Industry Comments on Amending Decree 181 on Regulating Cross-Border Advertising Services in Vietnam

20 October 2020

His Excellency Nguyễn Mạnh Hùng
Minister of Information and Communications,
Ministry of Information and Communications (MIC)
18 Nguyen Du Street
Hanoi, Vietnam

On behalf of the Asia Internet Coalition (AIC) and its members, I am writing to express our sincere gratitude to the Ministry of Information and Communications (MIC) and the Government of Vietnam for the opportunity to submit comments on the amendments to Decree No. 181/2013/ND-CP on Elaboration of Some Articles of the Law on Advertising ("Draft Decree").

AIC is an industry association comprised of leading Internet and technology companies in the Asia Pacific region with an objective to promote the understanding and resolution of Internet and ICT policy issues. Our members include Airbnb, Amazon, Apple, Expedia Group, Facebook, Google, SAP, Cloudflare, LinkedIn, LINE, Rakuten, Twitter, Verizon, and Booking.com. Our member companies strive to provide the most innovative and helpful platforms and services to their end users in Vietnam. Importantly, we are committed to partnering with the government of Vietnam to ensure a conducive and forward-looking regulatory environment that enables Vietnam to become a digital leader and encourages innovation and investment that will create new jobs and economic opportunities in Vietnam.

We believe the Internet has an immensely positive impact on society and **supports the development of a transparent legal framework** that would promote its continual contribution to Vietnam's growth. Clear and consistent regulatory frameworks support the growth of Vietnamese tech enterprises and vibrancy of the country's tech ecosystem, are consistent with Vietnam's international trade commitments, as well as lay the foundation for the creation of meaningful partnerships that would facilitate innovation and enable digital transformation.

To this end, we would like to offer our comments and recommendations on some key principles that would make for an effective regulatory framework:

- **Rule of law and Legal clarity**: It's important to clearly define what companies can do to fulfill their legal responsibilities, including removal obligations. A company that takes other voluntary steps to address illegal content should not be penalized. (This is sometimes called "Good Samaritan" protection.) Conversely, a lack of ***clarity in the definitions, procedures, and restrictions*** placed on companies will hinder efforts to implement and comply with regulations (e.g. due to misinterpretations of vague rules), and also cause undue increase in the cost of doing business for local, as well as, international developers and service providers. At the same time, to provide greater regulatory certainty, overlaps in regulation should be avoided. Provisions and requirements that already exist in another regulation should not be replicated.

- **Flexibility to accommodate new technology**: While laws should accommodate relevant differences between platforms, given the fast-evolving nature of the sector, laws should be written in technology-neutral ways that address the underlying issue rather than focusing on existing technologies or mandating specific technological fixes.

- **Technical Feasibility**: Provisions in laws should be technically feasible for internet companies to implement.

Given that the proposed amendment focuses on content related to online advertising, we would recommend that all content be regulated under a single legislation.

As such, please find appended to this letter detailed comments and recommendations, we would like the Ministry to consider. The AIC also looks forward to engaging with MIC, MOCST and MPI amongst others, to help consider reviewing the overall legal framework on advertising in Vietnam for the digital economy to fully benefit from rapid developments in the digital advertising space.

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact our Secretariat Mr. Sarthak Luthra at Secretariat@aicasia.org / +65 8739 1490 or Ms. Ly Do at ly@ps-engage.com / +84 165 839 0988.

Sincerely,

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Detailed Views and Recommendations on Amendment to Decree 181

1. **Decree 181 is not a content law and should not be treated as such. Existing law adequately addresses content related matters for foreign service providers; the amendments relating to content are duplicative and likely to result in confusion and lack of consistency**

Recommendation: We recognise that the amendments have been proposed with a view of steering cross-border advertising activities towards MIC's scope of oversight and governance. However, MIC and other competent authorities already have extensive oversight over cross-border online activities on content related matters--including over foreign advertising service providers--under existing laws. The passage of these amendments would be duplicative and would result in confusion and lack of consistency.

