



## EUROPEAN CHAMBER OF COMMERCE IN VIETNAM

### POSITION PAPER AT THE MIDTERM VIETNAM BUSINESS FORUM 2018

Honourable H. E. Prime Minister Nguyen Xuan Phuc, Ministers and Government Officials, Country Directors of the World Bank and IFC, Ambassadors, colleagues of the Chambers of Commerce, Ladies and Gentlemen.

EuroCham is pleased to take on the role of Co-Chair of the Vietnam Business Forum Consortium in 2018. We appreciate the strong support and concrete steps that the Vietnamese Government has made to improve the business environment and to increase Vietnamese companies' competitiveness, listening to chambers and businesses in the last VBF in December 2017 and other high-level Government dialogues that EuroCham has conducted recently (Dialogue with Advisory Council for Administrative Procedure Reform in January 2018 and our Whitebook Launch in March 2018 in Hanoi).

As trade remains our key interest, EuroCham continues to support the ratification, final approval and implementation of the EU-Vietnam Free Trade Agreement (EVFTA) to advance Vietnam's position to the globalised level. If the Agreement comes into force, it should help us to develop many sectors - both for export and import - on a 'win-win' basis. We have seen many positive changes to further pave the way for the upcoming EVFTA, and we would like to raise our ideas and contributions to help Vietnam make the most of the Agreement.

The following issues aim to constructively and substantially enhance Vietnam's profile, making it one of the most attractive, competitive, efficient, and sustainable investment destinations for European businesses in ASEAN.

#### **I. IMPROVING CITIZENS' LIVING STANDARDS AND WELL-BEING**

##### **A. Shaping the Future of Vietnam's Healthcare Sector**

The EuroCham Healthcare Forum is a platform for EuroCham members operating in the healthcare industry to discuss industry issues. EuroCham Healthcare Forum Sector Committees such as Pharma Group, Medical Devices and Diagnostics and International Quality Generics, work together to advocate and achieve goals for common issues. These Sector Committees can function independently of the Healthcare Forum and of each other, but are supported by EuroCham to collaborate on areas where there is an express agreement on collective representation, especially at high-level forums such as the Vietnam Business Forum Mid-Term today.

##### **1. High Value, Sustainable Life Sciences Sector Development**

Vietnam has the potential to build a high value, self-sustaining life science sector and position itself as an attractive investment destination in ASEAN. Taking a sectoral approach to healthcare will stimulate the development of a healthcare eco-system in Vietnam consisting of not only manufacturing, but also of service providers, clinical research organisations and others; thus also

boosting small and medium-sized enterprises and eventually enabling exports to replace overseas development assistance by attracting sustainable FDI and PPPs. This presents a unique window of opportunity for collaboration from key stakeholders both from the public and private sector, in working towards the shared objectives:

- **Facilitate fast and sustainable access to safe and high quality treatment solutions for Vietnamese patients.** This would not only improve the quality of treatment and patient experience in Vietnam, but also in the long term help reduce the outbound medical tourism;
- Send a strong **signal to existing and future investors about the stability and predictability of Vietnam's investment environment**, thus creating opportunities for investments. As a result, the Vietnamese economy will benefit from the generation of high knowledge-based jobs, taxes, etc. and establish itself as an attractive investment destination in the region;
- Bring opportunities for **collaborations and partnerships to develop local capability**. The exposure to international best practices and technical know-how will help Vietnamese businesses to attain sustainable growth, meeting the demands of Vietnam's healthcare and potential for exports, thus contributing to the overall life-sciences sector development.

## **2. Home Care/ Home-Treatment (Out-Patient)**

Given the limited bed capacity of Vietnamese hospitals, there is an imbalance of 'supply and demand'. The number of patients needing treatment and the overcrowded hospitals are a challenge that MOH aims to overcome. But even healthcare systems with greater bed capacity have established home care services to improve the follow-up of chronic and long-lasting diseases for patients who return to their homes to continue treatment after being discharged from hospital. Patients in Vietnam are currently overburdened with high out-of-pocket payments and, therefore, require affordable treatment options. However, affordable treatment should not be at the cost of quality.

Out-of-pocket healthcare spending is a significant burden for households. The indirect costs of healthcare, such as travelling, meals during hospitalisation and loss of income during treatment put patients and their families under enormous financial pressure. In the absence of professional and organised home care services, patients tend to care for themselves with the help of their family. This causes a lot of concern to patients and potential additional health complications due to the lack of professional follow-up. Moreover, in most cases, patients will return to hospital several times and, for some, with more severe conditions.

We believe that Vietnam should support the creation and development of a professional homecare scheme that empowers patient access to treatment with the involvement of healthcare professionals, in order to reduce the number of hospital visits, especially by patients with chronic diseases. Home care can empower patient access to treatment, help to address the problem of overcrowded hospitals, reduce high public spending on chronic diseases and mitigate out-of-pocket healthcare spending for households. At the same time, it can help to improve quality of life for all patients suffering from chronic diseases. We are willing to support the development of a home care scheme together with the Government.

