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Submitted electronically

### **Comments on Draft Viet Nam Personal Data Protection Decree**

The Global Data Alliance (**GDA**)<sup>1</sup> welcomes this opportunity to provide our comments to the Ministry of Public Security (**MPS**) regarding the draft Personal Data Protection Decree (**PDPD**). While member companies may have interests and concerns on a range of issues raised in the draft PDPD, the GDA is focused on policies related to cross-border data transfers. Accordingly, this letter addresses those provisions that are relevant to cross-border data transfers. The GDA has previously submitted our comments in March 2020.<sup>2</sup>

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. GDA companies rely on the ability to transfer data responsibly around the world to create jobs and make local industries more competitive. Cross-border data transfers power innovation and growth across the globe and all sectors of the economy — from manufacturing and farming to local start-ups and service providers. 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. We have attached as appendices to this submission the Alliance's Position Paper on cross-border data transfers,<sup>3</sup> as well as several documents describing the economic benefits of cross-border data transfers.

GDA members share a deep and long-standing commitment to protecting personal data across technologies and business models. They recognize that today's cross-border economy depends on the trust of consumers and the general public. A forward-leaning policy on cross-border data transfers, which is interoperable with international frameworks, is a particularly effective tool to aid policymaker efforts to drive innovation, increase employment, and create other economic and societal benefits. The GDA, therefore, supports policies that protect personal data while enabling data to move across borders.

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<sup>1</sup> The Global Data Alliance is a cross-industry coalition of companies that are committed to high standards of data responsibility and that rely on the ability to transfer data around the world to innovate and create jobs. GDA members include BSA members and American Express, Amgen, AT&T, Citi, ITB360, LEGO, Mastercard, Medtronic, Panasonic, Pfizer, RELX, Roche, United Airlines, Verizon, Visa, UDS Technology, and WD-40 Company. BSA | The Software Alliance administers the Global Data Alliance. For more information on the Global Data Alliance, please see: <https://www.globaldataalliance.org/downloads/aboutgda.pdf>

<sup>2</sup> Please see Global Data Alliance's comments in March 2020. <https://www.globaldataalliance.org/downloads/en03172020VietnamGDAcmntsPDP.pdf>

<sup>3</sup> Please see Global Data Alliance paper "The Cross-Border Movement of Data: Creating Jobs and Trust Across Borders in Every Sector" available at <https://www.globaldataalliance.org/downloads/GDAeverysector.pdf>.

We strongly recommend that the draft PDPD revise its restrictive approach to international data transfers, which is out of step with global norms and threatens to undermine the ability of businesses in Viet Nam to provide products and services that rely on data. Accordingly, we urge you to revise Article 21 of the PDPD to create a robust legal framework that enhances personal data protection while fostering digital innovation and allowing companies to responsibly transfer data outside Viet Nam. Viet Nam committed to ensuring the cross-border transfer of information in Article 14.11 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Consistent with its commitments in Article 14.8 of the CPTPP, Viet Nam should take into account relevant international principles and guidelines, such as the APEC Cross Border Privacy Rules (CBPR), in its forthcoming legal framework.

### **Article 21 Threatens to Undermine Global Business Activity in Viet Nam**

The ability to transfer data, including personal data, across international borders is the lifeblood of the modern digital economy. Members of the GDA represent sectors as diverse as agriculture, healthcare, manufacturing, and banking — and we are united in the need to send data across international borders to provide our customers with the products and services they demand. Indeed, the ability to send data across borders is vital not just to businesses, but also to consumers and workers. In our professional lives, we transfer data when we send emails to colleagues, manage staff and budgets, attend videoconferences, and in thousands of other routine business activities. In our personal lives, we transfer data across borders when we engage in e-commerce or use messaging platforms to stay in touch with friends and relatives overseas. In each of these scenarios, we rightly expect to use global services that can connect us with others worldwide — in a manner that protects the privacy and security of our data.

For this reason, it is critical that the PDPD allows companies to responsibly transfer data internationally.

We are deeply concerned with the restrictive requirements on cross border transfers of personal data. Under Article 21(1), personal data may only be transferred out of Viet Nam if all the following conditions are met: a) the data subject has agreed to the transfer of the data; b) the “original personal data” is stored in Viet Nam; c) the country of to which the data is transferred imposes the same or higher level of data protection (must have a document proving the same); and d) the PDPC agrees to the transfer in writing.

