

2015 EUROPEAN BUSINESS POSITION PAPER

Trade/Investment Issues & Recommendations in
support of a Competitive Economy in Thailand

*“Strengthening Thai – European Economic Relations
towards a More Competitive Thai Economy”*

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Message from the President

Bangkok, January 2015

The European Association for Business and Commerce (EABC), for another year, proudly presents our annual European Business Position Paper. Since its successful launch in 2012, the EABC Position Paper has served as a communication tool on trade and investment, supporting the competitiveness of the Thai economy.

Thailand has gone through a challenging phase in its development since 2013, both politically and economically. This included a new government with a new policy direction, a pause in EU–Thailand Free Trade Agreement (FTA) negotiations, as well as the upcoming full realization of the ASEAN Economic Community (AEC) by the end of 2015. This edition of the Position Paper then contains both new and ongoing issues reflected by the European business community in Thailand, all of which share the goal of promoting the country as a more attractive trade partner and investment destination. It also comprises policy recommendations for better trade and investment facilitation, as well as doing business in Thailand, which will increase the economy's competitiveness.

As an enhancement to our EABC Advocacy Groups, the Rail and Road Infrastructure working group was established last year, in addition to our nine existing working groups: *Automotive, Cross Sectoral Issues, Energy and Energy Efficiency, Food and Beverages, Healthcare and Pharmaceuticals, Information and Communication Technology (ICT), Intellectual Property Rights (IPR), Insurance, and Transport and Logistics*.

On behalf of the EABC, I would like to express my appreciation to all company members of the EABC Working Groups and everyone who was involved in useful policy dialogues that enabled the continued development and publishing of this EABC Position Paper. I would also like to pass my deepest gratitude to the European Delegation to Thailand who has always been very supportive of our operations and activities. My thanks also for the dedication and effort shown by everyone related to the EABC in support of our important publication.

I believe that this publication will be beneficial to investors as well as Thai policymakers in providing business strategies and a road map for Thailand to strengthen its competitiveness and attractiveness in the regional and global economy.

Yours sincerely,



Rolf-Dieter Daniel
President, EABC

About European Association for Business and Commerce (EABC)

The European Association for Business and Commerce (EABC) was established in 2011 as a platform for representing the interests of the European business community in Thailand.

The overall objective of the EABC is to contribute to the improvement of the business and investment climate, strengthening Thailand's position as a competitive and attractive investment destination as well as a potential gateway to ASEAN. The EABC aims to facilitate investment and further diversify market opportunities and access for European companies in Thailand, in parallel with promoting Thailand as a high potential trade and investment market for European businesses.

Our main activities include carrying out policy and advocacy dialogues, providing support to European businesses with trade related information, and organising key events to foster opportunities for European businesses in Thailand. The EABC is a part of the European Union (EU) strategy to support the internationalisation of European SMEs and other European enterprises by enhancing market access, in particular, in emerging and fast growing markets such as Thailand and ASEAN.

The EABC consortium contains business organisations and chambers of commerce, both in Thailand and Europe. A combined membership base of EABC and Consortium partners represents more than 2,000 companies in Thailand. The EABC interacts as the unified voice of

European businesses in Thailand. Ten Advocacy Working Groups facilitate constructive policy and regulatory dialogues among European businesses, with the aim of improving market access and robust business cooperation between Europe and Thailand. These transversal as well as sectoral working groups – chaired by representatives of prominent European enterprises from respective sectors – are:

- Automotive
- Food & Beverages
- Healthcare & Pharmaceuticals
- Cross Sectoral Issues
 - Customs
 - Employment and legal issues
- Information & Communication Technology (ICT)
- Insurance
- Intellectual Property Rights (IPR)
- Transport & Logistics
- Energy & Energy Efficiency
- Rail & Road Infrastructure

With strong support from the European Union as well as our partners and extensive networks in Thailand and Europe, the EABC serves as a communication platform for businesses to interact with authorities and counterparts in Thailand. The EABC is committed to working closely with European businesses, the Royal Thai Government, the EU Institutions, and the Chambers of Commerce as well as counterparts in Thailand, ASEAN, and Europe.

EABC Board Members



* Appointed by EABC President, as laid down in the EABC Bylaws. The directorship shall be confirmed by the AGM and registered at the Ministry of Commerce respectively.

Executive Summary

Struck by global economic turbulence and domestic instability, Thailand is now making a concerted effort to maintain its attractiveness as one of the most favourable investment destinations in ASEAN. Its strategic geographic location, and its level of economic development, gives Thailand advantages over neighbouring countries. However, more work needs to be done to enhance Thailand's competitiveness in the global economy, on the path to sustainable economic growth.

Robust economic relations between Thailand and the European Union (EU) have been very extensive and shown through trade, investment, and other economic cooperation. Thailand ranks as the third largest trading partner of the EU while the EU is the second largest source of foreign direct investment (FDI) to Thailand. The full implementation of ASEAN Economic Community (AEC) in 2015 will provide great opportunities for Thailand; however, it will also bring challenges for the country in relation to sustaining its competitiveness. Thailand needs to progressively increase its productivity along with economic efficiency to successfully overcome such challenges and become a leader in the region.

Despite positive foreign investor confidence toward the Thai economy, as claimed by the Board of Investment (BOI, 2014), there is no significant improvement in Thailand's overall competitiveness ranking shown in the Global Competitiveness Report 2013–2014. Main concerns were placed on political and policy instability, including immoderate regulations, pervasive corruption, and security disturbance. To enhance its productivity, Thailand must urgently upgrade its public health, education, technological readiness, internet access, and quality of

institutions. An improvement was shown in the overall ranking in the World Bank's Doing Business Report 2015, in which the ranking of starting a business in Thailand deteriorated. It is then essential for Thailand to further improve related procedures to facilitate trade and investment in the economy. Services liberalization is one of the major factors that can drive Thailand toward a more competitive economy. Overall, Thailand's liberalization in services has not yet materialized. Restrictions and regulatory barriers on market entry and movement of labour – which have been a major obstacle in investing in Thailand – are still evident. Having entered the so-called middle income trap, Thailand needs to overcome this challenge by advancing its services sector through an infusion of new skills and technologies to increase productivity as well as developing more liberalized regulations.

Among Thailand and EU economic relations, the Free Trade Agreement (FTA) negotiations between Thailand and EU are a crucial platform that will benefit both economies. Losing its GSP privileges from the EU in January 2015 as a result of becoming an upper-middle income country, Thailand needs to come up with a new strategy to maintain its competitiveness in EU export markets. A conclusion to the FTA will be even more imperative. Gains from the completion of FTA negotiations are expected to improve Thailand's social welfare and resource allocation as Europeans can bring in capital, high technology, expertise, innovation, and improvement in regulatory standards and procedures.

The EABC, as a voice of the European business community in Thailand, has adopted Policy Advocacy Working Groups in its structure. The main goal is to create a policy

and regulatory platform where industries can participate and propose their business issues of interest as well as recommendations to the Thai authorities. The Working Groups consist of Cross Sectoral Issues, Intellectual Property Rights (IPR), Automotive, Food and Beverages, Healthcare and Pharmaceuticals, Information and Communication Technology (ICT), Insurance, Transport and Logistics, Energy and Energy Efficiency, and Rail and Road Infrastructure. Fundamentally, the EABC Advocacy Groups work to generate positive contributions for Thailand's further competitiveness within the spirit of EU-Thailand: partnership for growth.

Continuing on from our previous Papers, European businesses still emphasize enhanced transparency, improved efficiency, an enabling economic and regulatory environment, and liberalization of the services sector as key priorities for tangible improvement in Thailand's

position. The 2015 Position Paper is also intended to be a source of information from the EU and European Member States to assist in their engagements with Thai policymakers and authorities. We are hopeful that Thai businesses, media, and academics will find this Position Paper useful in their trade-and-economic related future use.

The table below is a summary of key trade and investment recommendations contributed by our EABC working groups. We are fully committed to providing constructive contributions in terms of policy and regulations that will foster a long-term economic partnership between Thailand and Europe. We appreciate all valuable exchanges with the Royal Thai Government and wish to continue our regular dialogue and mutually beneficial collaboration at both policy and business levels.

Issues	Recommendations
Overall Trade and Investment Policy	
	<ul style="list-style-type: none"> Stronger economic relations are highly recommended for the benefit of Thailand and the EU. A reengagement of FTA negotiations between EU and Thailand can enhance economic opportunities; thus, significant economic gains. Liberalization of services sector is a key enabler of competitiveness, skill development, enhancement of productivity, and a boost of economic growth and resilience. In view of globalization and regionalization, Thailand is highly encouraged to strengthen its competitiveness and attractiveness through further liberalization, creation of a level of playing field, and development of hardware and software infrastructure.
Cross Sectoral Issues (CSI)	
I. Enhance transparency in policymaking and implementation of rules and regulations	<ul style="list-style-type: none"> Customs reforms toward transparency and efficiency in customs procedures are recommended. <ul style="list-style-type: none"> <i>Reward scheme</i>: a phased approach for elimination of reward scheme is recommended. Rewards should only be allowed where revenue collection exceeds current budgeted targets set by the Ministry of Finance. <i>Penalty scheme</i>: the scheme should be based on proportionality, taking into account the intention and the severity of an offense. A clear distinction between civil and criminal offences must be made.

Cross Sectoral Issues (CSI)

	<ul style="list-style-type: none"> The concept of “reasonable care” by the trading community should be recognized, as a mitigating factor in penalty assessment, to encourage compliance with laws and regulations. Free zone requirements are recommended to be more practical. Additionally, confidentiality of product cost structure and production process is encouraged.
II. Ease of doing business to improve investment climate in Thailand	<ul style="list-style-type: none"> Competitive tax regime and compliance methods should be simplified to improve economic efficiency as well as enhance transparency in tax collection. Robust investment promotion policy that allows clarification, adjustability, time and methodology appropriateness for R&D activity is recommended. Clear guidelines regarding the establishment and operationalization of IHQ and ITF frameworks are strongly encouraged. Role of court system in ensuring foreign business confidence in the country and attracting more FDI to Thailand is emphasized. Sound implementation of competition law is suggested for the promotion of economic efficiency and prohibition of anti-competitive behaviour.
III. Creating an enabling economic and regulatory environment	<ul style="list-style-type: none"> Relaxation of foreign ownership restriction and progressive liberalization of services sector Implementation of the existing review mechanism on List 3 in the FBA to duly remove restrictions and encourage foreign investment in a board range of services sectors is supported. A level of playing field for European businesses in the services sector is strongly encouraged. Review, with an aspect of relaxing, the current rules for foreign ownership of land and condominiums, and the leasing of land and buildings is continually recommended to attract FDI. Ease of employment procedures and laws to facilitate free flow of skilled and unskilled labour Facilitate issuance procedure for visa and work permit Simplify regulations/ requirements regarding employment of foreigners More detailed recommendations on employment regulations are provided in the CSI section. Simplification of regulations on hazardous substances control with international practices Simplification of operational procedures for reporting, classification, registration, and licensing of hazardous substances is recommended. This should be formalized into official regulations for predictability and sustainability.

Intellectual Property Rights (IPR)

I. Amendments of IP-related legislations	<ul style="list-style-type: none"> Amendment of Trademark Act on accession to the Madrid Protocol and illegal refilling practices and amendments to Trademark Act on protection of scent and sound marks <ul style="list-style-type: none"> Ensure full utilization of existing enforcement measures. The interpretation of provision for enforcement agencies and/or implementation plan should allow possibility to broaden the definition of illegal refilling practices. Regular feedback on progress made to proposed legislative amendments would be appreciated by relevant stakeholders.
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Intellectual Property Rights (IPR)

	<ul style="list-style-type: none"> • Landlord liability provision for IP infringement <ul style="list-style-type: none"> – Urgently reconsider and include the provision on landlord liabilities into Copyright Act, Trademark Act, and other possible IP-related legislation. – Coordinate with relevant government agencies and IPR right-holders to consider other currently available courses of action under existing laws including the deployment of administrative measures against uncooperative landlords. • Amendment of the Geographical Indicators Act B.E. 2546 is necessary to comply with all the requirements of Article 22 and 23 of the TRIPS Agreement (protection of GIs and prohibition on the use of GIs in any means that indicates/ suggests/ translates the GIs).
II. IP Policies	<ul style="list-style-type: none"> • Backlog on patent registration <ul style="list-style-type: none"> – Address patent backlog and improve patent approval process – Restore patent term to create fair practice to compensate the rights holders – Promote a regular dialogue and consultation between public and private sectors • Trademark Elimination via Plain Packaging Policy and excessive measures restricting normal use of trademarks shall not be adopted. An alternative social policy shall be considered to address consumption of alcohol and tobacco products.
III. Role of IPR in Digital Economy	<ul style="list-style-type: none"> • Speed up examination and grant procedure of patents to encourage more investment and innovation • IPR regulations and law must be periodically reviewed as well as aligned with current international standards.

Automotive

I. EU-Thailand FTA Negotiations	<ul style="list-style-type: none"> • Resume FTA negotiations as soon as possible • Reduce tariff rate on automotive products at least to a similar level of that under the JTEPA • Eliminate NTBs in Automotive Sector by adopting international standards and recognizing ECE test report / certificate
II. Technical Regulations	<ul style="list-style-type: none"> • Align with internationally-accepted UNECE standards and recognize international certification • Actively engage in developing and implementing ASEAN MRA for automotive products • Streamline TISI operations by outsourcing tasks to appointed test laboratories and technical services and reduce bureaucratic process
III. Taxation	<ul style="list-style-type: none"> • Ensure alignment of Customs and Excise taxation policies related to Customs Free Zone • Ensure clear and consistent Customs Free Zone rules • Announce subordinate legislation for the CO2-emission-based excise in 2015 and accept CO2 emission testing certificates issued according to UNECE regulations, for excise purposes

Automotive

	<ul style="list-style-type: none"> Fairly consider any changes to excise tax base, so as not to discriminate against Free Zone automakers Tighten control on grey market vehicle imports through close monitoring of declared customs value and technical testing requirement
IV. Labour Development	<ul style="list-style-type: none"> Take an holistic approach in developing mid- and long-term strategies to raise availability of labour

Energy and Energy Efficiency

I. Energy Security	<ul style="list-style-type: none"> Due to continuously increasing energy demand and insufficient supply in the country, it is recommended for the government (in collaboration with private sector) to identify new sources of energy or alternative energy.
II. New Opportunities in the Energy Sector	<ul style="list-style-type: none"> Support development of renewable energy sources for clean and sustainable energy supply Encourage comprehensive bilateral consultation between the government and private sector to develop inclusive policies for Thailand's energy market Establish the role of Thailand as a regional energy hub under the AEC framework by emphasizing the importance of building interconnections in ASEAN toward achieving long-term security, availability, and reliability of energy supply in the region.
III. Enhancing Energy Efficiency	<ul style="list-style-type: none"> Focus on best practices in energy efficiency and engage European expertise with local business, policy-makers and the public to achieve targets of lowering carbon emissions and business preparations to deal with rising energy requirements and energy costs; at the same time, increasing share of renewable energy in the economy. Improve energy literacy with the support of the EU
IV. Energy Saving: Reducing Energy Use	<ul style="list-style-type: none"> European lighting products and design services can help in terms of energy-saving and achieving targets set in the EEDP.

Food and Beverages

I. Excise Tax	<ul style="list-style-type: none"> In setting the applied Liquor Tax rates in the new Excise Tax Code, there should be no increase in taxation burdens, particularly on premium products. The tax base for any ad valorem component should be exclusive of excise or other taxes payable, to ensure simplicity and transparency of the system. There should be a clear pathway over time towards a fully specific taxation regime. There must be adequate and consistent enforcement to help address tax evasion or illicit trade practices.
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Food and Beverages

II. Labelling	<ul style="list-style-type: none"> • Alternative and more effective measures to inform and educate general public about harm-prevention and responsible drinking are recommended. • Implementation guidelines for alcohol labelling regulations should be provided as soon as possible. • Regular consultation with the Alcohol Policy Board in the areas of addressing drinking and driving; reducing underage drinking; providing examples of self-regulations; providing relevant information through education, awareness and health-related interventions; and the responsible service and sale of alcohol.
III. Excessive graphic health warnings	<ul style="list-style-type: none"> • Thailand should reject any proposal to introduce graphic health warnings and consider alternative and more effective measures to reduce the harmful use of alcohol. The interventions need to be evidence-based and target specific problems.

Healthcare and Pharmaceuticals

I. Market Access	<ul style="list-style-type: none"> • Technology transfer and innovation <ul style="list-style-type: none"> – Ensure viable and accessible local market with available skilled workers. The public and private sectors must work together to advance R&D and ensure access, viability and sustainability of the investment. – Thailand needs to adopt innovation and develop products and services to serve demand of global customers and maintain its market share. • Draft Drug Act <ul style="list-style-type: none"> – Urgently consider removal of Section 48 (11) and Section 49 (5) from the draft Drug Act. – Revise Section 48 (10) adding the condition for generic drugs to notify the patent status of the medicine to be registered with authorities which could be specified in the Ministerial Regulation. This is in order to prevent patent infringement of the generic drug companies that will cause unnecessary business conduct costs to the generic companies themselves. • Government procurement and reimbursement <ul style="list-style-type: none"> – Establish transparent procedures for pharmaceuticals listing, pricing, and tendering process, taking into account the value of innovation to therapeutic outcomes and clinical needs rather than cost savings. – Create a level playing field, and any preferential treatment for state-owned pharmaceutical companies or national companies should be eliminated.
II. Intellectual Property Issues	<ul style="list-style-type: none"> • Improve the patent examination process with adequate resources to bring the approval within a reasonable timeframe. • The number of qualified patent examiners shall be increased and the DIP shall commit to training these examiners in the short, medium, and long term. • IT development for efficient patent registration and data filing is suggested. • Patent-term restoration should be encouraged.

Information and Communication Technology (ICT)

I. Digital Economy	<ul style="list-style-type: none"> • A reformed and renamed MICT is welcomed. However the fundamentals of telecoms reform and a well-structured industry, underpinned with broadband should not be glossed over or considered unimportant. • A trusted internet (with cybersecurity and civil society governance) will produce better results for business, individuals and the economy than one where the perception of the internet is a vehicle to monitor and collect data. • Skills are in short supply and for the whole ICT sector (and the entire economy) there is a long overdue need for work permit and visa reform including a practical business visa
II. Telecommunications	<ul style="list-style-type: none"> • A structure conducive to fairness and innovation is long overdue. Reform and evolution of state-owned enterprises is needed. Competition regulation is missing. Commercial spectrum should continue to be issued by auction only. The Foreign Dominance Notification continues to be an impediment to investment. A strong, effective and truly independent regulator is needed; measures to weaken it are not recommended.
III. Digital Broadcasting	<ul style="list-style-type: none"> • Allocation of spectrum in late 2013 gave a great shot in the arm to the sector. The industry is seeing innovation and opportunities for participation. Clear rules on spectrum use including about digital dividend spectrum will be welcome.
IV. Information Technology (IT)	<ul style="list-style-type: none"> • The software development industry and other start-ups need access to funds. Government procurement can be enhanced greatly.

Insurance

I. Liberalization of insurance industry	<ul style="list-style-type: none"> • Liberalization of the insurance market should be based on four major areas; <ul style="list-style-type: none"> – Risk focused: the regulatory bodies should focus on the risk profile of each institute rather than strictly rely on standard rules binding all insurance companies. – Stakeholder reliant: a supervisory framework that allows regulatory bodies the ability to closely monitor the behaviour of insurance and other players in the market is suggested. – Disclosure based: this is to build educated consumers who can make well-informed decisions. – Business friendly: laws and regulations have to keep pace with the rapidly changing insurance industry landscape. It is desirable to promote a business climate conducive not only to business retention but also expansion.

Insurance

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| II. Enhancing the development and competence industry | <ul style="list-style-type: none"> • Increase capital requirement • Improve regulations and product approval process to encourage innovation • Remove insurance restrictions and encourage foreign investment in the sector to promote skills and bring expertise • Arrange regulatory consultations • Remove the restriction on tariff system/de-tariffing insurance premium • Promote insurance knowledge to create well-informed and empowered consumers as well as qualified insurance agents |
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Rail and Road Infrastructure

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| I. Introduction of European Standard | <ul style="list-style-type: none"> • With Thailand's expanding scale of infrastructure development program, European companies are keen to offer assistance, leveraging the expertise they have acquired building the sophisticated transportation systems in Europe. This includes the areas of regulatory standardization and the interoperability of transport systems • The EABC Rail and Road Infrastructure Working Group aims to support Thai government agencies in improving the efficiency of their public procurement activities by adopting international best practices and attracting international suppliers • The ultimate goal of the Working Group is to provide constructive contributions to the long-term economic partnership between Thailand and Europe |
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Transport and Logistics

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| I. Market Access | <ul style="list-style-type: none"> • Liberalization of logistics services: to follow the AEC framework and allow foreign ownership of 70 percent in all logistics sectors • Gradual liberalization of the postal sector for higher competitiveness |
| II. Customs reforms for trade facilitation | <ul style="list-style-type: none"> • Establish detailed and technical guidelines for customs procedures • Undertake comprehensive customs reforms to support trade facilitation • Simplify procedures for goods in transit • Simplify Customs clearance procedures and requirements based on the "quick wins" proposal |
| III. Improvement of procedures for effective National Single Window (NSW) | <ul style="list-style-type: none"> • Removal of the dual-language requirements will eliminate uncertainty and reduce additional costs and time for customs clearance. • Regarding the controlled and non-controlled items, it is recommended that the 2-digit HS code classification or statistic code be used for the approval process. |

Acronyms and Abbreviations

ACFS	National Bureau of Agricultural Commodity and Food Standards
ADB	Asian Development Bank
AEC	ASEAN Economic Community
AEDP	Alternative Energy Development Plan
AFAS	ASEAN Framework Agreement on Services
AFTA	ASEAN Free Trade Area
AHN	ASEAN Highway Network
APG	ASEAN Power Grid
ASEAN	Association of Southeast Asian Nations
CAP	Certificate of Approval for Protection
CBI	Confidential Business Information
CEA	Comité Européen des Assurances
CEPEA	Comprehensive Economic Partnership for East Asia
CEN	European Committee for Standardization/ Comité Européen de Normalisation
CJEU	Court of Justice of the European Union
CMO	Collective Management Organisations
DBD	Department of Business Development
DEDE	Department of Alternative Energy Development and Efficiency
DIW	Department of Industrial Works
EFTA	East Asian Free Trade Area
EEDP	Energy Efficiency Development Plan

EFTA	European Free Trade Association
EPO	European Patent Office
EPPO	Energy Policy and Plan Office
EU	European Union
FBA	Foreign Business Act B.E. 2542 (1999)
FDA	Food and Drug Administration
FDI	Foreign direct investment
FEL	Foreign Equity Limits
FIDF	Financial Institutions Development Fund
FTA	Free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCI	Global Competitiveness Index
GDP	Gross domestic product
GDP (PPP)	Gross domestic product at purchasing power parity
GIs	Geographical Indications
GIPC	Global Intellectual Property Centre
GMS	Great Mekong Sub-region
GSP	Generalised system of preference
IEA	International Energy Agency
IEAT	Industrial Estate Authority of Thailand
IHQ	International Headquarters
IMD	International Institute for Management Development

IMF	International Monetary Fund
IPR	Intellectual Property Rights
ISO	International Standardisation Organisation
ITC	International Trading Centre
JFCCT	Joint Foreign Chambers of Commerce in Thailand
JSCCIB	Joint Standing Committee on Commerce, Industry and Banking
JTEPA	Japan–Thailand Economic Partnership Agreement
LWP	Last Wholesale Price
MEPS	Minimum Energy Performance Standards
MFN	Most favoured nation
MICT	Ministry for Information and Communications Technology
MOC	Ministry of Commerce
MOF	Ministry of Finance
MOPH	Ministry of Public Health
MRA	Mutual Recognition Arrangement
MSC	Manufacturer Self–Certification
NBTC	National Broadcasting and Telecommunications Commission
NEPC	National Energy Policy Commission
NESDB	National Economic and Social Development Board
NLEM	National List of Essential Medicine
NSW	National Single Window
NTBs	Non–Tariff Barriers
OECD	Organisation for Economic Co–operation and Development

OIC	Office of Insurance Commission
OPDC	Office of Public Sector Development Commission
PDP	Power Development Plan
RBC	Risk-Based Capital
ROO	Rules of origin
SFIs	Special Financial Institutions
SOE	State owned enterprise
SPS	Sanitary and phytosanitary measures
SRP	Suggested Retail Price
TAGP	Trans-ASEAN Gas Pipeline
TBA	Telecom Business Act
TBT	Technical barriers to trade
TDRI	Thailand Development Research Institute
TFP	Total factor productivity
TISI	Thai Industrial Standards Institute
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNECE	United Nations Economic Commission for Europe
VAT	Value-added tax
WEF	World Economic Forum
WHO	World Health Organization
WTO	World Trade Organisation

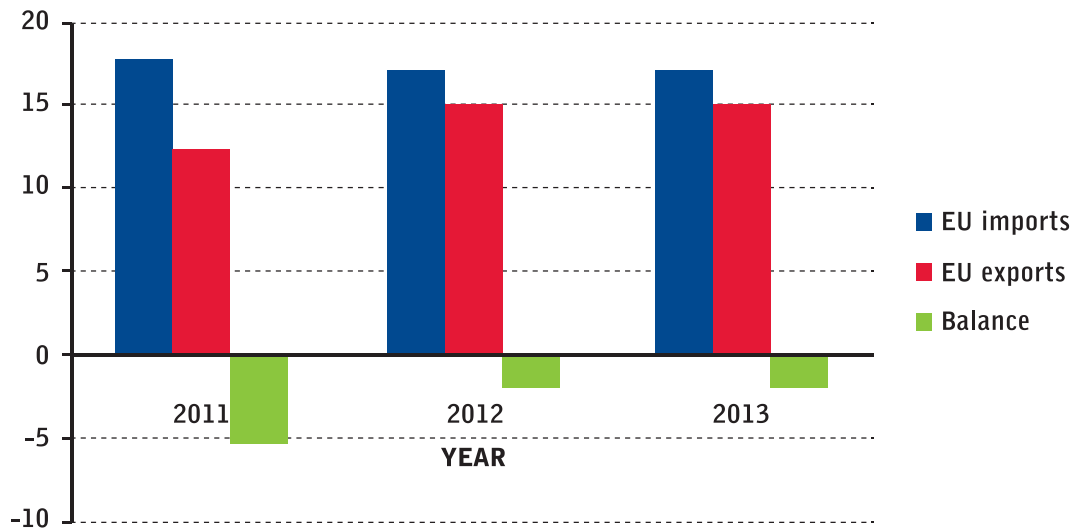
Introduction

With its strategic geographic location and level of economic development, Thailand is an attractive destination for European businesses in several sectors. Among the ASEAN countries, Thailand ranks as the third largest trading partner of the European Union (EU).

The Organization for Economic Cooperation and Development (OECD) projects that the Southeast Asia economy as a whole will grow moderately at an annual average rate of 5.4 percent. Thailand is projected to expand at a similar range of approximately 4.9 percent in the years 2014–2018. Since recovering from the Asian

financial crisis in 1997–1998, Thailand's GDP growth has on average reached five to six percent per annum (Thailand's Board of Investment: BOI, 2013). However, political instability has caused economic uncertainty and discouraged business confidence. Thailand's GDP shrunk by 0.1 percent in the first half of 2014 (Asian Development Bank: ABD, 2014) due to both internal and external factors. While Indonesia and the Philippines have become the top two fastest-growing economies in ASEAN, Thailand is now struggling to regain its regional economic position and foreign business confidence.

Figure 1: EU trade with Thailand (EUR billion)

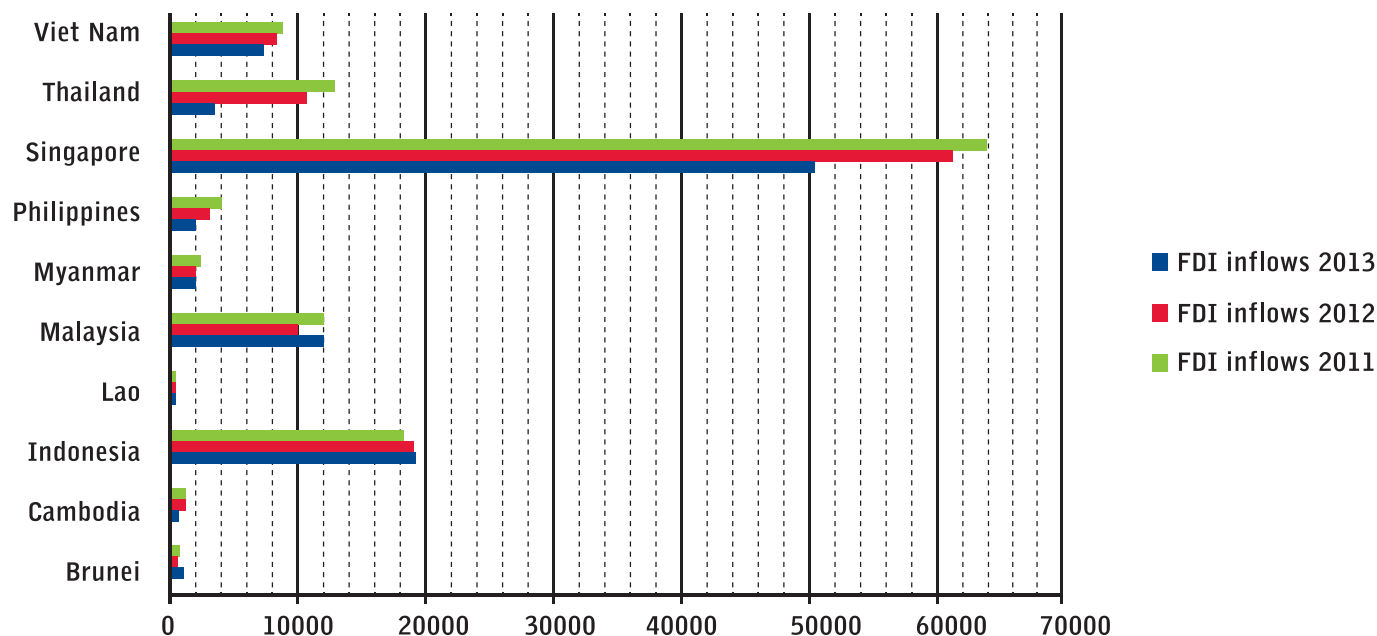


Source: European Commission, 2014

goods (European Commission Statistics, 2014). For many years, the balance of trade between Thailand and the EU has been in Thailand's favour. In 2013, EU exports to Thailand reached EUR 15 billion, while EU imports from Thailand were valued at more than EUR 17.1 billion (European Commission 2014). With the prospect for negotiation of an EU–Thailand Free Trade Agreement (FTA) along with the realization of ASEAN Economic Community (AEC), trade between Thailand and the EU is estimated to grow further in the coming years.

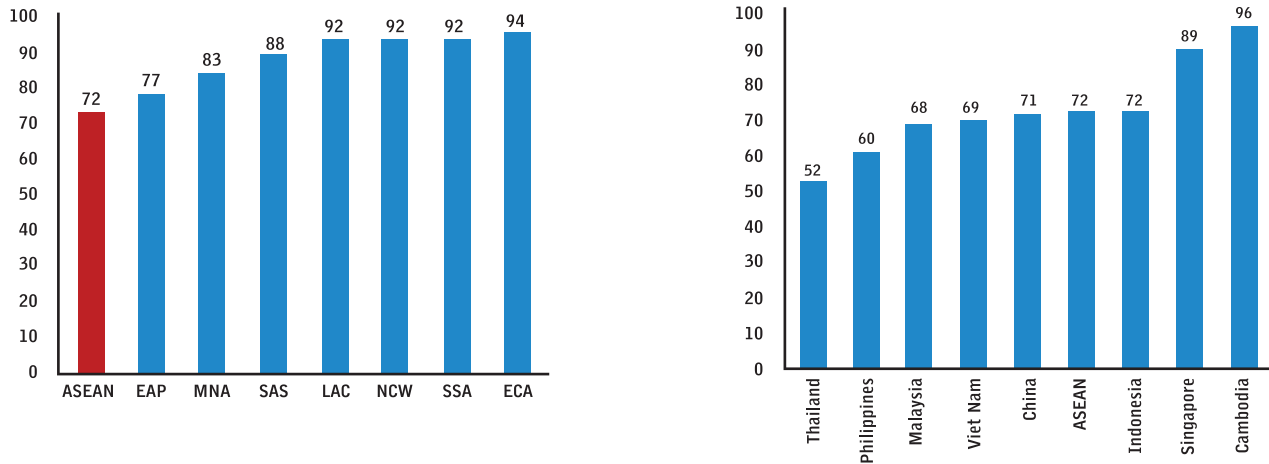
In addition to the robust trade relationship, the EU has been a source of a significant amount of Foreign Direct Investment (FDI) to Thailand over the past decade. With the EU's FDI inflows worth over USD565 million in 2013, the EU is currently the second largest source of FDI to Thailand after Japan (Bank of Thailand, 2014). Despite the slowdown in FDI to ASEAN, growth in FDI inflows was still evident at seven percent in 2013 (UNCTAD, 2014). According to figure 2, the top five FDI destinations in ASEAN are Singapore, Indonesia, Thailand, Malaysia and Vietnam respectively.

Figure 2: ASEAN's FDI inflows by Country (USD million)



Source: data from UNCTAD (2014): World Investment Report 2014 p. 206

Figure 3: Variation in de-jure Foreign Ownership Restriction – among regions and within ASEAN



Source: World Bank East Asia Pacific Economic Update, April 2014, p. 69

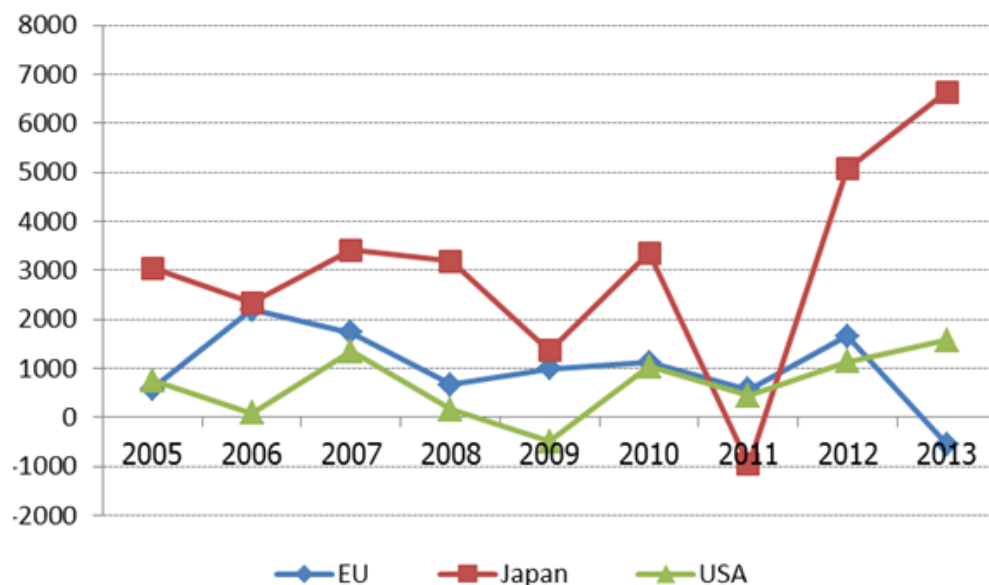
Note: ASEAN – Association of Southeast Asia Nations, EAP = East Asia and Pacific, ECA = Europe and Central Asia, LAC = Latin America and the Caribbean, NCW = North America and Western Europe, SAS = South Asia, and SSA = Sub Sahara Africa.

Despite the importance of FDI, many ASEAN countries restrict foreign ownership by law (World Bank 2014). Comparative to many regions, ASEAN has imposed more rigorous de-jure foreign ownership restrictions (Figure 3). Taking a closer look at the region, among the ten countries, Thailand was shown as the least-open country in the region by this measure. The country's restrictive foreign ownership laws could restrain upcoming foreign investment into the country. On the other hand, Cambodia is the most liberalized economy, allowing 100 percent foreign ownership in various sectors, similar to Singapore. Therefore, to create a more business-friendly regulatory environment, the Thai government is strongly encouraged

to adopt less restrictions in its foreign business ownership law; otherwise it will risk losing its competitiveness to neighbouring countries.

Despite the persistent political instability, foreign investor confidence toward the Thai economy remains positive (BOI, 2014). The annual Foreign Investor Confidence Survey conducted by Thailand's Board of Investment (BOI) in November 2014 demonstrated optimistic responses from most foreign companies, including European firms operating in Thailand. Overall, the foreign business outlook in 2014 to 2015 is to maintain or expand their investment in Thailand. Most foreign investors are confident that the

Figure 4: Thailand's Net flow of Foreign Direct Investment Classified by Sources (USD million)



Source: Data from Bank of Thailand (updated 28 Nov 2014)

Note: 1/ The table displays net flow of FDI data for ALL sectors. Positive figures reflects that the volume of transactions associated with the increase in investment during the period (either in the form of equity capital, reinvested earnings, or borrowing from affiliates) higher than those associated with the decreases in investment (either in the form of divestment, or affiliates' repayment on their inter-company borrowings). On the contrary, negative figures mean the increases in investment during the period were lower than the decreases.

2/ Starting 2009 and 2011, this item also includes transactions in debt securities, and trade credits between affiliated enterprises, respectively.

3/ EU comprises 28 countries : Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United, Kingdom, Cyprus, Czech, Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Bulgaria, Romania and Croatia

business environment in Thailand and the upcoming implementation of the AEC will provide significant economic opportunities. Nevertheless, there are factors that foreign businesses considered as key barriers/ challenges to their business operations such as political instability, corruption and lack of transparency, higher minimum wage and high cost of skilled labour. For these reasons, relevant policies such as bureaucratic reforms

and improvement of visa and work permit applications were recommended to the Thai Government and BOI to establish a more business-friendly ambiance in Thailand.

