

# **Issues and Recommendations on DRAFT Revision of Decree 93 on the Management and Utilization of Foreign Non-governmental Aid**

29 October 2016

As representatives of development partners and international NGOs working cooperatively in Vietnam, and in line with the 2014 Vietnam Development Partnership Forum commitment to review Decree 93 with Development Partners, International and Vietnamese NGOs, we welcome the opportunity to contribute our joint comments and recommendations on the revised draft decree on the Management and Utilization of Foreign Non-governmental Aid (the Draft Decree). We support the process of policy development with full public consultation according to the provisions of the Law on the Promulgation of Legal Normative Documents (2015). Revision of the existing Decree 93/2009/ND-CP is a necessary step towards mobilizing greater resources from foreign non-governmental organizations and improving the quality and effectiveness of our partnerships with the Vietnamese government, people and society in pursuit of inclusive and sustainable development.

## **Rationale for revising Decree 93**

Following the request of development partners and international NGOs (INGOs), the Minister of Planning and Investment received Prime Ministerial approval to revise Decree 93 including simplified regulations that are more advantageous and effective for the receipt, management, and use of foreign non-governmental aid (FNGA). The revised Decree should serve the purpose of promoting and encouraging more effective aid to Vietnam's development and people. This means the revised Decree needs to include provisions on the promotion of aid, with the intention of facilitating its receipt and utilization, not just its management. The Decree should also guarantee compatibility with other regulations in the Vietnamese legal system, as well as with international commitments that Vietnam has signed. We recommend that this rationale be included in Article 5 as one of the principles underlying the Draft Decree.

## **Strengths of the Draft Decree**

Compared with Decree 93, the Draft Decree has more detailed regulations and procedures (57 articles versus 43 articles in Decree 93). The Draft Decree comprehensively lists the various types of foreign agencies that provide non-refundable aid not covered under intergovernmental agreements (Article 1.3). This helps in clarifying sources of FNGA subject to the Decree.

In terms of aid management, the Draft Decree introduces a distinction between projects of differing size and scope with respect to the requirements of a PMU. In addition, the Draft Decree specifies a time limit for several steps, including 20 days for appraisal, 12 days to obtain consultancy inputs from concerned agencies in the process of project appraisal, 2 days and 3 days for preparation of the appraisal meeting and appraisal report as well as applying the rule that if no response is received in this time frame from line ministries, it constitutes agreement (Article 17.2). These provisions contribute towards more efficient appraisal and management processes for FNGA.

## **Areas for improvement of the Draft Decree**

Despite the positive changes mentioned above, overall the Draft Decree has not yet addressed the existing shortcomings of Decree 93 (both in written content and actual implementation). The spirit of the Draft Decree still fundamentally demonstrates a lengthy, complex, and multi-window process

of project approval. It does not create favourable conditions for mobilizing, receiving, managing and using FNGA. In particular:

**1. The Draft Decree is not yet consistent with the Civil Code and other relevant laws and regulations, including the National Programme for Mobilizing FNGA**

Chapter 4 of Vietnam's Civil Code stipulates that social organisations of various types that are officially registered or have licenses granted by state agencies are considered to be legal persons and have the right to conduct civil transactions independently, on a voluntary basis, and are responsible before the law. Also, according to Article 5 of the 2015 State Budget Law funding for aid recipients in categories b, c, d and đ in Article 1.4 of this Draft Decree are not considered as part of the state budget. Thus, receipt of funds by Vietnamese social organisations with legal personhood is legally considered as a civil transaction, with no requirement for further approval of a third party. Non-profit transactions for legally recognised public purposes should not be subject to greater requirements than transactions between for-profit businesses.

In cases where aid is provided by INGOs, these organizations are also legally registered in Vietnam according to Decree 12/2012/ND-CP, with specified locations and sectors of operation. Under the principle of 'unified state management', projects and programs that already lie within the scope of an INGO's registered status in Vietnam do not require a separate appraisal and approval process.

The Vietnamese Government has made it a priority to increase development assistance through a range of partnerships including FNGA. This objective is formalized in the National Programme for Mobilizing FNGA between 2013-2017 (Prime Ministerial Decision 40/2013/QĐ-TTg), articulating the intention of encouraging FNGA funding and operations as well as the need to 'build a suitable and favourable legal environment for FNGA'. At the Addis Ababa International Conference on Financing for Development in July 2015, this commitment was reconfirmed. In the Vietnam Partnership Documents, the Government commits to create an enabling environment to facilitate the participation of Vietnamese civil society organizations (CSOs) and INGOs in achievement of the Socio-Economic Development Plan (SEDP). This includes promotion of a favourable policy and institutional environment for the participation of Vietnamese CSOs and INGOs.

