterprises sends a negative signal to investors that Vietnam's investment climate is not genuinely stable, open or integrated.

Such interference also has negative commercial effects on the industry. According to data released by market research company AC Nielsen in July 2015, the market for formula milk for children under 6 years old has decreased by 11% in volume in the twelve months after Decision 1079 was implemented.<sup>4</sup> This might have been caused by the negative psychological impact that the price ceilings have had on consumers' behaviour. Furthermore, up to 60% of the public report having experienced moderate to no benefit from the price intervention measures introduced by the State.<sup>5</sup> This, together with the actual modest rise in prices of economy-tier products since the imposition of price controls, suggests that price ceiling intervention may have failed in its stated humanitarian objective of lowering prices for needy consumers. While the National Nutrition Strategy considers milk products to be important, and encourages their use to improve the nutrition status of Vietnamese children, the observed 11% decline in powdered milk volume sales means that Vietnamese children are drinking less milk overall and thus getting fewer nutrients. This will have a negative future impact on the National Nutrition goals for improving Vietnamese children's health status.

There are now more than 700 different products across three distinct segments (premium, mid-tier, and economy); this product grouping offers an incredibly diverse selection of products to meet the equally diverse needs of Vietnamese consumers. According to AC Nielsen in July 2015, the average price of formula products in Vietnam's premium segment were in line with the average price levels of premium products in countries with comparable economic conditions and market characteristics in the region, such as Malaysia, Thailand and the Philippines (with Vietnamese prices differing by around 1%).

### Recommendations

NFG members would like to make the following recommendations:

- ▶ Allow for a return to market-based pricing and refrain from imposing any extensions of existing price ceilings or additional controls.
- ▶ Clarify the objectives as well as the intended beneficiaries of the State's price stabilisation measures.
- ▶ Revise and clarify unclear and inconsistent provisions in the Law on Pricing and implementation documents including the circumstances under which price stabilisation measures should be imposed ('unreasonably high or low due to changes of price constituents') so that the State's intervention in market mechanisms be adequately justified.
- ▶ When necessary, impose price stabilisation measures over a restricted period of time and only on essential products that 'meet the basic needs of the people' as stipulated in the Law on Pricing. With regards to the milk formula market, the Government should not control the prices of products in the mid-tier and premium segments, but should only impose price stabilisation measures on the economy segment to improve access to these products by low income consumers.

<sup>4</sup> 'Cơ hội cho ngành hàng sữa bột tăng trưởng tại nông thôn', *Nielsen*, 26/07/2015. Available at <<http://www.nielsen.com/vn/vi/insights/2015/milk-powder-decrease-july-15.html>> and 'Powdered milk sales fall in major cities', *The Saigon Times*, 24/07/2015. Available at <<http://english.thesaigontimes.vn/42096/Powdered-milk-sales-fall-in-major-cities.html>>

<sup>5</sup> Report 'Vietnam in Transition: Changing Attitudes to the Market and the State: Perception of a Number of Vietnamese People in 2014' jointly issued by the *Vietnam Chamber of Commerce and Industry and the World Bank* and released in July 2015, p.35 figure 16.

- › Consider lowering price-composing factors such as import tariffs (currently at 5% for imports from ASEAN and 10% for other countries, higher than in other regional countries) and VAT rates as solutions to help reduce the prices of formula products for children under 6 years old; and
- › Ensure precise and consistent enforcement of the Law on Pricing and its sub-law documents by State authorities, particularly in regards to provisions governing circumstances where price stabilisation measures are needed<sup>6</sup> and on the methods of price determination for goods subject to price stabilisation measures.<sup>7</sup>

### III. QUANTITATIVE CONFORMITY STAMP

Relevant Ministries: Ministry of Science and Technology (MOST)

#### Issue description

Law No. 04/2011/QH13 on Measurement, which became effective on 1 July 2012, mandates that 'Group 2' pre-packaged goods bear the quantitative conformity stamp on their labels.<sup>8</sup> Despite the petitions from relevant industries, the requirement was later on solidified in the MOST's Circular No. 28/2013/TT-BKHHCN dated 17 December 2013 regulating the State inspection of measurement (Circular 28) and most recently, in the MOST's Circular No. 21/2014/TT-BKHHCN (Circular 21) dated 15 July 2014 regulating the measurement for pre-packaged products.

Dairy products, which are already required to bear several stamps, including the Conformity Registration (CR) stipulated by the Law on Quality of Goods and Products<sup>9</sup> may now be required to bear one more stamp - the quantitative conformity stamp.

#### Potential gains/concerns for Vietnam

New product stamp requirements reflect a shift from a 'post-control' mechanism to a 'pre-control' mechanism under which companies must follow a complicated procedure just to certify with relevant authorities that their packaging machine is working correctly or to re-check the weight of imported products.

These stamp regulations increase costs and expenses and create additional administrative burden for companies. Furthermore, for imported products, it will take an additional 10 days to check the quantity before customs clearance, slowing down the pace of cross-border commerce.

One industry example is in the dairy sector: for imported dairy products, importers need to take samples for three checks:

- › Food safety check with the relevant authorities under the MOH;
- › Veterinary check with the relevant authorities under the Ministry of Agriculture and Rural Development (MARD); and
- › As of August 2014, a quantitative check with the relevant authorities under the MOST.

This procedural costs are burdensome in terms of time (seven days for the food safety check<sup>10</sup>, five days for the veterinary check<sup>11</sup>, and ten days for the quantitative check<sup>12</sup>) and money (these checks delay the circulation of the products - time is particularly crucial to ensure the quality of dairy products).

<sup>6</sup> Article 16, Law on Pricing dated 20 June 2012, and Article 4, Decree 177/2013/NĐ-CP dated 14 November 2013 of the Government

<sup>7</sup> Circular 25/2014/TT-BTC dated 17 February 2014 of the Ministry of Finance

<sup>8</sup> Article 39.2.d, Law on Measurement dated 11 November 2011

<sup>9</sup> Article 27.1.b, Law on Quality of Goods and Products dated 21 November 2007

<sup>10</sup> Decision 23/2007/QĐ-BYT dated 29 March 2007 of the Ministry of Health

<sup>11</sup> Decision 86/2005/QĐ-BNN dated 26 December 2005 of the Ministry of Agriculture and Rural Development

<sup>12</sup> Circular 28/2013/TT-BKHHCN dated 17 December 2013 of the Ministry of Science & Technology

### Recommendations

- › In order to maintain a simple administrative procedure and a sustainable business environment for companies in Vietnam, it would be helpful if the authorities would either limit the aforementioned procedures to a minimum or limit the list of products on which quantitative conformity stamps are compulsory (so-called 'Group 2 products').
- › The Government should consider simplifying and synchronising the requirements regarding measurement to move back toward a 'post control' approach to regulation, in which companies violating relevant provisions shall face a corresponding penalty.
- › The Government should also consider accepting the quantitative stamps for imported products which have been admitted by foreign countries.
- › The EuroCham NFG would be happy to share its experience/views/best practice with the relevant authorities to achieve the best outcome for both the industry and the Vietnamese Government.

### ACKNOWLEDGEMENTS

EuroCham Nutritional Foods Group



# CHAPTER 17 PHARMACEUTICALS

## OVERVIEW

Pharma Group (PG) - the Foreign Research-Based Pharmaceutical Manufacturers Association in Vietnam - represents the voice of the innovative pharmaceutical sector in Vietnam and is committed to its cooperation with the Government of Vietnam to ensure that Vietnamese people have sustainable and fast access to high quality, safe, and innovative medicines.<sup>1</sup>

*'Pharma Group's priority is to ensure that Vietnamese people have sustainable access to high quality, safe, and innovative medicines'*

PG is encouraged to see recent Vietnamese health sector policy initiatives setting Vietnam on an ambitious journey. However, no journey is without its obstacles: limited access to healthcare in provinces; overcrowded hospitals; an underdeveloped local pharmaceutical industry; a convoluted regulatory framework that discourages foreign direct investment to name a few, as Vietnam moves into the ranks of middle-income countries. A new Pharma Law, a revised Tendering regime, developing Free Trade discussions (EVFTA, TPP, FTA between Vietnam and the EFTA,...) and the developing ASEAN Economic Community are all opportunities to pave the way for a healthy Vietnam.

PG remains committed to continuing this journey with Vietnam, and believes that its experience from other countries may serve as a helpful compass in designing holistic 'win-win' solutions, with the overarching objective to develop a high-standard, patient-centric healthcare sector and pharmaceutical industry in alignment with the Prime Minister's vision.<sup>2</sup> The perspectives and recommendations presented hereafter build on the constructive dialogue and collaboration PG has with the Government of Vietnam, in particular with the Ministry of Health (MOH) and the Drug Administration of Vietnam (DAV).

### PHARMA GROUP – EDUCATING FOR THE FUTURE

*PG members are the key providers of continuous training for Healthcare Practitioners (HCPs), working with more than 220,000 participants and VND 340 Billion invested in medical information to develop a high standard healthcare.*

*Source: Pharma Group Value Survey 2015*

### Summary of chapter recommendations

- 1. Fast patient access to pharmaceuticals** – Sustainable and fast access to innovative medicines for Vietnamese patients in line with other ASEAN countries' timelines. A more efficient drug registration process, elimination of local clinical trial requirements, and a timely drug reimbursement process are key to improving patient access.
- 2. Sustainable access** - Allowing FIEs to participate on par with local companies in Public Procurement to meet demands of a modern and innovative universal healthcare system.
- 3. Legal presence and developing local industry** – Clear and practical guidelines for the establishment of FIEs with full trading and distribution rights. Providing incentives to the innovative pharmaceutical industry to invest in local industry, including technology transfer.

<sup>1</sup> Pharma Group is a Sector Committee under EuroCham.

<sup>2</sup> Prime Minister's National Strategy on Protecting, Caring, and Improving the People's Health, 2011-2020 with Vision to 2030, and National Strategy for Vietnam's Pharmaceutical Industry Development to 2020, with Vision to 2030

## I. FAST ACCESS – PATIENT ACCESS TO PHARMACEUTICALS

Relevant Ministries: Ministry of Health (MOH), Drug Administration of Vietnam (DAV), Ministry of Industry and Trade (MOIT), the National Assembly (NA)

### Issue description

Before a pharmaceutical company is able to introduce a new drug or vaccine to patients, it must undergo rigorous testing, including clinical trials. In general, the time from discovery of a new molecule to commercialisation takes around 10-15 years. However, the time before Vietnamese patients get access is extended by 5-7 years, as is further explained below. In order to improve patient access to medicines, a number of regulatory hurdles need to be crossed; elimination of the local clinical trial requirement, shortening the drug registration process and providing for a timelier drug reimbursement system. These recommendations will not only improve health outcomes in Vietnam, but also bring back some of the USD 2 billion spent on medical tourism every year.

### Factors leading to 5-7 years delay:

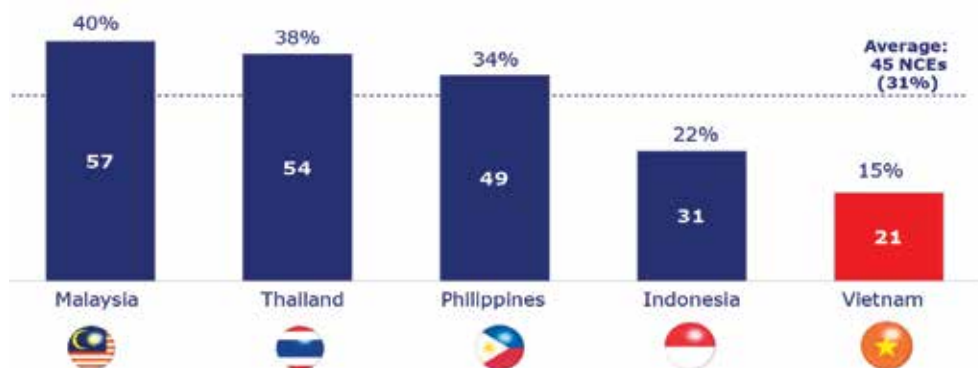
1. Local clinical trial requirement; and
2. Infrequent review of the reimbursement list.

### Local Clinical Trials

In order to ensure pharmaceuticals are effective in all 4 medical ethnicity archetypes, pharmaceutical companies conduct clinical trials globally to meet the ethnicity requirements. Vietnam qualifies under the Asian ethnicity, meaning that a global clinical trial undertaken with an Asian component is satisfactory from a medical standpoint. However, Vietnam currently requires additional clinical trials, or to wait 5 years post-registration in country of origin. This requirement extends patient access to innovative medicines by 2.5-5 years at a minimum.

In other words, Vietnamese patients get access to innovative medicine much later than patients in other countries - in fact Vietnam is the only ASEAN country that requires a local registration study.<sup>3</sup> Patient safety is the foundation of innovative pharmaceutical companies' global mission. Duplicative clinical trials that do not add additional safety protections, but impede - or delay - access to medicines are not in the best interest of the patients. The lack of new drugs in Vietnam predominantly stems from the local clinical trial requirement and 2-year visa period ahead of being granted reimbursement.

