Asia Internet Coalition (AIC) Industry Submission
Thailand Royal Decree regarding Supervision of Digital Platform Services

13 August 2021

To

Mr Chaiwut Thanakamanusorn,
Minister of Digital Economy and Society (MDES)
Government of Thailand

Cc: Ms. Ajarin Pattanapanchai
Permanent Secretary, Ministry of Digital Economy and Society (MDES)
Government of Thailand

Dear Hon'ble Minister Chaiwut

The Asia Internet Coalition ("AIC or We") and its members express our sincere gratitude to the Government of Thailand, The Electronic Transactions Development Agency (ETDA) and the Ministry of Digital Economy and Society (MDES) for the opportunity to submit comments on the Draft Royal Decree regarding Supervision of Digital Platform Services ("Draft Decree").

AIC is an industry association that represents leading global internet companies on matters of public policy. To further its mission of fostering innovation, promoting economic growth, and empowering people through the free and open internet, AIC would like to present our comments on the Draft Decree. Our members are Airbnb, Amazon, Apple, Expedia Group, Facebook, Google, SAP, Cloudflare, LinkedIn, Grab, LINE, Rakuten, Twitter, Yahoo, Booking.com.

In continuation to our participation in the Public Hearing organised by ETDA on 15 July 2021, we share a common goal of promoting a fair and transparent business environment. Building trust is key for a flourishing online as well as offline economy. Online platforms are an important driver for growth and jobs and operate by providing services to hundreds of thousands of businesses and millions of consumers across Thailand.

However, if the requirements set out in the Draft Decree are implemented, it will disrupt Thailand's digital economy and Fourth Industrial Revolution goals, without meaningfully improving national security or cybersecurity, provision of digital platform services to customers in Thailand and consumer protection.

During this critical period where the ease of doing business should be improved to help Thailand re-emerge stronger from the pandemic, this Draft Decree instead increases business costs, uncertainty, and disruption. The potential negative impact goes beyond foreign

companies which continue to invest in Thailand despite the tough pandemic conditions but also to Thai companies which leverage ICT (e.g. social media, e-payments, smart technologies, cloud computing). The unfortunate timing of this proposed Draft Decree exacerbates the negative impact of its problematic provisions.

Our main concerns with the Draft Decree are that it (i) contains certain provisions which go beyond the scope of the Electronic Transaction Act B.E. 2544 (as amended) (ETA), as the main legislation of the Draft Decree, (ii) introduces redundancy with existing laws and regulations,(iii) overly creates burdens/obligations for digital services, and (iv) no sufficient details/requirements as the Draft Decree allows the competent authority to prescribe further details/requirements at the later stage.

We request for further official industry consultation about the form of the law and subsequent rounds of public hearing, considering the Draft Decree is at a very preliminary stage and requires a holistic set of inputs from the industry. In addition to having more extensive industry consultation, we suggest that ETDA and MDES increase coordination with other parts of the Thai government as this Draft Decree cuts across multiple policy areas and already risks introducing overlapping regulations. Concerns around the lack of sufficient consultation had already been raised during the 15 July Public Hearing session and we wish to reiterate this along with AIC's offer to serve as a resource in thinking through how digital economy regulations could be best designed.

To expound on a key issue with the Draft Decree, the definition of "Digital Platform Services" is so arbitrarily broad that the entire internet and digital economy might fall under the scope, and the provisions are similarly broad in covering multiple aspects such as localization, criminal liability, licensing framework, notification, data disclosure, and content take down. A single one-size-fits-all piece of legislation to regulate the entire internet is not the right approach. Instead, there should be consideration for a panoply of policy solutions which recognizes the wide spectrum of digital services and their varying business models, focuses on a policy issue or goal, and is backed by evidence-based policy research and consultation. We would like to emphasize that there are also multiple sections in this Draft Decree which overlap with existing government policies regulating digital platforms today, e.g. the Trade Competition Act, supervision by the Consumer Protection Board. Such overlaps in coverage can create confusion for businesses, as they would be uncertain which regulation they should follow. Furthermore, the Electronic Transaction Act , which is the main regulation that stipulates ETDA's authority to issue this Draft Decree, does not empower ETDA to regulate all activities but e-transactions only. Thus, we suggest any platforms that do not have transaction on-platforms should be excluded.