Particularly, the measures set out in the Draft Decree's Article 13, which imposes rules towards censorship of prohibited advertisement contents, have already been subsumed into existing laws that apply to cross-border activities and entities, including the following:

a. **Decree 72/2013/ND-CP:** Article 5 lays down a comprehensive list of prohibited acts in the provision and use of internet services and online information, against which MIC has extensively enforced. Particularly, against foreign organisations, Article 2.2 of Circular 38/2016/TT-BTTTT (on the cross-border provision of information) already mandates a requirement to cooperate with MIC to handle violating content (e.g., by responding to take-down requests). Article 2.2 also confers wide power on Vietnam's regulatory authorities to take actions against violations.

b. **Law on Cybersecurity:** Article 8 prescribes a wide scope of prohibited acts in cyberspace (*and the Draft Decree's Articles 13.1(c) and 13.2(a) cross-refer to*

these prohibitions), while Article 16 sets out a list of violating information (content). Article 26.1 already explicitly prohibits such type of content on websites, web portals and social media pages, and both domestic and foreign service providers further have a duty to block and delete such content upon MPS' or MIC's request under Article 26.2.

c. **Law on Information Technology:** Article 12 prescribes a wide scope prohibited acts regarding information technology. Article 15.3 expressly prohibits any information that violates the above from being supplied, exchanged, transmitted stored or used.

2. Limiting the scope of application

Online ads on social networks and applications (besides website) are now subject to Draft Decree 181:

Advertisements on social networks and applications are now expressly subject to the requirements of Draft Decree 181. The decree also does not define social networks and applications.

Recommendation: We recommend for the scope in the draft to be limited to websites as per the original Decree181/2013. Online advertisements in applications help the application developer to make the application freely available to an audience while making revenues from the advertisements. The imposition of the Decree on online advertisements on applications will be detrimental to the development of a vibrant app economy in Vietnam. As physical borders for applications do not exist, it should be made feasible for global developers to offer their apps in Vietnam without onerous requirements on their monetization strategies. Such requirements could be considered digital trade barriers and could invite reciprocal treatment from other markets, thereby stifling the potential of the promising Vietnamese app developer community to export their products globally.

3. New obligations imposed on cross-border providers

Draft Decree 181 imposes new obligations on offshore service providers specifically on advertisement content and placement of such content. Offshore service providers must, among others:

i. review and examine advertisement content to ensure that such content does not violate Article 8 (prohibited acts) of Law on Advertisement;
ii. ensure that the placement of the advertisement content on the applications or websites comply with Article 8.1 (prohibited acts) of Law on Cybersecurity;
iii. filter out and take down content violating Vietnamese laws at the MIC's request;
iv. comply with tax payment obligations; and
v. have solutions to ensure that advertisement publishers in Vietnam are capable of controlling, detecting and removing cross-border ads that violate Vietnam's advertising rules.

Recommendation: We therefore recommend that:

- The obligations in (i) and (ii) above be revised to prevent any overlapping liability on ads contents and placements, since the local advertisers/ ads publishers/ ads service providers are already liable and responsible for their advertisements.

- In addition, the requirements related to take-down requests and tax obligation in (iii) and (iv) above are already mentioned in, and should be regulated only in Decree 72 and relevant tax laws respectively. We recommend removing these requirements from this Draft Decree 181 to avoid confusion and duplication during legal application and enforcement procedures. We encourage that proposed amendments to Decree 181 should aim to create a clear, consistent and effective framework so as to avoid confusion.

- Obligation (iv) above imposes an undue burden on foreign service providers. One party should never in any way be made responsible and liable for the business operation and regulatory compliance of another party, who is not even a subsidiary or an independent unit. We recommend removing this regulation as it is unreasonable and will negatively impact offshore providers' interests and motivations in continuing to provide services to Vietnamese customers. There is no technically feasible solution to meet this requirement and offshore providers will not be able to comply with the requirement. There are existing channels to report violative advertisements.

