



January 26, 2010

His Excellency, Mr. Vu Van Ninh  
Minister of Finance  
Socialist Republic of Vietnam

## **Follow-up: Draft Circular to Implement Price Control Mechanisms**

Your Excellency,

On behalf of the memberships of the American Chamber of Commerce in Vietnam (AmCham) and the European Chamber of Commerce in Vietnam (EuroCham), we offer our compliments to your Excellency, and request your attention to our concerns over a draft circular to implement price control mechanisms that your Ministry is considering.

Last month, AmCham and EuroCham sent letters to you with concerns about the draft pricing circular. The attached position paper provides additional details of our concerns.

AmCham and EuroCham put forward these comments in the hopes of contributing to Vietnam's stable economic and social development. We are sensitive to the dangers of rising inflation and other economic challenges that Vietnam is facing. However, we do not believe the proposed circular will help achieve the government's economic goals.

Rather than price controls, consideration should be given to liberalizing the supply chain for distribution to make it more efficient as a more effective means of making products more affordable. We feel our member companies, their business partners, and all enterprises and consumers in Vietnam will suffer if this circular goes into effect.

Our memberships thank you for your consideration and we are grateful for the opportunity to have our opinions considered on this important issue. Please do not hesitate to contact us if you have any questions for our respective Chambers.

Respectfully yours,

Hank Tomlinson  
National Chairman, AmCham

Alain Cany  
Country Chairman, EuroCham



## POSITION PAPER

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# Comments on the Draft Circular on the Regulation of Prices

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### *Background*

A Draft Circular<sup>1</sup> on pricing issued by the Ministry of Finance (“MOF”) was posted on the MOF website on 24 December 2009.<sup>2</sup> This Draft Circular, if adopted, will replace Circular No. 104/2008/TT-BTC (“Circular No. 104”).<sup>3</sup> Circular No. 104 applies only to State Owned Enterprises and for a limited range of products. The Draft Circular would expand the scope of Circular 104 to include private sector enterprises (whether local or foreign invested)<sup>4</sup> as well as increasing the number of products subject to price regulation.<sup>5</sup> Circular No. 104 guides various decrees of the Government that implement certain provisions of the Ordinance on Prices.

The Draft Circular would impose three basic levels of regulation, those being: price stabilization measures, price registration, and price declaration. These three types of regulation are contemplated in the existing Circular No. 104, but problematic new criteria would be introduced by the Draft Circular, among which are vague and non-transparent conditions for the application of price stabilization.

### *Policy Analysis*

First and foremost, there are important policy reasons for avoiding the kind of price controls proposed by the Draft Circular. We highlight the following five points in particular:

#### **1. Price controls do not work and are counterproductive**

First, unless there is an emergency, it is risky for a government to impose price controls on commodities because such controls simply do not work and are often counterproductive. If a government imposes a mandatory price ceiling that is too low, the suppliers of that product could withhold the good from the market, or sell it to customers outside of the country with the price controls. This can lead to shortages and could lead to black-market sales of the good at a higher price. Imposing price controls on commodities that are priced internationally, such as animal feeds, could be particularly problematic. The prices of these commodities are largely determined by international commodity exchanges, rather than the local market condition in Vietnam. If the Government of Vietnam were to impose price ceilings on these products, foreign suppliers would simply sell their products to consumers in other countries, and the Vietnamese livestock and fish producers would be faced with a shortage of animal feed, because Vietnam is not self-sufficient in the production of animal feed.

#### **2. Domestic Price Controls – A Huge Administrative Burden**

Second, with many of the products covered by this draft being imported or being produced in whole or in part from imported materials, costs and prices change regularly in today’s markets, not least because of exchange rate changes. With so many niche products and specialized materials, it is very difficult to see that the government can determine realistically, properly and

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<sup>1</sup> Draft Circular Guiding the Implementation of the Government’s Decree No. 170/2003/ND-CP of December 25, 2003, Detailing the Implementation of a Number of Articles of the Ordinance on Prices and Decree No. 75/2008/ND-CP of June 9, 2008, Amending and Supplementing a Number of Articles of the Government’s Decree No. 170/2003/ND-CP of December 25, 2003, Detailing the Implementation of a Number of Articles of the Ordinance on Prices (“**Draft Circular**”).