Should the Draft Decree be passed in its current form, it would create the following impact:

- Inevitably render offshore platforms under Thai jurisdiction and create much stronger nexuses for other Thai authorities to apply other applicable laws to its media services which goes against international best practice (see Section 8 and Section 25);
- Unnecessarily impose burden on foreign digital platform services to appoint a representative residing in Thailand where the representative must be assigned the

power to act on behalf of such platforms without any limitation of liability (see Section 9);

  - The appointment of representatives for foreign service providers has no restriction on liabilities as per stated in the draft, meaning that the appointed representative will be liable for any action of the principal company. We propose to remove this clause.

- Hurt those already vulnerable to the economic downturn by requiring identification and verification of operators and consumers which hinder Thailand's digitalisation efforts (see Section 16)
- Severely damage autonomy of current business platforms in deciding its business model, operation policy, security measures, data protection policy, commercial arrangements with partners, content provision and other key operational aspects (see Section 16 and 18);
- Require a company to submit a notification for operating services under a category defined by the authority while the procedures and rules are unclear (failure to do so resulting in suspension of services), as well as annual notification to disclose confidential business information (see Section 13-15);
- Hinder renovation of technology and health competition (see Section 16);
- Increase cost of doing business in Thailand due to the new rules specified for operation (see Section 16); and,
- Result in suspension of services in the event of non-compliance and prosecution(see Section 22 and 27).

As such, please find appended to this letter detailed comments and recommendations along with general comments in the Appendix, which we would like to respectfully request the Government of Thailand to consider when reviewing the Draft Decree.

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact us directly at Secretariat@aicasia.org or +65 8739 1490. Importantly, we also look forward to offering our inputs and insights, directly through meetings and discussions with the Ministry and concerned stakeholders.

Thank you for your time and consideration.

Sincerely,

Jeff Paine
Managing Director
Asia Internet Coalition (AIC)

Detailed Comments and Recommendations

1. **Section 3 on the Definition of "Digital Platform Service**

The Draft Decree defines "Digital Platform Service" as a digital platform service provided in an intermediated means for digital platform users to be connected for the purpose of offering goods, services or intangible assets through computer network regardless of whether an agreement has been made through such digital platform or not. The current broad definition would essentially produce a one-size-fits-all regulation for digital services which is not only impractical but also raises fundamental questions over what the policy goal/issue is and whether there is indeed a need for such a blunt policy.

With this broad definition, electronic communications for the purpose of bringing together buyers and sellers would be considered digital platform service operators. As such, activities such as online advertisement or even any discussions about products or services by users on a non-e-commerce platform type of social media (e.g., organic content, messaging) that does not have transaction on-platforms would fall within this scope--even though such content would not otherwise be captured under the Electronic Transaction Act. The nature of each social media and messaging are different, some may be solely for the purpose of communications, some may be solely for the purpose of e-commerce, some can be a combination of both, and etc.

Thus, we recommend that ETDA address the issue of regulatory overlap, the wide spectrum of digital services, and the proportionality of its proposed policies. These three concerns are currently present throughout the draft, and exemplified in the overly broad definition. As a primary objective of the decree is to ensure consumer protection, then B2B businesses should be excluded from the scope. Based on the current draft, there is concern that it will result in a greater regulatory challenge for startups and other platforms that intend to support Thailand's digital economy and SMB's transformation to digital. This also does not gel with the country's desire to improve the ease of doing business and attract investments.

2. **Section 8 on the Scope of Digital Platform Operators governed by the Draft Decree**

The Draft Decree implements the extraterritorial concept. According to Section 8 of the Draft Decree, digital service platform (DSP) operators outside Thailand providing services to users in Thailand would be subject to the Draft Decree. It will be deemed that digital platform service operators outside Thailand have the intention to provide services for users in Thailand if certain criteria are met. These criteria include showing

results in Thai language, using THB for payment, using Thai law for transaction, setting up office or personnel(s) for the purpose of supporting/assisting users in Thailand.

