



Special Alert

May 2022

www.indochinecounsel.com

Shaping New Rules for Electronic Transactions

The Law on Electronic Transactions No. 51/2005/QH11 dated 29 November 2005 (the “**ET Law**”) covers issues which have seen a great deal of advancement since its promulgation over fifteen years ago. This has resulted in the need of a legal system update for conformity and more comprehensive management.

The ET Law was built as a framework law, merely based on the UNCITRAL model law (i.e., the United Nations Commission on International Trade Law, as established by the General Assembly in 1996). Its provisions contain only basic regulations which are not comprehensive enough in today’s era of non-stop development of electronic transactions and novel technologies (typically, e-commerce, internet banking, AI technology, etc.).

Vietnam has further witnessed a significant breakthrough of electronic transactions in different sectors of life, from administration, civil, economy to society, since the outburst of the COVID-19 pandemic that encouraged the shift from traditional transactions to online transactions, and with the launching of many novel forms of electronic platforms and activities, for which the provisions of the ET Law may not be sufficient.

Given that, a project on drafting the new law on electronic transactions (the “**Draft ET Law**”) is conducted and planned to be presented to the National Assembly for review in the 4th Session taking place this October, 2022.

Remarkable Points

Some amendments compared to the ET Law

The governing scope under the Draft ET Law no longer excludes the following fields: “*issuance of*

certificate of land use right, house ownership and other real estates, inheritance-related documents, marriage certificates, divorce decisions, birth certificates, death certificates, bills and other valuable papers". This amendment is re-emphasized under Article 3 of the Draft ET Law regarding its application, indicating that the Draft ET Law will play the role of the core legislation governing electronic transactions in all fields, and that any specialized regulations must be based on and in compliance with this Draft ET Law.

The number of definitions under the Draft ET Law has been doubled, from 15 to 33 definitions, in comparison with the ET Law, among which, many apropos concepts are included, in order to cover new trends in various fields related to electronic transactions. Remarkably, definitions of "data", "digital data" and "data processing" have been raised, supporting the aim of forming a unified legal framework for data protection in Vietnam.

Regarding general principles for the implementation of electronic transactions, some new points have been provided under Articles 5.3 to 5.6 of the Draft ET Law, for the purposes of streamlining administrative procedures. In addition, certain new criteria for recognizing the validity of data messages have been added under Article 10 of the Draft ET Law, the particular and typical of which is the requirement on the trust level assigned to such data messages.

Accordingly, there are four levels of trust, ascending from Level 1 to Level 4, which are primarily based on the content and nature of the data message in question. In particular:

- Level 1: Data message does not contain information on sender or creator, and it is impossible to identify, verify the completeness of such data message;
- Level 2: Data message does not contain information, or contain uncertified information on sender or creator, and its completeness is certified via at least one independent electronic means, such as phones or emails;
- Level 3: Data message contains certified information on sender or creator, and its completeness is verified via at least one independent electronic means, such as phones or emails;

Data message guaranteed by entities providing electronic infrastructure and means for the purpose of certifying the control ability over the completeness of information contained in such data message during the process from being initiated, sent and stored on system, will be recognized as having Level 3 of trust;

- Level 4: Data message contains certified information on sender or creator, and its completeness is certified by safe electronic certifying means provided by licensed certification services providers or competent state agencies in accordance with the laws;

Data message which is signed with digital signature issued by legitimate electronic signature

certification services providers, or which is certified and stored in the system of a legitimate organization providing data message certification services, will be recognized as having Level 4 of trust.

From these new regulations on levels of trust, the ways of identifying whether a data message is treated as written and/or original documents, as well as how it is used as evidence are also changed. Accordingly:

- For information required by law to be presented in writing, a data message of the same shall be recognized as a valid written document if such data message meets Level 3 or Level 4 of trust;
- Data messages shall be used and valid as a master and/or original copy, and can replace a master and/or original copy, if such data message meets Level 4 of trust; and
- Data messages meeting Level 3 or Level 4 of trust are valid as evidence by default without the need to be certified and/or verified.

