

Industry submission on the Enforcement Decree of the Korean Telecommunications Business Act (“TBA”)

Note: Please note that the translated submission in Korean language will be submitted to the ministry in due course.

19 October 2020

**Mr. Ki-Young Choi
Minister of Science, Technology and ICT (MSIT)
194, Gareum-ro, Sejong-si, 30121, Republic of Korea
South Korea**

To the Hon’ble Minister Choi,

On behalf of the Asia Internet Coalition (AIC) and its members, I am writing to express our sincere gratitude to the Minister of Science, Technology and ICT (“Ministry”) and the Government of South Korea for the opportunity to submit comments on the Enforcement Decree of the Telecommunications Business Act (“TBA or the Act”) amendments, which defines the requirements and responsibilities of “value-added telecommunications service providers” (VSPs).

AIC is an industry association comprising 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 current members are Airbnb, Amazon, Apple, Expedia Group, Facebook, Google, SAP, Cloudflare, LinkedIn, LINE, Rakuten, Twitter, Yahoo (Verizon Media), Booking.com, and Grab.

Korea has one of the world’s most developed internet and digital economy ecosystems, and our member companies are significantly invested in Korea’s economic growth and development. We are committed to partnering with the Korean government to ensure a conducive and forward-looking regulatory environment that enables Korea to remain a digital leader and encourages innovation and investment that will create new jobs and economic opportunities in Korea.

Our member companies comprise leading internet and technology companies around the world that care deeply about the quality and reliability of their services, and strive to provide the most innovative and helpful platforms and services to their end users in Korea. They have played a pivotal role in keeping users connected to the world during the COVID-19 pandemic, and worked tirelessly with governments and internet service providers to meet user demand and recover quickly from disruptions, even in times of great uncertainty. Due to the nature of global data flows, internet and technology companies rely on the cooperation of internet service providers to effectively and reliably deliver their services to end-users. That is why we share the concerns of the Korea Internet Corporations Association (K-Internet) and other trade associations about the TBA and related

Enforcement Decree, which is premised on shifting the burden of consistent and stable internet connection and service reliability to VSPs despite their lack of end-to-end control of the data.

As written, the Enforcement Decree creates significant technical obligations, reporting requirements, local representative requirements, and legal/commercial risks on foreign companies delivering internet services to Korean users that could run afoul of Korea's international trade commitments in the WTO and the Korea-US Free Trade Agreement. Based on widely reported media articles and statements by Korean lawmakers, we are also concerned about the discriminatory intent of the law against global tech companies in favor of supporting the commercial interests of domestic ISPs and telecommunications providers. We appreciate Korea's commitments to allow cross-border service providers to access the Korean market in a non-discriminatory way, and urge regulatory consistency with Korea's bilateral and multilateral trade agreements.

Against this backdrop, we would like to submit our concerns and recommendations to the Government and respectfully request the Ministry to consider our submission which will be a useful feedback for the policy-making process. As responsible stakeholders, we appreciate the ability to participate in this discussion and the opportunity to provide our inputs. **As such, please find appended to this letter detailed comments and recommendations, we would like the Ministry to consider. Please note that the translated document in Korean will be submitted to the ministry in due course.**

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 or at +65 8739 1490. Importantly, we also look forward to offering our inputs and insights, directly through meetings and discussions and help shape an effective and competitive regulatory framework in South Korea.

Sincerely,

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

Jeff Paine
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Detailed comments and recommendations

A. Industry Comments on Telecommunications Business Act Enforcement Decree (Article 22-7) and Local Presence Requirement (Article 22-8)

Current Text - Article 1:

(1) A value-added telecommunications service provider who meets standards prescribed by the Enforcement Decree in Article 22-7 of the Act means a value-added telecommunications service provider who meets all of the following requirements.

- 1. The average number of daily users in the last 3 months as of the end of the preceding year is at least one million; and*
- 2. The traffic volume in the last 3 months as of the end of the preceding year is at least 1% of the total traffic amount in Korea*

Proposed Amendment:

Delete 1% of total web traffic as a threshold criteria.