The concept of deemed operation is too broad and there are many websites or apps that may fall into the definition. For example, if a platform is captured under the Draft Decree simply by virtue of showing results in Thai language, this is an overly broad and overly simplistic approach; having search results show up in Thai language does not necessarily mean that the platform or website is targeted to Thai consumers, which we assume is the intention of the Draft Decree when seeking to apply to offshore operators. Further, if a platform uses an international payment gateway that is capable of THB payments, this could deem that the site is targeting Thailand, while in fact it is simply serving an international audience. There is no mechanism by which the operators can be certain that the authority applies and enforces the Draft Decree to all operators fairly and no avenue for operators to seek clarification or raise concerns to the authority.

Section 8 determines an onshore nexus is way too broad and almost excludes all customer friendly features or services that a foreign DSP may provide to customers in Thailand. It would also not be commercially meaningful for a foreign DSP to provide its services without any of these features as set forth in Section 8. Having any of the characteristics which render a foreign DSP under Thai jurisdiction can only create administrative burden to Thai authority as well as make DSP to reduce customer friendly services to customers in Thailand.

- We recommend revising Section 8 to cover only a DSP that is incorporated in Thailand, deploys servers inside of the country and meets ALL of the characteristics that are subject to the Decree.
- We recommend revising section 8 only to cover only a DSP that has transaction on-platforms, which under the remit of the Electronic Transaction Act
- We recommend ETDA to adopt international standards when defining digital platform services and how to regulate these services.
- Compliance should not trigger a breach of the *Foreign Business Act* on the basis that offering 'services to consumers in Thailand' equates to doing business in Thailand for offshore platforms.
- The language of Section 8(5) should be clarified as the Thai version suggests a focus on service providers used by platforms to verify/check user locations
- Section 8(6) should also be clarified as to the impact on local service/business development entities as it is unclear whether the existence of a local business development entity trigger the applicable requirement.

3. **<u>Section 9 on local presence and without limitation of liability</u>**

The Draft Decree requires a digital platform service operator outside Thailand to appoint a representative who resides in Thailand. Normally, the concept of a local representative is to ensure that such a business operator is contactable. As such, if a digital platform service operator has another channel for its customer to easily contact,

a local representative may not really be necessary, and such operators should be exempted from this requirement.

Due to wide-variety of digital platforms' business models and rapid-changing technology, we recommend that the regulation should not be too prescriptive and give flexibility for the platform to offer different communication means or measures to connect with its customer (as opposed to a determined local representative). In addition, requiring platforms to have a local presence would be onerous. The costs involved would serve as a barrier for all platforms, especially startups, to access the Thailand markets\, and could deter or disincentivize foreign investment in Thailand.

In addition, the Decree should ensure that the scope of responsibilities/ liabilities (Appointment of local representative should ideally be exempt from income and other tax liabilities) of the local representative should be limited to what transactions under the ETA as the main regulation empowering the issuance of the Draft Decree, not any other laws. The scope must be clearly spelled out, and not subject to broad interpretation especially there are penalties under the law.

We also recommend that the local representative not be permitted to accept service of Thai proceedings on behalf of the offshore platform operator as it erodes the legal structure that most companies have in place. For example, this requirement would result in a default "rep office" structure, which is a structure most companies have opted out of.

More importantly, not only the Decree authorizes an overbroad power to ETDA to punish the representative without any limitation of liability for the act of digital service digital platform, but also is it contradictory with the existing laws and regulations in Thailand, such as the Computer Crime Act which have already been in place in dealing with this specific issue. This Decree is thus outside of the scope of ETDA and may result in a violation of the Thai Constitution due to rights and liberties of people who may be affected by this Decree.

4. **Section 10 on Submission of information/documents request by competent authority**

Digital platform service operators must inform competent authority for their business operation. Form and procedure will be as prescribed by the competent authority. As this requirement creates a burden on operators to report on their commencement of business, the form and supporting documents required for submission should be clearly prescribed in the Draft Decree so the operators can ensure that they fully comply with the requirement.

The competent authority may request that digital platform service operators submit additional information/documents as they deem appropriate for monitoring digital platform service. This requirement broadly empowers the competent authority to seek for any information/document they would like to request from operators. The requirement to request additional documents (other than those generally required) would cause unnecessary burden to business operators and, thus, should be carved

out. The information being requested should also be aligned with data protection regulation, based on court order and follow international best practices on data sharing.