## **B. The Enablers**

### **1. Business Environment**

Through dialogues with the Government, we are highly encouraged to see that the above vision of a high value, sustainable healthcare sector development aligns with the long-term strategy of the Vietnamese Government, and the Government's acknowledgment of the private sector's value and role on the journey to make this vision a reality. In order to make this shared vision a reality, we need a few key enablers:

- **Create a clear legal framework** that provides investors with **predictability** as well as **incentives** to attract investment. This would further encourage and enable multi-national corporations to invest, transfer knowledge and technical know-how to Vietnam as well as partner with local companies.
- **Optimise the administrative procedure** to shorten the process of bringing new, high quality treatment solutions to patients, addressing the increasing need of a growing Vietnamese population for **fast and sustainable access to safe and high quality treatment solutions**;
- **Form an Inter-Ministerial Taskforce under the leadership of a senior Government representative** to develop and lead the implementation of a Roadmap for the sector's development.

We remain committed to playing a proactive role in the development of a clear and predictable legal foundation and a positive business environment that both attracts even more investment and meets the current and future demands of Vietnamese patients.

### **2. Ethical Standards and Regulatory Compliance**

#### **a. Promoting High Ethical Standards in Vietnam**

As the Vietnamese healthcare landscape is rapidly evolving, trust and integrity play an increasingly important role in shaping relationships between healthcare professionals, medical devices and the pharmaceutical industry that truly serve the best interest of patients.

The EuroCham Healthcare Forum, made up of the Medical Device Sector Committee, Pharma Group and the International Quality Generics Group, are very proud to have signed a **Consensus Framework for Ethical Collaboration** under the APEC forum with healthcare stakeholder groups in Vietnam – including the Vietnam Medical Devices Association (Vimedas), Vietnam Pharmaceutical Companies Association (VNPCA), Vietnam Medical Association and Vietnam Women Union. This Framework is the **first of its kind in Asia**, and represents a significant milestone in our joint efforts to promote and strengthen ethical practice in the country.

We believe that our global experience, and our strong ethical values and practices, will bring a meaningful contribution to this partnership. We are committed to working with all signatories through frequent dialogues to promote high ethical standards, fairness, integrity and transparency in interactions with healthcare practitioners, towards the development of a higher quality, more efficient healthcare system in Vietnam to best serve patients and in general improve the health of the people of Vietnam.

We welcome all stakeholders in the healthcare sector to join the Dialogue with us to further strengthen ethical standards for the benefit of patients.

## **b. Medical Devices Industry Code of Conduct**

Understanding the issues of risk and unfair competition among industry players, including foreign investment and local enterprises in Vietnam, the Medical Devices Industry Code of Conduct is being built to facilitate ethical interactions between corporate members that develop, manufacture, sell, market or distribute medical technologies in Vietnam and those individuals and entities that use, recommend, purchase or prescribe medical technologies in Vietnam. The spirit of the Code of Conduct shall be focused on: i) strict compliance with the law and regulations in the territory; ii) prioritising people and patient health and safety; and iii) the promotion of scientific and educational activities to bring the best benefits to patients.

An ethical business environment is one of the greatest concerns for multinational companies, especially when seeking to invest in 'high risk' jurisdictions. We believe that the commitments on high ethical standards shall create an environment in which Vietnam can better attract investments in the field of healthcare with further long-term benefits to the community.

Considering the key role of Ministry of Health (MOH) in regulating and leading the development of healthcare in Vietnam, to create a transparent business environment we would recommend MOH support us in promoting ethical collaboration among industry players, particularly:

- To support multinational companies who have to follow and implement their international industry code in Vietnam as well as in their communication activities towards Government-related stakeholder groups (e.g. implementation of APACMed measures in 2018).

## **C. Healthy and high-quality food that meets global standards**

### **1. Foods, Agriculture and Aqua Business**

The Food, Agri and Aqua Business sector has seen both positive and negative tendencies in 2016 and 2017. Indeed, agricultural product exports have increased, but the sector remains vulnerable to climate change and volatility of buyers. We are, therefore, pleased with the directives of the Ministry of Agriculture and Rural Development to focus on the restructuring and development of the agricultural sector as well as promoting ten key export products of Vietnam.

- To promote further food safety, the Government should engage with local and foreign private sectors to **reduce AMR, encourage research on alternative treatments to antibiotics and increase awareness and educate farmers on the risks associated with the misuse of antibiotics**. Good husbandry practices should also be applied to reduce demand for antibiotic treatment in farms through agricultural extension programs and related activities.
- A **risk-based assessment should be applied when registering products and their use**, and there should be a partnership between the Government, crop protection product industry and relevant stakeholders to jointly promote the safe use of products and practices. The application of Circular 21 with regard to GHS and PHI criterion should be abolished, and continued efforts should be made to monitor domestic markets in terms of consumer safety.
- An **animal identification and recording system containing a traceability component should be financed and set up**, starting with a product in which Vietnam is competitive and which has export potential. The Government should roll out the Ho Chi Minh City pilot nationwide to increase the reputation of Vietnamese products, food safety and exports; draft regulations to prevent the sale of products that are being tested; look at best practice from

around the world; and improve food safety through involving producers and committing them to supply safe food products.