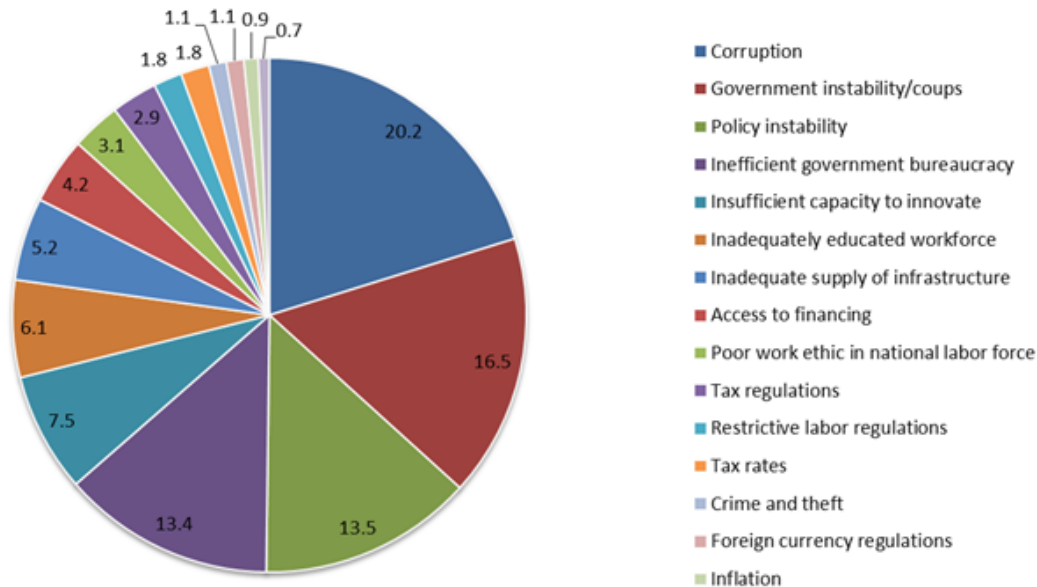
- Enhancing Thailand's Competitiveness: Strategy for Sustainable Growth**

According to recent data in the Global Competitiveness Report 2013–2014, the World Economic Forum (WEF),

Thailand ranked 37th out of 148 countries. The result was a slight improvement from the previous year, while several competitiveness factors showed no progress. Such challenges include political and policy instability, immoderate regulations, pervasive corruption and security disturbances. These unfavourable elements have disrupted the appearance and quality of Thai institutions, leading to a drop in institutions' ranking to 78th place. The other two main concerns which require urgent improvement are public health and primary education where Thailand has dropped three positions from last year to 81s.

Technology readiness improved seven ranks from 2013, reaching 78th rank, showing there is still room for significant improvement. When it comes to technology preparedness, internet access and subscription of mobile broadband still need to be further improved. On the other hand, Thailand's macroeconomic environment stood at 31st rank, making it the most competitive element of the country, supported by favourable fiscal status, high savings rates and low inflation rate, and a relatively good debt-to-GDP ratio. The improvement of the market efficiency (34th) as well as the financial development (32nd) has been seen in the past four years.

Figure 5: Thailand's most problematic factors for doing business (percentage)



Source: Data from World Economic Forum (2014)

According to the World Bank's Ease of Doing Business Report 2015, the overall ranking of Thailand improved from 28th to 26th place in 2015. The report showed five areas where Thailand has out-performed among the global top 30 economies. One of these developments was the arrangement of construction permits. Through the introductory of a fast-track approval procedure, Thailand has become one of the world's most business-friendly for building permits for smaller buildings, ranking 6th out of 185 economies while electricity access (12th),

enforcing contracts (25th), and registering property (28th) remained unchanged. Nonetheless, starting a business in Thailand has now become more challenging. A drop in ranking for investor protection demonstrated a lower degree of disclosure in Thailand. The insufficient collateral and bankruptcy laws to protect the rights of borrowers and lenders, and thus facilitate lending, were among the main concerns, with Thailand ranking 89th. It is thus essential for Thailand to improve all these factors to facilitate new investors and maintain its competitiveness.

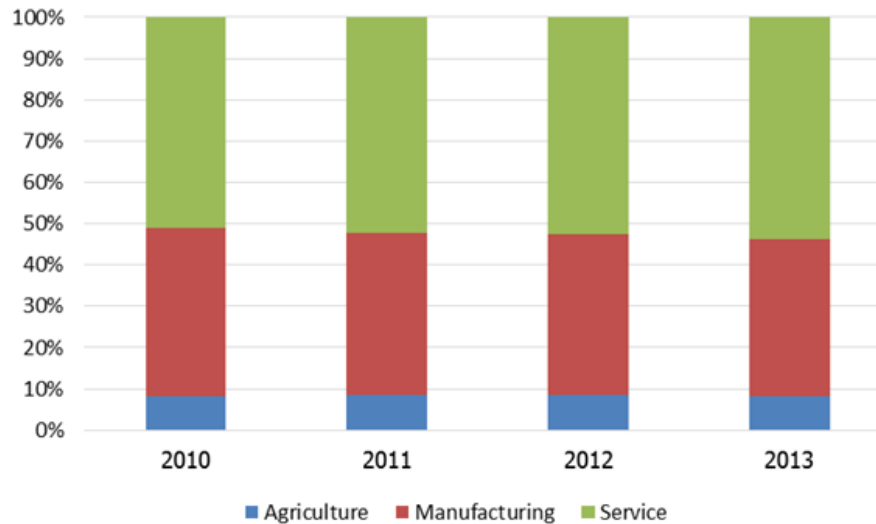
Table 1: Thailand's ranking on the World Bank Ease of Doing Business Report 2015

Thailand – Overall Ranking	DB 2014	DB 2015	Change in Rank
	28	26	+2
Starting a business	68	75	-7
Dealing with construction permits	11	6	+5
Getting electricity	12	12	No change
Registering Property	28	28	No change
Getting credit	86	89	-3
Protecting investors	21	25	-4
Paying taxes	63	62	+1
Trading across borders	33	36	-3
Enforcing contracts	25	25	No change
Resolving insolvency	44	45	-1

Source: World Bank (2014)

The manufacturing and service sectors have been key drivers of Thailand's economic growth. While agriculture has stably contributed around 10 percent to the economy, manufacturing and service industries have contributed approximately 90 percent of the country's total GDP from 2010–2013 (Figure 6). Nonetheless, the political as well as

global economic disturbances in the past few years have held back the growth of the services sector in Thailand. Although the tourism Industry and tourists' confidence have not fully recovered, the importance of manufacturing remains robust.

Figure 6: Contribution to Thailand's GDP (Percent)

Source: Data from NESDB (2014)

Expected to be fully implemented in 2015, the ASEAN Economic Community (AEC) will renew the momentum of Thailand's development in strengthening its competitiveness in the services sector. Free flows of goods and services including the free movement of skilled labour will certainly support the growth of the Thai economy as well as bringing along technological and skill transfers. With the possible extension to existing non-ASEAN companies, such benefits from the AEC framework could be enjoyed by them.

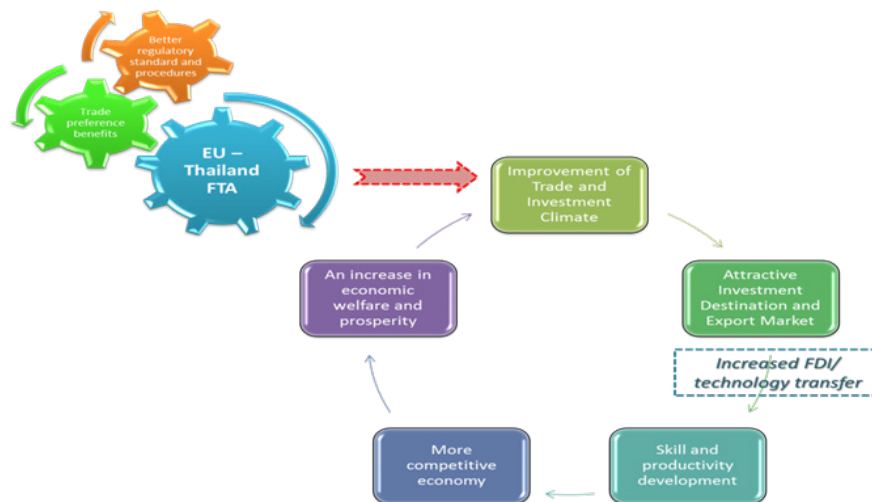
- Trade and Investment Liberalization under the EU–Thailand FTA: Enhancing Economic Opportunities**

To further enhance trade and investment ties between the EU and Thailand, negotiations on the EU–Thailand Free Trade Agreement (FTA) were formally launched on 6

March 2013. This is an important development for Thai–EU relations, following the accomplishment of a Partnership and Cooperation Agreement in February 2013. The main FTA issues cover tariffs, non–tariff barriers and other trade related topics, such as services, investment, procurement, intellectual property, regulatory issues, competition, and sustainable development. Among the ten ASEAN members, Thailand is the fourth country to start FTA negotiations with the EU.

Significant gains are expected following the completion of the EU–Thailand FTA. For example, the Department of Trade Negotiation's (DTN) report conducted by the Hunton & Williams Consulting Company (2011) projected a two percent increase in Thailand's export value as well as its real GDP after the completion of the FTA negotiations. These gains would also improve Thailand's social welfare

Figure 7: Prospective Cycle of Growth under the EU – Thailand FTA



Source: EABC, 2014

and resource allocation through lower import prices and higher wages of skilled and unskilled labour. Together, removal of trade barriers and further trade liberalization under the FTA should strengthen Thailand's competitiveness and investment attractiveness as compared to its ASEAN neighbours.

Due to the enforcement of Martial Law and the military coup in May 2014, FTA negotiations were put on hold. The European Union announced at its Council Meeting on 23 June 2014 that the EU and its Member States will not sign the Partnership and Cooperation Agreement with Thailand until a democratically elected government is in place. This deferment will also appropriately affect

other agreements between Thailand and European countries (The European Council, 2014). Thus, a delay in EU-Thailand negotiations is expected.

With the expiration of the GSP¹ for Thailand in 2015, Thai exporters will definitely face challenges. According to the SCB In-Focus Analysis (Q3/2012), 50 items will graduate from Europe's GSP custom taxes. The lost privileges are expected to reach approximately USD 78 million in the medium term while, in the long run, they could reach USD 2.56 billion as Thailand becomes an upper-middle income and loses its GSP privilege for all products. As a result, Thailand needs to develop a new strategy to maintain its competitiveness and growth,

¹Generalized System of Preferences (GSP) is a scheme of generalised tariff preferences that offers **preferential** access to imports (duty reduction or elimination) into the EU market **from developing countries**. Thailand will fully exit from the EU GSP scheme on 1 January 2015 (EU Delegation, 2014).

especially for the export sector. In this regard, the conclusion of an FTA between the EU and Thailand becomes even more imperative.

Figure 7 gives an idea of possible outcomes of the completion of EU–Thailand FTA negotiations. With improvement in regulatory standards and procedures, together with tariff reduction through the FTA, Thailand is set to gain a better trade and investment climate that will attract higher trade and FDI. This has the potential to upgrade Thailand’s productivity and labour skill; hence, competitiveness that will bring welfare and prosperity to its economy and people. As a result, the EABC strongly supports a balanced FTA, which we are confident, will benefit both Thailand and EU economies.

- **EU–Thailand: Partnership for Growth, Competitiveness, and Prosperity**

The EABC, as a voice of European business community in Thailand, consists of ten Advocacy Working Groups; namely Cross Sectoral Issues, Intellectual Property Rights (IPR), Automotive, Food & Beverages, Healthcare & Pharmaceuticals, ICT, Insurance, Transport and Logistics, Energy & Energy Efficiency and Rail and Road Infrastructure. Discussions on key issues in trade and investment as well as recommendations from each Working Groups are duly included in this Position Paper. The EABC continues to support and facilitate European trade and investment to Thailand, with a goal to strengthening bilateral economic relations toward a more competitive Thai economy. This also extends to promoting Thailand and ASEAN as potential markets for European businesses and, potentially, creating production networks in the region. With the challenge presented by entering the middle income trap, stronger trade and

investment relations between Thailand and Europe can be complementary factors and create mutual benefits. Because European companies are recognized as resource and skill contributors in advanced technologies, innovation, and research and development (R&D), Thailand has significant benefits to reap from attracting more technologies and investments from Europe.

Fundamentally, the European Business Position Paper represents views of European businesses in Thailand and serves to communicate the key issues of interest and proposed recommendations to respective Thai authorities and counterparts for the improvement of Thailand’s trade and investment climate. Considered as a home to European investors and companies, the EABC works to generate positive contributions for Thailand’s further competitiveness within the spirit of EU–Thailand: partnership for growth.

This Position Paper is aimed to be a useful source of information for both the European business community and Thai Government. It is our aspiration that the Paper will serve as a communication tool and foundation for a continued constructive dialogue on trade and investment matters. Our recommendations focus mainly on practical aspects to improve policy and regulatory standards in Thailand, including both short term and long term aspects.

Cross Sectoral Issues (CSI)

SUMMARY OF RECOMMENDATIONS

- I. **Enhancing Transparency in Policymaking and Implementation of Rules and Regulations**
 - a. Customs reforms toward transparency and efficiency in customs procedures, including reward and penalty schemes
 - b. Recognition of “reasonable care” by trading community
 - c. Free Zone requirements
- II. **Ease of Doing Business to Improve Investment Climate in Thailand**
 - d. Competitive tax regime
 - e. Robust investment promotion policy
 - f. Role of court system, resolution of disputes, litigation and arbitration
 - g. Sound implementation of competition law
- III. **Creating an Enabling Economic and Regulatory Environment**
 - h. Relaxation of foreign ownership restrictions and progressive liberalization of services sector
 - i. Ease of employment procedures and laws to facilitate free flow of skilled and unskilled labour.

Overview

It could be said that 2014 was a year of change for Thailand. Having entered a new phase of development with numerous changes, Thailand is now facing challenges to maintain its competitiveness in the global market. Although the Thai manufacturing sector has been comparatively successful among countries in the region, the services sector is expected to advance further toward real modernization in sectors such as Information and Communication Technology (ICT), financial services, logistics, and professional businesses to enhance the country’s productivity. Thailand has been putting a lot of effort into overcoming the so-called

middle income trap phenomenon, where an economy loses its competitiveness due to the increasing price of resources. In order to overcome such challenges, Thailand needs to further develop its services sector through an infusion of new skills and technologies as well as services liberalization. More details about what liberalization means appear later in this section. It is also necessary for the country to attain more research and development (R&D) programs along with enhancing protection of intellectual property rights (IPRs). The EABC once again would like to emphasize the importance of R&D and economic liberalization in the national agenda

to improve productivity; hence, achieve more competitiveness in the globalized world. Together with these, regulatory as well as structural reforms are areas that must be pursued to strengthen the Thai economy against all external and internal impacts.

Arguably, current trade and investment relations between Thailand and the EU seem to be significantly below their real potential. Important concerns remain with respect to policy and regulatory developments in many areas as Thailand further pursues its economic objectives and openness. To name a few, factors of production will need to be relocated between sectors to improve Thailand's total factor productivity and competitiveness. Logistics and basic infrastructure need to be upgraded to support increased flows of goods and services. Government policies, rules, regulations and legal frameworks must be improved and updated to facilitate trade and investment.

The EABC therefore recommends improvement in the following key areas, which would make significant and meaningful contributions towards strengthening Thailand's competitiveness and attractiveness as a global investment destination for the benefit of both the country and its trading partners.

I. Enhancing Transparency in Policymaking and Implementation of Rules and Regulations

As highlighted in both 2012 and 2013 Position Papers, transparency and predictability in policymaking and implementation of rules and regulations are highly crucial to ensure foreign businesses' confidence in the Thai economy. In order to achieve this, it is important that rules and regulations are aligned between departments and ministries, and that timely public

consultation takes place prior to rules, regulations and laws being enacted. Equally important, policy frameworks and the legal environment must be improved to serve fair market-based competition and wider social interests. Recognized as a cross-cutting issue, enhancing transparency in policymaking and the application of rules and regulations will allow due protection of legitimate business interests and fair competition. This will then make it possible to ensure that the drivers of productivity, efficiency and innovation can be strengthened.

Despite ongoing efforts by different agencies/stakeholders to enhance transparency and curb corruption, lack of clarity and transparency in policymaking and its implementation, plus application, of rules and regulations still exist as main concerns. In the WEF Global Competitiveness Report 2013–2014, companies still ranked corruption and an inefficient government bureaucracy among the top difficulties in doing business in Thailand, which leads to a negative image of Thailand's investment climate.

• Customs Reforms

In June 2014, recognizing the importance of transparency and reduction of corruption, the EABC organized a Roundtable Series on Anti-Corruption, with the topic of discussion being "How to Improve Transparency in Customs Procedure." H.E. Dr. Areepong Boocha-oom, the former Secretary General of the Office of Public Sector Development Commission (OPDC), participated as a keynote speaker. The main discussion issues covered reforms of customs regulations and schemes, interpretation of laws and regulations, and consultation between government authorities and the private sector.

The Government's clear policy to bring more transparency to the Thai Customs and modernize and improve the customs law is commendable. To add more momentum to the Customs reform, Thailand is urged to pursue successful accession of the Revised Kyoto Convention (RKC) to achieve the full benefits of the RKC in facilitating legitimate international trade, impacting customs controls including the protection of customs revenue and society. In addition, as a WTO member, the EABC calls for Thailand to align its customs and trade measures and procedures with the provisions of the WTO Trade Facilitation Agreement (the Bali Package).

Customs reform will not be possible without the reform of Customs' penalty and reward schemes. The current reward and penalty scheme within Thai Customs encourages individual customs officials to take an aggressive and rigid stance in customs clearance, including customs valuation, document inspection, controls and audits, in order to get rewarded even for minor, administrative errors. There is insufficient checks and balances on both the abilities and authorities of the Customs as well as recognition of compliant practices of the trading community. This, together with insufficient clarity in the legal framework and regulations, makes compliance difficult for traders. Desirable reward and penalty schemes should encourage customs officials to help promote compliance by the traders, not to make individual gains from non-compliance.

- **Proposed Customs law amendment on penalty scheme**

While it is important to have in place effective customs investigations to prevent any offence or attempted breach of customs provisions, clear distinction must be

identified between intentional serious offences and unintentional violations or technical mistakes. This is well recognized under the revised Kyoto Convention (KTC) which clearly states that *'Customs shall not impose substantial penalties for errors where they are satisfied such errors are inadvertent and that there has been no fraudulent intent or gross negligence. Where they consider it necessary to discourage a repetition of such errors, a penalty may be imposed but shall be no greater than is necessary for this purpose'*.

We support the position taken by the Thai private sector represented by the Joint Standing Committee on Commerce, Industry and Banking (JSCCIB) on the penalty scheme, which recognizes the notion of intent. Currently, Customs does not have the burden of proof and so they are allowed by law to qualify various non-compliances as smuggling regardless of circumstances and intention of the alleged offenders. Technical mistakes are also disproportionately penalized by Customs. The notion of intent is well-recognized in international best practice under the revised KTC and is actually embedded in the customs law in many developed countries.

- **Proposed Customs law amendment on reward scheme**

Thai Customs has an incentive programme rewarding officials and informants for identifying importers suspected of false declaration of origin, false product classification, or false valuation. The EABC appreciates that Customs has made a change to reducing the percentage of reward paid to Customs officers from 25 to 15 percent, with the ceiling capped at THB 10 million (Customs Act No. 21, B.E. 2557 and Amendment on Customs Tariff Decree B.E. 2530 No. 8, B.E. 2557).

Nonetheless, as the reward is based on a percentage (up to 55 percent¹) of the recovered revenues or penalties, the maximization of the latter seems to be encouraged. In practice, it is arguable that the customs officials will have a very strong incentive to use all means available to investigate importers for possible commitment of offences. Unless there is a transparent mechanism or a reasonable cap on the reward in place, the system provides an incentive for potential misuse of the mechanisms as well as excessive investigations and maximization of penalties.

We support the proposed caps on the customs bribes and rewards, but would like to go a step further to call for the differentiation of reward and bribe scheme for various kinds of offences. We endorse the position taken by the JSCCIB that calls for the removal of the bribes and rewards in cases of unintentional violations and technical mistakes.

• **Comprehensive Customs Reforms**

There is scope to undertake comprehensive legal and administrative reforms of the Thai Customs administration. The reforms will enhance transparency as well as efficiency in customs procedures, leading to cost and time effectiveness that will strengthen Thailand's competitiveness. The recommendations shall include consistency of law/regulation interpretation, effective appeal/ complaint mechanisms, adoption of "reasonable care" concepts, regulatory and procedural alignment with international standards, simple procedures for goods in transit, and regulatory consistency among the customs-related agencies.

To achieve comprehensive customs reforms, the EABC urges for close collaboration between the Customs Department and representatives of industry as well as key stakeholders, for better information dissemination and clearer understanding. For example, the Republic of Korea has developed an efficient and effective system for interaction between customs and representatives of the private sector, and may be considered as a model for Thailand. To accommodate the comprehensive Customs reforms, the EABC sub-working group on Customs and Legal provided comments on the draft Customs Bill, B.E. ... for consideration of the Customs Department (Annex I).

• **Free Zone**

Free Zone was initiated as a mechanism to attract investment and promote trading activities in Thailand. Given the Free Zone's privilege of import duty exemption granted to all importations into the Free Zone, Customs has imposed stringent requirements to control the businesses located therein and also severe penalties for Free Zone-related violations.

One of the difficulties faced by the Free Zone business operators is to ensure that their Free Zone inventory remains consistent with their original customs declaration at all times; otherwise, they could be penalized at the same scale as those for smuggling. Such requirements, although understandable from the Customs control perspective, is unrealistic. In reality, inventory discrepancies are normal for business, and adjustments are acceptable from an accounting perspective. Therefore, it should not be subject to the

¹According to the recent Draft Customs Bill B.E. ..., the Customs Department proposed a reduction of percentage from 55 percent to 45 percent.

same penalty as smuggling, which is a serious criminal offence, particularly in cases where the discrepancies are unintentional.

The confidentiality of the product cost structures and production process disclosed by Free Zone business operators to Customs when applying for duty reduction on local sales is also a point of concern. Such information is extremely sensitive for business, yet Customs does not provide any assurance that it will be treated confidentially. There have been, in fact, several occasions when such information from one company has been shared with another company by Customs. It is, therefore, recommended that a confidentiality provision is included in the Customs Act or its subordinate law as appropriate.

Recommendations:

1. For the reward scheme, it is recommended to put limits and specific conditions before any reward can be accorded to Customs, and that rewards may be paid only in cases of proven intentional violation (intentional smuggling and intentional duty evasion), which is in line with the position taken by the JSCCIB. A phased approach for elimination of the reward scheme is still recommended to raise Thailand's regulatory system to a world-class standard and enhance transparency.
2. Rewards should only be allowed where revenue collection exceeds current budgeted targets set by the Ministry of Finance, or for cases which have clear fraudulent intent. This is to prevent abuse of the reward and penalty scheme.

3. We also recommend that the penalty scheme should be based on proportionality, taking into account the intention and the severity of the offense, instead of the current practices which set the penalty in court at four times the value of the goods. A clear distinction between civil and criminal offences must be made. A penalty regime should take into consideration the business reality whereby unintentional non-compliance may happen and should not be penalized at the same rate disproportionately.
4. The concept of "reasonable care" by the trading community should be recognized, as a mitigating factor in penalty assessment, to encourage compliance with laws and regulations. This addresses the notion of intent in non-compliance or violation: distinguishing between unintentional non-compliance versus intentional/fraudulent violations.
5. In the context of enhancing transparency in policy making and implementing, the EABC strongly encourages government-private sector consultation before any law amendment. This will give a chance for both local and foreign businesses to voice their comments to increase economic efficiency as well as strengthen Thailand's competitiveness.

II. Ease of Doing Business to Improve Investment Climate in Thailand

The World Bank Doing Business Report (2013) referred to Thailand as one of the world's most business-friendly

for local entrepreneurs, with a ranking of 18th out of 185 economies. In the 2015 report, Thailand improved its overall ranking by two ranks to 26th from 189 economies; however, the ranking for starting a business fell seven places. Thailand then has to come up with strategies to promote its competitiveness. The EABC would like to encourage the Thai authorities to consider these three strategies; (i) competitive tax regime, (ii) robust investment promotion policy, and (iii) implementation of competition law.

- **Competitive tax regime**

To improve the investment and business climate in Thailand, the Thai government has put a reduction of corporate tax as one of the key incentives to attract foreign investors. Since tax systems significantly impact companies' ease of doing business, the EABC urges the Thai government to develop tax systems that foster business investment and economic growth. Keeping tax rates at a reasonable level, together with prompt information sharing with the public, will help the private sector in doing business as well as formalizing robust businesses. This in turn would expand the tax base and increase tax revenue. Both business and government can benefit from tax systems which are simple to administer and have reasonable compliance costs.

Equally important as a competitive tax rate is the efficiency of tax administration and tax compliance costs. Although the overall rankings of Thailand in terms of ease of doing business have stayed in the range of 13–18 over the past few years, the country's scores in the area of paying tax rank significantly below those of other areas and are still on a downward trend. Thailand's rank on paying taxes improved to 62nd ranking in 2014,

although this is still low compared with other aspects. This suggests a need to expediently address the issue of efficiency in tax administration and compliance, in order to make Thailand more competitive.

Recommendations:

The EABC appreciates Thailand's efforts on tax reforms to strengthen the country's competitiveness. Further concrete actions should be moved toward simplifying tax compliance methods to improve economic efficiency, as well as enhancing transparency in tax collection. The EABC expresses its readiness to closely work with the Government towards addressing hindrances and improving the competitiveness of the country's tax regime and compliance.

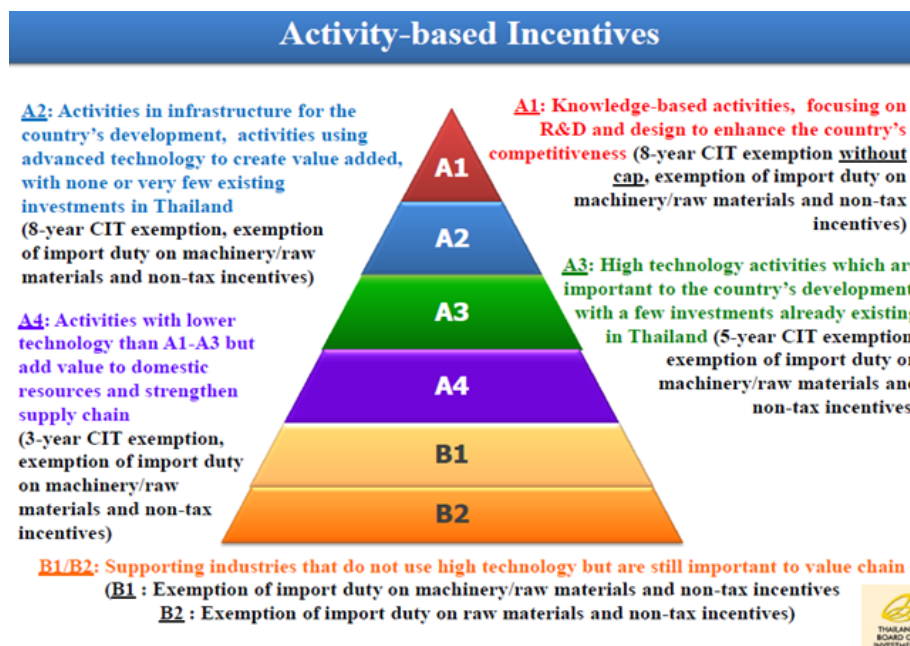
- **Robust investment promotion policy**

To promote Thailand's investment attractiveness, Thailand's Board of Investment (BOI) announced a complete package of new investment promotion policies in December 2014. The main objective of BOI's seven year investment promotion plan is to promote investment flows, both in Thailand and overseas, to enhance Thailand's competitiveness, to overcome the "Middle Income Trap", and to achieve sustainable growth, following the King's philosophy of "Sufficiency Economy". To detail further, the promotion plan will encourage more new industrial clusters in different regions of Thailand to create new areas of concentrated investment; cross-border investment and special economic zones, as well as to promote activities that are environmentally-friendly, offer energy savings and use alternative energy to drive balanced and sustainable economic growth.

Under the new investment promotion policy, which entered into force in January 2015, the incentives granted are activity-based and merit-based². The economic activities that will be eligible for BOI privileges are classified into six classes (A1–A4, B1–B2)³ said to be based on technology level/ value added contributed to the Thailand economy. According to the BOI's

classification, some high-technology activities do appear in category B1 or B2 categories. Together, the merit-based incentives will be granted additionally to the activity-based incentives, based on benefits that the country will get from competitiveness enhancement, decentralization, and industrial area development.

Figure 8: BOI's Activities-Based Classifications



Source: BOI, 2014

²The Zoning Criteria remains in the text of the BOI Notification 2/2557, but is no longer a main criterion for incentives consideration.

³Seven categories: agriculture and agricultural products, minerals, ceramics and basic metals, light industry, metal products, machinery, and transport equipment, electronics and electronic appliances, chemicals, paper and plastics, and services and public utilities, are included for the classification of eligible activities. More information can be found on BOI's website www.boi.go.th.

At the same time, the BOI is removing a number of activities from the current list of activities eligible for investment promotion privileges. Rationale for delisting of these activities have been low technology, low value-added output, less complex production processes, low linkage with other industries, and labour intensive production involved in the activities. Also included in the removed activities list are those having high energy consumption and creating environmental problems, having concessions or monopoly activities under state protection, and those in conflict with laws and regulations. The revised strategy will not have an impact on currently promoted projects and project applications lodged before 31 Dec 2014. It remains, however, difficult for some businesses to assess whether their activities fall within the scope of the BOI's eligible activities list and whether they will continue to enjoy the same incentives going forward. Another main concern is that because of the very short notice of the new promoted list of activities prior to the actual effective date of the new policy, businesses have had only a short period of time to clarify whether their activities would be covered by and to adjust to this new investment policy. It also affects their annual business plan.

Given the history of development of these new policies, they cannot be fully expected to address the services sector yet. It is not clear for example whether logistics can be promoted and some other services sub-sectors have limited or no promotion. It should be noted that BOI's powers to promote are curtailed somewhat by the ability to issue a Foreign Business Certification under Section 12 of the Foreign Business Act (FBA). Relevant sectors can only be those in List 2 or List 3 of the FBA.

The European business community supports the special promotion of Research & Development activities, which would help attract more private investments in this area. Both the activity-based and the merit-based incentives related to R&D under the BOI Announcement no.2/2557 may be granted only in the context of a new project. The R&D project on existing operations may be promoted under the BOI Announcement no.1/2557, which gives less attractive incentives to business, in the sense that the corporate income tax exemption amount is capped at 50 percent of eligible investment over the three year promotion period and that the applications may be lodged after the tax exemption period under preceding promotion has expired (in case of existing promoted activities). This is restrictive and does not seem to support the BOI's goal to promote more value-creating and innovative activities such as R&D. Generally, BOI offers up to three years' 50-percent subsidy of the R&D investments in existing operations, but innovation development and R&D programs usually take longer than three years to be developed and subsequently new investment should also be eligible for promotion as well.

In addition to the incentives for R&D projects related to existing operations, the BOI Announcement no.1/2557 also promotes investments in energy saving, reduction of environmental impact and productivity improvement. However, as per the Explanatory Notes issued by the BOI for the promotion of energy saving and productivity improvement projects under said Announcement, the projects previously promoted under similar preceding BOI schemes may not be eligible. Such a condition is more restrictive than stipulated in the text of the BOI Announcement no.1/2557 itself. More importantly, since the promotion requires new investment, the new

investment amount should be considered in isolation of the previously promoted activity's investment. Such a restriction does not help further the BOI's goal of promoting private investment in these targeted areas and disqualifies companies that have demonstrated their will and ability to achieve environmentally-friendly projects in the past.

The anticipation of the full implementation of the AEC in 2015 will bring along free flows of goods, services, investment, and skilled labour as well as freer flow of capital. An initiative to create Thailand's centrality in the region, with aspirations to be an investment hub, would help Thailand to strengthen its competitiveness and step up its economic growth to escape the middle income trap. At the BOI Seminar on "New Investment Promotion Strategies: Toward Sustainable Growth" on 15 December 2014, H.E. MR. Pridiyathorn Devekula, Deputy Prime Minister, presented the International Headquarters (IHQ) and International Trading Centre (ITC) concept, which would consist of tax exemption (for profit and income remittance, capital gains, withholding tax for headquarters), and employment facilitation (visa and work permit). We hope to see further clarification regarding the scope and relevant definitions under both schemes from the BOI and/or the Ministry of Finance. It is also important that adjacent guidelines and amendments to effectively facilitate operationalizing these schemes (e.g. foreign exchange regulations) are also provided.

Recommendations:

1. The EABC highly recommends clarification of the list of eligible activities (A1–A4 and B1–B2).
2. The Explanatory Notes for the promotion of

energy saving and productivity promotion under BOI Announcement no.1/2557 should be amended to also allow new investment in existing projects which have previously been granted tax exemption incentive under similar preceding BOI schemes

3. A wider analysis of services sectors is highly recommended. The middle income trap can only be overcome with up-skilling and productivity enhancements.
4. Further expansion of existing R&D activities should also be promoted over a longer promotion period, regardless of the historical promotion status, because R&D activities are generally long-term projects.
5. The EABC positively welcomes the IHQ and ITC frameworks and their adjacent regulations. We wish to see considerable progress in the near future. Clear guideline regarding the establishment and operationalizing of these schemes is strongly encouraged.
6. We wish to see the BOI taking on a leading position in driving any new investment promotion scheme such as the IHQ and ITC schemes, and in supporting the promoted businesses in their dealings with relevant government agencies as necessary for the undertaking of the promoted businesses, given that the BOI Office has been moved to be under the Prime Minister's Office. A focus on the services sector is also highly encouraged.

- **Court system, resolution of disputes, litigation and arbitration**

Building on the 2013 European Business Position Paper, the EABC would like to again emphasize the important role of the court system in ensuring foreign business confidence in the country and attracting more FDI to Thailand. This includes its speed and efficiency in processing disputes, issuing and enforcing judgments and arbitration awards.

Recommendations

Litigation

1. *General:* In general, the civil and criminal litigation system needs to be made more efficient, sped up and made more user-friendly.
2. *Pre-trial injunctions:* There are occasions when it may be necessary to apply to the court for an injunction (in Thai this is referred to as a 'provisional remedy') prior to the issue of the substantive action. For example, to prevent the removal of assets out of Thailand, or to seize evidence, or to examine assets. In practice, it is often very difficult to obtain such an order. Rules should be adopted to make it clear in what circumstances the court would consider issuing such an order, and the conditions that might be imposed on a person who applies for such an order, for example requiring an indemnity where the person against whom the injunction is issued suffers loss.
3. *Injunctions in general:* As to injunctions in general, we make similar comments as for pre-trial injunctions above. In practice, it is

often very difficult to obtain an injunction, and the circumstances in which it might be successfully applied for should be considered and made clear.

4. *Affidavits:* At present, affidavits do not technically exist in Thai law. Affidavit evidence, meaning written evidence that has been sworn as true, is often useful where, for example, the evidence is admitted by all parties, and can then be read out at the trial, thus avoiding the need for the witness to have to attend court.
5. *Summary judgment where there is no real defence to a claim:* Currently, there is no procedure for a party to apply for a summary judgment on the grounds that the defendant has no real defence to a claim, and is merely prevaricating or using delaying tactics. Such a procedure, if adopted, would help to speed up litigation.
6. *Entering judgment in default:* At present, there is no procedure to obtain a fast judgment where, for example, the defendant has failed to file a defence within the period allowed under the CPC⁴. It is necessary for a court hearing to be convened to dispose of the case. We would suggest, where the claim is for a fixed sum of money and interest, that it would be possible to enter a final judgment, by proving the proceedings have been served on the defendant, and that no defence has been entered, without the need for a court hearing. If the defendant can prove that he/she was not served with the

⁴In this Position Paper, 'CPC' means the Civil Procedure Code.

proceedings, and that he has a prima facie defence to the claim, then he/she would still have the right to apply for the default judgment to be set aside, and to defend the action.

7. *Trial on consecutive days:* Current civil procedure in most courts is that a trial takes place on one day, and is then adjourned for a second day of evidence that may be 4–6 weeks ahead, and so on. This is slow and inefficient. We would suggest that in general, a trial should take place on consecutive days in both civil and criminal cases. This would speed up the process of litigation.
8. *Pre-trial disclosure of documents:* At present, there is no procedure to compel parties to disclose documentary evidence in their possession prior to trial. The closest procedure is to apply for the issue of a witness summons against a person to produce the documents at trial. This may cause delays, and a party may be taken by surprise and may have to ask for an adjournment to consider the new evidence. We would suggest that there should be a procedure whereby within one month of close of pleadings, each party must disclose to all other parties in the case a list of documents in its possession that are relevant to the case, and supply copies of such documents to a party upon request. Such a procedure enables all parties to make an assessment of the strength/weakness of their case, and will often lead to settlement negotiations, and a compromise settlement. A similar procedure could be adopted to obtain pre-action disclosure or disclosure from third parties who are not parties to the case.

9. *One appeal only:* Whilst the CPC contains provisions that allow for one appeal from the Court of First Instance to the Court of Appeals, and limit a second appeal to the Supreme Court except in specified circumstances, in practice, it is relatively easy to mount a second appeal. This drags out the process of litigation. Our recommendation would be to allow one appeal only to the Court of Appeals. A second appeal to the Supreme Court would only be possible on a point of law of public importance, and with permission for a second appeal being granted by either the Court of Appeals or the Supreme Court.
In a criminal case, there would always be a right to a second appeal if, as a result of new evidence being discovered, the conviction can be shown to be unsafe or unsatisfactory.
10. *Improved system for enforcement of judgments:* The enforcement of civil judgments is slow and inefficient. It is relatively easy for a judgment debtor to delay paying a judgment or to conceal his/her assets. We would suggest a speeding up of the processes for judgment enforcement. We would also suggest that a judgment debtor could be subject to an oral examination, to be summoned to court to give sworn evidence about his/her assets and income, to produce documentary evidence of assets and income, and to explain why the judgment has not been paid.

Arbitration

1. *No arbitration clause in contracts with a government authority:* At present, there is a Cabinet resolution in force that declares that arbitration clauses are not permitted in contracts where a government authority is a party, and in addition, that such contracts should be in Thai language only. We would suggest that this is unfair and partisan. It puts the other contracting party at a disadvantage, if such contracts cannot be referred to arbitration, which can be faster than the dispute being processed in the civil litigation system. This becomes acutely relevant in the PPP Law (passed in April 2013 and with regulations and master plan expected to be finalised in April 2015).
2. *Position of foreign lawyers representing parties in arbitration:* There is a regulation issued under the Foreign Employment Act regulation that inhibits the ability of foreign lawyers to speak in arbitrations in Thailand. A foreign lawyer may only speak in arbitration where Thai law is not the jurisdictional law, or where the party he/she represents is defending not prosecuting the case, and the arbitral award does not have to be enforced in Thailand. We would suggest revision of this

regulation so that a foreign lawyer may represent a party in arbitration in Thailand, without these limitations.