**Figure 13: Availability of the 143 New Chemical Entities (NCEs) introduced globally in the period 2007-11.**



Source: IMS MIDAS<sup>4</sup>

<sup>3</sup> Improving Patient Access to Innovative and High Quality Medicines in Vietnam, IMS Consulting Group, May 2015, Commissioned by Pharma Group Vietnam

<sup>4</sup> *op.cit.*, p.13

## Drug Registration Process (Marketing Authorisation)

All pharmaceuticals, both domestic and imported, must have a Marketing Authorisation (MA) and corresponding registration number (also called a 'visa number') prior to being put into circulation in Vietnam. The statutory time limit for issuance of an MA number is six months after submission of a proper and complete application dossier, but in practice it can take much longer. Serious difficulties arise in obtaining MA renewals (which are required every 5 years) as a renewal dossier cannot be filed until 12 months prior to expiry (a significant improvement compared to the previous 6 months!) of the preceding visa. However, as the time to obtain a renewal visa takes from 18 to 24 months in practice, companies may be forced to assume various financial/regulatory risks in the interim to continue operations.

## Reimbursement Process

Once a pharmaceutical product receives a Visa/MA number, it is still not eligible for reimbursement. This is because the National Reimbursement List (NRL) only is reviewed every 3-4 years and the review process itself takes around two years, during which time no new information or newly licensed product can be considered for reimbursement. Altogether the product may have to wait for up to 5 – 6 years for inclusion in the NRL if it has not obtained a visa by the time the list is opened for review or if its visa expires soon after the new NRL is issued, effectively causing a considerable delay in bringing new treatments to Vietnamese patients.

## Potential gains/concerns for Vietnam

Removing the local clinical trial requirement, improving the Marketing Authorisation application process and speeding up the drug reimbursement process will make the healthcare system more efficient; reducing the administrative burdens for the DAV by avoiding unnecessary clinical trials, already undertaken by agencies in other countries. More importantly, it would be in line with the Prime Minister's vision to improve patient access to new, life-saving medicines, as the patients who are suffering most from this lack of access, are those who cannot afford to travel abroad, where new medicines are available sooner. Finally, it would be aligned with the standards applied in other ASEAN countries (ASEAN Economic Community) and lead to a return of medical tourism expenditure.

## Recommendations

**Local clinical trial:** Pharma Group compliments the Ministry of Health on the proposal in the draft Pharma Law, to remove the local clinical trial requirement for drugs, biologics and vaccines. Furthermore, access to new pharmaceutical products will be significantly speeded up, if new pharmaceuticals originating from ICH countries can be granted an immediate 5-year visa, rather than the current practice of granting an initial 2-year trial period visa.

**Drug Registration Process:** Pharma Group proposes to further improve the registration process by introducing the below amendments:

- Adoption of a more efficient drug registration process.
- Processes should be streamlined to shorten registration lead time from up to 24 months to the 6 months stipulated in the Pharma Law.
- Fast-track registration process should be adopted for orphan drugs and new molecules that address a high unmet medical need.
- Vietnam should consider following the decisions of competent registration authorities of the US or EU to allow market authorisation of new drugs based on a positive prior decision for products within US, EU or reference markets (ex. Australia, Singapore).
- Accept Certificate of Pharmaceutical Products from Country of Manufacture or from reference countries without the requirement for the product to be actively marketed in the country of manufacture. This would allow Vietnamese patients access to new molecules much faster.

**Reimbursement Process:** Pharma Group suggests integrating the process of reimbursement decisions and National Essential Drug List (NEDL) management into one, centralised, seamless process, and specifically recommends to:

- Increase the frequency at which the National Reimbursement List and National Essential Drug List are reviewed and updated (currently every 3–4 years) with clear criteria for molecule selection and percentage of reimbursement. Ideally, the National Reimbursement List and National Essential Drug List would be reviewed annually to timely benefit from the availability of new treatments or new data.
- Enable faster, automated implementation of reimbursement list in public hospitals.

## II. SUSTAINABLE ACCESS

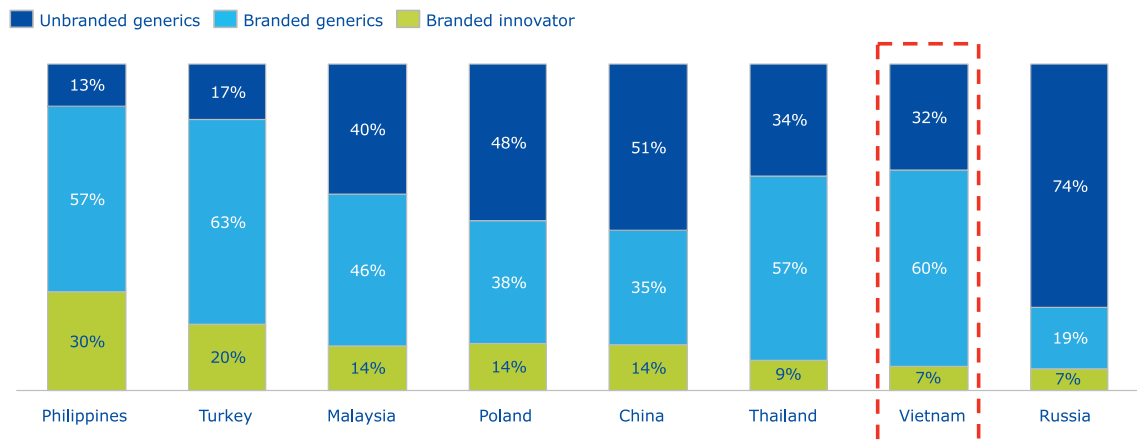
Relevant Ministries: Ministry of Health (MOH), Ministry of Planning and Investment (MPI), Ministry of Industry and Trade (MOIT), Ministry of Science and Technology (MOST)

### Government Procurement

#### Issue description

Total healthcare spend in Vietnam is amongst the lowest in ASEAN, in both absolute numbers and in terms of absolute expenditure.<sup>5</sup> It does represent a high percentage of GDP, which is a typical trend for emerging countries. Vietnam is already a highly genericised market with 93% of Government Procurement met by local/imported generics.

**Figure 14: Generic Penetration (volume) in hospital sector in Selected Emerging Markets MAT Q3 2014**



In the hospital sector, Vietnam along with Russia has the lowest original share, with generics taking up 93% of the volume sales.

Source: IMS MIDAS<sup>6</sup>

The Ministry of Health is in the process of reviewing its Government procurement scheme - the draft Tender Circular<sup>7</sup> and Tender Lists<sup>8</sup> - in line with the regulations of the New Bidding Law (effective as of July 1 2014)<sup>9</sup>. In this process a number of issues need to be effectively addressed so as to ensure continuity of supply and fast access of innovative pharmaceuticals.

<sup>5</sup> Improving Patient Access to Innovative and High Quality Medicines in Vietnam, *IMS Consulting Group*, May 2015, Commissioned by Pharma Group Vietnam

<sup>6</sup> Improving Patient Access to Innovative and High Quality Medicines in Vietnam, *IMS Consulting Group*, study commissioned by Pharma Group Vietnam, May 2015, p.23.

<sup>7</sup> The draft Tender Circular refers to the draft Inter-ministerial Circular regulating the selection of drug suppliers in health care establishments

<sup>8</sup> The draft Tender Lists refer to the draft Circular promulgating the list of drugs subject to tender, centralised tender and price negotiation.

<sup>9</sup> Law No. 43/2013/QH13 published on 26 November 2013, available at <[http://www.itpc.gov.vn/investors/how\\_to\\_invest/law/Law\\_No.43\\_2013/view](http://www.itpc.gov.vn/investors/how_to_invest/law/Law_No.43_2013/view)>

As foreign-invested enterprises (FIEs, see below) currently are not allowed to directly attend pharmaceutical tenders in Vietnam, it would effectively render some of the new proposed initiatives, such as price negotiations very difficult to implement in practice.

Furthermore, the revision of the tendering regime, provides a unique opportunity to update current shortcomings by introducing definitions of key terms such as biologics, biosimilars, etc. in order to ensure a transparent framework with clarity for all stakeholders.<sup>10</sup> In line with this proposal, clear criteria for selecting pharmaceuticals for the tender lists as well as reaffirmation that the Tender Circular excludes 'hospital service pharmacies' from the scope of what is considered 'other legitimate revenue streams of public health establishments').

### Potential gains/concerns for Vietnam

A level playing field for participation in public tenders will provide procurement agencies with more choice in terms of price and quality, contributing to the improvement and efficiency of expenditures on state budgets and health insurance funds. Moreover, a focus on ensuring a consistent quality standard/norm should take precedence over price in the introduction and implementation of the proposed centralised tendering and price negotiation mechanisms, to reduce the risk of quality and supply issues posed by the presence of numerous small generic manufacturers.

### Recommendations

While government procurement has recently focused on achieving lower prices for tenders, Pharma Group recommends that quality requirements should be increased substantially. Specifically, we recommend the Government to adopt the following policies:

- Transparent regulatory framework in the new Tender Circular with decisions justified based on verifiable criteria, including innovation, quality, and technical standards of manufacturers and implemented at local level. Access to government procurement should be based on objective criteria, of which meeting international safety/quality standards should be the primary objective. Affordability is an important criteria in a developing country. However, high-quality standards should be the primary objective to protect public health and safety.
- There is an inherent need to ensure a level playing field through the direct participation of foreign companies, instead of relying on local partners - replicating the level playing field offered in other countries. Foreign companies should be enabled to tender on par with Vietnamese enterprises, through the eradication of all technical barriers differentiating between tenderers based on nationality. Due to the fact that local companies cannot meet the requirements on treatment outlined in the Bidding Law, the 'list of domestically manufactured drugs meeting the requirements on medical treatment, price of drugs and supply capacity' should not apply to the Innovator and Generics 1 packages.

## Intellectual Property Rights - Protection of research data

### Issue description

Research & Development is a significant investment for research-based biopharmaceutical firms. Without adequate safeguards, other firms could receive significant competitive advantage by relying on innovator-created regulatory data. This explains the need for substantive Regulatory Data Protection (RDP). As part of the implementation of Vietnam's obligations under TRIPS, Vietnam currently allows for five years of RDP. However, even if theoretically companies have the possibility to apply for Data Protection, in practice this is rarely done, due to the following reasons:

1. Time consuming (different and separate procedure from the normal registration application)
2. To qualify for data protection in Vietnam, it is required that the data has been undisclosed up to the time of the application for protection. This is not always feasible in practice as data disclosure under certain conditions is a common industry practice - and is at times required by law in other jurisdictions, e.g. in the European Union and United States.

<sup>10</sup> Pharma Group has recently sent the following letters: 2407/2015-MOH-MPI-MOF/EUC-PG; 2309/2015/MOH-MPI-MOF/EUC-PG and 0411/2015/MOH-MPI-MOF/EUC-PG

As a result of the above, to our knowledge none of the Pharma Group member companies, have received the approval letter for Regulatory Data Protection.

### Trademarks

Pharmaceutical companies' IPR – especially trademarks - are infringed upon in Vietnam, and a number of medicines on the market are counterfeit<sup>11</sup>:

1. Again, the burden is on the IPR holder to monitor the marketplace and alert the relevant authorities about IPR violations. However, it should be recognised that there has been praiseworthy cooperation from law enforcement agencies and from the National Institute for Drug Quality Control (NIDQC) through increased testing. Furthermore, Pharma Group members have recently won a number of IP cases, which is a positive development appreciated by foreign MNCs.
2. Monetary fines imposed for infringement are neither sufficient nor appropriate.

### Potential gains/concerns for Vietnam

In terms of IPR, the adoption of patent protection, a strong enforcement system, Regulatory Data Protection (RDP), and other intellectual property protections that conform to international standards, would enhance Vietnam's healthcare system, create a more predictable environment for investment, promote innovation, and help address the critical health issue of counterfeit medicines. In particular, counterfeit medicines represent a serious public health risk for patients, who may purchase medicines of questionable or unknown quality.

### Recommendations

- › **Intellectual Property Rights:** Vietnam should commit to an RDP mechanism consistent with international standards, in particular putting in place a procedure that would provide for the automatic granting of RDP upon approval, without further requirements. If disclosure of the data were made elsewhere to comply with legal requirements of a certain jurisdiction, or if the disclosure were made under the provisions of Regulatory Data Protection in that jurisdiction then such disclosure should not prevent the data from being granted due protection in Vietnam.

Vietnam should also improve IPR enforcement standards and related procedures, by encouraging training of both judges and enforcement authorities. Pharma Group looks forward to working with health officials to raise awareness on the dangers of counterfeit medicines and combatting them. Finally, penalties for infringers manufacturing, supplying, or selling counterfeit medicines should be increased.

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<sup>11</sup> World Health Organisation, *FSP Mekong and Pharmaceutical Security Institute*.