- Finally, the Government should **enforce existing regulations on the use of banned hormones**, provide easy access to products to be used in livestock production imported from countries with which a Free Trade Agreement exists, and increase awareness of the use of banned antibiotics, especially as a growth promoter.

## **2. Nutritional Food Group**

### **a. Unnecessary and Prolonged Veterinary Inspection of Heat-treated Milk Products stipulated in MARD's Circular 25/2016/TT-BNNPTNT and Circular 24/2017/TT-BNNPTNT**

These Circulars require veterinary inspections for any product containing milk, regardless of whether milk has been processed or not (for example, a cookie containing a few drops of milk is still subject to veterinary inspection). This requirement conflicts with international best practice: World Organisation for Animal Health (OIE) and Codex require veterinary inspections for milk and milk products, but not for processed milk (heat-treatment) or food products containing heat-treated milk or dairy ingredients, since the risk of disease (if any) has already been eliminated. These documents also do not comply with current procedure on issuing legal documents. For example, MARD issued Circular 25/2016/TT-BNNPTNT<sup>1</sup> without the list of HS Code. Then, on November 15, 2017, MARD promulgated Circular 24/2017/TT-BNNPTNT<sup>2</sup> with the list of HS Code. However, these circulars were introduced without consulting affected stakeholders, which led to products that are not “milk and milk products” being subject to veterinary inspections. In addition, the regulations are inconsistent with the Government's Resolution 19 on reducing import inspection, and create significant costs for firms without any benefit. It delays product clearance at ports for 1-2 weeks, which could cost millions of working days and a waste of hundreds of billions of VND per year.

We propose eliminating veterinary inspection for packaged heat-treated milk and food products containing heat-treated milk or milk constituents (milk protein, casein, lactose), taking inspiration from Decree 15/2018/ND-CP<sup>3</sup> (which cuts 95% of food safety inspections) to simplify/reduce veterinary inspections.

### **b. Decree 09/2016/ND-CP<sup>4</sup> regulates that “Salt used for direct consumption and for food processing must be supplemented with iodine” (Article 6, Clause 1, Sub-clause a)**

This requirement creates significant challenges for the food processing industry. The industry has significant concerns about technical difficulties, retention, losses and changes in organoleptic properties of final products, with the inclusion of iodized salt in industrialised processed foods. Potassium iodide is an oxidant, so it could change the organoleptic properties of final products (for example, changes in colour, flavour, etc.). It has been reported that considerable losses, up to 100%, are possible during food processing, depending on the product and the procedure, moisture, heating and storage. Some countries, such as Japan and Australia, refuse to import foods with iodized salt in the product ingredient. Several food products (formula milk for young children, for example) use specialised iodine and sodium separately to retain the iodine &

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<sup>1</sup> Circular 25/2016/TT-BNNPTNT dated 30 June 2016 providing for the quarantine of terrestrial animals and animal products.

<sup>2</sup> Circular 24/2017/TT-BNNPTNT dated 15 November 2017 promulgating list of harmonized system (HS) codes for export and imports under management of the Ministry of Agriculture and Rural Development.

<sup>3</sup> Decree 15/2018/ND-CP of the Government dated 2 February 2018 guiding the Law on Food Safety.

<sup>4</sup> Decree 09/2016/ND-CP of the Government dated 28 January 2016 providing for fortification of food with micronutrients.

sodium amounts in the final products rather than fortifying iodine salt directly in the products as the quality of those food products will be significantly affected. No country in the world uses iodine salt in the production of formula milk. MOH issued Official Letter No.6134/BYT-PC dated 27/10/2017 guiding “not to inspect food manufacturing business which uses iodized salt”. However, it is not clear whether food manufacturing firms are allowed to use non-iodized salt in the production of packaged food products.

We support the Government's implementation of the iodine deficiency prevention program in Vietnam. However, due to the irrationalities mentioned, we recommend Decree 09/2016/ND-CP is amended to remove the phrase “iodine salt must be used during food processing”. The fortification policy should be focused on iodization of table salt alone to achieve optimal iodine nutrition of the population while saving the cost of production for the food industry.

## **II. CONSUMER CHOICE AND PROTECTION**

### **1. Mobility – Automotive and Motorcycles**

#### **a. Special Consumption Tax (SCT) cap for imported CBU passenger cars**

Due to the limited volume of imported CBU passenger cars, the SCT cap deducted from the taxable price should be increased from 7% to 15% in order for the importers and dealers to be able to maintain sustainable business operations. Also, the definition of ‘related parties’ applied to the SCT calculation has been changed over time. It remains unclear and this creates uncertainty for the importers on the tax liabilities.

We recommend that the SCT cap deducted from the taxable price should be increased from 7% to 15%. SCT should become a standard calculation applicable to all regardless of the distribution channels, integrated ownership and unrelated parties’ relationship. Tax liabilities generated by unclear or changing definitions of related parties should not be subject to late payment penalties and should be waived.

