

Evaluation of the Implementation of Decree 12

Joint Comments and Recommendations by INGOs

Warm greetings from international non-governmental organisations operating in Vietnam!

The community of international non-governmental organisations (INGOs) in Vietnam, undersigned here, welcomes the opportunity to share our joint comments and provide recommendations on the implementation of the Decree 12/2012/ND-CP (Decree 12). We appreciate the intention of the Ministry of Foreign Affairs (MOFA) to receive feedback from INGOs on the upcoming revision of Decree 12. We look forward to receiving the first draft of a revised decree in near future, so that we can provide more detailed comments. Our goal is to support the Government of Vietnam in strengthening the legal environment for INGOs; creating more favourable conditions for humanitarian aid; and continuing our participation in the future development of the country. In addition, we would greatly appreciate if the MOFA team in charge of the revision could schedule a meeting with a group of INGO representatives, following the submission of this document, so that we can discuss our comments, suggestions and recommendations more productively.

Since 2012, when Decision 340 was replaced by Decree 12, INGOs have witnessed a remarkable improvement in the registration process and management of their operations in Vietnam. Today, five years later, it is an appropriate time to acknowledge the advantages this change has brought about; but also to identify the challenges surrounding the implementation of Decree 12. As Vietnam has attained lower middle-income status, it has become increasingly difficult for INGOs to raise funds for humanitarian aid and to maintain the same level of budget for development activities in Vietnam. If the operating conditions for INGOs remain conducive, more organisations will come and more existing INGOs will continue activities in Vietnam. In this context, the revised Decree 12 should not impede our work by imposing more bureaucratic hurdles — but rather encourage it by creating a favourable legal environment.

Overall, the existing procedures for the issuance and renewal of certificates are reasonable and appropriate. However, Decree 12 is more focused on registration, supervision and monitoring procedures — and less on mechanisms for feedback between relevant government agencies and INGOs. The majority of the 487 registered INGOs in Vietnam communicate regularly and interact daily with the People's Aid Coordinating Committee (PACCOM) team. PACCOM has been instrumental in facilitating INGO registration, reporting, visas, work permits, and tax issues and helping INGOs to navigate through a complex and burdensome regulatory framework. However, PACCOM's role has not been mentioned in Decree 12.

If Decree 12 was the only legal document governing INGOs' registration and administration it would be straightforward, balanced and well-adjusted to their needs. Unfortunately, INGOs are subject to an array of different laws, decrees, circulars, executive orders and other legal documents which are sometimes conflicting or misleading, to say the least. There is a lot of duplication amongst the legal requirements and administrative burdens imposed on INGOs through different legal documents released by different Vietnamese authorities. Later in this document, we will share more detailed observations and specific suggestions following the format prescribed by MOFA. Before these specifics, we would like to highlight some of the main issues, which were repeatedly mentioned by INGOs who participated in this evaluation:

- Overlapping responsibilities of relevant government agencies in implementation of Decree 12
- Prolonged delays and lack of timely feedback during certain stages of INGO registration
- Ambiguous or conflicting procedures for personal income tax (PIT) exemptions for expatriate staff
- Insufficient coordination between different Vietnamese authorities that manage INGO operations
- Requirements for multiple approvals of the same INGO projects during implementation
- Duplication of reporting and auditing requirements requested by different Vietnamese authorities
- The Current Framework Agreements do not supply the legal basis for PIT exemption

I. Comments on the Registration Procedure for International NGOs in Vietnam

1. Advantages, disadvantages and reasons

Procedures for issuance, renewal, amendment and re-issuance of certificates

INGOs' main concern relating to registration procedures is with the long deadlines for responses from relevant government agencies. There are inconsistencies between the description of the deadlines in Decree 12 and Circular 05/2012/TT-BNG (Circular 5). The deadline for written notifications on an INGO's application status by the Committee for Foreign NGO Affairs (COMINGO) is specified as 45 days in Article 6 of Decree 12. The same deadline appears to be at least 55 days as it is described in Article 3 of Circular 5, which states that VUFO (the Standing Office of COMINGO) has 35 working days to consult relevant government agencies and People's Committees; while the relevant agencies have 20 days to respond. Moreover it does not specify the period for MOFA to review and submit the results to COMINGO members.

INGOs that comply with all application deadlines may be left without registration certificates. In practice, waiting periods for INGOs are even longer than described above, particularly when INGOs apply to change the form of their registration. If an INGO is upgrading from 'Operations' to 'Project Office' or downgrading from 'Representative Office' to 'Project Office', the waiting periods may extend beyond a year. These registration procedures are resource-intensive for both INGOs and relevant government agencies. It would be beneficial for both sides to find a way to simplify procedures and shorten waiting periods.

Further, it is unclear what the status of INGOs' operations will be if relevant government agencies do not comply with the deadlines prescribed by Decree 12 and Circular 5. For example, if an INGO submits all required documents for extension of the 'Operations' status on time, but does not receive any response within the deadline, will the INGO be allowed to continue its operations while waiting for response? More than one INGO has experienced a delay of several months in receiving a Certificate of Registration of Project Office instead of a one-month waiting period per Article 11 of Decree 12. Another INGO experienced a four-month delay instead of a one-month waiting period for an upgrade to 'Representative Office' status per Article 14 of Decree 12, causing delays in project implementation.

