Procedure and Forms of Representation in Establishing Rights to Scent Marks: Comparative Lessons from the United States and the European Union for Vietnam

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ABSTRACT

Scent has become a deliberate instrument of brand identity in aviation, hospitality, retail and luxury goods, yet in Vietnam a scent cannot be registered as a trademark, because Article 72(1) of the Law on Intellectual Property still requires a mark to be a visible sign. Most proposals for reform stop at deleting the visibility requirement. This paper argues that such a change would remain ineffective unless it is accompanied by a workable mechanism for establishing rights, and it focuses on two elements of that mechanism: the filing and formality procedure, and the form in which an olfactory sign is represented in the application and in the register. Using doctrinal legal analysis and a comparative reading of the United States and European Union regimes, the study examines how applications are received and classified, which forms of representation (verbal description, chemical formula, physical sample, gas chromatography and mass spectrometry data, digital odour data, or a combination) are accepted, and how deficiencies are handled. The findings show two contrasting models. The United States accepts a detailed verbal description supported by specimens and resolves residual uncertainty through iterative office actions, so the description becomes the only content recorded in the register. The European Union, despite abolishing the graphical representation requirement in 2017, continues to apply the Sieckmann criteria and its electronic filing system offers no admissible format for smell, so applications fail at the formality stage. Measured against these models, Vietnamese law shows gaps in the filing form, the electronic filing system, the content and legal status of a description, the treatment of samples and technical data, and the time allowed for correcting deficiencies. The paper derives reform directions directly from these gaps: a dedicated scent-mark option and fields in the application form, a mandatory structured verbal description as the registered representation, samples and chromatographic data as supporting rather than defining evidence, a mandatory statement of the manner of use, and an extended, multi-round deficiency procedure. The paper further tests illustrative structured descriptions against the requirements of clarity, precision, objectivity, consistency and legal certainty, sets out the implementation requirements of the proposed procedure, and organises its recommendations into legislative, administrative, technological and institutional measures within a phased implementation plan.

Keywords: scent marks, olfactory marks, non-traditional trademarks, establishment of rights, representation of marks, formality examination, Vietnam

INTRODUCTION

Trademarks are no longer confined to words, logos and other signs that can be seen. Firms increasingly invest in proprietary scents to differentiate goods and services and to create an association with their commercial origin. Airlines diffuse a signature fragrance in cabins and lounges, car makers design the smell of an interior, and hotels and retailers use ambient scent as part of a consistent brand experience. In Vietnam the same trend is visible in aviation, hospitality, retail and financial services, yet enterprises that develop a signature scent have no trademark tool with which to protect it. Article 72(1) of the Law on Intellectual

Property continues to require that a mark be a visible sign, and this requirement survived the major 2022 amendment and the further amendment by Law No. 131/2025/QH15 [15].

Comparable systems have moved in a different direction. The first scent mark was registered in the United States in 1990 for a plumeria fragrance applied to sewing thread and embroidery yarn [11]. The European Union removed the graphical representation requirement when the reform that produced Regulation (EU) 2017/1001 took effect [6], and Australia includes scent expressly within its statutory definition of a sign [12]. Article 18.18 of the CPTPP requires each party to make best efforts to register scent marks [2]. Vietnam therefore faces growing pressure to recognise olfactory signs.

Most Vietnamese commentary treats the question as one of eligibility: whether the visibility requirement should be removed [27], [28]. That question is necessary but not sufficient. A right to a mark comes into existence in Vietnam through registration, so a scent becomes protectable only if it can pass through a filing system, be represented in an application, be examined and be recorded in a public register. Experience abroad shows that each of these steps can block protection even where the substantive law permits it [1], [8]. This paper therefore isolates the procedural and representational component of the mechanism for establishing rights and asks how it should be designed. The study has five objectives:

- To identify the characteristics of scent marks that make the filing procedure and the form of representation decisive for establishing rights.
- To compare how the United States and the European Union receive, classify and examine the formalities of scent-mark applications.
- To evaluate each available form of representation of an olfactory sign against the criteria developed in case law.
- To identify the gaps in Vietnamese law on filing, formality examination, the content of the application and the treatment of samples and technical data.
- To propose reforms derived from those gaps rather than from general policy preference.

Prior Scholarship and the Contribution of this Study

The international literature on scent marks is substantial, but its emphasis is particular. Work on non-traditional trademarks examines mainly whether olfactory signs satisfy the substantive conditions of protection, such as distinctiveness, functionality and the need to keep certain sensory features free for competitors [1]. Studies centred on the European Union analyse the Sieckmann criteria and their survival after the 2017 reform, and generally conclude that no available form of representation is adequate [8], [23]. The WIPO survey prepared for the Standing Committee on the Law of Trademarks catalogued the forms of representation used by national offices, but did not consider how they should be built into a filing and examination procedure [20].

Vietnamese scholarship is more recent and has been framed largely around compliance with Article 18.18 of the CPTPP. It has argued for removing the visibility requirement, for an express statutory reference to scent marks and for clearer distinctiveness criteria, and has suggested that applicants be allowed to combine several forms of representation, with digital odour data as a preferred long-term option [27], [28]. These contributions establish the case for eligibility but leave the operation of the registration system largely unaddressed.

Four limitations of the existing research can therefore be identified. First, representation is usually treated as a single threshold question, accepted or rejected, rather than as a set of documents with different legal functions. Second, the procedural architecture that determines whether a scent can be filed at all, namely the application form, the electronic filing system, the formality checklist and the deficiency procedure, is rarely examined, although European Union experience shows that it can block protection independently of the

substantive law. Third, reform proposals are seldom tested against concrete examples, or against the administrative capacity and costs of the office that would apply them. Fourth, proposals favouring technologically advanced forms of representation rarely consider their effect on access for small and medium-sized enterprises.