• Enforcement of competition law

Thailand's main legislation regulating anticompetitive practices is the Trade Competition Act B.E. 2542 (1999) (hereinafter "the Act"). In addition to several other legislations which may affect competition by seeking to protect the consumer and by affecting how businesses behave and interact⁵, the Act is implemented by the Office of the Trade Competition Commission in the Department of Internal Trade (DIT) in the Ministry of Commerce (MoC). The Commission is chaired by the MoC and includes representatives of the Ministries of Commerce and Finance along with other members appointed by the Council of Ministers. In general, the Act covers all types of business operations. It is; however, important to note that the Act does not apply to central, provincial or local administration, state trading enterprises, farmers' groups, co-operatives or co-operative societies, or businesses prescribed by Ministerial Regulations to have an exemption from the Act.

Several types of anticompetitive behaviour are prohibited under the Act, including: abuse of a dominant position such as fixing buying or selling prices, applying

⁵Such as:

- the Unfair Contract Terms Act B.E. 2540 (1997), which provides a legal basis on which the courts determine whether the terms of a contract are unfair and gives them the power to intervene by limiting or voiding such unfair terms;
- the Prices of Goods and Services Act B.E. 2542 (1999), which gives legal basis for price controls and prescribes certain business practices as infringements on the operation of a free market (section (iv));
- the Direct Sales and Direct Marketing Act B.E. 2545 (2002), which entered into force in 2007, regulates direct sales through the internet; and
- the Liability for Damages Arising from Unsafe Products Act B.E. 2551 (2008), which established consumer courts and made producers and importers liable for selling unsafe products and put the burden of proof on them rather than on consumers.

conditions or restrictions to sales or purchases, or restricting supply of goods or services; mergers that may result in monopoly or unfair competition; agreements between businesses that amount to a monopoly, or a reduction or restriction of competition; agreements that restrict purchase of goods or services from overseas; and unfair business practices.

The Trade Competition Commission has received a number of complaints and decisions have been made, including on some notable cases such as alleged excessive pricing by a cable television monopoly; an alleged tie-in of sales of beer with a liquor made by the same producer; allegations by domestic suppliers and retail outlets that foreign retail companies engaged in unfair business practices; and alleged exclusive dealing in the motorcycle market, where a foreign manufacturer that held a market share of 80 percent in Thailand, prohibited retail outlets from selling or displaying other brands in the same outlet.

However the Act has barely been used in certain sectors and is generally regarded as an ineffectual tool. Various literatures have suggested that the performance of Thailand's competition law has not been very satisfactory to ensure the existence of market contestability and to prohibit anticompetitive behaviour. It could be argued that certain industries are prone to the existence of anticompetitive behaviour, particularly those where Thai conglomerates possess a prominent position or where producer concentration is high. Despite the increasing importance of public utilities to keep pace with economic dynamism, privatization and reforms to further enhance efficiency in the sectors are yet to take place. Despite its existence for more than a decade,

pragmatic shortcomings in the competition law enforcement still exist, such as capacity constraints and deficiencies in the legal infrastructure and provisions, for example structure of the Trade Competition Commission, penalty system, etc. Sector-specific competition regulation, for example in the telecoms industry suffers from lack of enforcement. Furthermore, no progress has been evident since the SME Act passed in 1999, and there has not been a list published outlining action taken to promote fair competition in the country.

Recommendation:

Trade competition is regarded as a core policy measure to promote economic efficiency and prohibit anti-competitive behaviour for the end benefits to consumers. The EABC is strongly supportive of any promotion activities to ensure effective functioning of Thailand's competition policy to address unfair trade practices. Further, the enforcement of competition regulation where it applies to specific sectors, needs better industry support and recognition that it is a tool for the benefit of the sector overall.

III. Creating an Enabling Economic and Regulatory Environment

• Relaxation of Foreign Ownership Restrictions / Liberalization of Services Sector

Despite the progressive liberalization in the manufacturing sector, the overall liberalization of Thailand's services sector has not materialized and is still an on-going agenda. Significant restrictions and regulatory barriers remain on market entry and foreign equity participation in several sectors. The restrictions



of foreign ownership have been a major obstacle in investing in Thailand for a long time.

According to the **Foreign Business Act B.E. 2542 (1999)**, foreign participation in services businesses on ‘List 3’⁶ is limited to 49 percent, and above that is restricted and controlled by the MoC. Foreign investors are required to obtain necessary permissions from relevant ministries to be able to operate. For instance, current inter-co shared services i.e., accounting, loans, HR management services, ITM, etc. require approval from the Ministry of Commerce, which generally takes time and involves costs to obtain such permission⁷. A foreign business entity who wishes to enter into this business is required to obtain a business license for specific financing, with a 7:1 debt to equity requirement, which is not required for a local entity. A certain kind of complexity has been exercised in the governing regulatory framework in the Thai services sector. In the past couple of years, Thailand has somehow shown an attempt toward more restrictive regulations against foreign businesses in Thailand. Recently, the model of potential amendment on the FBA was proposed at the public hearing session with the Department of Business Development (DBD), Ministry of Commerce. The model included a proposed re-definition of “foreign juristic person” to include control criteria, including voting rights and management controls, in addition to equity ownership. This

re-definition of foreign juristic person would impose further restrictions on foreign investment as well as introduce uncertainty to a large number of foreign companies operating in Thailand. Putting more restrictions on services and investment would send out the wrong signal to foreign investors and could affect the Thai economy, its labour force, and investments.

At present, European investors are at a disadvantage vis-à-vis U.S nationals and companies who still benefit from national treatment provisions in the US–Thailand Treaty of Amity and Economic Relations 1968 with respect to establishing, as well as acquiring interests, in enterprises of all types for engaging in commercial, industrial, financial and other business activities, with the exception of seven specific sectors⁸. Given the expiration of the WTO derogation from Article II GATS (MFN-clause) at the end of 2004, Thailand is urged to consider these legitimate concerns in its policy formulations and ensure a more investor-friendly environment, duly aligned with its WTO obligations. It also seems difficult to reconcile the justification, under the FBA, that Thai enterprises are not ready to compete with foreigners and thereby restricts foreign control of Thai companies, with the fact that Thai companies have been successfully competing with U.S investors for many decades, and in fact, are competing.

⁶Businesses that Thai nationals are deemed not ready to compete with foreigners.

⁷Interpretation of the Act issued since 1999 by the Ministry of Commerce has extended its scope to renting of immovable and movable property and the provision of guarantees or other security to support group borrowing. Arguably, such wide interpretation of the Act was not envisaged when the Act was drafted. Whilst manufacturing is generally open to 100 percent foreign ownership, after sales, repair and maintenance, or supplying a guarantee are deemed as services. The 49 percent ownership therefore is only permitted for those activities.

⁸Namely communications, transportation, fiduciary functions, banking involving depository functions, exploitation of land and natural resources, owning land, and domestic trade in agricultural products.

The EABC supports liberalization of Thailand's services sectors and implementation of the existing review mechanism on List 3 in the FBA to duly remove restrictions and encourage foreign investment in the services sector. The continual recommendations from the 2013 EABC Position Paper still remain (Annex II).

Recommendations:

1. Progressive liberalization of Thailand's services sector is strongly encouraged and the EABC will continue pushing for this policy agenda as part of the on-going EU-Thailand FTA negotiations. The EABC has and will continue to support implementation of the existing review mechanism on List 3 in the FBA to duly remove restrictions and meaningfully encourage foreign investment in a broad range of services sectors and also to address real liberalization. The liberalization and development of Thailand's services sector is considered vital to build economic strength and enhance the country's competitiveness – so Thailand is not left behind when competing economies are moving ahead in keen expectation of the AEC.

Furthermore, under the light of the ASEAN Framework Agreement of Services (AFAS), AEC's services liberalization, Thailand is yet to put in place the necessary changes toward the AFAS target of 51 percent foreign equity allowance in all services sectors since December 2010. We again emphasize five key elements we see for the meaningful liberalization of services which apply generally and not just to the AEC context:

- i. Relaxation of foreign equity limits,
 - ii. Facilitation of free movement by changes to work permit and visa rules,
 - iii. Sector-specific changes and mandates by way of relaxation of restrictions on permits, licenses and other barriers to entry, and to mandate access to facilities
 - iv. Other sector-specific reforms or mandates e.g., structural changes in a sector to make it competitive,
 - v. Improvement and greater efficiency in the licensing procedures to obtain majority foreign ownership
2. Any attempt to tighten the law, such as the use of additional criteria (e.g. an extension of the existing definition of 'foreigner/alien' to include management control and/or voting rights in addition to foreign shareholding) could lead to the violation of WTO commitments and is therefore strongly discouraged. In addition to avoiding further restrictions on foreign ownership under current legislation, the EABC aims to obtain a level playing field with other non-European competitors in the services sector.
3. The EABC would like to repeat our recommendation from the 2013 Position Paper on the establishment of a mechanism that allows ownership of commercial land to foreign companies. Although the BOI and the Industrial Estate Authority of Thailand (IEAT) can grant permission for land ownership to the majority of foreign owned Thai companies, not all are eligible for such investment privileges.

4. More flexibility needs to be provided for residential and commercial leasing of land and buildings. The fixed maximum lease periods of 30 and 50 years limit the chance for commercial negotiations between landlords and tenants. A longer term of leasing is suggested by the EABC as well as a clarification of technical rules regarding the enforceability of options and assignment of leases.
5. The current foreign ownership cap of 49 percent of usable space in a condominium building should be reviewed, together with technical rules requiring the purchase monies to be brought into Thailand rather than earned locally.

- **Ease of employment procedure and law to facilitate free movement of foreign skilled and unskilled workers**

Certain existing laws and regulations in Thailand are impediments to the development of more robust critical sectors. For example, high registered capital and a specific ratio of Thai to foreign employees are required for each work permit issued to a company. These approaches are not appropriate for SMEs, especially in the services sector and when critical skills are needed. SMEs, many of which provide important services to much larger organizations, often begin as sole proprietorships, or with just two or three partners and no additional employees.

Even long-established service companies often need only a small staff to generate significant revenue. Their primary assets are the skills and intellectual capital of their employees, not plant and equipment, and they therefore have no need for high initial capital investment. There is regional competition for skills and Thailand should encourage the intake of skills and entrepreneurs from around the world to invest and start-up in Thailand, regardless of ratio or initial capital commitment. SMEs (Thai- or foreign-owned) should not be restricted from hiring foreigners to provide needed know-how. Such skilled workers will not take away local jobs but, rather, will enhance competencies and competitiveness overall, and help in overall business recovery.

The Alien Working Act, B.E. 2551, which came into force on 23 February 2008, repealed and replaced the Alien Working Act, B.E. 2521, as the principal Act dealing with the employment of foreigners in Thailand. In general, any foreigner who wishes to undertake any form of work in Thailand, whether paid or unpaid, must hold a valid work permit authorizing that employment, with exceptions for foreign diplomatic staff and employees of the UN and certain other international agencies.

The legislation broadly defines ‘work’ to include any work involving physical strength or knowledge, whether or not done for money or other remuneration. Work by foreigners (referred to as ‘aliens’) in Thailand may only be done in accordance with regulations issued by the Ministry of Labour and may only be done with a work permit, except when the work permit is not required for an alien in

Thailand temporarily under the immigration laws to do necessary and urgent work for a period of up to 15 days. To limit the number of aliens employed in roles other than as craftsmen or experts, the Minister of Labour, with the approval of the Council of Ministers, may impose a fee on employers employing such aliens.

Work permits are normally issued for one year, but up to two years in some cases. In the case of work permits issued in connection with the Law Governing Investment Promotion or other similar laws, it allows a period of time that the alien is permitted to work under such laws. Work permits may be renewed for additional two year periods, but the period of time an alien is permitted to work is not to exceed four consecutive years unless otherwise permitted by the Council of Ministers. Work permits have no effect on the duration of stay permitted under the immigration laws. Employment business visas may be issued with a maximum of one year. An alien with a work permit is required to carry or keep the work permit at the place of employment during working hours, and may only work in accordance with the limitations and conditions set forth in the work permit.

Thirty-nine occupations and professions are closed to foreigners in accordance with the Royal Decree Prescribing Works Relating to Occupation and Professions in which an Alien is Prohibited to Engage B.E. 2522 (1979). In applying for a work permit for an occupation that is not prohibited, conditions related to the paid-up capital of the sponsoring company and the ratio of Thai staff to foreign employees must be observed.

In the current context of business interconnectedness, it is arguable that business operations have become global. Particularly in many strategic parts of the services sector which are regarded as international, supply of jobs is outstripping the supply of local workers to fill these vacancies to ensure smooth business operation. This inevitably mean foreign talent and business people are required to overcome the skills shortage. To strengthen Thailand's position as a competitive regional business hub, restrictions on visa and work permits should be eased and immigration rules should not hamper – but on the contrary facilitate – sustainable growth of the Thai economy.

It is also important to note that the consistently low unemployment rate in Thailand – whilst usually seen as a positive economic indicator – is restricting the potential for growth in several key sectors. As Thailand progressively develops, many industries are facing serious challenges in recruiting the local workforce to fill many unskilled or moderately skilled vacancies. This has already led certain manufacturers to move their investment away to other countries where labour availability is less of an issue. This prominent shortage of workers however continues to pose a significant challenge as the industries strive to offer quality services to customers. These include the hospitality, healthcare, and retail sectors, which are recognized as Thailand's strategic economic sectors. Most hotels and hospitals throughout Thailand are struggling to fill basic but essential positions such as maids, cooks, technicians or security guards. According to the EABC HR and Labour Planning Survey 2013, shortage of skilled labour was identified as the biggest challenge, accounting for 67 percent of respondents.

As a result, it is necessary for Thailand to address the difficulty in obtaining work permits and visas due to lengthy procedures, recognition of employees' qualifications, and lack of transparency in regulations at various administrative levels in order to ease restrictions with the aim to facilitate the free movement and recruitment of expatriate skilled and unskilled workers which duly correspond to Thailand's economic development and business needs.

To enable business to be done in Thailand, outside the need for local employment or highly cumbersome procedures, a business visa is needed. This will be essential to the success of IHQ / ITC policies and many of the so called 'digital economy' policies. A new business visa, available on arrival for 30 days to cover all activities generally understood to be about doing business, short of local employment should be introduced. This would involve redefinition of 'work' and scrapping of the WP-10. It would also require collaboration between the Immigration Bureau and the Ministry of Labour in order to administer it.

Recommendations

The EABC has and will continue to recommend the following combination of administrative and legislative remedies:

1. Issuance of visas and work permits for longer than one year, particularly for BOI and regional operating headquarters, is highly recommended
2. Elimination of the 90 day notification of stay, to be replaced with notification of change of work or residential address shall be considered
3. Cancellation of the requirement for foreigners to work only in the permitted province or area
4. Elimination of registered capital and staff ratio as a metric for work permit issuance
5. Elimination of the need for a work permit for foreigners who have already obtained a permanent residence visa
6. A new business visa, available on arrival for 30 days to cover all activities generally understood to be about doing business, short of local employment. This would involve redefinition of 'work' and scrapping of the WP-10.
7. Elimination of Thailand's list of approved jobs for work permits, starting by reducing the list,
8. Ease rules governing the employment of foreign labour, particularly in respect of lower skilled labour.

Regarding employment regulations, the EABC is ready to engage in the consultation process to achieve a mutually beneficial outcome on these issues.

- **Simplification of Regulations on Hazardous Substances Control with International Best Practice**

Thailand's legislation and regulations on hazardous substance control remain very burdensome to business operators. Of particular concern is the requirement to disclose 100 percent composition details of a given substance if a classification ruling or registration is sought. Given the complexity of supply chain and confidentiality concerns, meeting such a requirement is extremely difficult for business operators. We appreciate the Department of Industrial Works' (DIW) understanding and accommodation of such limitations, specifically by offering an option to provide the Confidential Business Information (CBI) directly to the DIW and accepting the Manufacturer Self-Certification (MSC) for use in seeking a classification ruling or registration.

Recommendations

In addition to the accommodations rendered by the DIW in this regard, we would like to further call for the following:

1. Simplification of operational procedures for reporting, classification, registration and licensing of hazardous substances both in normal cases and in the cases of samples (including samples for R&D), as the scope of control expands, so as not to create even more unnecessary burden on business
2. Formalization of the simplified operational procedures into official regulations, for predictability and sustainability.

Intellectual Property Rights (IPR)

SUMMARY OF RECOMMENDATIONS

I. Amendments to IP-related legislation

- a. Amendments to Trademark Act on accession to Madrid Protocol and illegal refilling practices; and amendments to Trademark Act on protection of scent and sound marks
- b. Landlord liability provisions for IP infringement
- c. Amendment of the Geographical Indications Act B.E. 2546 (2003)

II. IP Policies

- d. Backlog on patent registration
- e. Trademark elimination via plain packaging policy and excessive measures restricting normal use of trademarks

III. Roles of IPR in Digital Economy

- f. Examination and grant procedure of patents
- g. Review of IPR regulations and laws

Overview

The subsistence and effective protection of Intellectual Property Rights (IPRs) are key drivers of Foreign Direct Investment (FDI). Generally speaking, a lower to middle income country would hope to attract inward FDI so as to improve its overall investment climate and business infrastructure than to strengthen its patent regime

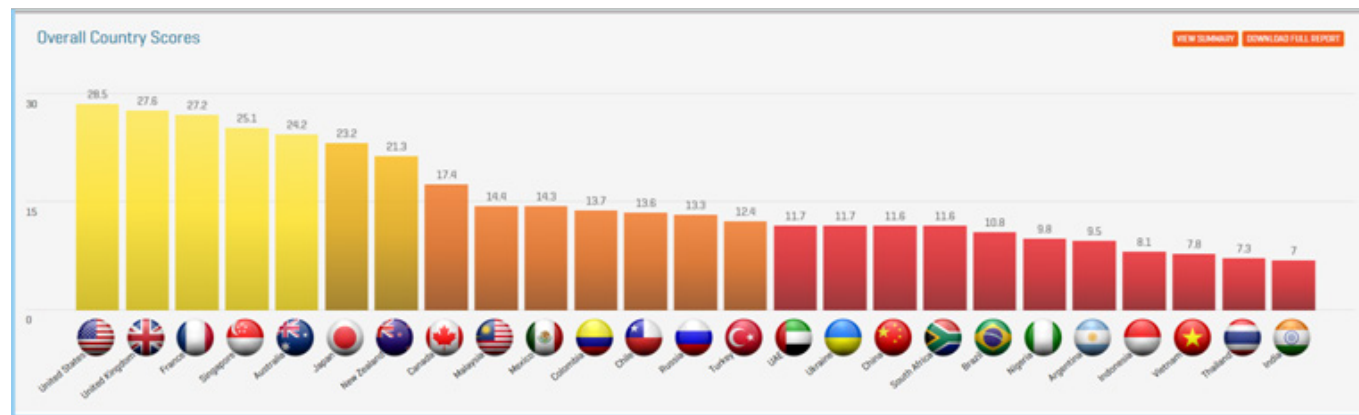
sharply, an action that would have little effect on its own¹. For Thailand however, as an upper middle income country² and struggling to break out of the “middle income trap” with a low 7.3 score in the latest Global Intellectual Property Centre (GIPC) International Index³, raising its IPR regime standards is imperative.

¹Maskus, Keith E. 2000. Intellectual Property Rights in the Global Economy. Washington, D.C.: Institute for International Economics

²World Bank. 2013

³U.S. Chamber of Commerce's Global Intellectual Property Center. January 2014. GIPC International IP Index. Second Edition.

Figure 9: GIPC International Index



Source: www.theglobalipcenter.com/gipcindex

An effective IPR regime is a critical consideration for multinational firms making location decisions among middle-income countries with strong abilities to absorb and learn technology. For Thailand, this fact is confirmed by its 39th and 54th place in the ranking of efficiency enhancers and innovation and sophistication factors' index⁴ of the Global Competitiveness Index (GCI) 2014–2015.

The international mobility of skilled workers and the associated international knowledge diffusion are important drivers of domestic innovation and thus important development challenges. Given this relationship, WIPO Development Agenda Recommendation 39 mandated a project in 2014 in order to seek a better understanding the link between international mobility of skilled workers and IP policies and its impact on IP

protection, international diffusion of knowledge, and innovation and development.⁵

For effective development and implementation of a national IPR strategy aimed at transforming Thailand from an efficiency-driven to an innovation-driven economy in line with developed countries, it is important to strengthen not only Thailand's IPR legal framework but also the IPR enforcement system. This effort must be supplemented by other important elements such as raising public awareness on the importance of IP. The EABC endeavours to support the Thai authorities in the development of its IPR regime. The EABC Working Group on Intellectual Property Rights has identified a number of key issues that should be considered and addressed to improve Thailand's IPR regime as a basis for attracting and maintaining FDI.

⁴– Efficiency enhancers comprises national scores of higher education and training, goods market efficiency, labour market efficiency, financial market development, technological readiness, and market size.

– Innovation and sophistication factors comprise national scores of business sophistication, and innovation.

⁵WIPO. 2014. Project Document: Committee for Development and Intellectual Property (CDIP)

I. Amendments to IP-related legislation

While noting the positive development in November 2014 involving amendments to the Copyright Act regarding anti-camcording and the protection of rights management information, and technological protection measures and the Trade Secrets Act on penalty provisions having been ratified into legislation, it is respectfully submitted that Thailand's copyright law still falls a long way short of current international standards.

At a recent meeting with the DIP and in response to a direct question about Thailand's accession to the 1996 WIPO Copyright treaty and The 1996 WIPO Performances and Phonograms Treaty it was stated that since Thailand is enacting measures on rights management information and technological protection measures it sees no need to accede to the treaties in the short term. It was argued that Thailand's copyright law now mirrors that of countries who are member of the treaties.

With respect, this indicates a basic misunderstanding of the dual function of the international copyright treaties. They are not merely agreed in order to establish minimum standards for copyright law. They also create a union amongst the members based on the principle of national treatment.

Standing outside the treaties, Thailand is not part of the international community of countries providing effective copyright law. There is more to the 1996 treaties than the technology related measures. Unless Thailand is part of the union built around the international treaties, foreign rights holders have no assurance that the measures in the copyright law of Thailand are consistent with either international standards or whether, in any

event, they are, as foreign entities, entitled to the protection of the law in Thailand

Of course, the inverse proposition is also true: unless Thailand is a party to the international treaties and part of the international community, its own creators and innovators are unlikely to receive due protection outside Thailand.

Furthermore, it is noted that the following proposed amendments to legislations are still pending.

a. Amendments to Trademark Act on accession to Madrid Protocol and illegal refilling practices; and Amendments to Trademark Act on protection of scent and sound marks

The EABC has underlined during various meetings with the Thai authorities the urgency to protect unconventional marks such as scent and sound as well as to prevent illegal refilling, which affects various industries including food and beverages, perfumes and cosmetics, and automotive, in order to reassure the protection of consumers as well as the rights of IP owners. The Thai Department of Intellectual Property (DIP), during various discussions and consultations with the EABC and its European business representatives, duly took note of the issue and concern. Since then relevant provisions have been proposed for amendments to the Trademark Act.

The EABC fully understands that due process for ratification of legislations at parliament level or Council of State level is required to finalise such amendments, and that such processes may take months to fulfil. The EABC will continue to pay close attention to the progress of the amendments to legislations.

Recommendations:

1. Ensure full utilization of existing enforcement measures, whilst the provisions for protection of unconventional marks and against illegal refilling practices could come into force. Efforts should rapidly be dedicated to target illegal refilling practices which should be recognized as a basic act of trademark infringement.

In this vein, in order to act efficiently to eliminate illegal refilling acts, definitions referring to private refilling acts and/or broadly accepted practices could be avoided. Within the framework of the provisions on illegal refilling practices, the interpretation of provisions for enforcement agencies and/or implementation plans should allow the possibility to broaden the definition of illegal refilling practices to encompass fundamental issues often related to illegal refilling such as 3D trademark packaging protection and protection of trade dress.

2. Regular feedback on progress made to proposed legislative amendments would be much appreciated by relevant stakeholders.

b. Landlord liability provisions for IP infringement

With the need for Thailand to adapt to modern sales channels through the internet and online marketplaces⁶, it remains necessary for the country to expediently introduce landlord liability provisions in the Thai IP Legislation for further protection of IP rights holders, not

only for copyright but also for other rights, in particular trademarks. Such protection would assist in eliminating the public perception that there is legal impunity for the sale of counterfeit and/or pirated goods as presently practiced by numerous large-scale marketplaces.

Landlord liability for infringement of intellectual property can be seen in a form of secondary liability as referred to in several pieces of legislation such as tenancy law, real property law, money laundering law etc. in the EU and US. One example is the UK case of *Wendy Fair Markets*⁷ where a number of stall owners had been found selling counterfeit DVDs, CDs, video games, and computer software. The prosecutor was able to convince the jury to convict the market owners or defendants on counts of violations of Section 328(1) of the UK Proceeds of Crime Act 2002⁸. This case was primarily based on the landlords' direct receipt of rents from stall owners or tenants who were convicted of selling counterfeit products. In the State of New York, trademark owners can pursue counterfeit goods vendors by holding landlords liable under New York Real Property Law §231. The statute provides that "[t]he owner of real property, knowingly leasing or giving possession of the same to be used or occupied, wholly or partly, for any unlawful trade, manufacture or business, or knowingly permitting the same to be so used, is liable severally, and also jointly with one or more tenants or occupants thereof, for any damage resulting from such unlawful use, occupancy, trade, manufacture or business."

Additional landmark cases showed courts' decisions of holding landlords liable on secondary liability basis for

⁶Based on World Internet Users and 2014 Population Stats, 42.3 percent of the world population are internet users. (<http://www.internetworldstats.com/stats.htm>)

⁷*R. v. Wendy Fair Markets Ltd.*, Nicholas Giles Hobday & Sally Ann Ward, [2008] EWCA Crim 2459 (Lord Justice Pill et al., Oct. 16, 2008)

⁸Los Angeles County Bar Association International Law Newsletter Vol. 99 TMR. 2010. Daniel R. Plane, *Going After the Middleman: Landlord Liability in the Battle Against Counterfeits*

sales of infringed IP rights even when the landlords were unaware of the infringement. For instance in a US case⁹ on copyright infringements against the owner of a chain of department stores where a concessionaire was selling counterfeit recordings, the court held the landlord liable providing that the landlord or proprietor had the power to cease the conduct of the concessionaire, and because the proprietor obtained direct financial benefit from the infringement of copyright. In Canal Street cases¹⁰, Louis Vuitton was able to secure a permanent injunction against the landlord, who was not able to dispute his knowledge that tenants in his buildings were selling counterfeit Louis Vuitton goods.

In a decision related to the infamous Silk Market¹¹ in China, landlord liability for owners of retail markets was upheld and clarified. Landlords who obtain reliable knowledge of infringing behaviours in their market have to stop it, if need be by termination of the lease agreement. Landlords must perform checks and observations, and cannot just insist on preventing 'open sales' only¹².

It should be further emphasized for Thailand that a stronger legal framework, particularly that of landlord liability provisions, would ensure better enforcement, helping to diminish repeat offenders including those arriving from new sales channels. This should allow demonstration to rights-holders and the public in general of the commitment and capacity of the Thai authorities to really deal with widespread IP infringements.

In the latest EU and US industry consultation with the DIP on 16 December 2014, it was noted that the DIP considered not introducing an inclusion of landlord liability provision into any of IP legislation, rather to apply current and existing tools seen in Civil and Penal Codes for this purpose. This latest development is not deemed as an advancement, rather a step back, in the effort to strengthen the protection of IP rights' holders.

Recommendations:

1. Urgently reconsider an inclusion of provisions on landlord liabilities into the Copyright Act, Trademark Act and other possible IP-related legislation to ensure clear and practical provisions with appropriate levels of penalties, which are often seen as negligible in Thailand and generally not able to outweigh the profits made by counterfeiters.
2. Coordinate with relevant government agencies and IPR rights holders to consider other currently available courses of action under existing laws including the deployment of administrative measures against uncooperative landlords.

IPR in an eCommerce Context

Online infringement of intellectual property rights is a growing problem worldwide. The role of both rights holders and on-line intermediaries in addressing this

⁹United States Court of Appeals Second Circuit, 316 F. 2d 304, Shapiro, Bernstein and Co. v. H.L. Green Co., decision 15 April 1963

¹⁰United States District Court for the Southern District of New York, Case

No. 05CV3331 (S.D.N.Y. Apr. 19, 2005) Louis Vuitton Malletier v. Richard E. Carroll et al., and United States District Court for the Southern District of New York, Case No. 06CV13424 (S.D.N.Y. Nov. 21, 2006), Louis Vuitton Malletier et al. v. Trust under the Will of Vincent Terranova and Terranova Real Property Management Corp.

¹¹Supreme People's Court of China (SPC), April 2007, Chanel, Burberry, Prada, Gucci, and Louis Vuitton v. Xiushui

Haoson Clothing Market Co., Ltd. (<http://www.court.gov.cn/news/bulletin/release/200704260020.htm>)

¹²http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc_143737.pdf

problem including the issue of establishing possible liability for such infringement, involves necessarily complex questions. The EABC recommends a balanced approach to finding the correct solution for Thailand, which recognises both national priorities and established international legal principles.

C. Amendment of the Geographical Indications Act B.E.2546 (2003)

The EABC welcomes Thailand's recognition of the importance of geographical indications (GIs). However, Article 22(2) of the WTO TRIPS Agreement, which sets out protection for GIs, has not been implemented by the Geographical Indications Act (the Act) or in the associated Ministerial Regulation (B.E.2547 (2004)).

Section 3 of the Act, which gives a definition of GIs and sections 27 and 28, which give protection to GIs, do not fully implement the provisions of Article 22(2) of the TRIPS Agreement because these sections only appear to protect the registered geographical indications themselves and do not prohibit the use of any means that indicates or suggests the GI.

In addition, Article 23 of the TRIPS Agreement has not been fully implemented by section 28 of the Act. Whilst the additional protection provided by Article 23, which prohibits the use of certain expressions in association with wine and spirit GIs, has been implemented, Article 23's prohibition on the use of GIs in translation has not been included in section 28.

Recommendation:

Amendment of the Act is necessary to comply with all the requirements of Articles 22 and 23 of the TRIPS Agreement.

II. IP Policies

d. Backlog on patent registration

The period of patent approval from the submission to the approval date remains unpredictable and can be counted as long as 12.6 years on average in Thailand, due to a lack of human resources – particularly chemical and pharmaceutical patent examiners – at the DIP. The bottlenecks, resulting in only 1,095 patents granted in 2012¹³, give rise to uncertainty of investment protection for right holders and increase the possibility of infringement from local generic companies during the pending approval periods, which damage for both local businesses and innovators. Under such unpredictable circumstances, the patent term restoration or adjustment have never been established in the Thai legal framework.

As mentioned above, the current delay for patent approval discourages applicants from seeking patent protection in Thailand. On a related note, a good source of profit for the patent office is the annual renewal fees for maintenance of the patent applications or patents. Some jurisdictions, like the European Patent Office (EPO), require the payment of an annual fee from the third year on for a pending patent application. In other jurisdictions like Singapore or Thailand, the renewal fees are due only once the patent is granted, although the patentee has

¹³http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=TH

to pay accrued renewal fees from the fourth or fifth year on. Consequently, it is evident that the patent office under the DIP faces loss of potential revenue from renewal fees should the patentee opt to abandon the patent before it is granted. In conclusion, not only does the huge delay of the DIP in granting patents discourage applicants to seek protection in Thailand, but this also means missing out on potential earnings for the DIP.

Recommendations:

1. Address the patent backlog and improve the patent approval process with a reasonable timeframe for patent registration, supported by increased numbers of competent patent examiners.
2. Patent term restoration should be considered and established as a solution to create fair practices to compensate right holders, considering the current patent backlog in Thailand as well as the delay of regulatory marketing authorization.

In the circumstance that a reasonable timeframe of registration is presented, the patent term restoration will only occur in case of a delay. This should enhance the effectiveness and productivity in government procedural level with mutual benefits.

3. Promote a regular dialogue and consultation between the public and private sectors for information sharing.

e. Trademark Elimination via Plain Packaging Policy and excessive measures restricting normal use of trademarks

Draft plain packaging legislation and notification on excessive graphic health warnings on alcoholic beverages and tobacco products have resumed and are reportedly under consideration by the Thai government. The implementation of such provisions gives rise to doubt as to their conformity to fundamental rights, such as the right to property. The usage of these excessive measures also risk being unconstitutional, provided that it is deemed to limit the property right as afforded under the constitution, as it may pose a risk to consumers given the indifferent appearance of goods.

Trademarks and trade dress are particularly relied upon by consumers as signposts of genuine goods and services. This is true for both word trademarks and figurative (graphic) trademarks, and for trademarks combining the two, as well as so called “non-traditional” trademarks such as packaging shapes and colours per se. Trademarks also indicate the source of goods and services to assure consumers of the quality of the products that they purchase, or are considering purchasing. This fundamental function cannot be fulfilled if trademarks are not noticeable, or are unavailable, to consumers when selecting a product for purchase. The inability to recognize a brand or trademark on a product would lead to consumer confusion, and therefore diminish the goodwill acquired by that brand through considerable investment and effort over a significant period of time. In fact, the inability to recognize a brand also takes away consumers’ freedom of choice.

Where intellectual property rights are concerned, the policy or legislation on plain packaging would surely eliminate trademarks and their respective value. With this potential elimination of trademarks, such policies risk being in contravention of TRIPs Article 20¹⁴ that prevents unjustifiable encumbrances of trademark rights. Most importantly, plain packaging of any protected trademark products would increase and ease the production and transaction of counterfeit goods.

Recommendations:

1. We strongly urge the Thai government not to adopt a plain packaging policy or the like, in order to remain in keeping with the WTO TRIPs obligations and principles of consumer protection.
2. Consider alternative social policies to address the consumption of alcohol beverages and tobacco products.

III. Roles of IPR in the Digital Economy

Thailand has recently announced plans to move towards a digital economy. This part is covered in more details in the ICT section. The plans will reportedly encompass development of both hard infrastructure (networks) and soft infrastructure (the laws and standards which will enable the digital economy to function). The EABC notes that a number of the proposed laws, including those related to intellectual property rights, will need extensive revision and upgrading as parts of any such initiative.

As recent experience has shown in many parts of the world, an effective intellectual property regime is

essential to the development of digital economy initiatives. While the Government will establish the strategy and road map for building the digital economy, the innovation will come primarily from the private sector. Patent and copyright laws are the main pillars of the legal framework required for innovation; without them private sector investment cannot be guaranteed.

This need for effective patent and copyright laws to support digital economy plans highlights at least two issues discussed in detail elsewhere in this Position Paper. First, the inordinate time involved in the examination and grant of patents: as securing investment in innovation relies on the early ability to protect and manage the product of the investment through intellectual property rights.

Second, since copyright plays such a key role in the development and deployment of digital economy technologies it must be kept constantly under review. It must also be aligned with current international standards through Thailand's membership of the relevant international treaties.

Recommendations:

1. Speed up the examination and grant procedure of patents to encourage more investment in innovation; thus, the digital economy
2. IPR regulations and laws must be periodically reviewed as well as aligned with current international standards.

¹⁴TRIPs Article 20 states that the use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings. This will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the specific goods or services in question of that undertaking.

Automotive

SUMMARY of RECOMMENDATIONS

I. EU–Thailand FTA Negotiations

- a. Resume the FTA negotiation as soon as possible
- b. Reduce tariff rate on automotive products at least to a similar level of that under the JTEPA
- c. Eliminate NTBs in Automotive Sector by adopting international standards and recognizing ECE test report / certificate.

II. Technical Regulations

- d. Align with internationally-accepted UNECE standards and recognize international certification
- e. Actively engage in developing and implementing ASEAN MRA for automotive products
- f. Streamline TISI operations by outsourcing tasks to appointed test laboratories and technical services and reduce bureaucratic processes

III. Taxation

- g. Ensure alignment of Customs and Excise taxation policies related to Customs Free Zone
- h. Ensure clear and consistent rules for Customs Free Zone
- i. Announce subordinate legislation for the CO₂-emission-based excise within 2015 and accept CO₂ emission testing certificates issued according to UNECE regulations, for excise purposes
- j. Fairly consider any changes to the excise tax base, so as not to discriminate against Free Zone automakers
- k. Tighten control on grey market vehicle imports through close monitoring of declared customs value and technical testing requirements

IV. Labour

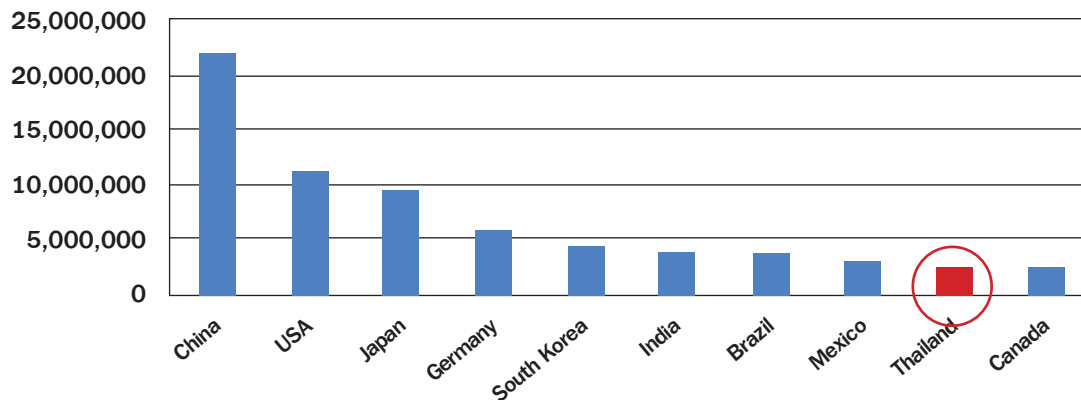
- l. Take holistic approach in developing mid- and long-term strategies to raise availability of labour

Industry Overview

The Thai automotive industry has made a significant contribution to driving Thailand's economic growth for over 50 years (BOI 2014). With strong support from both the private and public sectors, the Thai automotive industry has become the largest production-base in Southeast Asia, and the ninth largest globally, as of 2013. Being ranked in the top-ten among world

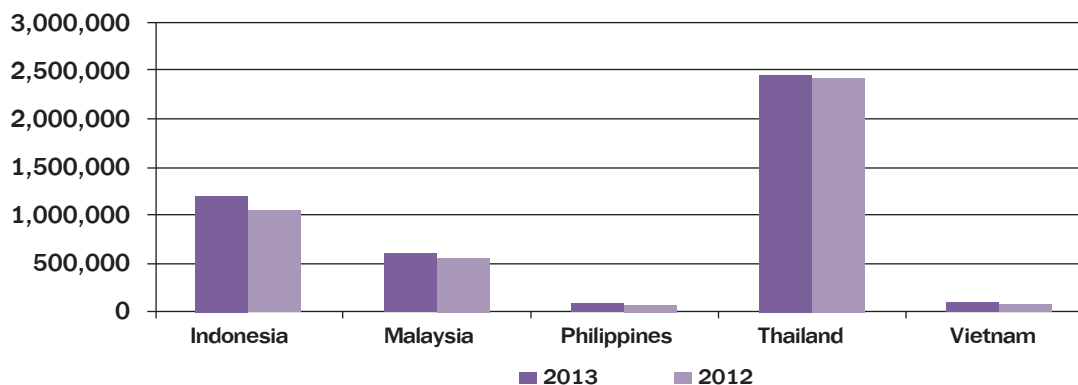
producers confirms the importance of the automotive sector in the Thai economy. Besides contributing considerable economic growth to the Thai manufacturing sector, the automotive industry generates employment, a value-added market, technology and innovation as well as a creation of relevant supply chains with other industries.