Comments:

- **Arbitrary standards:** There are no reasonable grounds for requiring onerous regulations on value-added telecommunications service providers (“VSPs”) simply because they have more than 1 million average number of users and comprise 1% of Korea’s total web traffic. If a criteria is required, then 1 million users is easier to measure and more aligned with the government’s public policy objectives of improving reliability for all services, while creating a reasonable exemption for small and micro enterprises.
- **Web traffic is not a justifiable standard to scope legislation on:** Web traffic should not be the primary standard to judge the importance of a service. This standard inevitably captures more video streaming services, but to customers, other internet applications and services (such as voice) could be more important than video streaming services. Yet those services don’t fall within scope of this regulation. According to MSIT’s public documents, the purpose of the law is to “provide convenient and stable telecommunication services to users,” but only want to include “as few operators as possible.” If the government’s goal is to ensure reliable services for all consumers, it should make these requirements apply to all OTT/content/application services.
- **Web traffic is difficult to measure and presents conflict of interest for ISPs:** Web traffic is highly variable, and takes other governments (such as the United States and Japan) 6-12 months to accurately measure and report historical web traffic. It will be challenging and onerous for VSPs to assess whether they meet the 1% standard because there is no publicly available and verifiable data about total web

traffic in Korea. While Korea's major ISPs capture the majority of the traffic, they would not capture the entirety of web traffic in Korea - for example, enterprises loading their data onto cloud services. More importantly, both VSPs and the Korean government would be fully dependent on the accuracy of ISPs' self-reporting to make their assessment since there is currently no way to verify the accuracy of ISP's data. ISPs may have a conflict of interest in reporting accurate data since they have their own content and over-the-top services that compete directly with VSP services.

- **Web traffic data is a trade secret:** VSPs consider their traffic data on a country-specific basis a trade secret, as it would be one of the signals that competitors use to determine the utilization of various services.

Current Text - Article 2:

A value-added telecommunications service provider falling under Article 1 shall ensure that users are provided with convenient and reliable telecommunications services regardless of the device used by the user or the facilities-based telecommunications service provider to which the user is subscribed.

Proposed Amendment:

*A value-added telecommunications service provider falling under Article 1 shall **make efforts to provide convenient and reliable telecommunications services to the extent they can control elements of the network that are relevant to service reliability** regardless of the device used by the user or the ~~facilities-based telecommunications service provider to which the user is subscribed.~~*

Comments:

- **Reliability standards must be proportionate to the service's function and technology, and acknowledge that service outages and problems will inevitably occur:** The explanatory notes from MSIT define the concept of "convenient and stable service" as "the service provided by the value-added telecommunications service provider according to the contract with the user that is 1) normal without errors and 2) continuously available without interruption." It is not technically feasible to expect VSPs to provide reliable service 100% of the time. Despite best efforts, unavoidable and unexpected technical bugs, outages, and other problems will occur, especially as many aspects of the service are not under the VSP's control. Requiring convenient and reliable service 24/7 overlooks this technical reality, and increases the risk of legal disputes with users. Even in the telecom industry, "reliable service" is never interpreted as "100% in service" and regulations always allow some level of outages depending on the nature and function of the service.
- **VSPs depend on ISPs and other intermediaries to provide reliable service to users:** Data on the internet travels from origin to destination through several independent intermediaries; the number of intermediaries usually varies between 4 to over 50 during the course of the data travel. This makes it basically impossible for a single entity to control entirely the reliability of the data delivery to the user. VSPs can only make efforts to provide convenient and reliable services to the extent they can control the network. Elements of the network that VSPs can control are generally within the premises and facilities that VSPs either operate directly or contract independently from ISPs. For overseas VSPs a non-trivial portion of these elements sits outside of Korea. In most situations, VSPs and ISPs depend on each other to provide a reliable experience to users within Korea. This involves relying on each other's

capabilities including but not limited to, willingness to interconnect, availability of network capacity, availability of sufficient physical links (such as leased lines, subsea cables, etc) to interconnect, and availability of resources such as colocation space.

Current Text - Article 3:

Measures prescribed by Enforcement Decree necessary for securing measures for service reliability in Article 22-7 of the Act means all of the following measures taken by a value-added telecommunications service provider falling under Article 1 within the scope of its authority and responsibilities.