This study responds to each limitation. It draws a functional distinction between the document that defines the protected sign in the register and documents that merely support the application as evidence; it maps the procedural changes required at each stage of the Vietnamese registration procedure; it develops a structured verbal description and tests illustrative descriptions against explicit legal criteria; and it sets out implementation requirements and a phased plan with assigned responsibilities and evaluation indicators. Its contribution is therefore not a further argument for recognising scent marks, but an operational framework through which recognition could take effect.

Scope and Key Concepts

Mechanism for establishing rights. The term refers to the set of rules, procedures and institutions through which a registration authority receives an application, examines it, decides on it and records the resulting right. This paper covers only the first and most distinctive part of that mechanism for scent marks: filing, classification of the application, formality examination, the handling of deficiencies, and the composition of the application dossier. Substantive criteria such as distinctiveness and functionality, organisation of examination units and search databases are referred to only where they affect procedure or representation.

Form of representation. Because a scent cannot be placed on paper, it must be represented indirectly. The paper uses "form of representation" for any means by which the sign is fixed in the application and in the register: a verbal description, a chemical formula, a physical sample, the output of gas chromatography and mass spectrometry (GC-MS), digital odour data, or a combination of these. A distinction is drawn between a document that defines the protected subject matter and a document that merely supports the application as evidence.

Comparators. The United States and the European Union are chosen because they represent the two most developed and contrasting approaches: a pragmatic model that accepts verbal description and a stricter model built on the Sieckmann criteria. Australia, the United Kingdom and India are mentioned where they illustrate a particular point.

METHODOLOGY

The study adopts a doctrinal legal methodology. Primary sources are the Vietnamese Law on Intellectual Property [15], Decree No. 65/2023/ND-CP [9] and Circular No. 23/2023/TT-BKHCN [14]; the Lanham Act, the Trademark Rules of Practice and the Trademark Manual of Examining Procedure in the United States [17], [18], [19]; and Regulation (EU) 2017/1001, Implementing Regulation (EU) 2018/626 and the EUIPO Examination Guidelines in the European Union [5], [6], [7]. Leading decisions, in particular Sieckmann, Eden and In re Clarke, are analysed for the standards they set [3], [4], [11]. Secondary sources include WIPO documents and academic commentary [1], [8], [20]. In line with the doctrinal method, these sources are located, read and synthesised in order to state the law, identify gaps and inconsistencies within it, and propose how it should develop [21].

Analytical approach. The study is comparative and evaluative. For each stage of the procedure it describes how the two comparator systems operate, identifies the corresponding Vietnamese rule or the absence of one, and evaluates the difference against two principles that any mechanism for establishing rights must satisfy: clarity and consistency of the procedure, and complete, consistent and verifiable identification of the subject matter of the right. These two principles are made operational through the six evaluation criteria set out below.

Functional comparison. The comparison follows the functional method of comparative law, under which rules are compared according to the problem they solve rather than their formal labels [29]. The common

problem examined here is how a registration system receives, fixes and records a sign that cannot be seen. Rules that look different, such as a United States drawing exemption and a European Union list of admissible file formats, are therefore compared as alternative answers to the same question.

Selection of comparators. The United States and the European Union were selected on four criteria. (i) Depth of practice: each has a published body of legislation, examination guidance and decisions dealing specifically with olfactory signs, which allows procedure to be analysed from primary sources. (ii) Contrast: they represent the two coherent poles of current practice, a permissive model based on verbal description and a restrictive model based on the Sieckmann criteria, so that comparing them exposes the consequences of each design choice. (iii) Relevance to Vietnam: Vietnam's obligation on scent marks derives from the CPTPP, whose intellectual property chapter largely originated in the negotiating texts of the Trans-Pacific Partnership in which the United States played a leading role, while the European Union is a treaty partner of Vietnam under the EU–Vietnam Free Trade Agreement and its trademark concepts are frequently used as a reference in Vietnamese legislative work; any Vietnamese reform will therefore be read against both. (iv) Availability of authoritative sources. Australia, the United Kingdom and India are used only as illustrations, because their practice involves few registrations or closely tracks one of the two main models.

Selection of procedures and representation methods. The procedural stages examined are those through which every Vietnamese trademark application passes under Articles 108 to 119 of the Law on Intellectual Property: filing, formality examination, publication, substantive examination and grant [15]. The analysis concentrates on filing, formality examination and the handling of deficiencies, because these are the stages at which the form of representation is first tested and at which scent-mark applications in the European Union have failed. The representation methods examined are those that have actually been submitted to, or considered by, offices and courts in reported applications and decisions, namely verbal description, chemical formula, physical sample, chromatographic data, digital odour data and combinations of these [4], [7], [20]. Methods with no record of use in trademark practice are excluded.

Evaluation criteria. Each design option, whether an existing foreign rule or a proposal for Vietnam, is assessed against the six criteria in Table 1. Criteria C1 to C3 operationalise the two principles stated above; C4 and C5 capture administrative feasibility and access, which earlier work has largely left aside; and C6 tests whether the option can be inserted into the Vietnamese framework without creating inconsistency with other rules. The assessment is qualitative and uses a three-level scale (high, medium, low), with the reasons stated in the text.

Table 1. Criteria used to compare the United States and European Union systems and to evaluate their suitability for Vietnam

Criterion	Question asked	Source of the standard
C1. Procedural clarity and accessibility	Can an applicant declare and submit an olfactory sign through the prescribed form and electronic channel, and does the examiner have stated criteria for formal validity?	Principle of clear and consistent procedure; Articles 105 and 109 of the Law on Intellectual Property [15]
C2. Legal certainty of the registered subject matter	Does the registered representation allow the office and third parties to identify the sign clearly, precisely, objectively and durably, and in the same way at different times?	Sieckmann criteria [4]; Article 4(b) of Regulation (EU) 2017/1001 [6]
C3. Correctability	Can deficiencies be remedied through dialogue with the examiner before refusal, within defined limits?	37 C.F.R. § 2.62 [17]; Article 41 of Regulation (EU) 2017/1001 [6]
C4. Administrative feasibility	Can the office operate the option with realistic staff skills, equipment and cost?	Practice of the USPTO, EUIPO and IP Australia [7], [12], [19]