Figure 10: World Ranking of Top Automotive Manufacturers, 2013 (thousand units)



Source: International Organization of Motor Vehicle Manufacturers (OICA) 2014

Figure 11: ASEAN Car Production and Share, 2013

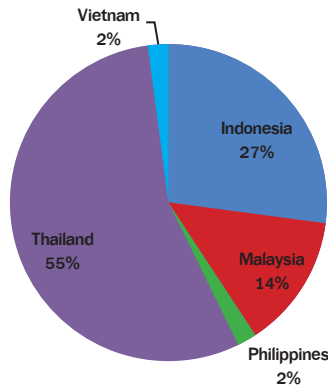


Source: ASEAN Automotive Federation 2014

Its strategic location has made Thailand an automotive hub as well as a major regional production base for motorcycles and automotive parts in Southeast Asia. In 2013, Thailand held 55 percent of total car production in ASEAN with a capacity of 2.45 million vehicles and employing over 500,000 people in the sector. Due to its

strong performance, Thailand's automotive production capacity is expected to increase to more than 3.4 million units by 2017. In this environment, the Ministry of Industry believes that Thailand will become the world's fifth largest automotive manufacturer in three years.

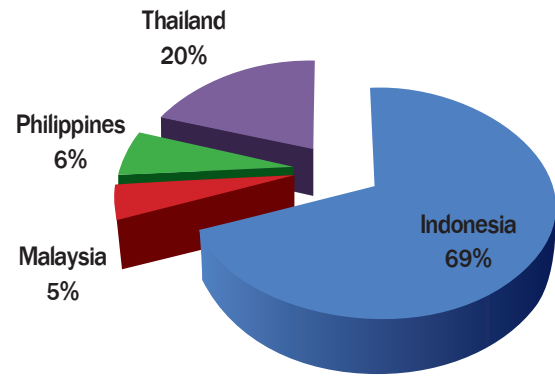
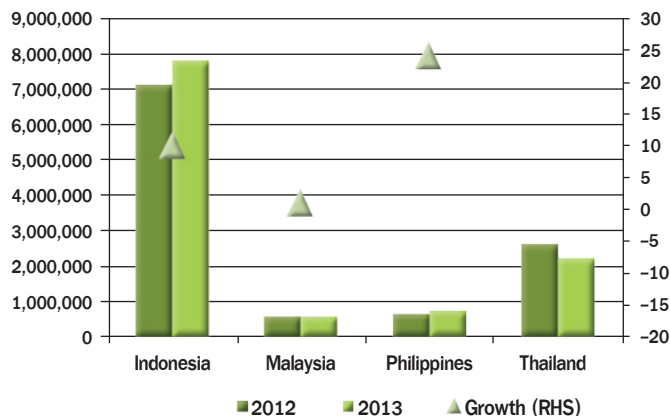
Figure 12: Share of ASEAN Car Production, 2013



Source: ASEAN Automotive Federation, 2014

Thailand was also the second largest producer of motorcycles in ASEAN in 2013, with a production capacity of 2.2 million units. However, Thailand's motorcycle production continued to decrease for two consecutive years, while neighbouring countries like Indonesia and the Philippines gained production growth of 10 percent and 24 percent, respectively.

Figure 13: ASEAN Motorcycle Production and Share, 2013



Source: ASEAN Automotive Federation, 2014

Despite political instability, the performance of Thailand's automotive industry remains robust. The sector itself contributed approximately 10 percent of Thailand's gross domestic product (GDP) in 2011 (Thailand Automotive Institute, 2012). New challenges continue to be introduced in a new industrial landscape, including sustainable growth and the global trends of the environment and safety. The Thai government has set up a consultation process with the private sector to develop a Master Plan for the Automotive Industry (2012–2016), setting Thailand up as a global green automotive production base in this new framework. This will then bring more investment as well as research and technology development to the Thai automotive industry.

In order to cope with these challenges, priorities have been set for the Thai automotive industry, especially those related to reducing skilled labour shortages. According to the Ministry of Industry, the target is to improve the labour capacity and skills of 300,000 workers in the automotive industry by 2016 (The Government Public Relations Department, Office of the Prime Minister, 2013). The goal is for Thai personnel to produce an average of six vehicles a year.

Automotive manufacturers must not only serve domestic demand, they must also take into account consumer preferences in the regional and world markets. In addition to this, cost efficiency must be considered. Many manufacturers expand their investments to new and developing markets with the goal of reducing their production and transaction costs. As a result, the Thai industry development strategy must include the idea of Thailand's centrality as a potential market and an efficient production base in the region. The concept of supply chain creation is worth considering, enabling an expansion of the regional production network in response to the forthcoming full realization of the ASEAN Economic Community (AEC) by the end of this year. Overall, the EABC is very keen to strengthen and support the competitiveness of Thailand's automotive position in the regional and global market. Complementing Thailand's strategic planning, the prospective negotiation of an EU-Thailand FTA will enhance Thailand's capabilities in the current global environment and full implementation of the AEC.

In the spirit of partnership and to underline our long-term commitment to Thailand, we appreciate the Thai Government's various policies and measures which have enabled the country's automotive industry to achieve its current position. To further expand its production and strengthen its position in the global automotive industry, it has become increasingly vital for Thailand to improve market access for locally-made products by creating an environment which is conducive to further development of its automotive industry. Four areas of policy recommendations are identified for the Thai Government's consideration, namely **EU-Thailand FTA negotiations, Technical Standards, Taxation and Labour**. With the objective of enhancing investment attractiveness and

sustaining the Thai automotive industry's long-term competitiveness, we welcome positive developments in certain areas and encourage Thailand to maintain the positive momentum. In this Position Paper, the following priority areas as well as recommendations are highlighted for future improvement.

I. EU-Thailand FTA Negotiations

We strongly encourage the Thai Government to fulfil its commitment to the FTA negotiations. Despite the recent developments in its domestic politics, we strongly urge Thailand to remain engaged in the FTA negotiations or technical discussions, as the FTA would bring mutual benefits to both sides.

a. Tariff Rate Reduction

We call for a level playing field in Thailand's automotive market, which may be achieved by reducing import tariffs on automotive products from Europe under the EU-Thailand FTA to the similar level as the Japan-Thailand Economic Partnership Agreement (JTEPA). By reducing the import tariff on Japan-originating automotive parts imported by OEMs to zero percent from 1 April 2012, and on engines and certain engine parts to 0 percent from 1 April 2014 onwards, the JTEPA has put other foreign automotive businesses at a disadvantage in the Thai market. Such distortion is anticipated to deepen if Thailand agrees to further reduce the import tariff on CBU vehicles exceeding 3,000 c.c. under the JTEPA, from currently 60 percent to zero percent.

Recommendations:

1. Reaffirming our position in the 2013 European Business Position Paper, the EABC remains supportive of Thailand–EU FTA negotiations and encourages Thailand to continue its engagement with the EU at every appropriate level.
2. In order to minimize trade distortion brought about by the JTEPA, Thailand is encouraged to agree to an immediate tariff reduction for automotive products under the FTA to at least a level similar of that under the JTEPA.

b. Elimination of NTBs in regards to standards, technical regulations and conformity assessment

Reduction of tariff barriers alone would not be enough to promote trade under the FTA. We have observed many instances where domestic technical regulations have become non-tariff barriers to trade amidst increasing tariff reductions. In the automotive industry, differences in technical requirements across countries have made it difficult to penetrate foreign markets.

Therefore, we emphasize the importance of reducing, eliminating, and preventing non-tariff barriers, including promoting technical regulations based on international standards and recognition of approvals based on approval schemes applied under the agreements administered under WP29 1958 Agreement (UN ECE). Such adoption will not only enhance competitiveness of EU-certified automotive products, but also raise the protection of human health, safety and the environment by virtue of technological advancement.

Recommendation:

Promotion of international standards (UN ECE) and recognition of approvals would be strongly recommended. This shall be included as one agenda in future EU–Thailand FTA negotiations.

II. Technical Regulations

To facilitate further expansion of its automotive industry, it is vital for Thailand to streamline its relevant technical regulations. Although countries may impose technical regulations to protect the welfare of their respective citizens, these technical regulations should not effectively become barriers to trade and investment expansion. Designed and implemented appropriately and efficiently, technical regulations could help contribute to raising the industry's competitiveness in the global market.

d. Alignment with International UNECE Standards

Although Thailand has already signed the WP29–1958 Agreement, it has not yet adopted any products prescribed therein. Currently, Thailand's industrial standards for automotive products as announced by the Thai Industrial Standards Institute (TISI) are not fully in line with the international WP29–1958 Agreement, and TISI thereby does not recognize internationally-accepted test reports or certification.

As a result, manufacturers of automotive products in Thailand are required to comply with the local mandatory standards on top of international standards. It is even worse when those automotive products receiving type approvals according to the internationally-accepted UNECE standards are required to be re-tested in TISI certified/accredited laboratories and the manufacturing plants where the products are

originally produced (e.g. in Europe) must undergo quality audits by Thai inspectors. As pointed out in the 2012 and 2013 EABC Position Paper, such requirements make the whole approval procedure in Thailand very costly and time-consuming, which in turn, hinders the development of the local automotive industry. The cost and time spent doing the redundant testing and auditing could be better used for other purposes that would improve the industry's competitiveness.

Recommendations:

Reiterating our recommendations stipulated in the 2013 EABC European Business Position Paper, Thailand is strongly urged to:-

- Adhere to the WP29-1958 Agreement,
- Recognize internationally-accepted test reports or certificates, and
- Abolish redundant approval requirements

e. ASEAN Mutual Recognition Arrangement (MRA) for Automotive Products

Harmonization of the standards under the MRA is vital to unify the ASEAN Economic Community (AEC) automotive market, which means better market access for Thailand's automotive products. We applaud Thailand's active engagement in developing the first phase of ASEAN MRA for automotive products covering 19 standards based on the UNECE standards. We strongly wish to see its implementation by 2015 as planned, and urge Thailand to continuously engage in further development of the MRA, including its second phase encompassing 32 standards. While harmonizing the standards, it is also important to prevent complexity and inefficiency in the implementation of the ASEAN MRA, by providing for recognition of internationally-accepted UNECE standard certification.

Recommendation:

Thailand is urged to continue its active engagement in further development of the ASEAN MRA, which also provides for recognition of UNECE standard certification.

f. TISI Operations

With the rapid growth of the automotive industry, industrial standards have played an important role in protecting human health, improving safety and the environment, as well as promoting industry development. Nonetheless, the relevant existing organizations and infrastructure do not seem to fit with the industry's expansion and changing context in the regional and global fields.

Thailand should review the national standardization strategy, consider the necessary investment in testing facilities, appoint more technical services staff to carry out the tasks on its behalf as well as improve the certification system in order to cope with the future adoption of UNECE Regulations under 1958 Agreement and ASEAN MRA. It is also important for TISI to streamline its operations by reducing bureaucratic processes, resulting in higher efficiency and enhanced business competitiveness.

Recommendation:

Appointment of additional testing laboratories and inspection bodies by TISI as well as speeding up certification processes are strongly advisable so as to better accommodate industry expansion.

III. Taxation

g. Alignment of Customs and Excise Policies on Customs Free Zone

The objective of the Customs Free Zone (CFZ), as envisioned by the Cabinet's decision on 25 November 2003, is to promote foreign investment in Thailand and to enhance the local industry's competitiveness. However, the Excise Department is considering revision of the excise laws such that automobiles assembled within the CFZ would be subject to the same excise assessment method as those assembled outside the CFZ.

Currently, automobiles assembled inside the CFZ are assessed for excise based on their ex-CFZ price when distributed locally, which is the same basis as the customs duty and VAT assessment. The proposal being considered by the Excise Department would; however, change from this basis to the basis used for automobiles produced outside the CFZ, which is an ex-factory price that shall not be less than 76 percent of the retail price.

The proposed amendment that changes the excise assessment basis and calculation method would create inconsistency in Thailand's taxation policies for the CFZ. This practice would undermine the trust and confidence of existing investors in the CFZ and in Thailand. In addition, such inconsistency would potentially entail several implementation difficulties that would make the taxation process inefficient. Therefore, any amendment of relevant laws should be in alignment with the CFZ's objectives.

Recommendation:

In order to achieve the objectives of the CFZ policy and minimize business uncertainty, Thailand shall ensure that CFZ privileges are preserved and not impaired by changes in the excise law. Generally, the Customs and Excise policies related to CFZ shall be aligned, be and transparently and consistently implemented.

h. Customs Free Zone's Rules

We acknowledge the ongoing revision of the CFZ's rules (CN 63) and appreciate the consultation opportunities granted by Thai Customs. In its efforts to revise the rules, we strongly urge Thai Customs to be mindful of the objective of the CFZs, which is to promote foreign investment in Thailand to enhance the local industry's competitiveness. Therefore, the rules should not create unnecessary burden to business operators in the CFZ, which would undermine their competitiveness.

We wish to see clear and consistent rules on the CFZ. At the moment, CFZ rules are not entirely clear and the application of the rules is, therefore, subject to interpretation by individual customs officials, causing uncertainty in business operations. In particular, we would appreciate a justifiable, clearly-defined timeframe of approval for the CFZ, which would enable business to efficiently plan our operations. We appreciate the initiative to improve the overall principal approval process in the near future by basis of self-declaration and E-document system. If Thai Customs is suspicious of any customs law violation related to the CFZ duty reduction, the suspicion could still be addressed via the post-clearance audit procedure.

Recommendation:

Revision of the CFZ rules should be made for more clarity to ensure they are applied consistently.

i. CO₂ Emission-Based Excise Structure

The new excise structure for automobiles based on CO₂ emissions will take effect on 1 January 2016. We see the move to assess the excise based on CO₂ emission as a step in the right direction, which should encourage the use of low CO₂ emission vehicles, consistent with trends in the global automotive market. We hope to see similar developments regarding excise tax structure in the motorcycle market.

However, so far there has been no subordinate legislation announced to set implementation rules for the CO₂-emission-based excise rate. Such subordinate legislation is crucial to the smooth transition to the new excise structure. Of particular importance is the one setting the rules for CO₂ emissions testing and approval as well as labelling. The Excise Department is, therefore, urged to promulgate the subordinate legislation by 2015 as well as to allow industry enough time (preferable one year) to prepare for the new excise structure effective on 1 January 2016.

On the CO₂ emission testing procedure, it should be noted that there are significant backlogs with respect to testing in Thailand. Therefore, to prevent any business disruptions from implementation of the new excise structure, we urge Thailand to accept the test results or certificates conducted in accordance with the UNECE regulations. Implementation rules for the recognition of such test results and certificates should also be announced within 2015.

For effective reduction of vehicular CO₂ emissions in the long term, CO₂-emission based excise should be adjusted such that it becomes technology-neutral. The new excise structure to be effective on 1 January 2016 is not technology-neutral as the excise rate differs across vehicle, engine and fuel types. To effectively use excise tax as a tool to induce growth of the green vehicles market, each gram of CO₂ should be treated equally.

Recommendations:

1. To mitigate potential business disruptions, we propose that:-
 - CO₂ emission test results or certificates based on the UNECE regulations be fully recognized and accepted as a basis for tax assessment, without the need to conduct a re-test in Thailand.
 - Subordinate legislation setting implementation rules be announced as soon as possible, so as to allow operators at least 12 months to conduct necessary preparation.
2. For long-term effectiveness, the CO₂-based excise should be adjusted toward a technology-neutral basis.

j. Excise Tax Base

It is noted that the Excise Department is working toward consolidation of all excise laws under the Excise Code, while also revising certain provisions of the laws, including, among others, the excise tax base.

Currently, the excise tax base for imported vehicles is the C.I.F. price, whereas the tax base for CFZ vehicles is the ex-work price, while for locally-assembled vehicles it is the ex-work price which shall not be less than 76 percent of the suggested retail price (SRP).

We strongly wish to see the current tax base maintained in any future excise law amendments, as it creates consistency between the Customs and the Excise policies related to imported and CFZ vehicles, which in turn would encourage more investment in the CFZ. Any policy inconsistency or unpredictability would only discourage future investment.

If, however, the current tax base is not avoidable, we would highly appreciate a reduction in excise tax rate in compensation for an increased tax burden because of the changing tax base calculation. This is to ensure tax revenue neutrality and at the same time minimize business impact on the automotive industry. In any case, it is important that any change to the tax base makes the taxation simple, efficient and transparent, and not discriminate against the CFZ automakers who have significantly invested in Thailand through the utilization of CFZ that attracts value-adding investment into the country.

Recommendations:

With a view to minimizing the complexity regarding the customs and the excise tax calculation,

1. The current excise tax base for imported vehicles, including those manufactured in CFZ, should remain.
2. If necessary, any change to the tax base should not impose any tax burden nor discriminate against the CFZ automakers. The excise tax rate reduction could be a solution in case such change is unavoidable.

k. Grey Market Control

Parallel importation, also known as a grey market, has long been an issue of concern among automakers in Thailand. By under-invoicing, grey market importers take the chance to reduce the duty and tax burden on vehicles significantly. Additional cost savings from not having to undergo TISI testing has meant grey market vehicles are more price-competitive. Such negligent control has created unfairness and non-transparency in law enforcement.

TISI's recent requirement for all shipments of grey market imports to pass TISI testing requirements is commendable, as it not only creates a level playing field, but also helps ensure that local consumers get safe and compliant products. It is important to maintain efficient coordination among all the relevant authorities (i.e., TISI, the Customs and the Department of Land Transport) to effectively address this issue.

As for the under-invoicing of grey market imports, we strongly urge Thai Customs to exercise its power in examining whether the declared invoiced price of the grey market imports is an appropriate customs value according to the WTO Valuation Agreement.

Recommendation:

Reiterating our recommendation in recent years, we encourage Thailand to tighten its control on grey market imports, particularly through the strict customs valuation examination and the TISI testing, in order to ensure legal compliance and a level playing field.

IV. Labour

Despite an increase in the number of graduates and qualified engineers, Thailand continues to experience a labour shortage due to continual increases in requirements for higher-skilled and technology-intensive manufacturing.

We support the government's policy on promoting vocational training. Efforts to encourage public-private partnerships in engineering and technical training, in addition to government incentives for education, are commendable.

In addition, we call for the Thai Government to also take a mid- to-long- term view to see how the qualifications of the local graduates could be raised across the board to match skills with industry requirements. Such a holistic approach would help raise Thailand's overall labour productivity in correspondence with wages/labour cost, and enhance Thailand's competitiveness, particularly under deepening AEC integration.

Recommendation:

Thailand should take a holistic approach in developing mid- and long-term strategies to promote effective vocational training and incorporate industrial practical training in the higher education curriculum, so as to raise the qualifications of graduates across the board to meet industry requirements.

Energy and Energy Efficiency

SUMMARY OF RECOMMENDATIONS

I. Energy Security

- a. Identify new sources of energy or alternative energy

II. New Opportunities in Energy Sector

- b. Support development of renewable energy sources for a clean and sustainable energy supply
- c. Encourage comprehensive bilateral consultation between the government and private sector to develop inclusive policies for Thailand's energy market
- d. Establish the role of Thailand as a regional energy hub under the AEC framework by emphasizing the importance of building interconnections in ASEAN toward achieving long-term security, availability, and reliability of energy supply in the region.

III. Enhancing Energy Efficiency

- e. Engage European expertise with local business, policy-makers and the public to achieve the targets of lowering carbon emissions and business preparation to deal with rising energy requirements and energy costs
- f. Improve energy literacy with the support of the EU

IV. Energy Saving: Reducing Energy Use

- g. Adopt new energy lighting to enhance energy saving and energy efficiency

Industry Overview

Thailand's total energy consumption has continuously grown in the past decade due to domestic economic growth, demand for energy from increasing production, and demand for power generation, among other factors. Evidently, in 2012, the energy consumption grew at 6.8 percent while the production growth was 6.2 percent (Ministry of Energy, 2014). Although the growth rates were at roughly the same level, the volumes were different as energy consumption reached 1,981 KBD (of crude oil equivalent), while production was only 1,082 KBD. This difference caused Thailand's energy net imports

to increase six percent or 1,079 KBD. As a result, due to this energy import reliance, it is necessary for Thailand to continue developing its energy master plan to ensure energy stability as well as its sustainability for the Thai economy.

Currently, Thailand's new Energy Master Plan 2015–2035 is under the drafting process, with collaboration from the Energy Policy and Plan Office (EPPO) and the Energy Research Institute, Chulalongkorn University. Combining Thailand's national vision 2027 with the

national energy policy, the main focuses of the new Energy Master Plan cover (1) economic and energy security, (2) self-sustainability and competitiveness, and (3) environmental friendliness. In summary, the energy vision to 2035 is stated as *“Be secured and efficient, drive national economies, and create energy-intellectual society.”* In order to achieve this vision, four strategies are recommended.

- **Efficient and Green Energy:** Energy efficiency and renewable energy are introduced for this strategy. This is to improve the efficiency of the upstream sector as well as the fuel supply chain. An energy pricing scheme based on market value is recommended to shape the economy toward efficient and clean energy use and to increase social welfare through a non-pricing social assistance program. In addition, R&D promotion and support must be included for advanced energy technology as well as tracking mechanisms.
- **Energy Security:** An energy safeguard to prevent external shocks shall be developed along with investment-opportunity exploration in domestic and international potential energy resources. The main objective is to create self-dependence and diversify sources of energy for future energy uses. Furthermore, an action plan for emergency response must be developed.
- **Energy as Economic Growth Engine:** Building up energy infrastructure in connecting to neighbouring countries is crucial under the AEC, in order to boost ASEAN connectivity. At the

same time, creating profitability opportunities for the private sector, especially in the renewable energy sector, will help promote economic growth in the country. Moreover, to encourage investors' and players' confidence, restructuring the energy business toward competitiveness is required.

- **Energy-Intellectual Society:** Creating energy networks in local areas to manage local resources properly is needed. Such networks would also develop a knowledge management system along with public dissemination channels. It is essential to energy education for stakeholders, the community, and related businesses. It is also important to focus on public participation and hearing in a process of any energy project development. Moreover, related business models, based on community-owned business, shall be promoted too.

The EABC Energy and Energy Efficiency Working Group was established to serve as a forum to discuss critical issues in this particular field, and to enhance the role of the European business community in dealing with Thailand's key energy challenges. To achieve energy and economic sustainability, four recommendations are proposed here for consideration by the Royal Thai Government and relevant agencies:

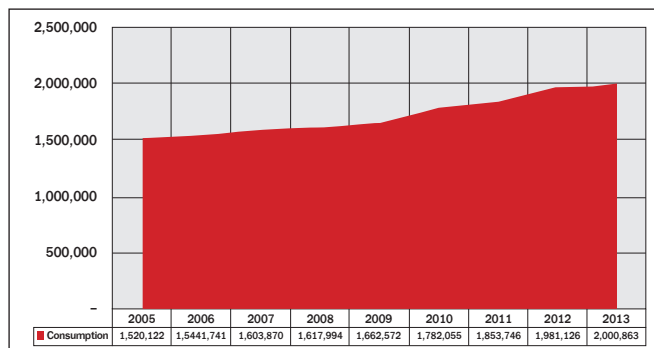
- 1) Energy Security;
- 2) New opportunities in the energy sector;
- 3) Energy efficiency;
- 4) Energy saving/reducing energy use.

I. Energy Security

Thailand has faced consistent challenges with energy security in the past decade. To maintain economic stability and robust economic growth, a new area of the energy sector must be identified to overcome the existing challenges facing the Thai economy.

The first concern is addressed as a growing gap between Thailand's energy demand and its domestic energy supply. Due to an increase in income level and the prospect of AEC realization in 2015, Thailand's energy usage and consumption has continuously increased over the past decade. A lack of alternative energy sources would push Thailand toward the edge of energy shortages in the near future.

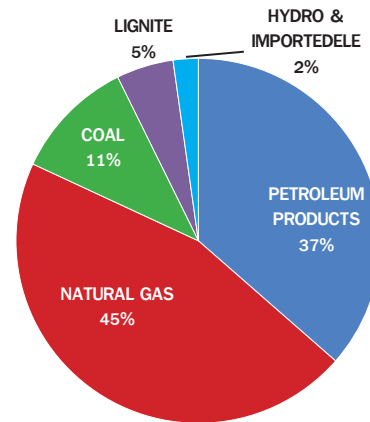
Figure 14: Thailand's energy consumption (2005 – 2013)



Source: Ministry of Energy, 2014

Total energy consumption continued to increase by 0.9 percent in 2013. Several factors are indicated to explain the expansion of Thailand's energy consumption i.e., an increase in household consumption, expansion of government expenditure, and significant growth in private investment.

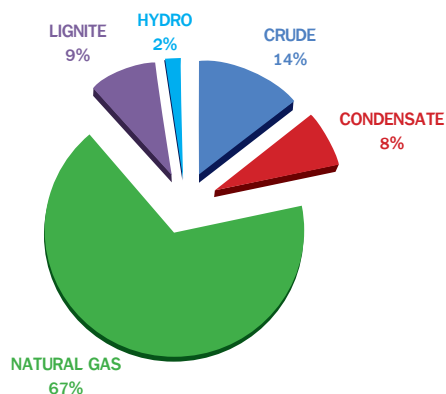
Figure 15: Thailand's Energy Consumption by Source, 2013



Source: Ministry of Energy, 2014

When considering energy consumption by source, in 2013 natural gas held the biggest share at 45 percent of total energy consumption, followed by petroleum (37 percent) and imported coal (11 percent). As an energy producer, especially petroleum and natural gas, Thailand still relies heavily on fuel imports; accounting for more than 50 percent of total energy supply, particularly crude oil and natural gas. Given the country's forthcoming plan to invest more in public infrastructure, particularly electric train lines, Thailand's energy demand will further increase. Under this outlook and the high dependence on external sources, Thailand must then develop new strategies to ensure its national energy security.

Figure 16: Thailand's Energy Production by Source, 2013



Source: Ministry of Energy, 2014

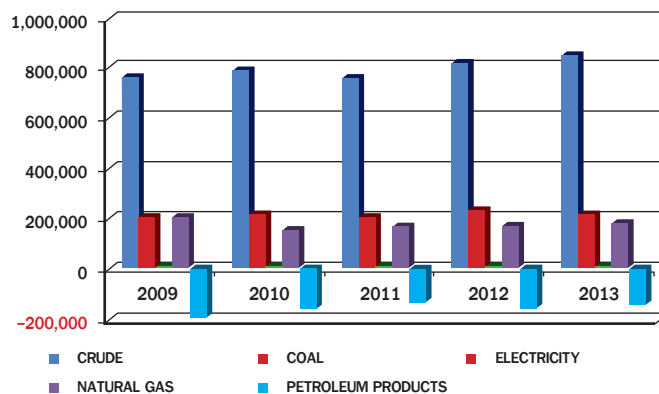
Thailand's energy production has continued to increase since 2005. As primary energy sources, natural gas (67 percent) and crude oil (14 percent) showed a significant increase in production in 2013, accounting for over 80 percent of total energy production in Thailand. In terms of energy trade, Thailand continues to export a big share of petroleum products while imports of crude oil have repeatedly hit the highest value, followed by imports of coal and natural gas. This high amount of energy imports will push Thailand to a certain point where its energy status is no longer secure, due to heavy energy dependence on external resources.

II. New opportunities in the Energy Sector

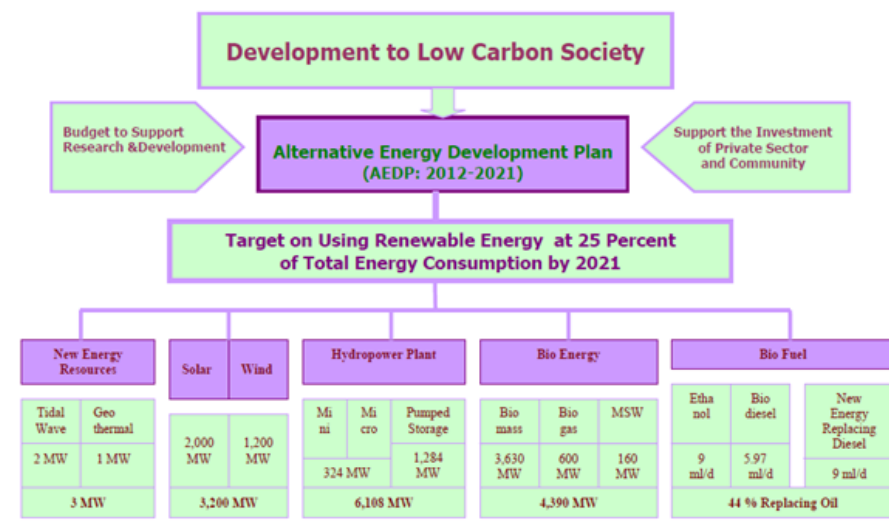
In response to continuously increasing energy demand, Thailand, as the leader of Southeast Asia in renewable energy, announced a promotion policy on renewable energy in 2010. The policy aims to transform Thailand in to a low-carbon country as well as to respond to

expanding energy consumption (BOI 2013). Following this in 2012, the Ministry of Energy endorsed the Alternative Energy Development Plan (AEDP), aiming to raise renewable energy to 25 percent of total consumption within 10 years (2012–2021). The upcoming implementation of the BOI's new investment promotion scheme in 2015 includes benefits for energy saving and improved production efficiency sectors. Covering promotion of renewable energy and energy efficiency policies, it will drive positive development in the energy sector. In sum, active development of alternative energy sources can generate clean and sustainable future energy supplies. A focus on new priority areas is then renewable energy sources like solar, wind, hydro, biomass, and biogas.

Figure 17: Thailand's Energy Import by Source, 2013 (BBL/Day, oil equivalent)



Source: Ministry of Energy, 2014

Figure 18: Thailand's Alternative Energy Development Plan (AEDP), 2012 –2021

Source: Department of Alternative Energy Development and Efficiency (DEDE), Ministry of Energy

According to Thailand's AEDP 2012 – 2021, a variety of alternative energy sources will be promoted to maintain energy security in the country. Main benefits to Thailand are expected to include energy (oil and fossil) substitution, new types of energy for power and thermal generation, reduction of energy imports, investment promotion in the renewable energy sector, reduction of CO₂ emissions, and innovation and research development. In response to such expectations, EU energy companies, as world leaders in renewable energy production and technology, can make a significant contribution to the development of Thailand's energy sector. Strong collaboration between the Thai government and private sector is required in fostering new policies that will promote the development and use of clean energy as well as ensuring energy sustainability for the next generation. A comprehensive bilateral consultation

between the government and private sector will help develop inclusive policies that take into account relevant interests and concerns of all stakeholder groups and local communities.

Several channels can be introduced here as new opportunities in Thailand's energy sector. First, due to the advantages of Thailand's climate, the Thai government is developing a new policy to enhance the share of renewable energy in the domestic market by tapping Thailand's abundant solar potential. The National Energy Policy Commission (NEPC) approved two policy packages to promote Thailand's Photovoltaic (PV) capacity to a total of 3,000 MW in 2013 (DEDE, 2014). These policy packages include support of the deployment of rooftop PV in Thailand, starting in Bangkok, Nonthaburi, and Samutprakarn. The application of this

system will be taken further by the Metropolitan Electricity Authority (MEA), extending to the Provincial Electricity Authority (PEA). The second package is developed under the community-based approach and local value creation. The objective is to create job opportunities and generate a new income channel for villages and solar-potential communities. In response to these policy packages, EU, as a global PV player, should take this as an investment opportunity in a new and potential market. In 2013, PV production by the EU accounted for 59 percent of total cumulative installed capacity of global PV (EPIA Global Market Outlook, 2014). Furthermore, in light of AEC 2015 implementation, Thailand has already been a leader in PV deployment in ASEAN. With further efforts in developing this sector, Thailand can become a regional centre.

Under the AEDP 2012–2021, a potential market is shown through a continual increase in demand for biofuel and government support. Given Thailand's energy security issues, the government has put focused on establishing new sources of energy as well as fuel substitution. Besides the existing ethanol (gasoline substitute) and biodiesel (diesel substitute), new types of fuel have been developed and tested i.e., *Jatropha Curcus*, sea and white water weeds, FAEE, ED95, diesohol, BHD, and BTL. This year, the Ministry of Energy is promoting the use of B7biodiesel, a mixture of 7 percent biodiesel with diesel oil. The EU, as a technological expert, can again consider this an opportunity to be involved and help develop energy sustainability for Thailand.

Given the ongoing work of the AEC, its full realization in 2015 will bring opportunities to the energy sector through trade channels and skilled-labour movements. Thailand, with its strategic location in the region, can become an

energy hub in various areas; gas, electricity, bioenergy, and other renewable energy. The Trans-ASEAN Energy Network; comprising of the Trans-ASEAN Gas Pipeline (TAGP) and the ASEAN Power Grid (APG), has emphasized the importance of establishment of the interconnecting arrangement toward achieving long-term security, availability, and reliability of energy supply in the region. In response to this initiative, Thailand must quickly speed up the expansion of its energy infrastructure development and come up with a robust strategy for optimal balance between economic growth, environment sustainability, and energy security. Such infrastructure development can be an investment opportunity for any European companies with energy expertise.

III. Enhancing energy efficiency

Trends in demography globalization, rapid urbanization, climate change, and energy security create unprecedented challenges for business. The efficiency of the entire energy chain needs to be improved to shape a sustainable future. The Energy and Energy Efficiency working group is ready to bring European expertise to engage local business, policy-makers and the public to work together to meet targets to lower carbon emissions and prepare companies to deal with rising energy requirements and energy costs.

To ensure the country's energy security, Thailand needs to pursue a sound policy of energy diversification and reduction of its energy intensity. Meeting its targets for a new energy mix under the Power Development Plan (PDP) and AEDP 2012–2021 requires taking an inclusive, collaborative approach, in which policies are shaped by taking into account relevant interests and concerns of all stakeholder groups and local communities. Promoting behavioural change through improved energy literacy to

improve the country's energy efficiency will also be central to achieving this. It is important that the public understand the true costs and challenges of achieving energy security, and the implications of government targets for their everyday lives.

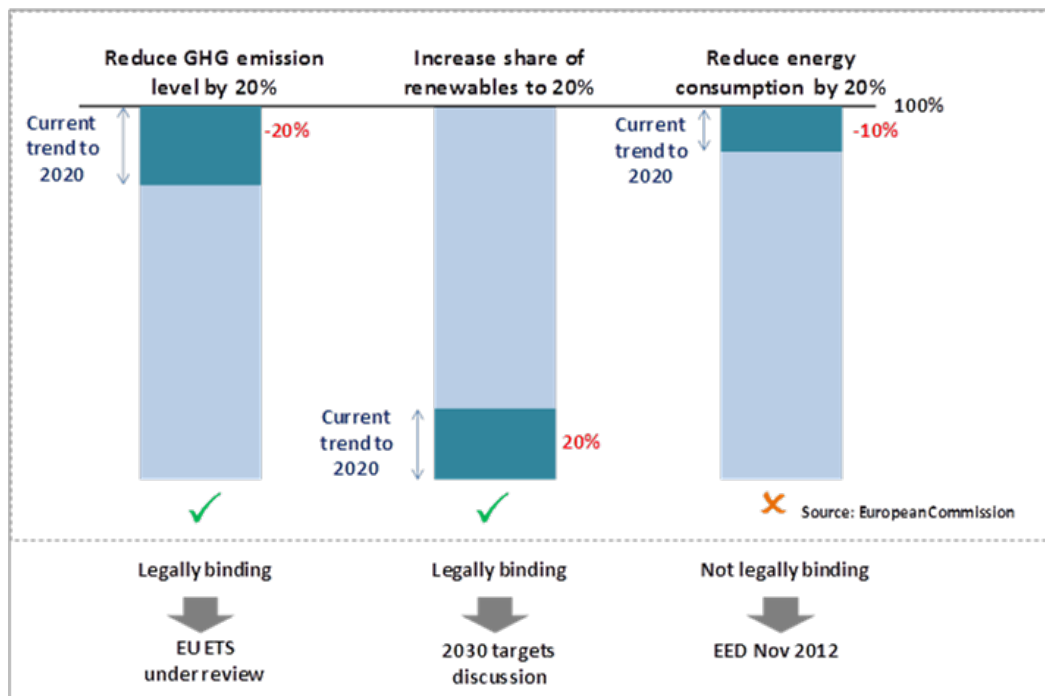
Lessons and success stories may be learned from other countries. The EU has long been working on establishing an energy policy that would boost energy security and competitiveness while also tackling climate change, with a strong emphasis on cooperation and partnerships as well as strengthening of energy efficiency. This challenge is one of the biggest issues facing Europe today. To enhance energy efficiency and

security, and to combat climate change, the EU has agreed to an ambitious set of **'20X20X20' targets** (as per Figure 19). The progress to date indicates that significant improvements can be made to reduce energy consumption and greenhouse gas emissions, and to increase the share of renewables in the energy mix.

Three main targets have been clearly set, which the EU is working to achieve by 2020:

- Reduce greenhouse gas emissions by 20 percent;
- Increase share of renewable energy to 20 percent;
- Reduce energy consumption by 20 percent.

Figure 19: The EU's 20X20X20 energy and climate targets



Source: Mr Nicolas Brizard and Prof. Christophe Ménézo in the presentation for Regional EU-ASEAN Dialogue Instrument (READI) Seminar on Energy Efficiency and Conservation in Buildings and Power Production in the EU and ASEAN Member States, 20–22 June 2013, BITEC – Bangkok, Thailand

Note: According to the European Commission, the EU aims to get 20 per cent of its energy from renewable sources by 2020. Renewables include wind, solar, hydro–electric and tidal power as well as geothermal energy and biomass. More renewable energy will enable the EU to cut greenhouse emissions and make it less dependent on imported energy. Boosting the renewables industry will also encourage technological innovation and employment in Europe.