Several of these requirements are impractical individually; collectively they threaten to undermine the ability of global companies to do business in Viet Nam and, by the same token, threaten the ability of companies in Viet Nam to operate globally. Moreover, they do not further the data protection goals of the PDPD. For example, requiring copies of personal data to be stored in Viet Nam will do nothing to enhance personal information protection, as the security of data depends on the policies, procedures, and technologies employed by the entity storing the data, and not upon the physical location or legal jurisdiction of such data. In addition, requiring the PDPC to approve data transfer in advance will be enormously costly to the PDPC — both in time and resources — and disruptive to normal business operations. Even the requirement for individual companies to determine if the jurisdiction in which data is stored meets the same level of protection afforded in Vietnam is subjective and labor intensive.

A further way in which cross border data transfers can be restricted is the inclusion of certain categories of data within the definition of “sensitive information” as per Article 2(3) of the PDPD which references data from several sectors and requires additional limitations on the ability of organizations to transfer data across borders. While the processing and transfer of sensitive information across borders may require enhanced data protection measures, a broad-brush approach to restrict the data transfers of sensitive information would disrupt companies’ operations and increase the costs of providing services in Viet Nam, including domestic Vietnamese companies who wish to serve overseas markets.

We highlight below concerns about the broad nature of these conditions, the narrowly drafted exceptions, and the impractical results of additional obligations imposed on transferred data.

**Broad Conditions:** Requiring all four conditions to be fulfilled concurrently under Article 21(1) is not practical and risks upsetting the ability of companies, workers, and consumers in Viet Nam to benefit from

global services. The compliance costs and transaction delays for companies, and administrative burdens on the PDPC would not be sustainable. Nor is it clear that the exceptions set out in the PDPD under Article 21(3) provide sufficient flexibility to facilitate data transfers, as explained below.

We encourage you to amend Article 21 to enable more flexibility in transferring data across borders.

**Narrow Exceptions:** As currently drafted, Article 21(3) provides for four conditions that can exempt organizations from having to meet these initial conditions. These are: a) the data subject grants consent for the transfer; b) the PDPC provides written approval; c) the personal data processor (internationally referred to as data controller) provides a “commitment to protect personal data”; and d) the personal data processor provides a “commitment to apply personal data protection measures”. It is unclear whether an organization needs to meet only one of these conditions or if the organization must meet all four to legally transfer personal information without meeting the obligations of Article 21(1). Furthermore, the conditions under Article 21(3)(a) and (b) appear to simply restate the conditions in Article 21(1)(a) and Article 21(1)(d).

Under Article 21(3)(c) and Article 21(3)(d), companies may transfer data on the basis of commitments to protect that data, regardless of the data’s location. These provisions appear to reflect the accountability principle, which was first established by the Organisation for Economic Cooperation and Development (OECD)<sup>4</sup> and was subsequently endorsed and has been integrated in many legal systems including the EU,<sup>5</sup> Japan,<sup>6</sup> New Zealand,<sup>7</sup> Singapore,<sup>8</sup> and Canada.<sup>9</sup> The accountability principle is also a significant feature of the APEC Privacy Framework,<sup>10</sup> the APEC Privacy Recognition for Processors (PRP) system,<sup>11</sup> and the APEC Cross Border Privacy Rules (CBPR) system.<sup>12</sup> Under this principle, organizations that transfer data globally should implement procedures to ensure that when data is transferred to countries other than where it was collected the data will continue to be protected.

We encourage MPS to make clear that meeting either Article 21(3)(c) or (d) individually will be sufficient to internationally transfer personal data, consistent with the accountability principle discussed above.

**Impractical Additional Obligations:** In addition to the overly restrictive conditions for cross border data transfer in Article 21(1), the provisions in Article 21(4), (7), and (8) contain additional burdensome requirements for personal data processors (internationally referred to as data controllers) to store data transfer history for three years, register with the PDPC for cross-border transfers of sensitive personal data with very detailed requirements for registration, and for the PDPC to carry out annual assessments or audit-like exercises on cross-border data transfers by personal data processors. These obligations are not practical and may create new privacy and security concerns by forcing companies to store and

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<sup>4</sup> OECD Privacy Framework 2013 (p15), [http://www.oecd.org/sti/ieconomy/oecd\\_privacy\\_framework.pdf](http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf)