C5. Applicant accessibility	Is the option affordable and usable for small and medium-sized enterprises as well as for large firms?	Policy of support for small and medium-sized enterprises [26]
C6. Systemic compatibility	Can the option be inserted into the Vietnamese procedure consistently with other rules and with CPTPP commitments?	Law on Intellectual Property, Decree No. 65/2023/ND-CP, Circular No. 23/2023/TT-BKHCN, CPTPP Article 18.18 [2], [9], [14], [15]

Classifying weaknesses. Each weakness identified in Vietnamese law is assigned to one of four categories:

- Filing and classification: whether the application form and the electronic filing system allow an olfactory sign to be declared and submitted.
- Formality examination: whether the criteria for a formally valid application are defined for a non-visual sign.
- Representation and dossier: whether the law specifies what document fixes the sign, what it must contain and what legal value it has.
- Deficiency handling: whether time limits and the number of exchanges between examiner and applicant fit a sign for which no standard practice exists.

Three limitations should be noted. First, the study does not assess substantive criteria of protectability in detail. Second, observations about examination practice abroad are drawn from published rules, guidelines and decisions rather than from internal office data. Third, because Vietnam has no scent-mark applications on record, the analysis of Vietnamese law is necessarily prospective. Nothing in this paper constitutes legal advice.

RESULTS

Why procedure and representation are decisive for scent marks

For a word or figurative mark, the specimen attached to the application is the sign itself, and procedure is largely routine. For a scent mark, the subject matter cannot be placed in the file directly. Applicants have used verbal descriptions, chemical formulae, physical samples, technical analyses of composition, and combinations of these. Each method captures the sign to some degree, but none guarantees a complete and stable representation, so the same scent may be represented in several ways with unequal precision [20]. If the law does not specify which forms are admissible and how their validity is judged, the registration authority has no stable basis for determining the scope of protection and third parties cannot identify what has been registered. In the European Union, reliance on unstable forms of representation has been the main reason for refusal, including where a description was accompanied by an image [3].

Two principles follow. The first requires the filing and examination procedure to be clear, consistent and suited to the sign, so that applicants know what to submit and examiners do not decide by conjecture. Vietnamese law already applies this logic to sound marks: since 2022, Article 105(2) of the Law on Intellectual Property requires a sound mark to be filed as an audio file together with a graphical representation of the sound [15]. The second principle requires the subject matter to be identified completely, consistently and verifiably, so that the authority and third parties can check and re-identify it at different times. This is the logic behind the seven Sieckmann criteria: the representation must be clear, precise, self-contained, easily accessible, intelligible, durable and objective [4].

Receiving and classifying scent-mark applications

The first and decisive difference between the comparator systems lies in the application form. In the United States, the Trademark Rules of Practice provide that an applicant for a sound, scent or other non-visual mark is not required to submit a drawing but must instead provide a detailed written description of the mark [17]. In the Trademark Electronic Application System (TEAS), the applicant indicates that the mark is non-visual and enters the description as text, so the application is not routed through the stream designed for figurative marks and reaches examiners familiar with non-traditional marks [19].

In the European Union, Article 3(3) of Implementing Regulation (EU) 2018/626 lists the types of mark and the format in which each must be represented, while Article 3(4) allows marks of "other" types [5]. Smell is not among the listed types, and the EUIPO Guidelines state that olfactory marks cannot at present be represented in a way that satisfies the legal requirements with generally available technology [7]. Because the electronic filing system accepts attachments only in the formats prescribed for each mark type, an applicant has no admissible way to complete an electronic filing for a scent. The barrier is thus not only normative but also embedded in the architecture of the filing system. Other jurisdictions confirm the range of outcomes: the United Kingdom, Australia and Canada recognise scent marks in legislation and have registered a small number, India retains a graphical representation requirement although it has accepted a rose scent for tyres, and Japan and China exclude olfactory signs altogether.

The lesson is that a procedural or technical instrument, such as the design of a form or an upload field, can on its own prevent substantive rules from being applied. If Vietnam amends Article 72 without redesigning the application form and the electronic filing system at the same time, the right recognised on paper will not be obtainable in practice.

Formal requirements and validity of the application

At the formality stage the two systems diverge sharply. The United States Patent and Trademark Office (USPTO) applies a comparatively open regime: no drawing is required, and a precise verbal description of the scent is accepted together with specimens showing use, which for scent marks are typically scent-impregnated pads, cards, labels or packaging [17], [19]. The European Union applies a far stricter standard. Although Article 4(b) of Regulation (EU) 2017/1001 replaced graphical representation with a requirement that the sign be represented in the register in a manner enabling the authorities and the public to determine clearly and precisely the subject matter of protection [6], the EUIPO and the courts continue to apply the Sieckmann criteria. Verbal descriptions, chemical formulae, deposited samples and chromatographic data have each been rejected, so scent-mark applications in the European Union fail at the formality stage [4], [7].

On timing, the systems also differ. Section 1(a) of the Lanham Act requires use in commerce for a use-based application, but Section 1(b) allows filing on the basis of a bona fide intention to use, which lets an enterprise secure priority before launching a scent [18]. In the European Union no prior use is required for filing, while distinctiveness acquired through use may be relied on under Article 7(3) of the Regulation [6]. Combining these features would allow Vietnam to balance the need for evidence of use against the need to protect priority early, reducing the risk that a competitor copies a scent before it is protected.

Forms of representation of an olfactory sign

Verbal description. Because a scent exists as an olfactory stimulus, a description in words is the most accessible representation, but it suffers from the absence of a standardised vocabulary for smells. Scents are usually named after their source, such as strawberry, peppermint or sandalwood, which risks confusion with word or figurative marks. In Sieckmann, the description "balsamically fruity with a slight hint of cinnamon" was held insufficiently clear, precise and objective [4]. In Eden, the description "smell of ripe strawberries" was rejected because ripe strawberries do not have a single, uniform smell, and the accompanying image of a strawberry was considered even less precise because it depicts the source rather than the scent [3]. By contrast, the OHIM Board of Appeal accepted "the smell of fresh cut grass" for tennis balls in 1999, a

decision later criticised because the description cannot tell whether every variant of the smell of cut grass is covered [16]. In the United Kingdom, John Lewis of Hungerford confirmed that visual representation was not mandatory but gave no guidance on what alternative would suffice [13].