**Recommendation:** The contents of the Draft Decree should be consistent with existing commitments in the Civil Code, Decree 12, and the National Programme for Mobilizing FNGA. Projects that support the Government to implement SEDPs, or that lie within the scope of previously approved INGO registration, should be welcome and not require appraisal and approval processes any more.

**2. Procedures in the Draft Decree are more complicated and burdensome than in the current Decree 93.**

Though the Draft Decree is longer than its predecessor, much of the added content consists of additional requirements in the appraisal and approval process for FNGA. Chapter 2 describes multiple appraisal and approval requirements at various levels: (i) Vietnamese aid recipients' applications undergo appraisal and approval through their competent supervisory agencies; (ii) the donor is appraised and approved in line with their registration of operations; and (iii) there is a further appraisal by local authorities in geographic locations where the proposed program/project will be operational. There are new requirements for non-objection by 6 central state agencies

(Article 17.2), where objection or lack of response by one agency could lead to rejection of the appraised project.

**Recommendations:** (1) Instead of adding a requirement of “non-objection” by state agencies, the Draft Decree should preserve the provision in Decree 93 that “the supervisory agency can invite” other agencies to support project appraisal with comments and feedbacks on the proposed project and their position should be only for reference. The final decision making should be decided by the competent approval agency. In addition, the Draft Decree should state that aid recipients belonging to category d in Article 1.4 (social and professional organizations) do not need project approval but should only submit “funding reports” to the competent functional authority.

(2) The management role of the State should be determined as one of oversight, encompassing the relevance of an aid project to the licensed/registered working domains of the donor and aid recipient, and the observance by INGOs/donors and VNGOs of specialized laws in the sector in which an aid project is implemented.

(3) In cases where project approval is necessary, this should be carried out through a one-stop shop. Accordingly, we recommend adding a clause to Article 19: “Aid approval decisions by the approving agency or supervisory agency are valid nationwide. Aid recipient organizations do not need to carry out additional approval procedures with any other agency, including provincial People’s Committee(s) in the location(s) where the project is implemented.” Provincial People’s Committees are already consulted during the appraisal process in Article 17.1 of the Draft Decree.

### **3. The Draft Decree does not yet solve the issue of “hanging projects” pending approval**

Many of the complex requirements for project appraisal and approval lack specified time limits, which would result in lengthy approval processes or leave projects in “approval pending” status for extended periods. Especially, there is no limit for the final step of project approval (Article 19). If implemented, these procedures would increase costs for donors and recipients, and reduce the effectiveness of projects. This is particularly the case for humanitarian projects that need clear and specific procedures to ensure a timely response.

**Recommendation:** Add a provision limiting the time for the step of project approval (such as 7-10 days) from when the project appraisal dossier is complete. In this way, the total time for the aid approval process would be  $20 + 2 + 3 + 10 = 34$  days beginning from when the project approval agency receives a valid dossier.

### **4. Regulations for establishing Project Management Units are not suitable to FNGA projects**

Although the Draft Decree distinguishes among types of projects to form PMUs (Article 27), these requirements are not yet suited to the actual realities, capacities, and management needs of FNGA projects, especially for aid recipients in category d, Article 1.4 such as social, business, academic, professional associations and Vietnamese NGOs with relatively limited human resources receiving small-scale projects.

**Recommendation:** Add to Article 24 that excepting programs/projects approved by the Prime Minister, the establishment of Project Management Units should not be mandatory. A decision on whether or not to set up a PMU should depend on the agreement with donors,

the size and type of the project, and the capacity of the implementing organisation. Article 27 of the Draft Decree may be removed accordingly.

#### **5. The Draft Decree shows a hierarchy of duplicated management and approval processes in the management and use of aid**

According to the provisions of the Draft Decree, each project will basically have double requirements for project formulation, monitoring & evaluation, and reporting. Aid recipients will have to send 2 separate project proposals and 2 reports according to different formats of the donor and of state management agencies. This requirement will make project preparation and approval processes more time-consuming and costly, leading to less effective projects.

**Recommendations:** (1) Remove Article 13 regulating the contents of program and project documents. Instead, project documents should be used according to the files already sent to the donor. At the same time, add a stipulation in Article 40 on the use of project and reporting formats that the aid recipient has sent to the donor agency, specifying that these documents can be sent to state management agencies without additional annexes as in clause 6 of this Article.

(2) Clause 38.2 should be explicit on when an extraordinary evaluation may be requested. Semi-annual/annual reports and final audits are largely sufficient to evaluate project performance.\_

#### **6. The Draft Decree inappropriately applies the same appraisal and approval procedures for all kinds of assistance**

The process of appraisal and approval presented in the Draft Decree is the same for all FNGA activities, whether they are in priority sectors (Article 6) or not. For emergency assistance, this process is particularly inappropriate given the necessity that such assistance is available in a timely fashion to the people most in need.

**Recommendations:** (1) Revise Article 15 on appraisal of non-project aid (especially emergency relief) to be simpler, faster, and to meet the needs of emergency assistance.