<sup>5</sup> Directive 95/46/EC (General Data Protection Regulation), <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

<sup>6</sup> Act on the Protection of Personal Information, <https://www.ppc.go.jp/en/legal/>

<sup>7</sup> Privacy Act 2020, <https://www.legislation.govt.nz/act/public/2020/0031/latest/LMS23223.html>

<sup>8</sup> Personal Data Protection Act 2012, <https://www.pdpc.gov.sg/Overview-of-PDPA/The-Legislation/Personal-Data-Protection-Act>

<sup>9</sup> Personal Information Protection and Electronic Documents Act fair information principles, [https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/p\\_principle/](https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/p_principle/)

<sup>10</sup> APEC Privacy Framework, [https://www.apec.org/Publications/2017/08/APEC-Privacy-Framework-\(2015\)](https://www.apec.org/Publications/2017/08/APEC-Privacy-Framework-(2015))

<sup>11</sup> APEC Privacy Recognition for Processors, reference needed

<sup>12</sup> APEC Cross Border Privacy Rules system, <https://www.apec.org/About-Us/About-APEC/Fact-Sheets/What-is-the-Cross-Border-Privacy-Rules-System>

access data they otherwise would not. We encourage MPS to avoid imposing such obligations on cross border transfers.

## Specific Recommendations

GDA recommends the amendments below to Article 21. These recommendations will help to enable more flexibility for organizations to transfer data across international borders and ensure that companies and consumers in Viet Nam can depend on global products and services that depend on the ability to send data across borders while ensuring a high level of data protection:

- Revise Article 21(1) to eliminate the requirements in Articles 21(1)(b), (c), and (d) and also to clarify that consent by the data subject to process data is a standalone basis that is sufficient to allow for international data transfers.
- Revise Article 21(1) to recognize additional bases for international data transfers, including binding corporate rules, international trustmarks, regional certifications, and contractual arrangements. These mechanisms are incorporated in other global data protection frameworks to promote cross-border data flows, including the APEC CBPR and PRP frameworks, the EU GDPR, and Japan's APPI. Recognition of these mechanisms will also better align the PDPD with the recent initiatives in ASEAN such as the development of the ASEAN Model Contractual Clauses<sup>13</sup> and other ongoing work under the ASEAN Cross Border Data Flows Mechanism.<sup>14</sup>
- Revise Article 21(3)(c) and Article 21(3)(d) to highlight the obligations of companies (both data transferor and recipient) to protect data regardless of its location of storage and recognize that the commitments reflected in these provisions are independent bases for transferring data. As noted above, this approach would align with the accountability principle that has been implemented in data protection laws worldwide.
- Eliminate the requirement under Article 21(4) for personal data processors to store data transfer history for three years which may lead to unintended privacy and security risks by forcing companies to store and access data they otherwise would not.
- Eliminate the registration requirement under Article 21(7)(a) for transferring sensitive personal information internationally. Any requirements imposed by other provisions in the PDPD for processing sensitive personal information (e.g., conducting a privacy impact assessment) should already address the privacy concerns raised by the collection and use of sensitive personal data; likewise, a company's reliance on the mechanisms described above for transferring data with appropriate privacy protections ensures those privacy protections continue to apply to the data regardless of where it is stored. The additional registration requirement is thus unnecessary.
- Incorporate additional flexibility for organizations under Article 21(8) by permitting companies to submit independent third-party audits and supporting documentation in lieu of additional or duplicative audits conducted by the PDPC.

We appreciate the opportunity to share these views and hope that they will be helpful as MPS considers its next steps on the draft PDPD, promoting a robust data protection environment, while allowing responsible stewardship of data to continue benefiting the citizens and economy of Viet Nam.

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<sup>13</sup> ASEAN Model Contractual Clauses, [https://asean.org/storage/3-ASEAN-Model-Contractual-Clauses-for-Cross-Border-Data-Flows\\_Final.pdf](https://asean.org/storage/3-ASEAN-Model-Contractual-Clauses-for-Cross-Border-Data-Flows_Final.pdf)

<sup>14</sup> ASEAN Cross Border Data Flows Mechanism, <https://asean.org/storage/2012/05/Key-Approaches-for-ASEAN-Cross-Border-Data-Flows-Mechanism.pdf>

Please do not hesitate to contact us with any questions regarding this submission.

Sincerely yours,

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