

**COMMENTS ON THE DRAFT DECREE IMPLEMENTING THE TELECOM LAW**

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*by Vilaf-Hong Duc Lawyers*

**Abbreviation/Definition:**

**Draft Decree:** the Draft Decree on guiding the implementation of the Telecom Law

**MIC:** the Ministry of Information and Communication

**TSA:** the Telecom Specialized Authority

**WTO:** the World Trade Organization

<b>Issue</b>	<b>Content</b>	<b>Comment</b>	<b>Proposal</b>
<i>Power of the TSA</i>	<p><b>Competition Dispute Settlement:</b></p> <p>(1) Under Article 6.1 of the Draft Decree provides that the TSA shall preside and co-operate with the competition authority to resolve and decide the cases relating to the restraint of or unfair competition in establishing telecom network and providing telecom services under Articles 19.1 and 19.2 of the Telecom Law.</p>	<p>According to the Law on Competition, the competition authority (i.e. Vietnam Competition Authority) and the Competition Council are the authorities to resolve the disputes or infringement in competition.</p> <p>The provision of Article 6.1 of the Draft Decree is contrary with the above provision of the Competition Law and may result in the overlap in the authority of the telecom authority and the competition authority.</p>	<p>The Draft Decree should simply provide that the competition disputes or infringement shall be resolved in accordance with the Law on Competition. The TSA shall assist the competition authority in resolving the competition disputes or infringement in telecom sector.</p>

	<p><b>Competition Dispute Settlement:</b></p> <p>(2) Under Article 6.1(b), if the parties do not agree with the decision of the TSA on a telecom competition case, they can request the Minister of MIC or the court to settle such dispute. However, the decision of the TSA must be enforced during that time.</p>	<p>According to the Law on Competition, the competition authority and the Competition Council are the authority conducting competition proceedings.</p> <p>Thus, if the Parties do not agree with the decision of the competition authority, they can submit the case to the Competition Council for final resolution.</p> <p>Decision of the competition authority pending the disagreement of the parties must not be enforced to avoid the situation where the Competition Council decides differently.</p>	
	<p><b>Telecom Business Dispute Settlement:</b></p> <ul style="list-style-type: none"> <li>• Under Article 3.1(d), the TSA has the power to settle the dispute between enterprises in the activities of network establishment and provision of telecom services.</li> <li>• In details, Article 7.3 sets out the procedures for such dispute settlement as follows:             <ol style="list-style-type: none"> <li>(1) The TSA shall organize negotiation</li> </ol> </li> </ul>	<ul style="list-style-type: none"> <li>• It is unclear whether the dispute settlement procedure via TSA is compulsory.</li> <li>• In addition, similar to the case of competition dispute, it is not appropriate to request the parties to the dispute to implement the decision of the TSA's Head during the period they file the petition to, and wait for the judgment of, the Minister of MIC or the court (in case</li> </ul>	<p>The Draft Decree should clarify that the dispute settlement through the TSA is not a compulsory procedure and the concerning parties could bring the case to the arbitration, as agreed in their contracts, or to a competent Court for final settlement.</p> <p>The Draft Decree should provide a certain period before the</p>

	<p>between concerned parties;</p> <p>(2) If no agreement reached after negotiation, the Head of the TSA shall make decision on the dispute within 30 days since the expiration date of negotiation;</p> <p>(3) <b><u>Concerned parties shall be responsible for implementation of decision in handling dispute made by Head of the TSA;</u></b></p> <p>(4) In case of disagreement with the decision made by Head of the TSA, concerned parties shall be entitled to request Minister of the MIC to handle the dispute or bring the case to court for settlement of the dispute in accordance with the provisions of law;</p> <p>(5) <b><u>During such period<sup>1</sup> the concerned parties still have to implement the decision that has been made</u></b> (by the</p>	<p>the parties disagree with the decision of TSA's Head).</p> <p>➤ How a concerned party will be compensated for the damages it suffered as the result of the implementation of the decision of the TSA's Head during that period if the judgment of the Minister of MIC or the court is contradict to such decision.</p>	<p>implementation of the decision of the TSA's Head during which the parties to the dispute are entitled to file their appeal to the Minister of MIC or the competent court for resolving the dispute.</p> <p>Article 7.3(b) should be revised as follow:</p> <p>If concerned parties fail to reach agreement after negotiation, the Head of the TSA shall make decision in handling disputes within 30 days since the expiration date of negotiation. <b><u>Concerned parties shall be responsible for implementation of decision in handling dispute made by Head of the TSA unless they file the appeal to</u></b> Minister of MIC or the court for settlement of the dispute in accordance with the provisions of</p>
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<sup>1</sup> We understand that this means the period before the judgment of the Minister of the MIC or the Court