4. **Requiring foreign advertising service providers to conduct proactive review of advertisements to ensure they do not violate law is neither technically feasible nor practical--and does not accord with Vietnam's current legal framework and international commitments.**

Article 13.1(c) introduces a new obligation for proactive review and inspection of advertisements to ensure they do not violate the Law on Advertising or are not placed alongside prohibited content. This proactive review requirement extends beyond what is currently regulated in existing legislation. In addition, it appears to present a new legal obligation on foreign organisations and individuals providing cross-border online advertising services which generate revenue from Vietnam via websites, social media networks and applications accessed by users in Vietnam or used by people in Vietnam ("**Foreign Advertising Service Providers**").

We would recommend that Article 13.1(c) be removed, for the following reasons – which would be in line with international practice:

a. **Vietnam would be a global outlier.** We are not aware of any country that imposes similar duties of proactive review or inspection in their legislation. Many of these jurisdictions have recognised the technical and economic limitations of being able to comply with such obligations and/or the need to maintain the integrity of safe harbour principles. As such, the enactment of Article 13.1(c) would result in Vietnam being a global outlier – among the first (and likely only) jurisdictions in the world to actively impose this onerous duty on foreign organisations.

b. **The requirement is impossible or unduly onerous to comply with.** Subjects of Article 13.1(c) would include operators of websites, social media networks and applications which generate advertising revenue. As recognised by MIC in its draft Memorandum, some service providers may have hundreds, or thousands of cross-border advertisements placed on media. With this volume, it is factually impossible for service providers to proactively review/inspect each and every one of these advertisements.

   This is true, even with the introduction of technology-assisted (AI) reviews. While filters against certain content (e.g., pornography) may be achieved with automated tools, there is no tool that is sophisticated enough to review/inspect advertisements to the extent contemplated in Article 13.1(c). No software is capable of filtering information or audio-visual content against the broad and generally-crafted scope of Article 8 of the Law on Advertising, or capable of fully appreciating the contexts associated with communicated information. As a result, it is also impossible for Foreign Advertising Service Providers to proactively review/inspect advertisements placed alongside the prohibitions under Article 8.1 of the Law on Cybersecurity.

For smaller Foreign Advertising Service Providers that have lower volumes of advertisement contents on their platform, the costs and resources required to comply with this requirement is prohibitive – whether through manual screening or investment in proprietary technology. It would disincentivise these service providers from engaging in business in Vietnam. The eventual consequence is that Vietnamese advertisers will lose out on being able to access (and Vietnamese advertising agencies will lose out on being able to offer) appropriate online channels through which goods/services can be advertised

c. **Article 13.1(c) is discriminatory against foreign organisations and individuals.** The Draft Decree's Article 13.1 exclusively applies to the Foreign Advertising Service Providers – it does not apply to Vietnamese service providers. As indicated above, no other provision of Vietnamese law mandates proactive review or inspection of advertisement contents.

   As such, its enactment would effectively discriminate against Foreign Advertising Service Providers. In its Memorandum, MIC had recognised that the existing provisions of Article 13 "*would be taken as both discriminatory and unfeasible in enforcing the law*". Yet, the proposed Article 13.1(c) appears to play to this existing discrimination – much less address it.

   The principles of non-discrimination between foreign and Vietnamese investors have been enshrined in various investment protection treaties. For example, in respect of cross-border trade in services, national treatment obligations exist under Article 10.3 of the CPTPP that would require Vietnam to provide services and service suppliers of other contracting States with treatment that is no less favourable than that accorded to Vietnamese services and service suppliers. This is particularly pertinent as Vietnam has long since committed not to impose restrictions regarding the cross-border supply of advertising services, including under the WTO and the US-Vietnam Bilateral Trade Agreement

d. ***Article 13.1(c) conflicts against the legal responsibilities of makers of the advertisements, as well as users in the online environment.*** While Article 13.1(c) intends to apply to all Foreign Advertising Service Providers, it omits to recognise that not all such service providers are directly involved in making the advertisements. This is in spite of the Law on Advertising specifying that the advertisers or makers of the advertisements would generally bear responsibility for the advertisement contents. This allocation of advertiser liability is reinforced by Article 21.5 of Decree 72/2013/ND-CP, which requires organisations and

individuals to take responsibility for the information that they store, transmit, provide or spread online. Article 16.4 of the Law on Information Technology further sets forth a general "safe harbour", pursuant to which organisations that transmit digital information of others will not be responsible for the contents of such information, save in limited circumstances (i.e., where the organiser originates the transmission, selects the recipient of the transmission or selects and modifies the content of information to be transmitted).The aforementioned provisions are generally consistent with platform liability (hosting defence) policies that are prevalent across other countries.