The United States treats the description differently. In In re Clarke, the mark was described as "a high impact, fresh, floral fragrance reminiscent of Plumeria blossoms". The description does not allow a reader to reproduce the scent, but its function in the United States system is identification, not reproduction [11]. Later registrations, such as the scent of Play-Doh modelling compound registered in 2018, follow the same model [10]. A key consequence is that the description is the only content entered in the register and the sole basis for determining the scope of protection; much of the examiner's work therefore consists of editing and standardising its wording [19], [20]. Australia offers a similar route, allowing a verbal description supported by an endorsement that assists searching, under which a eucalyptus scent for golf tees was registered in 2009 [12].

Chemical formula. A formula identifies a substance, not its smell. The Court of Justice held in Sieckmann that a formula does not represent the odour of a substance, because the perceived odour depends on concentration, temperature and the carrier, and that few people would recognise a scent from a formula, so it fails the requirements of intelligibility and accessibility [4]. Publishing the formula in a public register would also expose valuable trade secrets. The USPTO likewise does not accept a formula as the sole representation.

Physical sample. A sample is the most direct form, since the examiner and the public can smell the sign itself. However, volatile compounds evaporate and change over time, so a sample fails the durability criterion [4]. Article 3(9) of Implementing Regulation (EU) 2018/626 states that a sample or specimen does not constitute a proper representation [5]. The USPTO accepts scented specimens, normally as sealed scent strips or scented labels and packaging, but only as evidence of use at the time of filing, not as the registered sign [19]. When the scope of the registration must later be determined, the reference point remains the description, not the physical scent. This is an argument against heavy early investment in sample storage infrastructure in Vietnam.

GC-MS data and digital odour data. Gas chromatography separates the volatile compounds of a scent and produces a profile of their proportions, a kind of chemical fingerprint. The Court of Justice, OHIM and several national offices have not accepted chromatograms as a valid representation, and WIPO has noted the same limitation [7], [20]. Not every compound detected contributes to the perceived odour, and interpretation requires equipment and expertise that trademark offices do not have. Digital odour coding and electronic-nose technology would in principle satisfy durability, reproducibility, public accessibility and objectivity, but decoding devices are not in general use, and no trademark office has yet recognised this form [7]. A distinction must therefore be drawn between two functions of technical data: they cannot define the subject matter in the register, but they are valuable as internal, objective evidence when two similar descriptions must be compared or a claim in opposition must be verified.

Combination of forms. Sieckmann attempted to combine a formula, a description and a reference to a sample, and the Court held that the requirement could not be met by any of these forms or by their combination [4], reasoning that combining imprecise forms adds ambiguity rather than precision. The United States, by contrast, routinely combines a verbal description with a physical specimen, the description supplying the concept and the specimen the sensory experience, and this combination has proved workable in a number of registrations [10], [11]. Table ~~1~~2 summarises the comparison.

Table ~~1~~2. Treatment of forms of representation of scent marks in the United States and the European Union

Form of representation	United States	European Union	Implication for Vietnam
Verbal description	Accepted; the only content	Rejected as not clear,	Adopt as the mandatory,

	recorded in the register and the basis of the scope of protection	precise or objective (Sieckmann, Eden)	registered representation, with a prescribed structure
Chemical formula	Not accepted as the sole representation	Rejected: represents a substance, not an odour	Exclude as a representation; avoid disclosure of trade secrets
Physical sample	Accepted as a specimen of use, not as the registered sign	Excluded by Article 3(9) EUTMIR	Optional supporting evidence with safety and storage rules
GC-MS / chromatography	Not used to define the sign	Rejected as a representation	Supporting technical evidence; required only in defined cases
Digital odour data	Not recognised	Not recognised	Monitor technology; no present role
Combination	Description plus specimen accepted	Rejected even in combination	Description as the core, other forms as evidence

Assessment against the evaluation criteria. Applying the criteria in Table 1 explains why the verbal description is proposed as the registered representation. A structured verbal description rates high on procedural clarity (C1), correctability (C3), administrative feasibility (C4), applicant accessibility (C5) and systemic compatibility (C6), and medium on legal certainty (C2), its weakness lying in precision rather than in durability or accessibility. A chemical formula rates low on C2, because it identifies a substance rather than an odour, and low on C5, because publication would disclose a trade secret. A physical sample rates low on C2 for lack of durability and medium on C4 because it requires storage. GC-MS data rate medium on C2 when used as evidence, but low on C4 and C5 because of the equipment, expertise and cost involved. Digital odour data rate low on C1 and C4, because no standard file format or decoding device is in general use. The combination used in the United States therefore offers the best overall balance, provided that the description is structured and the other forms are confined to an evidential role.

Handling Deficiencies During Formality Examination

An important feature of USPTO practice is the office action. Where the dossier is incomplete or the description is inadequate, the examiner does not refuse the application at once but issues an office action identifying the deficiency; the applicant has three months to respond and may obtain one three-month extension [17]. Scent-mark applications commonly pass through more than one round, mainly concerning the wording of the description and supplementary evidence of distinctiveness; the Crayola crayon scent, for instance, was registered only in 2024 after a prosecution of about six years. This practice recognises that, for a sign without standard precedents, neither description nor evidence is likely to be adequate at the first filing and both must be refined through dialogue.

In the European Union the corresponding step is the notice of deficiency under Article 41 of Regulation (EU) 2017/1001, usually with a two-month period for remedy [6]. For scent marks, however, a deficiency notice tends to lead directly to refusal, because the problem lies in the nature of the representation rather than in a curable technical error, so the dialogue has little effect.