**Table 5: Vietnam and TRIPS compliance**

Vietnam is TRIPS compliant, but the stance towards pharma specific laws is not favorable to foreign investors

	Malaysia	Thailand	Indonesia	Philippines	Vietnam
1) TRIPS status	Compliant	Compliant. Aiming for TRIPS plus	Compliant	Compliant	Compliant
2) No of patents in 2011	6940	6746	5838	2994	3805
3) No of patents by country of origin	294	75	17	38	85
4) Stance/trend for incremental innovation for patent extension?	Not granted?	Govt positive, though popular opinion against it.	Not granted	Not granted currently	Not allowed
5) What is the status on data protection?	Directive form only. 5 yrs from approval in origin country. 3 yrs for new indication	Limited to disclosure by government officials. Not granted for new indication	Not yet incorporated		Data protection has to be applied for separately, and has to be a trade secret. However, such data still has to be disclosed as necessary to protect the public upon the decision of the competent licensing authority.
6) Existence of Bolar provision	Bolar provision exists	Yes. On medicines	Bolar provision exists	Yes. On Medicines	Yes. On all products
7) Patent Linkage	No	No	No	In process in 2014	No

Source: IMS Market Prognosis reports  
Improving Patient Access to Innovative and High Quality Medicines in Vietnam  
2 April 2015

2. Rationale for change

A.  
B.  
C.  
D.

Source: IMS Consulting Group<sup>12</sup>

### III. LEGAL PRESENCE AND DEVELOPING LOCAL INDUSTRY

Relevant Ministries: Ministry of Health (MOH), Ministry of Industry and Trade (MOIT), Ministry of Planning and Investment (MPI), Ministry of Justice (MOJ), Ministry of Finance (MOF)

#### Issue description

##### Foreign Invested Enterprise Establishment

Current regulations are unclear as to whether a Foreign Invested Enterprise (FIE) in the pharmaceutical sector can undertake the fundamental functions which a pharmaceutical company must be able to perform in order to function. These functions are: 1) to import its products; and 2) to market its products.

Clarifications and guidance for the pharmaceutical industry have been attempted by the MOH since 2009, in the form of 13 different drafts of a Circular guiding the right to import/export by FIE pharmaceutical companies. However, official regulations have never been issued or enacted, and the industry therefore still has no certainty on this issue.

Decree 79<sup>13</sup>, which specifies the implementation of the 2005 Pharmaceutical Law,<sup>14</sup> only covers regulations for local pharmaceutical companies and 'representative offices of foreign businesses operating in the pharmaceutical sector in Vietnam'.<sup>15</sup> Representative offices are, according to the Law, not allowed to import pharmaceuticals, forcing foreign companies to rely on a complex set of arrangements for their foreign parent companies to import pharmaceuticals into Vietnam. The representative offices have a strictly limited role under Vietnamese law and are

<sup>12</sup> Improving Patient Access to Innovative and High Quality Medicines in Vietnam, *IMS Consulting Group*, May 2015, p.111. Commissioned by Pharma Group Vietnam

<sup>13</sup> Decree 79/2006/ND-CP dated 9 August 2006 detailing the implementation of a number of articles of the Pharmaceutical Law, as amended in 2012 (Decree 79).

<sup>14</sup> Law 34/2005/QH11 on Pharmacy, adopted on 14 June 2005, available at [http://www.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?itemID=6838](http://www.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?itemID=6838)

<sup>15</sup> Decree No 79.

prohibited from 'directly conducting profit-generating activities in Vietnam' – e.g. not allowed to issue invoices to business partners in Vietnam – consequently all business transactions are either offshore or cross-border in nature.

### Trading Rights

Another obstacle for pharmaceutical companies stems from an overly broad definition of the term 'distribution' in the pharmaceutical sector<sup>16</sup>, which includes marketing and re-sale activities. According to Circular 34/2013/TT-BCT dated 24 December 2013 (Circular 34), drugs and vaccines are specified as goods which foreign companies are prohibited from distributing. This results in foreign companies being unable to undertake trading – e.g. marketing activities and re-sale to licensed distributors.

**Table 6: Import and Distribution Rights – a regional comparison**

Country	As a foreign pharmaceutical company are you allowed to establish a legal entity in the country?	If yes, is the legal entity allowed to perform the following functions:						
		import/trading?	Sell to licensed distributor	Sell to Trade	Sell to Hospitals	Distribute	Promote	Education
Vietnam (currently Rep Office model)								
Malaysia					Up to a certain limit.			
Philippines								
Indonesia		Only New Chemical Entities or products that cannot be produced locally.						
Hong Kong								
Taiwan		Only product license holders can import the product to Taiwan.			If hospital is a registered pharma merchant		Direct consumer activities are not allowed	
Singapore								
Australia								
New Zealand								

Source: Pharma Group Value Survey

### Potential gains/concerns for Vietnam

The implementation of international commitments to establish FIEs will increase the level of trust of quality and operational capabilities of innovative pharmaceutical companies, while increasing FDI. If companies were to enjoy an increased sense of legal certainty, through the implementation of a simple and clear FIE regulation and with the right incentives in place, the level of investment would likely soar, making Vietnam a potential hub for ASEAN pharmaceutical manufacturing and future exports. Additional investment would also lead to the creation of more high-end jobs, increased tax revenue and a healthy and competitive healthcare sector with increased exports.

<sup>16</sup> As defined under Article 3 of Decree No. 23/2007/ND-CP (Government, 12 February 2007), 'distribution right' means the right to undertake directly activities of wholesaling, retailing, agency for purchase and sale of goods and franchising. Pharma Group requests that the full scope of the distribution right is applied to pharmaceuticals (including vaccines), which are defined to include 'any substance used by humans for the purpose of preventing, treating, or diagnosing illness, or for correcting physiological or physical functions. Law on Pharmaceuticals No. 34/2005/QH11 (National Assembly, 14 June 2005) (Pharma Law), Article 2.2.



## Recommendations

- Pharma Group recommends the full and complete implementation of Vietnam's existing WTO commitments allowing foreign investors to establish Foreign Invested Enterprises (FIEs). Under Vietnamese domestic law, such FIEs should be able to undertake the following activities, which can be categorised in two broad categories:
  1. Trading activities:
    - a. Independently import pharmaceutical drugs and vaccines into Vietnam;
    - b. Build (or use third-parties) warehouses to meet Good Storage Practice (GSP) requirements in Vietnam to store, deliver and otherwise conduct logistics related to imported pharmaceuticals;
    - c. Sell imported pharmaceuticals to either:
      - i. (a) pharmaceutical wholesalers; or
      - ii. (b) companies with pharmaceutical distribution rights in Vietnam;
    - d. Freely negotiate contracts with distributors allowing the FIEs to monitor the distribution process for issues of pharmaceutical quality and drug safety;
    - e. Perform clinical research/trials;
    - f. Partner with or invest in local partners to manufacture domestically; and
    - g. Employ local enterprises to toll manufacture for purpose of sale of drugs in the Vietnamese market.
  2. Medical education activities (for both Rep Offices and FIEs)
    - a. Fully engage in the direct delivery of medical education, through drug information to public and Health Care Professionals (HCPs), including doctors and pharmacists This is essential to enhancing the ability of HCPs in Vietnam to prescribe pharmaceuticals in the right way to ensure patient safety and pharmaceutical efficacy in the treatment of medical conditions;
    - b. directly employ medical representatives to deliver medical education;

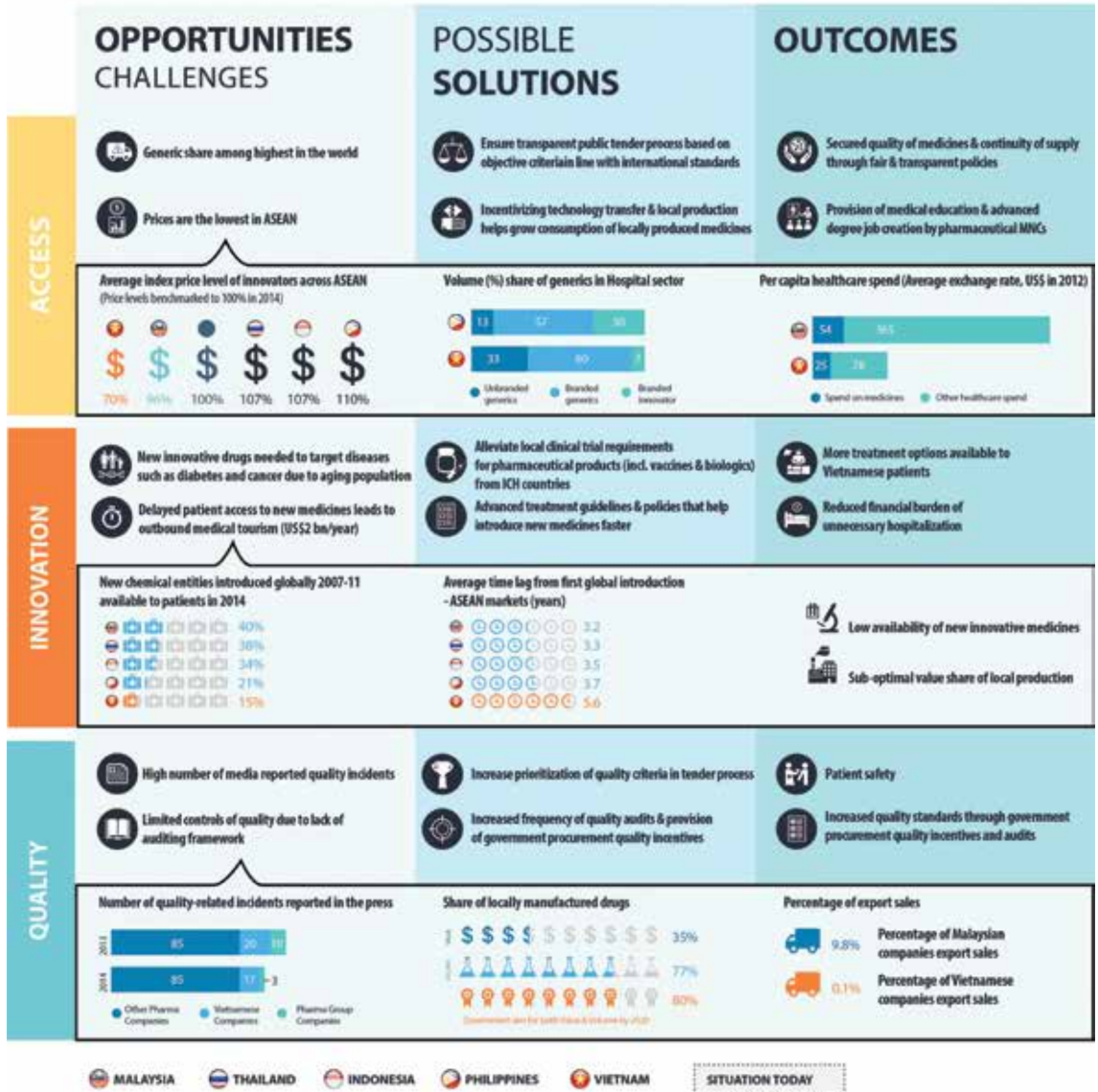
The above activities should be allowed as a package, or independently, without any one or more of them - or any other activities - being a prerequisite of another. Furthermore, such rights must be specified in the conditional business license, which should be granted in a reasonable time period; 0-6 months from proper application to the issuance of the relevant license or Investment Registration Certificate.

In addition to Vietnam's above-mentioned WTO commitments, Pharma Group hopes that adequate commitments, leading to the full liberalisation of distribution services, shall be made in the EVFTA and TPP agreements, in order to enable a level playing field with other economic agents and ensure enhanced access to innovative, safe and high-quality medicines. Consequently, any restriction under domestic law, like those under Circular 34, would need to be removed, and, furthermore, new regulations implementing full distribution rights for FIEs need to be enacted, over a pre-set period of time.

Figure 15: Partnering with Vietnam to achieve Universal Healthcare Coverage while facilitating industry development

### Partnering with Vietnam to achieve Universal Healthcare Coverage while facilitating industry development

Working together to ensure that Vietnamese patients have sustainable, equitable and fast access to high-quality, safe and innovative medicines



## ACKNOWLEDGEMENTS

EuroCham Pharma Group

## CHAPTER 18 REAL ESTATE

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### OVERVIEW

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As a result of the promulgation of the Law on Real Estate Business (LOREB) and the Law on Residential Housing (LOH) by the National Assembly of Vietnam in 2014, observers and stakeholders are expecting the Vietnamese real estate market to see more activity in the near future. New provisions of the LOREB and the LOH will likely have a positive effect on the recovery and development of the Vietnamese real estate market. A significant change in the LOH is the relaxation of the restrictions on property ownership of overseas Vietnamese and foreign organisations and individuals. That move may stimulate the development of the market and trigger significant capital resources from overseas to pour into the Vietnamese market. Furthermore, new regulations on minimum legal capital requirements for enterprises operating in real estate business (an increase from VND 6 billion or USD 266,000 to VND 20 billion or USD 889,000) will be a way to screen weak enterprises and improve the quality of the real estate market.

In addition, the LOREB supplements provisions on bank guarantees of real estate business enterprises for off-the-plan real estate before bringing them to trade on the market. The purpose of guarantee obligations for off-the-plan real estate is to protect the legal rights and interests of consumers, and prevent investors from misappropriating capital funds or not implementing or delaying the projects thus causing damage to consumers.