The Draft ET Law also allows the replacement of regulatory physical storage of documents, papers, files or information, etc. with storage of the same under data message form, if the digitalized data message of the same (or such information under written form) meets certain prescribed conditions for being stored as a data message (similar to the ET Law) **and** has Level 4 of trust.

Notably, the Draft ET Law saves the whole of Section 3 of Chapter II for regulations related to “*electronic certificates*”, a concept that was used throughout the ET Law without being properly defined, which led to certain backlogs in cross-reference and application. Adjustments have been made to this concept under the Draft ET Law, identifying the competence to issue such an electronic certificate belongs to competent agencies and organizations, not just electronic signature certification service providers. Article 17 of the Draft ET Law sequentially lists out conditions for using electronic certificates in certain circumstances where the laws have specific requirements in respect of the original written documents. In particular: Article 17.2 provides conditions for using electronic certificates where the laws require written certificates, patents, and/or diplomas; Articles 17.3 to 17.6 provides conditions for applying the same regulations [as applicable to written certificates, patents, and/or diplomas] to data messages of the same, where the laws require or allow, respectively:

- The ownership of such written certificates, patents, and/or diplomas;
- The transfers of the ownership mentioned in point above;
- The indication of time and place related to such written certificates, patents, and/or diplomas; and
- The amendment of such written certificates, patents, and/or diplomas.

Regulations in terms of the validity and use of electronic certificates are also raised in detail under Article 18 and Article 19 of the Draft ET Law.

As topics of interest, data security, online information safety and cybersecurity in electronic transactions are also included in the Draft ET Law, with more specific regulations for conformity with the recent developments in the legal system of Vietnam. In addition, it also reflects the practical and essential demand of the economy and society.

Overall, the Draft ET Law brings many new chapters in contribution to a comprehensive and exhaustive legislation in relation to electronic transactions, covering recently developed activities in the field. Apart from the said topics of data security, online information safety and cybersecurity, it is also worth noting the following chapters: Chapter III – Electronic Transaction Accounts; Chapter VI – Trust Services and Electronic Transaction Supporting Services; and most prominently, Chapter VII - Electronic Transaction System (“ETS”), Digital Platforms and Digital Services.

Regulations on ETS, digital platforms and digital services

1. Definitions

- Definition of “ETS” is given under Article 51.1 of the Draft ET Law, quoted as follows: “ETS is an information system set up to serve part or whole of the electronic transactions operation process”.
- Article 53.1 of the Draft ET Law introduces the concept of “digital platforms”, (a) which are defined as an ETS using digital technologies to create an environment for organizations, enterprises and individuals to interact, transact, provide services, products, and/or goods; (b) which are available for immediate use, simple, convenient, and flexible; and (c) in which participating parties do not need to invest, manage, operate and maintain.

A derivative concept of digital platforms, “intermediary digital platforms”, is also raised, which refers to digital platforms set up and operated to provide environments in cyberspace, operating online, allowing various parties to join and interact, transact, provide their services, products, and/or goods to their partners, customers, and users.

- Accordingly, “digital services” is defined under the Draft ET Law as services provided to clients or users via ETS and/or digital platforms (*Article 54.1*). Providers of digital services can either use a third-party intermediary digital platform or utilize their own ETS and/or digital platforms. One ETS or digital platform can provide one or more than one digital service.

Such new definitions are of high-generality, and can cover a wider range of subjects, despite the fact that they are rather abstract. ETS appears as a broad concept which may cover information systems related to the offering of goods and/or services, transactions management, payment processes, etc. Meanwhile, digital platforms own the features of sale

e-commerce platforms, and intermediary digital platforms reflect an e-commerce trading floor.

