

26 December 2018

Addressed to
H.E Mr Nguyen Manh Hung,
Minister of Information and Communications (MIC)

CC:
H.E Mr Mai Tien Dzung, Minister, Chairman of Office of the Government (OOG)
H.E Mr. Le Thanh Long, Minister of Justice (MOJ)
H.E Mr. Tran Tuan Anh, Minister of Industry and Trade (MOIT)

Subject: Comments on the provisions to Draft (Version 4.0) Decree No. 06/2016/ND-CP

The Asia Internet Coalition ("AIC") appreciates the opportunity to share our views regarding the amending and supplementing a number of provisions of Decree No. 06/2016/ND-CP ("Draft Decree") on management over, provision and use of, radio and television services.

AIC is an industry association comprised of leading internet and technology companies. AIC seeks to promote the understanding and resolution of Internet and ICT policy issues in the Asia region. Our members include AirBnB, Amazon, Apple, Expedia, Facebook, Google, LinkedIn, LINE, Rakuten, Twitter and Yahoo (Oath). Earlier this year, AIC also had the valuable opportunity to share our views on digital economy regulations with Prime Minister Nguyen Xuan Phuc in Singapore and on the Implementing Decree on the Law of Cybersecurity. We hope to continue our engagement with the key ministries and the government of Vietnam to drive a long-term economic development strategy that is forward looking and favours the country's Industry 4.0 ambitions.

With the hope that the Ministry of Justice ("MOJ"), Government Office ("OOG"), and Ministry of Information and Communications ("MIC") will find it helpful as they review the Draft Decree, we encourage the authorities to consider the immense potential of important technological developments in Internet platforms and on-demand services, and the role these will play in Vietnam's digital transformation journey. Accordingly, the regulatory approach should be aligned with Vietnam's digital economy goals and aspirations, which could translate into local growth opportunities, innovation, investment, and job creation.

The summary of issues and concerns regarding amendments on the Draft Decree have been prepared based on our expertise and international best practices. **We are concerned that, if passed, in its current form, the Draft Decree might set precedent for other countries to impose reciprocal regulations on online services, impact of which would be demonstrated in regulatory barriers for Vietnamese businesses trying to expand beyond Vietnam's borders. We therefore request considering the potential consequences of the Draft Decree in order to prevent unexpected negative impact on the Vietnamese economy.** As such, please find appended to this letter detailed comments and recommendations.

We are mindful that the Draft Decree is under review process, and we are thankful for this opportunity to share our concerns and feedback. Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact me directly at Secretariat@aicasia.org or +65 8739 1490 or +84 165 839 0988. Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Paine".

Jeff Paine
Managing Director,
Asia Internet Coalition

Detailed Comments and Recommendations

1. Over-the-Top ("OTT") Service Providers should be distinguished from broadcasters

Radio and television services are proposed to include a new service type "On-demand service on the Internet" (Article 3.1 as amended). On-demand service on the Internet is defined as a type of "radio and television service using Internet connection by use of domain names of portals or identified Internet addresses and Internet applications used only to transmit on-demand contents to service subscribers" (Article 4.1(e)). "On-demand content" includes domestic and foreign radio/television programs, films and other video, audio content meeting the specific requirements of Vietnamese law, which are provided to subscribers on demand, including content to be broadcasted live following program schedules (Article 3.18). In light of the above, it appears that On-demand service on the Internet would effectively include Over-the-Top ("OTT") services that stream video and audio.

The proposed amendments seek to bring more online services within the scope of the country's broadcasting legislation. The extension of broadcasting regulation to OTT services is disproportionate and can stifle the growth of Vietnam's digital economy. Traditional broadcasting services and OTT services are functionally and technically distinct, and their respective frameworks are carefully calibrated to reflect such distinctions.

Traditional broadcasting regulations serve to facilitate fair access to scarce telecommunications resources (e.g., spectrum allocation) and along with granting rights for selected licensees to exploit a scarce resource, are bound to impose corresponding obligations on licensees and regulated entities to ensure the best possible uses of such scarce resources (and prevent interference with other service providers that are granted similar rights, which could undermine the benefit of the spectrum). By contrast, OTT services are fundamentally different, because they do not depend on a scarce resource like spectrum, and are not subject to the same constraints. With this in mind, OTT service-related regulations do not need to focus on limiting the ecosystem of service providers to a chosen few in order to maximise the use of a scarce resource, or on enforcing limitations around the use of a scarce resource (e.g. via a closely controlled licensing regime) to prevent issues like interference. The growth of OTT services has led to innovative new services and service providers, greater diversity of content and more choice for the consumer. A key objective should be to ensure that regulation of OTT services does not act as a barrier to market entry and stifle innovation. Regulatory burdens could have a chilling effect on the content ecosystem to the detriment of service providers and local users alike. Best practice regimes for OTT services balance the need for easy access to the market, healthy competition and consumer protection, thus focusing on ensuring low barriers to entry.