<sup>2</sup> See <http://www.mof.gov.vn/DefaultE.aspx?tabid=632&ItemID=66400>

<sup>3</sup> Circular No. 104/2008/TT-BTC, dated November 13, 2008, of the Ministry of Finance guiding the implementation of Decree No. 170/2003/ND-CP dated 25 December 2003 of the Government detailing the implementation of some articles of the Ordinance on Prices and Decree No. 75/2008/ND-CP dated June 9, 2008 amending and supplementing some articles of Decree 170/2003/ND-CP dated December 25, 2003 of the Government detailing the implementation of some articles of the Ordinance on Prices.

<sup>4</sup> Price registration would apply to enterprises that 1) conduct wholesale business; 2) conduct both wholesale and retail business, 3) are simultaneously importers and exclusive distributors; 4) are distributors; or 5) are sales agents. See Article 28 of the Draft Circular.

<sup>5</sup> Please see the attached detailed listings for a full list of industries covered by these proposed pricing measures of price stabilization (**Appendix 1a**), price registration (**Appendix 1b**), and price declaration (**Appendix 1c**).

efficiently the costs and prices for millions of transactions of tens of thousands of enterprises seeking to sell the thousands of product variations that would fall within the Draft Circular's scope. The administrative processes triggered by the circular would be a major nightmare and added expense for each enterprise handling any of the listed products - manufactures, importers, wholesalers, and retailers.

### **3. Other laws already provide adequate protection for consumers**

Third, other laws such as consumer protection laws and competition laws ensure that consumers are not being charged unfairly high prices or suffer from illegal price setting. Consumer protection laws can be used to ensure that the most vulnerable consumers, such as the elderly, are not preyed upon by unscrupulous companies selling products at unreasonably high prices through deception. Competition laws can be used to ensure that a single producer or a small group of producers do not use monopolistic or oligopolistic market conditions to charge uncompetitive prices for goods or services. More often than not liberalization and promotion of competition is the best option to lower prices and discourage price fixing and other unlawful anti-competitive behaviors.

### **4. Price controls create shortages by discouraging investment which ultimately increases reliance on foreign suppliers**

Fourth, Vietnam should be aware that the announcement and enforcement of price control regulation could have a chilling effect on foreign direct investment (FDI) in Vietnam overall and for the listed products in particular. Vietnam needs substantial FDI in facilities such as feed grain milling, vegetable oil production, fertilizer production, and milk production, to name a few. Foreign investors may be unwilling to invest in these facilities if they perceive that the government will interfere with the market for these products by attempting to regulate the prices for these products. The Draft Circular introduces a great deal of uncertainty to investors, as they are not sure if and how price control may be introduced. This would make investing in Vietnam and trading with Vietnam less attractive and will hamper the trading and investment into the country. In fact, we have already heard of cases in which much-needed new investment in domestic production of some of the commodities covered by the Draft Circular being scuttled due to the news that such a measure may be introduced.

### **5. Price controls will undermine Vietnam's ability to achieve "Market Economy Status"**

Fifth and last, Vietnam is still classified as a "Non-Market Economy" for purposes of U.S. Anti-dumping laws, introducing an element of unpredictability in anti-dumping cases that makes it riskier for Vietnamese exporters. We have worked hard over the years to see that Vietnam is ultimately given "Market Economy" classification, and we believe some progress has been made, but these efforts would be set back several years were the Draft Circular to take effect.

For the above reasons, the Government of Vietnam should consider using the laws on consumer protection and competition as a more rational form of economic regulation for a modern economy, rather than implementing price controls.

## ***Legal Analysis***

In addition to important economic policy implications noted above, we believe that the Draft Circular, if adopted, would raise serious issues in light of several key provisions of the GATT as analyzed below.

