



September 15, 2023

BSA COMMENTS ON DRAFT DECREE SUPERSEDING DECREE NO. 72/2013/ND-CP

Respectfully to: The Ministry of Information and Communications

On behalf of BSA | The Software Alliance (**BSA**),¹ we send you our sincere regards and thank you for soliciting feedback from the private sector on the Draft Decree superseding Decree No. 72/2013/ND-CP (**Draft Decree**). We welcome the opportunity to submit comments to the Ministry of Information and Communications (**MIC**) on the Draft Decree. In the past years, BSA provided comments on the draft Decree 72 in September 2021² and December 2021,³ on Decree 53 in September 2022,⁴ and on the Draft Law on Telecommunications in December 2022.⁵ Most recently, we commented on Decree 13 on Personal Data Protection in June 2023.⁶

BSA is the leading advocate for the global software industry. Our members are enterprise software companies that create business-to-business technologies that help other businesses innovate and grow. For example, BSA members provide tools including cloud storage and data processing services, customer relationship management software, human resource management programs, identity management services, and collaboration software. BSA offers our extensive global experience in technology policy to serve as a resource and we hope that our comments in this submission will be helpful to the MIC.

Data localization requirements

The Draft Decree may be interpreted to impose new obligations on entities providing public information on a cross-border basis and (1) lease space in data centers, or (2) receive at least 100,000 visits from Vietnam for six consecutive months. In particular, Article 26(3)(dd) could be read to require such entities to store personal information of Vietnamese users within Vietnam. As noted in our prior submissions, such data localization requirements will have a chilling effect on the local economy if they do not allow enterprises to fully benefit from cutting edge technology and services available in the global marketplace. For instance, data localization requirements may restrict domestic enterprises, both small and medium-sized enterprises (**SMEs**) and larger organizations such as hospitals, airlines, and banks, from using world leading information technology (**IT**) and cloud

¹ BSA's members include: Adobe, Alteryx, Altium, Amazon Web Services, Atlassian, Autodesk, Bentley Systems, Box, Cisco, Cloudflare, CNC/Mastercam, Dassault, Databricks, DocuSign, Dropbox, Elastic, Graphisoft, IBM, Informatica, Juniper Networks, Kyndryl, MathWorks, Microsoft, Nikon, Okta, Oracle, Palo Alto Networks, Prokon, PTC, Rockwell, Rubrik, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.

² [Vietnam: BSA Comments on Proposed Amendments to Draft Decree 72 | BSA | The Software Alliance](#)

³ [Vietnam: BSA Comments on Proposed Amendments to Draft Decree 72 | BSA | The Software Alliance](#)

⁴ [Vietnam: BSA Comments on Decree 53 to Implement the Law on Cybersecurity](#)

⁵ [Vietnam: BSA Submission on Draft Law on Telecommunications](#)

⁶ [Vietnam: BSA Comments on the Personal Data Protection Decree No. 13/2023/ND-CP](#)

computing solutions from service providers that offer their services from outside of Vietnam. Such services frequently provide best in class security capabilities; prohibiting domestic companies from using such services may reduce their competitiveness, especially internationally, and expose them to great data security risks.

Requiring data localization does not increase the protection of data and indeed can increase the risk that such data may be compromised. As long as affected entities are able to meet their remaining obligations under Article 26(3)(dd), data localization requirements are not necessary. We were informed that in a conference co-hosted by the MIC and the US-ASEAN Business Council held on August 31, 2023, the MIC commented that the Draft Decree does not require cross-border information providers to localize users' personal information in Vietnam. BSA therefore recommends specifying in the final Decree that there is no requirement for data localization in addition to verbal explanations provided during the conference.

Concerns Regarding Vietnam's Commitments in International Agreements

We also wish to highlight that any data localization requirement may raise concerns regarding Vietnam's commitments in international agreements and present challenges to Vietnam's efforts to harness digital transformation for the benefit of its economy and citizens.

a) Consistency with CPTPP Commitments

The data localization requirement in the Draft Decree raises concerns regarding Vietnam's compliance with its international obligations under the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP) as it potentially requires foreign organizations providing cross-border information with more than 100,000 visits per month from Vietnamese users to "use or locate computing facilities" in Vietnam as a condition for conducting business. These localization requirements appear to be incompatible with CPTPP Article 14.13, which states (in relevant part) as follows:

"Article 14.13: Location of Computing Facilities: ... 2. No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory."

Vietnam's limited transition period to comply with this obligation will expire in January 2024, meaning that such localization requirements will be formally out of compliance with Vietnam's CPTPP commitments at that time.

b) Coherence with CPTPP Exceptions Frameworks

The data localization requirement may not qualify as reasonable or permissible exceptions within the meaning of CPTPP Article 14.13.3.⁷ Derogations from the aforementioned CPTPP provisions must be "necessary" to secure compliance with domestic laws and "not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective." Unfortunately, the Draft Decree does not appear to meet this standard.