It is important to note that traditional consumer behaviour around music and video has changed significantly, with users now employing the service-on-demand model, delivered via a download or streaming service. Compared to the traditional broadcast model, customers today have choice and control over when and how they consume content, whether they purchase content individually (music services by downloading song or album, for example), or choose subscription-based services instead, none of which are possible through traditional broadcasting service. Consumer choice also allows for personalisation and on-demand delivery, which makes streaming fundamentally different to radio, with subscribers completely in control of content consumption. The reality of today's consumer behaviour and demand make it clear that trying to apply traditional broadcasting regulations and licensing requirements to online-based services, could be an obstacle to the efforts on modernizing Vietnam's regulatory environment.

Given the ever-rising popularity and influence of OTT services, the case in point of today's consumer behaviour and demand make it clear that Vietnam's regulatory environment should reflect such reality. Trying to apply traditional broadcasting regulations including licensing requirements to OTT services would be a big step backwards. Therefore, we submit that broadcasting regulation is not appropriate for regulation of online services for reasons highlighted below:

The Draft Decree imposes various obligations that are inappropriate or ill-suited to online service providers considering the market and technical differences between traditional broadcasting services and online services.

Provided here are a few examples:

The Draft Decree would require online services to “propagate....nationwide”, especially in remote areas, distant areas, the frontier, islands and extremely disadvantageous areas.” (Article 9 Clause 1)

- Online service providers cannot be expected to comply with this requirement because they do not control the underlying broadband infrastructure and cannot provide service to a customer unless that customer already has Internet access provided to them by an Internet service provider.

The Draft Decree would specify that “the content of a free broadcasting service includes . . . National and local channels serving essential political propagation [and] Other Vietnamese channels.” (Article 13 Clause 1)

- Such a limitation on the content available to online service providers would be unreasonable to providers and harmful to Vietnamese consumers. Allowing online service providers to transmit any lawful content encourages competition and diversification amongst providers, promotes content creation particularly of niche and independent content, and benefits consumers by enabling them to access a wide variety of content.

The Draft Decree would also provide that consumers “have the right to complain about the service quality” of online services to state regulatory authorities. (Article 8 Clause 1)

- Assuming that this requirement refers to strength of signal and technical quality of signal reception, we would note that online service providers do not own or control the networks over which their services are transmitted and do not control what network is chosen by the consumer. As a result, online services cannot provide any guarantees or remedy any issues regarding quality of service provided.

The Draft Decree would require online services to ensure that contents are consistent with information content regulations “prescribed in laws on the press.” (Article 9 Clause 4)

- Such regulations would be inappropriate for certain types of online services that do not exercise editorial control over the content that appears on their platform, such as platforms that host user-generated content. Such services cannot reasonably be held responsible for vetting and ensuring the compliance of all content that appears on their platforms. User-generated content should be treated separately.
- Meeting consumer demand for local as well as non-local content is essential to attracting consumers and sustaining the business case to provide them with the content they demand. The best way to meet this demand is to have multiple services innovating and investing to meet consumer demand. Competition for distribution on Video on Demand (“VOD”) services creates incentive for video producers to create high-quality content that consumers want to watch. Content quotas distort this competition by creating artificial demand. In a quota system, a minimum amount of content must be licensed by VOD services every year. This discourages content producers from producing high-quality audio-visual programming and limits the ability of VODs to be selective in terms of price and quality.

2. Licensing requirement

On-demand service on the Internet provided on a fee basis, payable by users, is subject to the licensing requirement and must be licensed by the Ministry of Information and Communications (Article 12.a as amended). It means that On-demand service on the Internet (both onshore and offshore) will be required to comply with the licensing requirements. A consequence of this licensing requirement would be establishing a local presence in Vietnam, which is discussed further in Section 5 below. We also suggest taking into account the effect the new licensing requirement would have on the local industry because the licensing requirements will apply to foreign and domestic companies alike. Local OTT service providers, which have been largely unregulated until now, may be burdened by the new licensing requirements under the Draft Decree.

