



20 June 2014

Ministry of Information and Communications  
National Steering Committee on ICT Office  
18 Nguyen Du Street  
Hoan Kiem District  
Ha Noi, Viet Nam

Dear Sir/Madam,

**Re: Draft decree on Information Technology Services**

The Asia Internet Coalition (AIC) is an industry association formed by eBay, Facebook, Google, Salesforce, LinkedIn and Yahoo! Incorporated. The AIC seeks to promote the understanding and resolution of Internet policy issues in the Asia Pacific region.

The AIC is very concerned about the draft decree on Information Technology (IT) Services (“Draft Decree”). We appreciate the opportunity to share our comments with the Government of Vietnam. At this point, we would urge the Ministry of Information & Communications to engage in a substantive public consultation before proceeding further with the Draft Decree.

As the Ministry considers how and whether to impose new regulations on the internet economy in Vietnam, the AIC requests that the Ministry consider international best practices, the perspectives of domestic & international industry and of Vietnamese consumers, as well as Vietnam’s existing international treaty obligations.

**Specifically, the AIC recommends that the Ministry consider the following factors:**

1. The Internet has been an engine of economic growth and progress in Vietnam precisely because of the international nature of the Internet’s infrastructure. Businesses and individuals in Vietnam are able to choose IT solutions anywhere in the world, based on their pricing needs and technical requirements.
2. Similarly, Vietnamese people use the Internet to achieve their educational and professional goals; they are able to access a large amount of resources and tools online that would be out of reach or more expensive in the ‘offline’ world.
3. Finally, the Internet has been such a significant source of innovation around the world because individuals and businesses have been free to launch new products and solutions; this has been fundamental to the innovative and fast-moving nature of the technology sector.

The AIC offers itself as a resource to the Government of Vietnam as it develops its regulations of the IT sector.

**We would appreciate your consideration of the following comments:**

- **RE: Article 2 – Subject of Application** - Consider amending the article to make clear that the obligations for foreign IT service providers are solely within Article 15 on “Supply of cross-border information technology services.” It is also important that the



Draft Decree clarify as to what constitutes “direct participation” in IT services in Vietnam.

- **RE: Article 3 – Interpretation of terms** - The spectrum of IT services available in Vietnam today would have been unrecognizable just a few years ago. This is why we would question whether trying to define the types of services in order to regulate is sustainable, practical and appropriate for an industry that is meant, at its best, to be constantly innovating and evolving.
- Over-regulation will challenge the fundamental innovative and fast-moving nature of the technology sector. We do not think that a permission-based approach to regulation is the best structure. We would recommend industry self-regulation that is more consistent with international best practices. However, if the Ministry is unable to adopt our recommendation, we recommend that the Ministry consider drafting this provision such that it will not quickly become obsolete as the industry evolves further. To that end, the Ministry should consult a respected glossary or international standard definitions in order to accurately define technical terms and categorize services. The current approach risks creating uncertainty within the industry.
- **RE: Article 3 (Clause 13) – Definition of Cross-border provider** – Under the current definition, it is possible that both domestic and foreign companies could be considered cross-border providers. Many of Vietnam’s most competitive enterprises utilize IT solutions located outside of the country. Successful Vietnamese game and application developers, such as the top-downloaded app “Flappy Bird” that depended on Facebook for fans to post their scores, are but a few examples of those relying on foreign IT services in order to, in turn, provide their own IT services in Vietnam and around the world. The definition of what exactly is meant by “cross-border information technology” should be clarified.
- **RE: Article 5 – Types of IT services** – Again, we would question whether this level of detail is necessary or practical in the Ministry’s attempts to regulate and promote the development of Vietnam’s IT industry. We would dissuade the Ministry from adopting this permission-based approach in favour of industry self-regulation that creates a conducive environment for innovation. However, if the Ministry is unable to alter its general approach, the Ministry should consider consulting a respected resource or glossary. If a suitable alternative cannot be found, we would suggest that Article 5 be removed from the text, subject to further research in developing a detailed list at a later date.
- **RE: Article 14 – Registration of an IT Service** - The registration requirement is unnecessary and will negatively impact companies seeking to provide IT services in Vietnam. Moreover, this requirement would be unique among ASEAN countries and fails to specify the obligations and responsibilities resulting from registration. It would deter many IT service providers from investing in Vietnam, and would place Vietnamese enterprises at a disadvantage globally. The IT industry in Vietnam and around the world has made remarkable progress without licensing or registration requirements in other jurisdictions. Instead, such a regime is likely to slow innovation and would create a



significant barrier to doing business in Vietnam. We recommend that the registration requirement be removed from the Draft Decree.