Besides the aforementioned significant new regulations, another issue of concern for investors is the transfer of real estate projects. When investing in real estate projects, investors are concerned about the ability to retrieve their capital from these projects, and the right to transfer projects is one of the ways for investors to withdraw their capital. A further positive effect of the LOREB is to allow investors to transfer a part of their project or the whole project without restriction on the types of project that can be transferred (i.e. under the previous regulations, projects that could be wholly transferred were limited to new urban zone projects, residential zone projects or industrial zone technical infrastructure projects). These new provisions will facilitate investors' divestment without delay. When this provision takes effect, M&A transactions will be more straightforward as businesses with strong financial capacity will acquire clean land funds to implement new projects and provide for the market.

At the date of writing, the Vietnamese Government has not yet issued any sub-law documents detailing and guiding the implementation of the LOH and only one decree, i.e. Decree 76/2015/ND-CP, has been introduced to guide the implementation of the LOREB. Any further delay in issuing such guidance may hinder potential real estate investors, from making their decisions to participate in real estate projects. More comprehensive implementing provisions are needed to create a strong and transparent legal framework to attract organisations and individuals to invest in real estate.<sup>1</sup>

Although improvements are seen in both laws as compared with previous legislation, there are still several shortcomings regarding bank guarantees for off-the-plan real estate, house ownership of foreign individuals, as well as conditions for transferring investors' real estate projects. Therefore, we would like to draw the competent authority's attention to the legal impediments to real estate in Vietnam and to formulate recommendations to the Government on how to address these issues. We welcome the opportunity to work alongside the regulators to facilitate growth and efficiency in the real estate market.

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<sup>1</sup> This chapter was finalised in November 2015

## I. OFF-THE-PLAN REAL ESTATE TRADING

Relevant Ministries: State Bank of Vietnam (SBV), Ministry of Construction (MOC)

### Issue description

As mentioned above, one of the most significant supplementations of the LOREB is that off-the-plan real estate must be guaranteed by a licensed bank before participating in the market for transactions of purchase and sale or hire purchase<sup>2</sup>. It is recommended that the State Bank of Vietnam should identify and well articulate a list of banks authorised to provide such guarantees as this requirement is completely new. Even though the LOREB took effect on 1 July 2015, the central Vietnamese authorities have not yet enacted any legal documents detailing the implementation of this requirement. Circular 07/2015/TT-NHNN of the State Bank of Vietnam dated 25 June 2015 regulating bank guarantees contains provisions on guarantees for off-the-plan real estate, but these provisions remain vague and difficult for relevant parties to implement in practice. Consequently, real estate business enterprises and banks are still struggling in the implementation of these provisions.

Although the purpose of the new provisions on guarantees is to protect the legal rights and benefits of consumers, these provisions do not seem suitable for the current situation of the Vietnamese real estate market.

Firstly, it is not necessary for all enterprises trading off-the-plan real estate to apply for a guarantee obligation, especially reputable investors in the market. A majority of clients of these companies do not have a requirement for a bank guarantee when they participate in transactions with enterprises. However, in such case the mandatory implementation of the bank guarantee will unnecessarily lead to guarantee fees, which will be included in the selling price of real estate.

Furthermore, the issue of guarantee fees is also of concern for real estate businesses when they require guarantee services from banks. Because real estate business enterprises need a guarantee from banks before carrying out transactions of off-the-plan real estate, they depend on them. Therefore, if the authority does not provide detailed limitations on guarantee fees, banks can decide these fees by themselves, which may result in inequality for real estate enterprises as banks will be free to apply different fees to different real estate businesses. Specifically, real estate businesses which are banks' subsidiaries /affiliates may be entitled to enjoy preferential guarantee fees in comparison with other enterprises.

Another point for concern is the unfair treatment against foreign real estate operators regarding the payment as stipulated in Article 57 of the LOREB 2014. This Article 57 provides that domestic real estate businesses shall be allowed to receive a maximum payment of 70% of the contract value before they hand over real estate to clients. Meanwhile, foreign-invested enterprises are only allowed to receive a maximum payment of 50% of the contract value in the same situation. Therefore, Article 57 has created unfair treatment between domestic enterprises and foreign-invested enterprises in relation to the amount of payments they may receive from their customers.

Furthermore, according to Article 56 of the LOREB, it is mandatory for all real estate business enterprises to perform guarantee obligations for off-the-plan real estate. While the guarantee obligation is the same, it would be unreasonable to allow foreign-invested enterprises to receive maximum payments that are less than that of local enterprises. Article 57 runs counter to the principles of equal treatment between domestic and foreign investors. It affects the ability to raise capital from clients of foreign-invested enterprises, thereby limiting their competitiveness on the market.

### Potential gains/concerns for Vietnam

The Vietnamese real estate market is still in the early stages of its recovery period. Thus, additional obligations which incur additional unnecessary expenses may result in an increase of real estate prices and consequently weaken the momentum of the market's recovery.

At the same time, unfair treatment between domestic and foreign-invested real estate enterprises will have a negative impact on the attractiveness of the off-the-plan real estate market for foreign investors.

<sup>2</sup> Article 56 of the Law on Real Estate Business

## Recommendations

- › The provisions on guarantee obligations for off-the-plan real estate be modified to respect the guiding principle of equal treatment as committed by Vietnam under its WTO accession. In addition we believe such regulations should target the protection of consumers' interests without causing unnecessary impediments to the business activities of enterprises.
- › Regarding rules on payment, the unfair treatment between domestic and foreign-invested enterprises is not necessary, as well as a potential violation of Vietnam's WTO commitments. Most importantly, it might negatively influence the possibility of attracting foreign investment into this potential market.
- › Vietnamese authorities should issue detailed instructions on the procedures for bank guarantee for off-the-plan real estate.
- › Bank guarantees should not be a mandatory obligation for all off-the-plan estate of all enterprises. For example, enterprises would not be required to carry out this obligation in case their customers do not require a guarantee for off-the-plan real estate when they purchase or lease these properties from enterprises.
- › The amount of guarantee fees that banks may apply for real estate business should be limited; and
- › Foreign-invested real estate business enterprises should be entitled to receiving the same amount of (pre-) payments from their customers as domestic enterprises.

## II. TRANSFER OF REAL ESTATE PROJECTS

Relevant Ministries: Ministry of Planning and Investment (MPI), Ministry of Industry and Trade (MOIT), Ministry of Natural Resource and Environment (MONRE)

### Issue description

The LOREB states that investors must obtain the certificate of land use rights for the whole transferred project (or for a portion of it in case of partial transfer project) before they transfer it to other investors.<sup>3</sup> In fact, many investors encounter financial difficulties when implementing real estate projects and want to transfer all or part of their projects to other investors. However, they cannot implement this transaction because they have not obtained a certificate of land use rights (LUR) for those projects.

According to Article 8.1 of the Circular 24/2014/TT-BTNMT, in order to be issued a certificate of LUR, investors must complete financial obligations relating to LUR. It means that they must have made a full payment for the fee of LUR to the competent authority. However, in some cases, at the time of paying the fee of LUR, if the investor has encountered financial difficulties, they then do not have enough financial capacity to implement this obligation. Therefore, they cannot satisfy stipulated conditions to be issued a certificate of LUR.

With the aforementioned restrictions, a number of investors are trapped in their own projects because they can neither transfer them nor do they have the financial ability to continue implementing them.

Moreover, before a project is transferred to another investor, such project must have a detailed master plan at the scale of 1/500 which is approved by the competent authority. As mentioned above, in order to transfer a project to another investor, a current investor must carry out procedures to calculate and pay a fee for LUR to be issued a certificate of LUR. However, after receiving a transfer for such a project, if a new investor wishes to amend the detailed master plan of a transferred project, these amendment lead to a change in the fee for LUR. Pursuant to Article 10 of the Circular 76/2014/TT-BTC, the new investor has to implement procedures to recalculate and pay such a fee for LUR in accordance with the amended detailed master plan. Thus, the new investor has to implement a similar procedure to pay the fee of LUR which has been already done by the previous investor.

<sup>3</sup> Article 49 of the Law on Real Estate Business

However, if there is no requirement on a certificate of LUR for transferring a project, the current investor does not need to implement procedures to identify and pay the fee of LUR before transferring its project. They can transfer a project to a new investor after finishing the procedure of site clearance. Then, a new investor who wishes to amend the detailed master plan of the project can do this and then identify a fee for LUR according to the amended detailed master plan to pay to competent authority to obtain a certificate LUR. Therefore, if there is no requirement on a certificate of LUR, in case of amending the detailed master plan after receiving a transfer of a project leading to a change of the LUR fee, the procedure to identify and pay a fee of LUR will be implemented only once, instead of twice as analysed above, before obtaining a certificate for LUR.

To sum up, requirement on a certificate of LUR causes a waste of time and expenses for investors to implement unnecessary procedures and it is clear that foregoing procedures can be cut down if condition on a certificate of LUR is removed.

### Potential gains/concerns for Vietnam

Strict regulations like the one abovementioned will directly affect the ability to transfer real estate projects of investors. This will result in pending investment projects and it may prevent investors from withdrawing their investment capital from these projects.

### Recommendations

With the challenges mentioned above, we suggest to:

- Further relax the conditions for the transfer of real estate projects in order to create more flexibility in the market and to make it easier for investors to withdraw their investment capital when they cannot continue their projects; and
- Investors should be allowed to transfer all or a part of a project without having the relevant certificate of land use rights for the project. Accordingly, a project can be transferred when it meets the other conditions as prescribed in Article 49 of the LOREB.

## III. HOUSE OWNERSHIP OF FOREIGN INDIVIDUALS AND ORGANISATIONS

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 Relevant Ministries: Ministry of Construction (MOC), Ministry of Natural Resource and Environment (MONRE)  
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### Issue description

According to the LOH, foreign individuals who are allowed to enter Vietnam are entitled to own individual residential houses and apartments in housing projects in Vietnam. These new provisions of the LOH extend the scope of house ownership of foreigner individuals in Vietnam.

However, there still is a conflict between the LOH and the Law on Land No. 45/2013/QH13 (LOL) 2013 regarding single house ownership of foreigners. Specifically, according to Article 161 of the LOH, foreigners owning a single house in Vietnam have the same rights and benefits as Vietnamese citizens. If such would be the case, however, foreigner individuals should be recognised as having ownership over their house and land use rights for land on which the house is located. However, according to the LOL, foreign individuals are not recognised as land users.<sup>4</sup> Therefore, when foreigners receive the transfer of a single house in a housing project, there are still insufficient legal bases for them to receive the transfer of land use rights associated with the house. And vice versa, when foreigners transfer their single houses to other organisations or individuals, are they allowed to transfer the land use rights associated with the house?

One other issue relating to these provisions is the certificate for single house ownership of foreign individuals. It is

<sup>4</sup> Articles 5 and 169 of the Land Law 2013

unclear whether they will obtain general certificates of land use rights, house ownership and assets attached to land, or only certificates of house ownership, as in the case of owning a condominium.

### **Potential gains/concerns for Vietnam**

If this issue is not clarified, it will likely cause challenges for foreign individuals when participating in transactions related to single houses in housing projects. Firstly, it will cause difficulties to quantify the house transfer price because the value of the land use rights is included in the transfer price of a house. However, real estate enterprises cannot decide whether foreigners are allowed to receive the transfer of land use rights associated with house ownership or not.

Secondly, this conflict will directly affect foreigners' transactions of single houses in Vietnam, especially when they transfer single houses to other organisations and individuals. This may hinder foreign individuals investing in the Vietnamese real estate market.

### **Recommendations**

Our recommendations are the following:

- Articles 5 and 169 of the LOL 2013 should be considered for amendment in order to recognise foreign individuals as land users; and
- Foreign individuals owning single houses should be granted the same certificates as those certificates issued to Vietnamese individuals.

## **ACKNOWLEDGEMENTS**

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VCI Legal

## CHAPTER 19 TOURISM AND HOSPITALITY

### OVERVIEW

Whilst visitor arrivals in 2014 were up by 4% from 2013 levels at approximately 7.9 million, there was a worrying trend with year on year decreases in arrivals for 13 months in a row but year on year increases in the months of June, July and August. This led to a year on year decrease of 11.3% for H1 2015 and 7.5% at the end of August 2015.

The impact of the political tensions with China and the problems faced by the Russian economy as a result of political tensions with the US and Europe were the main contributors to the decrease in arrivals from June 2014 to June 2015. Notwithstanding the above, mainland China is still the largest inbound market with 1.1 million arrivals in the first 8 months of 2015.

In 2014, visa waiver countries (South Korea, Japan, Norway, Sweden, Finland and Denmark) except Russia showed an average a 5% year on year increase and in H1 2015 there was an average 8% increase over the corresponding H1 of 2014.<sup>1</sup> South Korea registered the biggest growth with 13% in 2014 and 32.9% in the first 8 months of 2015.

Travel and tourism is a major contributor to both employment and to the gross domestic product (GDP) and in comparison to other major contributors seems often sadly neglected. Worldwide, the total contribution of travel and tourism to GDP (including wider effects from investment, the supply chain and induced income impacts) in 2014 was 9.8% of GDP. In 2014, total contribution of travel & tourism to employment in the world, including jobs indirectly supported by the industry, was 9.4% of total employment, a figure that is expected to reach 10.7% in 2025.<sup>2</sup>

The objectives targeted in the Government's National Strategy (for 2020, vision 2030) regarding the development of the tourism industry<sup>3</sup> are to: attract 10-10.5 million international visitors by 2020, serve 48 million domestic tourists, increase tourism revenue to USD 18-19 billion by 2020 and contribute 6.5-7% of GDP by 2020. There are several key issues that we continue to believe need to be addressed in order for the travel and tourism industry to achieve its full potential and for Vietnam to achieve its development plan 2020 and Vision 2030.