3. Removing or revising advertising restrictions

Article 17 of Decree No. 06 (as amended) requires that foreign channel programs on pay radio and television services must not have overseas built-in advertisements. Rather, advertisements (if any) must be installed in Vietnam. A press agency who is licensed to edit content will be in charge of the instalment of advertisements and will be responsible for the duration and content of such advertisement.

Advertising is an essential revenue stream for creating and distributing video content. The existing and proposed restrictions on advertising (in Article 14: Clause 6 and Article 17 Clauses 6 a and b) will continue to inhibit the development of Vietnam's media market and prevent industry from meeting consumer demand. We recommend removing or revising advertising restrictions (Article 14: Clause 6 and Article 17: Clause 6 a, b).

The Vietnamese media industry is under increased pressure from new competitors and illegal services. With low monthly Average Revenue Per User (ARPU), pay TV players and paid video services are increasingly relying on advertising revenues. As a result, any ban or overly strict regulations on advertising will reduce the incentives for foreign companies to invest in Vietnamese content, reduce consumer choice and will prevent Vietnamese companies from growing and competing.

Barring services that require a subscription fee from advertising, or forcing certain services to carry local ads only, is also inconsistent with international standards and limits platform flexibility to deliver the highest quality content to consumers at the lowest possible price. The media and entertainment industry and the Government are no doubt aligned on wanting to locally relevant advertising for viewers. A better way to achieve the shared goal of more local ads is therefore to permit business model flexibility in order to provide sufficient revenue that supports the delivery of the full range of advertising relevant to consumers. We recommend the implementation of a reliable audience measurement infrastructure (such as the Nielsen measurement metric) for local ads to be sustainable.

4. Editing/translation requirements would create more burden than necessary

- *Editing requirement:* On-demand contents (including videos and music streamed online) must be edited by news agencies having the License for Operation in Broadcasting Industry for domestic programs, edited and translated for foreign programs prior to broadcasting, except for programs that have been distributed on licensed channels under the laws of Vietnam. (Article 21.3 as amended).
- *Translation requirement:* 100% of the content of reporting programs, films, documentaries, cartoons, reality shows, game shows, and music provided on on-demand services must be translated into Vietnamese (Article 19.2 a,b as amended).

With on-demand services providing more choices for consumers, a significant increase in the volume of content will continue to become available on the Internet. Taking into account the volume of content to be introduced by OTT services, Article 19 may create more burdens than necessary to ensure the quality and/or compliance of on-demand services on the Internet. For example, the pool of accredited and licensed editing organizations in Vietnam is limited. An oligopoly of editing

organizations might be established, which could result in unhealthy competition conditions and consequently unreasonably high costs of editing and translating foreign program contents.

In addition, it is likely that all contents provided via OTT Service (including films, music, reality shows) would be subject to the editing and translation requirements. It is practical for editing and providing Vietnamese translation (i.e., through subtitles) for a films or reality shows, but it remains unclear how such requirement can be enforced against music.

We believe editing/translation requirements will result in unhealthy competition conditions and consequently unreasonably high costs of editing and translating foreign programme content. Enforcement wise, it will be impossible for the government to meet the high demand for approvals under the revised decree.

If the objective of these requirements is to protect the local market from sensitive content, Vietnam may consider achieving such objective by way of other solutions. For example, utilizing the existing Vietnamese age-rating system and content restrictions could serve the basis of an efficient and economical alternative solution. To elaborate - film production companies would be responsible for editing and rating films to be distributed via OTT services in accordance with said age-rating system and content restrictions. This alternative solution would ensure compliance with local content restrictions while allowing film production companies to be wholly responsible for the editing and rating prior to marketing the films in Vietnam, rather than imposing requirements on OTT service providers.

5. Forcing businesses to create a local presence does not align with the global best practice

Forcing businesses to create a local presence is outside normal global practice and compels an investment without a business need. Indeed, the recently agreed Comprehensive and Progressive Agreement for Trans-Pacific Partnership prohibits such mandates, indicating a regional understanding of the importance in facilitating cross border business. The global nature of the internet provides consumers with a wide range of services and opportunities unavailable otherwise. This enormous value proposition is eroded when local requirements are unnecessarily placed on cross border services. Further, taking such an action would send a clear signal that Vietnam is uninterested in investment and economic growth and may trigger reciprocal action requiring Vietnamese entities to set up local presence in other countries. Simply put, the decree should not compel onshore requirements on offshore providers. Rather than imposing a local requirement, the Government should focus on educating consumers to do business with reputable businesses.