- **RE: Article 15** – We understand that a cross-border service provider should be bound to this article only, and not other provisions of the Draft Decree. We therefore recommend that the article be amended to explicitly state this limitation, as otherwise cross border providers would be exposed to a significantly broadened range of regulatory risk from the other articles in this decree.
- **RE: Article 15 (Clause 1) – Supply of cross-border IT Services** – This clause is unclear and would be a deterrent to IT service providers seeking to do business in Vietnam. What is considered a “great number of users of [a] service” and a “great number of traffic from Vietnam”? Moreover, it is not clear which cross-border services are subject to Article 15 – any type of cross-border IT service, or is this limited to providers of the services listed in Article 14? These ambiguities would create uncertainty among the industry and mean that these criteria cannot be practically implemented.
- Because of the inherent variability of Internet traffic, under Article 15 it would be unclear when an offshore IT service provider would be required to appoint a local representative in Vietnam.
  - Service providers often are not able to control the number of services users or the volume of traffic from Vietnam.
  - While the numbers of users and the volume of traffic may be small at a certain point in time they may increase above the threshold value for registration (at present undefined) in a matter of hours or even minutes only to drop back below the threshold level.
- Under the current Draft Decree, it is unclear at what point in time the local representative requirement of Article 15 would arise. For these reasons, we would strongly recommend that this requirement be deleted from the Draft Decree.

**RE: Article 15 (Clause 1(a)) – Legitimate representative** - The expected responsibilities and legal status of the “legitimate representative” of a cross-border service provider are insufficiently defined and would create uncertainty for the cross-border provider as well as the assigned representative. If the local agent is to be responsible for the foreign IT service provider, would there be a local Vietnamese entity who would be willing to take this on? Requiring that businesses assign such a representative would be a financial and logistical burden, and would deter businesses from investing in Vietnam.

- Article 15 of the Draft Decree stipulates that, in order to lawfully provide their services in Vietnam, foreign IT services providers that provide services on a cross-border basis must appoint a local agent in Vietnam - and notify Vietnamese authorities of the identity of this agent - for the purpose of “dealing with relevant issues before Vietnam’s state bodies.” This requirement appears incompatible with Vietnam’s WTO Commitments because it hinders foreign IT service suppliers’ ability to provide their services on a cross-border basis. This requirement may also be incompatible with further liberalization of this sector to which Vietnam may commit under the Trans-Pacific Partnership negotiations that are currently underway.



- As currently worded, we assume that the intent of Article 15 is only to require IT service providers with a “great number of users of [a] service” or a “great number of traffic from Vietnam” (as impractical as this is) to appoint an agent but it is not a prohibition of restricting access to the Vietnamese market by foreign cross-border IT services suppliers that do not meet these criteria. The Ministry should clarify this. If our assumption is incorrect, then this provision could be interpreted as restricting access to the Vietnamese market by foreign cross-border IT services suppliers - by allowing only those suppliers that have “a large amount of users in Vietnam or access from Vietnam” to provide these IT services on a cross-border basis. In brief, Article 15 may constitute a de facto limitation on number of service suppliers permitted access to the [A1] Vietnamese market which could in turn constitute a violation of Article XVI:2(a) of the GATS.
- As the only such requirement in the ASEAN region, it would certainly deter investment in Vietnam and disadvantage users in Vietnam. At this time, many foreign IT service providers already have established processes for contacting with relevant agencies — and vice versa — and there is no need to add an extra layer of communication between the requestor and the provider by appointing an agent. The extra layer could lead to delays and miscommunications. We recommend that this provision be removed from the decree.
- RE: Article 15 (Clause 1-Comply with Vietnam’s law) – Internationally, this is a relatively novel legislative approach in applying local law to cross border service providers, and could come into conflict with the legal obligations of cross border services providers under other jurisdictions where their principal activities are carried out. We therefore recommend removal of this clause.
- RE: Article 15 (Clause 2) – This basket or catch-all provision introduces substantial uncertainty and risk of arbitrary regulation to cross-border service providers and should be revised to state specific, limited guidance.
- **RE: Article 17 – Rights and obligations** - The provisions in Article 17 are vague and would create uncertainty. Article 17 should refer to applicable civil and criminal penalties or it should be removed; it should not attempt to micromanage contracts between service providers and their clients. Existing Vietnamese rules around contracting should apply to IT services; it would be unnecessary to create a special set of rules that apply solely to IT services.
- **RE: Article 17 (Clause 3) – Privacy** – We request that the Ministry clarify which privacy obligations it intends to reference in Clause 3.
- **RE: Article 17 (Clause 4) – Compensation** - Which body would determine whether a service does not meet quality standards, or how much compensation is due to clients? Who would determine the quality standards in the first place? If compensation is to be determined by a court or arbitration under civil proceedings, the reference to compensation in this article is unnecessary and should be removed.