#### **b. VAT for vehicles and spare parts and accessories**

Regarding the Value Added Tax (VAT) for vehicles, spare parts and accessories, we are aware that the Ministry of Finance has proposed increasing VAT for most goods and services, including vehicles, spare parts and accessories from 10% to 12%. If such a proposal is approved by the National Assembly in 2018, the new tax rate will be applicable from early 2019.

Given the current economic climate, with relatively low household income, living standards and business performance, the increase in VAT may have unexpected negative impacts, which could become a burden for Vietnam’s socio-economic conditions in general and the motorcycle sector in particular. The Government should carefully review the proposal of increasing VAT for vehicles, spare parts and accessories. In particular, there should be a roadmap for VAT adjustment in the long-term which is relevant to the socio-economic status and residents’ income.

#### **c. The implementation of Decree 116 and Circular 03/2018/TT-BGTVT with insufficient transitional timing**

One more critical issue is that there is no transitional time for CBU importers to implement Decree 116/2017/ND-CP and Circular 03/2018/TT-BGTVT. There has been hardly any homologation for CBU imported from Europe in 2018 due to new VTA requirements.

The deadline for effective implementation was given at too short notice and with an inefficient transitional period so that goods “en route” were affected. Vehicles continued to arrive and have been stuck at the harbour since 1<sup>st</sup> January 2018. This causes high logistics fees and operational costs day by day. In reality, as of mid-April 2018, only one car company seems to have had CBU vehicles homologated, so the process is not as smooth as mentioned by a representative of the Prime Minister’s Advisory Council for Administrative Procedure Reform (ACAPR).

Due to this critical situation for CBU importers and dealers, we recommend immediately postponing for 6 months the implementation of these documents. The new VTA requirements according to Decree 116/Circular 03 should be waived. Alternatively, homologation should be maintained for those CBU models previously homologated in 2017 to provide reasonable time for CBU importers to comply.

**d. Lot by lot test required in homologation**

The lot by lot test required in homologation also creates a situation in which importers may have to homologate the same model even if an identical model is still waiting for an emission test at the National Motor Vehicle Emission Test Center (NETC). Moreover, vehicles imported from the EU with UNECE/ECE certification are no longer exempted from testing as used to be the case in the past.

We strongly recommend that a homologation test should be limited to the first lot of new models and not be repeated for subsequent lots of the same model. The test validity period for CBU models should be consistent with CKD vehicles (18-36 months) to be compliant with GATT. Alternatively, certification should be valid for at least 6 months. The lot by lot testing requirement should be exempted for imported vehicles with UNECE/ECE Whole Vehicle Type Approval. Lot by lot testing should be maintained only on a sample basis from time to time in case of serious suspicions of fraud.

A representative of the ACAPR agreed at the meeting between EuroCham and the Government Office in January 2018 that a lot by lot test should be considered to test the first lot only, and subsequent lots should be subject to random testing only when necessary, or that certification should be valid for at least 6 months. MOT agreed that lot by lot testing is necessary, however the administration requirements should be eased for business. ACAPR should demonstrate leadership by imposing its view on MOT so that only the 1st lot will be subject to systematic testing, with subsequent lots tested only at random.

**e. The impact of requiring CKD component parts to be tested in Vietnam on costs and administration workload**

According to Decree 116, CKD components (safety parts) are to be tested in Vietnam. That means parts imported from the EU with UNECE/ECE Certificates or test reports will no longer be accepted for test exemption unless the certificate or test report provided is from a country which has a Mutual Recognition Agreement with Vietnam. This is despite the fact that the Vietnam National Technical Regulation on Safety and Environment Protection for Automobiles refers to UNECE/ECE standards and regulations.

We recommend that the Government continues the practice of accepting valid UNECE/ECE certificates/test reports/COP certificates for parts issued by an overseas competent organisation. For imported parts, valid UNECE/ECE type approval, test reports, and COP certificates should be considered sufficient evidence of a valid certificate.

## **f. Management of imported materials for export production**

Imports are based on the production plan. However, in practice, the production plan and the actual production do not match exactly. There will always be changes in usage purposes for E31 and/or A12 in most enterprises using the scheme of importing materials under both E31 and A12. Hence, it is very complicated and difficult for enterprises to manage materials and to track by import sources to comply with the law in a timely fashion and to declare the change in usage purposes and pay taxes for E31, which creates risk. If the enterprise wants to avoid that risk, it must import all materials as taxable under A12 and then ask for a tax refund when it is used in a good which is exported. This leads to significant cash flow/workload/financial cost burdens for the enterprise.

We propose that the Government considers revising the current customs rules in order to enable the simplification of the management process required for enterprises who import both under E31 and A12. It is important to encourage exports in line with the recent policy of the Vietnamese Government on administration/tax procedure reform.

## **g. Multi-purpose 3-wheel vehicles for the Vietnamese market**

European countries are considering 3-wheel tilting vehicles (MP3 concept) as a potential future key for urban mobility as it succeeds in conjugating typical 2-wheel bike agility with a higher level of safety thanks to the stability during braking and emergency conditions. However, this type of vehicle cannot currently be sold in Vietnam because the distance between the front wheels of an MP3 is  $d=465\text{mm}$ . According to Circular 67/2015/TT-BGTVT<sup>5</sup>, if  $d>460\text{mm}$ , a vehicle is not classified as one motorcycle in the L3 category and is not approved by the Ministry of Transport.