6. Foreign content quota is not realistic in the Vietnamese market

Article 17 of Decree No. 06 (as amended) requires that the number of foreign channel programs on pay radio and television services must not exceed 30% of the total numbers of channels. Article 21 of Decree No. 06 (as amended) requires that the percentage of domestic programs to the total number of programs on OTT Service shall not be less than 30%.

Requiring OTTs to include at least 30% domestic programs can be a blocker for market entry in disguise. Imposing such a requirement in Vietnam, where the digital content market is not as developed and vast as jurisdictions such as the European Union ("EU"), is burdensome and unrealistic. If the objective of this requirement is to achieve and maintain cultural specificities, alternative options are available, e.g. support the local cinema industry; work with international film production companies and support the translation of video content and provision of subtitles in Vietnamese language.

We stress that applying quotas to on-demand internet services is an inefficient way to promote the creation of locally relevant content, as it restricts the ability of content creators to freely participate in an increasingly competitive and global media market. Delivering locally relevant content to consumers is a shared goal between on -demand service providers and the government but expanding

quota requirements to new platforms will limit the ability of the industry, and specifically the local content market, to meet this goal.

Some likely (unintended) consequences of applying quotas are that on-demand services will obtain low quality content to meet the requirement or just reduce the amount of non-local content to achieve the prescribed ratio. Both outcomes could lead to poor consumer experiences and represent an artificial distortion in the market that would otherwise be responding to consumer demand. On a technical front, quotas are inefficient mechanism for online services which do not have a restricted 24-hour window for broadcasting, not to mention the fact that online service have unlimited shelf space. We instead urge the government to focus on supporting and developing local content creators, so that talented Vietnamese can create engaging content, not just for the local audiences, but for sharing with a global audience, thereby enabling outreach to millions of users with Internet access.

7. Advertisement requirement violate WTO commitments

Pursuant to Vietnam's WTO Services Schedule, Vietnam commits to allow foreign investors to provide advertising services (CPC 871, excluding advertising for cigarettes) on a cross-border basis (Mode 1) to Vietnam-domiciled customers without any limitation. In other words, Vietnam does not reserve for the adoption or maintenance of any market access limitation with regard to cross-border supply of advertising services (noted that the customers must be Vietnam-based).

Advertising services under CPC 871 comprise, among other things, CPC 8711- "sale or leasing services of advertising space or time", i.e., services provided in soliciting advertising space or time for newspapers, other periodicals, and television stations.

With regard to the Advertising Requirement under the Draft Decree, for advertisements provided for onshore customers, such activities would be under the scope of Vietnam's WTO commitments. In that light, it is arguable that the Advertising Requirement is not in line with the WTO commitment of Vietnam on "advertising services". Specifically, by requiring that foreign channels shown on OTT services must not contain overseas built-in advertisements and advertisements on foreign channels shown on OTT services in Vietnam must be installed by a Vietnamese licensed press agency, the Advertising Requirement may de-facto limit the ability of foreign advertising providers from providing advertising services to its customers in Vietnam (if any) on a cross-border basis. Therefore, the adoption and maintenance of the Advertising Requirement might arguably be inconsistent with Vietnam's commitments under the WTO.

8. Aligning with global industry views and practices should be the key

More generally, imposing prescriptive requirements undermines the incentive for Internet companies to continue to innovate and distinguish themselves amongst their competitors as 'best in practice', risking a degradation in quality that would negatively impact consumers. The flexibility to pursue voluntary measures and build tools incrementally is important to innovation in a dynamic online environment.

We encourage considering opportunities for deregulation of the existing broadcasting sector. Globally, many policymakers recommend a cautious approach to extension of existing regulation to new services that also considers opportunities for deregulation of traditional services.

- For example, in a joint letter to the European Commission (EC) regarding reform of the European Union's telecoms framework, the governments of 10 European countries cautioned against "automatically extending" regulation to online services, urging the EC to "consider deregulation of traditional telecoms services." See Joint Letter from Belgium, Czech Republic, Denmark, Estonia, Ireland, Finland, Lithuania, Poland, Sweden, United Kingdom to Vice-President Ansip and Commissioner Oettinger, European Commission, at pp. 1-2 (2016), [available here](#).
- Similarly, the Nordic National Regulatory Authorities recommended "a cautious approach to regulation" of online services and that "possibilities to simplify, modernize and lighten

existing regulation should be pursued.” Nordic NRAs, The EU telecommunications legislation for the Digital Single Market, The Nordic NRAs’ viewpoints (July 4, 2016), [available here](#).