The Current Position under Vietnamese law

Filing and classification. Article 105 of the Law on Intellectual Property requires an application to contain a sample of the mark and a list of goods and services, a structure premised on a mark that can be printed or shown as an image [15]. The trademark application form (Form No. 08, Appendix I to Decree No. 65/2023/ND-CP) contains a box for the mark sample with size and copy requirements, but no field declaring the type of mark and no field for a description of the sign [9]. Even if Article 72 were amended, an applicant would have no administrative means to declare that the sign is olfactory. Article 89 permits electronic filing,

but the online system accepts only image formats for the mark sample, which reproduces the technical barrier seen at the EUIPO.

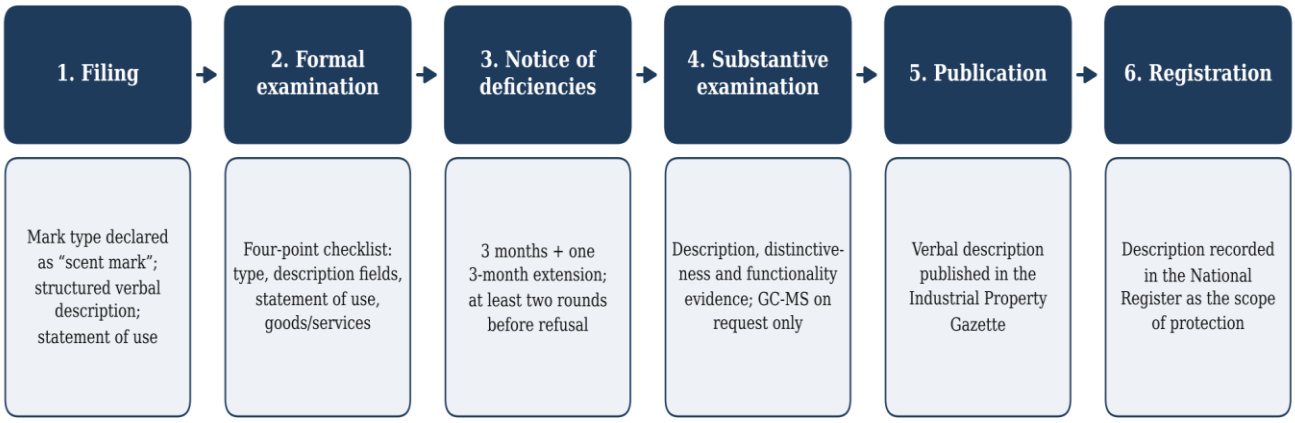
Representation and dossier. Vietnamese law contains no rule on a description of the sign: it is not a component of the application, its minimum content is not defined, and its legal value in determining the scope of protection is not stated. This gap is decisive, because without a recognised description the authority has nothing to enter in the National Register. The law is also silent on the safety conditions for receiving scented articles, their storage and replacement, and on the legal status of GC-MS results, that is, whether they are a representation, supporting evidence or of no legal value.

Deficiency handling. The law provides for notification of an intended refusal and an opportunity to respond, but the time limits and the number of exchanges are designed for traditional signs, whose dossiers are usually adequate at first filing [14], [15]. Applied unchanged to scent marks, these limits would cause most applications to be refused on procedural grounds before their substance had been properly examined.

A Proposed Procedure for Scent-Mark Applications

Drawing on these findings, Figure 1 outlines a six-stage procedure for scent-mark applications in Vietnam. It retains the existing sequence of filing, formality examination, substantive examination, publication and registration under the Law on Intellectual Property, but inserts the elements specific to olfactory signs at each stage.

Figure 1. Proposed procedure for establishing rights to a scent mark in Vietnam



At the filing stage the applicant declares the mark type and submits the structured description and a statement of use. The formality check is limited to the presence and structure of these elements. Deficiencies trigger a notice with an extended period and at least two rounds of correction. Substantive examination assesses the description, distinctiveness and functionality, with chromatographic analysis required only in defined situations. The verbal description is then published and entered in the National Register as the definition of the protected sign.

DISCUSSION

Two models and what they teach

The comparison reveals two coherent but different choices. The United States prioritises commercial effectiveness and the protection of investment in brand scents. It accepts a degree of uncertainty about the scope of protection, places the verbal description at the centre of the register, and leaves residual uncertainty to the courts in individual disputes. The European Union prioritises legal certainty and the public's ability to identify the protected sign with precision. Having abolished graphical representation, it has nonetheless kept the substance of the Sieckmann criteria and has not provided an admissible filing format, so that, in practice,

scent marks remain unregistrable [7], [8]. Neither model offers a perfect form of representation; each form has strengths and limitations, and suitability depends on the overall dossier.

For Vietnam, the United States model is the more realistic starting point, provided its main weakness, the vagueness of free-form descriptions, is addressed through a prescribed structure. A structured description satisfies the clarity and objectivity concerns behind Sieckmann better than an unconstrained text, while keeping the system operable. Its quality determines the quality of the whole system, not only because it defines the protected sign but also because, in the absence of an international classification of odours, it is the only tool available for searching and comparing earlier marks.

Gaps, Inconsistencies and Implementation Challenges

Three kinds of weakness can be distinguished. A gap exists where Vietnamese law contains no rule at all: on a scent-mark option in the form, on a description as a component of the application, on the treatment of samples and on the status of technical data. An inconsistency exists where a rule designed for visible signs would apply to olfactory signs with inappropriate results, as with the requirement of a mark sample and the deficiency time limits. An implementation challenge exists where a sound rule depends on infrastructure that does not yet exist, notably the electronic filing system, storage for scented samples, and laboratory capacity for GC-MS analysis. Experience at the EUIPO shows that the last category can neutralise the first two if reform is not synchronised.