IV. Energy Saving: Reducing Energy Use

The Thai Ministry of Energy published the “Thailand 20–Year Energy Efficiency Development Plan (2011–2030)”. This is commonly referred to as the EEDP. This document states that “This 20–year Energy Efficiency Development Plan (EEDP) is formulated with a target to reduce energy intensity by 25 percent in 2030, compared with that in 2005, or equivalent to reduction of final energy consumption by 20 percent in 2030.”

Increases in industrial activity as well as the growth of cities and energy users means that demands on energy usage will continue to increase, so to achieve a 20 percent overall reduction in energy consumption will involve major changes in the way energy is delivered to users as well as changes in user behaviour.

One major area of energy consumption is lighting. According to the International Energy Agency (IEA), “**Lighting** represents almost 20 percent of global electricity consumption. This consumption is similar to the amount of electricity generated by nuclear power. The latest IEA predictions show the total savings potential in residential and services lighting at more than 2.4 EJ per year by 2030.”

To achieve energy savings in lighting, the IEA recommends governments:

- Phase–out inefficient lighting products as soon as technically feasible and economically viable
- Require and promote improved lighting systems design and management by ensuring that building codes promote the use of natural light and include Minimum Energy Performance Standards (MEPS) for lighting systems

Many governments have begun to recognize that major savings in energy consumption and reduced energy costs can be achieved by switching traditional lighting to new lighting technologies, of which LED lighting is currently leading the way for efficiency. This process of change has only just begun and the EABC can help play a part in supporting European businesses in their endeavours to drive these improvements to help Thailand achieve high quality, safe LED lighting with MEPS standards.

Another major area is building materials and building design. Energy consumption in buildings is a large share of the world’s total end use of energy. Globally, buildings account for close to 40 percent of total end use of energy. In Thailand this is also a similar statistic and it is no surprise that the 20 year efficiency plan focuses on industrial and residential as a major focus of energy efficiency improvements.

Therefore the EABC can help bring European products and design services into this growing sector, required for achieving the targets set in the EEDP.

Recommendations:

1. Develop new strategies to ensure national energy security. The AEDP 2012–2021 is a good starting point for the supply management side. The Thai government shall also pursue more work on the demand management side.
2. New opportunities in the energy sector have already been explored. A strategic plan should be developed as a way forward to gain new sources of energy and provide business opportunities. The promotion of clean and renewable energy will help Thailand combat the middle income trap. Facilitation of financial solutions in all possible areas will also enhance the country's energy capacity.
3. Focus on best practices in energy efficiency. Energy knowledge and awareness of energy efficiency will upgrade energy saving potential in various industries e.g., waste water treatment plants, PET bottling plants, car industry, etc. Together, investment in energy recovering solutions in manufacturing plants, using modern technology and energy saving solutions is ideal.

Food and Beverages

SUMMARY OF RECOMMENDATIONS

I. Excise Tax

- a. New excise tax code shall not increase tax burden
- b. Simplicity and transparency of tax system
- c. Adequate and consistent enforcement

II. Labelling

- c. effective strategies to reduce the harmful use of alcohol
- d. dialogue with the Alcohol Policy Board to explore pragmatic solutions to labelling

III. Excessive Graphic Health Warnings

- e. Alternative method to reduce harmful use of alcohol

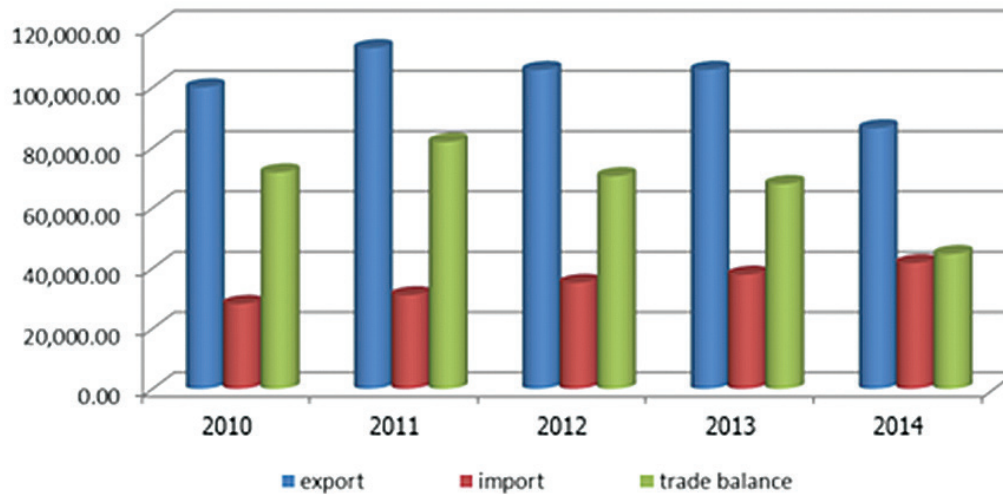
Industry Overview

The European Union (EU) continues its leading role as the world's biggest exporter¹ and importer of food and beverages, despite its economic downturn. Food and beverages is the largest EU manufacturing sector in terms of turnover, value add, and employment. Its economic contribution is significant, adding 1.8 percent to EU gross value, a 14.6 percent share of food and beverages turnover in the manufacturing sector, and 12.5 percent share of food and beverages value add in manufacturing (European Food and Drink Industry Report 2013–2014). The industry is essentially characterized by a wide range of company sizes with SMEs accounting for a large share of activity (99.1 percent in total or 283,000 companies), employing 2.9 million people. The EU's key product groups include dairy products, frozen fruit and vegetables, prepared food, processed starch products, spirits and liquors, wine and vermouth.

The extended impact can be captured through the supply chain of the industry, as 32 million professionals were employed in the extensive food and beverage supply chain across the EU e.g., food and beverage services, agricultural products, retail and wholesale. Consequently, the industry's supply chain generated six percent share in the EU, gross value add.

Thailand still remains in the top ten food and beverages trading partners to the EU, with a total value of EUR 2.6 billion in 2012. It is also worth-noting that Thailand is one of the most attractive investment destinations in Southeast Asia for the EU food and beverage industry. Abundant natural resources, combined with relative technological sophistication, give Thailand an advantage as a potential market and production base. In terms of trade, Thailand has been a net exporter of food and beverages to the EU as shown in the Figure.

¹EU market share of global food and beverages exports reached 16.1 percent in 2013.

Figure 20: Thailand's Food and Beverages Trade Balance with the European Union (THB million)

Source: National Food Institute, Ministry of Industry

Nevertheless, a number of regulatory restrictions and impediments still remain, causing difficulties in conducting business in the industry. The current issues and challenges in the food and beverages sector are discussed in this Position Paper.

I. Excise Tax

Excise taxes on alcohol beverages are an important revenue source for the Royal Thai Government.

The current tax structure is; however, complex and discriminatory, and encourages non-tax paid activity. While attempts were made in September 2013 to address various issues in the tax system, the introduction of Last Wholesale Price (LWP) and the increase in overall burdens, especially for European imports compared with

local products, have increased costs for business, distorted market dynamics, and failed to optimize tax revenues. Indeed, we understand from recent Excise Department data that tax collections in November / December 2013 reduced by THB 3 billion, compared to the previous 12-months, for spirits and beer. These numbers clearly demonstrate that beyond a certain tipping point, an increase in tax rates actually leads to a reduction in government revenue (Laffer Curve phenomenon). Besides the increasing tax burden on the alcohol beverage business and the above mentioned impacts, it also spontaneously increased illegal alcohol sales in the Thai market and increases the workload of domestic supervisory officials.

It should also be noted that discrimination remains in relation to white spirits and there appears to be discrimination against the wine category. Fundamentally, the alcohol excise structure should be simplified towards a non-discriminatory, single, specific tax on a per-liter-of-pure-alcohol (LPA) basis, consistent with international best practices and recognized by the World Health Organization's (WHO) Global Alcohol Strategy.

We therefore fully support the objectives of the Excise Tax Code in seeking to harmonize and streamline excise tax law in Thailand, which is currently subject to numerous separate pieces of legislation and subsidiary laws/regulations. Indeed, there are key proposals in the current draft that will help support revenue growth and stability, improve transparency, minimize evasion and avoidance practices, and simplify the situation for legitimate businesses.

Recommendations:

- In setting the applied Liquor Tax rates in the new *Excise Tax Code*, there should be **no increase in taxation burdens**, particularly on premium products. This is essential in order to minimize the non-tax paid trade, encourage revenue growth, and support consumer and business confidence.
- The tax base for any ad valorem component should be exclusive of **excise or other taxes payable**, to ensure simplicity and transparency of the system. European importers of alcohol beverages prefer the previous methodology of 'ex-factory/CIF plus customs duty' as this constitutes the best practice for calculating the

ad valorem alcohol tax base. It is a commonly –applied international methodology for determining the value of goods for Customs purposes and is subject to international Customs Valuation agreements, which imposes rigour around the tax base calculation process.

- There should be a clear pathway over time towards a **fully specific taxation** regime.
- There must be **adequate and consistent enforcement** to help address tax evasion or illicit trade practices.

II. Labelling

Labelling requirements in Thailand can be extremely onerous and often exceed the requirements needed to adequately inform consumers. This can lead to additional packaging costs and could be considered as a non-tariff barrier if the requirements for imported goods differ to that for domestic products. Certain requirements should be exempted for specific products where they are not relevant or would be unnecessarily burdensome.

The European beverage alcohol industry is deeply concerned with the recent changes approved by the Alcoholic Beverages Policy Board on labelling of alcohol products.

Specifically, the government approved restrictions on the content of alcohol beverage labels for containers (e.g., bottles, cans), packaging (e.g., IBC boxes) and associated materials (e.g., neck tags). The notification

is intended to remove any words or images from labels that could induce a consumer to purchase beverage alcohol and prohibit the use of celebrities, “misleading” romantic words and unregistered “cartoon images”.

The industry agrees with the overall objective of improving the information available to Thai consumers and the interdiction of practices which can mislead consumers. In this respect, the industry welcomes some of the provisions of the new regulations such as the interdiction of false messages, those which materially mislead consumers or those which link alcohol consumption with sexual success or health benefits. In fact, these are aligned with the international alcohol industry’s self-regulatory efforts which address the negative practices that the proposed regulation aims at removing.

However, there is a considerable lack of clarity in many of the terms and the broad scope afforded to regulators in its application, which distort fair competition, confuse industry and consumers, and lead to unintended consequences. In the event of extreme interpretations of certain aspects of the regulations, the knock-on impacts could include: distortions in fair competition, confusion for consumers, the exit of some internationally-recognized brands from Thailand – thus restricting consumer choice and further increasing in non-tax paid trade including counterfeit; and losses in government tax revenues. This is why the industry opposes the introduction of the proposed regulation in its current form and reiterates its request for the government to engage in a good faith dialogue on all issues regarding the regulation of alcohol based on international best practices.

Recommendations:

- We recommend that the Alcohol Policy Board considers alternative and more effective measures to inform and educate the general public about harm-prevention and responsible drinking and engages in a meaningful dialogue with the industry on alcohol labelling regulation.
- Since the new alcohol labelling regulation will come into force on 21 April 2015, we urge the relevant agencies to publish the implementation guidelines of alcohol labelling regulations as quickly as possible. The guidelines are expected to provide more clarifications on certain requirements, new label approval procedures, and help facilitate daily operation of the industry.
- The industry, via the EABC Food and Beverage Working Group, supports effective strategies to reduce the harmful use of alcohol and would like to engage in dialogue with the Alcohol Policy Board to explore pragmatic solutions to labelling as well as other areas we could potentially work together on including:
 - Addressing drinking and driving;
 - Reducing underage drinking;
 - Providing examples of self-regulation;
 - Providing relevant information through education, awareness and health-related interventions; and the
 - Responsible service and sale of alcohol.

III. Excessive Graphic Health Warnings

A draft Notification prepared by the Alcohol Beverage Control Committee proposes to mandate graphic, pictorial warning labels on all alcohol beverage products. These labels would be at least 25 percent of the area of the largest label on a bottle and 25 percent of the surface area of entire box. The European alcohol beverage industry believes that it is fundamentally inappropriate to apply such images to alcohol packaging/labels.

There is no scientific evidence to suggest that these graphic warnings are efficient and, indeed, no other country in the world applies such measures. They are extreme and, unlike the World Health Organization's (WHO) Global Alcohol Strategy, the proposal does not make the very important distinction between the *harmful* use of alcohol and alcohol consumption per se.

Importantly, the proposal raises a number of serious concerns and could lead to unintended consequences that are not in the interests of Thailand's international standing and reputation. For instance:

- Damage to Thailand's international image as a preferred tourism destination at a time when the overall economy and tourism numbers are extremely volatile;
- Potential intellectual property rights implications under national and international laws. The proposal curtails intellectual property rights and would need to be carefully considered in light of Thailand's obligations under the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS);

- Potential increase in illicit activity as the use of pictorial warnings that cover the majority of a product's label will make it easier for counterfeit and other non-tax paid activities; and
- Hurt business confidence as the proposal will substantially increase supply chain costs and erode brand equity.

Recommendations:

- Thailand should reject any proposal to introduce graphic health warnings and consider alternative and more effective measures to reduce the harmful use of alcohol. The interventions need to be evidence-based and target specific problems.
- As noted above, the industry, via the EABC Working Group, would like to engage in dialogue with the Alcohol Policy Board to explore pragmatic solutions to labelling as well as other areas we could potentially work together on the abovementioned areas.

Healthcare and Pharmaceuticals

SUMMARY OF RECOMMENDATIONS

I. Market Access

- a. Technology transfer and innovation
- b. Draft Drug Act
- c. Government procurement and reimbursement

II. Intellectual Property Issues – Patent and Data Exclusivity

- d. Patent examination process
- e. IT development for efficient patent registration and data filing
- f. Patent-term restoration

Industry Overview

The innovative healthcare industry represents a prime example of the knowledge based economy not dependent upon low labour cost and low manufacturing cost for success. As a regional leader in the principle of universal health coverage and as a popular destination for medical tourism; Thailand stands ready to benefit from its core competencies and break free from the middle income trap to become an innovation-driven economy given appropriate strategies, policies and enabling legislations are implemented.

In an era of newly emerging diseases and re-emerging diseases, innovation is extremely vital to address global health needs and the research-based biopharmaceutical industry is fully committed to develop new and more effective medicines to serve those needs. Given the high investment cost and high risk of failure, respect for intellectual property rights in both developed and emerging economies, supported by sound government regulatory processes, a well-developed

health delivery system and adequate healthcare financing, are key enabling factors to ensure a greater chance of success in innovation.

Among the emerging markets of China, the Republic of Korea, Brazil and Russia, overall spending on research and development (R&D) for medicines has increased dramatically over the past decade while in others it is growing more slowly. Increased investment in early stage research is very notable in China, supported by the clear increase in publications by researchers in this market as well as the number of patents attained. Incremental innovation, which tailors medicines for the local markets in middle-income countries, is well practiced within the region with a significant number of products developed in India and China, as well as a significant number of innovative products in Phases II and III.

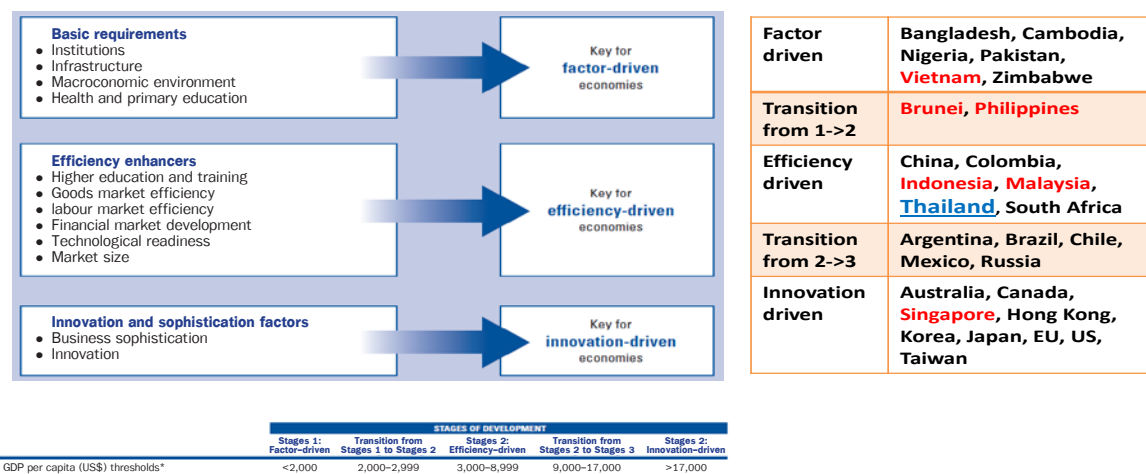
Although there are no international blockbuster drugs yet emerging from this region, participating in the range of innovative activities resulted in additional benefits in the long term, including:

- Clinical research contracts that help to sustain a nucleus of experienced researchers in participating centres;
- The infrastructure to participate in clinical research brings benefits directly to patients and should bring medicines to market more quickly;
- Undertaking later phases of development can provide the platform from which domestic or international companies establish networks to undertake a full range of R&D activities within a middle-income country;

- Ultimately, this may open up the possibility of developing new treatments for diseases that are a high priority in that country, or on a regional basis in Asia or Latin America, which may be economically viable without being dependent on the US and European markets for commercialized revenues.

To become a regional leader in healthcare services, Thailand needs to develop a long term consistent innovation policy dialogue that is implemented effectively; there are needs to be coordination between industrial and health policy; intellectual property is necessary as both international and domestic companies will only invest in the risky research process if it is possible to protect the intellectual property of these investments and finally, sustainable innovation requires coordination among the public, private and academic sectors.

Most of the developed economies are innovation-driven economies



Examples of direct-interlink among GDP, investment, number of patents and R&D expenditures are shown in Table 2 below:

Table 2: Ranking of Countries by per capita GDP, Investment, Patents, and R&D Expenditure, 1981–97

Rank	Investment		GDP		Patents		R&D Expenditure	
1	Japan	10,153	Switzerland	42,824	Switzerland	176	Switzerland	870
2	Switzerland	8,863	Japan	36,138	Japan	157	Sweden	730
3	Norway	7,417	Denmark	30,889	Sweden	95	Japan	705
4	Austria	5,823	Norway	29,152	Canada	68	France	466
5	Finland	4,980	Austria	26,054	Finland	64	Iceland	442
6	Iceland	4,875	Iceland	25,492	Netherlands	58	Norway	436
7	Denmark	4,546	Sweden	24,996	France	49	Finland	436
8	France	4,539	Belgium	24,555	United Kingdom	45	Denmark	390
9	Netherlands	4,536	France	24,397	Austria	44	Netherlands	376
10	Belgium	4,096	Finland	23,507	Denmark	42	United Kingdom	375
11	Sweden	4,039	Netherlands	23,173	Belgium	36	Belgium	306
12	Australia	3,842	Canada	18,401	Norway	29	Canada	297
13	Canada	3,347	Australia	18,056	Australia	26	Austria	272
14	Italy	3,177	Italy	17,183	Italy	20	Australia	267
15	New Zealand	2,952	United Kingdom	17,040	New Zealand	16	Italy	216
16	United Kingdom	2,700	New Zealand	15,423	Iceland	15	New Zealand	150
17	Ireland	2,509	Ireland	13,729	Ireland	14	Ireland	137
18	Spain	2,504	Spain	12,617	Spain	3	Spain	88
19	Greece	2,106	Greece	10,487	Greece	1	Greece	61
20	Portugal	2,061	Portugal	9,005	Portugal	1	Portugal	52

Source: International Monetary Fund. 2004. R&D, Innovation, and Economic Growth: An Empirical Analysis

To that end, a Competition Policy must be efficiently implemented in the innovative high technology sector. By its nature, competition brings to freedom of choice that leads to innovation and productivity improvement which lower prices and increases good value for money; thus, ultimately benefiting consumers. Despite many misconceptions, **Intellectual Property (IP) protection is not exempt from the application of competition law disciplines.** Nor is IP protection presumed to confer market power or to indicate anti-competitive behaviour. An effective competition policy creates **between-patent**

competition in pharmaceutical markets: where alternative products of the same therapeutic class may be available, and producers of such drugs then compete in the same market. **Where competitive alternatives are available, IPRs do not lead to the creation of economic monopolies,** providing “checks and balances” to IPRs.

Thailand stands to benefit from the changing business model of innovation in the 21st Century which has moved away from **Vertically Integrated** pharmaceutical models where one entity undertakes all operations in-house to

a **Horizontal Cluster** of independent universities, research-institute combinations and SMEs which jointly collaborate in the invention and patenting of novel medicines. The choices of portfolio to be researched are now aligned with the target country's clinical needs and health/disease trend; **in-license of intellectual properties developed locally is becoming the business norm as global business partnerships form to serve the global market.** At the same time, many companies from developed economies are **outsourcing R&D to more efficient partners** in the developing economies where the innovation eco-system is sufficiently mature for technology transfer.

Thailand, with its pool of researchers and existing unindustrialized research, stands ready to benefit from this trend given pro innovation reform in key strategies, policies and laws. This document aims to underscore some of the hindrances preventing Thailand from becoming an innovation-led economy and a true leader in healthcare provision.

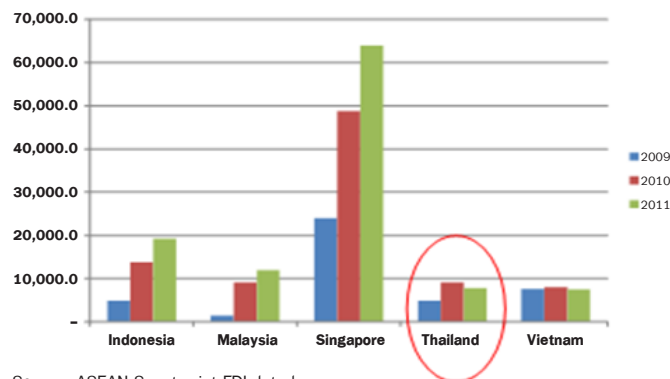
I. Market Access Issues

a. Technology Transfer and Innovation

To attract technology transfer and sustainable direct investment in R&D and other innovative activities, framework conditions conducive to innovation are vital. Whilst the most important condition is a large stock of well-educated labour and human capital, which accelerates technological catch-up, a viable regulated market is needed for technology transfer where private and public or public-interest actors (such as foundations or NGOs) can play equally strong roles in providing incentives for sharing. Although there is a positive relationship between FDI and the development of innovation; market size and market growth rate is the best predictor of FDI.

Figure 21 shows that Thailand is not yet attracting its fair share of FDI, compared to its ASEAN neighbours.

Figure 21: Net Flow of Foreign Direct Investment (FDI) in selected ASEAN countries, 2009 – 2011 (USD Million)



Source: ASEAN Secretariat FDI data base

In the global pharmaceutical market, China presents a large pharmaceutical market size and high growth rate, corresponding to the high levels of Greenfield investment by pharmaceutical multinational companies. Brazil comes in the second place in terms of market size and the levels of pharmaceutical investment. Notwithstanding, Malaysia and South Africa, despite their smaller market sizes, have been able to attract a relatively high proportion of FDI in pharmaceutical R&D.

Recommendations:

1. Ensure viable and accessible local market with available skilled workers. Industry cannot go in alone. The public and private sectors must work together to advance R&D and ensure access, viability and sustainability of the investment.

2. Thai enterprises cannot focus solely on the domestic market. They need to develop their products and services to serve the demand of global consumers; otherwise, they would lose market share to other ASEAN enterprises.

b. Draft Drug Act

The current version of Thai Drug Act was established in 1967. Presently, the Thai Food and Drug Administration (FDA), under the Ministry of Public Health, is proposing a new Drug Bill for consideration by the Cabinet and National Legislative Assembly, respectively.

The European industry has raised some key concerns on the regulatory requirements for marketing authorization applications¹ included in the new Act notably:

- a) Mandatory disclosure of patent information of innovative medicines during marketing authorization submissions
- b) Disclosure of price structure for innovative medicines
- c) Empowerment of the Thai authorities to refuse regulatory marketing authorization approval in the event that prices of patented innovative medicines are deemed unreasonable or not cost-effective.

The decision to deny market entry of innovative healthcare products on subjective, and as yet translucent price

level determination as opposed to the internationally accepted norm of safety, quality and efficacy, will not only create an excessive barrier to innovative and essential medicines and restrict public health benefits, but also send out the wrong signal to potential investors in R&D. It is highly recommended that such articles should not be associated with marketing authorization approval as the ramifications on availability of novel medicine decided on subjective price consideration will have negative impacts on social, scientific and economic perspectives. To date, a similar provision has not been established in countries with known competent regulatory capacity.

Trade wise, these additional requirements represent technical barriers to trade (TBT) and are discriminatory towards new patented medicines.

Recommendations:

1. Urgently consider removal of Section 48 (11) and Section 49 (5) from the draft Drug Act.
2. Revise Section 48 (10) adding the condition for generic drugs to notify the patent status of the medicine to be registered with authorities which could be specified in the Ministerial Regulation. This is in order to prevent patent infringement of the generic drug companies that will cause unnecessary business conduct costs to the generic companies themselves.

¹Reference is made to the following sections:

Section 48: The application for Drug Marketing Authorization (Registration) under section 48 shall include the following particulars:

Section 48 (10): Patent information, if the drug is a patented drug under patent law, or information concerning rights in Thai traditional medical knowledge if the drug is registered under Thai traditional medical knowledge in the category of personally owned formula under the law on protection and promotion of Thai traditional medical knowledge;

Section 48 (11): Price structure if the drug is a patented drug under the patent law, subject to the rules and procedures announced by the relevant committee.

Section 49: The Licensor (Thai FDA) shall not be approved for marketing authorization if the Licensor considers that:

Section 49 (5): The patented drug under the patent law has an unreasonable price structure or is not cost-effective.

c. Government Procurement and Reimbursement

With the national government procurement and national listing system, the procedures for pricing, reimbursement and tendering may be unclear, inconsistently enforced, and lack transparency. In addition, Thailand is one of the countries that are often seen to provide preferential treatment to its state-owned pharmaceutical company. It is observed that state-owned pharmaceutical companies enjoy particular exemptions and privileges that other privately-owned domestic companies do not receive. As mentioned in the EABC 2013 Position Paper, the regulations of the Office of the Prime Minister on Procurement B.E. 2535 (1992) allows the state enterprise, specifically the Government Pharmaceutical Organization (GPO) a strong preference and price advantage. This practice distorts the market mechanisms of the public healthcare and pharmaceutical market (see Annex I). Together, such preferential treatment may raise doubts about the competitive disadvantage borne by the private sector.

Recommendations:

1. Establish transparent procedures for pharmaceutical listing, pricing and tendering process considering the value of innovation to therapeutic outcomes and clinical needs rather than cost savings. This would affirm that all Thai citizens would receive the most innovative medicines and treatments.
2. Encourage more industry consultation or regular dialogue to ensure transparent procedures and to enhance access to medicines.
3. A level playing field should be exercised with open competition in order to best serve consumers and patients. Any preferential treatment for

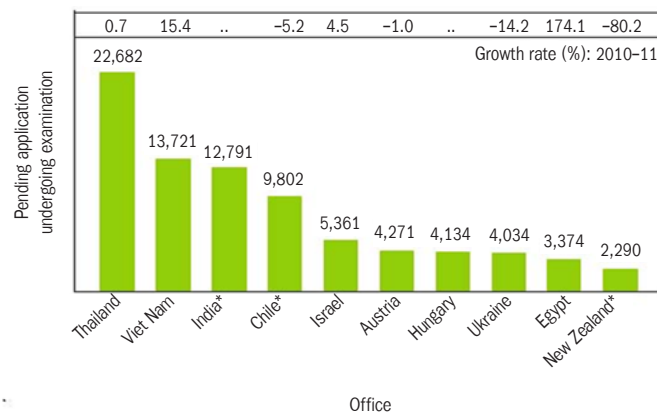
state-owned pharmaceutical companies or national companies should be eliminated.

4. Continuing our recommendation from the previous EABC Position Paper, it is essential that legislation, in both procurement and regulatory frameworks as well as the Trade Competition Law, must be reviewed for further liberalization to allow competition on an equal basis.

II. Intellectual Property Issues – Patent and Data Exclusivity

Generally, the term of a patent is limited for 20 years starting from the filing date of the patent application, which is in line with international standards as well as clearly defined in WTO TRIPS agreement, Article 33. The present average period of time for Thai patent approval (from application to grant) is 12.6 years. Data collected by the WIPO affirms similar high figures of patent backlog compared to other countries, as demonstrated below:

Figure 22: Patent application backlog



Source: WIPO Statistics Database, October 2012

Data exclusivity is necessary to provide a measure of certainty to the innovator that they will be provided with a period of protection for their efforts of testing a drug and ensuring its safety and effectiveness for patients no matter when, where or how long it takes to bring a drug to market. Patents are an important form of intellectual property, but are not themselves necessarily sufficient to create the favourable environment needed to support the development of medical advances. Data exclusivity is not an extension of patent rights, and it does not prevent the introduction of generic versions of the innovative drug during the data exclusivity period², as long as the marketing approval of the generic version does not use or rely upon the innovator's test data.

The Thai Department of Intellectual Property (DIP) is aware that it must eliminate the backlog and has, as a work in progress, drafted patent examination guidelines on chemical and pharmaceutical patents and has tried to increase human resources within the Patent Office. However, such measures are yet to show signs of short to mid-term recovery for applicants affected by the examination bottleneck at both formality checking stage (i.e., patent applications/design patent applications are not published on time) and the substantive examination phase. A large patent application backlog delays the delivery of patented innovations to market. A long patent pendency negatively affects private patent value and increases uncertainty for both patent-seeking inventors and other technology innovators interested in understanding the competitive environment. This overall situation of unacceptable patent pendency results in uncertainty of security of investment for rights holders and an increased possibility of infringement during the pending approval

periods – damaging for both local businesses and innovators. Importantly, it also prevents Thai companies from being able to contribute to incremental innovation over existing patents. Incremental innovation (improvements over existing technology) is the most likely area in which Thai innovators will be able to make an impact. A delayed patent system provides a vague and uncertain patent landscape on what subject matter is considered patentable and what can therefore be improved to the benefit of the Thai economy.

A delay in granting patents has also created uncertainty for third parties wishing to exploit a product or process in Thailand as they would not be able to know whether the related patent will be granted and with what scope. Despite the filing of a submission showing conformance with a granted patent or raising some other relevant issues against the issue of the patent in question or of its scope of protection, the process has not become quicker (if anything, slower) with the position still being that no action at all appears to have been taken by the Examiner for several years on many patent application files.

Under unpredictable circumstances as such, the suggested remedy of patent term restoration or adjustment has never been established in the Thai legal framework, which would redress the impingement on the patent rights of affected patent applicants for lost time and investment. Observing international standards such as those of the EU, patent term restoration (also known as supplementary protection certificate) will also be given to a patentee wishing to encourage innovation by compensating the patentee for the long period of

²<http://www.ifpma.org/innovation/ip-rights/data-exclusivity.html#sthash.TPqXjpSw.dpuf>

time taken to obtain regulatory approval of their human and veterinary medicinal products on the occasions of unreasonable delay. Such restoration applies only after the corresponding general patent expires and has a maximum lifetime of five years. The term ‘extension’ has been seen and distorted as somewhat of a scheme, biased towards monopolization, in which de facto is prejudiced to those investing and working in research and development. The term ‘restoration’ better illustrates the concept.

The implementation of approved patent examination guidelines (in 2014) should not be seen as a magic wand to solve the issue of patent pendency. Indeed, great care must be taken when assessing whether the guidelines will improve the overall position in terms of ensuring important incremental innovation is protected in Thailand – especially as there are issues surrounding the requirement of efficacy or vague requirements involving surprising effects to qualify for patent protection.

Recommendations:

1. Improve the patent examination process with adequate resources to bring the approval within a reasonable timeframe which will ensure sustainable solution for all stakeholders.
2. Recommend that the DIP increases the number of qualified patent examiners and commits to the training of these officers in the short, medium and long term. It is stressed that merely increasing numbers is not satisfactory – these new examiners must be skilled in a particular art, such as pharmacy, mechanical engineering, electronics etc. and must be adept at patent analysis.

3. Alternatively, the DIP may consider further outsourcing options to improve efficiency.
4. Suggest that DIP and the EABC/EU open a dialogue on possible collaboration and capacity building strategies to strengthen the DIP’s IT capacity. By upgrading the IT system, providing public and applicants access to a centralized patent database, the DIP would effectively reduce the delay in the filing and registration procedures. Establish patent term restoration as a solution to create fair practice to compensate rights holders, considering the current patent backlog in Thailand as well as the delay of regulatory marketing authorization. Patent term restoration will occur only in case of delay. This should enhance the effectiveness and productivity at the government procedural level with mutual benefits to Thai entities and foreign direct investment.

Information and Communication Technology (ICT) including Digital Economy

The ICT sectors, including what has come to be known as ‘digital economy’, can represent about 10 percent of a nation’s GDP, and are regarded as strategic, because if functioning efficiently they can have a positive multiplier effect on the rest of the economy. Thailand is currently lagging well behind in telecommunications infrastructure (notably broadband infrastructure) and ICT facilities. Thailand’s GDP, capacity for innovation and other aspects could be greatly enhanced if telecommunications were reformed and broadband policies implemented. The ICT section of this position paper is divided into four sub-sections: Digital Economy, Telecommunications, Digital Broadcasting and IT. Recommendations are shown.

This chapter underscores the importance of service sector liberalisation.

Digital Economy:

- A reformed and renamed MICT is welcomed. However the fundamentals of telecoms reform and a well-structured industry, underpinned with broadband, should not be left unaddressed or considered unimportant.
- A trusted internet (with cybersecurity and civil society governance) will produce better results for business, individuals and the economy than one where the perception of the internet is a vehicle to monitor and collect data.
- Encouraging Thai companies to increase their use of ICT and develop new business models, a key strategy of digital economy, requires enabling structures, mechanisms and regulations. Investment in ICT is a form of investment in innovation – to date there are few mechanisms such as grants and direct funds which encourage companies, particularly SME, to invest in such innovation. (Tax incentives are not always relevant).
- Skills are in short supply and for the whole ICT sector (and the entire economy) there is a long overdue need for work permit and visa reform including a practical business visa.

Telecommunications:

- A structure conducive to fairness, innovation and effectiveness is long overdue. Reform and evolution of state-owned enterprises is needed. Competition regulation is missing. Commercial spectrum should continue to be issued by auction only. The Foreign Dominance Notification continues to be an impediment to investment. A strong, effective and truly independent regulator is needed; measures to weaken it are not recommended.

Digital Broadcasting:

- Allocation of spectrum in late 2013 gave a great shot in the arm to the sector. The industry is seeing innovation and opportunities for participation. Clear rules on spectrum use including about digital dividend spectrum will be welcome.

IT:

- The software development industry and other start-ups need access to funds. Government procurement can be enhanced greatly.

EABC seeks an innovative, attractive and efficient sector which contributes more positively to the economy which it serves, to quality of life. The papers from the ICT Conference of 2 July 2013 ‘Unlocking ICT’ continue to be a good reference point to illustrate many of these policies. The EABC 2013 position paper including ICT provides further details, not all of which are included in this 2015 paper. Both are on the EABC website.

I. Role of ICT (including Digital Economy)

The ICT sector (a strategic sector) in Thailand plays a vital role for the wider services sector and supports industry and agriculture. Where the ICT sector is well-functioning, efficient, effective and innovative it will have a positive multiplier effect on the economy as a whole. Several governments around the world have changed the names of their administrations from time to time, variously from ‘telecoms’ and ‘ICT’ to ‘broadband and digital economy’ to ‘communications’ to ‘multimedia’, and often back again. One country changed to ‘Broadband and Digital Economy’ under one government then back to ‘Communications’ under the succeeding government. There are fundamentals in the sector – including hard and soft infrastructure – which apply regardless of the name and organisation, and in Thailand certain fundamental structural reforms have

not occurred. While a name change brings welcome added focus to various activities and indicates a high level policy objective, it does not mean that the reforms are done. Thus, we structure this ICT section as digital economy, telecoms, broadcasting and IT and avoid duplication of coverage of issues.

II. Digital Economy

1. Background

Restructuring and re-naming of the Ministry of ICT (MICT) as Ministry of Digital Economy and Society to have a digital economy focus will potentially have positive outcomes if the fundamentals of the structure overcome long-standing shortcomings (see more in the Telecoms section), the role of government is as facilitator and enabler (including of base infrastructure), the regulator has a proper and independent role, the many law changes

have industry and user support (requiring proper consultation) and key aspects such as the internet governance supports the ‘Trusted Internet’ concept.

2. What does it mean?

Knowledge-Based Economy, Creative Economy, Digital Economy, Smart City (Smart Nation) all have some common aspects or elements. If they only address superficial aspects or are political window-dressing they go into the same basket as the history of fads. Digital Economy is the recognition of the eco-system of activities related to communicating and interacting electronically.

To be useful and effective, it must have a positive impact on the economy and on quality of life. The Digital Economy push sounds as if it has the ingredients to be useful. But it will need real private sector engagement, coordination amongst ministries, and structural change which may be uncomfortable for some. In one sense, almost all that we do every day is somehow ‘digital’. We have defined Digital Economy to be about economic activity, thus¹:

The ‘digital economy’ is all economic activity mediated by software and enabled by telecoms infrastructure.

This includes core telecoms services such as **voice, messaging** and **data**.