Requiring notification to the authority under the correct "Firm" category is not clear to DSP on the rules and procedures. It is challenging for DSP to complete such notification without understanding the criteria and documentation needed. Certain information provision may cause a foreign DSF to violate laws where it is incorporated or create additional issues (e.g. for DSPs that are public companies and need to protect the dissemination of their non-public material information),, while failing to notify may cause suspension of services. The dilemma puts a foreign DSP into by this requirement ultimately could result in termination of services to Thai customers.

- We recommend removing the requirement or promulgate detailed rules and categories of "Firms" for DSP to have a chance to comment.
- The form and supporting documents required for submission should be clearly prescribed in the Draft Decree so the operators can ensure that they fully comply with the requirement.
- The requirement to request additional documents (other than those generally required) would cause unnecessary burden to business operators and, thus, should be carved out. The information being requested should also be aligned with data protection regulation, based on court order and follow international best practices on data sharing.

5. Section 11 on the time period for a DSP to communicate with the authority

Section 11 leaves a very short period of time for a DSP to communicate with authority for meeting compliance requirements. A foreign Firm would not be able to adjust its policies globally or revise its system for one country in 90 days.

We recommend revising 90 days in Section 11 paragraph 4 to a practically reasonable period of time.

6. **Section 11 on Notification System and Disclosure of Information**

Section 11 states that the Agency, with approval from the Committee, must additionally prescribe information on Firms that can be disclosed to the public through electronic means. This section needs to be further clarified to ensure that there will be no potential leakage of confidential information or trade secrets of businesses.

7. **Section 15 on the Obligations as digital platform service operators**

Yearly submission of business size within 30 days after the end of accounting period is required (Section 15) with the form to be prescribed by competent authority. There is no definition of "business size" and the form is not yet available so it is unclear what information will be required to provide.The form should be made available as attachment to the Draft Decree so that business operators can have an idea as to what kinds of information needed.

To the extent "business size" is meant to refer to revenues collected or transactions completed on the platform, for certain types of platforms, such as platforms that simply facilitate interactions between buyers and sellers, such a requirement should not apply and would in any event be unfeasible to meet, as the platform may not have visibility into monies collected or transactions completed, or the payments are done off-platform / offline. Also, for foreing platform operators, the calculation of "business size" should be taken into consideration only for businesses operating in Thailand.

Further, any information will be provided based on the availability of data and the requirement should be aligned with the data protection regulation, and follow international best practices on data sharing.

We recommend the following language under Section 15: "Firm may voluntarily provide information to the extent permitted and available under the law where it is incorporated."

8. **Section 16 on the Specific requirement for large Digital Platform Service**

The competent authority is empowered to issue criteria and conditions for large digital platform service as it deems appropriate. As there is no definition on what constitutes "large" digital platform service, it is unclear and would create more burden to operators especially as to whether they have to comply with this specific requirement at a later stage. We are also concerned about the lack of definition of what ETDA classifies as a "risk" and the specific circumstances which enables ETDA to enforce the 12 rules and conditions to digital service providers.

We believe there cannot be one-size-fits-all regulations for all business operators. Each platform/ website is different in nature and has its own process to deal with how to list, display, rating, collect information, terms, dispute, appeal etc. So instead of issuing subordinate regulations detailing under section 16, the authority should consider a broad provision that enables each platform to ensure for itself that they have appropriate measures in place and encourage industry self-regulation.

Regardless of lack of definition, the specific criteria and conditions to be issued under this Section 16 would consider unnecessary burden or overly limit rights of platform operators. These include (i) rules and conditions for providing services between platform operators and merchant on the platform, as well as fees, compensation,

service fees, and costs relating to the provision of service that is clear and fair, (ii) product/service inspection, details about the products or services, advertisement, as well as electronic information *[to include "live "* on the Digital Service Platform that is an offense under the relevant laws, including measures for prevention and rectification, (iii) categorizing the appropriateness of the content on the digital service platform by their type and age range of consumers. Platforms that are mere intermediaries, for example, would not have the relevant details about the products or services, and it is overreaching (and operationally unfeasible) to require such platforms to collect, verify and display such information for every single product or service.

Other requirements such as pre-listing mechanisms and guidelines for illegal goods and contents can have unintended consequences of hurting small sellers on the platforms. Digital platforms handle tremendous amounts of traffic and transactions every second. Thus, from a volume perspective, it would be difficult to manage. From the small sellers' perspective, these requirements could introduce more barriers to digitalising their business, many of whom are pivoting during the pandemic. Such costs tend to impede their ability more than bigger, established sellers, creating more inequality in the process.