- **RE: Article 17 (Clause 5) – Reporting requirements** - A reporting requirement – especially one that is “ad hoc” and therefore unpredictable – would be an investment deterrent for domestic and foreign businesses. It is also unclear why the Ministry would need information on every company's business situation.
- **RE: Article 17 (Clause 6) – High-tech crimes** - The appropriate law enforcement and judicial bodies should follow established legal channels when investigating high-tech crimes. This clause also may be unnecessary in light of Vietnam’s draft Law on Information Security.
- If authorities can order a business to “suspend” its services – with no reference to established legal processes – it would create a great deal of uncertainty within the business community. Further, a requirement to “suppress” high-tech crime is vague; it would be difficult for a company to know whether it is in compliance. We recommend that this provision be removed from the decree.
- **RE: Article 4 (Clause 3) – State Management of IT Services** - We support the Ministry’s intention to promote the development of the IT industry in Vietnam. We would urge the Ministry to consult with the Government’s economic advisors, private industry, as well as relevant Ministries – such as the Ministry of Finance, the Ministry of Industry & Trade, and the Ministry of Planning & Investment – in order to determine the most effective means by which to encourage the sector’s development. These consultations should take place before the decree on IT Services moves forward.
- **RE: Articles 7-11 (inclusive) – Incentives & Policies** – The Ministry should conduct more research and consultations with economic experts and industry representatives before moving forward with any incentive policies. It is important that the appropriate Ministries develop these policies, and that the policies establish incentives where they are most needed. Furthermore, there are existing policies in place to incentivize these activities. The Ministry may not need to create additional regulations in this area.
- **RE: Article 12 – Licensing to refurbish hardware** – As Article 12 correctly notes, businesses in Vietnam should abide by applicable laws – in this case, environmental law, labour safety & hygiene law, and other laws – that govern the establishment and operation of all Vietnamese enterprises. Companies that refurbish hardware products in Vietnam therefore would do not need to be subject to an additional licensing requirement. Nor does the Ministry need to assess the “feasibility” of an ordinary business investment.
- **RE: Article 13 – Conditions for IT consultation service practice** - The Draft Decree is also unclear as to whether foreign-invested enterprises may engage in all of the IT services described in Article 5 of Draft Decree. For example, according to Article 13, the requirements for businesses providing IT consultancy services appear to contemplate only Vietnamese-owned enterprises (Article 13.2). If this were the case, Article 13 would be incompatible with Article XVII:1 of the GATS, by failing to give to services and services suppliers of other WTO members treatment no less favourable than that accorded to Vietnamese services and services suppliers.



- **RE: Article 13 (Clause 3(b)) – Education requirement** – The requirement that a person conducting IT services possess a certain university degree is unnecessary and should be removed from the decree. Around the world, IT expertise has come from many backgrounds; indeed, many of the most successful technology entrepreneurs did not obtain university degrees. More generally, a government certification system for IT consultants appears unnecessary and could instead impeded development of the IT sector in Vietnam by making it more difficult for companies to quickly hire new employees.
- **RE: Article 18 (Clauses 1-4 inclusive) – Rights and obligations of users** - Special provisions for the IT sector are unnecessary and should be removed. A breach of a commercial contract should be subject to existing penalties.
- **RE: Article 20 (Clause 2) - IT Services and State Bodies** - A requirement that entities providing services to state bodies be “Vietnamese organizations or individuals” will unduly restrict the range of choices available to state bodies. Instead of focusing on the origin of the service provider, the Ministry should focus on the security and confidentiality requirements needed. Only those service providers meeting those standards should be permitted to contract with state bodies. We recommend that the provision be revised accordingly.
  - Specifically, Article 20.2 limits the ability of foreign IT services suppliers to provide IT services on cross-border basis in transactions with State authorities - even where in which government procurement is not involved. Under the Draft Decree, only “Vietnamese organizations or individuals” may provide services to the State authorities. Other foreign organizations or individuals may only provide services in rare cases and subject to the specific discretion of the competent authorities. This provision may constitute a violation of Article XVI:2(a) of the GATS.
- **RE: Article 20 (Clause 3) - Server Storage Requirements** - A requirement that all servers storing data of state bodies be based on Vietnam’s territory would result in higher cost and a lower quality of service. Vietnamese and foreign companies take advantage of data hosting solutions outside of the territory of Vietnam in order to provide the best service possible to public and private sector clients. Security and confidentiality are in fact strengthened by the existing, geographically disbursed infrastructure of the Internet; forced localization requirements weaken security and confidentiality standards. Local server requirement will disadvantage foreign service suppliers seeking to supply IT services on a cross-border basis.
  - A recent study conducted by the European Center for International Political Economy (ECIPE) evaluated the impact of Vietnam’s data-localisation requirements in another decree, Decree 72/2013/ND-CP (“On the Management, Provision, and Use of Internet Services and Online Information”). It predicted that those data-localisation requirements would cause Vietnam’s Gross Domestic Product (GDP) to fall by 1.7% — a loss of more than \$2.4 billion. The loss to Vietnam’s international competitiveness would also be severe: if economy-wide data localisation measures were enforced, the study predicts a fall in domestic investments by 3.1%.



- The data-localisation requirement in the Draft Decree would also be economically harmful.
- Decisions on where to locate servers should be made based on technical and commercial considerations.
- Additionally, mandating local data storage appears incompatible with Vietnam's WTO commitments to permit cross-border trade in services.