Because we are dealing with imported products, WTO rules apply, and because the rules being discussed could differentiate between domestically produced products and foreign-produced products, there are legal issues to examine under Vietnam's WTO commitments, which include the World Trade Organization ("WTO") Accession Protocol for Vietnam,<sup>6</sup> with the issue of price controls having been addressed directly in Vietnam's WTO accession Working Party Report,<sup>7</sup> paras. 96-103. These commitments include the general requirements of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").<sup>8</sup> In particular, the WTO/GATT rules in Article III on Non-Discrimination Between Vietnamese and Foreign Products (National Treatment) apply. There are specific provisions in Article III relating to price controls needing to avoid prejudicial effects to the interests of countries supplying imported products (Article III.9). The applicable provisions of Article III also caution that any measures should not be applied to imported products so as to afford protection to domestic production (Article III.1). Another requirement is that imported products cannot be treated less favorably than domestic like products in respect to all rules relating to internal sale, transportation, distribution or use. These rules need to be accommodated.

There are also rules under Article XI of GATT 1994 which address general restrictions on measures other than duties, taxes or other charges whether made effective through quotas, licenses or other measures.

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<sup>6</sup> Protocol on the Accession of the Socialist Republic of Viet Nam, adopted in the General Council as annexed to the Council Decision on Accession of the Socialist Republic of Vietnam, WT/L/662, dated 7 November 2006 (hereinafter referred to as the "WTO Accession Protocol").

<sup>7</sup> Report of the Working Party on the Accession of the Socialist Republic of Viet Nam to the WTO Agreement reproduced in document WT/ACC/VNM/48, dated 27 October 2006 (hereinafter referred to as the "Working Party Report").

<sup>8</sup> General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187; 33 I.L.M. 1153 (1994).

Vietnam reiterated its commitment to these standards – specifically in relation to price controls -- when it joined the WTO, where the WTO Working Party Report notes:

The representative of Viet Nam confirmed that, from the date of accession, Viet Nam would apply price controls in a WTO-consistent fashion and take account of the interests of exporting WTO Members as provided for in Article III:9 of the GATT 1994, and in Article VIII of the General Agreement on Trade in Services (GATS). He also confirmed that Viet Nam had published the list of goods and services subject to State price control and any changes in its Official Gazette and would continue to do so after accession. He further confirmed that pricing policy in Viet Nam would be applied in compliance with the provisions of the WTO Agreement, including Article III:4 and XI:1 of the GATT 1994 and Article 4 of the Agreement on Agriculture. The Working Party took note of these commitments.<sup>9</sup>

The rules on non-discrimination in the WTO cover discrimination clear on the face of a measure (known in WTO law as a “de jure” violation). The WTO rules on non-discrimination extend further and broadly cover the conditions for competition between the domestic and imported products (known in WTO law as a “de facto” violation). This has been interpreted to cover not only laws or regulations which directly govern the conditions of sale or purchase of a product, but also any laws or regulations which might adversely affect the conditions of competition between imported and domestic products.<sup>10</sup>

According to our review of the Draft Circular, these are the four main substantive areas of concern under the WTO rules. We consider each of these below.

### **1. Possible violation of GATT Article III.9 concerning maximum price control measures:**

GATT Article III.9 contains a set of provisions specifically addressing the scenario here, namely measures setting maximum price controls. This provision places a positive obligation upon Vietnam to avoid measures that would have prejudicial effects on other contracting parties supplying imported products. The rule provides:

The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

Accordingly, Vietnam needs to consider that maximum price measures affect the trade expectations of other contracting parties, since imported products may be prejudiced, due to many factors such as changing exchange rates, changing technical requirements, and any other factors that are not present for domestic products. Because of this rule, Vietnam must avoid such prejudicial effects “to the fullest practicable extent”.

The Draft Circular falls short of these standards. It contains vague provisions that could enable authorities to act at their discretion, making it impossible to avoid to the fullest practical extent the prejudicial affects to the interests of Vietnam’s trading partners. For example, Article 4.1 of the Draft Circular provides conditions for application of price stabilization measures by using unquantifiable terms such as “fluctuat[ing] abnormally” or “prices increase too high or fall too low in an unreasonable manner”. In addition, Article 31.1 of the Draft Circular states that when the authorities detect that the price registration dossier has “unreasonable price constituents”, they can request the enterprises to explain the price constituents and re-register the price.