We propose that the Government and MOT considers revising the current rules in order to enable a new kind of vehicle, like MP3, to enter the Vietnamese market as it could represent a very interesting alternative and safe solution to cars for large towns affected by traffic congestion.

## **2. Wines and Spirits**

### **a. Draft Law on Prevention and Fighting against Harmful Effects of Alcoholic Beverages**

The W&S SC supports the Government's efforts in preventing and countering harmful impacts of alcohol abuse. We are, however, very concerned with some requirements proposed by the Draft Law on Prevention and Fighting against Harmful Effects of Alcohol Beverages (the "Draft Law"), which would be market and trade restrictive, and would not address the public health concerns. For instance, the Draft Law proposes a compulsory financial contribution into a Health Improvement Fund or earmarked tax on alcoholic beverages, which will not only create an additional tax burden on the alcohol producers, but also be inconsistent with the Government's policies and efforts to reduce non-budgetary funds and reform of organisational and management structures of Government authorities. Since alcoholic beverages are already subject to significantly high tax rates, it is unclear how the additional compulsory contributions or earmarked tax will contribute to the overall efforts of preventing and fighting against harmful use of alcohol or allocated for improving public health. It is recommended that the Government should allocate some revenue collected from the industry for tackling the harmful use of alcohol instead of imposing an earmarked tax or additional compulsory contribution.

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<sup>5</sup> Circular 67/2015/TT-BGTVT of Ministry of Transport dated 6 November 2015 on National technical regulation on safety and environmental protection for motorcycles and mopeds.



In addition, the Draft Law imposes a number of restrictions on advertisements and promotion, ban of sale at certain times of day, shops density (not less than 500m), ban of sponsorship for cultural and sports events etc. which are merely commercially disruptive measures rather than addressing public health concerns.

In light of the fact that unrecorded alcohol amounts to more than 70% of the alcohol consumed in the country<sup>6</sup>, close to the figure of 75% (notably rice wines/spirits), according to results of a population survey done by the Institute of Population and Social Studies under the National Economic University, published in February 2018<sup>7</sup>, the Draft Law should focus on (i) improving public health protection through strengthening the control of production and circulation of unrecorded alcohol; (ii) changing the mind set and behaviours of consumers through education and communications, especially at the grassroots levels; and (iii) the prevention of violations caused by alcohol abuse through strict remedies and penalties.

### **b. Special Consumption Tax Reforms**

The European wine and spirits industry has suffered from successive reforms of the Special Consumption Tax (SCT) and, in our opinion, the successive SCT reforms have nullified any benefits that the industry was contemplating from the EVFTA. This has put an unfairly higher tax burden on imported wines & spirits and further intensified the economic incentive for illicit cross-border activities and counterfeit and thereby exacerbated revenue loss and increased the risks to public health. W&S SC would welcome greater transparency in the evaluation of the SCT regime, and requests that public consultations on any proposed changes to the regime happen as early as possible. We also would like to engage with the Government, the Ministry of Finance and other Government authorities to initiate a positive dialogue and explore a sustainable and evidence-based alcohol tax roadmap that addresses public health concerns around harmful consumption.

### **c. EU-Vietnam Free Trade Agreement**

The European Union (EU) wines and spirits industry has been supportive of an ambitious FTA with Vietnam from the very beginning as it expected to benefit from a mutual opening of markets. The EU-Vietnam Free Trade Agreement (EVFTA), will facilitate the market access of EU wines and spirits to Vietnam through tariff elimination on EU-originated goods based on non-alteration rule, European brand and Geographic Indications (GIs) protection, as well as trade facilitating reform to simplify administrative measures and to harmonise the technical regulations with international practices. We would respectfully request that the Vietnamese Government conducts a speedy and smooth ratification and implementation of the EVFTA.

## **3. Intellectual Property Rights: Online enforcement of copyright**

Online enforcement of copyright is considered to be one of the primary challenges to the effective protection of IPRs. The lack of a sufficient legal framework has led to increased copyright piracy and domain name infringements, amongst others. Furthermore, civil and criminal proceedings have proved to be inefficient for IP enforcement, while the judicial capacity in dealing with IP cases still needs improvements. Long-standing issues regarding legal

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<sup>6</sup> “Global status report on alcohol and health 2014” *World Health Organisation*. Available at: <[http://www.who.int/substance\\_abuse/publications/global\\_alcohol\\_report/profiles/vnm.pdf](http://www.who.int/substance_abuse/publications/global_alcohol_report/profiles/vnm.pdf)> accessed on 8 December 2017.

<sup>7</sup> <http://www.iard.org/wp-content/uploads/2018/02/Unrecorded-Alcohol-Report-Vietnam.pdf>

procedures and information transparency also hamper the effectiveness of IP protection and enforcement.