(2) The draft should enable streamlined appraisal and approval procedures for programs/projects within priority sectors;

(3) Extend the list of priority sectors to programs/projects supporting gender equality, people with disabilities, child protection/children in difficult circumstances, and other vulnerable groups.

(4) The important functions of monitoring and social critique to “support the institutional formulation of normative legal documents” should be removed from the list of projects requiring the Prime Minister’s approval (Article 19).

#### **7. The Draft Decree does not yet recognise the roles and responsibilities of donors in the management of aid**

We understand and respect the ownership principles inherent in the Government’s framing of aid donors and recipients. That said, it is necessary to recognize that donors, including INGOs and other agencies that provide FNGA, are not only sources of financing. They are partners in project implementation, adding value to the development process through capacity building, training,

research, communication and other activities in coordination with Vietnamese state and non-state counterparts. Further, it is important to recognize the shared interest of donors in ensuring transparency, accountability and effectiveness in the management and utilization of FNGA – an interest which translates directly into responsibilities to ensure effective management of FNGA through monitoring and evaluation, auditing and reporting. These multiple contributing roles of donors are not yet included in the Draft Decree. There is also not yet recognition of donor roles in the management of programs/projects or any mechanism for INGOs or donors to participate in the appraisal and approval process, such as by reviewing comments and recommendations made by relevant state agencies. In cases where development partners and foreign governmental aid agencies are the source of funding for programs/projects coming under the scope of the Draft Decree, their roles and responsibilities are also not yet considered.

**Recommendations:** (1) Explicitly recognize the role of donors in the management of program/projects, including the addition of a mechanism for participation in the appraisal and approval process.

(2) Remove the requirement of a dedicated bank account for every project.

(3) A clear policy on VAT and tax exemption should be in place, at the same time project holders should be able to produce the official receipts, to improve tax collection and compliance systems.

## **8. Some provisions of the Draft Decree overlap with other policies**

Several procedures introduced in the Draft Decree appear similar to those regulating official development assistance (Decree 16/2016/ND-CP). Compared to ODA, FNGA programs/projects are typically much smaller, shorter in duration, and with more specific objectives and targets. As recommended above, the requirement of a PMU is not appropriate for most FNGA projects with limited human and financial resources. The definitions of ‘technical assistance’ and ‘investment projects’ in the Draft Decree are not clear, and would seem to apply more appropriately to ODA projects. FNGA donor procedures build in reporting, auditing, and monitoring & evaluation requirements that do not need to be duplicated by the host country government. Instead, consistent with the principles of the National Programme for Mobilizing FNGA, the Vietnamese Government should promote efficient use of aid in which Vietnamese aid recipients are the legitimate project owners.

**Recommendation:** Align project management requirements (including reporting, audit, monitoring and evaluation) to the existing requirements of donors to remove duplication and increase effectiveness.

## **9. Conflicts of interest may arise in the multiple roles assigned to state management agencies in the Draft Decree.**

The Draft Decree specifies roles for multiple state agencies in appraising and approving FNGA projects in their areas of responsibility. Certain of these agencies are also current or potential aid recipients of both ODA and FNGA. This creates the possibility of situations in which a particular agency is ‘both a player and a referee’. Under the appraisal and approval procedures proposed in the Draft Decree, it is conceivable that an agency could comment on or reject a proposed program/project based on interests that go beyond the characteristics of a specific project. The Draft

Decree does not yet require agencies to provide explanations for their comments on aid appraisals and approvals to the affected parties, nor does it specify what reasons for rejection of an application are legally justified. In principle, aid applications should only be rejected in cases of violations of the law or on internationally accepted grounds of national security and public order.

## **Conclusions**

Although the Draft Decree makes some positive additions to Decree 93, it still contains many shortcomings as presented above. Development partners and international NGOs present in Vietnam urge the Vietnamese Government to streamline the current complexities in the regulatory framework for foreign non-governmental aid by clarifying the intention of the Draft Decree and bringing it into alignment with existing laws and decrees that shape the enabling environment for FNGA, including the Civil Code, Decree 16, Decree 12, and the framework of business regulations. INGOs and Vietnamese aid recipients with legal status should develop framework agreements with their competent registering authority, containing planned thematic and geographic areas of work and reporting mechanisms, in place of burdensome project-by-project appraisal and approval procedures. These proposed changes would allow for more efficient and effective FNGA and state management to support sustainable development in Vietnam.

**This contribution to the Drafting Committee  
is submitted to you with the support of the  
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| 2. ADDA – Agricultural Development Denmark Asia                  | 22. Marie Stopes International Vietnam            |
| 3. ADRA – Adventist Development & Relief Agency                  | 23. MCNV  |
| 4. American Council of Learned Societies                         | 24. Medecins du Monde                             |
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