



September 15, 2023

GLOBAL DATA ALLIANCE COMMENTS ON DRAFT DECREE SUPERSEDING DECREE NO. 72/2013/ND-CP

Respectfully to: The Ministry of Information and Communications

The Global Data Alliance (**GDA**) appreciates the opportunity to provide feedback on the Draft Decree superseding Decree No. 72/2013/ND-CP (**Draft Decree**). We welcome the opportunity to submit these comments to the Ministry of Information and Communications (**MIC**). To avoid unintended harms, the GDA recommends that Vietnam explore alternative approaches to the data localization mandates found in the Decree.

The GDA has provided comments on numerous Vietnamese proposed requirements to localize data or restrict data transfers. For instance, the GDA provided comments on data localization and related data restrictions in Vietnam in June 2023,¹ December 2022,² as well as April 2021,³ September 2021,⁴ October 2021, November 2021⁵ (translation),⁶ and December 2021⁷ (translation).⁸ The GDA has also joined a broad group of global industries in expressing concerns with the restrictive direction of Vietnam's cross-border data policies.⁹

The GDA is a cross-industry coalition of companies, headquartered in different regions of the world, that are committed to high standards of data privacy and security. The GDA supports policies that help instill trust in the digital economy without imposing undue cross-border data restrictions or localization requirements that undermine data security, innovation, economic development, and international trade.

Alliance member companies are significant investors in Vietnam, investing millions of dollars and supporting thousands of jobs. GDA member *companies are active in Vietnam in the aerospace, automotive, consumer goods, electronics, energy, financial services, health, media, supply chain, and telecommunications sectors*. Data transfers enable the digital tools and insights that are critical to enabling entrepreneurs and companies of all sizes, in every country, to create new kinds of jobs, boost efficiency, drive quality, and improve output.

The GDA is concerned that the Decree's potentially requires data localization restrictions, which will impede Vietnam's stated goals and will produce significant unintended consequences. We respectfully recommend the MIC clarify that data localization mandates are not intended within the Decree, and to evaluate the other recommendations suggested herein.

A. Data Localization Requirements

The Draft Decree may be interpreted to impose new obligations on entities providing public information on a cross-border basis that (1) lease space in data centers, or (2) receive at least 100,000 visits from

users in 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 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. The GDA therefore recommends specifying in the final Decree that there is no requirement for data localization in addition to verbal explanations provided during the conference.

B. 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.

1. 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.

2. Coherence with CPTPP Exceptions Framework

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 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.

3. 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.

4. Threat to Vietnam’s Innovation and Technology Ecosystem

The Draft Decree’s data localization requirement could threaten Vietnam’s 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.

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.

C. Conclusion

The GDA 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 me at josephw@bsa.org if you have any questions or comments regarding our suggestions.

Sincerely,

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¹ [Vietnam: Global Data Alliance Comments on the Cross-Border Data Transfer Elements of the Personal Data Protection Decree](#)

² [Vietnam: GDA Comments on Draft Law on Telecommunications \(globaldataalliance.org\)](#)

³ [Vietnam: Comments on Draft Viet Nam Personal Data Protection Decree \(globaldataalliance.org\)](#)

⁴ [Vietnam: Comments on Proposed Amendments to Draft Decree 72 \(globaldataalliance.org\)](#)

⁵ [Vietnam: Comments On Proposed Amendments To Draft Decree On Sanctions Against Administrative Violations In the Field of Cybersecurity \(globaldataalliance.org\)](#)

⁶ [Ý kiến Đóng góp về các Đề xuất Sửa đổi đối với Dự thảo Nghị định Quy định về Xử phạt Vi phạm Hành chính trong Lĩnh vực An ninh mạng \(globaldataalliance.org\)](#)

⁷ [GDA Comments on Proposed Amendments to Draft Decree 72 \(globaldataalliance.org\)](#)

⁸ [Ý kiến Đóng góp về các Sửa đổi được Đề xuất đối với Dự thảo Nghị định 72 \(globaldataalliance.org\)](#)

⁹ [Vietnam: Multi-association Letter on Draft Decree on Personal Data Protection \(globaldataalliance.org\)](#)