We suggest a number of measures to address this issue. Firstly, the Government should amend the Law on Intellectual Property and its subordinate regulations to accommodate enforcement of IPRs in the online environment; increase levels of administrative fines against individuals committing copyright infringements; strengthen enforcement efforts against infringing websites; and implement Joint Circular 07/2012/TTLTBTTTT- BVHTTDL.<sup>8</sup> Secondly, it should ensure the provision of ‘notice and take down’ measures and the application of a more practical approach by setting limitations and exemptions for the liability of infringements against copyright and related rights as required by the EU-Vietnam Free Trade Agreement (EVFTA). Thirdly, it should cover infringements against industrial property rights, adopting a Uniform Domain-Name Dispute-Resolution Policy (UDRP)-type system for resolution of ‘.vn’ domain name disputes and cybersquatting, or amend either IP laws or Information and Technology (IT) laws for administrative enforcement authorities to settle cases more effectively – including against absent registrants.

We recommend the Government strengthen the ability of People’s Procuracies, People’s Courts and the Ministry of Public Security to prosecute criminal enforcement against serious IPR infringements once the threshold is met. Changes should be made to the Law on Intellectual Property Rights (which should provide for injunctions and provisional measures applicable on IP infringements, simplified proof of ownership in IP enforcement, especially regarding copyright and related rights) and Civil Procedure Code and its guiding regulations which shall empower the courts to order the publishing of judicial decisions in relation to IP enforcement.

### **III. REGULATORY FRAMEWORK, TAX AND ADMINISTRATIVE REFORMS**

#### **1. Legal Issues**

##### **a. Vietnamese courts**

Foreign investors usually prefer to settle their dispute through arbitration rather than before the courts. The lack of independence and transparency of the judiciary are still the main reasons why foreign investors avoid Vietnamese courts. Our members also face the issue of publishing the judgements of courts, precedents and case-law as well as decisions of authorities, such as Vietnam Competition Authority, which are not generally published.

The permitted scope of legal services for foreign law firms still remains uncertain: the implementation of Decree 123/2013/ND-CP guiding the Law on Lawyers prevents a fully qualified Vietnamese lawyer from representing clients before Vietnamese courts if the lawyer is working at a foreign law firm. Presenting before the courts is important for our investors, who often wish to be supported by their legal counsel in all aspects of their operations in Vietnam, including disputes. We recommend removing this restriction and allowing a Vietnamese lawyer working at a foreign law firm to represent clients before Vietnamese courts.

Our members are following with great interest the current process of publicising the judgements of Vietnamese courts. Our members note the launch of two websites managed by the People’s Supreme Court and encourage the publication of judgements of all levels without further delay. In addition, we encourage the publication of decisions of the Vietnam Competition Authority,

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<sup>8</sup> Joint Circular 07/2012/TTLT-BTTTT-BVHTTDL dated 19 June. 2012 of the Ministry of Information and Communications and the Ministry of Culture, Sports and Tourism, providing the responsibility of intermediary service providers for protection of copyright and related rights on the Internet and in telecommunication networks.

especially the decisions relating to economic concentration. Furthermore, we would like to recommend amending the Law on Lawyers to allow fully qualified Vietnamese lawyers to represent clients before Vietnamese courts, even if the lawyer is working for a foreign law firm.

## **b. Arbitration in Vietnam**

Court intervention during the arbitration proceedings continues to represent a major obstacle for foreign investors in Vietnam. As per our members' report, intervention by Vietnamese courts does not happen only before an award is issued (which results in the termination of arbitration proceedings) but also by setting aside an award once it has been issued by a VIAC tribunal. For example, we are aware of cases in which Vietnamese courts set aside arbitral awards, allegedly due to the conflict with "fundamental principles of Vietnamese law", when in fact the courts reconsidered the merits of the case. We would also like to raise an issue regarding the procedures of arbitration in Vietnam: even though arbitral tribunals may request the assistance of the courts in the summoning of witnesses or in collection of evidence, in practice the courts do not actively or effectively support arbitration proceedings.

Legal Sector Committee members recommend providing better instructions to lower level courts to consistently limit court interventions during arbitration proceedings, and the introduction of the right of appeal to first instance court decisions on jurisdiction or on the validity of an arbitral award.

## **c. Recognition and enforcement of foreign arbitral awards**

It appears that the Vietnamese courts have often issued decisions to reject the applications for the recognition and enforcement of foreign arbitral awards for reasons not consistent with the New York Convention. We would like to recommend ensuring that the 1958 New York Convention is strictly applied by Vietnamese courts, in accordance with the 2015 Civil Procedure Code, and that the Vietnamese court should not re-open the merits of the case.

## **2. Tax and Transfer Pricing Sector Committee**

### **a. The application of tax treaties and benefits**

Vietnam has a very broad tax treaty network with 75 signed treaties. Generally, income tax could be exempted or reduced under the relevant tax treaties between Vietnam and other countries if stipulated conditions are satisfied. However, tax treaty benefits do not apply automatically in Vietnam. Taxpayers must self-assess their eligibility, and if tax treaty benefits are available, tax treaty notification must be submitted to the local tax authorities, together with supporting documents. The tax authorities do not issue any confirmation of the tax treaty benefit entitlement upon the receipt of the tax treaty notification dossier.