Testing the Structured Verbal Description

The proposal that a structured verbal description should be the registered representation can be evaluated only through concrete examples. The template proposed for Vietnam has six fields: (F1) the mark type, declared as a scent mark; (F2) the reference odour, stated by the common name of a recognisable material, such as jasmine, lemongrass or agarwood; (F3) the olfactory family, chosen from a closed list to be published by the IP Office, such as floral, citrus, woody, aromatic, gourmand or musky; (F4) the composition of the impression, listing one dominant note and up to three secondary notes, each qualified as dominant, secondary or trace; (F5) the goods or services and the manner in which the scent is attached to them or diffused in connection with them; and (F6) an optional reference to supporting evidence, such as a specimen strip or a GC-MS report, which is kept on file but not entered in the register. Evaluative or emotive adjectives are not permitted in fields F2 to F4.

Table 3 applies the template to four hypothetical descriptions constructed by the author to illustrate typical cases, and assesses each against the requirements of clarity, precision, objectivity, consistency and legal certainty.

Table 3. Illustrative structured descriptions and their assessment (hypothetical examples)

Sample	Description as it would appear in the register	Assessment (clarity / precision / objectivity / consistency / legal certainty)	Likely outcome
A. Hotel services (Class 43)	Scent mark. A floral scent with jasmine as the dominant note, secondary notes of white tea and bergamot, and a trace of white musk, diffused through the ventilation system in the lobbies, corridors and guest rooms of hotels.	Clarity: met (one identifiable impression named by common materials). Precision: largely met (the note hierarchy narrows the range, but intensity is not quantified). Objectivity: met (no evaluative terms). Consistency: met if specimens and statement of use match. Legal certainty: medium-high (scope confined to a jasmine-dominant floral blend in the stated use).	Accepted at formality stage

B. Air transport services (Class 39)	Scent mark. A woody scent with agarwood as the dominant note, secondary notes of green tea and lotus flower, diffused in aircraft cabins and passenger lounges.	Clarity: met. Precision: medium ("lotus flower" is less standardised as a perfumery note and may require clarification). Objectivity: met. Consistency: met. Legal certainty: medium.	Accepted after one round of clarification
C. Hotel services (Class 43)	A luxurious, warm and welcoming fragrance that evokes the spirit of Vietnamese hospitality.	Clarity: not met (no reference odour or family). Precision: not met. Objectivity: not met (entirely evaluative). Consistency: cannot be assessed. Legal certainty: not met (scope cannot be determined).	Deficiency notice; refusal if not corrected
D. Dried fruit (Class 29)	The smell of ripe mango, applied to the paper packaging of the goods.	Clarity: medium. Precision: low (varieties and ripeness differ, as in Eden). Objectivity: medium. Consistency: low (the smell of the source varies). Legal certainty: low. The scent also describes the goods.	Deficiency notice to complete F3 and F4; likely refusal at substantive stage for lack of distinctiveness

The examples show that the structure does most of its work at the formality stage. An examiner can verify almost mechanically whether fields F2 to F4 are completed with non-evaluative terms (Sample C) and whether a bare source name has been supplemented by a family and a note hierarchy (Sample D). The remaining uncertainty concerns precision, because words cannot express concentration or intensity. For this reason the description defines the sign at the level of a perceived olfactory impression rather than a chemical composition, and Samples A and B illustrate the level of detail that is realistically attainable.

Distinguishing similar scents. The most serious difficulty lies in comparing scents that are close to one another. Experimental research shows that people can discriminate many odours they cannot reliably name, and that speakers of most European languages lack an abstract vocabulary for smells and rely on source names instead [25]. Perceptual ratings of the same molecule vary between individuals and with concentration [24], and published odour classification systems arrange the same odours in different ways [22]. Two descriptions such as "jasmine dominant, white tea secondary" and "jasmine dominant, green tea secondary" may therefore refer to scents that consumers cannot tell apart, while two scents carrying identical descriptions may be perceived differently. The framework addresses this in three steps. At the search and examination stage, earlier marks are retrieved by comparing fields F3 and F4, and identity of olfactory family and dominant note creates a presumption of similarity that the applicant may rebut. In opposition, invalidation or infringement proceedings, where the comparison is decisive, the office or court may order comparative evidence, such as a GC-MS comparison of the two products and, where perception is disputed, a structured sensory test with a panel, the cost being advanced by the party requesting it. Finally, the legal test remains the overall impression on the average consumer of the relevant goods or services, so that technical data inform but do not replace the legal assessment.

Boundaries of protection. Because the description is the registered sign, its wording must also mark the outer limit of protection. Three rules are proposed. First, protection extends to scents that create the same dominant impression in the described manner of use, not to the olfactory family or to the reference material as such: the owner of Sample A would acquire no right over jasmine scents in general. Second, a note qualified as a trace cannot by itself found a finding of similarity. Third, a description may be narrowed but not broadened after filing, consistent with the general principle that amendments must not expand the scope of the mark, and a description narrowed during examination is read in its narrowed form. These rules give

third parties a reasonable basis for assessing risk while accepting, as United States practice does, that some residual uncertainty will be resolved case by case.

Implementation Requirements of the Proposed Procedure

A procedure that is sound on paper may still fail if the office lacks the capacity to operate it. The requirements below are grouped according to the resources they involve.

Examiner training. Scent-mark applications should be assigned to a small specialised group of examiners already responsible for non-traditional marks. Their training should cover basic olfactory terminology and the published list of families, the evaluation of descriptions against the template, the reading of GC-MS reports to the extent needed to understand what they can and cannot show, and the conduct of comparisons in opposition. Calibration exercises in which several examiners assess the same set of descriptions, of the kind shown in Table 3, would allow the office to measure and improve the consistency of its decisions before the procedure is opened to all classes. Technical cooperation with WIPO and with offices that have examined scent marks, such as the USPTO and IP Australia, would reduce the cost of building this expertise.

Technical resources. Three resources are needed. The electronic filing system must provide a scent-mark option, structured text fields corresponding to F1 to F6, and an upload slot for supporting documents. If specimens are accepted, the office needs a secure, temperature-controlled and light-protected storage area with an inventory linked to the application number. GC-MS analysis should not be carried out in-house; instead, the office should maintain a list of accredited laboratories to which analyses ordered in the defined cases are referred, so that no investment in laboratory equipment is required in the initial phase.

