

# AmCham EU's response to EU-Vietnam Industry Consultation

CONSULTATION RESPONSE

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# Background and Analysis

## QUESTIONNAIRE ON A 'FREE TRADE AGREEMENT' WITH VIETNAM

On 31<sup>st</sup> May 2012 the European Commission received the endorsement from the Council to open negotiations for a Free Trade Agreement (FTA) with Vietnam.

### *Background*

In 1995 Vietnam joined the ASEAN and begun its accession to the World Trade Organization, which was completed in 2007. At the same time, in 1995, Vietnam signed a cooperation agreement with the European Community, which unilaterally granted to Vietnam the MFN treatment. In recent years, within the ASEAN, Vietnam became party to five FTAs: ASEAN – China, ASEAN – India, ASEAN – Korea, ASEAN – Japan and ASEAN – Australia – New Zealand and has bilateral FTAs with Japan and Israel. Vietnam is also negotiating within the Trans Pacific Partnership.

Vietnam is the EU's fifth individual trade partner in ASEAN, with bilateral trade in goods reaching €18 billion in 2011. The EU exported goods worth €5.2 billion and imported goods worth €12.8 billion. From 2007 to 2011, EU export grew by 9.8% on average per year.

### *Information on the questionnaire*

The questionnaire is divided into the following sections:

I. Trade in Goods

II. Trade in Services and Investment

III. Regulatory Issues (Intellectual Property Rights, Competition, Government Procurement)

IV. Other issues

Should there be any additional point you wish to draw the Commission's attention to, please describe this under chapter "IV. Other issues".

In addition, where possible, we would appreciate receiving as specific information as possible (substantiated where possible by economic indicators and/or data) of respondents' interests, prioritization within sectors, and any proposals for solution, where problems have been identified.

The questionnaire has been prepared in order to provide the Commission with information to assist it in establishing priorities and taking decisions throughout the negotiating process. Your reply to this questionnaire is important in this process and we thank you in advance for your contribution.

The Commission, subject to the application of the EU's rules on access to documents (Regulation No 1049/2001), will treat the information that you provide as confidential. EU rules on access to documents allow the Commission to withhold access to a document where disclosure would undermine the commercial interests of a natural or legal person or harm the EU's relations with third countries, unless there is an overriding public interest in disclosure.

Please send your replies by 17 August 2012 to the following e-mail address: [trade-industry@ec.europa.eu](mailto:trade-industry@ec.europa.eu)

## **I. TRADE IN GOODS**

The Trade in Goods section of this questionnaire is divided into the following sections:

- A. General goods-related questions
- B. Questions related to rules of origin
- C. Questions related to import restrictions and prohibitions
- D. Questions related to access to raw materials and export restrictions and prohibitions
- E. Questions related to import and export procedures (included under a general heading "customs procedures")
- F. Questions related to discrimination and transparency in domestic regulation and taxation
- G. Questions on trade defence instruments (anti-dumping, anti-subsidy and safeguards)
- H. Questions related to Technical Barriers to Trade (TBT) (industrial goods)
- I. Questions related to Sanitary and Phytosanitary Measures (SPS) (agricultural goods, fish and fishery products)

### **A. General goods related questions**

1. What are the existing trade flows in your sector(s)?
2. What is your assessment of the potential for growth in this sector(s)?

**Response to questions 1 and 2:**

*The membership of the American Chamber of Commerce to the European Union (AmCham EU) is composed of producers, exporters, importers and users of products and services in different sectors. AmCham EU has noted from the document “Main Economic Indicators” regarding Vietnam dated 21 March 2012 as available on DG Trade’s website that*

- the EU-Vietnam trade balance is significantly in favour of Vietnam and that the EU share in total imports by Vietnam is small;*
- Vietnam imports more services than it exports on a worldwide basis;*
- the EU ranks fourth in terms of value of imports into Vietnam behind China, South Korea and Japan whilst the EU is Vietnam’s second largest export partner after the USA.*

*Vietnam being an economy in full development and an important ASEAN country, the EU’s data demonstrate that for the different sectors represented by AmCham EU, significant trade flows exist and there is even greater potential for growth. However, since 2010, Vietnam has introduced a number of protectionist measures. While the government stated that their aim was to reduce the trade deficit, a number of the legislative measures have had a direct and disproportionate impact on legitimate foreign producers.*

*AmCham EU notes highlights the following:*

- (i) Pursuant to its WTO Commitments, Vietnam has made general reductions in import duties applied to goods brought into Vietnam. The average import duty rate is currently about 9.3%, down from an average of 13.7% in 2005.<sup>1</sup> Nevertheless, this duty rate level is more than double the rate the EU currently applies to goods imported from Vietnam, about 4.1%.<sup>2</sup> In addition, although Vietnam has made some overall reductions, certain categories of goods are subject to an unusually high level of import duty.<sup>3</sup> Some of these categories include products which are main EU exports, such as cars. Vietnam has maintained its import tax on cars at about 90%.<sup>4</sup>*

<sup>1</sup> Report on The Proposals of Vietnamese Business Community on the Perspectives of Vietnam - EU FTA, prepared by the Committee on International Trade Policy of Vietnam Chamber of Commerce and Industry (unpublished).

<sup>2</sup> Ibid.

<sup>3</sup> Specifically, EU products face an MFN tariff in Vietnam that can be as high as 50% on average for beverages, 33% for confectionery, almost 27% for coffee and tea, nearly 17% for dairy products and 15% for animal products?

<sup>4</sup> Ibid.

- (ii) *Aside from tariffs, Vietnam has also issued a list of goods which are "discouraged" from import (Decision No 1380/QD-BCT, 25 March 2011). The list has been modified over time but, currently includes wines, spirits, tobacco products, cosmetics, passenger automobiles, SUVs and sports cars.<sup>5</sup> For discouraged goods, Vietnam will impose the highest import duty rate permitted under its WTO Commitments or under the relevant treaties to which it is party. Moreover, additional import formalities may be required for discouraged goods.*

*The Ministry of Industry and Trade ("MOIT"), the government authority which regulates trade of goods, has issued several pieces of legislative guidance which, in effect, limit imports of certain products. For example, Circular No. 20/2011/TT-BCT (12 May 2011) requires additional procedures for the import of vehicles with nine seats or less. The entity importing such vehicles must provide additional documents, including:*

- a power of attorney or an appointment letter from the manufacturer designating the entity as an authorized importer and distributor, or an agency contract with the manufacturer; and*
- a certificate of car warranty and authorized maintenance facility, issued by the Ministry of Transport.*

*Another MOIT regulation, Notification No. 197/TB-BCT (06 May 2011), permits import of wines, spirits, cosmetics and cell phones only through the ports of Hai Phong, Da Nang and Ho Chi Minh City. Notification 197 requires a letter of authorization as the distributor and importer, similar to that required for import of vehicles. These authorizations must be notarised and consularised.*

- (iii) *Finally, in addition to discouraged goods, there is also a list of goods which are completely prohibited from import. These items are listed in Appendix 1 of Government Decree No. 12/2006/NĐ-CP (23 January 2006). The prohibition applies to both domestic and foreign investors.*

*In light of the above, an FTA with Vietnam addressing these issues offers additional opportunities of access to the market.*

3. Could you specify your overall "offensive" and "defensive" interests?

*(Note: "Offensive interest" is understood to mean the interest you may have in gaining access to the Vietnamese market. "Defensive interest" is understood to mean competition from Vietnamese firms in your domestic market.)*

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<sup>5</sup> *Decision No. 1380/QD-BCT (March 25, 2011) Providing the List of Goods Discouraged for Import.*



**Response:**

*AmCham EU's members are in a broad range of sectors both in terms of products and services. They have both offensive and defensive interests. AmCham EU's position is in support of open and fair trade. It supports FTAs that provide fair and balanced opportunities in terms of reciprocal access to markets with transparency and non-discrimination in terms of regulatory treatment and foreign direct investment being significant for the AmCham EU membership. Thus, by way of example, the spirits sector has strong offensive interests and would seek improved market access through a reduction of import tariffs and the removal of non-tariff barriers that impede the trade in EU products.*

4. In your sector, do you see either:

- a) an interest in EU companies supplying goods to Vietnam (i.e., an export interest)?
- b) an interest in importing?
- c) an interest in EU companies setting up production facilities in Vietnam?