The fundamental principle that underlies the above provisions is that it would not be appropriate for operators of platforms (including websites, social media networks or applications on which advertisements may be placed by the advertisers) to proactively review and be liable for matters over which they would not necessarily have control or oversight.

e. **Sufficient measures already exist under the law.** As noted in Item 1 above, the requirement for proactive review is unnecessary as content issues have already been addressed in existing laws, including the Law on Cybersecurity, Law on Information Technology and Decree 72/2013/ND-CP. In line with this, we further view that the restriction against placing advertisements alongside violating content under the Law on Cybersecurity has been misplaced. Particularly, the core of this subject should be (and has already been) addressed by obligations in existing laws. Otherwise, Article 13.1(c) effectively creates a redundant subsidiary obligation which is incapable of being enforced in practice. As a logical consequence of enforcing the content-related obligations under existing laws would, the concerns that the Government seeks to tackle through Article 13.1(c) would already be addressed.

f. **Article 13.1(c) creates conflicting duties of review against Article 13.2(a).** In the Draft Decree, Article 13.2(a) requires Vietnamese advertising service providers which contract with Foreign Advertising Service Providers to "*be liable for reviewing the contents of the ads to ensure that they do not violate the provisions in Article 8 of the Law on Advertising*." This obligation is an elaboration upon Article 15.2(a) of Decree 181 which the Draft Decree seeks to abolish. Article 13.1(c) would be inconsistent with Article 13.2(a), and it confuses the subjects that are required to review the advertisement contents. Where the Vietnamese advertising service providers are already supposed to review the contents Article 13.2(a), it would not be appropriate to duplicate this onto the

Foreign Advertising Service Providers – especially when, as indicated at Item 2.d above, they typically do not play a role in shaping the contents of the advertisements.

5. **New reporting regime**

The draft decree requires offshore service providers to file (i) an annual report (on 15 December) and (ii) ad-hoc report(s) at the request of the MIC or other competent state authorities on the advertising activities of offshore advertisement platforms. This is an extremely onerous requirement. It is impractical for offshore providers that do not maintain a presence in Vietnam to file annual reports. Further, the report and content required to be disclosed therein could potentially not adhere to or may be in violation of internal policies or applicable law of jurisdiction of where the company is incorporated.

Recommendation: We recommend that the requirement of an annual report not be imposed on offshore providers. We also recommend that the draft decree explicitly clarifies the scenarios under which a foreign provider may need to submit an ad-hoc report. This requirement should only be as a result of lawful and reasonable allegations of Advertising Law violations by competent authorities.

6. **New Notification Requirements**

The draft decree puts in place a new notification regime, whereby offshore service providers are required to notify to MIC: (i) their name, nationality; (ii) head office, and location of main servers; and (iii) contact information of foreign and domestic organizations/persons, including name, email address, phone numbers. This requirement already exists under Decree 72.

Recommendation: We recommend that this requirement be removed from the draft decree 181 as it is a duplication of an existing requirement under Decree 72.

7. **New obligations on advertising service providers and advertisement publishers in Vietnam on ads content and placement**

Draft Decree 181 provides a list of obligations of advertising service providers and advertisement publishers in Vietnam with regard to the cross-border advertising services. In particular, the advertising service providers must: (i) examine and ensure that the advertisement content does not violate the Law on Advertising; and (ii) requires the offshore application or website owners to ensure that the placement of advertisement content on such application or

websites comply with the Law on Cybersecurity. Advertisement publishers, in turn, must: (i) guarantee their ability to detect and remove advertisement content that violate the law; and (ii) not post or distribute advertisement content of offshore applications or websites, the owners of which have been identified by the authorities as violating Vietnamese laws. This obligation is onerous and cannot be complied with as there is no technical mechanism to facilitate compliance with this requirement.