The goods and services within the digital economy can be broadly grouped as:

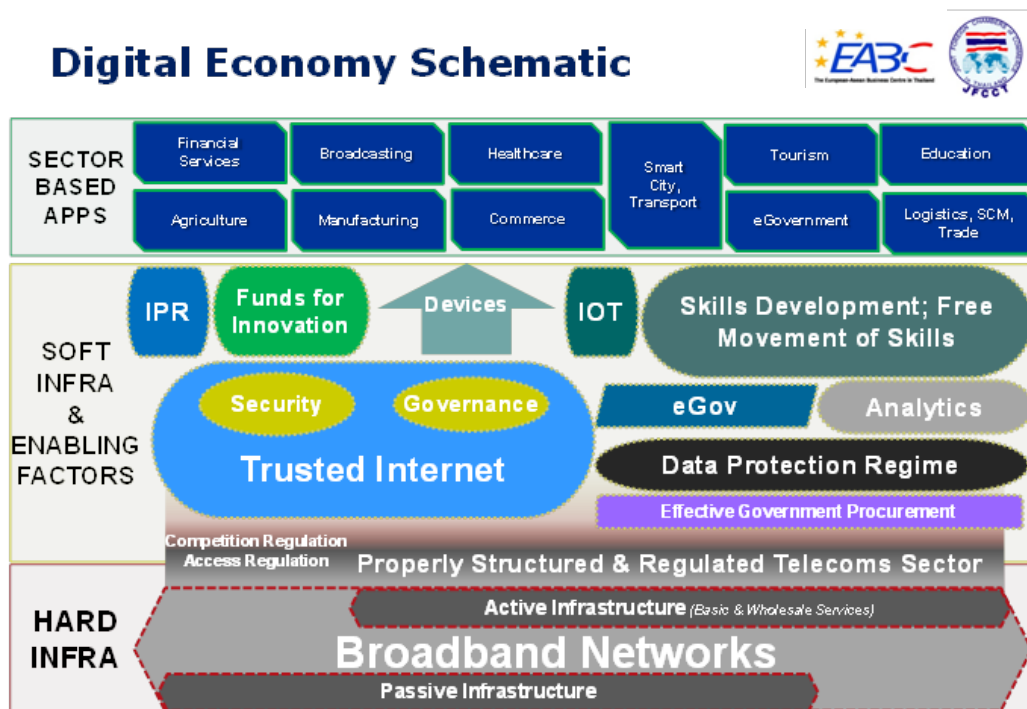
- **intrinsically digital** – streaming video, ebooks, computing services, Facebook
- **substitutes for established equipment and services** – virtual private communications networks, security services, virtualised PBXs
- **marketing, sales, logistics etc. of physical goods** – Amazon, eBay, Alibaba, Tarad.com, Pantip market

It also includes the role of governments in the development of infrastructure, services, and the enablement of people and of social and economic enterprise.

In this section, the essential elements are shown.

¹Adapted from Analysys-Mason

3. Essential Elements



We see the Digital Economy in **building blocks**, or layers, with government having a role as enabler and facilitator. Government owned infrastructure applies where lower than commercial returns are likely – e.g. on passive infrastructure. Government should get out of being an operator in all respects with a managed transition, as has been recommended for over a decade. The schematic is an industry view developed by the EABC with the Joint Foreign Chambers of Commerce in Thailand (JFCCT).

(a) BASE LAYER: HARD INFRA – Broadband and high speed, reliable communications

The EABC along with the JFCCT have published much on the structural issues in the telecoms industry which have hampered the sector's ability to contribute to the economy and to people's lives in ways it could and should. The various models to address the broadband question are covered in more detail under telecoms. Some fundamentals about a properly structured industry follow:

- All operators licenced from the one regulator, move beyond concessions
- Fairly administered spectrum allocation policy and regional harmonisation
- Reform in foreign equity limits and the repeal of the Foreign Dominance Notification
- Evolution and policy–forced change to the role of State–Owned Enterprises and their evolution to being contributing infrastructure and base services, but not propping them up with mandatory use, and avoiding creating new monopolies.

And most importantly, the creation of a viable wholesale market with regulated access prices. Cloud services for example rely greatly on effective broadband.

(b) SOFT INFRA AND ENABLING FACTORS: Certain of these are covered here.

Trusted Internet – Multi-stakeholder model

If the internet is overly–policed, confidence in its operations will be diminished. If its main purpose is seen to be about surveillance, it will not be respected or trusted. The internet needs to a tool for citizens, business and government interaction. If trust in reasonable confidentiality, security and operability are low, its value will diminish and it will not support Digital Economy, aims in the way it could and should. The multi-stakeholder model now accepted by the majority of the world’s states, is recommended as the model to use and all relevant laws should support it.

There are two dimensions which need balancing:

- Cyber security – in which all participants must play a part for it to be effective, it cannot be left to a government agency alone.
- Civil society governance of the internet. The rules of engagement are like using a roadway. Civil society and industry groups buy–in to good practices, security, peer pressure on malware and other offensive conduct is needed, along with protection of freedoms which also have certain respected boundaries.

Review of the Computer Crimes Act to remove overly – onerous reporting and maintenance and certain other provisions is needed as is a more workable approach on cybersecurity law.

eGovernment

Reference is made to the EABC / JFCCT policy on eGov (v 8.0) published on 18 September 2014. Key relevant points include citizen/business interaction with government; inter–agency interaction and whole–of–government interaction in phases. eGov appears both as an enabler and as a set of applications. For example the new Government Services Facilitation Act could start on a eGo basis where one–stop centres have a primarily on–line engagement mode.

eCommerce

Well supported eCommerce is an essential part of transactions. While promoted by the Board of Investment (BOI), more is needed to enhance this area.

Fair treatment of online intermediaries e.g., (ISPs, data centres) in terms of copyright infringement by online merchants or others is needed, along with better means of reducing online copyright piracy.

Data Protection Regime; Analytics

Trust in Thailand as a big data management jurisdiction is important. Thailand must be a well-respected place for data management. Thus, a data protection law needs to provide for the collection, storage and use of data with relevant consents along the way. A regime for cross-border treatment is an essential part of this as it is a standard practice for data to be processed offshore, which should not circumvent a local law. The Asia-Pacific Economic Cooperation (APEC) recommendations and model; for example, are helpful. Open Data (or publicly available data which is useful for analysis) is a development worthy of support.

Analytics will be more and more part of business and government. Doing this and moving to promote Open Data without a legal data protection regime will be difficult. Public data (anonymised as necessary) will need to be accessible by many.

Funds for Innovation

Private sector-led initiatives in software development, apps development and other tools are needed. Funding sources for start-ups in a variety of applications are lacking and a system is needed.

Skills Development; Free movement of skills

This is covered under IT. The relevant issues are the same.

Digital Content and Broadcasting

Digital Broadcasting has not only brought greater spectral efficiency and quality of images, but also a whole range of ways of interacting with customers, managing images etc. Now in full operation, digital content will need a regime for intellectual property protection and data protection.

(c) TOP LAYER: Various sector applications and take-up

The opportunities for development and take up of various applications are large. The financial services sector has much catching up to do and there are many further opportunities in manufacturing, smart city and tourism.

For advanced services promotion, liberalisation of services generally is important. Many of these sectors rely on services support. Higher-end professional services which are very 'digital' including Knowledge Process Outsourcing and support, and support for IHQ / ITC will need this.

III. Telecommunications

1. Trends

In recent times, the biggest single event was the award of technology neutral mobile licenses (generally referred to as '3G' although it may be deployed for 4G/LTE) in the 2.1GHz spectrum outside the Concession system (i.e., with direct licensing from the NBTC to operators)

which should provide a solid basis for the provision of wireless broadband in Thailand, thus stimulating more innovative competition on services rather than just price.

Services for corporates are also not up to the standards available in some other ASEAN markets, thus having a negative impact on other sectors. Overall service quality in Thailand (availability of broadband, and range of service offerings for businesses) is not close to what it should be, except on one dimension – price.

The advent of smartphones, cloud computing, Over-The-Top (OTT) services, consumer and other data retention, management and analysis, and the data centre industry have combined to place massive demands on networks and the need for greater fixed and mobile bandwidth.

2. Role of telecommunications

As noted in the General Agreement on Trade in Services (GATS), and many FTAs with telecommunications chapters, the telecommunications sector has a dual role in the economy:

- (i) An industry in its own right, contributing often as much as 10 percent to a nation's GDP; and
- (ii) a support sector for the rest of the economy

A well-functioning, efficient, effective and innovative ICT sector has a positive multiplier effect on the economy.

Within a certain band, from example, an increase in mobile penetration of 10 percent can contribute to a

material percentage increase (in single digits) in GDP. Other dimensions include the productivity and efficiency gains in the economy brought about by ICT advances, contribution to better education and quality of life. The ICT chapter of EABC's 2013 Position Paper has more information.

3. Sectoral development and frustrated prospects for growth; the importance of industry structure

The telecommunications industry works best when well-structured and regulated; a structure that is currently not present in Thailand. No part of the telecommunications industry has been able to evolve and develop in ways in which it might have, nor in ways which would provide better support for national economic development and various user groups, including businesses.

For a very long time the effects of vested interests and the lack of an overarching and well supported vision for the industry have combined to frustrate real progress. In some respects, Thailand has an almost unique history in this regard, but the issues are by no means novel or unique. Thailand has not followed certain global norms which are almost universally standard in the sector even in many less developed economies, although in some instances it has, or has had, plans to do so.

The legislative basis for the industry in Thailand was Article 47 of the Constitution of Thailand B.E. 2550 (A.D. 2007), the Telecommunications Business Act (TBA) B.E. 2544 (A.D. 2001 and amended A.D. 2006), the Act on Organisation to Assign Radio Frequency and Regulate

Broadcasting and Telecommunication Services B.E. 2553 (A.D. 2010) which replaced the BE 2543 (A.D. 2000) Act, and numerous regulations and notifications issued by the former National Telecommunications Commission (NTC) and current ‘merged’ regulator the National Broadcasting and Telecommunications Commission (NBTC), to be renamed. A number of these laws have undergone revision in the ‘Digital Economy’ context but the fundamentals should not change and some proposed changes are controversial; the EABC 2013 Position Paper includes more background.

The telecommunications industry is arguably the most interdependent industry in the world. It cannot work without interoperability, without interconnect and thus standards. It will not operate on an optimum cost structure if every operator has to build and operate infrastructure and services at every level. For example,

in Thailand, mobile operators should not have to build out anything like the level of backhaul infrastructure (or other passive infrastructure) which is currently required. As the majority of the telecommunication infrastructure in Thailand historically has been constructed on a Build Transfer and Operate (BTO) principle, and such infrastructure is to be handed over to the Telephone Organization of Thailand (TOT) Pcl or CAT Pcl upon expiry of the Concessions, the concentration of control over essential facilities and key network elements is significant. This cannot work without other ‘soft’ infrastructure such as enforced competition regulation. And due to the massive abuses of position which can occur, by its very nature it works best if regulated, where rules are transparent, fair and enforced. Industrial structure and a range of predictable rules of engagement in support of access, free and fair competition are paramount.

Main BTO Concessions expiry schedule:

Expiry	Concession	BTO owner	Spectrum holding
Q4 2013– and carried over	True Move	CAT Pcl	1800MHz 12.5Mhz
Q4 2013 – carried over	DPC (AIS)	CAT Pcl	1800MHz 12.5MHz
Q4 2015	AIS	TOT Pcl	900MHz 17.5MHz
Q4 2018	DTAC	CAT Pcl	1800MHz 50MHz* 850MHz 10MHz

**Only 25MHz approved for utilization.*

We believe it is now becoming most urgent for Thailand that the sector functions properly so as to increase its contribution to the economy, and furthermore, that telecommunications be empowered to play a key role in enhancing Thailand's attractiveness for domestic and foreign investment.

It is (unfortunately) well-acknowledged that Thailand is lagging on almost all 'network readiness' / 'knowledge economy' indicators. There was some improvement in 2014 but other ASEAN economies, especially Indonesia, are doing well. The table is an extract from the Networked Readiness Index from three Global IT Reports (published by WEF and an academic / research partner)

ASEAN Member State	2012	2013	2014
Brunei	54	57	45
Cambodia	108	106	108
Indonesia	80	76	64
Laos	N/A	N/A	109
Malaysia	29	30	30
Myanmar	N/A	N/A	146
Philippines	86	78	86
Singapore	2	2	2
Thailand	77	74	67
Vietnam	83	84	84
Total economies	142	144	148

Some existing policy frameworks have been superseded or revised and it remains to be seen how new policies will fare. A useful Cloud Scorecard is described in the IT Section of this paper.

With 2G / 2.5G mobile service, comparatively low broadband penetration (another area in which many countries are overtaking Thailand), and comparatively inferior and costly services for corporate users, after several years of delays Thailand has issued technology neutral spectrum in the 2.1GHz band (commonly referred to as supporting 3G licences). Significant progress has been made by the issuance of regulations covering network sharing, domestic roaming and MVNO provisions. However, the issuance of regulations mandating access to networks has not resulted in an effective wholesale sector.

4. Reformation of the State Owned Enterprises / ‘Concession evolution’:

We strongly believe that a plan is needed for reformation and evolution of the two State-Owned Enterprises (SOEs). At press time, this had not been sufficiently addressed in the Digital Economy plans. The plan should include at least partial privatisation. There was a plan for corporatisation, then partial privatisation, but it stalled shortly after corporatisation. Today, the SOEs compete with their own concessionaires, and at the same time receive very large amounts in regulatory fees and revenue sharing payments from those same concessionaires. After the expiry of the three year moratorium (late in 2013) in the 2010 Frequency Act, much of the revenues which were streamed to the SOEs should be going to

their shareholder, the Ministry of Finance (MoF). Propping up the SOEs with revenues from areas where they compete with the private sector is not a good model for a competitive and innovative industry. Changes to the Frequency Act to prolong inefficient operation should be avoided.

We believe that such reforms of the SOEs are an essential and valuable step in reform of the telecommunications sector.

Thailand is not an exception in this regard. There is nothing so different about Thailand which makes universal global experience inapplicable. The only exceptional thing is that basic reforms of the telecommunications industry were never put in place – the industry is currently handcuffed to a business model nearly 20 years old (concession-based) and does not even reflect what the legislated changes (about a decade old) contemplated. A reform is needed and with certain concession-based contracts expired in 2013 (and carried over pending new spectrum issuance in 2015) and the last in 2018 the moment is opportune. An overview of Concession expiry dates can be found earlier in this document.

Thus, there is and will be at least for a period, multiple regulatory models:

- Concession-based operations for at least two mobile operators
- Some special deals between mobile operators and SOEs

- 3G operated via Mobile Virtual Network Operator (MVNO) arrangements by one SOE (which are different to wholesale)
- One SOE at least operating 3G spectrum
- Directly licensed operation from the NBTC for 2.1 GHz spectrum

This is a far cry from the only structure which will truly support free and fair competition, which is arms-length licensing to all operators directly from the NBTC. It is noted that the NBTC aims to facilitate more rapid number porting from 2G services to 3G and has a stated policy of supporting direct licensing, away from the concession era.

A choice: the industry and the economy overall, or State-Owned Enterprises (as they are currently structured) above all?

A decision must be made as to whether governments will stick, in the long run, with ownership of such enterprises, competing with the private sector, or will see greater good and value in creating an attractive and innovative industry overall, where fair competition can take hold, and thereby allow state-owned monopolies to evolve and develop through privatisation and reformation.

Historically the SOE evolutionary path in the sector based on global practice has been:

- i) Government departments providing monopoly post, telephone and telegraph (hence the term 'PTT') services
- ii) A separated regulator which becomes independent.

- iii) Corporatisation, often with postal services restructured to another entity
- iv) At least partial privatisation
- v) Injection of different financial targets and seeking out value-adding roles
- vi) The reformation or restructuring of the SOE

We may consider the varied development paths of British Telecom (BT), Telstra, Singtel, Telekom Malaysia (TM), and PLDT. Over some years, all have become listed entities in reasonably to very competitive markets which have strengthened the players in those markets and in most cases enabled the 'PTT' to invest overseas. The TM evolution story in particular is an impressive one (in April 2013 TM won a prestigious regional award for best broadband carrier). The transformations may have come with some pain but they were not ultimately avoided.

These developments have brought benefits to businesses, government and consumers in the home market, strengthened the former 'PTT', added wealth to the home economy, well beyond what it might have enjoyed from an unreformed SOE and the industry with an unreformed SOE, and contributed skills and innovation to the overseas markets in which they have invested. No such development has occurred in Thailand.

The transformation story was illustrated at the 2 July 2013 ICT Conference: "Unlocking ICT: an enabler for innovative growth" – with presentations from BT and NTT of their story of evolution. These can be seen at on the EABC website under Advocacy groups / ICT.

We thus **recommend, on the general and structural issues:**

- (1) Regulations about network access, domestic roaming and MVNO should fully implemented to include wholesale services including open access and non-discriminatory terms and conditions. Wholesale licences should be assessed independently and separately to those for retail services. Wholesale services should apply to all services using fixed, wireless and converged transport or transmission technologies and such principles must also be adhered to by the SOEs.
- (2) The **evolution of the SOE** not to pursue retail mobile but to become network operators and play a sound role in wholesale services as outlined in the national Policy and being subject to the same terms as apply to the private sector; extension of spectrum use by SOEs should be limited and only as necessary on technical grounds, and then the economic treatment should be different to the technical. In the Digital Economy, they should not be the centre piece of activity but should play a role as base infra providers and wholesalers.
- (3) Review of **competition regulation** to see that real, fair and effective (i.e., enforced) regulation results

5. Spectrum management

Spectrum planning is a science and an art. Harmonisation with global norms and standards is needed to ensure device compatibility while harmonisation with regional plans is needed to ensure proper management of the ether in border areas and for other reasons.

The EU, through the READI programme, has provided transfer of skills and knowhow through regular interaction. TELSOM and TELMIN (organs in the ASEAN ICT Master Plan) engage in regular consultation and dialogue to ensure spectrum harmonisation.

In Thailand, historically spectrum has been issued primarily to the two SOEs and reassigned to Concession holders. This was the case in relation to most available 900MHz and 1800MHz spectrum although CAT retained 10MHz of the 850 MHz band for its own use. Broadly, spectrum is deployed currently under these regulatory commercial models:

- Directly licensed from NBTC (e.g. 2.1GHz for '3G' and later applications)
- Historical spectrum issued to SOEs and used for its own purposes
- Spectrum issued to SOEs and used under concession arrangements (for example, the existing 2G / 2.5G based services)
- Spectrum used for broadcasting

Our strong recommendation is that two fundamental principles should apply:

- (i) All spectrum for commercial use should be issued by auction, consistent with standard global practices, being the only consistently fair and transparent way known. Special issuances and exceptions should be avoided. Other means for non-commercial applications may be possible.
- (ii) Ultimately, all spectrum should be issued by the one national regulatory authority, the NBTC, and all spectrum held by SOE should be returned to the NBTC and re-issued on commercial terms to all operators (including SOEs), with all on comparable licence terms.

Use of revenue from spectrum auctions is a policy matter; the needs of the industry for good regulation and industry development need to be included in that mix.

The NBTC had planned to arrange the re-farmed auctions of existing issued 1800 MHz (TMV:12.5 MHz/DPC: 12.5 MHz) and 900 MHz (AIS: 17.5 MHz) in August 2014 and September 2014, respectively. The NCPO issued an order to the NBTC on July 17th, 2014 to delay the planned auctions for one year, and also to revise the relevant laws and regulations. The stated reasons for the delay were to ensure a transparent process. There was a view expressed that objection to a 2014 auction came from the SOE quarter – that the SOEs were not ready to operate in an environment where such re-farmed spectrum had been issued.

Focusing on a 2015 auction, the preference is to have a “Big Bang Auction” in which all concessionary spectra are put into a single multi-band auction as per the table below:

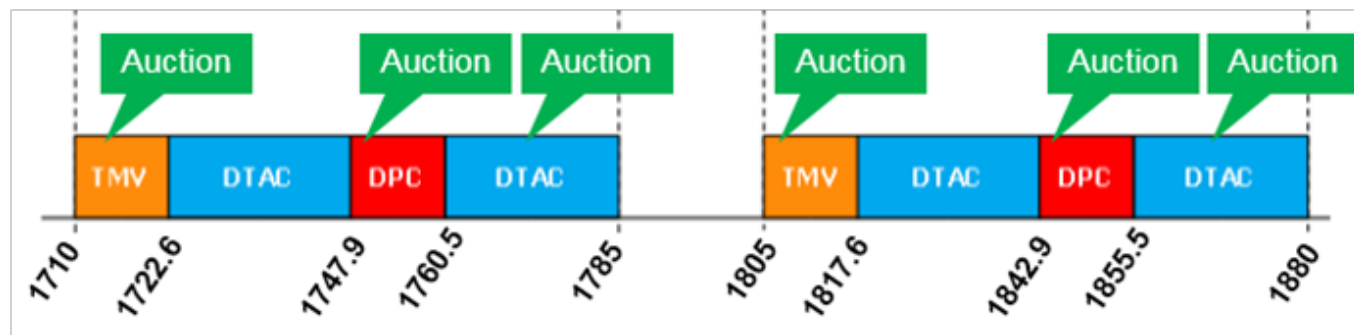
Spectrum Band (with current concessionaire)	BTO owner	Spectrum holding (concession expiry)
850 MHz (dtac)	2x10 MHz	2018
900 MHz (AIS)	2x17.5 MHz	2015
1800 MHz (dtac upper band/TMV/DPC)	2x50 MHz	2015
1800 MHz (dtac lower band)	2x25 MHz	2018

This auction would reduce industry investment risk by deciding in 2015 the assignment of spectrum available now and from 2018 onwards. A simultaneous award of 850 MHz and 900 MHz could be structured such that it effectively increases the amount of spectrum available

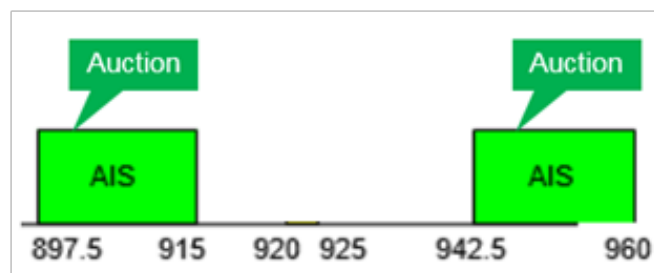
in those bands in Thailand.

However, at a minimum, the spectra which can be released in 2015 should be pooled into the 2015 spectrum auction (i.e., 2x17.5MHz of the 900 band, and 2x50MHz of the 1800 band).

1800 MHz BAND



900 MHz BAND



Railway communications systems

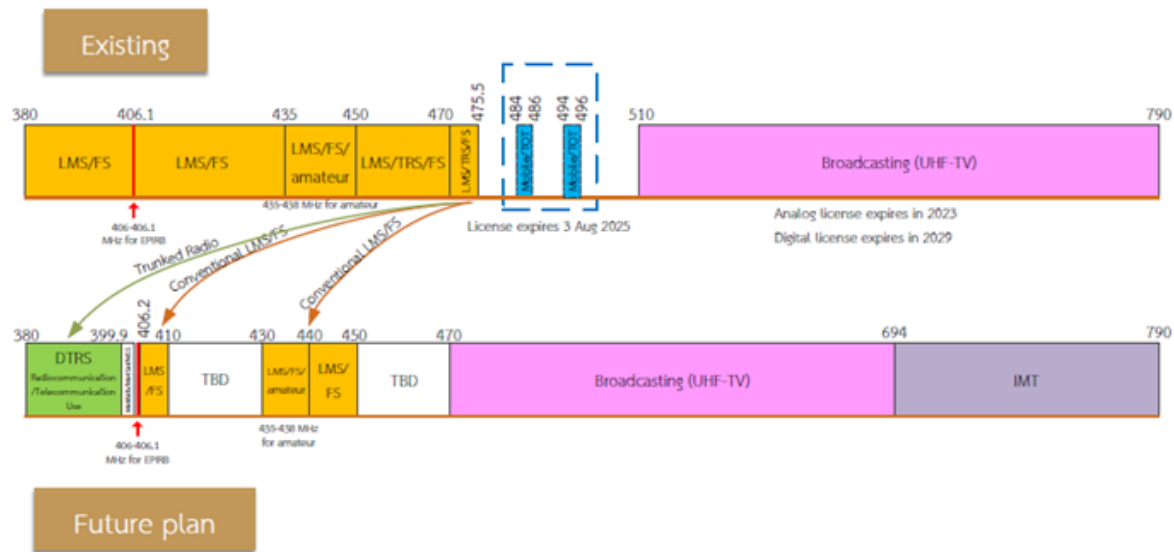
Efficient joint utilization of the 850 and 900 MHz bands in Thailand is not compatible with using 900 MHz spectrum for railway systems. We suggest that the government allocate higher bands for railway systems (with technical compatibility adjustments as necessary by SRT, as has been done in Australia. New technology will also permit use of other bands than those allocated for public communications systems.

‘Digital Dividend’ refers to the spectrum available from the use of spectrum for analogue TV purposes (typically 700 MHz) which could be available for wireless broadband purposes.

Currently, the 700 MHz spectrum, so called ‘Digital Dividend’ spectrum, is becoming one of the standard LTE bands. More and more countries are considering using it as an LTE coverage band including Thailand’s neighbouring countries.

However, according to Thailand’s National Spectrum Master Plan, the 510–790 MHz spectrum was defined for Broadcasting Services. The NBTC conducted a large spectrum auction in December 2013 covering the whole band 510–790 MHz for Digital Television purposes.

Later on, according to the draft spectrum roadmap, NBTC has defined the 700 band for mobile services purposes. The NBTC proposed to define 694–790 MHz for telecommunications and shift broadcast to the lower band – 470–694 MHz – as shown in below picture.



The 700MHz band re-farming plan is eight years away (2023). Further consideration is needed for this.

We consider that NBTCs intention to assign 700 MHz as having a telecommunication services purpose to be valid, but would encourage NBTC to expedite the re-farming process to be completed within three years (2018) so that this band can be utilized as soon as possible for a LTE coverage band, to deploy a mobile broadband network covering Thailand's upcountry areas.

The International Telecommunication Union (ITU) has been selected to design the 1800 and 900MHz auctions.

6. International Gateways (IGWs)

Full liberalisation of IGWs is needed for the data centre policy to work effectively and also for the Digital Economy vision.

CAT had provided Thailand's sole IGW, other than for routes to neighbouring countries where TOT had IGWs until the gateway's failure at the end of 2006 following an earthquake off the coast of Taiwan. This prompted the NTC to open up the sector for internet traffic to other operators with partial liberalisation. Today, IGWs are deregulated either for voice or for IP transit. Full liberalisation in every sense is strongly encouraged.

7. Broadband development

The development of broadband (the backbone of the Digital Economy) in Thailand has been slow, with limited access only to major cities and towns and many parts of the country relying on dial up connections to the Internet.

Based on experience elsewhere (e.g., Australia – where full FTTH rollout was planned in a very expensive national broadband network (since revised to take better advantage of wireless broadband)), Singapore (NGNBN) and Malaysia (a PPP or GLC–Private model), the options depend on structured returns, what is affordable and an audit of available rights of way and fibre.

Creating new monopolies; however, we would suggest, is a bad idea.

In order to achieve this kind of policy objective, comparative studies should be conducted into various National Broadband Networks (NBN)–type structures with a view to assessing the benefits of such structures to find whether they can, if appropriately structured and managed, accelerate broadband rollout and take-up. This should also include the evaluation of efficiency gains by pooling or leasing or vending in fibre backbone. Thus MEA, PEA, EGAT all have fibre which can be usefully deployed.

Such structures (e.g., being built in Australia and in operation in Singapore) or different approaches such as in Malaysia, where the former but now evolved government monopoly provider, Telekom Malaysia Berhad (TM), which has won regional awards for its wholesale and retail broadband services, has obligations to roll out and provide broadband services based on a national plan. The new Public–Private Partnership (PPP) Law should also afford some means of supporting development of broadband infrastructure.

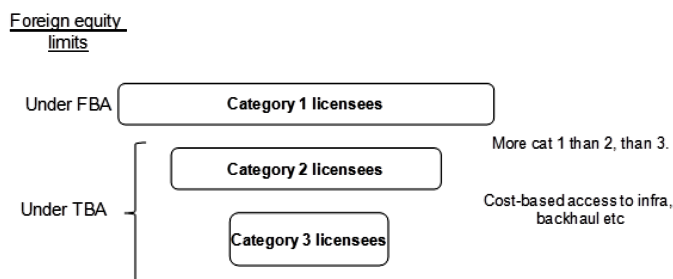
We recommend the following principles be used:

- i) A wholesale market for services should be developed immediately and not wait for any considerations around an NBN or indeed the deployment of one.
- ii) A PPP model for an NBN be investigated, where shareholders / contributors would be the SOEs, other infra owners, financial investors etc. with the SOEs not having a majority. Some government funding and soft loans (including possibly from regional development agencies) are likely to be needed. To ensure investor confidence, an independent manager of the asset owner is recommended. The new PPP Law should support such projects. Risk sharing considerations are reflected in the new PPP law. The new law does need resolution of the arbitration issue; it is recommended that arbitration be allowed for government contracts.
- iii) Infra owners can vend or lease in but there is no monopoly – existing wholesale and infra providers should be able to continue
- iv) Appropriate separation (e.g., structural or operational) as between infra owner and retail service provider needs to be determined. A range of wholesale services should be available at non-discriminatory, cost-oriented rates.
- v) Facilities-based competition should continue and not be terminated.

8. Foreign Equity Limits in the Telecommunications Sector

A separate more detailed paper has been prepared on this topic. The legislative regime for foreign equity is illustrated by this diagram:

Figure 23: Building blocks in the telecommunications industry – licencing perspective



Up to 100 percent foreign equity has been approved for Category 1 licences on a case-by-case basis.

We recommend as a starting point the premise that 100 percent foreign ownership to be allowed, with certain Category 3 operators being exceptional cases to be assessed on a case-by-case basis.

The area of global managed services illustrates the need for potential 100 percent foreign equity. MNCs and larger corporations are the clients of such services and providers seek to provide a high standard, one-stop solution for seamless global coverage. Effective control of the entire operation will deliver better results. Restricting ownership makes Thailand a less attractive choice as a hub in this area.

(i) *Category 1 and Category 2 operators*

Category 1 licences allow for 100 percent foreign ownership. The Ministry of Commerce, which administers the Foreign Business Act (FBA), must approve such applications on a case-by-case basis. We recommend that such allowance be understood as normal, rather than exceptional, practice. The JFCCT made a detailed submission about the value of allowing for 100 percent foreign ownership for Category 1 licences.

For Category 2, in our view, the industry would be well-served through allowing majority ownership, through to 100 percent foreign ownership. That would include both the ‘network ownership’ and ‘no-network ownership’ parts of Category 2.

(ii) *Category 3 – fundamental national domestic infrastructure-based operator*

There is often some sensitivity about the levels of foreign ownership of the fundamental national domestic infrastructure-based operator. This might be because of such an organisation’s role in fulfilling certain national social and economic policies – such as a Universal Service Obligation (USO) to provide services to all.

But such organisations must evolve so that they can become effective players in a competitive multi-operator market. FEL policy should ensure that the entity can effectively compete in a

dynamic market, and not be concerned to protect the entity's current market position. Thus, some level of foreign equity needs to be contemplated.

(iii) Category 3 – other operators

Ownership levels should allow, in our view, foreign majority ownership and control, right up to 100 percent, with the aim of stimulating participation by local companies.

9. Liberalisation of the services sector

Within ASEAN, the services sector accounts for 40 to 70 percent of each economy's GDP, including 48 percent in Thailand. Education, the upgrading of local skills, infusion of foreign skills (which will lead to mutual technology/knowledge transfer), and overall productivity increases are the cornerstone of a competitive economy. It is the services sector which can tap new areas of growth and development for Thailand – e.g. creative industries, and the move from raw creativity to real innovation. The Cross Sectoral Issues Section of this Position Paper covers the matter in more detail as does the ICT chapter of the EABC 2013 Position paper.

Services liberalisation has a number of elements; all of which we recommend are pursued:

- Relaxation of foreign equity limits
- Facilitation of free movement by changes to work permit and visa rules
- Sector specific changes and mandates by way of relaxation of restrictions on permits, licences and other barriers to entry, and to mandate

access to facilities – such as is done in GATS in relation to telecommunications, and in other FTAs with telecommunications chapters

- Other sector-specific reforms or mandates (e.g. structural changes in a sector to make it competitive and innovative, such as is recommended for the telecommunications sector)

In a more general, economy-wide context, these are described in an earlier section on the Cross Sectoral Issues of this Position Paper. The strategic importance of some parts of the services sector cannot be emphasised enough. For example, gains in efficiency and effectiveness of the telecommunications sector will have a multiplier effect on the economy overall, while a lagging sector disappoints the rest of the economy.

The **Board of Investment (BOI)** is able to provide incentives (some tax based). The BOI has confirmed however that it currently has no broad remit to support an enhanced services sector but it is hoped that with the change of location to the Office of Prime Minister (OPM) in 2014, this would come to be supported. The new policies in effect from 1 January 2015 have some services sector promotion, but it is recommended that more is done.

Some effort is recognised in partly addressing services (e.g. logistics, digital economy, IHQ, ITC) in the new policies which came into effect 1 January 2015 with some controversy over timing and short notice, but there is more to be done.

A number of recommendations in the ICT area have been made jointly by the EABC/JFCCT during special consultative sessions with BOI. These include recognition that to support the services sector's development, liberalisation is needed and thus incentives to spur on various activities of strategic importance are needed.

10. Foreign Dominance Notification

The JFCCT has made separate submissions and policy recommendations on foreign dominance since 2006, joined since 2011 by the EABC, along with many of Thailand's trading partners. The Foreign Dominance Notification had a long gestation period, from 2006 through to its passage by the NTC in August 2011.

A revised Notification, which became law in July 2012, widens the legal concept of 'foreignness' well beyond shareholding to almost every conceivable aspect of foreign connectedness (including shareholding, voting, advisors, banker relationships, mid to senior staff, equipment providers, paying dividends, financial accommodation or services, voting, board seats, use of IP and even customers if they are influential, much of which is included in the Annex to the Notification) and brings in factors beyond the standard in the FBA.

The Notification was objected to formally shortly after it came into force. Norway, supported by the EU, US and Japan, tabled the matter at WTO's Council for Trade in Services in September 2012. The matter is ongoing. The objection is to the enlargement beyond the basic criteria on which the GATS commitments were made. The detailed reasons why the FDN is not recommended are in the EABC 2013 Position Paper and are still relevant.

11. Consultation – general

We note the improvements previously brought about by the NBTC in public consultations. However, we note that in this rules-based, highly interdependent industry, consultations are an essential part of industry buy-in and education. Through consultations the industry can effectively operationalise. Rushed or only single-stage consultations often miss these elements. Thus we recommend:

- An overall programme of industry consultation and turnaround of drafts (at least two for each major area), managed by a small team with the time and skills to support it, like a programme management team.
- Drafts plus industry comments published on a website, in both Thai and English
- Hiring a law firm, a consulting firm (with some strong economic regulation background) for the necessary periods to help prepare materials, process the inputs and responses.

These external skills would report into an NBTC executive and all would be done under the direction of the NBTC; now there is an appearance that industry consultative forums are not always sincere attempts to get clear comment and the NBTC is not taking the opportunity to educate the industry (which the two round process would better do).

A similar approach (although possibly without the external facilitator) is important for **development of policy**. Policy consultation needs to open and be transparent.

12. Independence and role of the NRA (NBTC) Competition Regulation – assessment

While the basic tools for competition regulation exist, they have not been deployed in a manner which will best facilitate free and fair competition (even leaving aside the basic structural issues which do not support good competitive outcomes. Enforcement is more effective when it is undertaken by a body which is independent of government and of the firms in the industry. The agency should thus be free not only of corrupt behaviour (needless to say), but also of partiality towards any political party or firm.

We recognise that apparent, formal independence of a regulator can conceal de facto dependence on government or business interests. However, such situations are not easy to document. Accordingly for full independence we look not only for formal independence from government and the absence of successfully prosecuted departures from impartial behaviour, but also for a system of governance within the regulator which includes an element of independent directors.

We strongly recommend that the independence of the NRA be strengthened, not weakened and that it continue to have responsibility for spectrum management and issuance, including making national spectrum plans. There is an old policy debate between who should set policy and who should affect regulations; however, there are grey areas based on definitions. Generally, a regulatory practice is broadly bound to follow high level policy but with responsibility for management of spectrum for example. But when that turns into directives, independence suffers.

Independence of the NRA is an essential for investor confidence and for trust in the sector. Independence is generally understood in the industry to mean two things:

- i) Independence of government (recognising that it is government which sets policy nevertheless); and
- ii) Independence of any operator.

Experience has shown that there is a third element; the governance of the regulator. Precedents for this are:

- a) Stock exchange listing requirement – at Stock Exchange of Thailand (SET) and elsewhere
- b) Some other agencies in Thailand
- c) Other regulators in the sector (e.g. MCMC)

A board which is fully comprised of executives will thus have more challenges in achieving an independent status. The agency should consider having independent, non-executive directors on its board and the legal machinery necessary to support this should be explored.

A ‘superboard’ provides oversight. While this is a positive move, we maintain our existing recommendations. It would be a concern if a committee such as a National Committee for Digital Economy and Society being a direct part of the Ministry (howsoever named) would have a role to make a range of specific directives to the NBTC.

13. ASEAN ICT Master plan

Since September 2003, the ASEAN Telecommunications and Information Technology Ministers (TELMIN) have adopted various programmes for employing ICTs to strengthen and develop ASEAN economically, politically and socially. The vision is most comprehensively spelt

out in the 2010 *Master plan on ASEAN Connectivity: One Vision, One Identity, One Community (MPAC)*. The MPAC was drawn up in consultation with the ADB and the Tokyo-based Economic Research Institute for ASEAN and East Asia (ERIA), UNESCAP and the World Bank.

The ASEAN ICT Master plan grew from the principles of ASEAN Connectivity. We welcome the ASEAN ICT Master plan as a basis for enhancement of the role the industry plays in the member economies and towards ASEAN economic integration. The most cogent area of focus has been in spectrum planning and we welcome and support the role of ASEAN and EU engagement for these initiatives.

14. Intellectual Property Rights

IPR protection is an important aspect of building a knowledge and innovation economy and in supporting investor confidence overall.

Software Piracy: Software piracy practices in Thailand are at an acute level. It is common practice for example to use counterfeit operating systems and other unauthorised versions of software.

Remedies include a range of measures:

- (i) A change in attitude to non-tolerance of the use of pirated software.
- (ii) More affordable versions – e.g. academic and student versions and SME versions, all with appropriately packaged functionality levels.
- (iii) Education about the negative consequences of the use of pirated software.
- (iv) Greater likelihood of being caught and enforced penalties for breaches.

IPR in an eCommerce context

Online infringement of intellectual property rights is a growing problem worldwide. The role of both rights holders and online intermediaries in addressing this problem including the issue of establishing possible liability for such infringement involves necessarily complex questions. The EABC recommends a balanced approach to finding the correct solution for Thailand which recognises both national priorities and established international legal principles.

IV. Digital Broadcasting

In late 2013, the NBTC (the nation's merged broadcasting and telecoms regulator) held auctions to issue the country's first commercial digital spectrum, and then issued 24 commercial digital terrestrial TV licences. This heralded a new era in converged digital media.