How strongly (for example, in financial terms) would you rate the level of these interests?

**Response:**

*As mentioned above, the interests of AmCham EU's membership cover all three interests without it being possible overall to determine whether any one of these interests predominates. This depends on the sector of industry concerned. Overall, AmCham EU believes that all interests are to a large extent equally important.*

- 5. Is there any element in an FTA between Vietnam (or ASEAN) and a third country that harms your competitive position?
- 6. How would you assess for your sector the relative importance of Vietnam (in terms of production capacity, comparative advantage, potential etc.) among the countries of the South-East Asian region?

**Response:**

*Although of course there will be some variation by business sector, we note that Vietnam maintained its 11th overall rank in the recent World Investment Report 2012 released by UNCTAD among the top prospective economies for foreign direct investment. Interest in investment in Vietnam, among the Southeast Asian economies, remains robust.<sup>6</sup> This*

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<sup>6</sup> *Massive Investment Potential is Untapped*, Ninh Kieu, VIETNAM INVESTMENT REVIEW July 23-29, 2012.

*definitely demonstrates the significance of the opportunities for AmCham EU's members.*

*For some of its members, Vietnam is one of their major sourcing and manufacturing countries. It is also one of the fastest growing markets in Southeast Asia for consumption of their goods. Thus, for example, Vietnam is a key ASEAN market for a number of export sectors; its growth rate is of particular note and hence why certain export sectors, e.g. wine and spirits but also other consumption goods as well as machinery producers would see it as a top priority in the region.*

**B. Questions related to rules of origin**

7. What preferential rules of origin should apply in the sector(s) of your interest in any agreement with Vietnam, standard or new rules based on the reform of GSP? (if relevant, please indicate the maximum level of non-originating materials that you could accept – or prefer).

**Response:**

*AmCham EU strongly supports the harmonization of rules of origin across ASEAN partners and the region. The rules of origin should be easy to use, objective, transparent, fit for the sector of industry concerned and predictable. AmCham EU members support rules of origin that allow for full regional cumulation even beyond ASEAN.*

*It is likely that one type of rule of origin might not fit all industries. Still, in the field of textile and apparel, single-transformation should confer origin. In any event, rules of origin should recognize the realities of modern global supply chains. Current rules in many of the ASEAN FTAs call for value-added rules. Those rules allow companies flexibility to source inputs that may not be locally available, from third countries without sacrificing the benefits of an FTA. Value-added rules origin ensure that trade grows among participating countries while taking into account the fact that certain material inputs cannot be procured locally.*

*Rules of origin should work in concert with commercial realities and support importer-focused trade facilitation measures, i.e.:*

- *Using the EUR1 certificate of origin and invoice declarations as alternatives at the option of the exporter. (AmCham EU believes that the lack of implementation of the EUR1 for EU exports in the EU-South Korea FTA has resulted in a de-facto inability to benefit fully of the FTA and the loss of competitiveness for small legal EU entities/SMEs due to their lack of resources in going through the burdensome process of applying for the status of 'approved exporter').*
- *Provisions that ensure the acceptance and validity of preferential certificates of origin for 'transshipments', i.e., EU products exported to Vietnam via commercial hubs in the region (such as for*

*example Singapore or Malaysia) - provided that goods stay under customs supervision in the 3<sup>rd</sup> country territory and no changes are made to the product, except for the possible 'splitting' of consignments and the addition of country-specific mandatory information (e.g., in the case of EU spirits this could be the addition of a fiscal tax stamp for Vietnam).*

8. Would your industry need specific flexibility to source abroad, including from other ASEAN Member States? If yes, from which ASEAN country? Could your industry indicate sensitivities as regards possible cumulation by Vietnam of materials or products from other ASEAN countries?

**Response:**

*ASEAN is an economic reality that the EU has already taken into account in its GSP regime by allowing cumulation to take place. This cannot now be ignored in FTA negotiations lest recourse will continue to be made to the GSP commitments of the EU rather than the FTA when concluded. Moreover, cumulation offers additional market access opportunities for those companies that wish to set up production facilities in Vietnam or other ASEAN countries.*

**C. Questions related to import restrictions and prohibitions**

9. Does your sector face import restrictions or prohibitions in Vietnam? If so, please specify the type of import restrictions (tariff rate quota, import licensing, import prohibition etc.) Please specify the likely effect of their elimination.
10. If your product is subject to import licensing requirements, are such licenses granted automatically to all applicants?
11. Are all measures related to import restrictions or prohibitions publicly available?

**Response to questions 9, 10 and 11:**

*Various members of AmCham EU have experienced market access difficulties and are calling for the following:*

- *elimination of tariffs on EU export product;*
- *making certain that import licenses are distributed on a non-discriminatory basis;*
- *current practices to afford preferential treatment to domestic firms are abandoned;*
- *removal of discrimination in the attribution of trading licences.*

*By way of example, reference is made to following:*



- *the difficulties in importing pharmaceutical products by foreign enterprises also referred to in the EU's Market Access Database (Barrier ID105360);*
- *the right to import certain products (e.g., cigars and cigarettes, crude oils or recorded media for sound or pictures) that remains restricted to state trading entities (see the US' 2012 National Trade Estimate Report on Foreign Trade Barriers at page 403).*

*The revision of Decree 40/2088 on liquor production and trading also presents concerns for the wines and spirits sector, notably by requiring tax stamps to be applied prior to export (current law foresees application in bonded warehouses in Vietnam) and by tightening liquor trading conditions for imported products. The trading licenses are to be subject to a quota system according to population. As most local products can be traded outside this system, imported products (notably SMEs) will be most affected if a license is refused.*

*The European Commission's Ninth Report on Potentially Trade Restrictive Measures for September 2011 – 1 May 2012 itself at page 76 points to the de facto difficulties for the importation of wines & spirits, mobile phones and cosmetics that are banned from being imported by road, rail, air and seaports or to the additional customs papers needed for the importation of cars with 9 seats or below.*

*All the measures related to import restrictions or prohibitions are not as such publicly available as some result from the practical implementation of regulations without codification or guidelines on such implementation.*

**D. Questions related to access to raw materials and export restrictions and prohibitions**

12. Does your sector have an interest in purchasing raw materials from Vietnam? If so, please specify what raw material and describe its economic relevance. Are there any measures that could be included in an agreement to facilitate trade or reduce costs for trade in raw materials?

**Response:**

*AmCham EU believes that the FTA should include a provision guaranteeing that raw materials in particular will not be made subject to export restrictions in law or de facto and that Vietnam will abide by all the WTO requirements as interpreted in WTO dispute settlement such as the recent procedures targeting China's export policies on raw materials.*

13. Does your sector face export restrictions or investment restrictions with respect to Vietnam? If so, please specify the type of export restrictions (export duty; tariff rate quota, VAT rebate schemes; licensing; discriminatory promotion schemes)? Please specify the likely effect of their elimination.

14. Are you aware of dual pricing of raw materials, i.e. where raw materials are priced at a lower level on the domestic market compared to international market prices to the benefit of local production?
15. On top of legally binding provisions in an eventual EU-Vietnam agreement, does your sector favour closer cooperation in the field of raw materials with Vietnam? If so, in which form (e.g. regular dialogue)? What could be the topics discussed in the framework of such a cooperation (e.g. rules, points of concern, alliance building with raw material producers and potential users)?
16. Do any environmental issues arise?
17. Does your sector have an interest in investing into the Raw Materials sector in Vietnam? Which are the specific issues which should be tackled to facilitate this? Please explain.