2. **Some notes for operators of ETS, providers of digital platforms, and providers of digital services**

In addition to the novel definitions, the Draft ET Law also provides for respective conditions and obligations which should be taken into account by operators of ETS and providers of digital platforms.

Operators of ETS:

One of the regulatory obligations of ETS providers under the Draft ET Law is to publish their minimum information on the home pages or main interfaces of their ETS, including:

- Name and headquarters address of organizations or enterprises; or name and residing address of individuals;
- Number, issuance date and place of enterprise registration certificates of enterprises; or number, issuance date and unit of establishment decision of organizations; or tax code of individuals; and
- Phone number or another online means of contact for accepting feedback on operation quality of the ETS.

Operators of ETS are also required to register for trust assurance in the operation of their ETS with the Ministry of Information and Communications (MIC), which registration can be conducted online or offline in accordance with the law. The Draft ET Law also notes that this registration will be further regulated by the MIC. As such, if the Draft ET Law is adopted, we can expect its guideline(s) to be issued in the future, which is likely a guiding decree by the MIC.

Finally, operators of ETS must ensure the qualification of conditions in terms of hardware, software, operation administration and security of their ETS.

Digital platforms:

- (a) Providers of digital platforms (*being organizations and/or enterprises owning, managing and operating such digital platforms*) must comply with certain principles in the course of operation, including, inter alia: registration of digital platforms operation. In particular:
 - (i) Providers of digital platforms being Vietnamese entities must comply with ETS registration obligations (*as mentioned in Section Operators of ETS above, and as detailed in Section 1 – Chapter VII of the Draft ET Law*); and
 - (ii) Foreign providers of digital platforms provided cross-border to users in

Vietnam must comply with the ETS registration obligations in the following cases:

- Concerned digital platforms are operated under a Vietnamese domain name (i.e., “.vn” domain name);
 - Concerned digital platforms have display language being Vietnamese;
 - Concerned digital platforms allow users to transact, make payment in Vietnamese Dong (VND); and
 - Concerned digital platforms have number of accesses from Vietnam reaching 500,000 times/month or above in 6 continuous months.
- (b) For special digital platforms via which the services provided are considered as conditional business lines, providers of such special digital platforms must comply with respective requirements in terms of special licenses / sublicenses / permits, etc.
- (c) Some particular types of special digital platforms are named, accompanied with respective regulatory rules under Section 3 – Chapter VII of the Draft ET Law, typically including: online social networks, media networks; online information look-up and data analysis platforms; online digital content sharing platforms and digital applications; e-commerce trading floors, online advertising platforms; etc.
- (d) Providers of digital platforms must publicly notify and list information on their ETS registration certificate in respect of their ETS on the main interface of such ETS. For special digital platforms, the information to be notified and listed shall be those reflected on applicable special licenses / sublicenses / permits, etc. Other obligations as to technical conditions, ensuring security and trust, and operation (e.g., accepting, handling, removing violating contents; protecting user’ data, etc.) are also raised and require compliance from digital platform providers.
- (e) Apart from general obligations of a digital platform provider, providers of intermediary digital platforms will be additionally subject to further obligations set out under Article 58 of the Draft ET Law.
- (f) Notably, definitions of “*major digital platforms*” and “*dominant digital platforms*” are provided, being outlined in Section 4 of Chapter VII, which provides for additional obligations. Wherein:
- (i) “*Major digital platforms*” refers to intermediary digital platforms having a large number of usual users, collecting, managing data of various individuals, organizations in Vietnam; and
 - (ii) “*Dominant digital platforms*” refers to major digital platforms having dominant position and crucial role, contributing in the connection between services/goods providers and a massive number of users in the territory of

Vietnam.

The MIC will provide further instructions on the criteria for identifying these types of digital platforms, and detailed lists of the same will be announced.