In practice, this means that the Vietnamese party withholds the tax as it is not willing to accept the uncertainty of the treaty relief applying and potentially being left with the responsibility to pay the tax. This nullifies the application of treaties in Vietnam. As a further consequence, overseas tax authorities will usually not allow the foreign company a tax credit when they consider relief should technically be available under a treaty, thus giving rise to double taxation.

EuroCham Tax and Transfer Pricing Sector Committee recommends the tax treaty notification dossiers be reviewed upon receipt by the local tax authorities. Any further request or issue must be notified within a certain timeline, for example 1-3 months. If there are no issues raised within the set timeline, this can be relied upon as acceptance by the taxpayer. This would enhance

taxpayers' full compliance with Vietnamese regulations, whilst protecting its tax treaty benefits and demonstrating Vietnam's respect and commitment to the mutual application of tax treaties and the avoidance of double taxation.

#### **b. The use of Comparable Companies in Transfer Pricing Audits**

Enterprises commonly find that the tax authorities reject such taxpayer analysis and propose a different arm's length margin based on other taxpayers' data or 'secret comparables'. This is based on the data of other Vietnamese taxpayers which is only accessible to the tax authorities.

Tax authorities should give due consideration to the analysis undertaken by the taxpayer. Challenges should be based on the merits and demerits of the taxpayer's comparables and adequate rationale should be provided for rejecting their comparable companies. If comparables are rejected, authorities should propose a better set based on the same database or another public database, rather than resorting to data which is not accessible to the taxpayer.

### **IV. EFFICIENT AND SUSTAINABLE DEVELOPMENT**

#### **1. Green Growth Sector Committee**

##### **a. Further MOIT guidance on the strategy for the solar power market and the Power Purchase Agreement (PPA) terms from 1 July 2019**

Green Growth Sector Committee (GGSC) is seeking for Ministry of Industry and Trade (MOIT) guidance on the strategy for the solar power market and the terms of the PPA that might apply from 1 July 2019. We recommend that MOIT makes the three most important amendments to the solar PPA (Termination, Curtailment, Arbitration Clauses) and extends the PPA for new solar projects to 30 June 2020 with a reduced Feed in Tariff. This should attract a minimum of USD 2bn in new investment. It would also be logical to amend the standard PPAs for wind power, biomass and waste to energy. EuroCham urges MOIT to involve VBF Energy and Power sub-WG in the writing of Power Master Plan 8 from the beginning, so as to benefit from the international industry's experience in making the plans happen. We expect that among many improvements on PMP 7, gas and liquified gas will be the main fuel substitutes of coal generation.

##### **b. Stimulate investment in energy efficiency and distributed electricity generation by power consumers**

A comprehensive review of the retail power tariffs is recommended in 2018. We should create a market-based differentiated pricing system which on the one hand continues the socialised pricing system and supports low-income citizens, and on the other hand encourages efficiency, attracts investment in distributed clean energy generation and energy efficiency, has fair and transparent tariffs for those consumers who can afford to pay the full cost of electricity, with three key actions:

- Redesign the daytime hourly tariff for Commercial and Industrial (C and I) consumers to reduce the peak demand and the peak load on the transmission system and to reduce transmission losses.
- Create regional variation in retail tariffs to reflect the different regional prices in the wholesale electricity market.
- Publish a Roadmap to C and I electricity tariff inflation to 2020 and 2025.

### **c. Development of green buildings in Vietnam and standards**

Buildings are, and will remain, the largest consumers of electricity. The rapid growth of urbanisation and its associated life and working style, which includes intensive air-conditioning use, accounts for a considerable proportion of the energy consumption growth in the major cities of Vietnam. Proper building design can reduce this growth for the next 25 years of a building's lifetime. However, the development of green buildings is still in its infancy in Vietnam; just around 40 buildings have certification, the majority of these being in the industrial sector.

EuroCham GGSC would like to suggest that the use of Green Building (GB) standards should be promoted. Many building owners have been introduced to the concept of GB, and organisations such as the Vietnam Green Building Council (VGBC) report a significant uptick in interest over the past couple of years. Over 100 buildings are now GB-certified or are undergoing GB certification in Vietnam.

We recommend the Government provides effective encouragement for building owners to certify their buildings. In addition to international green building certifications already being used in Vietnam, such as the United States Green Building Council (USGBC) Leadership in Energy and Environmental Design (LEED) and International Finance Corporation (IFC) Edge, VGBC has developed the LOTUS certificate. We would support a move to recognise multiple systems for use in Vietnam, letting the market determine which are practical and useful. These systems could be licensed for operation based on a set of simple criteria such as transparency, reliability and coherence according to recognised norms.

The application of NFB solutions should be enforced and promoted through the Vietnam Association of Building Materials (VABM), since compliance may reduce carbon emissions from 70% to 40%.