**E. Customs Procedures (import, export and transit procedures)**

18. Do you face problems regarding one or several of the following issues? Please respond with yes/no and where possible provide a more detailed description of the problems faced.
  - a) Overall problems with procedures and requirements for imports, exports and/or transit in Vietnam?
  - b) Do you encounter specific problems related to:
 

- inspections and controls during clearance	YES/NO
- fees and charges	YES/NO
- confidentiality of data	YES/NO
- data requirements	YES/NO
- documentation requirements	YES/NO
- other customs procedures	YES/NO
- transparency / publication of and access to trade regulations	YES/NO
- discriminatory treatment	YES/NO
- lack of uniformity in application of procedures	YES/NO
- customs valuation	YES/NO
- co-ordination between different border agencies	YES/NO

- use or non-use of information technology YES/NO
  - application or non-application of relevant international standards YES/NO
  - procedures for legal recourse/appeal YES/NO
  - transshipment YES/NO
  - other (please specify) YES/NO
- c) In light of your sourcing / delivery patterns, do you have any other comments to make?

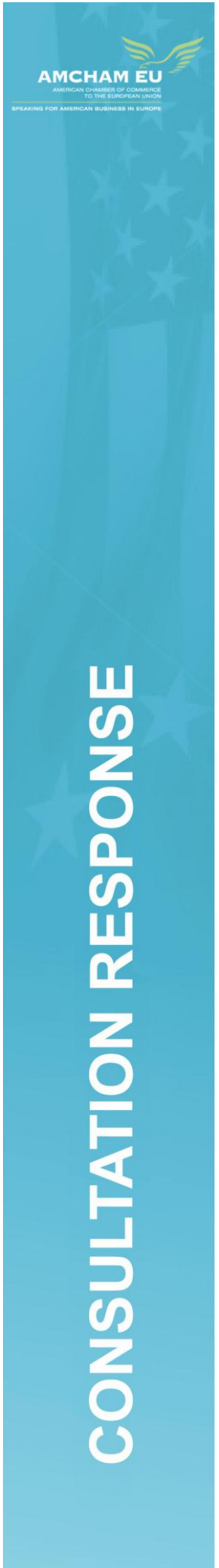
**Response to a), b) and c):**

*Any FTA should improve transparency of regulatory information and procedures. In particular, the rules governing customs, tariffs, etc. should be available online, up-to-date, and published in a common language.*

*AmCham EU members face a wide range of issues with Vietnamese customs with regard to procedures, processes and requirements for imports, exports and transit of goods. This is due to the following:*

- *complex processes and regulations;*
- *different approaches, treatments and interpretations of regulations and changing requirements across customs working in different zones as there is very limited cooperation between the regional customs zones;*
- *poor infrastructure leads to problems with transit;*
- *poor communication from authorities;*
- *higher administrative burden due to outdated computer systems.*

*In particular, as mentioned at page 75 of the European Commission's Ninth Report on Potentially trade Restrictive Measures covering September 2011 – 1 May 2012, the validity of import licenses for 30 days makes it difficult for companies to calculate when to introduce the request for the issuance of a license so as to avoid that the license expires before the goods arrive at the port. Backlogs of products at ports, additional business costs and reduced availability of goods may result from Vietnam's Circulars 24 and 32 on import licensing. In addition consularisation or 'pre-export authorization' of customs documents was also introduced, as previously mentioned. While foreign producers and importers have managed to work through the burdensome changes, AmCham EU members nevertheless request that similar measures are not introduced in order to avoid further complication for importers.*



*As also mentioned at page 76 of the Ninth Report, the use of reference prices for imported goods results in de facto minimum import values in violation of the WTO Agreement on Customs Valuation triggering higher customs duty amounts. By way of example, Vietnam maintains a 'check price' database for imported beverage alcohol brands and this has raised issues for industry. Accordingly, AmCham EU supports the inclusion of language that incorporates the WTO Customs Valuation Agreement as an integral part of the agreement, subject to the dispute settlement provisions of the FTA.*

*AmCham EU also supports the adoption of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. This would ensure that prices paid for transactions between related parties are in-line with the prices that would have been extended if the parties were independent third parties.*

*Vietnam has a list of non-essential commodities and consumer goods that are not encouraged for imports and for which importers' access to foreign exchange through official channels is restricted (see also page 87 of the Ninth Report).*

*As mentioned previously, AmCham EU supports the use of regional hubs allowing products to retain eligibility for preferential tariff rates.*

*AmCham EU members support capacity building efforts to educate customs in Vietnam on safe and appropriate handling of, for example, chemical products. In addition, an agreement with Vietnam and other ASEAN partners is an opportunity to work on warehouse safety standards and other safety practices for the transportation of chemical and other products.*

*AmCham EU also supports all efforts to streamline, make more efficient and clarify application of customs rules in order to contribute to ensuring that the right product is delivered to the right customer in a cost efficient and timely manner. Greater harmonization of policies and procedures between Customs and revenue departments is also important to provide greater certainty and transparency for business when tensions arise as a result of transfer pricing adjustments. Creating uniform application of customs across the ASEAN partners is an essential element.*

*Regarding transshipment, please see the response to Question 7.*

**F. Questions related to discrimination and transparency in domestic regulation and taxation**

19. Is your sector faced with discriminatory measures and practices between domestically produced goods and imported goods into Vietnam? If so, describe the nature of this discrimination (e.g. is it based on legislation or on de facto discrimination? Does it concern a regular domestic regulation and/or taxation regime?) Can you provide written substantiation of discrimination (including reference to legislation)?

20. Do you encounter problems due to lack of transparency of Vietnamese regulation, e.g. in the form of lack of publication of legislation or other documents? (Please also refer to the detailed questions under section III.A) below regarding transparency).

**Response:**

*In this respect, some AmCham EU members concur with the concerns raised in the US' 2012 National Trade Estimate Report on Foreign Trade Barriers at page 402 about :*

- *transparency concerns in relation to Circular 24 on import licensing and the difficulties experienced in obtaining import licenses;*
- *concerns in relation to discrimination in the application of Circular 122 on the application of price controls for a number of products including steel, chemical fertilizers, animal feed, or papers.*

*AmCham EU also voices concern related to transparency with regard to the execution of newly issued Law on Pricing e.f. January 1, 2013 especially on state determination of prices and state examination on price formulation for a number of products & services subject to price stabilization and determination (e.g., domestically produced cigarettes)*

*AmCham EU Members reports that there is discrimination when it comes to allocation of trading licences. Domestic producers do not have to apply the same procedure as importers.*

*AmCham EU recommends that Vietnam and the EU should designate a point of contact for the business community when there are questions of interpretation or when there is a request to review a specific treatment.*

**G. Questions on trade defence instruments (anti-dumping, anti-subsidy and safeguards)**

21. Have you had experience related to the use of trade defence instruments in Vietnam (anti-dumping, anti-subsidy or safeguards)?
22. Were there particular difficulties in communicating with and/or receiving information from the Vietnam authorities dealing with trade defence instruments?
23. Have you encountered market distortions (subsidies, pricing policies) in Vietnam which should be addressed by e.g. trade defence measures or other types of measures or which create structural trade difficulties?