Recommendation: We recommend that these requirements be removed as they are technically not feasible to be implemented and are not in line with international good practice. Including these requirements will only increase the burden on businesses and impose additional barriers on the advertising industry. To the best of our knowledge, no other digital advertising legislation has equivalent requirements.

8. **Requiring advertising agencies to request corporate and individual providers of cross-border advertising services not to place advertisements alongside violating content under Article 13.2(a) is unnecessary.**

Recommendation: We have concerns over the appropriateness of the new obligation at Article 13.2(a), which requires advertising service providers (advertising agencies) to "*request*" cross-border advertising service providers not to place advertisements alongside contents that violate Article 8.1 of the Law on Cybersecurity:

Article 13.(2(a) overlaps or contradicts Article 13.1(c). This obligation coincides with the proposed Article 13.1(c), which imposes a comparable duty on the Foreign Advertising Service Provider to remove such advertisements. This means that in effect, the Draft Decree creates overlapping obligations – one on the Foreign Advertising Service Provider and one on the advertising agencies.

This requirement at Article 13.2(a) is redundant. As we indicated at Item 2.e, the obligation has been misplaced. At its core, this concern should (and has already been) addressed by existing legal prohibitions. By the fact that the content or conduct at Article 8.1 of the Law on Cybersecurity is already prohibited, then it makes the obligation at Article 13.2(a) redundant and duplicitous.

Furthermore, according to MIC's Memorandum, this Article 13.2(a) was advanced with the aim of safeguarding the interest of the advertisers whose brands were placed alongside prohibited contents. As such, this request should not be a mandatory obligation as between the contracts between the advertising agencies and the Foreign Advertising Service Provider (to which the

advertiser may not be privy). It would be more appropriate for such concern to be directed to the relationships between the advertiser and the advertising agencies.

This requirement at Article 13.2(a) is discriminatory. Furthermore, Article 13.2(a) is discriminatory because it only subjects cross-border (i.e., foreign) service providers to this request. It does not impose the same requests to be made towards Vietnamese service providers, notwithstanding Article 8.1 of the Law on Cybersecurity being applicable to all service providers (Vietnamese and foreign alike) in cyberspace. As specified at Item 2.c, such discriminatory approach would go against Vietnam's international commitments.

9. **Article 13.1(g), which requires foreign advertising service providers to have in place solutions to enable advertisement publishers in Vietnam to control, detect and remove cross-border ads that violate local law is neither technically feasible nor practical.**

Recommendation: As an initial matter, Article 13.1(g) is unclear as to the level or type of "solution" that foreign advertising service providers would need to establish in respect of the advertisement publishers. This should be clarified.

In any event, while we understand Article 13.1(g) was introduced with the aim of enhancing measures against violating content, it would not be appropriate to pass this duty down onto all Foreign Advertising Service Providers. This is because many of such service providers typically do not have control over the manner in which advertisement publishers manage their platforms (websites, etc.). They provide a tailored solution for their clients which may partially or wholly include the use of online advertising, and would not be in a position to enable or mandate such publishers to have these necessary measures in place.

For those Foreign Advertising Service Providers that own or manage their own means of advertising, they have already been captured by the general obligations under Article 13.1(a), as well as existing content control measures under the Law on Cybersecurity and Decree 72/2013/ND-CP. In any case, as indicated at Item 2.b above, there are limitations as to the type of measures that can be taken. Therefore, we would propose the removal of Article 13.1(g)

10. **Removal of the local agency and 15-day notification requirements are in line with Vietnam's international commitments.**

Under Current Decree 181, Vietnamese customers must contract with an onshore advertising agency to have their ads published on websites of foreign service providers. In addition, 15 days prior to publication of ads on foreign platforms, offshore service providers must notify the MOCST with relevant information of their local advertising agencies. These requirements are removed under the Draft Decree 181. We welcome this development and encourage the Government of Vietnam to consider making changes to the Law on Advertisement in order to remove for example, Article 40 of the Law on Advertising.