Prior to addressing these, we would like to congratulate all Ministries on the recent granting of visa exemptions to 5 major European countries plus Belarus and for the minor improvements in the processing of E visa applications at Tan Son Nhat International Airport in particular. We further congratulate the Government on the bold move to allow foreign ownership of residential property which we anticipate will increase the percentage of return visitors to Vietnam.

Some of the major hindrances which we wish to see addressed will be covered in our chapter: Entry Visa Policy; Destination Marketing, and Land Use costs and tax issues.

<sup>1</sup> 'International visitors to Vietnam', *Vietnam National Administration of Tourism (VNAT)*, 2015. Data available at <<http://vietnamtourism.gov.vn/english/index.php/cat/1501>>

<sup>2</sup> 'Travel & Tourism Economic Report 2015 World', *World Travel and Tourism Council*, 2015 p.1. Available at <<https://www.wttc.org/-/media/files/reports/economic%20impact%20research/regional%202015/world2015.pdf>>

<sup>3</sup> Decision of the Prime Minister No. 2473/QĐ-TTg dated 30 December 2011 approving the strategy for development of Vietnam's tourism through 2020, with a vision toward 2030.



## I. ENTRY VISA POLICY

Relevant Ministries: Ministry of Foreign Affairs (MOFA), Ministry of Public Security (MPS), Ministry of Culture, Sports and Tourism – Immigration Department

### Issue description

The strict visa policy for most countries requiring a visa prior to travel or a visa on arrival together with the relatively high cost is deterring higher spending Free Independent Travellers (FITs) visiting the country.

### Entry Visa Policy Trend

Entry visa policy is one of the Government policies' that has the biggest impact on the international tourism flow. International tourists consider visa procedure as an additional setback in terms of cost and time. If the cost for visiting a destination exceeds tourists' budget, they will choose a more convenient alternative one. To increase the competitiveness, attract direct investment and international tourist flows (in order to increase foreign currency income and create jobs), many countries are studying the option of step by step expanding the visa exemption, in order to make them more competitive in the market.

### Impact of visa policy simplification

In 2014, Thailand had 24.8 million international arrivals and exempted visas and fees for citizens from 52 countries in total while Malaysia received 27.4 million international arrivals and exempted visa fees for 164 countries. Similarly, Singapore received 15.1 million international arrivals and granted visa free entry to citizens of about 150 countries.<sup>4</sup>

### Visa on arrival, Visa Exemptions and Waivers

Currently Vietnam has visa exemption for citizens of ASEAN Countries and visa exemption for citizens of Japan, Russia, South Korea and 10 European and Nordic Countries). Our regional competitors have a much more liberal regime as shown below:

**Table 7: Regional comparison of visa policies**

Countries	Visa exempt/free	Visa on arrival/e-visa
Brunei Darussalam <sup>5</sup>	52	7
Cambodia <sup>6</sup>	7	All countries except Afghanistan, Algeria, Arab Saudi, Bangladesh, Iran, Iraq, Pakistan, Sri Lanka, Sudan, Nigeria
Indonesia <sup>7</sup>	45	32
Lao PDR <sup>8</sup>	15	All nationalities except 29 countries
Malaysia <sup>9</sup>	164	N/A
Myanmar <sup>10</sup>	7	101

<sup>4</sup> 'Vietnam ministries float visa waiver for tourists from 9 countries, *TuoitreNews*, 29/08/14. Available at <<http://tuoitrenews.vn/business/22008/vietnam-ministries-propose-visa-waiver-for-tourists-from-9-countries>>

<sup>5</sup> 'Visa information', *Ministry of Foreign Affairs and Trade Brunei Darussalam*, 2015. Available at <<http://www.mofat.gov.bn/Pages/Visa-Information.aspx>>

<sup>6</sup> 'Cambodia e-visa application'. Available at <<https://evisa-cambodia.online/>>

<sup>7</sup> 'Indonesia Offers Visa Free Travel for 30 more Countries', *Jakarta Globe*, 17/03/15. Available at <<http://jakartaglobe.beritasatu.com/news/indonesia-offers-visa-free-travel-30-countries/>> and 'Visa Immigration', *Bali.com*, 2015. Available at <<http://www.bali.com/visa-indonesia-entry-requirements-bali.html>>

<sup>8</sup> 'Lao Visa Exemption', *LaosVisas.com*, 2015. Available at <<http://www.laosvisas.com/laos-visa-news/lao-visa-exemption/>> and 'Visa on arrival', *Laos-Guide999*, 2015. Available at <<http://www.laos-guide-999.com/visa-on-arrival.html>>

<sup>9</sup> N. Natahadibrata 'Free visas for 30 nations violates law, may not fly', *The Jakarta Post*, 23/03/15. Available at <<http://www.thejakartapost.com/news/2015/03/23/free-visas-30-nations-violates-law-may-not-fly.html>>

<sup>10</sup> 'Notice to tourists', *Ministry of Immigration and Population*, 2015. Available at <<http://evisa.moip.gov.mm/noticetotourists.aspx>>

Countries	Visa exempt/free	Visa on arrival/e-visa
Philippines <sup>11</sup>	157	Most nationalities with exceptions
Singapore <sup>12</sup>	All countries not included in assessment I and II	N/A
Thailand <sup>13</sup>	52	19
Viet Nam <sup>14</sup>	21	All except 31 countries <sup>15</sup>

A report published by the World Tourism Organisation (UNWTO) and the World Travel & Tourism Council (WTTC) highlighted that international tourist arrivals increase from 5% to 25% as a direct result of visa facilitation.<sup>16</sup> Therefore, we believe Vietnam should be looking at the major higher spending tourist markets as well as markets for trade and investment and introduce an expanded number of countries whose citizens are eligible for visa on arrival or visa exemption.

### Exemption period and the 'Thirty day rule':

Whilst we welcome the further visa exemptions we do not consider the period of 15 days to be sufficient for many foreign visitors, particularly as Vietnam develops its long haul flights to Australasia and Europe. Many visitors arriving in Vietnam and departing Vietnam often want to stay for 21 or 30 days particularly if they also plan to visit neighbouring countries. In this case, they get caught by the no return within 30 day rule which then requires them to apply for a visa. This no return within 30 day rule is also very inconvenient for investors whose employees need to visit on a regular basis.

### Recommendations

- Immediately expand the list of visa exemption countries to include all EU member countries; countries in the TPP who do not have visa waiver namely Australia, Brunei, Canada, Chile, Mexico, New Zealand, Peru, USA and India.
- Move to a true visa on arrival system for all current visa waiver countries plus the countries mentioned above.
- Introduce a true E-Visa where visitors can get their visa on line and print for processing at immigration.
- Reduce visa fees which are the second highest in Asia but consider a premium for E visa and E visa application.
- Extend the visa exemption period from 15 to 30 days.
- Allow return within 30 days where passengers can show flights departing Vietnam within the 30 day period; and
- Create a visa free zone (similar to Phu Quoc) for major/regional international airports, initially Hanoi, Ho Chi Minh City and Da Nang in order to create a stop-over visitor industry.

## II. DESTINATION MARKETING

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 Relevant Ministry: Ministry of Culture, Sports and Tourism (MCST)  
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### Issue description

The lack of funding for the Vietnam National Tourism Administration (VNAT)'s destination marketing program is costing us competitiveness when compared to our higher spending neighbours. This is also increasing the necessity to find other ways at central level and provincial level to boost spending on destination marketing.

<sup>11</sup> 'Immigration', *Bureau of Immigration*, 2015. Available at <<http://www.immigration.gov.ph/index.php/faqs/travel-req>>

<sup>12</sup> 'Eligibility', *Singapore Immigration & Checkpoints Authority*, 2015. Available at <<http://www.ica.gov.sg/page.aspx?pageid=168>>

<sup>13</sup> 'Visa Exemption (Bilateral Agreement)' and 'Visa on Arrival', *ThaiEmbassy.com*, 2015. Available at <<http://www.thaiembassy.com/thailand/changes-visa-exempt.php>>

<sup>14</sup> 'Vietnam Visa Exemption', *Vietnam Visa Easy*, 2015. Available at <<http://www.vietnamvisa-easy.com/pages/vietnam-visa-exemption>>

<sup>15</sup> 'Vietnam Visa on Arrival', *Vietnam-tourist-visa*, 2015. Available at <[http://www.vietnam-tourist-visa.com/en-gb/FAQ/1012\\_651/Which-countries-cannot-be-supporting-Vietnam-visa-on-arrival-online.aspx](http://www.vietnam-tourist-visa.com/en-gb/FAQ/1012_651/Which-countries-cannot-be-supporting-Vietnam-visa-on-arrival-online.aspx)>

<sup>16</sup> 'The Impact of Visa Facilitation on Job Creation in the G20 Economies', *World Travel & Tourism Council*, Report prepared for the 4th T20 Ministers' meeting Mexico 16-16/05/12, p.4. Available at <[http://www.wttc.org/-/media/files/reports/policy%20research/visa\\_facilitation%20g20.pdf](http://www.wttc.org/-/media/files/reports/policy%20research/visa_facilitation%20g20.pdf)>

### Public-private partnership and destination competitiveness

The business of tourism is complex and fragmented and, from the time that visitors arrive in the destination until they leave, delivering excellent value depends on many organisations working together in unity. This is a key challenge in a region where, at present there is limited cooperation and communication between the public and private sectors, and between competing private sector companies.

Most destination management issues arising in the region need to be addressed at the provincial level. This is where existing structures of Government should be strengthened. It is therefore important that effective governance structures for tourism are put in place locally. It is at the local destination level that many services vital to tourism are delivered and where the positive and negative socio-economic and environmental impacts of tourism are most apparent, requiring sound local planning and management.

Destination management at present is largely the responsibility of Departments of Culture, Sport and Tourism (DCSTs) reporting to People's Committees and, occasionally, to the VNAT. In general, there are no structures for shared responsibility between Government agencies which impact tourism, or between DCSTs and the business sector. DCSTs do not formally meet with the business sector and industry representation organisations in the provinces are weak. Financial resources for marketing are very constrained and not transparent.

### Recommendations

Our members feel that active involvement of the MCST and the Government in enabling and supporting the development of destination management structures in key provincial regions is necessary. Furthermore, we believe that the private industry should be incorporated into these destination management bodies as key stakeholders.

We also recommend the following specific measures:

- Establish improved mechanisms for communication between tourism-related businesses, associations and the public sector; work with industry groups and associations in working groups on a regular basis; coordinate organisational structures.
- Put in place region-wide coordination structures to focus and maximise the actions of cooperating provinces and facilitate cooperation.
- Strengthen public-private cooperation for promotion and marketing at destination levels to support responsible tourism products and services.
- Adopt green and responsible tourism agendas and implement them.
- Develop stronger regional products that clearly reflect destinations and attractions of Vietnam.
- Create the regional linkage in tourism product development; and
- Deliver professional marketing, focussed on specific target markets and address issues such as greater awareness, electronic media and seasonality to improve business viability.

### Joint marketing initiative between the Tourism Advisory Board (TAB) and the Vietnam Administration of Tourism (VNAT)

Following the establishment of the TAB in 2014, industry stakeholders have worked with officials from the VNAT to revitalise Vietnam's tourism industry and improve the country's international marketing efforts by allowing government and industry leaders to pool their financial, human and intellectual resources. VNAT and the TAB are undertaking a joint marketing initiative focused on key international markets to market Vietnam tourism globally by redeveloping key assets (e.g. website, social media, branding campaigns) and programs (trade shows, junkets, etc.). Public and private sources will contribute to the funding of these projects.

### Budgetary Constraints

This joint marketing initiative is unprecedented in Vietnam and entails collaboration between public and private stakeholders. The long-term objective will focus on building VNAT's capacity to administer similar, best-in-class campaigns and to collectively lobby support for the government to contribute additional funding tourism promotion. In order for this partnership to work, the TAB is requesting for formal commitments from MCST/VNAT to contribute funds to a joint marketing initiative to be administered by TAB in conjunction with VNAT. The aim is to achieve a 1:1 matching of Public-Private contributions.

At present, the funding that is contributed to marketing Vietnam globally is less than USD 1.5 million. This amount is substantially inadequate for VNAT to be effective and is a fraction of what Vietnam's neighbouring competitors contribute to their national tourism boards (USD 130 million in Malaysia, USD 86 million in Thailand, or USD 3.5 million in Cambodia).<sup>17</sup> We cannot emphasise enough the importance of the travel and tourism industry to Vietnam's economy. The industry generates nearly 10% of GDP on an indirect basis. Thus, it is imperative for the government to recognise the industry's contribution to the socioeconomic welfare of the State in order to properly support the industry through an adequate budget for international marketing.