**Response:**



*Vietnam has issued several pieces of legislation intended to protect domestic producers. These include: (i) Ordinance No. 20/2004/PL-UBTVQH11 (29 April 2004) against Dumping of Imported Goods into Vietnam; (ii) Ordinance No. 22/2004/PL-UBTVQH11 (20 August 2004) on Anti-Subsidy for Imports into Vietnam; and (iii) Ordinance No. 42-2002/PL-UBTVQH10 (25 May 2002) on Safeguards in the Import of Foreign Goods into Vietnam. To date, however, no anti-dumping or anti-subsidy case has been initiated by Vietnam.*

#### **H. Technical Barriers to Trade**

*In the context of this questionnaire, the term "Technical Barriers to Trade (TBT)" is intended to mean requirements applicable to products (e.g. technical regulations) and the conformity assessment procedures intended to verify compliance with these requirements (e.g. testing, inspection and certification, product registration or licensing, etc.).*

*Please provide comments on the following issues. Comments are particularly welcome if you or your colleagues in the industry consider that some the below areas should take priority in the TBT discussions.*

24. Have you found product requirements to be a problem in exporting your products to Vietnam?

#### **Response:**

*AmCham EU members' concerns relate to:*

- *the requirement that IT and telecoms products be tested in designated laboratories located in Vietnam;*
  - *discriminatory treatment against foreign firms in terms of some product registration requirements for imported pharmaceuticals*
  - *concerns with regard to the registration of food products as contemplated in the Draft Decree of Food Safety (as per the comments of the European Chamber of Commerce in Vietnam dated 8 March 2012, at page 5).*
25. Often, trade barriers arise not necessarily from the product requirements as such, but the procedures used to verify compliance with these requirements (conformity assessment procedures). What are the procedures used by Vietnam to verify compliance of products in your sector? Are they more burdensome than those applied in the EU?<sup>7</sup> Do you encounter difficulties (e.g. increased costs and marketing delays) due to these conformity assessment procedures?

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<sup>7</sup> For instance, EU legislation may allow the manufacturer to self-certify the products without the intervention of a third party certification body, whereas Vietnam may require that the product be certified by a public authority or a certification body approved by this authority.

26. What is your assessment of Vietnam's transparency and good regulatory practice in the development, adoption and enforcement of technical regulations? Please focus in particular on the questions below, and provide as detailed answers as possible.
- (a) How do Vietnamese authorities consult industry on proposed standards or technical regulations? For instance, does Vietnam systematically conduct public consultations on draft standards or technical regulations, to which industry can submit comments?
  - (b) If not, do importers (or domestic industry in Vietnam) have other opportunities to submit comments during the drafting of new technical regulations, before the proposal is adopted?
  - (c) Are similar consultation opportunities being provided to both domestic and foreign industry?
  - (d) In your experience, have comments made by stakeholders been taken into account?
  - (e) Is industry involved in standardization work in Vietnam? In particular, are foreign and / or foreign-invested companies allowed to participate in standard-setting activities in your sector? (e.g. membership in technical committees developing new Vietnamese standards) If yes, what is your experience with regard to this area.
  - (f) Have you ever tried to obtain information about proposed or adopted technical regulations, conformity assessment procedures or standards from the Vietnamese TBT Notification and Enquiry Point ([www.tbtdn.org](http://www.tbtdn.org))? Have you encountered specific difficulties?

**Response:**

*Vietnam government offices will sometimes conduct public consultations on draft standards or technical regulations. This gives private entities (both domestic and foreign invested) and industry associations an opportunity to submit comments and feedback. While transparency and consultation could be improved, there is some outreach already by the authorities. AmCham EU members nevertheless request that such consultations become a systematic response to ensure a more open process and increased commitments towards transparency by concerned regulators, because it concerns multiple ministries and requires re-alignment and compliance with newly issued laws as well as effective laws issued in the past. If future technical standards and regulations are not thoroughly consulted with concerned businesses it potentially poses a threat to business continuity and might trigger anticipated risks of increased technical barriers to trade.*

27. Have you experienced problems or difficulties arising from the division of responsibility for TBT-related measures between Vietnamese

- authorities, or from regulatory differences between different regions of Vietnam?
28. Do any or all of the following issues pose particular problems with regard to exporting your products to Vietnam?
- (i) short implementation periods for new measures;
  - (ii) availability of technical regulations (e.g. official Journal, public website etc.)
29. Does Vietnam use relevant international standards as a basis for the national standards and technical regulations in your sector? If so, are there any unnecessary deviations from, or additions to those international standards, that could create barriers to trade?
30. Do you encounter any barriers to trade arising from burdensome or discriminatory labelling or marking requirements? If so, please describe them in as much detail as possible.

**Response:**

*Certain sectors do suffer from barriers to trade including the wines and spirits sector. Only imported wines and spirits require tax stamps in Vietnam. While the industry sector is as a matter of principle opposed to tax stamps because there are other more appropriate ways to prove the payment of tax or the authenticity of products, it is clear that any requirement should apply equally to imported and domestic products. The government is currently revising its policy on tax stamps and the industry has sought its removal. If tax stamps cannot be removed, the current system should remain in place (application in bonded warehouse) or written confirmation should be provided that application can take place in hubs.*

31. With your knowledge of the technical regulations, standards and conformity assessment systems both in the EU and Vietnam, do you have any recommendations for solutions which would facilitate trade?
32. Would your proposed solutions be achievable within the provisions of regulatory systems currently applied in the EU and Vietnam, or would changes to the systems or legislative framework be necessary?

**I. Sanitary and Phytosanitary Measures (Agricultural products, fish and fishery products)**

*Sanitary and Phytosanitary Measures apply in order to protect human, animal, and plant health.*

*Your answers to specific product questions (33) to (39) will be taken as an indication of interest that might change over time.*

33. List the agricultural products (these include animals and animal products, plants and plant products and fishery products) you are currently exporting to Vietnam / importing from Vietnam.
34. List the agricultural products that you may be potentially interested to export / import in future to Vietnam (regardless of whether exports are currently taking place or have taken place in the past).
35. Please specify the major Sanitary and Phytosanitary (SPS) barriers you have encountered in the past (or may potentially encounter) when trying to export agricultural products into Vietnam.
36. With your knowledge of the technical regulations, standards and conformity assessment systems both in the EU and Vietnam; do you have any recommendations for solutions which would facilitate trade?
37. Would your proposed solutions be achievable within the provisions of regulatory systems currently applied in the EU and Vietnam, or would changes to the systems or legislative framework be necessary?
38. Do you expect that an SPS chapter in the proposed future agreement will benefit your industry? If so, please clarify.
39. On the basis of your previous response, which basic elements/provisions should an SPS chapter with Vietnam contain in order to potentially fulfil your priorities?
  - (i) Transparency (better notification provisions on SPS import rules including predictability and stability of SPS rules)
  - (ii) Regionalisation for animal and plant diseases
  - (iii) Equivalence (system of recognition)
  - (iv) Pre-listing of exporting establishments
  - (v) Certification procedures
  - (vi) Verification procedures
  - (vii) Information exchange
  - (viii) Notification and consultation
  - (ix) Safeguard measures
  - (x) Labelling
  - (xi) Other

# CONSULTATION RESPONSE

## II. TRADE IN SERVICES AND INVESTMENT

40. What are the main barriers that your sector encounters in cross-border services trade with Vietnam (ex. obligation to have a local commercial presence, etc.)?

**Response:**

*Vietnam's WTO commitments, as well as some bilateral and regional trade agreements, set out restrictions on services and investment. The WTO commitments set out quantitative restrictions on foreign investment in a few business sectors by capping the level of foreign ownership in entities operating in those restricted areas, requiring a joint venture with a local party. While some business lines simply require a joint venture, other business lines have a specific limit on the proportion of foreign investment in the joint venture. For example, entities operating in advertising must have a joint venture, but there is no specific cap on the level of foreign investment. In contrast, entities providing freight transportation services must have a joint venture in which the foreign party's ownership is limited to no more than 51% of the entity's charter capital. Some caps are scheduled to phase out over time, and some are permanent.*

*Additionally, domestic laws set out substantive conditions on investment in certain areas. For example, real estate businesses must comply with the investment conditions set out in the Law on Real Estate Business, credit institutions with the conditions set out in the Law on Credit Institutions, and so on.*

41. What are the main barriers that your sector encounters in establishing a commercial presence in the primary, secondary or tertiary sector in Vietnam (ex. capital ownership / equity cap, difficulty in obtaining a licence or authorisation, complex and lengthy procedure between federal and provincial level, etc.)?