Providers of digital services:

In the course of providing digital services, providers are required to comply with certain obligations set out under Article 54.2 of the Draft ET Law, including:

- Registration of the ETS; operation principles, and trust assurance requirements in respect of the ETS;
- Provision of complete and accurate information about the digital services to intermediary digital platforms upon registration;
- Public announcement of information related to special licenses / sublicenses / permits, etc. (i.e., number, date and place of issuance) in case the concerned digital services are conditional business lines;
- Public notification and listing of essential information related to the concerned digital services;
- Ensuring the accuracy and honesty of the provided information related to the concerned digital services; being responsible for the concerned digital services quality and handling of users' claims;
- Reporting the status of operating the concerned digital services upon request of competent state agencies; and
- Compliance with requirements in terms of advertising, payment, commercial promotions, and taxation, etc.

Conclusion

The Draft ET Law is planned to be presented to the National Assembly in two sessions. In the 4th Session which will take place this October, the Draft ET Law will be presented for acquiring feedback from the National Assembly. Accordingly, it will be amended and shaped for completion, and will subsequently be presented for ratification by the National Assembly in the 5th Session taking place in April 2023. If adopted, the Draft ET Law is intended to supersede and replace the current ET Law.

About Indochine Counsel

Established in October 2006, Indochine Counsel is one of the leading business law firms in Vietnam. The firm provides professional legal services for corporate clients making investments and doing business in Vietnam. The legal practitioners at Indochine Counsel are well qualified and possess substantial experience from both international law firms and domestic law firms. The firm boasts more than 45 legal professionals working at the main office in Ho Chi Minh City and a branch office in Hanoi.

Indochine Counsel's objective is to provide quality legal services and add value to clients through effective customized legal solutions that work specifically for the client. The firm represents local, regional and international clients in a broad range of matters including transactional work and cross-border transactions. The firm's clients are diverse, ranging from multinational corporations, foreign investors, banks and financial institutions, securities firms, funds and asset management companies, international organizations, law firms to private companies, SMEs and start-up firms in Vietnam.

Indochine Counsel advises clients in the following areas:

- Inward Investment
- Corporate & Commercial
- Mergers & Acquisitions
- Securities & Capital Markets
- Banking & Finance
- Property & Construction
- Taxation
- Intellectual Property
- Technology & Media
- Mining & Energy
- International Trade
- Dispute Resolution

A full list of partners, associates and other professionals is available on our website. |

Contact Us

For further information or assistance, please contact the following Indochine professionals:



Dang The Duc

Managing Partner
duc.dang@indochinecounsel.com



Nguyen Thi Hong Anh

Partner, Head of IP&T Practice Group
anh.nguyen@indochinecounsel.com



Le Nguyen Huy Thuy

Partner
thuy.le@indochinecounsel.com



Le Van Duong

Partner, Head of Hanoi Office
duong.le@indochinecounsel.com



Phan Anh Vu

Partner
vu.phan@indochinecounsel.com



Steven Jacob

Of Counsel
steven.jacob@indochinecounsel.com



Pham Thi Thanh Lan

Partner
lan.pham@indochinecounsel.com



Greater China Desk
Ly Nghia Dzung / 李義勇

Associate
dung.ly@indochinecounsel.com

Ho Chi Minh City

Unit 305, 3rd Floor, Centec Tower
72-74 Nguyen Thi Minh Khai, District 3
Ho Chi Minh City, Vietnam
T +84 28 3823 9640
F +84 28 3823 9641
E info@indochinecounsel.com

Hanoi

Unit 705, 7th Floor, CMC Tower
Duy Tan Street, Cau Giay District
Hanoi, Vietnam
T +84 24 3795 5261
F +84 24 3795 5262
E hanoi@indochinecounsel.com

www.indochinecounsel.com

This Special Alert is designed to provide our clients and contacts with general information of the relevant topic for reference only, without the assumption of a duty of care by Indochine Counsel. The information provided is not intended to be nor should it be relied upon as a substitute for legal or other professional advice.

© 2022 Indochine Counsel. All Rights Reserved.