In addition, certain criteria and conditions are redundant with other regulations as well as would create more obligations to platform operators under other regulations. For example, the requirement for access to and use of information platform operators, whether it is personal data or data received from activities of merchants on platform/consumers would put platform operators more risky on the compliance of the Personal Data Protection Act B.e. 2560 (PDPA). Also, the take down request requirement should only be limited to any information that is considered illegal under the ETA itself, not other laws. For instance, the provision on data request and data access have been covered by the Computer Crimes Act. Therefore, the requirement under the Draft Decree is redundant and should be removed or replaced with "aligning with other applicable regulations related with these topics, to ensure legal certainty and platforms can comply.

Therefore, Section 16 extremely impedes not only the ecosystem of existing DSP (both local and foreign ones) but also prevents further technology development and business innovation of DSP. Rules on every aspect of services would easily damage the operation model of a DSP. Accessing all data of a DSP would potentially contravene other countries' laws and international treaties. It will only discourage foreign DSP from providing services to Thai customers who will be disturbed. Illegal content and information removal though is often seen as a regulatory requirement in many countries, however such removal burden to be borne by a DSP will not help an Operator on the Platform to proactively comply with applicable laws but increase uncertainty for them to transact with Thai customers via such DSP. Standardising service level of DSPs, especially imposing impractical requirements to DSPs who already provide high quality services, may only destroy healthy competition.

We recommend that ETDA to establish a multi- stakeholder industry feedback channel aimed at defining a consistent, transparent risk based approach which aligns with international standards.

- **Presumption against large digital ecosystems:**: Section 16 of the draft Decree targets large digital platforms on the assumption that size is harmful to users. However, such an assumption fails to take into account benefits large ecosystems bring to consumers. In a digital environment, where choices are abundant, consumers often prefer convenience, consistency, and a one-stop-shop experience. These efficiencies lower transaction costs, increase consumer welfare, and drive overall technological adoption. Large digital ecosystems have driven the growth of the digital economy. This would indicate an unfriendly investment environment in Thailand and, thus, resulting in limited consumers' choices with limited platform operators.

- **Need to Preserve Business Freedom**: Section 16.1 aims to introduce price regulation and to enhance transparency and fairness of terms and conditions. Business users exercise the freedom to conduct a business when they choose to accept the terms of dealing with platform operators. These private enterprises should have the freedom to judge the fairness of their agreements.

  Section 16.2 aims to introduce rules for the order in which products or services are listed. This is concerning as they involve source codes which are commercially sensitive and are potential trade secrets. Many digital platforms are already transparent about the terms and conditions that apply to their relationships with business users and consumers. The terms and conditions are mostly available at all times and in particular before contracts are made with users. If these alter users are generally informed.

  Online platforms go to great lengths to maintain good relations with their business users because it's in their own interest to do so. Also, all the transactions can rely on the general legal principle of Thai civil and commercial laws.

- **Data access:** as currently drafted, Section 16.4, is very broad and it is unclear what the scope of a data access obligation would be. Digital platforms already provide their business users with data analytics in accordance with privacy and security requirements. The implications of such a broad provision could be far reaching. For example, giving access to non-aggregated data raises important privacy challenges. Data sharing, i.e. Section 13 and 14, might also lead to cybersecurity concerns. The scope of data is not specified and too broad. ETDA should at least provide the scope of data that should be provided, disclosed, or connected to "facilitate" the Operator. There are no purposes of data collection, processing, and disclosure and also no standard of data safeguards and retention period to ensure data protection during data sharing among governments.

  Consumers expect that their information is processed according to high

standards. Once the data is shared outside of the original service provider's platform, the provider can no longer ensure data protection and it is unlikely that all business users will have the same level of security in place to protect the data.

- **Unclear standard/requirement for the Digital Service Platform's data processing:** Section 16(4) is unclear on a requirement of the standard of "data protection" - ETDA needs to confirm whether its guidelines under the PDPA and PDPA itself are sufficient.