**Response:**

*Vietnam is gradually lifting restrictions on foreign ownership. However, in the actual implementation there are still uncertainties affecting foreign presence in Vietnam. For example:*

- *it continues to be difficult for foreign investors to obtain approvals when they increase their capital in locally registered companies above 49%;*
- *the total equity held by foreign institutions and individuals in Vietnam's joint-stock commercial banks may not exceed 40% of the banks chartered capital;*
- *the equity caps in the sector of telecommunications is 49% for facilities-based services and 65% in non-facilities-based services;*



- *notwithstanding legal provisions allowing companies with foreign ownership of up to 49% to enjoy the same investment rules and conditions also benefiting wholly-owned Vietnamese companies, in practice, administrative procedures and implementation may be inconsistent and divergent;*
- *a local company in the field of distribution can be 100% foreign-owned but an economic needs test applies for the second and following retail outlets and, in the absence of implementing measures, legal uncertainty exists and it is difficult to obtain a favourable result as regards this economic needs test;*
- *although Vietnamese laws allow foreign trading companies (distribution) to establish branches in Vietnam under Decree 72, Vietnam's WTO commitments are more restrictive and do not provide for the same level of investment. In practice, the Ministry of Industry and Trade refuses to grant licenses for the setting up branches of foreign trading companies. The EU – Vietnam FTA should include provisions that allow for unrestricted foreign ownership by EU entities, including the establishment of local branches in Vietnam;*
- *in the absence of implementing measures, it continues to be difficult for foreign distributors of cement, tyres, paper, iron and steel, wines and spirits to obtain the required authorization.*

*On the issue of investment licenses, the Vietnamese licensing authority often suspends the process of granting an investment certificate until it has obtained feedback from the respective ministry that is responsible for a specific sector, which can take very long. Further delays are also caused by the need to legalize / authenticate all foreign documents. AmchamEU would welcome it if Vietnam would define a specific timeline (i.e., 15 or 30 working days), by which the respective ministries need to respond to the licensing authority. In case of no-response within that deadline, the licensing authority would be authorized to proceed with issuing an investment license. Furthermore, AmCham EU advocates the removal of the requirement for document legalization for EU investors / EU-based companies.*

*A Draft Decree on IT services contains several provisions that may hamper the operation of multinational companies.<sup>8</sup> In general, the following general comments are made with regard to this Draft Decree:*

- *The requirement to use only local facilities to deliver data centre services and cloud computing services is a major problem. This is clearly a violation of computer and related services commitments under the WTO GATS. Vietnam cannot expect to create an export*

<sup>8</sup> See the comments by the European Chamber of Commerce in Vietnam dated 25 May 2012.

*industry for IT services if it creates trade barriers to these services in its own market.*

- *Overall, the decree is highly regulatory and unnecessarily intrusive into the commercial marketplace. This will harm the Vietnamese economy by limiting access to the most advanced IT services, raising the cost of these services and slowing innovation.*
- *The licensing, registration and certification processes will not be able to keep up with the highly dynamic IT services industry. This will create a self-imposed handicap for Vietnam as an "innovation economy," since IT services are a critical enabler of innovations across all sectors.*

*Specific comments with regard to the Draft Decree on IT services are transmitted in **Annex 1** hereto.*

*AmCham EU members recommend that the EU-Vietnam FTA should include provisions on digital economy issues. The FTA needs to ensure cross-border data flows. Data flow commitments or non-binding agreements should be negotiated to complement cross-border services commitments and promote responsible and accountable treatment of data. This might be achieved through provisions in the EU-Vietnam trade agreement, balancing the need to protect data with the right to move data. The EU and Vietnam need to work together to develop approaches to data security and protection that will instil confidence in, and reduce resistance to, cross-border data flows. It could reduce the government's perceived need to restrict data flows and provide greater opportunities for cross-border trade in services.*

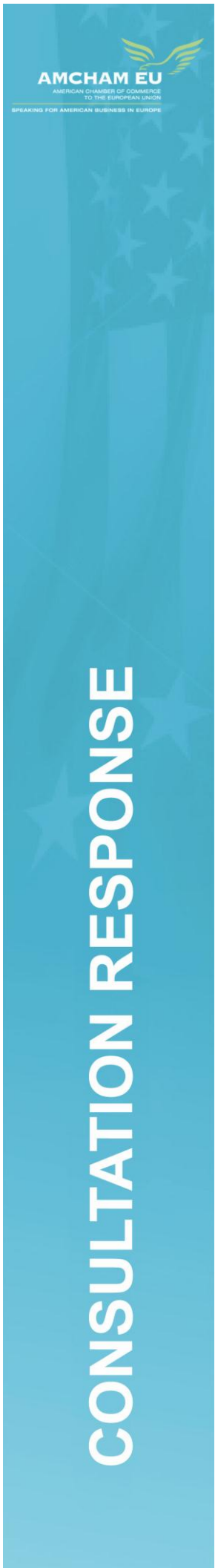
*The prospect of a bilateral EU-Vietnam agreement presents an important opportunity for services economies to establish rules to enable the global digital economy, ensuring the ability of their service providers and multinational businesses to move data around the world so that they can manage their businesses and server their customers most efficiently.*

42. What are the main barriers that your sector encounters with regard to the temporary movement of natural persons for business purposes in the primary, secondary or tertiary sector in Vietnam (ex. difficulty in obtaining work permits and visas due to lengthy procedures, lack of transparency in regulations at various administrative levels, etc.)?

**Response:**

*As reported in the EU's Ninth Report mentioned above (at page 118), work permits for foreign workers are extended on condition of employment of local workers.*

*Recent changes in regulations have made obtaining work permits for foreign employees quite complex. There are now stricter requirements for obtaining new work permits. Before applying for a work permit, the*



*employer must first attempt to recruit a Vietnamese individual to fill the position they would like to offer to an expat. An application dossier for a work permit must include evidence that the employer published a recruitment notice in national and local level newspapers to recruit a Vietnamese employee for that position. The publication must be made at least 30 days prior to the recruitment of the expat. This requirement is waived if the employer uses a recruitment agency. Applications to renew a work permit must be accompanied by a training contract with a Vietnamese employee who will replace the foreign employee for whom the renewal is requested.*

*AmCham EU advocates that Vietnam should simplify reporting and documentation requirements, eliminate government interference in the foreign employee recruitment process, i.e., remove requirement to publicly post a recruitment notice 30 days in advance to allow for domestic applications and remove requirement for training local employees. In addition, it should ensure that once a work permit is granted to a foreign employee, intra-company transfers across various subsidiaries in Vietnam are allowed.*

*AmCham EU also recommends that the Vietnamese government should be requested to provide visa exemption for EU citizens who have a short stay in Vietnam, especially for those who come to Vietnam for business purposes.*

43. Do you observe any self-imposed constraints (i.e. voluntary codes of conduct that are agreed and followed by operators) relating to environmental and social aspects of sustainable development, in the context of investment or services trade, which it would be to your advantage to see generalised or codified in Vietnam? And if so, which?
44. Do you encounter problems due to lack of transparency e.g. lack of publication of legislation or other documents relevant for your trade behaviour? Please also refer to the detailed questions under section III.A) below regarding transparency.
45. Is there an interest in having a Mutual Recognition Agreement in your sector (to cover recognition of standards, licenses, qualifications or else)?

**Response:**

*AmCham EU members support such an agreement to ensure that standards, definitions etc. can be aligned and the process more streamlined.*

46. Is market access allowed in your sector in Vietnam which goes beyond its relevant access obligations in the WTO and if yes, is it still interesting for your business to obtain further formal market access commitments?
47. In the sector in which your business specialises, do you have a particular interest in entering in the market of Vietnam?