### Recommendations

Our membership strongly advocates the Government to recognise the importance of the tourism industry and its socioeconomic impact by contributing additional funding in promoting Vietnam tourism internationally. In addition to public funding, the Government should enable public-private partnerships for building trade alliances and marketing initiatives.

We also recommend the following specific measures:

- To increase Vietnam's tourism promotion budget significantly to reflect the socioeconomic impact of the tourism industry.
- Develop broader initiatives with the private industry to undertake destination marketing as well as destination management activities; and
- Develop world class initiatives - VNAT should work more closely with the private industry and also appoint internationally recognised agencies (e.g. advertising and branding agencies).

## III. LAND AND RELATED TAX ISSUES

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 Relevant Ministries: Ministry of Finance (MOF), Ministry of Natural Resource and Environment (MONRE)  
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### Issue description

Investment decisions made around the level and scope of tourism and hospitality projects are driven significantly by the implications of land policy.

### Land Acquisition and Land Use Policy

Vietnam's constitution and the Land Law, 45/2013/QH-13 dated 29 November 2013, provides that all land is owned collectively by the People and that only land use rights may be granted to individuals and enterprises either through an allocation or a lease arrangement. For leased land, which is generally the form of acquisition for tourism and hospitality investment, the tenor of the lease is 50 years with some exceptions of 70 years. This is relevant as it imposes a fixed period over which the value of the investment can be realised and therefore is a significant factor in financial feasibility and return calculations. Regional competitors in comparison, allow for some form of freehold which provides both for the ability to front-load the return profile and create a more robust financial return profile.

Investment incentive is further limited by the lack of clear regulations and policy direction with respect to the ability to include residential components for master plan approval (zoning) on land which is located on beach

<sup>17</sup> 'Vietnam blames ineffective tourism promotion campaigns on shoestring budget', Tuoi Tre News, 04/06/15. Available at <<http://tuoitrenews.vn/business/27271/vietnam-blames-shoestring-budget-for-ineffective-tourism-promotion-campaigns>>

front property adjacent to the ocean. There has been inconsistent treatment by provincial authorities with respect to this. The successful development of a critical mass of high quality, high-end resorts in Da Nang and Quang Nam can be attributed to a more liberal view of the ability to develop vacation residences (with the issuance of pink or even red books) by these provincial governments. When a vacation residence in a resort is 'owned', but put back into a hotel rental pool arrangement, this has the benefits of: a) creating a cheaper source of financing (buyer financing) for the investor for the development of high-quality tourism products and b) creating an incentive for repeat visitation to the property by the owner as well as an incentive to promote the tourism property due to an economic interest in the success of the hotel room rental pool. Given the recent legal development allowing foreigners to own real property assets in Vietnam, this could potentially be a strong promotional scheme to encourage improvement of the return visitation rate which has been very poor for international visitors as recently reported at being only 6%.<sup>18</sup>

### Land Rent

The Land Law, 45/2013/QH-13 dated 29 November 2013 and Decree 44/2014/ND-CP dated 15 May 2014, are the primary documents for guiding the determination of land use rent to be paid by lease-holders. A major change from the previous legal framework is that land prices will be published every five years rather than annually with a mechanism for adjustment only in the event that prices are deemed to have changed by a factor of 20%.

While it is still too early to judge how the new regulatory framework will work in practice, it is important to note that the 'coefficient method' for land valuation still applies under Decree 44/2014/ND-CP. Previously this method has resulted in land use rent levels which were higher for service industry (hotels and other tourism projects) than for other land uses. While there are preferential regimes for Industrial Zone and Export-processing zones, the same treatment is not applied to land being used to develop Vietnam's tourism industry. It is important to view internationally focused tourism as an export activity that generates foreign currency earnings. Incentives, including land use pricing, should take this into account to encourage further investment and development.

### Potential gains/concerns for Vietnam

The biggest area for concern and potential gain is to make Vietnam more competitive for investment capital compared with its regional competitors. Table 8 shows Vietnam's position relative to the competitive based on proximity and some level of similarity in both offering and target markets for inbound tourism (hereafter called collectively 'the Competitive Set'): Cambodia, Malaysia, Philippines and Thailand.

It is difficult to make a direct comparison given the difference in the treatment of land under the differing legal systems. However, it is clear that the more successful attractors of inbound tourism provide clear incentives. Malaysia and Thailand have substantial incentives for the development of tourism businesses, including hotel development. Malaysia has programs of Pioneer Status and Investment Tax Allowances which offer substantial economic benefit to developers of hotels.

The development of the tourism industry should be viewed in the same context as other industries, recognising that there is competition not only for attracting visitors, but also competition for attracting capital to the tourism and hospitality infrastructure which will help to attract and support those visitors.

### Recommendations

- Master Plans for key areas with development potential for tourism should be given priority both at the central and provincial levels and should be coordinated with a unified tourism development strategy and plan. Particular attention should be provided to ensure infrastructure development.
- Support should be given to provide formal clarification and support for the permission to designate some portion of beach front land adjacent to the ocean. It is recommended that projects that are licensed for the development of five-star, international standard developments, particularly those that have a distinct destination element (such as golf courses, entertainment centers, access to medical tourism, etc.) should be given priority to develop a component of the project as residential for sale.
- An incentive package on preferential land use pricing for tourism projects (particularly those within an identified tourism focused master plan) should be developed to put tourism and hospitality on an equal footing with other encouraged investment sectors.

<sup>18</sup> Only 6% of international tourists return to Vietnam:survey, Tuoi Tre News, 11/02/14. Available at <<http://tuoitrenews.vn/business/23748/only-6-of-intl-tourists-return-to-vietnam-survey>>

Table 8: Comparison of data points with Competitive Set

No.	Categories	Taxes and Fees	Vietnam	Cambodia
1	Governing Laws		Real Estate Business Law Land Law	Land Law
2	Tenure of Land		Long-term or term Use Right max 50 years with renewable to additional 50 years	Free-hold and Lease hold up to 99 years
3	Tenure of Property for Developers and Owner		Permanent or term- ownership. From July 1, 2015 foreigners are allowed conditional ownership of landed and apartment properties	Permanent or term- ownership. Foreigners can conditionally own properties
4	Land and Property Taxes			
	One-time fee and Taxes - Acquisition and/or purpose change	Acquire directly from the government to attract Investment		Data still to be sourced
		Transfer Tax	2% of Property/Land Value	4% on all 'hard title'
		Fees	re-registration fee of 0.5%	
4	Land and Property Taxes (cont.)			
	Ongoing and recurring			
		Land un-developed	0.03% annual on government pricing	an annual land tax of 2% is levied on all unused properties on market price by square meter
		Property Tax	No applicable law regarding property tax	0.10%
		Rental Taxes	Individual on PIT of taxable invoice income on the person receiving income. Consolidated year end with other income	withholding tax of 10% on rental amount

Source: Vietnam's constitution and the Land Law, 45/2013/QH-13 dated 29 November 2013  
Decree 44/2014/ND-CP dated 15 May 2014

Malaysia	Philippines	Thailand
Real Property Law	Real Estate Taxes	Building and Land Act
Free-hold and Lease-hold	Conditional Free-hold and Lease-hold	Free-hold and Lease-hold. Foreigners are allowed max 30 years Lease renewable to add 30 years
Permanent or term- ownership. Foreigners are allowed to own properties. Special government program: MM2H	Only Filipinos or companies with domestic equity of > 60% can Permanent or term- ownership.	Permanent or term- ownership
Market-based. GST tax of 6% and Stamp Duty tax of up to 3%	Market-based. VAT charge of 12% on transaction and a Documentary stamp tax of 1.5% on conveyance.	Market-based. Land tax of 3.3% and Documentary stamp tax of 0.5% on conveyance.
	0.25-0.75% of selling or zone value	
	Documentary stamps 1.5%	
		Small tax depend on location. Will be < 0.5% if commercial and < 0.1% of residence
6% annual payment	Real property tax 1- <2% depends on locations payable 1st quarter of Year	Exempt for the 1st owner occupied, but not quite on other owners properties. Foreigners own through a company will have to pay property tax even without rental. New Property Tax - all - <0.5% of commercial use and <0.1% if own use
22.4% after deducting all relevant costs including depreciation, annual property tax, operation expenses (management services)	Local residents have much better deductible rate otherwise non-resident foreigners pay 25% of rental	12.5% of annual rental value or annual assessed rental value whichever higher

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Hawkins Pham, Managing Director, Indochina Capital HCMC

### **III. Land and related tax issues**

Colin M. Pine, General Director, Ho Tram Project Company Ltd



## CHAPTER 20 WINE AND SPIRITS

### OVERVIEW

Across Vietnam locally produced beer, spirits and 'fruit wine' are widely consumed in towns and cities whereas imported wine and spirits tend to be consumed in modern outlets such as hotels, bars, restaurants and clubs in big cities and typically by high-income consumers. As well as well-known and internationally renowned commercial beverage alcohol, home-made beverage alcohol, consumption of which may be particularly harmful to the health and well-being of consumers is commonplace and particularly popular among lower income households in rural and sub-urban areas.

The Vietnamese beverage alcohol market continues to develop in recent years. Beer (with total consumption standing at nearly 3.1 billion litres in 2014 alone)<sup>1</sup> leads the way, followed by vodka the second fastest-growing category. Cognac consumption remained stable while consumption of wines and whisk(e)y brands have steadily increased. An increasing number of local spirits brands have appeared on the market and are beginning to gain market share.

Vietnam is a priority market for the European wine and spirits industry. A middle-income country with favourable demographics, Vietnam is a market with strong and arguably unfulfilled potential for European imports in this field. With the upcoming implementation of the EU-Vietnam Free Trade Agreement (EVFTA), the industry predicts an increase in consumption of European wine and spirits. The formal Vietnamese spirits market was estimated at more than 4.4 million nine-litre cases with wine at approximately 1.4 million nine-litre cases in 2014. Volumes of imported spirits have increased by over 50% since 2009 whereas volumes of local spirits have increased by over 370% in the same period.<sup>2</sup> However, these volumes are dwarfed by the volumes of home-made and illicit liquor which is estimated at over 28 million nine-litre cases (around 250 million litres)<sup>3</sup>. This segment poses major health risks and deprives the Government of Vietnam of significant tax revenue. Eliminating the trade of illicit alcohol should be the primary focus of the National Policy for the Preventing and Fighting against the Harmful Effects of Alcohol Abuse (NAP).<sup>4</sup>

We anticipate rapid growth in imported wine and spirits categories in the coming years as tariff reductions due to various of Free Trade Agreements (FTAs) such as EVFTA, Trans-Pacific Partnership (TPP) etc. and rising incomes encourage more Vietnamese consumers to move away from the illicit sector and switch to premium imported drinks. However, we continue to face a number of trade, tax and regulatory challenges.

Amongst some of the concerns that were mentioned in last year's edition of the Whitebook. The issue of traceability remains important to the industry. It is recommended that a stronger protection of EU wines and spirits producers' original lot codes be enforced by legal prohibitions on the tampering, blurring, erasing or removing the traceability information (i.e. 'decoding') by Vietnamese legislation without introducing a new-country specific coding requirement which would duplicate requirements that these producers already conform to. Furthermore, in light of the EVFTA and according to a memo released by the European Commission on 4 August 2015<sup>5</sup>, Vietnam will now provide recognition and protections to the following key European Geographical Indications (GIs): Champagne, Irish Whiskey, Swedish vodka, Cognac and Scotch Whisky. The industry respectfully requests Vietnam to ensure a strict enforcement of Vietnam's IPR laws, especially on GIs, reducing unnecessary burdens for the enforcement procedures and improving cooperation between law enforcement services and brands protected by GIs.

<sup>1</sup> 'Người Việt uống 3,1 tỷ lít bia trong năm 2014', *Vn Express*, 23/01/15. Available at <<http://kinhdoanh.vnexpress.net/tin-tuc/doanh-nghiep/nguoi-viet-uong-3-1-ty-lit-bia-trong-nam-2014-3138223.html>>

<sup>2</sup> 'IWSR Country Report 2015', *Vietnam International Wines and Spirits Record*, 2015. Available at <<http://www.theiwsr.com/index.aspx?ReturnUrl=%2f>>

<sup>3</sup> Industry estimates based on 'Global Status Report on alcohol and health 2014', *World Health Organisation*, 2014, p.296. Available at <[http://apps.who.int/iris/bitstream/10665/112736/1/9789240692763\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/112736/1/9789240692763_eng.pdf)>

<sup>4</sup> 'Committee to target growth alcohol problem', *Vietnam Plus*, 05/05/2014. Available at <<http://en.vietnamplus.vn/Home/Committee-to-target-growing-alcohol-problem/20145/49791.vnplus>>

<sup>5</sup> 'EU and Vietnam reach agreement on free trade deal', Press Release from the *EU Commission*, 04/08/15. Available at <[http://europa.eu/rapid/press-release\\_IP-15-5467\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5467_en.htm)>

Regarding the licensing issue on Decree 94/2012/ND-CP dated 12 November, 2012 on liquor production and trading (Decree 94) which was presented in the 2015 Whitebook, we highly appreciated the promulgation of Circular 60/2014/TT-BCT dated 27 December 2014 of the Ministry of Industry and Trade (MOIT) to replace Circular 39/2012/TT-BCT for implementation of Decree 94, in which there is no requirement on liquor retail license for on-trade/service on the spot channels such as hotel, bars and restaurants. We also noted the promulgation of Decision 2219/QD-BCT dated 12 March 2015 of MOIT regarding the approval of 'Master Plan of the network of liquor trading, distribution and wholesale in Vietnam by 2025, vision up to 2035' in which there are many busy cities/provinces for which the quota for wholesale licenses was already exceeded. Nevertheless, the key concern remains the restriction on the distribution channels of importers. These restrictions run contrary to Vietnam's World Trade Organisation (WTO) accession commitments and ongoing obligations under the WTO. We are deeply concerned about restrictions imposed upon the ability of importers of beverage alcohol to partake freely in distribution and wholesale activities nationwide. We are now at a critical point where an urgent solution is required following our recommendations in last year's Whitebook.