Data localization is a less effective means of seeking to ensure access to information than legal standards that ensure (where there is a regulatory need) ready access to relevant information. For

⁷ CPTPP Article 14.13.3. states as follows:

"Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:

(a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and

(b) does not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective."

example, in some free trade agreements or digital economy agreements, the Parties prohibit data localization, but nevertheless permit “a Party’s financial regulatory authorities, for regulatory and supervisory purposes, [to require] immediate, direct, complete, and ongoing access to information processed or stored on computing facilities that the covered person uses or locates outside the Party’s territory.”

Rather than impose self-defeating data localization mandates, the final Decree should clarify when and under what circumstances specific information should be provided to relevant regulatory authorities.

c) Exclusion from IPEF and Other Regional Trade Initiatives

The data localization requirement in the Draft Decree would also threaten Vietnam’s ability to participate in and benefit from regional trade initiatives, such as the Indo-Pacific Economic Framework (IPEF). If Vietnam fails to abide by existing international commitments, it may raise questions about the strength and value of commitments that Vietnam seeks to undertake in other negotiations. A loss of trust in Vietnam’s ability to abide by its international commitments could undermine the willingness of partner economies to engage in digital trade negotiations with Vietnam in the future.

Provisions on protecting cross-border data transfers, prohibiting data localization and digital customs duties, and promoting cybersecurity and personal data protection are core pillars of the IPEF trade pillar. Those provisions will be based on standards found in the US-Japan Digital Trade Agreement (USJDTA), the Australia-Singapore Digital Economy Agreement (DEA), the Singapore-Korea Digital Partnership Agreement (DPA), the Digital Economic Partnership Agreement (DEPA), the US-Mexico-Canada Agreement, and the CPTPP, among others. Unfortunately, the restrictions outlined in the Draft Decree would be incompatible with the aforementioned provisions in each of the named agreements. By amending the Draft Decree to remove its data localization requirements, Vietnam would also avoid disqualifying itself from participating in the IPEF trade pillar negotiations on cross-border data matters.

Vietnam is also party to the recent statement by the Association of Southeast Asian Nations (ASEAN) on September 5, 2023, wherein ASEAN member states agreed to pursue to development of a Digital Economy Framework Agreement (DEFA), emphasizing the importance of interoperability and trade facilitation. Pursuing domestic data localization laws runs counter to the ASEAN member states’ agreement to develop a digital transformation strategy where seamless and secure flow of data is underpinned by enabling regulation.

d) Threat to Vietnam’s Innovation and Technology Ecosystem

The Draft Decree’s data localization requirement could threaten Vietnam’ ecosystem for software and technology start-ups, and its ability to attract investment and to compete with peer nations. By imposing restrictions that make it more difficult for foreign enterprises to engage with Vietnam in cross-border software development and technology transfer, Vietnam risks hobbling its own indigenous enterprises and making itself less attractive (in both absolute and relative terms) to foreign investment in software development and other emerging technologies. Again, amending the Draft Decree to remove its data localization requirement would help Vietnam avoid this negative outcome.

Content removal requirements should apply solely to B2C services

We note that the MIC recently stated at the August 31, 2023 conference that the Draft Decree’s scope applies to business-to-consumer (B2C) services, but that several business-to-business (B2B) service providers providing online storage, hosting, and/or internet data center services will have to cooperate with the competent authorities to handle the violating content. It is important to acknowledge that providers of B2B services are unable to moderate content on their enterprise customer’s services. Providers of B2B services do not have the technical or legal ability to view discrete instances of content on their customers platforms, which is important for protecting government and business data. It is therefore unreasonable to impose any content moderation obligations on B2B service providers.

Instead, content moderation obligations should exist only where there is a B2C relationship, i.e., a direct relationship between the service provider and end-users.

Additionally, we urge the MIC to rethink requirements for timed removals of content that exist across the regulation, and rather replace specific timings with wording such as “reasonably practicable.” Timed removals may incentivize platforms to take an overly cautious approach resulting in the excessive removal of content which can impact users’ fundamental rights to free expression and access to information.

Conclusion

BSA appreciates the opportunity to provide our comments and recommendations on the Draft Decree . We thank the MIC for considering our comments and hope MIC will positively implement our recommendations. We urge MIC to continue to engage in dialogue with the private sector and to continue open discussions to achieve common goals for developing a vibrant and competitive digital economy. Please do not hesitate to contact the undersigned at waisanw@bsa.org if you have any questions or comments regarding our suggestions.

Yours faithfully,

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