- 1. Take technical measures to prevent excessive concentration of traffic and technical errors (multiplying servers, optimizing contents transmission, etc.).*
- 2. Secure reliability for server capacity, consistent internet connection, traffic route management, etc. taking into consideration changes in traffic volume*
- 3. When needed in performing the measures referred to in Paragraph 2, consult with relevant undertakings including the facilities-based telecommunications service provider, and give advance notice if there is any reason that may significantly impact service reliability, such as change in traffic route*
- 4. Prepare guidelines for securing service reliability*

Proposed amendments:

- *Measures prescribed by Enforcement Decree necessary for securing measures for service reliability in Article 22-7 of the Act means all of the following measures taken by a value-added telecommunications service provider falling under Article 1 within the scope of its authority and responsibilities. **Provided, however, that if service reliability is not secured due to a facilities-based telecommunications service provider or any other third party even after a value-added telecommunications service provider has made commercially reasonable efforts to implement appropriate measures within his/her authority and responsibility, such value-added telecommunications service provider shall not bear any responsibility for violation of obligation.***
- *3.1 + 3.2 **Make efforts to secure technical reliability to prevent excessive concentration of traffic and technical errors (optimizing contents transmission, securing server capacity overseas or domestically, traffic route management, etc.)***
- *3.3 **When needed in implementing the measures referred to in Paragraph 2, give advance notice to the extent possible for any reason that may materially impact previously agreed upon metrics of service reliability with relevant service providers including facilities-based telecommunications service providers.***
- *3.4 Delete provision entirely. Ensure that this does not require companies to share trade secrets.*

Comments:

- **Article 3.1 and 3.2 include measures that are dependent on ISPs:** Most measures listed in this section require the full cooperation of ISPs to implement. Measures such as preventing concentration of traffic and securing consistent internet connection have been defined by the Korean courts as fundamental obligations of an ISP. VSPs cannot accurately predict changes in future traffic volume, and traffic volume is affected by unpredictable variables. The Enforcement Decree should acknowledge these contingencies, and encourage the ISP to cooperate in good faith with the VSP.

- **Measures should be illustrative, not prescriptive, and allow for VSPs to deliver internet services on a cross-border basis without restriction:** VSPs want to provide reliable services to their customers and have their own internal reliability metrics, but there are multiple ways of achieving this. The Enforcement Decree should explicitly allow for overseas VSPs to deliver internet services to Korean users on a cross-border basis.
 - Multiplying servers - duplicative with securing server capacity, so delete
 - Optimizing contents transmission - “Content optimization” can take many forms and happen at multiple levels. VSPs are not in full control of many types of optimization, and some are fully controlled by ISPs (like throttling devices). Optimization also relies on handsets, set top boxes, laptops, etc that end users use to access the content, which is not in direct control of the VSPs.
 - Consistent internet connection- fundamentally the responsibility of ISPs
 - Securing server capacity - VSPs should be able to design server capacities, the location of the servers, and the scaling mechanisms based on their own requirements (or customer requirements) without having to disclose those details to the government or the ISPs. What ultimately matters for reliability, is for the ISPs and VSPs to cooperate in good faith when exchanging this traffic.
- **VSP should not be required to consult with ISPs except for on previously agreed upon matters.** Since VSPs already cooperate with ISPs to provide their services to end users, they should not have a separate requirement to consult ISPs. To the extent possible, VSPs will give advance notice to ISPs on previously agreed upon metrics of service reliability. Just as important, ISPs should be required to work in good faith with VSPs and not unreasonably reject offers made by VSPs.

Current Text - Article 4

A value-added telecommunications service provider falling under Article 1 shall prepare materials on the implementation status of the measures specified in Paragraph of Article 3 and submit the materials to the Minister of Science and ICT by the end of January each year.

Proposed Amendment:

Where needed, the Minister of Science and ICT may request the submission of relevant materials to check the implementation status of measures specified in each Paragraph of Article 3 by a value-added telecommunications service provider falling under Article 1. In this case, the valued-added telecommunications service provider so requested shall comply with such request absent special circumstances. The foregoing shall not apply where such materials constitute trade secrets under Article 2, Subparagraph 2 of the Unfair Competition Prevention and Trade Secret Protection Act.

Comments:

- **VSPs should not be required to share trade secrets** in any reports to the Korean government. Having to compile this report on an annual basis will be unreasonably onerous and costly, and would have to be evaluated by several teams to ensure there are no trade secrets revealed. The report should only be submitted on an as needed basis, such as in the case of a major outage or service failure.

Current Text - Article 5

Article 5- Measures prescribed by Enforcement Decree necessary for handling user requests in Article 22-7 of the Act means all of the following measures.