- **Need for proportionality**: Section 16.8 seeks to introduce mandatory verification of business users' and consumers' identity by the digital platform. Mandatory verification raises serious privacy concerns and will eventually increase the amount of personal information to be held by digital platforms. In addition, it remains to be seen how the identity verification will take place; demands for identity verification tend to propose linking access to formal documentation, such as a utility bill or a bank account. However, these requirements would immediately disenfranchise those on low incomes, the unbanked, the homeless, and people experiencing any number of other forms of social exclusion, from being able to access essential information and services. This would hurt the government's digitalisation agenda during this critical period where the country is battling another pandemic wave.

  Further, we recommend removing section 16 (9), as this is overly broad and beyond the authority of ETDA. If the aim of the subsection is to govern streaming platforms/websites with their primary business are movie/ series streaming services and require age range information, it should be regulated under implementing regulation or explicitly clearly stated so. This is not commonly seen in any regulation on e-commerce. In addition, with the broad wording which may be interpreted that it is also applicable to any types of contents on the platforms/ website, that would not be practically possible and overly create unnecessary burdens and risks to other types of digital platforms/ website.

  We recommend removing Section 16 in its entirety.

9. **<u>Section 22 on failure to to comply with the Draft Decree</u>**

   If service providers violate or fail to comply with the Draft Decree, officers shall order the providers to stop their operations until they fully comply. In cases where service providers do not comply with the law within 90 days after the order is issued, their notification will be revoked.

   Companies which are voluntarily taking steps to address ETDA's specific concerns should not be penalized, also known as the "Good Samaritan" protection.

These penalties are not typically found in a Draft Decree. Also, as the concept under Draft Decree to merely to "notify", the revocation would imply that the operators have to seek approval. The revocation should be limited to circumstances where platform operators materially give "false" or "untrue" statements in the notification form.

10. **Section 25 on Investigation and cooperation with competent authority**

    Digital platform service operators are obliged to cooperate with legal order/court order under the Draft Decree as well as other laws. Otherwise, the competent authority is empowered to suspend the operation of business.

    It is unclear whether this Section 25 is enforceable, as the main legislation that empowers the issuance of the Draft Decree is the ETA. As such, the obligations, responsibility and liabilities of operators should merely be limited to those under the ETA without referring to other legislation.

11. **Section 26 regarding scope of power against digital platform**

    ETDA, with the approval of the ETC, may seek cooperation from relevant agencies to take actions--in accordance to their given scope of power--against digital platform service providers whose notification has been revoked in accordance with Section 22, or whose businesses commence without notifying ETDA, as well as users of digital platforms.

    We seek clarity on which other relevant agencies will be involved.

    We also recommend that the ETDA powers be limited to compliance with the ETA and that other agencies be required to investigate, prosecute and regulate independently under their governing/enabling legislation.

12. **Section 14 on Using of information provided by digital platform service operators**

    In the event that it is necessary for other authorities to use information provided by digital platform service operators, the competent authority is entitled to disclose such information without delay (Section 14, paragraph 1). This provides broad powers to the competent authority to disclose information provided by operators whereby some of which may be considered confidential information of the operators and should be fully protected. Otherwise, the disclosure may prejudice privacy rights of the operators. The disclosure of this information must be on a court order basis only and consistent with data protection regulations and international best practices on data sharing.

13. **Section 44 on Penalties**

    Under the ETA, operating service business relating to electronic transactions without notifying or applying for registration is subject to the imprisonment of not exceeding

one year or to a fine not exceeding THB 100,000 or both (Section 44 of the ETA). In addition, directors, managers or any person responsible for operation of the local representative, shall be subject to the same liability (Section 46 of the ETA).

As we have noted throughout this position paper, parts of the Draft Decree in its current form are vague, overreaching, and participants would be confused on how to comply. There will likely be confusion as to which business operators and platforms are required to register under the Draft Decree, and on what basis, because the definition is extremely broad. The cumulative effect is that, under the current draft, individuals could be facing criminal liability for non-compliance with vague requirements.

Also, as a matter of general principle, the extension of criminal liability to individuals or employees, when considering the additional obligations set out in the Draft Decree, is too broad and not proportionate. It runs counter to the established principle of company / corporation law that the organization is a separate legal entity. It is also out of step with several international benchmarks. This will likely have a chilling effect on foreign investment in Thailand as it will be a significant deterrent for many companies.

