

Comments on the Draft Decree on IT Services – Version 3.8

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1. Provisions apply to cross border supply of IT Services (Articles 19)

We understand from the Draft Decree that cross border suppliers of IT services are only subject to Article 19, not other provisions of the Draft Decree. As such, registration and licensing requirements under Section 1 and 3 of the Draft Decree, for example, will not apply to cross border suppliers (as the requirements are imposed on entities established in Vietnam). If that is the case, please clarify the same by adding this sentence to the beginning of Article 19: *“Only Article 19 is applicable to foreign organizations, enterprises providing cross-border IT services”*

2. Potential WTO inconsistency (Article 19.3)

Article 19.3 requires that cross border supply of IT services that are subject to licensing requirements or registration requirements must be conducted through the commercial branch or the commercial intermediaries of the foreign supplier in Vietnam. This requirement may be inconsistent with WTO obligations of Vietnam on market access: GATS Article XVI.2 and Vietnam’s commitments under the Services Schedule.

Specifically, according to GATS Article XVI.2, Vietnam must not maintain or adopt six types of market access limitations, unless otherwise specified in its Service Schedule.

The requirement under Article 19.3 may constitute limitations under paragraphs (a), (c) or (e) of GATS Article XVI.2.

Some services subject to the requirement of Article 19.3 can be classified as data base services, data processing services according to the CPC system of the United Nation. These services may also contain advertising services.

Meanwhile, the WTO Services Schedule of Vietnam on computer and related services and advertising services does not reserve any market access limitations similar to the requirement of Article 19.3.

Further, if a foreign supplier has to establish a branch to provide its IT services, the service supply mode is no longer “cross border”. This is because according to GATS Article XXVIII (d) (ii) “any type of business or professional establishment, including through the creation or maintenance of a branch or a representative office” constitutes “commercial presence”. As such, Article 19.3 de-facto prohibits cross border supply of relevant IT services.

For the above reasons, we recommend deletion of Article 19.3 to ensure WTO consistency.

3. Tax issue (Articles 19.1, 19.2 and 19.3)

With respect to cross-border transactions, even if tax arises, the local party making payments will be responsible for tax payment on behalf of the foreign entity. This article 19.1 says that "trans-border IT service providers shall pay the value added tax (“VAT”), corporate income tax, and other taxes as stipulated in law on taxation and other documentations regarding revenues generated in Vietnam." This is inconsistent with the general tax rule. This provision is also inconsistent with the last sentence of article 19.3 "Vietnamese party shall comply with Article 1 herein and fulfill tax obligations for trans-border IT service providers according to law on taxation, law on VAT, law on corporate income tax and other relevant documentations concerning revenues generated in Vietnam."

We suggest revising article 19.1 as follows: "Any taxes arising from trans-border IT services shall be implemented in accordance with current provisions of Vietnamese laws and regulations on tax."

Accordingly, the last sentence of article 19.3 should be deleted. In line with our above comments, the

whole Article 19.3 should be deleted.

Under Article 19.2, VAT and other taxes seem to be penalties for local customers who acquire trans-border IT services not through branches or intermediaries. This is odd since firstly IT services themselves in general are subject to VAT regardless of the sale channels and secondly taxes should be different from penalties. We suggest deleting this Article.

4. Removal of licensing and registration requirements under Sections 1 and 3, Chapter IV

The licensing requirements and registration requirements under Sections 1 and 3, Chapter IV of the Draft Decree are burdensome and unnecessary and thus should be deleted from the Draft Decree.

When applying for a business registration certificate (“**BRC**”) or an investment certificate (“**IC**”) to provide IT consultancy services, the applicant must provide evidence and explanation to prove its experience and capability. Where the project is subject to appraisal procedures, the MIC itself, as the management authorities in the IT sector, must have reviewed and approved such explanation and evidence before the licensing authorities issue the BRC or the IC to enterprises.

We believe that very often the MIC involves in reviewing IC application dossier related to IT services because most of IT services covered under the Draft Decree might be classified as computer and related services or might contain service components that are inscribed in the WTO Services Schedule of Vietnam.

The addition of the licensing and registration requirements under the Draft Decree just creates additional burdensome administrative procedures, which does not necessarily ensure the quality of relevant IT services or investment. Rather, the requirements create double licensing effects that will make the investment environment in Vietnam less attractive. Such additional requirements are contrary to the administrative reform spirit of the Vietnamese Government. With such effect, it will be harder for Vietnam to realize its goals of becoming a nation strong in information technology.

Meanwhile, cross communications among authorities and implementation of e-government can be an alternative measure, which is less costly, less burdensome and more effective, for State agencies to monitor IT services businesses.

For all the above, we recommend remove Sections 1 & 3, Chapter IV and related provisions of the Draft Decree;

5. Removal of IT professional certificate requirement (Section 2, Chapter IV)

As mentioned above, before receiving a BRC or an IC from licensing authorities, an applicant must have provided evidence and explanation to persuade the authorities of its capability, including those on personnel, for the provision of the relevant IT services.

Further, from business perspective, to be successful in the market, the service supplier is self motivated to ensure the quality of its staff and its services.

Thus, the additional of this certification requirement does not necessary ensure the quality of IT services. Rather, it just creates an additional burdensome administrative procedure, which will be time consuming and costly for both enterprises and authorities. Again, the requirement is contrary to the administrative reform spirit of the Vietnamese Government.

For all the above, we recommend remove Section 2, Chapter IV and related provisions of the Draft Decree.

6. Other issues (Article 14.4) – Clarification of terms (Articles 12.1, 15 & 16)

If it is impossible to remove the licensing, registration or certification requirement as recommended above, please consider the following additional issues:

- **IT professional certificate requirement (Articles 15 & 16)**

Article 16.4(a) of the Draft Decree seems to imply that IT professional certificate is compulsorily required only for the provision of IT services to State agencies. If that is the case, please revise Article 15 accordingly for consistency.

Also, as the IT professional certificate will affect the transparency of government procurements in this sector, the conditions for granting an IT professional certificate must be concrete and transparent. As such, please clarify how a person's capability and experience can be treated as being "appropriate" with the consulting field, and how an international certificate can be treated as "appropriate".

- **Term of license**

The license for IT services business is valid for a maximum term of 5 years according to Article 14.4 of the Draft Decree. This term might be too short, which can be burdensome for both the authorities and enterprises in practice, particularly when the investment in certain IT services is huge. Please consider revising this provision so that there is no limitation of license terms and providing specific cases where a granted license can be withdrawn instead.

- **Clarification of term**

Article 12.1 refers to the services of renewing, recycling, and renovating hardware and electronic products at "industrial scale". Please define the term "industrial scale" to avoid discretionary interpretation in practice.

Article 16.2 requires that the IT services that incorporate a lot of specialized products must have a management code for each product. It is unclear how many products included in an IT service will be treated as "a lot". Thus, this needs to be clarified as well.

7. BPO services coverage (Article 3.15)

Article 3.15 of the Draft Decree defines business process outsourcing (BPO) service as a service, in which the organizations and individual service providers perform one or many business processes for customers outside the territory of Vietnam via IT and telecommunications facilities.

We understand that this definition serve to classify which kind of BPO can enjoy incentives under Chapter III of the Draft Decree. It by no means prevents enterprises from providing business process outsourcing services to customers based in Vietnam. As such, please clarify this point directly in Article 3.15 or in Chapter II of the Draft Decree.