48. What are the areas/sectors in which European companies are at a disadvantage in vis-à-vis third countries' competitors, due to FTA agreements already in force or about to come into force (e.g. list of Vietnam-third country FTAs)?
49. In the light of question 48, what negotiating objectives should the EU focus on, in the various sectors, so as to achieve at least a level playing field for its service providers in Vietnam?
50. Are foreign investments in Vietnam treated in a fair and equitable manner? Have there been any unreasonable, arbitrary or discriminatory measures against foreign investments?

**Response:**

*Vietnam is party to the WTO and is therefore bound by the WTO's principles on non-discrimination, including MFN and NT.*

*Additionally, Vietnam is also party to a number of trade treaties concluded with its trading partners whereby non-discrimination principles are provided.*

*However, on the difficulties experienced, please refer to the response to Question 41.*

51. Have there been any cases of direct or indirect expropriation? If so, have expropriated investments been compensated promptly, adequately and effectively?

**Response:**

*So far, we have not seen any case of direct or indirect expropriation in Vietnam. The Vietnamese law on investment also provides for the State's guarantees for investment. Accordingly, the Law on Investment 2005 provides that (i) the investment capital and lawful assets of the investor shall not be nationalized or confiscated through any administrative measure, and (ii) compulsory purchase/acquisition of the investor's property shall take place only in extremely necessary circumstances for reasons of national defence and security, and in such a case, the investor shall be paid and compensated.*

52. Are the provisions on free transfer of funds of capital and payments related to an investment by investors fully respected?

**Response:**

*As soon as having fully performed their financial obligations to the State of Vietnam, investors are entitled to remit abroad their profits, capitals, payments or any of their lawful money and assets (Law on Investment 2005, Article 9).*



53. Have there been any restrictions on payments due to exceptional circumstances such as pressures on the balance of payments or exchange rate policy?

**Response:**

*The State Bank of Vietnam has occasionally issued regulations in order to control the transaction in foreign currency. Generally, Vietnam requires all transactions within the country be made in Vietnam dong with certain exceptions (Ordinance 2005 on Foreign Currency Management and its Decree No. 160/2006/NĐ-CP).*

### III. REGULATORY ISSUES

#### A. Transparency

*To the extent applicable, indicate what problems arise due to lack of transparency such as lack of publication of legislation or other relevant documents. In the questions below, administration/government should be understood as local authorities, for instance regulatory bodies, regulatory authorities, certification offices, licencing authorities.*

54. Is information on trade-related regulations and their administration published and readily available, including on laws and regulations, procedures, penalties, appeal procedures, administrative guidelines and practice, decisions, and agreements with Vietnam where relevant.

**Response:**

*The Vietnamese government ministries publish on their websites the information on the laws and regulations in both Vietnamese and English in those areas within their purview.*

*In addition, there are various websites specializing in publication of laws and regulations in both Vietnamese and English, such as <http://thuvienphapluat.vn>.*

55. Is information made available in a readily accessible way, including through websites?

**Response:**

*As answered in question 54.*

56. Are there enquiry points available and accessible to interested parties (including through web-sites) which help making information on trade-related regulations and their administration available?

**Response:**



*As answered in question 54.*

57. Other requirements, suggestions concerning the availability of information?

**Response:**

*AmCham EU members encourage the Vietnamese government and ministries to develop a user-friendly, comprehensive and systematic database for various areas including customs and trade which is easily accessible.*

58. Are the intervals between publication and entry into force sufficient to allow interested parties to become acquainted with and well prepared for complying with them?

**Response:**

*Law No. 17/2008/QH 12 on Promulgation of Legal Documents ("Law on Promulgation of Legal Documents") provides that the effective dates of legal documents shall be stipulated in the legal documents themselves but no sooner than 45 days since the dates of their publication or promulgation.*

*In general, there is usually a notice period prior to the implementation of new laws.*

*Hence, Amcham EU members believe that in law and in practice, there are user-friendly intervals between publication and entry force of new provisions.*

59. Are appropriate opportunities offered for prior consultation and commenting on new and amended rules?

**Response:**

*The Law on Promulgation of Legal Documents provides for prior consultation and on new and amended laws and regulations, and permits comments.*

*In practice, the prior consultation may be held either in person in form of seminar or via the website of the Office of the National Assembly (<http://duthaoonline.quochoi.vn>) or via <http://www.vibonline.com.vn>, which is a website operated by the Vietnam Chamber of Commerce and Industry (VCCI).*

*The consultation on major pieces of new and amended laws and regulations may last from several months to a year before such laws and regulations are passed.*

60. Are there effective consultation mechanisms between interested parties and government?

**Response:**

*Notwithstanding the Law on Promulgation of Legal Documents and on-going Public administration reform, there is an urgent need for further progress and improvement in setting up effective consultation mechanism between all parties concerned. Inter-ministerial consultation by qualified ministry's representatives deems critical to ensure alignment and consensus on key regulatory issues and their subsequent enforcement to eliminate potential arbitrary approach and misinterpretation at the expense of enterprises.*

61. Are there any areas or sectors where consultation could be improved?
62. Do the consultation mechanisms include timing considerations or deadlines that allow for efficient and transparent procedure?

**Response:**

*As answered in question 60.*

63. Are advance rulings available from the administration (such as for trade in goods on customs classification and origin)?

**Response:**

*The administrative bodies have occasionally issued advance rulings in form of official letter or notification.*

64. Are there adequate complaints possibilities and appeal procedures?

**Response:**

*Under Vietnamese law, there are two levels of adjudication: first instance and appeal. Judgments and decisions by the court of first instance may be appealed.*

*Additionally, a legally enforceable judgment or decision of a court may also be reviewed in accordance with the procedure for cassation and revision if there is a serious breach of law or new evidence has been found. (Law on Civil Proceedings No. 24/2004/QH11 of 15 June 2004).*

65. Are the appeal procedures adequate in terms of non-discrimination, transparency, possibility for representation by independent legal counsel, cost and timelines?

**Response:**

*Only Vietnamese-qualified lawyers are allowed to represent the client before the court.*

*The Civil Proceedings Code sets out processes for appeals, describes the jurisdiction of different levels of judicial authorities, and sets out timelines for lodging a request for review and appeal.*

66. Do you have any other comments on the administration of trade-related regulations, including on the use of discretion, system of penalties, coordination and control mechanisms?
67. Please specify any shortcomings identified. Where available, identify best practices (such as existing information and transparency mechanisms in Vietnam) that could serve as a reference or starting point.

**Response to questions 54 to 67:**

*AmCham EU agrees with the conclusions and recommendations of the European Chamber of Commerce in Vietnam in its 2012 "Trade / Investment Issues & Recommendations", i.e.:*

*"Eurocham member companies, continue experiencing long approval times and numerous delays for business registration and investment licensing. Authorities requiring additional documentation from our member companies have increased, and consequently the percentage of firms waiting more than three months to complete all steps necessary to start a business or license a project has also gone up significantly. ...*

*Ministry-level authorities may need to take a greater role in clarifying regulating and ensuring that local authorities under their supervision exercise their authority in a fair and consistent manner. Various interpretations should not exist between different local authorities. On a broader scale, we recommend that Vietnam moves to a comprehensive "one-stop-shop" approval for business registration and investment licensing."*

*There are insufficient implementation regulations or guidelines such that liberalizing measures are not implemented or are implemented divergently.*

*There should be more centralized implementation measures or guidelines and more transparency thereof in order to increase legal certainty and cut red tape.*

*Please also refer to the response to Question 41.*

**B. Intellectual Property Rights**

68. Are you satisfied with the current conditions of protection and enforcement of intellectual property rights (IPR) in Vietnam? Please explain briefly nature/scope of the problem, if any?
69. According to your experience, what are the main weaknesses / problems of the current system in place (if any)?