As with telecommunications, broadcasting uses spectrum, a scarce national resource. Digital broadcasting has far greater spectral efficiency (Mbps for each MHz of bandwidth) than does the analogue use of spectrum, allows for much better picture quality and also supports a range of other value-adding features and functionality. Digital television (DTV) is the transmission of audio and video by a digitally processed and multiplexed signal. The DVB T-2 standard is adopted in Thailand for broadcasting (along with all ASEAN nations other than the Philippines). Broadly, however, digital TV in various forms uses a variety of network types.

Similar to most countries, Thailand has started digital broadcasting well ahead of the end of analogue transmission (Analogue Switch Off date or ASO), which will take some time. The forces of convergence between

telecoms (especially mobile) and broadcasting are playing out now and the outcomes are fascinating.

The industry has spawned take up in technology and services, with a range of value-adding, innovative platforms and applications which push traditional boundaries at a very fast rate.

V. Information Technology (IT)

Thailand is the second largest IT market in ASEAN, and the national PC penetration rate is above 18 percent. Unlike the telecommunications sector, industry structure is not the key issue for IT.

The Cloud Scorecard 2013 (published by Business Software Alliance – BSA) assesses the world's top 24 economies which make up 80 percent of the world's IT spend. It uses seven criteria to rank the economies included in the scorecard. Thailand is ranked 23rd out of 24th. The criteria are: ICT readiness/broadband deployment, data privacy, IPR, security, promoting free trade, standardization/harmonization, and cybercrime.

1. Skills, Education and free movement

ICT skills are in short supply. The nature of the industry is global. Confining source pools to national boundaries makes it harder to find the right skills and limits innovation. Our recommendation is to strive for an innovative and entrepreneurial mind-set in graduates and other ICT industry participants. This implies a change to education and also to certification for ICT skills. We do not note it separately here; however, intellectual property protection is an essential ingredient in the attractiveness of various IT hub plans.

Universities grapple with ensuring that graduates are appropriately skilled. An IT Finishing School is one solution. Use of an IT Competency Framework is another. Generally, a move away from rote learning to encourage enquiry and imagination is needed.

As computer-related courses are taught in English, enhancing English language education (and its particular contribution to the soft skills of problem solving and project management) is especially important.

We caution against a licensing approach for IT skills and we see this as an unnecessary and non-value-adding measure. The marketplace is already a good determinant of skill levels and fit. Similarly, the idea of a government certifying agency will not in our view contribute towards the better development of skills nor the better deployment of skills in Thailand and Thai skills abroad. In this respect the ASEAN ICT Master Plan we believe needs revising. Again, however, an IT Competency Framework would be a useful means of being able to identify skills.

Recommendation:

Capitalising on the benefits of innovation and IT leadership will mean support for free movement of a range of skilled people, and investment in education and training in ICT areas and English language training. An IT Competency Framework will be useful but without a licensing or certification regime.

2. Free Movement of skilled people; work permit and visa issues

The benefits of liberalisation of the services sector and what it means have been addressed earlier.

The ICT sector is regarded as strategic for Thailand's economic and social development; an innovative and attractive ICT sector has a multiplier effect on the rest of the economy. The growth and enhancement of a nation's ICT industry relies on access to skills and on the continuing development of the industry's capabilities. Not all skills will be found within one nation's borders and thus a high level of 'free movement' is needed. In addition, both local and foreign investors need the freedom to conduct business without undue impediments.

Certain existing laws and regulations in Thailand are, however, impediments to the development of a more robust ICT sector. For example, high registered capital and a specific ratio of Thai to foreign employees are required for each work permit issued to a company. These metrics are not appropriate for SME's, especially in the service sector and in the 'knowledge industries' which propel ICT and the Creative Economy.

Another impediment to the development of Thailand's ICT sector arises from short-term business visitors having no easy way to enter Thailand and legitimately conduct business or respond to the urgent needs of a customer or employer. Many larger ICT firms regionally resource various skills. The process for receiving what is, in essence, a short-term business visa (WP-10) is impractical and inflexible. We recommend doing away with the WP-10 and using a simple business visa of say 30 days for all activities which do not include actual

local employment. The visa should be obtainable on arrival for VoA or on line prior to arrival for nationals, and be renewable. Even for VoA situations, queues can be very long.

The Cross Sectoral Issues section of this Position Paper covers the recommended changes. As stated there, some changes may be achieved by change to administration or policy rather than necessarily by legislation.

3. Data Centres

We note the BOI promotion for data centres. However, a number of issues need to be addressed to capitalise fully on attracting data centre business. Free movement of skilled people, broadband services (including a wholesale market) and international connectivity (IGW) issues also need to be addressed. These are discussed elsewhere in this document. The role of a data protection law will be important in this context.

4. IT Procurement: eAuction, Unlimited Liability, Software IP; source code handover

We believe that improvements in these four issues will enhance value appreciation on the supply side. We will be happy to provide further details.

eAuction: eAuctions can be a useful tool for commodity purchases. Multi-variant analysis is necessary for the typical package of ICT hardware, software and services so that overall value for amount spent can be understood. We recommend judicious use of eAuction and a revised model which supports proper appreciation of overall value.

Unlimited liability: This is an unnecessary term in most supply contracts. Governments elsewhere have come up with solutions to address the issues.

Software Customs Duty / import duty on software: Duty on software imports is hard to administer. We recommend zero percent import duty.

5. eGovernment

eGovernment in Thailand is at a relatively early stage of development and appears to be stuck with many opportunities missed to take it up (eg the new Facilitation law could be primarily rely on on-line processes) and is both a key and product of a digital economy. eGovernment can be defined as the use of information technology to support government operations, engage citizens, and provide government services. eGovernment can also include a wide range of governmental activities that are not services to users, such as intra-ministerial, inter-ministerial, and in the case of ASEAN and other external relationships, inter-Governmental; as well as the essential use of technologies other than the Internet in the provisioning of Government services². It is important that non-paper records be considered the primary form, rather than paper being the primary form with a digitised version merely being used to convey a process. Thus input of structured or machine usable data, expanding citizen services and co-operation with industry are recommended as areas of key focus.

The EABC along with the JFCCT has developed a policy paper n eGovernment (v 8.0 at September 2014). This takes into account Thailand's current position, various programmes and has a priorities rollout. The paper can be found on the EABC website.

Online commerce

There are impediments to the take up of online commerce including some of the restrictions in the Computer Crimes Act and others. eCommerce is promotable under BOI policies in place from January 2015. A dialogue with the banking industry and government is needed in order to ease restrictions on payment practices and small business support generally.

As to the responsibility of online intermediaries in relation to IPR infringements, please see above the Telecommunications section of this paper.

6. Creative Economy – IT focus

Creative Economy (discussed in this section with an IT focus) represents a new area of growth and productivity enhancement. We note the developments of Chiang Mai Creative City, of which the JFCCT is a member. We consider that a regional focus will work best in fostering these objectives. The recommendations contained in the 2013 EABC Position Paper continue to be valid.

It is noted that IT start-up communities have grown, almost in spite of government policy. Funding tends to be the glass ceiling in many cases and ventures often go overseas to secure funding.

²AState University of New York, University at Albany – Center for Technology in Government. Retrieved 5 June 2013. A working definition of E-Government. http://www.ctg.albany.edu/publications/reports/future_of_egov?chapter=2

ICT Glossary

AFAS	ASEAN Framework Agreement on Services
DIP	Department of Intellectual Property, in MOC
BSA	Business Software Alliance
ETDA	Electronic Transactions Development Agency
EGA	Electronic Government Agency
FBA	Foreign Business Act
FTI	Federation of Thai Industries
FEL	Foreign Equity Limits
IEEE	US based standards body, publishing standards for WiFi for example (802.11)
ETSI	European standards body
GSMA	The GSM based industry association for mobile operators
ITIL	IT Infrastructure Library
itSMF	IT Service Management Forum
ITU	International Telecommunications Union (UN agency)
LTE	Long Term Evolution – the ‘4G’ standard in the GSM world
Mbps	Mega bits per second (a speed)
Mpbs per MHz	A measure of spectral efficiency – speed per amount of spectrum available.
MHz, GHz	Typically used to refer to wavelengths or parts of the spectrum
MDES	Ministry of Digital Economy and Society – new name for MICT
MICT	Ministry of Information and Communication Technology

MB, GB	MegaBytes, GigaBytes (a size)
MRA	Mutual Recognition Arrangement
NBTC	National Broadcasting and Telecommunications Commission ; reconstructed and revised in a different name
NACC	NACC = National Anti-Corruption Commission
NESDB	National Economic and Social Development Board
NECTEC	National Electronics and Computer Technology Centre
NTC	National Telecommunications Commission, the predecessor to the NBTC
NSTDA	National Science & Technology Development Agency
SIPA	Software Industry Promotion Agency, under MICT
TBA	Telecom Business Act (as amended in 2006)
TCC	Thai Chamber of Commerce (one of constituent bodies Board of Trade)
TDRI	Thailand Development Research Institute
Thai IOD	Thailand Institute of Directors.

Insurance

SUMMARY OF RECOMMENDATIONS

I. Liberalization of insurance industry

- a. Key areas of liberalization
- b. Major principles of liberalized insurance market

II. Enhancing the development and competitiveness of the insurance industry

- a. Increase capital requirement
- b. Improve regulations and product approval process to encourage innovation
- c. Remove insurance restrictions and encourage foreign investment in the sector to promote skills and bring expertise
- d. Arrange regulatory consultations
- e. Remove the restriction on tariff system/de-tariffing insurance premiums
- f. Promote insurance knowledge to create well-informed and empowered consumers as well as qualified insurance agents

Insurance Industry Overview

The insurance industry contributes materially to economic growth by improving the investment climate and promoting a more efficient mix of activities and complementary development of other relevant services than would otherwise be undertaken in the absence of risk management instruments. Non-life insurance contributes to growth in countries at many different levels of development; while life and health insurance not only makes a substantial contribution to growth, but also insures people's losses for the improvement of social welfare.

According to the Comité Européen des Assurances (CEA) report entitled 'The contribution of the Insurance Sector to Economic Growth and Employment in the EU' (2006¹), the insurance industry plays a significant role in promoting economic growth and structural development including:

1. Providing broader insurance coverage directly to firms, improving their financial soundness since it allows them to expand and tackle economic risks more conveniently without the need to set aside capital in a liquid contingency fund.

¹CEA. (2006). The Contribution of the Insurance Sector to Economic Growth and Employment in the EU. Brussels.

2. *Fostering entrepreneurial spirit and attitudes, encouraging investment, innovation, market dynamism and competition.* Uninsured or underinsured firms are not likely to exploit new business opportunities and invest less in innovation.
3. *Offering social protection alongside the state, releasing pressure on public sector finance.*
4. *Enhancing financial intermediation, creating liquidity and mobilizing savings* due to insurance companies' extensive investment in the economy.
5. *Promoting sensible risk management by households and firms,* contributing to sustainable and responsible development. Insurance offers households and firms an indicator of their risk level and encourages responsible and sustainable use of resources.
6. *Fostering stable consumption throughout life.* Insurance acts as a security net to allow stable consumption throughout an individual's life.

Empirical studies also suggest that the benefits for developing countries from opening up their financial markets to foreign competition include: a more efficient financial sector; a broader range and improved quality of services for the consumer as well as corporate services; improved acquisition of human resources skills; pressures for improved regulation and supervision; better disclosure rules and general improvements in the legal and regulatory framework for the provision of financial services; and a reduction in (systemic) risks and improvements in liquidity. Importantly, it also allows consumers to obtain better and more appropriate services at competitive prices.

The Thai insurance market (both life and non-life insurance) has been growing at a promising rate. The insurance industry is driven by economic growth and several factors have contributed to such growth, including the outstanding role of bancassurance and growing awareness among Thai consumers about the importance of insurance, not only as a risk management tool but also an investment.

In data obtained from the Market Analysis and Statistics Department of the Office of Insurance Commission (OIC), there are currently 24 life insurance companies, 62 non-life insurance companies, and 705 insurance brokers operating in Thailand. In the current life insurance market (data last updated on 22 July 2014), four incumbent players are collectively holding more than 60 per cent of the total market share: AIA Thailand (24.8 percent), Muang Thai Life Assurance (13.7 percent), Thai Life Insurance (12.5 percent), and Siam Commercial New York Life (10.3 percent). In the current non-life insurance market (data last updated on 5 August 2014), three incumbent players are collectively holding approximately 35 percent of the total market share: Viriyah Insurance (16.7 percent), Dhipaya Insurance (11.63 percent), and Bangkok Insurance (7.4 percent).

The Secretary-General of the OIC believes that in 2015, the Thai insurance industry will grow approximately 13 percent; 12–13 percent for life insurance and eight percent for non-life insurance. Furthermore, the relatively low insurance penetration rate and premium per capita, compared to other countries in ASEAN and other regions, reflects the growth potential of the Thai insurance market.

With the full implementation of the ASEAN Economic Community (AEC) by the end of 2015, more players from both domestic and foreign companies will enter the market, which will increase competitiveness in the market and benefit consumers. It will also provide opportunities for Thai insurance companies and brokers to expand their businesses to other ASEAN markets. At the same time, mergers and acquisitions between insurance companies are expected to take place, resulting in capital increases and cost efficiency to strengthen their financial status; hence resulting in a less fragmented Thai insurance industry.

I. Liberalization of the Insurance Industry

Representing a cross-section of insurance businesses operating in Thailand, which have in one form or another European influence over them, the EABC Insurance Working Group wishes to engage with the government to create favourable conditions for investment and sustainable growth in the insurance market in Thailand. It is important to note the desired market conditions that will enable the Thai insurance industry to move forward in the right direction.

To begin with, features of liberalization in a competitive insurance market should be noted. In general, the most obvious results from opening up a market to competition are that consumers will benefit from lower prices and new, more efficient and more consumer-friendly services. Four key areas of liberalization can be summarized below:

1. *Greater access to capital:* including improvements in the quality of insurance regulation, transfer of technological and managerial know-how, and improvements in customer service and value.
2. *Economies of scale:* including market consolidation by merger operations, reduction of costs, and fostering efficiency in capital allocation.
3. *Market efficiency:* including a wider spectrum of new or innovated products, empowering underwriting experience to price setting, and moderate product pricing to the public.
4. *Social values and economic benefits:* including enhanced financial stability of individuals, families and organizations, increased domestic savings, and complementary savings to government expenses on social insurance programs.

However, in order to move forward in the same direction, each stakeholder in the insurance industry should clearly understand a complete picture of the components required to constitute a liberalized insurance market. The foundation of a liberalized insurance market requires a balance between regulations and facilitation. For this reason, a liberalized insurance market should be based on four major principles:

1. Risk-Focused

Although the risk-focused principle can be defined in several dimensions, it simply means that the more complex or higher risk an insurance company engages in, the more risk management capabilities, capital, and/or reserve it has to demonstrate, raise, and/or set aside. Accordingly, the role of regulatory bodies should focus on the risk profile of each institution rather than strictly rely on standard rules bindings all insurance companies. An example of this principle is Risk-Based Capital (RBC), a

principle adopted by various countries including Thailand. Mainly for the purpose of consumer protection, RBC ensures that each insurance company has enough capital to sustain operating losses while maintaining a safe and efficient market. As a consequence, consumers can rest assured that their selected insurance companies have a solid financial grounding.

2. Stakeholder-Reliant

Regulatory bodies have to put in place an appropriate supervisory framework that allows them the ability to closely monitor the behaviour of insurance companies and other players in the market. At the same time, they should avoid interfering with insurance companies' boards and management. In the event that interference is required, they need to develop intervention criteria that must be strictly followed. They also need to encourage the board and management to always seriously take into account fair business practice with clients, consumer protection, corporate governance, and utmost compliance with regulatory standards. In addition, all relevant stakeholders within the insurance industry should be encouraged to take part in active monitoring of the safety and soundness of insurance businesses as well as the roles and responsibilities of regulatory bodies.

3. Disclosure-Based

This disclosure-based principle encourages the creation of educated consumers who can make well-informed decisions. Those consumers understand the nature of different insurance

products and what they should look out for when contemplating each alternative. Therefore, in concurrence with the product approval process, insurance companies have to make available to consumers accurate material information regarding their products and services in a timely manner. Regulatory bodies should also place great importance on this principle to enhance its market facilitation role, instead of focusing mainly on regulation.

4. Business-Friendly

It is desirable to promote a business climate conducive not only to business retention but also expansion. Laws and regulations have to keep pace with the rapidly changing insurance industry landscape and regulatory bodies need to find a balance between being a regulator and being a facilitator. This means that effective monitoring and mitigation of risks such as controlling licensing of the business and strengthening solvency regulations are equally as important as promoting a competitive insurance market and business innovation. Any activities that may hinder the growth and competitiveness of the insurance market should be avoided. Regulatory bodies should also maintain close relationships and contact with all interested stakeholders and engage in dialogue with them to keep them updated about information and data concerning current market conditions.

II. Enhancing the Development and Competitiveness of Insurance Industry

Despite the nature and characteristics of a liberalized insurance market described earlier, several gaps exist, particularly in connection with the ‘business-friendly’ principle, between the desirable market conditions and the current conditions within the Thai insurance industry.

The following key issues and recommendations – representing the collective views of the working group members – aim to enhance the development and competitiveness of the insurance industry in Thailand amidst the growing insurance markets of ASEAN and beyond. Issues and recommendations described here aim not only to promote a favourable and competitive environment for insurance businesses and the industry, but also to make social and economic functions of insurance in line with the public interest, especially in relation to consumer protection and benefits.

• Capital

In response to the risk-focused principle, it is crucial for Thai insurance companies to retain their existing capital base as well as to generate new capital to remain in a position where they can provide their customers with financial security and the needed products. The floods in 2011 affected the Thai non-life insurance industry’s financial strength, which resulted in foreign capital flows into Thailand to shore up existing businesses. Though there were some new foreign reinsurers in the market, the capital flow to cover all catastrophic risks might not be enough due to lack of confidence of the existing lenders in the Thai economy. This leaves the average

customer with limited options in this area.

In conclusion, a significant increase in the amount of capital invested in the Thai non-life insurance industry should be encouraged. The benefits of this would be that insurance risks in Thailand could be underwritten and retained within the country and the reliance on foreign reinsurers reduced. This position could not be achieved in the short term but a long term plan to encourage foreign capital investment in the insurance sector should be considered as a priority. The Risk-Based Capital (RBC) regulations, which came into force on 1 September 2011, are a welcome introduction to the Thai non-life insurance market and will create a financially stronger sector; however, it does not in itself generate new capital, rather it improves the quality of the asset base. The next step is therefore to create a climate where foreign, and in particular European, investors see good investment opportunities for operating insurance businesses in Thailand.

Recommendation:

Thailand is encouraged to implement measures which effectively require insurance companies to increase capital to significantly higher levels than now required by law.

• Regulations / Product Approval Process

This key issue is in response to the business-friendly principle. The regulatory framework, which governs the Thai insurance industry, is commendable, in that it recognizes the importance of capital, expertise, customer protection and the resolution of disputes. The

regulations governing the introduction of new products however cause some insurance businesses to be reluctant to innovate; thus, the consumer does not necessarily obtain the product that would most suit them. This applies particularly in the personal lines, life and healthcare areas. The ‘file and use’ regulations allow a degree of freedom for simple products but, where the products are more complex, the approval process appears to be long and difficult mainly due to lack of transparency, inconsistency, and lack of standard procedures.

In certain cases of innovative insurance products, such long and difficult approval processes (which can happen in a very subtle way) result in the said product being copied easily over time and before any market momentum has been established. Consequently, an insurer who creates a new product will lose their competitive edge and later be discouraged to innovate again. A key example is the way that a ‘Unit Linked product’ has been introduced into the Thai market. Many of Thailand’s ASEAN peers have a flourishing Unit Linked product, with markets like Indonesia and the Philippines enjoying more than 60 percent sales of Unit Linked policies. Unit Linked products expand customer choice; greatly improve the health of the life insurance industry by reducing guarantees, and help customers to plan insurance needs to their individual circumstances. Whilst Unit Linked products are now available in Thailand, design constraints are highly restrictive and sales licensing requirements are prohibitive. As local companies begin to understand these products and start introducing them into their respective portfolios, lobby groups gain more traction and so laws will inevitably be changed to support

them, but this process takes time and ensures that any competitive edge is all but removed by the time the process unravels.

Furthermore, where new products are introduced, there is often a long time lag before tax rules change to bring these new products on to an equal footing with existing products. This adversely impacts consumer choice and stifles the success of these new innovations. The Unit Linked product, again, is a good example of this, whereby personal tax deduction is out of line with both traditional insurance products and with Long Term Equity Fund (LTF) and Retirement Mutual Fund (RMF).

Recommendation:

In the spirit of freer trade and enrichment of customer choice, regulatory bodies need to embrace innovation with a more coordinated and open approach so that all market players can leverage their respective competitive advantage. A review of these regulations followed by an open and transparent approval process with time limits would be a most desirable objective. Given the importance of regulations in the insurance sector, a dialogue with the relevant government departments to improve these and other regulatory issues would be welcomed.

- **Expertise Shortage/ Difficulties to Attract and Maintain Foreign Investors and Experts**

In response to the business-friendly principle, foreign entry can help enhance competitiveness and market efficiency. Literature on trade and investment in financial services, including insurance, suggest greater

competitiveness from foreign entry to domestic markets by forcing domestic players to operate more efficiently. Foreign entry also facilitates the use of modern skills and technology, improved risk management, the provision of specialized value-added services, and financial deepening through the provision of services in under-served segments of the market such as SMEs.

The issue of the insurance expertise shortage can be separated into two parts as follows;

a) Difficulty in attracting foreign investors

According to the Foreign Business Act (FBA) B.E. 2542 (1999), foreign participation is allowed in a range of business activities. However, services businesses on 'List 3' (businesses in which Thai nationals are deemed not ready to compete with foreigners) are restricted and controlled by the Ministry of Commerce. A foreign business entity who wishes to enter into one of these businesses requires a business license, which generally takes time and cost money to obtain, and specific financing with a 7:1 debt to equity requirement, which is not required for a local entity.

Foreign participation in the life and non-life insurance sector remains restricted and has been further limited with the enactment of the Insurance Amendment Act of 2008, which requires existing foreign majority controlled life and non-life insurance companies to amend their voting share structures to become majority Thai controlled by 2013. As a result of the post-flood situation, Thailand

has approved increases of foreign equity in insurance companies from the 25 percent cap to re-capitalize the cash-strapped Thai insurance sector. This; however, has only happened on a case-by-case basis. At the same time, Thailand has contemplated relaxation of foreign ownership in the insurance sector up to 49 percent of foreign equity, preparing for intense competition under full implementation of the AEC in 2015. Nonetheless, no formal notices have been issued to clearly state an effective date. To progressively liberalize trade in financial services within ASEAN, Thailand is also working toward recognition of professional qualifications (such as insurance intermediation, brokerage) with a view to facilitate their movement within the region. Unfortunately, this again has not led to any concrete, measurable result of improved market access.

In an effort to increase foreign participation in the market, Thailand plans to remove the 75 percent voting rights ('voting share sold') and management control restriction under the existing Insurance Amendment Act of 2008, which requires foreign insurance companies to restructure by 2013 to reflect the Thai control. Those failing to comply with such restrictions will be subject to penalties under the existing insurance laws, including prohibition of business expansion.

It is worth noting that the foreign equity caps in the insurance sector are much more restrictive than in other parts of the services sector and this is regarded as a key market access obstacle which needs to be addressed².

²Other barriers to entry include transfer of credentials and professional qualifications, restrictions to cross-border supply (even if mode 1 and mode 2 are fully bound), lack of competition resulting in high premiums and restrictions on innovative products, i.e. medical insurance are other industry concerns.

b) Difficulty in attracting foreign experts

Difficulty in obtaining work permits and visas still remains, due to lengthy procedures, recognition of employees' qualifications, and lack of transparency in regulations at various administrative levels. Certain existing laws and regulations in Thailand are impediments to the development of more robust critical sectors. It is very important that the potential EU–Thailand Free Trade Agreement (FTA) negotiations lead to positive outcomes toward materializing the combination of administrative and legislative remedies to ease restrictions, with the aim to facilitate the free movement and recruitment of expatriate skilled and unskilled workers who duly correspond to Thailand's economic development and business needs.

For example, high registered capital and a specific ratio of Thai to foreign employees are required for each work permit issued to a company. These metrics are not appropriate for SMEs, especially in the service sector and when critical skills are needed. SMEs, many of which provide important services to much larger organizations, often begin as sole proprietorships, or with just two or three partners and no additional employees.

Even long-established service companies often need only a small staff to generate significant revenue. Their primary assets are the skills and intellectual capital of their employees, not plant and equipment, and they therefore have no need for high initial capital investment. There is regional competition for skills and Thailand should encourage the intake of skills and entrepreneurs from around the world to invest and start up in Thailand,

regardless of ratio or initial capital commitment. SMEs (Thai- or foreign-owned) should not be restricted from hiring foreigners to provide needed know-how. Such skilled workers will not take away local jobs but, rather, will enhance competencies and competitiveness overall, and help in overall business recovery.

Thirty-nine occupations and professions are closed to foreigners in accordance with the Royal Decree Prescribing Works Relating to Occupation and Professions in which an Alien is Prohibited to Engage B.E. 2522 (1979). In applying for a work permit for an occupation that is not prohibited, conditions related to the paid-up capital of the sponsoring company and the ratio of Thai staff to foreign employees must be observed.

In the current context of business interconnectedness, it is arguable that business operations have become global. Particularly in many strategic parts of the services sector which are regarded as international, supply of jobs is outstripping the supply of local workers to fill these vacancies to ensure smooth business operation. This inevitably means foreign talent and business people are required to overcome the skills shortage. To strengthen Thailand's position as a competitive regional business hub, restrictions on visa and work permits should be eased and immigration rules should not hamper – but on the contrary facilitate – sustainable growth of the Thai economy.

The European insurance industry is recognized for its great strength, both in terms of financial security and professional expertise. By encouraging European

investors to participate to a much greater extent in the insurance sector, there would be a number of significant benefits for Thailand. One of these benefits would be increasing the skill-base within the insurance sector³.

Recommendation:

It is desirable to see liberalization within the insurance sector, not just for the benefit of a small group of European investors but for the country as a whole and for all Thai consumers.

To successfully bring expertise into the insurance industry of Thailand, it is important to build the necessary pre-conditions for Thailand to become an attractive investment destination for foreign insurance investors and experts. It is of great interest to the European insurance industry to seek further liberalization of Thailand's services sector and implementation of the existing review mechanism on List 3 in the FBA and the Insurance Amendment Act of 2008 to duly remove restrictions and encourage foreign investment in the sector. Both existing and potential European investors in the insurance sector would welcome the removal of all shareholding limits leaving them the freedom of choice over partners in a Thai insurance firm.

Also, the EABC recommends a combination of administrative and legislative remedies to ease restrictions with the aim to facilitate the free

movement and recruitment of expatriate skilled and unskilled workers who duly correspond to Thailand's economic development and business needs. The EABC and its Insurance Working Group express their readiness to work closely with the Royal Thai Government toward this objective.

• Tariff System

This key issue is in response to the business-friendly principle. With reference to Section 30 of both the Life Insurance B.E. 2535 and Non-Life Insurance Act B.E. 2535, insurance premium rates shall be under the supervision of the OIC. This means that pricing for all types of insurance products requires prior approval from the OIC. Accordingly, insurance companies will not have the freedom to set the price they deem appropriate. Since pricing is regulated, insurance companies have to compete on other merits; such as providing better services and various forms of sales promotion.

Although the reason behind those Sections is greatly for consumer protection and to help small and medium firms to compete with larger players, it also has an adverse effect, in that the tariff system indirectly hinders the motivation to innovate by creating new insurance products. Since the R&D of innovative insurance products may require a considerable amount of investment and time, the company that innovates such a product will have to set premium rates that are worth the innovation cost, i.e. the actual market value.

³There are, within the ASEAN region, insurance markets that have encouraged foreign insurance investors, the most obvious being Singapore where the insurance industry has moved from a small domestic market 10 years ago to a dynamic international insurance centre. The levels of expertise in that market now rival some of the traditional centres such as London.

However, if the OIC views that such a rate is too high or unreasonable, it has the authority to adjust the rate, which may not be fair to that insurance company. The most critical issue is that the Thai insurance industry can lose its dynamism, new insurance products will be rarely introduced to the market, insurance companies will mainly focus on competing on current simple products, and price-cutting momentum will be reinforced. Eventually consumers, instead of being protected, will be left with products that do not meet their risk management requirements due to the very low premium rate they pay.

Recommendation:

For free market competition and in the best interests of Thai consumers, de-tariffing insurance premiums (deregulation of pricing) is the desired goal. The EABC would like to urge a revision to alleviate the said restrictions from any laws and regulations in connection with the insurance premium tariff system being currently enforced.

● **Other Recommendations**

- a) In response to the disclosure-based principle, which aims to create educated consumers who can effectively make well-informed consumption decisions, the EABC encourages the OIC to take a leading role in dispersing knowledge to create well-informed and empowered consumers and actively encourage the public to have sound risk management systems. Consumers need to make a purchase with confidence; therefore, they need to know which insurance products are available in the market and which are likely to

meet their requirements. They also need to gain access to all critical information and clearly understand insurance products they are contemplating purchasing. An effective way to achieve this goal is to develop a simple targeted communication plan, which is to divide the target audiences into small groups (either by age, education, area, income, etc.) and then customize the content and messages that each group can relate to.

- b) Repatriation of funds by investors is subject to criteria which are unclear, inconsistent, and lack transparency and standard procedures. Such activity has to be conducted through time consuming negotiations with the OIC and results are not guaranteed. The EABC wishes to work closely with the OIC and other related government agencies to relieve the said difficulty obstructing the free transfer of capital and payments in connection with investments by foreign investors. The removal of such restrictions will make Thailand's market much more attractive.

Rail and Road Infrastructure

- With the expanding scale of Thailand's infrastructure development program, European companies are keen to offer assistance, leveraging the expertise they have acquired building sophisticated transportation systems in Europe. This includes the areas of regulatory standardization and the interoperability of transport systems.
- The EABC Rail and Road Infrastructure Working Group aims to support Thai government agencies in improving the efficiency of their public procurement activities by adopting international best practices and attracting international suppliers.
- The ultimate goal of the Working Group is to provide constructive contributions to the long-term economic partnership between Thailand and Europe.

Industry Overview

In light of globalization and regionalization, Thailand has emerged as a potential logistics hub in Southeast Asia through its investment in infrastructure. The 11th National Economic and Social Development (NESDB) Plan (2012–2016) aims to move Thailand forward on a more sustainable path and pave the way to achieve high-income country status in the long run (NESDB, 2014). One of the key factors is to speed up infrastructure development plans and secure their funding. For quality of growth and sustainability, Thailand plans to improve its transport and logistics capacity via the enhancement of multimodal transportation and the modernization of the public transportation network. These include improvements of the railway network, both inter-city links and metropolitan lines, highway network, maritime transport network, and air transport capacity. In response to the ongoing AEC 2015 implementation, Thailand

targets to play a larger role as a key regional logistics hub, thus improving trade and investment. The objective includes developing regional connectivity in transports and logistics systems; physical transportation links and harmonization of rules and regulations within ASEAN.

The eight-year (2015–2022) transportation development strategies plan focuses on five key programs, including: (1) inter-city rail network, (2) highway network linking key regions with neighbouring countries, (3) public transportation network within Bangkok and vicinity, (4) air transport, and (5) maritime transport. Under this THB 2.4 trillion infrastructure plan, economic growth is forecast at a range of four to five percent in the coming years. To align with the objectives of Thailand's 11th National Economic and Social Development Plan, the end goal of this Infrastructure Development Plan (2015

-2022) is to create quality of life and sustainable development for the Thai economy and its citizens. The strategies then cover enhancement of social security by improving people's quality of life, promotion of economic productivity by reducing public transportation cost and time, and strengthening competitiveness as well as positioning Thailand to receive optimal benefit from the AEC.

Focusing on rail and road infrastructure development, Thailand is currently constructing the new Purple and Red lines as well as extensions to the existing Green and Blue lines (BTS and MRT). In addition to these mass transit developments in Bangkok, the upgrade of the national rail infrastructure is articulated in the 8-year Infrastructure Development Plan with the establishment of double-tracking of six main railway lines and their extension to the borders (Figure 24), including track strengthening from 16T to 20T axle load. This is one of Thailand's strategies to become the ASEAN regional transportation hub.

In terms of road development, one of the five programs emphasizes capacity enhancement for the highway network to link with key areas in the country such as other regional capitals and industrial zones. The road infrastructure development strategies cover development of four-lane road networks linking Thailand's key economic regions to the borders, construction of new motorways, and facilities along the main roads e.g., container yards, etc. Thailand has put considerable effort

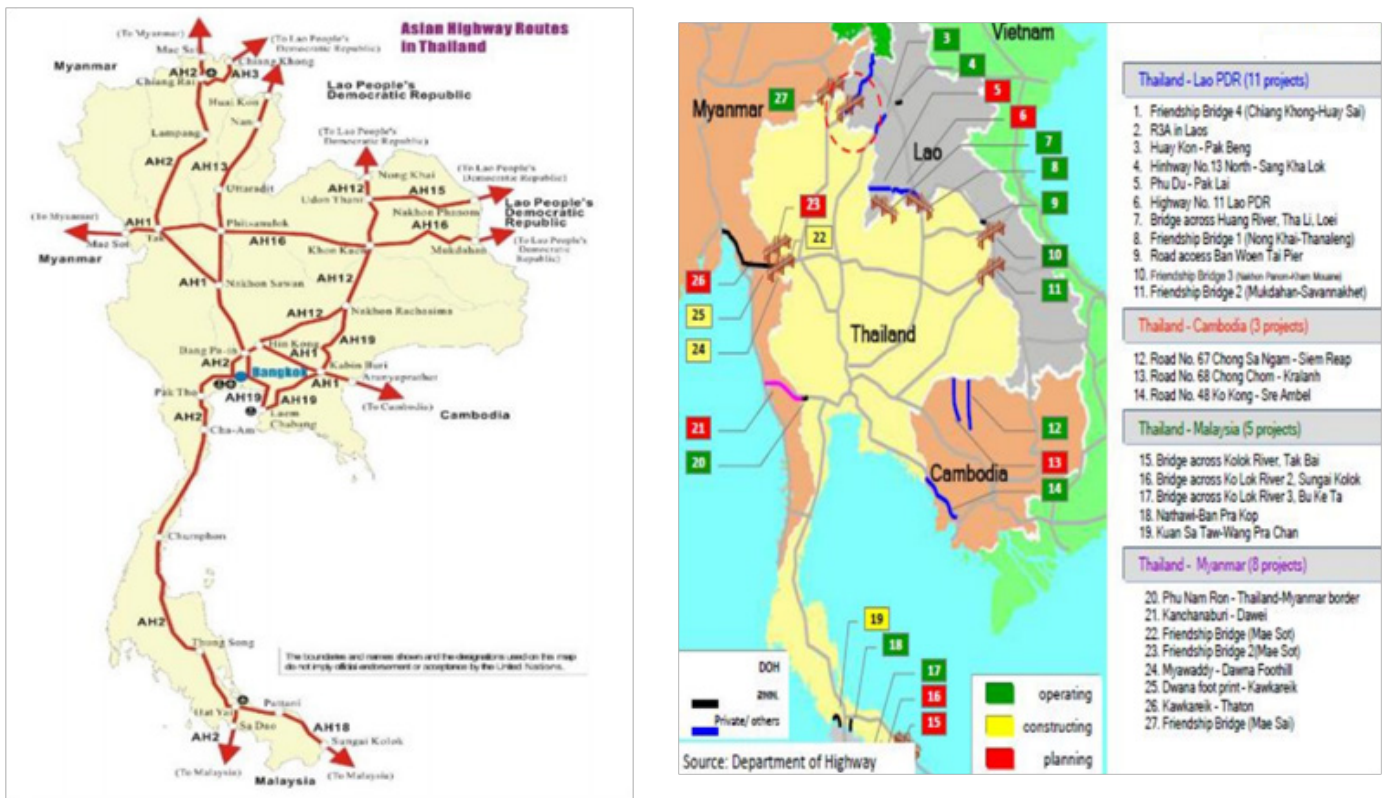
in to these road projects (Figure 25) in preparation for the ASEAN Highway Network (AHN) Project under the ASEAN Connectivity Master Plan, AEC. Thailand also offers its assistance to neighbouring countries in developing the AHN project and promoting connectivity in ASEAN.

Figure 24: Thailand Railway Network



Source: NESDB, 2014

Figure 25: Thailand Road Network in response to AHN



Source: NESDB and Department of Highways, Thailand

Thailand has also progressed in the regional development of rail and road infrastructure as well as supporting regional integration. The evidence is shown through the development of an economic corridor network as well as cross-border transport facilitation, especially in the Great Mekong Sub-region (GMS). The GMS was

conceptualized in 1998. The program strategy emphasizes Thailand's infrastructure development in transportation, energy and power supply, telecommunications, and other areas. With the support of the Asian Development Bank (ADB), the GMS program focuses on three main economic corridors; the North

– South Corridor, the East – West Corridor, and the Southern Corridor (Figure 26) Rail and Road Infrastructure. The new GMS Strategic Framework (2012–2022) focuses more on integrated, multi-development and spatial development in particular sub-regions – China, Cambodia, Lao PDR, Myanmar, Thailand, and Vietnam. To date, investment under the GMS Framework has been made in 55 infrastructure projects, with total investment capital of THB 420 billion, covering major areas of roads, airports, railways, hydropower, and tourism infrastructure. The key purpose of GMS is to complement regional integration through the ASEAN Connectivity. Therefore, efforts are being made for standardization of roads in ASEAN, improvement of road safety, achievement of the first GMS railway link by 2020, and establishment of the Greater Mekong Railway Association (GMRA). The objectives also include cross-border trade and investment facilitation; for example, upgrading border crossing point facilities, harmonization of cross-border procedures, National Single Window (NSW), E-Commerce, and improvement of laws and regulations in trade and transport.

Figure 26: ASEAN Economic Corridor



Source: Asian Development Bank Website



Regarding the funding of such infrastructure projects, Thailand once received financial support from the Asian Development Bank (ADB). Currently, the Thai government is pushing through the idea of an infrastructure fund registered with Thailand's Stock Exchange and overseen by the Ministry of Finance. The pilot ten sectors eligible for this Fund cover rail transport, electricity, water supply, roads/express ways/toll ways, airports, deep seaports, telecommunication, alternative energy, water management/irrigation, and disaster prevention.