Administrative costs. The main one-off costs are the modification of the application form and the electronic filing system, the drafting of guidance and the initial training. Recurring costs consist of examiner time, specimen storage and the periodic replacement of scent strips. Since scent-mark registrations remain few even in the United States and Australia, recurring costs are likely to be modest. The office should therefore not impose a surcharge that would deter applicants, but may recover the cost of a laboratory analysis from the party that requests it.

Applicant accessibility. The minimum dossier, consisting of the structured description and the statement of use, is within the reach of an enterprise without access to a laboratory. Model descriptions and a checklist published by the office would allow applicants to prepare a compliant description without specialist perfumery advice, and small and medium-sized enterprises could draw on the consultancy support available to them under the Law on Support for Small and Medium-sized Enterprises [26].

Safeguards against procedural abuse. A more flexible procedure also creates opportunities for abuse, such as filing deliberately vague descriptions to reserve a broad field, filing in bad faith to block competitors, or prolonging prosecution through repeated amendment. The framework contains several safeguards: descriptions that are purely emotive or limited to a family are rejected at the formality stage; amendments may not broaden the sign; the number of correction rounds before refusal is fixed at two, with any further round available only on payment of a fee and where the previous response has made substantive progress; third-party observations under Article 112 of the Law on Intellectual Property may trigger a requirement for supporting evidence; the statement of use provides a reference point for cancellation for non-use; and the general rules on bad-faith applications and on termination for five consecutive years of non-use continue to apply [15].

Justification of the proposed time limits. The proposed period of three months to respond to a deficiency notice, extendable once by three months, follows the response period that the USPTO applies to office actions under 37 C.F.R. § 2.62 [17], which has proved workable for scent marks. It reflects the time realistically needed to redraft a description with professional assistance and to obtain specimens or, where requested, a laboratory report. The shorter two-month period applied by the EUIPO [6] has not enabled scent applications to be rescued, although the main reason there lies in the substantive standard. The proposal does

not require the overall time limits in Article 119 of the Law on Intellectual Property to be changed: the one-month formality examination can be retained because the checklist is largely mechanical, and the period for substantive examination of trademarks, shortened to five months by Law No. 131/2025/QH15 [15], can also be retained, provided that, as under the existing rules on amendment and explanation, the time taken by the applicant to respond is not counted against the office. A minimum of two rounds is proposed because, for a sign without settled precedents, the first exchange typically clarifies the objection and the second allows the applicant to meet it; additional rounds would delay third parties who need certainty about the register.

Reconsidering priority processing. Granting priority processing to dossiers that include GC-MS data might seem to reward better evidence, but it would disadvantage small and medium-sized enterprises, for which a compliant laboratory analysis is a significant cost, and it would privilege a document that, under the proposed framework, does not define the sign. GC-MS data should therefore remain optional and confer no procedural advantage. Where expedited examination is available under the 2025 amendment, eligibility should depend on the completeness of the structured description and the statement of use rather than on technical evidence, so that the speed of examination reflects the quality of the dossier rather than the resources of the applicant.

POLICY RECOMMENDATIONS

The reform directions below are derived from the weaknesses identified. Table ~~2~~4 links each weakness to its category and to a proposed reform. To make them directly usable by policymakers, the recommendations are then grouped by the type of requirement they involve and placed in a phased implementation plan (Table 5).

Table ~~2~~4. Weaknesses in Vietnamese law and derived reform directions

Category	Identified gap or inconsistency	Derived reform direction
Filing and classification	Form No. 08 under Decree No. 65/2023/ND-CP has no mark-type field and no description field; the online system accepts only image files	Add a scent-mark option alongside word, figurative, three-dimensional and sound marks; add fields for a structured description, a statement of use and a list of evidence; update the e-filing system at the same time as the law takes effect
Formality examination	No formality criteria for a non-visual sign	Introduce a four-point checklist in the guidance on Article 109: (i) mark type declared as scent; (ii) all description fields completed; (iii) statement of use provided; (iv) goods and services within scope. Flag at this stage a description consisting only of emotive adjectives
Representation and dossier	No rule on a description, its content or legal value; mark sample presupposes a visible sign	Amend Article 105 and Decree No. 65/2023/ND-CP to make a structured verbal description the mandatory representation, replacing the mark sample, and to state that it defines the scope of protection
Representation and dossier	Samples and GC-MS data have no defined status	Treat samples as optional evidence with safety and storage rules; treat GC-MS data as encouraged but optional supporting evidence, mandatory only in defined cases
Representation and dossier	Manner of use of a non-visual sign is not documented	Require a statement of how the scent is diffused, where and on what goods or services, and how often
Deficiency handling	Time limits and rounds designed for traditional signs	Allow three months plus one three-month extension and at least two rounds of correction before refusal

Content of the structured description. The description should be presented in fixed fields: the common name of the scent under international nomenclature, such as jasmine or sandalwood; the olfactory family

used in perfumery, such as floral, woody, citrus, musky or spicy; the main notes where they can be identified; and the way the scent is attached to the goods or services. A description consisting only of emotive adjectives, such as warm, luxurious or pleasant, should be expressly declared inadequate, because it lacks technical content that could distinguish the sign or support a search. These elements correspond to fields F2 to F5 of the template tested above, and the complete template, including the mark-type declaration (F1) and the optional reference to supporting evidence (F6), should be set out in the implementing guidance.

Samples. Samples should be optional in the initial phase. If they are accepted, implementing guidance should define in advance the articles that will not be accepted for safety reasons, such as flammable liquids, fragile containers and biodegradable materials; require submission as sealed, scent-impregnated test strips rather than original bottles of essential oil; and set a cycle for periodic replacement.

Chromatographic data. GC-MS data should be encouraged but not mandatory~~, with priority processing for dossiers that include them~~, and their submission should confer no procedural advantage. The authority should be able to require an analysis in three cases: when valid third-party observations are filed, when a dispute arises over the scope of protection, and when the examiner has grounds to suspect confusion with an earlier scent mark, with the cost borne according to the general rules on expert assessment. Making such data mandatory would turn scent-mark registration into a privilege of well-resourced firms, because a compliant analysis is costly for small and medium-sized enterprises.