- 1. Secure an online or telephone automated answering channel that can receive requests from users in Korean according to business hours*
- 2. In the event of a significant change to securing means of stable services, notify users of contact details to advise with respect to such fact, the cause, and related matters*
- 3. If a user requests transmission of user-generated data pursuant to Article 2, Subparagraph 4, Item B of the Framework Act on Intelligence Informatization, establish procedure for the user to receive the data for a sufficient period of time*
- 4. Provide multiple payment method and authentication method for service fees for users who are paying service members*

Proposed Amendments:

- *Measures prescribed by Enforcement Decree necessary for handling user requests in Article 22-7 of the Act that a value-added telecommunications service provider falling under Article 1 shall take means all of the following measures **for services determined and publicly notified by the Minister of Science and ICT through domestic or international channels.***
- We recommend deleting 5.2

Comments:

- **VSPs should be able to provide customer support from any jurisdiction and have independent policies for different types of services**, i.e. paid versus unpaid. They should not be required to have a domestic representative providing customer support for every single service provided by the VSP in Korea. Imposing such significant obligations on VSPs may discourage them from releasing new or not-for-profit/free services in Korea to the detriment of Korean users.

B. Korea's International Trade Commitments

WTO and KORUS FTA Commitments

1. Article XVII of the GATS and Article 12.2 of KORUS FTA: National Treatment

In its WTO General Agreement on Trade in Services (GATS) schedule and Article 12.2 of the KORUS FTA, Korea has committed to provide national treatment to a wide variety of foreign services and service suppliers, including computer services (e.g., database services and data processing services), telecommunication services (e.g., value-added services, including on-line database and remote computing services), audiovisual services (including motion picture distribution services), and advertising services.

The national treatment commitments require Korea to treat US services and service suppliers “no less favorably”

than Korean suppliers in like circumstances, and the key test for this obligation is whether the measures in question will negatively impact conditions of competition for US suppliers relative to such Korean suppliers. The TBA amendments and related Enforcement Decree does exactly that. While the measure appears origin-neutral, it was broadly reported that the Telecommunications Business Act was amended in the National Assembly to target “global IT firms” and had discriminatory intent. The arbitrary threshold for 1 million users and 1% traffic volume also carves out Korean competitors that will not be subject to the same costly and burdensome requirements. This is particularly concerning because Korean facilities-based telecommunications service providers/internet service providers that have their own content streaming services that compete with US VSPs would not come within scope of the regulation. The provisions are also likely to negatively impact competitive conditions for US suppliers because they may impose conditions that US suppliers cannot reasonably meet without establishing a local presence, which would be contrary to Korea’s commitment to allow US suppliers to supply their services on a cross-border basis.

2. Article II of the GATS and Article 12.3 of KORUS FTA: Most-Favored Nation Treatment

Similarly, Korea is obliged to provide most-favored nation treatment under Article II of the GATS and Article 12.3 of the KORUS FTA. Given that the Enforcement Decree provisions subject US companies to onerous requirements that will not apply to direct competitors and other similar service suppliers from countries such as China, Japan, Singapore or the EU, this runs afoul of Korea’s MFN commitments as US companies will be treated less favorably compared to third country competitors.

3. Article VI of the GATS and Article 12.7 of KORUS FTA: Domestic Regulation

Article VI of the GATS and Article 12.7 of the KORUS FTA requires Korea to ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. In addition, in sectors subject to commitments (e.g., computer services, telecommunications services, audiovisual services, advertising services), Korea “shall not” apply licensing and qualification requirements and technical standards that “nullify or impair” such commitments, e.g., by failing to ensure that such requirements are based on objective and transparent criteria; are not more burdensome than necessary to ensure the quality of the service; or, in the case of licensing procedures, not in themselves a restriction on the supply of the service, if the requirements could not reasonably have been expected of Korea at the time it made its commitments.

Given such principles, the Enforcement Decree provisions may violate GATS Article VI and Article 12.7 of KORUS as they (i) are not based on objective criteria; and (ii) may operate in such a way as to restrict trade in relevant services. First, the objectivity of the threshold is questionable. The Ministry of Science and ICT acknowledged in its supplementary materials on September 9 that industry stakeholders had varying opinions on the minimum threshold for traffic volume (between .35% and 5%) and the government settled on 1% because it includes the minimum number of both domestic and foreign firms to not appear discriminatory, and not based on any objective or technical reason. Based on this information and media reports, it appears that the criteria was determined as a way of bringing foreign companies within scope.