Though the ETA has been in effect since 2001, it should be considered whether this provision would be in contradiction to the Constitution as in a criminal case, a defendant shall be assumed not guilty unless it is proven beyond reasonable doubt that he/she commits such guilt. In addition, given the Draft Decree provides various unclear obligations, how business operators can ensure that the law will not be interpreted and applied too broadly which employees of the company may be subject to liabilities.

14. **Section 2 on Grace Period**

Based on the current draft, business operators have approximately 6 months for transition. We believe a 12-month grace period would be a more proper time frame for business operators in preparing themselves, given that the new requirements require significant operational changes, and require time and process to consider how the requirements can be practically implemented. The Thai Personal Data Protection Act also provides a one year grace period, which also had even been extended due to Covid situation where the focus of various business operators are now on Covid efforts.

Appendix

General comments

1. **No evidence of systemic market failure:** we do not believe that there is strong enough evidence of a systemic market failure that needs to be addressed by market regulation. Regulatory intervention needs to build on solid evidence and a proper understanding of digital markets rather than broad assumptions about the economic dynamics prevailing in those markets.

   Before any legislative proposal is considered, it is important to carefully weigh the potential trade-offs of intervention and ensure that value is not destroyed to the detriment of users and innovation. These trade-offs should be thoroughly assessed and understood in markets characterised by complex interactions, strong synergies, and high levels of innovation, resulting in dynamic competition of a new kind with constant market entry.

2. **No one-size-fits-all approach:** Regulatory intervention must recognise the diversity and dynamic of platforms' business models. Digital platforms operate diverse and dynamic business models, deliver widely different services, are active in fundamentally different markets and monetise their services in very different ways. The definition of "Digital Service Platforms" in the draft decree is too generic and it fails to capture the plurality of the online ecosystem. The definition seems to assimilate applications and websites that are too dissimilar and that operate in very distinct markets. As such, it is not fit for purpose in a regulatory context.

2. **Redundancy or overlapping with other regulators which will be burdensome to the business operator:** All of the digital service platforms should be classified as a low impact to the public and the regulation should be out on an exceptional basis. This can help to narrow down which regulatory measures will be effective and which ones are impractical or could impose a significant burden. As there are existing laws and government agencies related to technology and digital economy and also consumer protection laws that can apply and regulate to the digital services platform without the necessity to issue the new regulations i.e. OTCC regulates free and fair trade competition amongst business operators, DIT regulates and promotes trade system in order to maintain price stabilization of products and services, the OCPB regulates on consumer protection, and many other government agencies are working on the regulation in the specific scope of business, where there may be a confusing division of responsibilities between ETDA and other government agencies. If the draft is out on an apply-to-all basis, it will have extremely wide-reaching effects on the ecosystem as a whole which is not aligned with the key mission of ETDA to accelerate the digital service growth. The regulatory approaches lack the agility to accommodate the increasing pace of technology development. The pace of technology development also

can make it difficult for government agencies to respond to evolving risks. As the technology is changing faster than the laws can keep up, relying on the legislative process these are likely to be out-of-date or redundant by the time they are implemented and being hard to define the fair law on such redundant.

3. **Wide discretion:** Some of the provisions rely on the exercise of discretion of ETDA to further prescribe the rules, procedures, or notifications, and also has the right to suspend the business and request for trade secrets without the clear scope of such discretionary power. When the government issues uncertain laws, discretion takes center stage, the business operator needs predictability and legal certainty in order to continue to innovate. ETDA may not make their decisions in a totally transparent manner because they operate on the basis of vague criteria responding more to overall regulatory objectives,

4. **Readiness of the regulator: ETDA has to ensure its readiness as a regulator.** ETDA should be flexible and should actively engage a broad and diverse range of stakeholders and initiate the best approach or regulatory impact assessments. Technical expertise is needed to be involved in the uncertainty surrounding technology developments and the overwhelming pace of digital transformation. These are important steps to create and sustain regulatory solutions that are evidence-based and to capitalise on the expertise of those who are familiar with the technologies and their implications.

Conclusion

The draft Decree raises significant concerns to foreign DSPs and the requirements set forth in it will not achieve the goals as stated in the preface. It will increase the cost of robust service provision to foreign DSPs, discourage foreign DSP to innovate, impede the development of the digital services industry in Thailand, and most importantly, it will deplete the benefits Thai users have access to from overseas services providers.