Statement of use. Unlike word or figurative marks, a scent mark is used in ways that cannot simply be photographed. A mandatory statement of the means of diffusion (air diffusion systems, products applied directly, scent impregnated in fabric or packaging), the place or goods concerned and the frequency of use would allow examiners to assess consistency of use, provide a basis for determining scope in disputes, and serve as evidence of use in proceedings for termination of protection.

Recommendations by type of requirement. The measures proposed in this paper fall into four groups, each with a lead institution.

- **Legislative requirements** (National Assembly; Government; Ministry of Science and Technology). Amend Article 72(1) of the Law on Intellectual Property to replace the visibility requirement with a requirement that the sign be capable of being represented in the register clearly and precisely, and refer expressly to scent; amend Article 105 to make the structured verbal description the representation of a scent mark and to state its legal effect; and provide that specimens and GC-MS data are supporting evidence only. Amend Decree No. 65/2023/ND-CP, including Form No. 08, and Circular No. 23/2023/TT-BKHCN to set out the description template, the formality checklist, the deficiency periods and rounds, the rules on specimens, and the allocation of the cost of analyses.

- **Administrative requirements** (Intellectual Property Office of Vietnam). Issue examination guidelines containing the template, the closed list of olfactory families, model descriptions and assessment criteria of the kind used in Table 3; publish an applicant checklist; establish procedures for third-party observations and for ordering analyses; and set internal service standards for each stage of the procedure.

- **Technological requirements** (Intellectual Property Office of Vietnam, with the information technology units of the Ministry of Science and Technology). Upgrade the electronic filing system with a scent-mark option, fields F1 to F6 and an evidence upload slot; structure the National Register so that marks can be searched by olfactory family and dominant note; establish specimen storage; conclude framework agreements with accredited laboratories; and monitor developments in digital odour representation for possible later use.

- **Institutional requirements** (Ministry of Science and Technology; Intellectual Property Office; courts and enforcement bodies). Designate and train a specialised examiner group with periodic calibration; pursue technical cooperation with WIPO and foreign offices; train judges and enforcement officers in

interpreting scent-mark descriptions; link scent-mark filing to existing support programmes for small and medium-sized enterprises; and involve universities and the fragrance industry in compiling and updating the list of olfactory families.

Phased implementation plan. Because Vietnam has no experience with scent marks, the reforms should be introduced in three phases, with progression from one phase to the next conditional on published evaluation results rather than on fixed dates. Table 5 sets out the actions, responsible bodies and evaluation criteria for each phase. The durations are indicative.

Table 5. Phased implementation plan for scent-mark registration in Vietnam

Phase	Main actions	Responsible bodies	Evaluation criteria
1. Preparation (indicatively 12–18 months)	Draft and adopt amendments to Articles 72 and 105, Decree No. 65/2023/ND-CP and Circular No. 23/2023/TT-BKHCN; issue examination guidelines, the list of olfactory families and model descriptions; modify the application form and electronic filing system; train and calibrate the examiner group; conclude laboratory agreements.	National Assembly; Government; Ministry of Science and Technology (lead drafting); Intellectual Property Office (guidelines, IT, training)	Legal texts adopted and in force; filing system tested end to end; guidelines and checklist published; all designated examiners trained; inter-examiner agreement on a test set of descriptions reaches a level set in advance by the Office
2. Pilot (indicatively 24 months)	Accept scent-mark applications in priority classes, such as cosmetics (Class 3), air transport (Class 39) and hotel services (Class 43); provide a helpdesk for applicants; record data on each application.	Intellectual Property Office; Ministry of Science and Technology (supervision); industry associations (outreach)	Number of applications; share passing formality examination at first filing; average number of correction rounds; pendency against statutory time limits; share of applicants that are small and medium-sized enterprises; number of complaints, appeals and disputes over scope
3. Extension and review	Open the procedure to all classes; revise the guidelines and family list in light of pilot data; reassess the role of GC-MS and digital odour data; publish an evaluation report.	Ministry of Science and Technology; Intellectual Property Office; independent evaluator such as a university or research institute	Indicators from Phase 2 maintained or improved after extension; consistency of examination decisions; cost per application; applicant satisfaction; recommendations for further amendment

At the end of each phase the Intellectual Property Office should publish a short evaluation report against these indicators, and the Ministry of Science and Technology should decide on progression to the next phase on that basis. This conditional design keeps the reform reversible at low cost: if the pilot reveals that descriptions cannot be examined consistently, the template and guidance can be revised before scent marks are admitted in all classes.

CONCLUSION

Deleting the visibility requirement from Article 72 of the Law on Intellectual Property would make scent marks eligible for protection in Vietnam, but it would not by itself make them registrable. Comparative experience shows that the filing form, the electronic filing system, the definition of an admissible representation and the deficiency procedure can each block protection even where the substantive law allows

it. The United States demonstrates that a verbal description, supported by specimens and refined through iterative office actions, can serve as a workable registered representation; the European Union demonstrates that, without an admissible format, legislative openness remains theoretical. Vietnam should therefore adopt a structured verbal description as the mandatory and registered representation, treat samples and chromatographic data as supporting evidence, require a statement of use, and allow an extended, multi-round deficiency procedure, while redesigning the application form and filing system in step with the law. The illustrative descriptions tested in this paper suggest that a structured template can screen out inadequate descriptions at the formality stage and confine protection to a defined olfactory impression, although the comparison of closely similar scents will continue to require supporting evidence in contested cases. Implementation depends as much on examiner training, adapted information systems, accessible procedures for small and medium-sized enterprises and safeguards against abuse as on legislative change. A phased approach, beginning with a pilot in priority sectors and evaluated against published indicators, would allow Vietnam to introduce scent marks while containing administrative risk. Future research should examine the substantive criteria of distinctiveness and functionality, the organisation of specialised examination, and the design of a searchable public database for scent marks.

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