This position paper outlines three key challenges and recommendations that will help increase Government revenue, support industry growth, and encourage a responsible drinking environment for those who choose to drink.

## I. EU-VIETNAM FREE TRADE AGREEMENT

Relevant Ministries: Ministry of Industry and Trade (MOIT); Ministry of Finance (MOF); Ministry of Science and Technology (MOST)

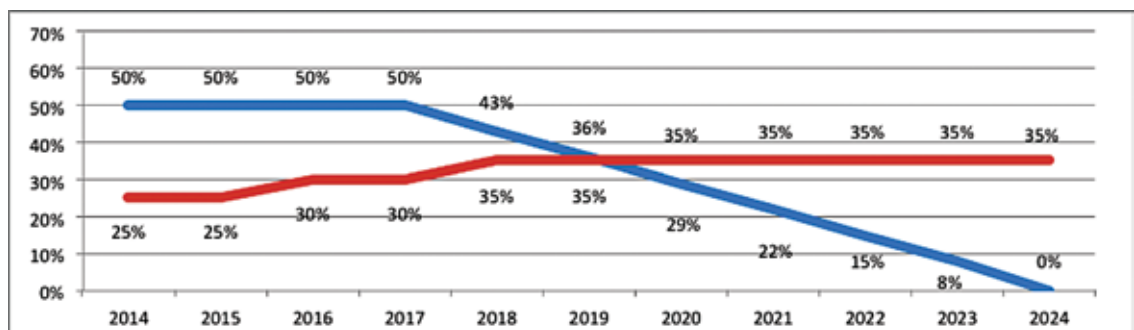
### 1. Tariff Concession and Elimination

#### Issue description

Vietnam currently levies import tariffs of 50% on wine, 45% on spirits (blue line).<sup>6</sup> These tariffs are high and, along with the Special Consumption Tax (SCT) (red line)<sup>7</sup>, create incentives for smuggling and other informal activities, impacting the ability of the Government to collect sufficient tax revenue. We believe the progressive tariff elimination on wines and spirits arising from the EVFTA will help improve the tax-paid proportion of importation of European wines and spirits and will thereby significantly reduce smuggling and other informal activities in Vietnam.

According to a Memo prepared by the European Commission on the EVFTA dated 4 August 2015<sup>8</sup>, the tariff for European wine and spirits will be completely liberalised 7 years after entry-into-force of the FTA.

**Figure 16: Anticipated evolution of import tariff and SCT for Wines from 2014-2024.<sup>9</sup>**

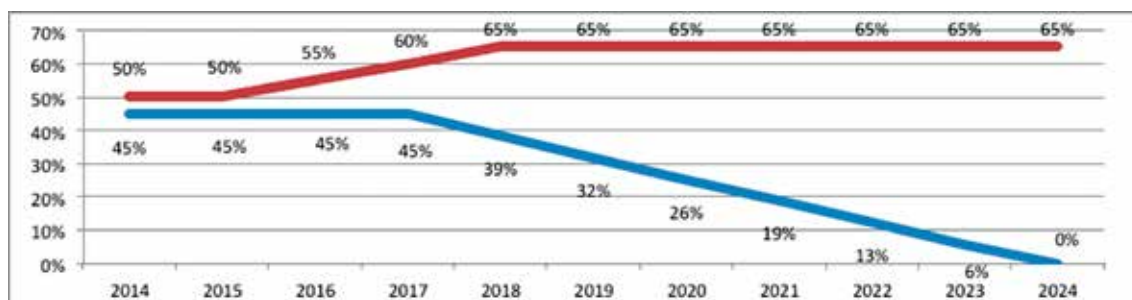


<sup>6</sup> Circular 164/2013/TT-BTC dated 15 November 2013

<sup>7</sup> Law 70/2014/QH13 Amendment of some articles of Law on Special Consumption Tax

<sup>8</sup> 'EU and Vietnam reach agreement on free trade deal', Press Release from the *EU Commission*, 04/08/15. Available at <[http://europa.eu/rapid/press-release\\_IP-15-5467\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5467_en.htm)>

<sup>9</sup> These charts are based on the assumption that (1) import tariff: EVFTA will come into force from 1 Jan 2018 and (2) SCT: no change on the tax rate after 2018. Available at <[http://trade.ec.europa.eu/doclib/docs/2015/august/tradoc\\_153674.pdf](http://trade.ec.europa.eu/doclib/docs/2015/august/tradoc_153674.pdf)>

Figure 17: Anticipated evolution of import tariff and SCT for Spirits from 2014-2024.<sup>10</sup>

### Potential gains and/or loss for Vietnam

Given the price differentiation between locally produced products and imported wines and spirits, it is clear that local and importer categories target different consumer groups. Tariff reduction will therefore have minimal negative effects for the legitimate local industry. A gradual phasing out of import tariff through the implementation of the EVFTA will bring the already very high tax burden on European wine and spirits to a level that will encourage legitimate and tax-paid importation, thereby reducing the economic incentive for smuggling, counterfeit and other forms of illicit activity. The EVFTA will allow EU exporters and investors to access a fast-growing market of more than 90 million people and consolidate their presence in one of the most dynamic regions in the world. It will further enable Vietnamese consumers to enjoy a wider range of high quality consumer products.

### Recommendation

- We strongly recommend to the Vietnamese Government that an uncomplicated and stable tax policy which aligns with tariff concession and eliminations agreed under the EVFTA for imported European wine and spirits is maintained. This will capture more tax-paid on imported products, significantly reduce smuggling and other informal activities and protect the health and well-being of consumers in Vietnam.

## 2. Rules of Origin/Trans-shipment through regional hubs

### Issue description

In order to realise the tariff concession benefits arising from the EVFTA, we recommend that the Rules of Origin (ROO) shall take into account the use of Asian hubs to ensure supply chain efficiency in the international trading environment. This will enable the industry to consolidate shipments and ensure compliance with specific domestic requirements of the importing country and necessary non-alteration operations such as storage, splitting of consignments, applying market specific labels and tax stamps (where required), which are all carried out in bonded warehouse under strict customs supervision in Asian hubs. Invoicing consolidation may also be adopted to provide further flexibility. This model adds efficiency, saves costs, and decreases order fulfilment time without diminishing the origin status of EU goods.

### Potential gains and/or loss for Vietnam

With reference to existing FTAs and ROO<sup>11</sup> regulations, Vietnam has demonstrated prudence and flexibility by ensuring that ROOs in its FTAs are sufficient to ascertain origin for preferential tariffs and remain compatible with modern supply chain arrangements. This promotes bilateral/regional trade and economic development to its fullest potential.

<sup>10</sup> These charts are based on the assumption that (1) import tariff: EVFTA will come into force from 1 Jan 2018 and (2) SCT: no change on the tax rate after 2018. Available at <[http://trade.ec.europa.eu/doclib/docs/2015/august/tradoc\\_153674.pdf](http://trade.ec.europa.eu/doclib/docs/2015/august/tradoc_153674.pdf)>

<sup>11</sup> 'FTA welcomes EU-Vietnam trade deal, but raises concerns on rules of origin', *Foreign Trade Association*. Available at <[http://itp.fta-intl.org/news/fta-welcomes-eu-vietnam-trade-deal-raises-concern-rules-origin-1?\\_ga=1.226680149.939927813.1443156814](http://itp.fta-intl.org/news/fta-welcomes-eu-vietnam-trade-deal-raises-concern-rules-origin-1?_ga=1.226680149.939927813.1443156814)>

## Recommendations

The industry requests a continuation of the prudence applied and requests more flexible ROOs/transshipment requirements in the EVFTA to ensure that the use of the hub model will be accepted while retaining EU goods' eligibility for tariff concession. This could be achieved, for example by the following:

- Accepting the proposed non-alteration rule which allows non-alteration operations (e.g. storage, splitting of consignments, applying market specific labels and tax stamps where required) to be carried out in non-party country/ies of transit whilst retaining the origin status.
- The FTA would enable certified exporters to self-certify the origin of their exports to enjoy preferential tariffs.
- Ensuring non-party invoices will not impede EU goods' eligibility for tariff concession.
- Clarifying whether the intermediary consignee<sup>12</sup> in the regional hub is allowed to put an origin declaration (incl. the approved exporter number of original EU exporter) on the commercial document that would accompany goods from the non-Party country/ies to Vietnam and would be ultimately used as a basis for claiming preferential rate under the FTA.
- The industry respectfully requests to be included in consultation/dialogue related to the implementation of the FTA, including the development of detailed implementation regulations on ROO.

## II. TAX POLICIES

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 Relevant Ministries: Ministry of Finance (MOF)  
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### 1. Special Consumption Tax

#### Issue description

Law 70/2014/QH13 dated 26 November 2014 amending some articles of Law on SCT will come into force on 1 January 2016. There will be significant changes on SCT rates as follows: - Spirits ( $\geq 20\%$  abv.): from 1 January 2016: 55%; from 1 January 2017: 60% and from 1 January 2018: 65% - Wine & Champagne ( $< 20\%$  abv.): 1 January 2016 – 31 December 2017: 30% and from 1 January 2018: 35%.

In addition to the increase of tax rates, another proposal on amendment of Law on SCT (the Draft SCT Law) has been tabled in the 10<sup>th</sup> session of the 13<sup>th</sup> National Assembly (20 October – 28 November). The industry is deeply concerned about the following change in the latest Draft SCT Law:

1. Change of tax calculation basis from import price to two tier-system, where SCT will be paid on import price; and also on importer's selling price.
2. The importer's selling price might be adjusted by the tax authority if the importer's selling price is lower than % level the average selling price of third party trading units. (Note: % level is 7% as defined in Decree 108/2015/ND-CP dated 28/10/2015 of the Government detailing and guiding implementation of some articles of the Law on Special Consumption Tax and Law on Amendments of some articles of Law on Special Consumption Tax).

This sudden and significant increase in SCT liability, which overlaps with the 3-year phased increase in SCT rates that will come into force from 1 Jan 2016 to 1 Jan 2018, adversely affects the livelihood of imported spirits and wines industry and FDI confidence. The level of increase is not only noted to nullify and impair the benefits of any tariff cut negotiated under the EVFTA or the TPP; but also render Vietnam to be one of the markets with the highest total tax burden in the Asia Pacific region, on par with India, Indonesia and Thailand, even when the import tariff on spirits and wines become zero in the future. By no coincidence, these are also the countries where

<sup>12</sup> The intermediary consignee is usually the overseas subsidiary of the company in the exporting party, or the exporter on behalf of the company in the exporting Party.

the level of illicit activities is very high.

On 28 October 2015, the Government published Decree No.108/2015/ND-CP that provided guidelines to some articles of the Law on SCT and the law on amendments to the Law on SCT (Decree 108) which will come into force from 1/1/2016. Article 6.2 of the Law on SCT No.27/2008/QH12 (Law No.27) stipulates that the taxed price for imported goods is 'the import-duty calculation price plus the import duty' while on Article 4.1 of Decree No.108 said 'taxed prices of imported goods (other than gasoline) is selling price of importer' and on Article 4.2 'with imported goods, at importation stage, the taxed price is the import-duty calculation price plus import duty'. To our best understanding, the provision in Article 4.1 relating to taxed price for imported goods is contrary to Article 6.2 of Law No.27 and Law No.70/2014/QH13 on amendments to the Law on SCT (no provisions on changing the taxed price for imported goods). Moreover, this article was published without seeking comments from imported European wine & spirits industry whose will be directly impacted.

### Potential gains/concerns for Vietnam

While Government revenues might increase in the short term, the increase of SCT could be counterproductive in the long term and would:

- › Jeopardising a stable and predictable business environment.
- › Nullifying and impairing the benefits of any tariff cut negotiated under the EVFTA.
- › Creating huge economic incentive for illicit activities, hence tax leakage.
- › Consumers trading down, hence tax revenue decrease.
- › Thorough assessment and consultation for a revenue sustainable tax policy for long term.
- › Clarity of the law and regulations for certainty and compliance e.g.