	<p><u>Head of TSA).</u></p>		<p>law. The parties to the dispute shall have [15 days] to file their appeal <u>to the Minister of the MIC or the Court.</u></p>
<p><b>Limitation of Investor's ownership</b></p>	<p><b>Ownership in telecom business</b>  <b>Article 4:</b>                      1. A domestic/foreign organization or individual shall not be entitled to own more than 20% of charter capital or shares in two or more different telecom enterprises which do business in the same telecom market in the list of telecom services promulgated by the State for the purpose of healthy competitiveness.                      2. In different period of time, MIC shall stipulate the list of telecommunication services as mentioned in Paragraph 1 of this Article and cooperate with line ministries and agencies to submit to the Prime Minister a list of enterprises and plans of ownership capital restructuring for approval in</p>	<ul style="list-style-type: none"> <li>• Imposing such 20% prohibition for “fair competition” is not in line with the Competition Law.</li> <li>• Further, imposing such 20% prohibition will violate the Competition Law under which any such prohibition should be based on the combined market shares as the result of an economic concentration.</li> <li>• In addition, how such 20% shall be calculated? Whether the cap 20% is the total shareholding ownership of an investor in the total of telecom enterprises in which they have ownership or the cap 20% is limited to the shareholding ratio that an investor is allowed to own in each telecom enterprise.</li> <li>• At the moment, VNPT has already been</li> </ul>	<p>We suggest Article 4 is deleted.</p>

	<p>accordance with provision in para. 1 of this Article.</p> <p>3. When percentage of ownership capital changes, owner of capital shall ensure the compliance with provisions in Article 17.1 of Telecom Law, Article 4.1, and Article 55 of this Decree.</p> <p>4. Enterprises as stipulated in para. 1 of Article 17 of Telecom Law, enterprises with foreign investment capital shall notify the agency granting telecommunication license when there is any change in the percentage of ownership capital or owner of capital. Enterprise that provides telecommunication services in the list of telecommunication services as stipulated in para. 2 of this Article shall notify the agency granting telecommunication license if there is any change in the list of organizations and individuals, who own more than 20% of charger capital or shares of the enterprise.</p>	<p>holding 100% charter capital in both Vinaphone and Mobifone. How will an enterprise (organization) in the situation of VNPT be effected by Article 4.1 of the Draft Decree?</p>	
<p><b>Limitation</b></p>	<p>Article 5.4 provides that a foreign investor is</p>	<ul style="list-style-type: none"> <li>• Under Vietnam's specific commitments to</li> </ul>	<p>This limitation should be removed.</p>

<p><b>of Foreign Ownership</b></p>	<p>not allowed to own more than 30% of the charter capital of a telecom enterprise.</p>	<p>the WTO, there are only restrictions on the total foreign ownership in telecom joint-ventures (e.g. 49% or 51%) without any requirement on the number of foreign investors in a telecom joint venture under Vietnam's commitments to the WTO.</p> <ul style="list-style-type: none"> <li>• In addition, the 30% limitation stipulated in Article 5.4 of the Draft Decree is not necessary because it will not help to protect the ownership ratio of the Vietnamese party (i.e. at least 51%) which is the ultimate purpose of the current laws and international commitments on telecom services in term of ownership limitation.</li> <li>• Therefore, the limitation of 30% ownership for each foreign investor under the Draft Decree may be considered as unnecessary and may nullify the right of a foreign investor under Vietnam's commitment to the WTO to establish joint venture with its local partner. <u>This may be considered as a violation to the provision</u></li> </ul>	
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		<u>of Paragraph 5, Article IV (Domestic Regulation) of the WTO's General Agreement on Trade in Services (GATS).</u>	
<b>Deposit</b>	Under Article 8 of the Draft Decree, the telecom enterprises must deposit an amount equivalent to 5% of the committed investment amount of such enterprises in the first 3 years (the " <b>Performance Bond</b> ").	<p>As the amount the telecom enterprises committed to invest in the first 3 years is at least VND2,000 billion (approx. US\$105 million), the Performance Bond required under the Draft Decree therefore is also a substantial amount.</p> <p>If the Performance Bond is frozen in 3 years, it may be difficult for the telecom enterprises, thus, it is suggested that the Performance Bond shall be released annually in percentage during the first 3 years.</p>	We suggest that the Performance Bond should only be used in case of telecom license is issued through "beauty contest" for allocation of scarce resources (such as 3G spectrum). For other cases, the Performance Bond should not apply.

**VILAF Lawyers**  
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