**Response to questions 68 and 69:**

*AmCham EU agrees with the statements in Barrier ID note 105363 of 16 December 2011 in the EU's Market Access Data Base which states as a fact that IPR piracy / counterfeiting is high in Vietnam and that IPR protection and enforcement is deficient even though new legal provisions have been adopted. Specifically, AmCham EU refers to the following problems:*

- *The enforcement of the IPR provisions is deficient with long proceedings leading to inefficient protection.*
- *The criminal prosecution for IPR infringements is unpredictable. In particular, criminal prosecution of counterfeiters is difficult to enforce. Vietnamese authorities have not interpreted the terms of "commercial scale" in Art 171, Criminal Code. The "intentional act" of counterfeiters is also difficult to prove. Due to these difficulties and shortcomings, the prosecutor cannot prosecute counterfeiters at criminal courts. There are numerous trademark counterfeit cases per year, but the numbers of criminal cases remain very low and rare.*
- *The level of fines does not discourage IPR infringements.*
- *There are insufficient customs controls on goods in transit.*
- *There is insufficient protection of geographic indications.<sup>9</sup>*
- *The Vietnamese officials are not trained as regards enforcement and enforcement scattered over many agencies.*
- *Vietnam has borders with China and Cambodia and China is flooding the neighbouring markets with counterfeit products.*
- *It is not rare that previous manufacturers of genuine goods become manufacturers of counterfeited goods.*
- *The export of counterfeit products is not illegal under Vietnamese law.*

<sup>9</sup> While Vietnam has taken some steps forward (e.g., the recognition of some EU GIs), there is still room for significant improvement.

- *The authorities turn a blind eye to the existence of numerous shops selling counterfeit products, which are sold everywhere including in the vicinity of major tourist attractions such as the Bin Thanh market at the heart of Ho Chi Minh City.*

70. Is an adequate and effective protection and enforcement of IPR in the country essential for the pursuit of your trading activities there?

**Response:**

*AmCham EU considers that an effective IPR regime with commensurate enforcement is essential for branded goods manufacturers to trade with Vietnam and to produce products in Vietnam.*

71. Please indicate whether you consider intellectual property rights issues as priorities and specify which IPRs are the top priorities for you in Vietnam and why :

- (i) Copyright and related rights
- (ii) Trademarks
- (iii) Geographical Indications (GIs)
- (iv) Designs
- (v) Patents
- (vi) Data protection
- (vii) Plant variety
- (viii) Enforcement

**Response:**

*AmCham EU members consider that the top priorities are the enforcement of intellectual property rights especially of trademark rights followed by designs, patents, copyright and data protection.*

72. Please indicate one particular aspect of intellectual property protection or enforcement that you would wish to see addressed in a trade agreement.

**Response:**

*AmCham EU members would like to see more and better criminal prosecution of counterfeiters.*

*In addition, Vietnamese IP Law should be revised making active customs protection and export of counterfeit illegal under the IP Code.*



*Increasing the penalty and power of the enforcement agency would also help towards better enforcement.*

*AmCham EU believes that a trade agreement should give incentives to improve the IP protection enforcement system in Vietnam.*

73. Have you encountered problems in protecting/enforcing your IPRs in Vietnam? If yes, how did the protection/enforcement mechanisms function in this country? Did you encounter difficulties in protecting/enforcing your rights being a foreigner in Vietnam?

**Response:**

*Yes, AmCham EU members have encountered problems in protecting and enforcing their IPR in Vietnam. Vietnam is in general challenging for brand owners when it comes to enforcing their rights. The procedures are lengthy, bureaucratic and costly and it is difficult to find local agents with a solid IP background. The outcome of any enforcement action taken in Vietnam is unpredictable for brand owners as information leaks on a regular basis and some infringers appear to be untouchable, and there is no consistency of application.*

74. Is there any type of enforcement measure missing in Vietnam's legislation and practices that you consider necessary in order to react against infringements of IP rights?

**Response:**

*AmCham EU members identified a few measures missing in Vietnam's current legislation:*

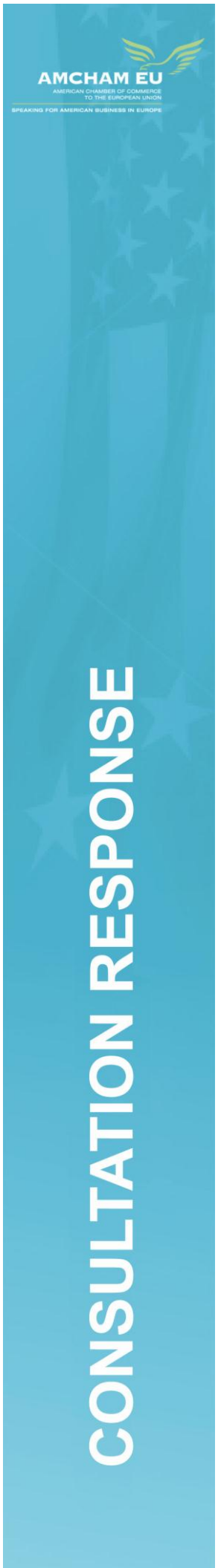
- In Vietnam there is no IP Court that could specifically deal with IP infringements. Today, IP cases are handled in normal courts with judges that have no experience to deal with IP cases.*
- Criminal cases depend in many cases on the decision and internal rules of the local police. Often, the local Criminal Science Institution's Inspector does not evaluate the counterfeit products under IP laws, but compares the products physically by design, material, colour and other methods, according to his own judgement.*
- Consistent state policy and Government decision is required to ensure that all seized imported illicit tobacco products shall be destroyed and will not be considered for optional re-export from Vietnam to third countries.*

*As mentioned several times earlier, there is a need for harsher and more deterrent penalties.*

*AmCham EU members also believe that a scheme to protect traceability information on imported goods (e.g. lot codes, batch numbers) could be included or shared with Vietnamese authorities as an example of best practice. The EU mandates all products to carry a production lot number and for traceability systems to be in place. Vietnam experiences major problems with counterfeit products and so, for certain products, such a scheme which were to include penalties for tampering with such information could be introduced. AmCham EU would request that this issue is raised in the framework of the negotiations on the FTA.*

**C. Competition, State Aid/Subsidies and State-Owned Enterprises**

75. Have you encountered any anti-competitive practices in Vietnam (cartels, abuse of dominant position, vertical or horizontal restrictions of competition, anti-competitive mergers & acquisitions) that are harming your business? If so, describe briefly the nature of the practices and the problems encountered.
76. Have you brought these problems to the attention of the relevant competition authority? If so, what has been their response/follow-up and how have decisions been enforced?
77. Have you been subject to investigations for alleged competition infringements by the Vietnamese competition authorities? If yes, how was this experience?
78. Have you been party to any merger review filings in Vietnam? If yes, how was this experience?
79. Are you aware of instances where state aid/subsidy granted by Vietnam authorities has had adverse effects on you?
80. Has Vietnamese state aid/ subsidy put you or a company you know of at a competitive disadvantage? If so, please
  - a) Indicate whether the aid made it more difficult for you to compete in the Vietnamese market, in the EU market and/or in export markets
  - b) Describe to the extent possible the form of the state aids/subsidies involved (e.g. export rebates, tax/duty exemptions, below-market loans, state guarantees, grants), the objective (e.g. Research and development aid, export aid, regional development aid), the sectors concerned, the granting authority (e.g. federal or provincial government, specific agency) and give an estimate of their amount.
  - c) Indicate if you have taken any steps to raise this matter, either in Vietnam or with the appropriate authorities in the EU? Have you had problems in getting information on the state aid/subsidy granted by the Vietnamese authorities?



81. Have you invested in Vietnam? Has the availability of state aids/subsidies played a role in your decision? If yes, please describe the form, amounts and objective of the aid in question and specify the granting authority. Have you experienced discrimination in the access to state aid/subsidies from Vietnamese authorities (e.g. aid or higher amounts of aid reserved to local firms)?
82. Are you aware of the Vietnamese government granting special or exclusive rights or privileges, advantages or immunities to domestic state-owned enterprises that have an adverse effect on your business (e.g. discriminatory treatment, state aid/subsidies, access to markets, access to public procurement, access to financing)? If so, describe briefly the nature of these practices and the problems encountered.
83. Are you aware of any exemptions from the national law granted to Vietnamese state-owned enterprises or the existence of statutory laws or favourable regulatory or other measures applicable to state-owned enterprises? If yes, please provide a brief description.