### Recommendations

- › Create and maintain a stable and predictable tax environment so as to allow businesses (both domestic and foreign) long term planning, including investment.
- › Defer the promulgation of the Draft SCT Law and maintain the tax base for wine and spirits until thorough assessment and consultation;
- › In case of the promulgation of new amendment of SCT Law is necessary, we are seeking the deferral of the implementation of the Draft SCT Law on wine and spirits until a later time when EVFTA, TPP or other FTAs come into force and the impact of the scheduled increase of SCT rates will be also assessed.
- › Repeal provisions in Decree 108 which is contrary to existing SCT laws.
- › Vietnam should consider an alternative approach: taxing products according to their alcohol content (i.e. a specific system) rather than their value (an ad valorem system). If it is not possible to move to a fully specific system immediately, the introduction of a small specific component alongside the existing ad valorem component would achieve many of the same objectives.

## 2. Customs Valuations

### Issue description

Following its accession to the WTO, Vietnam issued laws and regulations regarding the calculation of customs valuations for imported products, in compliance with WTO rules. However, since then, a system of reference prices for 'sensitive items' has been set in the customs data system. Provincial customs authorities refer to this database when there is an issue with importer's declared values. The use of reference prices for the calculation of customs valuation results in de facto minimum import values and discriminatory high customs levies.

### Potential gains/concerns for Vietnam

An objective and predictable system for determining dutiable value is vital for commercial planning. It improves transparency and allows companies to set the right price for the market, which benefits consumers and ultimately boost imports and hence customs revenue.

### Recommendation

- › We recommend that the Vietnamese Government assesses the aforementioned to ensure that it is fully compliant with the WTO Agreement on Customs Valuation, both in law and in practice.

## III. ALCOHOL SOCIAL POLICY

Relevant Ministries: Ministry of Health (MOH)

### Issue description

Vietnam promulgated Decision 244/QĐ-TTg dated 12 February 2014 on the National Policy in relation to Preventing and Fighting against the Harmful Effects of Alcohol Abuse by 2020 (NAP).<sup>13</sup> The Ministry of Health (MOH) plans on building up the Law on Prevention and Fighting against harmful effects of the abuse of liquor, beer and other alcoholic drinks (hereafter 'the Draft Law'). The general objective is stated as fighting against the harmful effects of alcohol in order to safeguard the health and well-being of the local community and contribute to a more stable social environment.

The Wine and Spirits Sector Committee fully supports the Government's commitment to reduce the harmful effects of alcohol and believe that education as well as moderate and responsible consumption of beverage alcohol is key to bring about effective results in this area.

The Wine and Spirits Sector Committee respectfully recommends that the MOH and the drafting committee work on the Draft Law based on a comprehensive assessment of the NAP. The industry is ready and eager to work constructively and collaboratively with the MOH and other key stakeholders to find meaningful solutions and targeted strategies to reduce the harmful use of alcohol. The Committee is further prepared to work with the MOH and the drafting Committee's members, and share our concerns and recommendations based on international experience on the following policy options proposed in the Draft Law: 1. Name of the Law, 2. Ban or restrictions on sales, 3. Ban or restrictions of promotion and advertisement, 4. Health Warning Label (HWL), 5. Alcohol taxation policy, 6. Health Improvement Fund (HIF).

### Potential gains/concerns for Vietnam

Comprehensive assessments and studies based on solid, science-based evidence should be applied when establishing a Draft Law fitting the Vietnamese context.

A fair and balanced NAP/Draft Law will reduce the harmful use of alcohol across Vietnam while protecting Government revenue, commercial freedoms and economic activity. An overly strict NAP may be counterproductive, driving people towards the black market, negatively impacting tourism and ultimately reducing tax revenue and increasing health risks to consumers.

### Recommendations

The Wine and Spirits Sector Committee supports an evidence-based, proportionate and targeted policy approach to effectively manage the problems linked to individual consumption behaviour and harmful use of alcohol without excessive restrictions on market access/legitimate business activities.

We fully support Vietnam's ambitions to:

<sup>13</sup> Vietnam promulgated Decision 244/QĐ-TTg on the National Policy for the Preventing and Fighting against the Harmful Effects of Alcohol Abuse by 2020 (NAP). Available at <<http://thuvienphapluat.vn/archive/Quyết-dinh-244-QĐ-TTg-nam-2014-phong-chong-tac-hại-lam-dung-đo-uong-co-con-den-2020-vb221176.aspx>>

- › Complete a detailed set of policies and regulations by 2020.
- › Tackle the issue of illicit alcohol.
- › Prevent underage consumption.
- › Prevent consumption in the workplace.
- › Prevent drink-driving.
- › Inform citizens about the dangers of harmful use; and
- › Help place those affected by the harmful use of alcohol in recovery programmes.

We are committed and are determined to work in partnership with the Government to promote responsible drinking in communities as evidenced by our work outlined below:

- › Since 2011, wines and spirits companies have developed a diversity of programs to help tackle drink driving in Vietnam.
- › In March 2012, we launched the 'Vietnam Alcohol Industry's Marketing Code – Guidelines for responsible marketing communications'.
- › In early April 2015, with the Sector Committee's initiative, the Vietnam Association for Responsible Drinking (VARD)<sup>14</sup> was formed with key scopes of work, as a response to the CEO's commitment and the Vietnam National Alcohol Policy (NAP).

## ACKNOWLEDGEMENTS

EuroCham Wine and Spirits Sector Committee

Members: Diageo Vietnam Ltd, Moët Hennessy Vietnam, Pernod Ricard Vietnam, Alchemy Asia Co. Ltd, Remy Cointreau Vietnam

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<sup>14</sup> Vietnam Association for Responsible Drinking. Available at <<http://vard.org.vn/>>

## LIST OF ABBREVIATIONS AND ACRONYMS

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A&P	Advertising & Promotion
ACCC	ASEAN Connectivity Coordinating Committee
ADB	Asian Development Bank
AEBS	EU-ASEAN Business Summit
AEC	ASEAN Economic Community
AI	Active Ingredients
APL	American President Lines
ARISE	ASEAN Regional Integration Support Programme
ASEAN	Association of South East Asian Nations
AVI	Association of Vietnamese Insurers
AWC	Advanced Wound Care
BCI	Business Climate Index
BeluxCham	Belgian Luxembourg Chamber of Commerce in Vietnam
BOT	Build – Operate – Transfer
BT	Build – Transfer
CBU	Complete Built-Up Vehicles
CCFIV	French Chamber of Commerce and Industry in Vietnam
CEEC	Central and Eastern Chamber of Commerce and Industry
CIETT	International Confederation of Private Employment Agencies
CIT	Corporate Income Tax
CKD	Complete Knock-Down Vehicles
CMA CGM	Compagnie Generale Maritime
CMIT	Cai Mep International Terminal
COV	Copyright Office of Vietnam
CPC	Central Product Classification
CR	Conformity Registration
CSR	Corporate Social Responsibility
CWM	Competitive electricity wholesale market
DAV	Drug Administration of Vietnam
DBAV	Dutch Business Association Vietnam
DCST	Departments of Culture, Sport and Tourisms
Decision 631	Decision No. 631/QĐ-TTg dated 29 April 2014 of the Prime Minister promulgating the list of projects calling for foreign investment until 2020
Decision 71	Decision 71/2010/ND-CP dated 9 November 2010 of the Prime Minister on pilot program for investment in PPP form
Decree 15	Decree 15/2015/ND-CP dated 14 February 2015 of the Government on PPP investment form
Decree 30	Decree 30/2015/ND-CP dated 17 March 2015 of the Government providing guidance on implementation of a number of articles of Law on Public Procurement relating to selection of investors
Decree 58	Decree 58/2012/ND-CP of the Government dated 20 July 2012 (as amended)
DFU	Diabetic Foot Ulcer
DPI	Department of Planning and Investment
Draft Law	Law on Prevention and Fighting against harmful effects of the abuse of liquor, beer and other alcoholic drinks
DTA	Double Tax Agreement



EBOWWN	European Business Organisation Worldwide Network
EE	Energy Efficiency
EEBC	Energy Efficiency Building Code
EFTA	European Free Trade Association
ERAV	Electricity Regulatory Authority of Vietnam
E-READI	Enhanced-Regional EU-ASEAN Dialogue Instrument
ESCO	Energy Service Companies
EU	The European Union
EUR	Euro
EuroCham	European Chamber of Commerce in Vietnam
EVFTA	European Union - Vietnam Free Trade Agreement
EVN	Vietnam Electricity
FAASC	Food, Agri and Aqua Business Sector Committee
FDI	Foreign direct investment
ILR	Internal Labour Regulations
FIA	Food Industry Asia
FIEs	Foreign-Invested Enterprises
FSA	Food Safety Agency
FTA	Free Trade Agreement
FTI	Feed-in Tariff
FTZ	Free Trade Zone
GBA	German Business Association in Vietnam
GDE	General Directorate of Energy
GDP	Gross Domestic Product
GHG	Greenhouse gas
GI	Geographical Indication
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
GSP	Generalised Scheme of Preferences
GTD	Vietnam's General Tax Department
HCP	Healthcare Practitioner
HIF	Health Improvement Fund
HKIAC	Hong Kong International Arbitration Centre
HWL	Health Warning Label
ICham	Italian Chamber of Commerce in Vietnam
ICT	Information and Communications Technology
IFC	International Finance Corporation
IFRS	International Financial Reporting Standards
IP Law	Law on Intellectual Property
IPR	Intellectual property rights
IPR SC	Intellectual Property Rights Sector Committee
ISO	International Organisation for Standardisation
IT	Information Technology
JCC	Joint Cooperation Committee
JV	Joint Venture
Labs	Laboratories
Law on Securities	Law No. 70/2006/ND-CP of the National Assembly on Securities dated 29 June 2006 (as amended)



LOE	Law on Enterprises 2014
LOH	The Law on Residential Housing No. 65/2014/QH13 issued by the National Assembly on November 25 <sup>th</sup> 2014
LOI	Law on Investment 2014
LOL	The Law on Land No. 45/2013/QH13 issued by the National Assembly on 29 November 2013
LOREB	The Law on Real Estate Business No. 66/2014/QH13 issued by the National Assembly on 25 November 25 2014
LUR	Land Use Right
M&A	Merger and Acquisition
MA	Marketing Authorisation
MARD	Ministry of Agriculture and Rural Development
MCST	Ministry of Culture, Sports and Tourism
MDG	Millennium Development Goal
MIC	Ministry of Information and Communications
MNRE	Ministry of Natural Resources and Environment
MOC	Ministry of Construction
MOF	Ministry of Finance
MOFA	Ministry of Foreign Affairs
MOH	Ministry of Health
MOIT	Ministry of Industry and Trade
MOLISA	Ministry of Labour, Invalids and Social Affairs
MOST	Ministry of Science and Technology
MOT	Ministry of Transport
MPAC	Master Plan on Connectivity
MPI	Ministry of Planning and Investment
MPS	Ministry of Public Security
MRL	Maximum Residue Level
MSC	Mediterranean Shipping Company
MUTRAP	Multilateral Trade Assistance Project
MW	Megawatts
NAP	National Alcohol Policy
NEDL	National Essential Drug List
NFG	Nutritional Foods Group (EuroCham)
NGO	Non-Governmental Organisation
NIDQC	National Institute for Drug Quality Control
NordCham	Nordic Chamber of Commerce Vietnam
NYC	1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
O&G	Oil & Gas
OECD	Organisation for Economic Co-operation and Development
OEM	Original Equipment Manufacturer
OF	Official Letter
OTT	Over-The-Top
PDF	Project Development Facility
PDP	Power Development (Master) Plan
PG	Pharma Group
PIT	Personal Income Tax
PMO	Prime Minister Office

PPA	Power Purchase Agreement
PPP	Public Private Partnership
PSC	Petroleum Sharing Contract
R&D	Research and Development
RASFF	Rapid Alert System for Food and Feed of the European Union
RDP	Regulatory Data Protection
ROO	Rule of Origin
SBG	Spanish Business Group in Vietnam
SBV	State Bank of Vietnam.
SCT	Special Consumption Tax
SED	Socio-Economic Development Strategy
SIAC	Singapore International Arbitration Centre
SKU	Stock Keeping Unit
SME	Small and Medium Enterprises
SOE	State Owned Enterprise
SSC	State Securities Commission of Vietnam.
SSIT	International Terminal Stevedoring Services of America
TAB	Tourism Advisory Board
TLPQM	Transport and Logistics Partners Quarterly Meeting
TPP	Trans-Pacific Partnership
TRC	Tax Residency Certificate
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UDRP	Uniform Domain-Name Dispute-Resolution Policy
UIO	Units in Operation
UNWTO	World Tourism Organisation
USD	United States Dollar
VAMA	Vietnam's Automotive Manufacturers' Association
VARD	Vietnam Association for Responsible Drinking
VAT	Value Added Tax
VCAD	Vietnam Competition Administration Department
VEAF	Vietnam Employment Agencies Federation
VGF	Viability Gap Funding
VIAC	Vietnam International Arbitration Centre
VILAS	Vietnam Laboratory Accreditation Scheme
VNACCS/VCIS	Vietnam Automated Cargo Clearance System/Vietnam Customs Intelligence Information System
VNAT	Vietnam Administration of Tourism
VND	Vietnam Dong
W&S	Wine and Spirits
WEF	World Economic Forum
WFOE	Wholly Foreign Owned Enterprise
WHR	Waste Heat Recovery System
WTO	World Trade Organisation
WTTC	World Travel & Tourism Council



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