Considering the scale of Thailand's infrastructure development program, European companies are keen to offer assistance, leveraging the expertise they have acquired building sophisticated transportation systems in Europe. In particular, EU organizations can help Thailand in the areas of regulatory standardization and the interoperability of transport systems. For example, Europe managed to develop standards and regulations allowing seamless rail operations across borders. Supporting Thailand adopting suitable interoperability standards would certainly position the country as a leader in developing the Great Mekong Sub-region (GMS) network. This would strengthen Thailand's competitiveness and would improve the Thai economy.

The EABC Rail and Road Infrastructure Working Group was set up in 2014 to address concerns related to the industry. Their key mandate is to establish a strategic direction for the Rail and Road Infrastructure sector in Thailand as well as to provide a constructive contribution to the long-term economic partnership between Thailand and Europe.

EU Technical Assistance in Upgrading Thailand's Rail and Road Infrastructure

Many investments in the transportation network have been focused on lowering the cost of procurement, to the detriment of the total cost of ownership. Usage of outdated standards and the negligence of systematic maintenance are responsible for the poor actual state of many structures. This leads to safety and availability issues, as well as higher operational and maintenance costs.

In co-operation with CEN – the European Committee for Standardization – the EABC Rail and Road Infrastructure Working Group in 2015 will support governmental institutions to adopt European and international standards applicable to transportation infrastructure. In parallel, the Working Group would also like to offer assistance on how to structure an appropriate model/ a fit for purpose maintenance system for existing infrastructure systems in Thailand. Through this initiative, Thai projects will benefit from better performance and quality, will cost less to operate and maintain, and will be built to last. Ultimately, Thailand will get a better return on its huge portfolio of investments.

The EABC will also support the introduction of European systems of preventive inspection and maintenance, again with the goal of immediately improving the lifecycle cost of transport infrastructure.

The EABC is also aiming to support Thai government agencies in improving the efficiency of their public procurement activities by adopting international best practices and attracting international suppliers.

To successfully deliver the planned infrastructure projects, Thailand will need to carry on investing in the development of its human capital. EU organizations ranging from universities to private companies are already involved in training Thai transportation engineers, consultants and project managers. They have been organizing seminars to support vocational education, technical colleges and university cooperation. An additional benefit of developing a strong transportation engineering base in Thailand is that the country will increase its share of exports of products and engineering services to other ASEAN member countries. Still, realistically, domestic engineering capacity will not be sufficient to deliver the planned investments. To attract qualified experts and consultants from abroad, liberalization of the services sector – as regularly advocated by the EABC – will be particularly important.

Transport & Logistics

SUMMARY OF RECOMMENDATIONS

I. Market Access

- a. Liberalize logistics services
- b. Gradually liberalize the postal service sector

II. Customs Reforms for Trade Facilitation

- c. Establish detailed and technical guidelines for customs procedures
- d. Undertake comprehensive customs reforms to support trade facilitation
- e. Simplify procedures for goods in transit
- f. Simplify Customs clearance procedures and requirements based on the “quick wins” proposal

III. Improvement of Procedures for Effective National Single Window (NSW)

- g. Remove the dual language requirement
- h. Regarding the controlled and non-controlled items, it is recommended the use of 2-digit HS code classification or statistic code for approval process.

Industry Overview

Thailand is strategically located in the center of Southeast Asia, linking Southeast Asia with South Asia and China, through vital sea, air and land connections. International trade has expanded over 600 percent in the past two decades (Thailand Investment Review: TIR, BOI, October 2014) due to improved connectivity, making Thailand a regional hub for several industries. Nonetheless, the full realization of the ASEAN Economic Community (AEC) in 2015 together with the government’s objective to avoid the so called middle income trap requires Thailand to accelerate infrastructure development and improve the efficiency of the logistics system. The higher logistics efficiency in Thailand, the higher the competitiveness and attractiveness for foreign investment will become, especially in high-technology industries, which are dependent on fast and reliable supply chains.

According to the 2014 Global Enabling Trade Report by the World Economic Forum (WEF), it is estimated that by 2020 global GDP will increase by 1.78 percent as a result of trade facilitation measures, and the economic gains, excluding China, Japan and South Korea, are estimated at 7.97 percent. Numerous research points to the fact that trade-enabling measures promote competitiveness, attract foreign direct investment, deepen regional economic integration, and contribute to economic growth and employment.

In the WEF Enabling Trade Index 2014, Thailand is ranked 57th out of 138 countries covered, while Indonesia ranks at 58th, Malaysia at 25th and Singapore obtains the top rank. The Report shows that the most problematic factors for import into Thailand include the following:

Figure 27: Thailand's most problematic factors for importing, 2013

Most problematic factors for importing	Score*
Burdensome import procedures	22.2
Tariffs	19.4
Corruption at the border	14.4
High cost or delays caused by international transportation	12.3
High cost or delays caused by domestic transportation	12.1
Domestic technical requirements and standards	8.8
Inappropriate telecommunications infrastructure	7.1
Crime and theft	3.7

Source: World Economic Forum, 2014

Comparative to other ASEAN countries, Thailand ranked in the upper band as 46th out of 138 countries in terms of infrastructure development, however, behind Singapore (1st) and Malaysia (23th). One of the reasons can be explained by consistent relatively high logistics costs in Thailand. Thailand has been heavily relying on road

transport; around 86 percent of freight is moved by road, while only two percent is carried via rail (BOI 2014). As a result, it is necessary for the Thai government to take a serious step to reduce these transaction costs by extending infrastructure development and efficiency and improving procedures to trade across borders.

Table 3: Proportion of logistics costs to GDP

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012p	2013e
								r	r		
Transportation cost to GDP	7.4	7.1	7.9	8.2	7.8	8.2	7.1	7.3	7.3	7.4	7.4
Inventory holding cost to GDP	7.2	7.2	7.6	8.0	7.8	7.4	6.6	6.5	6.1	5.7	5.3
Logistics administration cost to GDP	1.5	1.4	1.6	1.6	1.6	1.6	1.4	1.4	1.3	1.3	1.3
Logistics costs to GDP	16.1	15.8	17.1	17.8	17.1	17.1	15.1	15.2	14.7	14.4	14.0

Source: NESDB, 2014

Table 4: Infrastructure quality ranking 2014–2015

	Road	Railway	Port	Air Transport
Hong Kong	7	3	4	3
Singapore	6	n/a	2	1
Korea	18	10	27	31
Taiwan	12	7	25	36
Malaysia	19	12	19	19
Thailand	50	74	54	37

Source: The Global Competitiveness Report (WEF)

In terms of infrastructure quality, Thailand's performance is not far below other countries in Asia. Thailand's road quality rank dropped dramatically from the 39th in 2011 to 50th in 2013 (WEF 2014). Repeating problems like incomplete road networks and bottlenecks at gateways and borders were still unsolved (Office of Transport and Traffic Policy and Planning, 2011). According to the WEF 2014, railroads appear to be the least efficient carriage system in Thailand. While Malaysia improved its position to the world's top twenty for best quality railroads, Thailand dropped two ranks to 74th in 2013. A similar situation occurred in both marine ports (54th) and airways (37th).

The Thai government has taken proactive action to reduce national logistics costs by implementing the Logistics Development Strategy (2013–2017). However, in order to develop Thailand as a regional logistics hub, it is acknowledged that logistics costs need to be reduced further. In this regard, the EABC support the initiative of the Board of Investment (BOI) regarding a new promotion

policy, offering tax and non-tax incentives to logistics projects. In addition, the ongoing implementation of the National Single Window (NSW) system and development of the Trans-Asian Highway, which will link most ASEAN countries, could also be key drivers of Thailand's competitiveness in the AEC.

With its strategic geographical location, Thailand has a unique opportunity to position itself as the leading logistics hub in ASEAN. The Government has clearly announced its objective to lower logistics costs significantly in order to improve Thailand's competitiveness in preparation for the AEC in 2015. The quality and cost of logistics services depend on conditions such as foreign ownership rules, opening hours of ports and airports, and customs operations. Challenges still remain, particularly in the extent of trade facilitation, market access, and liberalization in certain areas. Considering the rapid growth of global and regional supply chains, Thailand needs to overcome these challenges to enhance its competitiveness and further tap into global supply chains.

Despite the Government's laudable efforts to actively invest in upgrading Thailand's transport infrastructure, the regulatory framework for the provision and management of infrastructure services in Thailand is still complex and restrictions on foreign investment apply in all transportation services subsectors. Restriction of foreign equity ownership is a significant barrier for development and expansion of high quality transportation and logistics services. Thailand is therefore encouraged to continue its efforts towards trade facilitation as well as services liberalization. The following key recommendations of the transport and logistics sector are outlined below:

I. Market Access

Conducive policies are key to efficient and competitively priced logistics services and do not require a lot of government resources, but would still have a large positive impact and create important spill-over effects in the local industry.

Liberalizing logistics services: The ASEAN Logistics Roadmap contains a list of sectors where ASEAN member countries "shall endeavour to achieve substantial liberalization" by 2013. The objectives of the Logistics Roadmap are to "create an ASEAN single market by 2015 by strengthening ASEAN economic integration through liberalization and facilitation measures in the area of logistics services". The AEC further commits to allow for foreign (ASEAN) equity participation of 70 per cent by 2013. Current rules in the Foreign Business Act limit foreign direct investments in logistics services to 49 per cent equity ownership.

Gradual liberalization of the postal sector: According to the Postal Act of 1934, the Thai Government has the

exclusive right to handle postal services. Collection, delivery or handling of letters and postcards fall under a monopoly held by Thailand Post. Breach of the postal monopoly by private postal, courier or express delivery operators is currently subject to a fine of THB 20 for each letter and postcard that is delivered from abroad to an addressee in Thailand. This creates an uneven level playing field, since the monopoly also covers segments which are outside the scope of basic postal services (such as express mail).

Recommendations:

1. The AEC Blueprint stipulates that ASEAN Member States should allow for 70 percent foreign ownership in all logistics sectors by 2013. The EABC views that Thailand's commitment towards fulfilling these commitments – with clear targets and an ambitious timeline – is a necessary action to strengthen Thailand's competitiveness in light of the AEC entering into force in 2015 and interconnections in the Asia Pacific region.
2. We would recommend Thailand to go down the same path as many other countries in gradually opening the postal market for competition.

II. Customs Reform for Trade Facilitation

To support the Government's aspiration of establishing Thailand as a regional transport and logistics hub in ASEAN, the EABC's Transport and Logistics Working Group would like to propose several recommendations related to customs reform and trade facilitation.

Trade facilitation seeks to reduce the transaction costs faced by exporters and importers to stimulate trade, investment and improve productivity. Customs plays a critical role in facilitating trade as customs and other border procedures have a direct impact on trade costs. Streamlined procedures, simplified documentation requirements and automation are the most critical aspects for efficient customs clearance procedures.

The Thai Customs Department has in the past decade introduced a number of laudable initiatives, such as an automated clearance system and simplified procedures for reliable traders. However, there are certain aspects that have an adverse impact on these measures:

- The **legal framework lacks sufficient clarity** and therefore becomes subject to interpretation from individual customs officials. Detailed and technical guidelines are not always made publicly available, which makes enforcement and customs clearance procedures a source of uncertainty for the business community.
- The current **reward and penalty scheme** within Customs encourages individual customs officials to take an aggressive and rigid stance in customs clearance, including customs valuation, document inspection, controls and audits, in order to get rewarded even for minor, administrative errors. There are insufficient checks and balances on both the powers and authorities of Customs as well as recognition of compliant practices of the trading community. There should be no arbitrary application of regulations or regulations written in a manner

which is unclear, making compliance by the trading community confusing and subjective. Current Thai regulations are not only unclear, but also subjective to internal contradictions and varying interpretation. In addition, there should be limits and specific conditions before any reward or incentives should be accorded to the Customs Department.

- The Customs should **recognize reasonable care by the trading community** to encourage compliance with laws and regulations. This addresses intent of a non-compliance of violation: distinguishing between unintentional non-compliance versus intentional/fraudulent violations. Other countries, like the U.S, have clear programs that encourage companies to voluntarily comply with regulations, recognizing reasonable care, allowing the trading community to voluntarily disclose errors/violations without attracting significant penalties etc. It should not be the case that all cases be deemed fraudulent and therefore attract significant penalties.
- Customs has during the last year **re-introduced certain manual procedures**, despite the existence of a well-functioning electronic customs clearance system.

In light of the above and in order to improve Thailand's competitiveness, stimulate trade, and lower logistics costs, we proposed the following measures to be considered:

- **Undertake comprehensive customs reform:**

There is scope to undertake comprehensive legal and administrative reform and overhaul the Thai Customs administration. This could include corporatization of the Thai Customs Department, introducing a different governance or management structure within the Customs Department and other relevant authorities. This is to ensure the following:

- i. Increase transparency, certainty and objectivity of customs processes and determination of imports, exports, regulations, and laws;
- ii. Align regulations and processes with international and regional best practices;
- iii. Enhance the professionalism of Thai customs officials;
- iv. Enhance accountability, checks and balances of Thai Customs officials;
- v. Ensure Thai Customs officials are remunerated fairly;
- vi. Eliminate the current system of financial incentives in the Thai Customs penalty regime, or introduce specific conditions where incentives are allowed or disallowed for e.g., incentives allowed only when revenue collection exceeds the annual targeted budget or cases where there is clear fraudulent intent etc.;
- vii. Clearly indicate ways companies can comply with regulations by making them transparent and objective, and accept the concept of “reasonable care”, submitting voluntary disclosures, publishing guidelines for compliance etc. when enforcing customs requirements;

viii. Indicate channels for appeals by the trading community which are fair, objective and non-bureaucratic where there are disputes with the Customs Department;

- ix. Clearly state service commitments of the Customs Department vis-a-vis the trading community, and likewise the expected commitments from the trading community to the Customs Department;
- x. Increase trade facilitation in application of customs controls.

- **Simplify procedures for goods in transit:**

Thailand’s current regime for goods in transit particularly affects cross-border road freight services and works against the government’s objective of establishing Thailand as a logistics and transit hub. The current regulations do not allow loading in the same vehicle goods in transit and goods for import, unless all goods are formally imported into Thailand i.e., even goods in transit. For example, Sadao, being one of the major border crossing points in terms of number of vehicles and volumes, is not a pre-approved transit point, meaning that all vehicles passing in transit have to go through separate approval procedures.

- **In the short run, several “quick wins” to simplify Customs clearance procedures and requirements are proposed:** these “quick wins” could have a large impact on trade facilitation but would not require large government resources.

- i. A so called **de minimis** regime provides streamlined border clearance and exemption from customs duties and other taxes below a specified threshold. The introduction of an appropriate de minimis facilitates, trade promotes e-commerce, and lightens the workload for customs clearance by adopting a more focused approach towards higher value shipments. Most ASEAN economies already have de minimis arrangements but they vary considerably. In Thailand, the threshold is currently only THB 1,000 (around USD 27), compared with USD 50 in Cambodia and Vietnam and RM500 in Malaysia. A study has shown that the net economic benefits to Thailand with a de minimis threshold of USD 200 would be USD 43.4 million per year, whereas the corresponding figure with a USD 100 de minimis threshold has been estimated at USD 27 million per year.
- ii. One section in the Customs Regulations (Customs Notification 39/2554, section 2.2.4) allows express carriers to use a pre-determined “Freight Zone” rate in the Cost Insurance Freight (CIF) customs value of shipments for import duty calculation. The Post Audit team of the Thai Customs Department has indicated that they will aggressively pursue importers and penalize them for non-compliant customs values during a post clearance audit.

Recommendations

1. EABC recommends that rewards are only allowed where revenue collection exceeds current budgeted targets set by the Ministry of Finance, or for cases which have clear fraudulent intent. This is to prevent abuse of the reward and penalty scheme.
2. Meanwhile, the Customs Department should take into account “reasonable care” by recognizing internal compliance programs of traders, publishing clear guidelines on how to comply and allowing for inadvertent/unintentional errors by the trading community. This does not exist in Thai Customs’ legal and enforcement framework at the moment.
3. Thailand should simplify procedures for goods in transit and align them with international standards. As a first step, Thailand should ratify all relevant ASEAN agreements and protocols regulating goods in transit, and ensure that they are transposed into Thai law.
4. Remove all duplicative and manual procedures.

III. Improvement of Procedures for Effective National Single Window (NSW)

Thailand's National Single Window application, known as the Paperless Clearance System, was launched in 2008. While the new system has enhanced the clearance process, it requires formal import and export customs entries to be performed in both English and Thai languages. This requirement is not trade-friendly and is not aligned with international best practices. In particular, this is also in contravention with the current Thailand Customs Law, Section 113, which only requires the submission to be performed in either English or Thai language. Customs officials often find 'errors' in the translation so that they can impose fines. This is due to the fact that Customs implements a system of reward/commission in case an individual Customs officer finds cases of non-compliance.

Additionally, the Customs' classification HS tariff code is interpreted differently among the relevant official authorities. This causes difficulty for importers to match the HS code of their products with the required classification list at the detailed digit code (4–6 digits). For example, some life science products, which are so called "non-controlled items", have to use the same tariff code as controlled items for customs clearance, such as blood for laboratory tests. However, blood for lab tests is not considered a controlled item by the Thai Food and Drug Agency (FDA). Since express customs procedures are not allowed for controlled items, every time blood samples are imported to Thailand, they need to be processed through formal customs clearance. This adds considerably to the customs clearance lead time for laboratories and hospitals in Thailand. As a consequence, it works against the government's

aspiration of making Thailand a life sciences hub in ASEAN. With the same issues occurring with other kinds of products e.g. medical devices and hazardous substances, it causes unnecessary delays in importation of non-controlled items, which in turn may undermine the country's economic efficiency.

Recommendations

1. The EABC would highly recommend that Thai Customs remove these dual language requirements, which are a source of uncertainty and additional cost and time required for customs clearance. In short, traders should be accorded an option to affect the customs entry in either English or Thai, not both.
2. The use of 2-digit HS code classification or statistic code for approval process. Regarding the controlled and non-controlled items, to avoid confusion, it is recommended that the Thai Customs Department issues completely separate tariff codes for controlled and non-controlled items, respectively. This will facilitate the import of non-controlled items.

Annex I: EABC's Comments on Draft Customs Bill B.E. ...

Draft Customs Bill, B.E. ...	Comments
<p>Section 164 Any person who imports or brings into the Kingdom any tax-unpaid goods or any goods which have not duly passed through Customs, or exports or takes such goods out of the Kingdom, or assists in any way in importing or exporting or removing or assisting in removal of such goods from any ship, quay, airport, godown, warehouse, place of security, or store room without due permission, or provides the place to store, keep or conceals such goods, or permits or arranges for other persons to do so, or is involved in any way in carrying or moving, or dealing in any manners with, such goods, shall for each offence be liable to <u>a fine of 4 times the duty-paid value of the goods</u> or to imprisonment for a term of 3 months up to 10 years, or to both.</p> <p>The acts stipulated in this section shall be deemed offenses <i>regardless of whether they were intentional</i> or effected by carelessness.</p> <p>Any goods related to the offences under this Section shall be forfeited regardless of whether any person must be penalized or not.</p>	<p>1. Penalties: The fine of 4 times the duty-paid value of the goods, in our opinion, disregards the notion of intent. In our opinion, offenses proved to be unintentional should be penalized commensurately. <i>We, therefore, propose that the fine be <u>not exceeding 4 times the duty-paid value of the goods</u>.</i></p> <p>2. Intention: The 2nd paragraph of Section 164 of the Draft explicitly disregards the actor's intention. However, we are of the opinion that the acts under Section 164 may, in fact, be affected intentionally or unintentionally. Therefore, <i><u>we propose that the 2nd paragraph of Section 164 of the draft be removed.</u></i></p> <p><i>As an example, the United States' 18 U.S. Code §145 regarding smuggling into the United States defines the scope of offense by clearly stipulating, "Whoever knowingly and willfully, with intent to defraud the United States, smuggles...." Such language reflects the recognition that smuggling may be affected intentionally or unintentionally, and only the intentional smuggling is an offense under said law.</i></p>

Draft Customs Bill, B.E. ...	Comments
<p>Section 165 Any person who imports or brings goods into the Kingdom, or exports or takes goods out of the Kingdom, or is involved in any way in importing or exporting goods by <u>evading, or attempting to evade, the payment of customs duty, with intent to defraud</u> the government of the tax payable on the goods, shall, for each offense, be liable to a <u>fine of 0.5 times to 4 times the additional amount of duty payable, or imprisonment for a term of not exceeding 10 years, or to both.</u></p>	<p>We agree with Section 165 of the Draft, which clearly requires that for an act to be considered an offense under this Section, there must be fraudulent intent. We also see support <i>the fine calculation based on the amount of additional amount of duty payable rather than on the duty-paid value of the goods.</i></p>
<p>Section 166 Any person who imports or brings goods into the Kingdom, or exports or takes goods out of the Kingdom by violation of restriction or prohibition applicable to such goods, shall, for each offense, be liable to <u>a fine as per the law prescribing that prohibition or restriction, or to imprisonment for a term of 3 months up to 10 years,</u> or to both.</p> <p>The acts stipulated in this section shall be deemed offenses <u>regardless of whether they were intentional</u> or effected by carelessness.</p> <p>Any goods related to the offences under this Section shall be forfeited regardless of whether any person must be penalized or not.</p>	<p>1. Penalty: We propose that the penalty, be it fine or imprisonment, under Section 166 be as per the legislation prescribing the prohibition or restriction.</p> <p>2. Intention: The 2nd paragraph of Section 166 of the Draft explicitly disregards the actor's intention. However, we are of the opinion that the acts under Section 166 may, in fact, be affected intentionally or unintentionally. Therefore, <u>we propose that the 2nd paragraph of Section 166 be removed.</u></p>

Annex II: Continual Recommendations on FBA by Sector

• **Financial services: banking and insurance**

Due to the sector specific legislation, Thailand's **banking industry** remains restrictive to foreign participation. Currently, the largest five domestic commercial banks control over 60 percent of the retail banking market with limited forms of competition. Stringent conditions for potential new foreign entities include majority ownership restrictions, limitations on the number of branches (a maximum of three for branches and 20 for subsidiaries), rules on minimum capital requirements and origin of assets and high joining fees for the retail payment system. Incoming foreign banks have also reported substantial administrative burdens and lack of transparency and certainty on legal and tax areas. As a result of the 1997 crisis, foreign banks were permitted to own majority shareholdings in selected troubled local banks for a period of 10 years. After 10 years, the foreign ownership will have to be diluted to 49 per cent before any foreign capital increases are allowed. This amounts to a forced asset sale.

In addition, Thailand has Special Financial Institutions (SFIs) who are governed by a special Act under the Ministry of Finance. These financial institutions – currently eight banks – account for 23 percent of banking assets and 26 percent of deposits in the system, and as they are not subjected to BOT oversight and regulation, often these banks compete with commercial banks on an uneven playing field. While they can be deemed to be systemically important, these financial institutions are not governed by the Bank of Thailand, and hence are not subjected to the special prudential measures nor the FIDF fees imposed on commercial

banks. Since the revision of FIDF fees to 45 basis points (bps), the Constitution Court has ruled in favour of a decree to allow transfer of FIDF debt by collecting 46 bps from all commercial banks and four state owned banks. The four are the Government Savings Bank, the Government Housing Bank, the Bank for Agriculture and Agricultural Cooperatives and the Islamic Bank of Thailand. The commercial banks paid the fee starting in July 2012, but the state-owned banks have not paid because of unclear enforcement.

Foreign participation in the **life and non-life insurance sector** remains restricted and has been further limited with the enactment of the Insurance Act of 2008, which requires existing foreign majority controlled life and non-life insurance companies to amend their voting share structures to become majority Thai controlled by 2013. As a result of the post-flood situation, Thailand has approved increases of foreign equity in insurance companies from the 25 percent cap to re-capitalize the cash-strapped Thai insurance sector. This however has only happened on a case-by-case basis.

At the same time, Thailand is contemplating relaxation of foreign investment in the insurance sector to up to 49 percent foreign equity, paving the way to prepare for intense competition under the AEC in 2015. Nonetheless, there has been no formal notice issued that clearly states that those limits no longer apply from a certain date. To progressively liberalize trade in financial services within ASEAN, Thailand is also working towards recognition of professional qualifications (such as insurance intermediation, brokerage) with a view to facilitating

their movement within the region. Unfortunately, this again has not led to concrete, measurable results of improved market access.

In an effort to increase foreign participation in the market, Thailand plans to remove the 75 percent voting rights ('voting share sold') and management control restrictions under the existing Insurance Act of 2008, which requires foreign insurance companies to restructure by 2013 to reflect Thai control. Failing to comply with such restrictions will be subject to penalty under the existing insurance laws of 2008 including prohibition of business expansion.

It is worth noting that the foreign equity caps in the insurance sector are much more restrictive than in other parts of the services sector and this is regarded as a key market access obstacle which needs to be addressed.

Transfer of credentials and professional qualifications, restrictions to cross-border supply (even if mode 1 and mode 2 are fully bound), lack of competition resulting in high premiums and restrictions on innovative products, i.e. medical insurance, are other industry concerns. In addition, where industry innovation has taken place and new product ranges are approved, discriminatory tax treatment has not allowed these products to become successful. An example of this is the unit linked business from life insurers.

The IT and non-IT offshore regulations, although issued, may open up the possibility of future on-shoring of

services. All banks should have the freedom to choose their suppliers, whether onshore or offshore to enable the most optimum and efficient level of service.

● **Retail and wholesale industry**

The **retail and wholesale industries**⁹ are captured under the FBA List 3 businesses. In addition, license to operate these wholesale and retail businesses must be obtained per location and there is no prescribed timeframe for the awarding process. Regarded as specific issues of concern of European investors, the limitations to operate under the FBA have been hindering European businesses' ability to compete on an uneven playing field and to implement the most efficient operational models for the benefits of consumers.

In the past, the government was trying to prepare a Retail Act to regulate the retail and wholesale industries in order to give the administration discretionary power to oversee the licensing regime and issue criteria to define 'fair' business practices and locations of store expansion and new openings. Among fair business practices, the draft law aims to regulate the relationship between suppliers and distributors and impose a so-called 'fair margin'. Arguably, the genuine purpose of the Act appears to be to give the administration in the Ministry of Commerce the means to react on developments in the distribution sector on a case-by-case basis without transparent and open scrutiny, while giving room for potentially discriminatory actions. Although efforts to push for the enactment of the Act seem to be put on hold, it is important to closely monitor potential

⁹Retail sale of goods of all types with the total minimum capital in the amount lower than one hundred million Baht or with the minimum capital of each store in the amount lower than twenty million Baht; Wholesale of all types with the minimum capital of each store in the amount lower than one hundred million Baht

developments to ensure that this does not lead to unfair, discriminatory practices on certain hyper-marts and superstores, discount stores, supermarkets and convenience stores, to the detriment of legitimate business interests.

• ICT

In telecoms services, category 1 licenses are restricted by reference to List 3 of the FBA, whereas for categories 2 and 3, the Telecom Business Act and the Foreign Dominance Notification govern foreign ownership. While there is at least one case of specific approval for majority foreign ownership in category 1, the policy of allowing it should be the norm rather than the exception. This is important for innovation and better supporting

end-to-end, global services. The EABC recommends the removal of the Foreign Dominance Notification as it sends the wrong message to investors and adds to regulatory compliance costs without adding any real value. Please also refer to the ICT section of this paper.

• Services Liberalization under AEC

The EABC appreciates the positive development in March 2013 with respect to the review of List 3 in the FBA to remove restrictions in certain areas of financial services¹⁰. We welcome more progressive development in Thailand's services liberalization via AEC participation, which aims to improve capacity, quality and competitiveness in the face of increase globalization. Thailand has been undertaking preparatory steps in

¹⁰The Amendment of the Category of Business under the Foreign Business Act B.E. 2542

The Ministry of Commerce amended the category of business under the Foreign Business License Act B.E. 2542 by issuing the Royal Decree for the Amendment of list 3 (13) annexed to the Foreign Business Act B.E. 2542 as follows: "(13) Internal trade related to traditional agricultural products or produce not yet prohibited by law unless the future trading of traditional agricultural goods in Thailand's future trading market of traditional agricultural goods without the delivery or the receiving of the domestic agricultural goods." The effective date of this Royal Decree is from 23 March 2013 onwards. By this Royal Decree, foreigners can operate the future trading of traditional agricultural goods in Thailand without the delivery or the receiving of the domestic agricultural goods without the business license under the Foreign Business Act.

New Ministerial Regulations Prescribing Businesses which are not listed in the List 3(21) of Lists Annex to the Foreign Business Act B.E. 2542

The Ministerial Regulations determines the following businesses to be service businesses which are not listed in (21) of the list 3 annex to the Foreign Business Act B.E. 2542, thereby rendering them not subject to foreign ownership restrictions under the FBA, as follows:

- (1) Securities and other businesses according to the Securities and Stock Exchange Laws
 - b. Securities Trading
 - c. Investment Advisory Service
 - d. Securities Underwriting
 - e. Securities Borrowing and Lending
 - f. Mutual Fund Management
 - g. Venture Capital Management
 - h. Credits Granting to Securities Business
 - i. Financial Advisory Service
 - j. Securities Registrar Service
 - k. Client's Assets of Securities Companies or Client's Assets of Derivatives Entrepreneurs
 - l. Private Funds Custodian
 - m. Mutual Funds Supervisor
 - n. Bondholders' Representative
- (2) Derivative Business according to Derivatives Law – (a) Derivative Dealers (b) Derivative Advisors (c) Derivative Capital Managers
- (3) Trustee Business according to Trust for Transactions in Capital Market Law.

By this Regulation, the mentioned businesses in (1)–(3) do not fall under the Foreign Business Act. However, they are still under the Securities and Stock Exchange Laws, the Derivatives Law and the Trust for Transactions in Capital Market Law as the case may be.

liberalizing trade in services under the ASEAN Framework Agreement on Services (AFAS)¹¹ and the AEC Blueprint. All of the main elements of the services sector, namely business services, communication services, construction and related engineering services, distribution services, education services, environmental services, health related and social services, tourism and travel related services, recreation, cultural and sporting services and transport services, are included under the schedule of commitment. Further improvement of liberalization, in terms of wider sector coverage and a deeper level of commitment, is also envisaged as targeted in the AEC Blueprint. Overall, however, it is regrettable that tangible progress in this respect is not yet forthcoming and commitments seem weak.

The EABC strongly believes that rationalizing the regulatory regime and increasing competition in Thailand's services sector could help to enhance innovation and productivity, and hence increase the competitiveness of the Thai economy as a whole, while also supporting and enabling Thai businesses to compete overseas. Progressive liberalization and healthy competition is encouraged to ensure sufficient and sustainable economic growth in the services sector. An increase in foreign participation will attract investment and transfer of technology and will be to the benefit of consumers, through cheaper and better services. Admission and temporary employment of foreign workers also

introduces more flexibility into the already tight labour market in Thailand given the country's serious shortage of skilled labour. To enable Thailand to position itself as a regional and international hub for the export of services, it would be important to ensure the business community's confidence with a concrete policy roadmap towards progressive liberalization. Essentially, this should also provide a meaningful drive for long-term development in the manufacturing sector, as well as increased tax revenues for the government.

¹¹Recognising the growing importance of trade in services, ASEAN countries officially launched their joint effort to work towards free flow of trade in services within the region through the signing of ASEAN Framework Agreement on Services (AFAS), aiming to substantially eliminate restrictions to trade in services among ASEAN countries in order to improve the efficiency and competitiveness of ASEAN services suppliers. AFAS provides guidelines for ASEAN Members to progressively improve Market Access and ensure National Treatment for services suppliers among ASEAN countries. AFAS rules are consistent with the General Agreement on Trade in Services (GATS) of the WTO, and shall be directed towards achieving commitments beyond Member Countries' commitments under GATS – known as the GATS-Plus principle. (Source: ASEAN Secretariat, <http://www.aseansec.org/6626.htm>)

Annex III: Restrictive Regulatory Constraints Pertaining to the Importation of Hazardous Substances

- **Department of Industrial Works' (DIW) existing regulations for hazardous substance imports**

a) *Requirement for information that may be confidential business information, in obtaining classification ruling, registration and import permit application*

Requirement	Legal Reference	Difficulties for Business
Name and location of manufacturer This information must be disclosed in obtaining a classification ruling, registration and import permit application.	<ul style="list-style-type: none"> – MoI Notification regarding Registration, Issuance of Certificate and Renewal of Certificate for Registration of Hazardous Substances under Department of Industrial Works' Responsibility B.E.2552 – DIW Notification regarding Classification Ruling for Chemicals/Products that may be Hazardous Substances per the Hazardous Substances Act B.E.2535, under Department of Industrial Works' Responsibility B.E.2551 	<ul style="list-style-type: none"> – Manufacturer information is not required to be disclosed according to international guidelines from the Globally Harmonized System of Classification and Labelling of Chemicals (GHS), under the United Nations' auspices – The GHS guidelines direct, however, that the name of the supplier be disclosed in the safety data sheet. In today's supply chains, the supplier may not be the same as the manufacturer, in which case the supplier will normally hesitate to disclose to its customer from which manufacturer the substance is sourced, as the customer may decide to purchase directly from the manufacturer. – Such deviation from international practice causes difficulties for the importers in obtaining the manufacturer information for use in getting a Classification Ruling, registration or import permit application.
Full chemical composition This information must be disclosed in obtaining a classification ruling	<ul style="list-style-type: none"> – DIW Notification regarding Classification Ruling for Chemicals/Products that may be Hazardous Substances per the Hazardous Substances Act B.E.2535, under Department of Industrial Works' Responsibility B.E.2551 	<ul style="list-style-type: none"> – Full chemical composition is normally the manufacturer's confidential business information, and in many cases the supplier may not have access to such information. – The GHS guideline only directs that the safety data sheet show only the hazardous components – Such deviation from international practice (e.g. EU REACH framework focused on substances rather than mixtures, with possibility of Only Representative intermediaries) causes difficulties for the importers in getting a Classification Ruling from the competent authority in order to be able to fully comply with all relevant rules, because the importers cannot obtain full chemical compositions information and lack internal expertise to make proper classification by themselves.

b) Lack of Procedure Specific to Importation of Samples

Businesses may need to import samples of chemicals that may be hazardous substances, for use in test or trial before deciding to make further purchases in large quantities, or for use in the research and development activities. Although the quantity is small, businesses may still want to fully comply with all relevant rules. However, they are faced with the problem of the complex and lengthy procedures for getting a Classification Ruling, registration and import permit application (particularly where disclosure of confidential business information is necessary and in the cases of lab-test samples which may be completely new substances not yet registered anywhere), although it is uncertain whether there will be future purchases or orders.

Such a problem hinders the importation of new chemicals for use in test, trial, or research and development activities to improve productivity and production technology, which will in turn enhance the local business' competitiveness. If Thailand truly strives to promote technological development, it is crucial that the country's regulations are made conducive to the undertaking of relevant activities by the private sector.

• **Department of Industrial Work's new regulations for hazardous substance imports**

The DIW January 2015 notification on protection against dangerous goods introduces a new regulatory layer for a "group of substances classified by characteristics" that were until then considered as non-dangerous since they did not appear on Thailand's List of Hazardous Substances. These substances, if exhibiting one of the 10 listed characteristics will, after the enforcement of the new regulation, be considered at least as DG1

substances and will require a specific reporting to DIW when imported in quantities over one metric ton (mt) per year, for further evaluation by DIW. Although business operators are not unfamiliar with the concept introduced by this new regulation which seems to have common grounds with the REACH-like framework, they are concerned by the fact that this regulatory layer is superimposed on top of an existing control mechanism which they are already struggling to comply with, because of the trade secrets disclosure issues that it creates in practice. The business community, eager to comply with Thai regulations, urges the Ministry of Industry and the Department of Industrial Works to take the opportunity – given Thailand's objective to introduce a REACH-like regulatory framework – to reform the current laws and introduce pragmatic mechanisms, in line with international practices, that operators will be able to comply with.

If and when the funding chapter of the current regulation is reformed (including the current standard "100 percent mixture composition disclosure requirement by the manufacturer"), then an additional layer, as suggested by the new regulation draft, can be contemplated, including the reporting of non-regulated substances exhibiting some characteristics considered as hazardous, in order to feed a national chemical database and advance Thailand on the path to a REACH-like regulatory framework.

Annex IV: The regulations of the Office of the Prime Minister on Procurement B.E. 2535 (1992)

The Prime Minister's Office Procurement Regulation B.E. 2535 (1992) stipulates in Sections 60, 61, 62, which address the remit of pharmaceutical and medical product spend by governmental agencies, grant most favoured treatment to the GPO.

- o Section 60 requires that hospitals affiliated to the Ministry of Public Health must spend 80 per cent of their allocated health budget on medicines listed in the National List of Essential medicine (NLEM) while other government hospitals must spend 60 per cent of their budget on the same.*
- o Section 61 requires that products produced by or supplied by the GPO must be selected for procurement by funds drawn from the state coffer over other choices at prices which may be three per cent higher than the next candidate.*
- o Section 62 indicates that in the event the GPO does not produce but can supply, first right of refusal to supply must be given to the GPO at prices which may be equivalent to other suppliers; the same privileges are accorded to suppliers sub-contracted by the GPO.*

In addition, the **Thai Drug Act (1967)** also provides additional operating privileges to the GPO with respect to regulatory requirements. Section 13 of the aforesaid Act exempts the GPO from regulatory approval to produce, sell and import pharmaceutical products for both commercial and non-commercial gains. In the commercial context, the circumvention reduces the time to market and reduces oversight in comparison to other suppliers thereby providing competitive trade advantage. The decision to register for marketing approval or not is voluntary for the GPO and not a mandatory requirement from the regulators. Concerns were raised when this privilege was retained in the Draft Drug Act which is presently under development by the Thai FDA.

Recently, as an instrument for cost containment, the GPO has acquired additional privileges even as a for-profit state enterprise. Since August 2012, the Ministry of Public Health had called for several rounds of price cuts with suppliers of single source products which are not listed in the National List of Essential Medicine (NLEM). The requests for submissions of substantial price reductions in an abbreviated timeline of many innovative products, still under patent protection with much uncertainty in criteria and scope, were further

augmented by the appointment of the GPO as the negotiator for the government. The resulting conflict of interest in the disclosure of commercial details to a for-profit state enterprise reduced cooperation and the required price cuts were not achieved. As a consequence, the Ministry of Public Health further empowered the GPO to:

- Be an exclusive importer, sourcing and importing generic drugs of selected items, some of which may remain under patent protection
- Facilitate the importation with fast track drug registration for selected items, even for non-essential or non-life-saving medicines as required by the normal fast track criteria
- Be the exclusive supplier of the selected generic items.



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