**Response:**

*In principle, with the promulgation of the Law on Enterprise No. 60/2005/QH11 (29 November 2005), State-owned enterprises shall enjoy the same treatment as other types of business entities. Notwithstanding that Law, State-owned enterprises, especially large-scale corporations, are in practice consulted first by regulators to amend existing national policies and regulatory framework.*

84. Are you aware of any particular government measures that would induce or encourage Vietnamese state-owned companies to engage in anti-competitive behaviour? Please describe such measures.

**Response:**

*In practice, the Government may take several measures in favour of State owned enterprises. For instance the Government may provide loan guarantees.*

85. Are you aware of any national policy objectives that the Vietnamese government is implementing through domestic state-owned enterprises and which have an adverse effect on your business? If yes, please describe briefly what such policy objectives are and how they affect your business.
86. How easy/difficult is it to get information about the activities on Vietnamese state-owned companies (though annual reports, published accounts etc)? If there are problems, how would you suggest to improve the situation?

**Response:**

*Information on state-owned enterprises is not readily available. State-owned enterprises generally do not publish information on their websites, and annual reports are usually not disclosed.*

#### **D. Government procurement**

*Please respond with yes/no and where possible provide comments to expand on the replies to the following issues.*

87. Are you satisfied with the current conditions of access to Vietnamese government procurement markets?
88. Are you aware of existing legislation on government procurement in Vietnam? Which are your experiences with its practical application?

#### **Response to questions 87 and 88:**

*AmCham EU members are aware of the Prime Minister's Directive no. 494/CT-TTg of 20 April 2010/ on the use of domestic materials and goods in bidding for state-funded projects. Based on this Directive, international bidding is held only if domestic goods, materials and equipment cannot meet package requirements or those cannot be provided locally. This legal document together with other provisions discouraging the importation of many products, has a significant effect on market access.*

89. Are there any areas in which you feel EU suppliers face restrictions or different treatments that do not apply to Vietnamese suppliers? Please indicate the key regulatory and market access obstacles met by EU suppliers when tendering for public contracts. Please specify the extent to which these obstacles prevent EU suppliers from doing business in Vietnam
90. Please indicate whether you consider the following possible elements of a government procurement chapter as a priority concerning procedural rules and national treatment:
- (i) Transparency in the tendering process
  - (ii) Easy access to the qualification system
  - (iii) Use of international rather than local technical standards
  - (iv) Effective review mechanisms including the possibility to obtain interim measures
  - (v) A single point of entry giving an overview of, and access to, all relevant procurement opportunities in a given jurisdiction

(vi) National and MFN treatment

91. Please indicate which key sectors, types of contract (public contracts, concessions, and other forms of Public Private Partnership) and procuring entities are priorities for EU suppliers. As regard services, mention precisely the category of services as well as the mode of supply (cross-border supply / consumption abroad / commercial presence/ presence of third country natural persons) in which EU providers are interested in.
92. Please indicate the key regulatory and market access obstacles faced by EU suppliers when tendering for public contracts. Please specify the extent to which these obstacles prevent EU suppliers from doing business in Vietnam.

**IV. OTHER ISSUES**

93. Are there any other issues related to the topics covered by the above sections or to any other topics that are not mentioned in this questionnaire and that you would like to address?

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*AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate U.S. investment in Europe totaled \$2.2 trillion in 2010 and directly supports more than 4.2 million jobs in Europe.*

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CONSULTATION RESPONSE





## **Annex 1**

### **Specific comments on the Draft Decree on IT services**

(i) Art. 3.24:

It is not clear what the purpose is of the "IT service product management code."

(ii) Art. 4.1:

It is not clear why there is a need to "unify the state administration" of IT services.

(iii) Art 4.2:

State administration of IT services will dramatically slow the innovation in this industry.

(iv) Art. 6.9.<sup>10</sup>

"Other information technology enabled services" appears to be very broad, covering any sector that can be delivered electronically and that is not already covered under 6.9.a-e. This exposes the entire "digital economy" to a highly regulatory regime that will limit Vietnam's ability to compete and innovate.

(v) Art. 7:

Preparing a detailed list of IT services is an impossible administrative task that would provide no real benefit. The industry moves too fast for government to keep up.

(vi) Art. 8:

The offer of incentives seems to be open to foreign companies, so at least this provision does not seem to be discriminatory.

(vii) Art. 11:

The GoV seems to recognize the importance of IT services to the overall economy by seeking to create "favorable conditions," including access to telecom networks. However, it is not clear exactly what this will entail. Furthermore, this apparent recognition of the economic importance of IT services is totally undermined by the overly regulatory and discriminatory provisions in the rest of the draft decree.

<sup>10</sup> Note - There was a typo in the translation. 6.9.e was listed twice.

(viii) Art. 12:

The proposed system of national standards on IT manpower skills is highly regulatory, very intrusive into the commercial marketplace and unnecessary. It is without recent precedent in other countries.

- + Government officials and institutions cannot keep up with technology changes - the courseware, certifications, etc. become outdated quickly.
- + Same applies for maintaining pace with changes in market and client needs for particular skills and capabilities.
- + Companies provide certification in key products where demand exists.
- + Vietnam would be out of step with the rest of its trading partners.
- + Workers in Vietnam would become less attractive given lagging skills profiles.
- + Vietnamese workers would be less attractive for assignments to international opportunities.
- + The government as an employer is free to set certain standards for its own employees. However, Vietnamese businesses have to compete, and to impose such requirements on them or their sources of skills would give non-Vietnamese rivals an advantage with better skilled and more competitively compensated employees.
- + Changes in the market and technology will swiftly outdate any pay scales that are tied to artificial constructs of skills accreditation and certification.

(ix) Art. 14.1-3:

Licenses, certificates and registrations for the broad range of dynamic IT services are impractical. This would add a useless layer of bureaucracy and cost to the Vietnamese economy.

(x) Art. 15.2:

Requiring web search portals, data centres and cloud computing services to be located in Vietnam will greatly limit the availability and raise the cost of these services to Vietnamese businesses, government users and consumers. Furthermore, this requirement is a clear violation of Vietnam's WTO GATS cross-border services commitments for computer and related services.

(xi) Art. 20.2:

For services requiring registration, the requirement to offer trans-border services through an agent adds no value while increasing cost and limiting and slowing the availability of IT services.

(xii) Art. 20.3:

Requiring users of IT services to confirm that their IT service providers have registered and holding them liable for a penalty tax if the providers have not registered is a huge disincentive to using IT services. This further handicaps the Vietnamese economy against its regional and global competitors.

(xiii) Art. 20.4:

This indicates that MIC could promulgate even more regulatory restrictions on trans-border services in the future.

(xiv) Art. 21.4:

The requirement for IT service providers to submit periodic reports is undefined and does not seem to serve a useful purpose. This adds more cost and bureaucracy to the Vietnamese economy.

(xv) Art. 23.3:

The requirement that only domestic IT service providers serve state bodies greatly limits the availability of these services to government agencies, increases the cost to the government and limits the potential efficiencies in the operation of the government. Furthermore, the requirement that a provider of IT services under Art. 14.1 for state bodies must be "a state-owned organization, company or the one that the state can control its decision-making and activities through business management agencies" would create an even greater limitation on the availability of these services to the government. This will make it extremely difficult for the GoV to capitalize on the latest advances in information technology, making the government and the economy of Vietnam less competitive relative to other countries in the region and the rest of the world.

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*AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate U.S. investment in Europe totaled \$2.2 trillion in 2010 and directly supports more than 4.2 million jobs in Europe.*

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