Second, the provisions may restrict the cross-border supply of services because they pose a high level of financial and legal risk, liability, and uncertainty associated with the vague and broad nature of the enforcement decree, require VSPs to submit an annual report on the “implementation status” of service reliability measures that may include commercially sensitive and confidential information, and apply onerous requirements on all of the VSP’s services without distinguishing the size, function, and nature of a VSP’s individual services.

4. Telecommunications Annex of GATS and Article 14.2 of KORUS FTA: Telecommunications Access and Use

Article 14.2 of the KORUS FTA sets forth rules for access to and use of any public telecommunications network or service offered across borders, including that of ensuring that service suppliers of the other party “have access to and use of any public telecommunications network or service . . . on reasonable and non-discriminatory terms and conditions.” Requiring VSPs to consult service providers concerning traffic route management, etc. and imposing obligations to secure consistent internet connection on VSPs may restrict the ability to freely access and use telecommunications networks and services across borders. It does not pass the test of “reasonableness”, given that a VSP does not have control over the whole route that data takes from origin to the end-user, and relies on cooperation with ISPs and intermediaries to provide a reliable service. The Decree fails to sufficiently acknowledge this interdependence by shifting the responsibility of service reliability on the VSP without requiring ISPs to work in good faith and mutual cooperation, resulting potentially in a situation where ISPs would be accorded unfair bargaining power over the VSPs.

Further, Article 14.2(2) provides that each party shall ensure that service suppliers of the other party are permitted to “(e) use operating protocols of their choice in the supply of any service.” The Enforcement Decree may restrict VSPs’ choice of operating protocol because it requires VSPs to consult with the ISP on specific measures to secure the reliability of traffic route management.

Finally, Article 14.2(5) provides that each Party shall ensure that no condition is imposed on access to and use of public telecommunications networks and services, other than as necessary to: (a) safeguard the public service responsibilities of suppliers of public telecommunications networks and services, in particular their ability to make their networks or services available to the public generally; or (b) protect the technical integrity of public telecommunications networks or services. The requirement to report trade secrets does not appear to be “necessary” nor the least-trade restrictive means to achieve these objectives. Instead, what the current provisions would effect is a restriction in VSP’s ability to provide services in Korea by forcing the sharing of commercially sensitive and competitive information.

The GATS Annex on Telecommunications also includes several obligations potentially relevant to the Enforcement Decree. For example, paragraph 5(a) of the Annex requires Korea to ensure that service suppliers of other WTO Members are accorded access to and use of public telecommunications transport networks on reasonable and non-discriminatory terms and conditions, for services that are subject to commitments under the GATS. Thus, Korea is obliged to provide such access and use for its committed services, which include computer services, value-added telecommunications services, audiovisual services and advertising services. The Enforcement Decree raises issues with respect to this obligation for the same reasons that it raises concerns under Article 14.2 of the Korea-US FTA.

Similarly, paragraph 5(b) of the Annex requires Korea to ensure that service suppliers of other WTO Members are permitted, inter alia, to use operating protocols of their choice in the supply of their services, other than as necessary to ensure the availability of telecommunications transport networks and services to the public. The Enforcement Decree raises concerns with respect to this obligation as well, as it may restrict VTSPs’ choice of operating protocols, as discussed above with respect to Article 14.2(2) of the Korea-US FTA.

Finally, paragraph 5(e) of the Annex includes a requirement similar to the requirement in Article 14.2(5) of the Korea-US FTA to ensure that no conditions are imposed on access to and use of public telecommunications transport networks and services other than as “necessary” to safeguard the public service responsibilities of suppliers of such networks and services, or to protect their technical integrity. Again, the Enforcement Decree raises concerns with respect to this requirement for the same reasons that it raises concerns under Article 14.2(5).

5. Article 12.5 of KORUS FTA: Local Presence

TBA 22-8 requires the designation of a local agent to fulfill user protection and requests for information, and notes that “where a local agent violates [Article 22-7], the telecommunications service provider who designated the local agent shall be deemed to have committed such act.” Appointing a local agent for the Enforcement Decree will have the effect of “measures to induce the establishment of an office in Korea,” particularly for the measures pursuant to Articles 3, 4, and 5 of the Enforcement Decree.

-End of submission