Recommendation: The removal of Article 13.2 (stipulating that the organizations and individuals wishing to advertise on cross-border platforms must do so through entities conducting advertising service business), and Article 14.2 (stipulating that foreign organizations and individuals providing cross-border advertising services must notify in writing the Ministry of Culture, Sports and Tourism 15 days in advance of the information about the Vietnamese entities conducting advertising service business) is a welcome change.

The removal of these requirements would align with Vietnam's international treaties that mandate a non-discriminatory approach to cross-border advertising services. Particularly, doing so would be in line with Vietnam's WTO Commitments, as well as commitments under the US-Vietnam Bilateral Trade Agreement and EVFTA. In line with this amendment, we also look forward to the corresponding removal of Article 39.2 of the Law on Advertising.

11. **The contact information notification requirements (proposed Article 14.1) overlap with existing requirements and are therefore not necessary.**

Recommendation: The notification requirements of the Draft Decree (the "Foreign Advertising Service Provider Notification") overlap with the requirement to notify MIC under Circular 38/2016/TT-BTTTT on the cross-border provision of public information (the "Public Information Notification"). By definition, advertisements are intended to convey information to the recipients (*See* Article 2.9 of the Law on Advertising). It follows that foreign advertising service providers would also be categorised as organisations that provide "*public information*" on a cross-border basis under Circular 38/2016/TT-BTTTT.

The proposed Article 14 would effectively require Foreign Advertising Service Providers to provide multiple notices with identical information (e.g., overseas and Vietnam contact points) to MIC. For this purpose, we note that many Foreign Advertising Service Providers, by virtue of their business model, are already likely to trigger the traffic count stipulated by Circular 38/2016/TT-BTTTT (having at least 1,000,000 persons that use or access the website per month) to mandate the Foreign Advertising Service Provider Notification. Furthermore, the Draft Decree proposes that the Foreign Advertising Service Provider Notification be delivered to and managed

by the Authority for Broadcasting and Electronic Information (ABEI) under MIC, despite ABEI also being the recipient and manager of the information of the Public Information Notification.

In short, this would subject Foreign Advertising Service Providers to an additional unnecessary burden when it is already required to give the Public Information Notification; and MIC would be provided with information that it likely already has on hand, thereby making the Foreign Advertising Service Provider Notification redundant.

12. **The periodic and ad-hoc reporting requirements (proposed Articles 14.2 and 14.3) give rise to confusion in application.**

Recommendation: The Draft Decree envisages two types of periodic/ad-hoc reports (each assigned a different report template): Periodic reports of "*foreign corporate and individual providers of cross-border advertising services in Vietnam*" pursuant to the new Article 14.2 ("**Form 1 Report**"); and Periodic reports of "*advertising service providers*" pursuant to the new Article 14.3 ("**Form 2 Report**"). It remains to be seen the type of content that organisations need to report under the Form 1 Report and Form 2 Report, as the forms of the reports have not been made available for comment.

In any event, it is unclear whether subjects of the Form 1 Report must also deliver the Form 2 Report. If this were the case, the Form 1 Report subjects would be subject to two sets of reporting obligations – which we anticipate would overlap in their content as well. The Draft Decree should clarify the subjects the Form 1 Report and Form 2 Report to avoid imprecise application.

13. **The existing language of Decree 181 sufficiently addresses taxation issues; any additional details should be left to the Ministry of Finance to regulate under the tax laws.**

Recommendation: While we recognise the desire to tighten taxation against overseas entities, we recommend that this be left to the current tax laws (as well as any future legislation of the Ministry of Finance) to prevent overlap and confusion.

In any case, the current regime sufficiently addresses the Government's tax concerns, as it confers broad measures to facilitate collection. For example, Article 27.3 of the Law on Administration explicitly allows banks in Vietnam to deduct payments to overseas organisations to account for taxes. As such, we believe the language of the existing Decree 181 (that "*tax on the revenues from advertising in Vietnam … shall be paid in accordance with legislation on taxation*") is sufficient to address the Government's concern. To the extent regulations on tax

collection needs to be tightened, Vietnam's advertising law is not the appropriate platform to do so.