Maintaining vague provisions as mentioned above constitutes a failure by Vietnam to avoid “to the fullest practicable extent” “prejudicial effects” to the interests of WTO members supplying imported products. If measures are to be applied, they need to account for problems likely to be faced by imported products, and the measures should be clear and transparent. With unknown elements of guidance, and with imports likely to need to price adjustments more regularly than domestic products, the inflexibility of this regime will work against importers.

### **2. Violation of GATT Article III.4 concerning less favourable treatment regarding laws, regulations and requirements for sale**

GATT Article III. 4 provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transpiration, distribution or use.

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<sup>9</sup> Working Party Report, para. 103.

<sup>10</sup> See, e.g., Panel Report, *Canada – Autos*, paras 10.80 and 10.84, WT/DS139?R, WT/DS/42/R, adopted 19 June 2000.

There is no “de jure” discrimination on the face of the Draft Circular that causes a violation, but a “de facto” violation may exist due to the adverse effect on the conditions for competition between the domestic and imported products in the Vietnamese market.<sup>11</sup>

Thus, for example, if information on market share or information on the cost structure of one of the covered product sector providers shows that: (i) foreign-produced products in that sector are significant in the Vietnamese market; and (ii) the price constituents of foreign-produced products are most likely at risk of having “unreasonable price constituents” according to the Ministry of Finance’s Regulation on Calculating Price of Assets, Goods and Services, then there could be a *de facto* violation of GATT Article III.4.

Accordingly, Article III.4 has been violated in the past by measures that appear to apply equally but in practice affect imported products more, specifically for minimum price requirements applicable to domestic and imported beer.<sup>12</sup> An Article III.4 violation has also been found for additional marketing requirements such as an obligation to add the name of the producer or the place of origin or the formula of a product.<sup>13</sup> It seems inherent that imported products will have more price constituents and possibly more procedural requirements than domestic products, not least because of exchange rates and world market developments, so the likelihood of this Article III.4 violation is significant.

### **3. Violation of GATT Article XI.1 concerning the price circular being a measure restricting importation other than a duty or tax**

Similar to the above, there will be a GATT violation where Vietnam’s measures are applied to restrict importation or sale, since these are measures other than the ones specifically allowed, namely duties, taxes or other charges. The rule in Article XI.1 of GATT 1994 provides:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

The wording of Article XI.1 is “comprehensive: it applied to all measures instituted or maintained by a contracting party... restricting the importation, exportation or sale... of products other than measures that take the form of duties, taxes or other charges.”<sup>14</sup> In one case, a GATT Panel found that the rules of Article XI.1 applied to a system of minimum import prices.<sup>15</sup> Given that maximum prices can have a restrictive effect just as other pricing control measures, this rule also needs consideration in this context.

### **4. Violation of GATT Article III.1 concerning the price circular affording protection to Vietnamese production**

Similar to the above, Article III.1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This rule provides:

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

Thus, if information on market share or information on the one of the covered product sectors providers shows that: (i) foreign-produced products in that sector are significant in the Vietnamese market; and (ii) the price constituents of foreign-produced products are most likely at risk of having “unreasonable price constituents” according to the Ministry of Finance’s Regulation on Calculating Price of Assets, Goods and Services, then, there would be a *de facto* violation of GATT III.1, if this measure is applied in a way that affords protection to Vietnamese domestic production.

To determine these issues, the application criteria, structure and overall application of a measure is relevant.<sup>16</sup> As shown previously, the pricing variables of imported products are far more likely to be captured and subject to uncertain controls than domestic production. Seen in light of expressions of concern in Vietnam relating to high pricing of certain imported products, the potential discriminatory impacts here are significant.

For the foregoing policy and legal reasons, we urge the Government of Vietnam to avoid measures that would have prejudicial effects on imported products, and would move further away from modern market economy operating principles.

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<sup>11</sup> See, e.g., Panel Report, *Canada – Autos*, paras 10.80 and 10.84, WT/DS139/R, WT/DS/42/R, adopted 19 June 2000.

<sup>12</sup> See, e.g., GATT Panel Report, *Canada – Provincial Liquor Boards*, para 5.12, adopted 18 February 1992, BISD 39S/27.

<sup>13</sup> See, e.g., Working Party Report, *Certificates of Origin, Marks of Origin, Consular Formalities*, para. 13.

