



Soo-il Lee
Director General for Regulatory Evaluation Management
Regulatory Reform Office
Office for Government Policy Coordination

Dear Director General Lee:

Our associations represent a broad range of global companies significantly invested in Korea's economic future. We write in regards to the proposed Presidential Decree to Article 22-7 (Value-Added Service Provider Securing Stability of Service, etc.) of the amended Telecommunications Business Act announced by the Ministry of Science & ICT ("MSIT") and currently under consideration by the Regulatory Reform Committee (the "Draft Decree"). We share many of the same concerns raised by K-Internet, the Korea Internet Corporations Association, reflected in their letter from November 6, 2020. We have also previously shared our views on the Draft Decree and appreciate the efforts of MSIT and the Korean government to listen to our concerns.

Unfortunately, the latest version of the Draft Decree continues to create significant burdens and uncertainty for foreign and domestic value-added telecommunication service providers (VSP) operating in Korea, and raises concerns of potential violations to Korea's obligations under the Korea U.S. Free Trade Agreement ("KORUS") and WTO General Agreement on Trade in Services (GATS). Understanding the near-final nature of this Draft Decree, and in line with most of K-Internet's comments, we would like to make two concrete recommendations that we feel would serve to alleviate some of these concerns.

Recommendation One

2.1. Each of the following measures to secure means of stability of service

We recommend adding the following clarifying phrase: "such that no such measure shall constitute a requirement to procure services from a facilities-based telecommunications service provider."

Rationale: Agreements between value-added service suppliers (VSPs) and facilities-based telecommunications service providers (FSPs) should be left to the parties to decide based on mutual interests, as inserting legal requirements to mandate the relationship will almost certainly create unfair commercial leverage and market advantages for FSPs. As written, the Draft Decree may be interpreted to obligate a VSP to consult with an FSP to deliver its traffic in a manner that is approved by the FSP, and could also set the expectation that VSPs are required to procure services from an FSP to meet service reliability requirements. This policy shift would be unprecedented and harmful for Korea's standing as a digital leader, as the global model for traffic exchange between FSPs and VSPs is one of voluntary and

mutual cooperation. Such a requirement would also deviate from MSIT's statement on September 9 that "[T]he current draft of the Presidential Decree in no way includes any provision requiring payment of fees for using the network." We would very much welcome greater legal clarity reflecting this statement in the form of the suggested language above.

From a trade perspective, Article 14.2 of KORUS and the GATS Annex on Telecommunications ("Annex") include obligations to ensure that service suppliers of other WTO Members and the United States specifically are afforded access to and use of public telecommunications transport networks on reasonable and non-discriminatory terms and conditions. We are concerned that the potential requirement to make network usage payments to FSPs may violate such commitments, and in any event is not the least-trade restrictive means to achieve the desired objectives.

The undersigned associations therefore encourage the Korean government to amend the decree to explicitly state, in accordance with the MSIT press release, that there will be no mandate on VSPs for payment of network use fees.¹

Recommendation Two

2.1.D. Measures to be taken by the VSP, such as increasing server capacity, securing uninterrupted internet connection and optimizing traffic routes, if an increase in traffic generation is expected to have a substantial impact on the provision of stable telecommunications service, taking into account traffic generation trends, and, if necessary for such measures, consult with the FSP and the VSP providing content delivery service

We recommend that this provision be deleted in its entirety.

Rationale: The language in Paragraph 2.1.D creates uncertainties as to the specific technical measures that service suppliers would need to implement and may conflict with Korea's services market access obligations under KORUS and the GATS. For example, KORUS requires the United States and Korea to provide market access and national treatment to the other party's service suppliers (including value-added telecommunications service suppliers) that provide their services on a purely cross-border basis. The agreement also prohibits requirements to establish a local presence as a condition for suppliers to supply their services on a cross-border basis. Hence, any requirements that could *de facto* force U.S. service suppliers to localize infrastructure as a conditional requirement for accessing the Korean telecommunications network may be inconsistent with Korea's trade commitments.

We are also concerned with the relative lack of clarity in what specifically the measures would require and feel such requirements may impose unworkable obligations on VSPs. Some VSPs build their own connection to the internet by directly connecting with FSPs. The stability of these connections is partially under the control of the FSPs or networks on the other side of the connection. A network connection

¹ See MSIT Press Release stating "[T]he current draft of the Presidential Decree in no way includes any provision requiring payment of fees for using the network," <https://www.gov.kr/portal/ntnadmNews/2259638>

could become unstable if an FSP refuses to upgrade interconnection capacity, or refuses to augment capacity without payment. In cases where an internet connection is procured by a VSP by way of transit, the stability would entirely be dependent on the transit provider. We therefore find the shifting of burden implicit in the measure to be an unfair demand on VSPs. As a general matter, we also note that securing an uninterrupted internet connection is non-specific and subject to inconsistent interpretation.

It is also unclear in the Draft Decree whether “optimizing traffic routes” allows for cross-border data flows as a form of delivering content. Overseas VSPs should be able to utilize traffic routes that originate from outside of Korea in a manner consistent with Korea’s trade obligations. For cross-border suppliers, routing decisions may involve network issues outside of Korea, which is outside the scope of Korean law. As written, the Draft Decree appears to try to control routing decisions in a potentially extraterritorial manner.

Finally, as noted above, the requirement for VSPs to “consult” with the FSP in order to take measures to secure service reliability, such as “increasing server capacity, securing uninterrupted internet connection, and optimizing traffic routes if an increase in traffic generation is expected to have a substantial impact on the provision of stable telecommunications services” is unnecessary, as both FSPs and VSPs already have legitimate commercial interests in consulting one another, and adding this legal requirement may result in the FSP having unfair commercial leverage over the VSP and could potentially force overseas service providers into commercial arrangements that may be inconsistent with Korea’s services market access obligations and lead to inefficient technical solutions that deviate from global best practices for network infrastructure. In addition, as we have seen during the COVID-19 pandemic, it is not always feasible to predict surges in traffic and VSPs should be allowed to deploy any reasonable measure within their control and within their own discretion to provide a reliable service to their customers.

The undersigned associations therefore encourage the Korean government to amend the decree to remove Paragraph 2.1.D.

Conclusion

The Republic of Korea’s market remains at the forefront of 5G leadership, offering exceptional opportunities for companies and consumers alike. The undersigned associations support the Korean government’s efforts to enhance its innovative and cutting-edge market. We therefore offer the aforementioned feedback in an effort to respectfully draw your attention to elements of the latest Draft Decree that we believe may be counterproductive to South Korea’s overarching goals in the realm of information and communications technology, and its standing as a champion of free trade. We would like to see Korea benefit from the most innovative new content services, which could serve as the use case for 5G adoption and export of Korean content to the world. We appreciate your consideration of these concerns, and we welcome the opportunity to engage further on these important issues.

Kind regards,

American Chamber of Commerce in Korea (AmCham Korea)

Asia Internet Coalition (AIC)

Computer & Communications Industry Association (CCIA)

Information Technology Industry Council (ITI)

Internet and Competitive Networks Association (INCOMPAS)

Internet Association (IA)

Software & Information Industry Association (SIIA)