Buildings should become more energy efficient. Making buildings more energy efficient does not mean higher investment costs. This process can be applied from the architecture phase, with passive design and the use of environmentally-friendly construction materials, to the implementation of energy-efficient devices during construction. We would encourage all buildings to achieve the minimum standards of the VEEBC code (or a simplified version) in order to receive the Building license at Basic Design Stage. Furthermore, 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.

There are many individual sustainable building solutions and best practice case studies available in the market. However, we believe that a clear urban planning showcase should be produced, including not just green buildings but also water, waste, traffic and environmental livelihood improvement solutions. This macro-level program of incentives and policies could help Vietnam move towards its vision of a Smart City.

## **2. Human Resource and Training**

### **a. Ratification of ILO Conventions for more efficient resource development**

Human Resources and Training Sector Committee (HR&T SC) closely monitors the on-going progress of labour quality, labour rights and labour commitments in Vietnam, especially when Vietnam has actively participated in global integration, signing and implementing many Free Trade Agreements (FTAs), including the EU-Vietnam Free Trade Agreement (EVFTA). We strongly suggest that the Government fully complies with the commitments on the ratification and effective implementation of the fundamental ILO Conventions. In addition, to effectively

implement the EVFTA, Vietnam needs to improve the country's working environment throughout preparations and enforcement of existing regulations and passing new and effective legislation.

#### **b. Social Insurance for foreign workers in Vietnam**

The regulations on Statutory Social Insurance contribution for foreign workers in Vietnam is the most urgent topic we have raised and we look forward to receiving updates and responses from the Government and Ministry of Labour, Invalids and Social Affairs (MOLISA).

#### **c. Training and capacity building to enhance productivity and efficiency**

With the aim of enhancing white-collar job readiness and increasing productivity at the top of the labour pool, the Government should consider increasing the percentage of Vietnamese students permitted to study at international schools at all levels. If the Government is interested in promoting international education in secondary cities, it should consider offering incentives to attract investors to these regions. It would be beneficial to invest in and support advanced vocational training for teachers, and to sponsor the technical facilities and equipment of public schools.

### **3. Information and Communication Technology**

#### **a. Cyber security**

The issue of cyber security has been rising up the global agenda for some time. Responding to the multitude of attacks and hacks of both large and small organisations, the National Assembly is taking positive steps towards organising cyber security on a national level by drafting a Law on Cyber Security through Ministry of Public Security (MPS).

It is suggested that the Government collaborates with innovators to provide real-world, standards-based cybersecurity capabilities; provides guidelines to establish hardware and software infrastructure with practical ways to implement cost-effective, repeatable and scalable cybersecurity solutions; uses these guidelines to support organisations to adopt cyber security technology with reduced cost of ownership; and establishes a single privacy law which protects end-consumers' private information.

#### **b. International Internet Bandwidth**

The forces that are changing the global ICT (including International Internet Bandwidth) market context, and its openness, create visible opportunities for a potential competitor. Improving this International Internet Bandwidth, by decreasing the cost and improving the quality of services, provides opportunities for Vietnam to attract foreign companies as part of a sustainable and long-term growth plan. ISPs should be allowed to set their own tariffs, competition should be introduced in services provision, prices should be benchmarked against regional and national averages, and more local content should be developed.

#### **c. Education and developing international skills in ICT sector**

Information Technology (IT) is a key growth industry in Vietnam. The Government recognises this, and has set a target to have 1 million employees meet international skills and education standards in the ICT sector by 2020. This ambition is set out in Decision 1755/QĐ-TTg dated 22 September 2010 of the Prime Minister approving National Strategy on "Transforming Vietnam

into an advanced ICT country” (Decision 1755). However, the limited availability of skilled and trained labour remains an immediate obstacle to the industry’s growth.

We recommend that the Government cooperates with high-performing foreign universities and learns from best practice to create an international, relevant curriculum; a national standard technical skills exam should be developed; soft skills and English communication should be encouraged; students should complete a practical internship; and universities should collaborate with industry to understand the demands of jobs on students after graduation

## **CONCLUDING REMARKS**

The European Chamber of Commerce in Vietnam would again like to thank the Government for the efforts made to increase the competitiveness and attractiveness of Vietnam as an investment destination for European companies. We, therefore, invite and encourage the Vietnamese Government to address the issues outlined in this Position Paper and to address the expectations of the European business community in Vietnam. Please note that our suggestions in this Position Paper 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 also in the long-term interest of the Vietnamese Government and the Vietnamese people.

We sincerely hope that our suggestions in this Position Paper will help the Vietnamese Government to reach its goals and EuroCham will continue to assist and partner with Vietnamese authorities in pushing forward the signature and ratification process in both the EU and Vietnam of the EU-Vietnam Free Trade Agreement. In parallel, EuroCham is also actively promoting awareness of trade opportunities created for Vietnamese enterprises by the EVFTA as well as sharing our experience, increasing capacity building and investment to reap its benefits. We are, therefore, looking forward to working with the Government of Vietnam and all our Members and partners, continuing to have regular dialogue and follow-up meetings through the Vietnam Business Forum to help businesses joining the global value chain through our common goodwill, cooperation and partnership.

Thank you very much!

EuroCham website: <https://www.eurochamvn.org/>