Regulators and lawmakers are also actively reconsidering existing broadcast regulatory frameworks in light of changes in the marketplace. For example, Hong Kong’s Commerce and Economic Development Bureau (CEDB) has initiated a review of its broadcasting regulatory framework “with the aim of relaxing obsolete statutory requirements.” (See Hong Kong Commerce and Economic Development Bureau, Review of Television and Sound Broadcasting Regulatory Regimes, Consultation Paper, at 15 (Feb. 2018). The CEDB did not propose to extend existing obligations for traditional audio visual services to OTT services in part because “[though OTT and other Internet TV and radio programme services are gaining their prominence, traditional media . . . are still highly pervasive and accessible to all in the family, young and old.” Id. at 46.

In November 2017, the US Federal Communications Commission (FCC) eliminated or revised several of its broadcast ownership rules to “reflect the present, not the past” of the media landscape. The FCC concluded that updating those rules – which principally limits single entity ownership of multiple media outlets – would afford broadcasters and local newspapers “a greater opportunity to compete and thrive in the vibrant and fast-changing media marketplace.” (See FCC, 2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al., MB Docket No. 14 et al., Order on Reconsideration and Notice of Proposed Rulemaking, (Nov. 20, 2017), [available here](#).

To reiterate, if passed, the Draft Decree might set precedent for other countries to impose reciprocal regulations on online services, one effect of which would be to build regulatory barriers for Vietnamese businesses trying to expand beyond Vietnam’s borders. Prime Minister Nguyen Xuan Phuc has said that Vietnam is striving to become one of the top 10 global suppliers of digital content by 2020. See Hanoi Times, Vietnam to enter top 10 suppliers of software outsourcing and digital content (Jan. 20, 2017), [available here](#). Passing the Draft Decree could also interfere with the Prime Minister’s vision.

If passed and other countries then impose similar regulations, it may be difficult or impossible for Vietnamese digital content and information technology providers to export or expand internationally. The net outcome of such regulations would harm both businesses, which would face prohibitive costs and regulatory and administrative burdens and be deterred from offering their services in Vietnam, and consumers, who would as a result not have access to the same innovative services and diverse array of digital content offered elsewhere in the world.

9. Summary

OTT services, including video streaming, are an essential—and increasingly important—element of the broadband value chain. Innovation in OTTs has led to a rich and diverse Internet, and has stimulated consumer demand for broadband Internet access, which in turn is a key driver for network operators to upgrade and expand their networks. Any attempts to impose additional regulation on OTTs would create business uncertainty and lower economic growth and investment. Ambiguous, unnecessary or misapplied rules will harm innovation and pose significant jurisdictional challenges for enforcement. We urge to closely review the proposed requirements and ensure their applicability to online service providers taking into account the various differences between traditional broadcasting services and online services.

We therefore encourage all the government agencies MIC, MOJ, and OOG to consider the immense potential of important technological developments in Internet platforms and on-demand services, and the role these will play in Vietnam’s economic transformation journey. Accordingly, the ideal regulatory approach taken in this realm should be aligned with Vietnam’s development and aspirations of successfully transitioning into the digital economy era. In turn, this will translate into local growth and opportunity, innovation, investment, and jobs. Given the ever-rising popularity and influence of

OTT services in Vietnam today, the present reality of consumer behaviour and demand make it clear that Vietnam's regulatory environment should reflect such reality. The Draft Decree attempts to apply traditional broadcasting regulations including licensing requirements to OTT services, which would distract Vietnam in its forward journey into the digital economy era.

As such, we recommend considering the issues/concerns raised above and reconsider how the radio and television services is classified to include OTT services under the Draft Decree. As mentioned above, OTT services should be treated separately given they are functionally and technically different. Therefore, the Vietnamese government may consider providing a separate regulation regime specific to OTT services that addresses the relevant concerns in a way that would enable users to maintain access to the market, foster healthy competition, and strengthen consumer protection.

Referring to industry best practices, AIC recently launched two OTT studies in Indonesia and Thailand, which would be of interest to you. The [Indonesian report](#) examines the value of RIA (Real Interactive Applications) or OTT, to the Indonesian economy, specifically on jobs, GDP and income, especially its impact on SMEs and key sectors of healthcare, education, tourism and employment. The [Thai report](#) examines the impact and value to the Thai economy coming from Video-on-Demand (VOD services), specifically on income, GDP impact and job creation. We hope you find these useful as references on the potential impacts of this sector on the whole economy value chain.

End of Submission