<sup>14</sup> See, e.g., GATT Panel Report, *Japan – Semiconductors*, para 104, BISD 35S/116, adopted 4 May 1988.

<sup>15</sup> See, e.g., GATT Panel Report, *EEC – Minimum Import Prices*, para 4.14, BISD 25S/68, adopted 18 October 1978.

<sup>16</sup> See, e.g. *Japan – Alcoholic Beverages II*, 199, 120, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996.

## Appendix 1a

### LIST OF GOODS, SERVICES SUBJECT TO PRICE STABILIZATION

1. Petrol and oil;
2. Cement;
3. Construction steel;
4. Liquefied gas;
5. Chemical fertilizers;
6. Plant protection drugs;
7. Veterinary drugs: foot-and-mouth disease vaccine; avian influenza vaccine; and antibiotics of Oxytetracycline, Ampicilline, Tylosin and Enrofloxacin;
8. Salt;
9. Milk;
10. Edible sugar (white sugar and refined sugar);
11. Paddy and rice;
12. Human-use preventive and curative medicines in the Ministry of Health's list of major curative medicines used at healthcare establishments;
13. Charge for transporting passengers by rail, for hard-seat tickets;
14. Certain livestock feeds: maize, soybean and soybean oil cakes.
15. Industrially manufactured animal feed (both domestically produced and imported), including:
  - Complete mixed feed, concentrated feed for raising pigs and chicken;
  - Mixed feed pellets for raising catfish, ba sa fish (No. 5) with weight from 200 gr/fish to 500 gr/fish;
  - Mixed feed pellets for tiger prawns (No.05) with weight from 10gr/prawn to 20gr/prawn.
16. Goods and services subject to price stabilization which the Prime Minister decides to add in the List of Goods and Services subject to Price Stabilization under applicable laws.

## **Appendix 1b**

### **LIST OF GOODS AND SERVICES SUBJECT TO PRICE REGISTRATION**

1. Petrol, oil in compliance with the Government's Decree on petrol and oil trading and inter-ministry guidelines of the Ministry of Finance and Ministry of Industry and Trade;
2. Cement;
3. Construction steel;
4. Liquefied gas;
5. Clean water for purposes other than clean water in daily life;
6. Chemical Fertilizer;
7. Plant protection drugs;
8. Veterinary drugs: foot-and-mouth disease vaccine; avian influenza vaccine: antibiotic: Oxytetracyclin, Ampicilline, Tylosin, Enrofloxacin;
9. Salt;
10. Milk;
11. Edible sugar (sugar and refined sugar);
12. Paddy, rice;
13. Certain livestock feeds: Maize, soybean, soybean oil dried;
14. Coal;
15. Paper: printing paper, newsprint, writing paper;
16. Postal and telecommunications services pursuant to the guidance of the Ministry of Information and Communications;
17. Textbooks;
18. Charge for transporting passengers by rail, for hard-seat tickets;
19. Industrially manufactured animal feed (both domestically produced and imported), including:
  - Complete mixed feed, concentrated feed for raising pigs and chicken;
  - Mixed feed pellets for raising catfish, ba sa fish (No. 5) with weight from 200 gr/fish to 500 gr/fish;
  - Mixed feed pellets for tiger prawns (No.05) with weight from 10gr/prawn to 20gr/prawn.
20. Goods and services subject to price stabilization which the Prime Minister decides to add in the List of Goods and Services subject to Price Stabilization under applicable laws.

## **Appendix 1c**

### **LIST OF GOODS, SERVICES SUBJECT TO PRICE DECLARATION**

1. Industrial explosive materials;
2. Seaport services in the Seaport Service Price List issued by port service providers;
3. Airport services in the Airport Service Price List issued by the director of airport or airfield;
4. Air fares on domestic flights in the list of State-specified price brackets;
5. Car freight;
6. Human-use preventive and curative medicines as stipulated in Joint Circular of Ministry of Health - Ministry of Finance - Ministry of Industry and Trade guiding the implementation of State management over prices of medicine and treatment for people;
7. Domestically produced and consumed cigarettes;
8. Imported or domestically produced cars.