The registration procedure should allow greater flexibility in relation to the requirement for INGOs to specify the number of Vietnamese staff hired by an INGO with 'Representative Office' status per Article 12 of Decree 12. The number of staff in representative offices frequently fluctuates, depending on the INGO activities, external funding, budget allocations at headquarters and other external factors.

Certificates of registration currently specify the cities and provinces in which INGOs are permitted to conduct their activities. These certificates are valid for periods of three to five years. During that time INGOs may start several new projects in different locations. The requirement to amend certificates of registration each time a new location is identified is time consuming, especially in light of current practices whereby actual processing time exceeds the processing time specified in Article 14 of Decree 12. Granting registrations based on INGOs' major programmatic sectors—and not locations—would allow INGOs to focus on implementation and avoid time-consuming paperwork associated with supplements, amendments and re-granting of certificates.

In addition to their ongoing projects in Vietnam, a small number of INGOs based in Vietnam also implement regional programmes which include Vietnam and one of its neighbouring countries such as Laos, Cambodia, or Thailand. It would greatly benefit these INGOs, as well as attracting new INGOs to Vietnam, if a new category 'Regional Office' is introduced to Article 2 of Decree 12, or at least if an option for conducting regional activities is provided under the 'Representative Office Certificate of Registration'.

Procedures for termination of activities of international NGOs in Vietnam

Article 11 of Circular 5 does not provide specific practical guidance on the implementation of general guidelines from Article 15 of Decree 12 regarding termination of INGOs' activities.

2. Suggestions and recommendations

Decree 12 and Circular 5 — include the contact address, email and phone number for each government body directly involved in the registration procedure, such as PACCOM, VUFO, COMINGO, MOFA or any other government body which INGOs may need to contact directly during the registration or project implementation.

Article 4 of Decree 12 on prohibited undertakings — consider amending this section so it does not apply to INGOs that operate like social enterprises (i.e. INGOs that make a profit which is entirely reinvested into humanitarian projects or used to address social issues and to support development activities).

Article 5 of Decree 12 on forms of INGO registration — provide a specific description of the three different forms of registration and the criteria used by relevant government agencies to determine if an INGO is eligible for one form of registration over another. It should be clarified that an INGO can have a project office without having a representative office first. The minimum requirements for an INGO to operate in Vietnam should be clearly explained to INGOs that have arrived in Vietnam for the first time.

Additional suggestion for Article 5 of Decree 12 — consider alternatives to reduce the frequency of INGO applications for registration certificates by establishing a new system of long-term registration. For example, consider a similar approach to that in the *Charities Act 2006* of the United Kingdom, where NGOs register once and are allocated registration numbers. Registered NGOs are monitored via regular reporting to relevant authorities, but do not need to apply for renewal of registrations.

Articles 7 - 15 of Decree 12 on registration procedures — simplify, streamline and shorten procedures for granting, supplementing, amending, renewal and termination of certificates of registration.

Articles 7, 10 and 13 of Decree 12 on extension of registration certificates — consider accepting previously submitted six-month reports and annual reports as a part of the application, rather than requesting new reports on activities undertaken during the period covered by the previous certificate.

Article 8 of Circular 5 on emergency relief without registration certificate — include a time limit appropriate for implementation of emergency relief, depending on the type of emergency, such as 7 - 30 days.

Article 10 of Circular 5 on temporary registration certificate — should be broadened and applied to INGOs who submitted all requested documents on time, but where relevant governmental authorities did not approve renewal or amendment of registration certificates within the deadline.

3. Other comments

If the new *Decree on Sanctioning of Administrative Violations* comes into force, it will significantly affect the operations of INGOs in Vietnam. Updating and amending certificates of registration will become an ongoing process and it may force INGOs to stop implementing projects for extended periods of time while waiting for the necessary amendments to registration certificates. It is neither practical nor desirable for project beneficiaries or donors, who will not tolerate excessive delays in implementation for purely bureaucratic reasons. This should be taken into consideration when revising Articles 8, 11 and 14 of Decree 12, as well as Article 10 of Circular 5.

II. Comments on Implementation of the Rights and Responsibilities of International NGOs

1. Advantages, disadvantages and reasons

Implementation of the rights of international NGOs

The implementation of the rights of INGOs defined by Decree 12 has been efficient, in large part thanks to the support and facilitation of the PACCOM team. As mentioned earlier, their role should be set out more clearly in the revised Decree 12 and Circular 5.

Although Personal Income Tax is covered by Article 23 of Decree 12 and Article 14 of Circular 5, there is no mention of any mechanism describing the refund of Value Added Tax (VAT) for INGOs. Please note that the VAT refund plays a significant role in securing INGO funding from most donors. Some of the biggest donors, such as the European Union (EU) and the United States Agency for International Development (USAID) make approval of funding conditional on INGOs guaranteeing VAT refunds during the implementation of their projects. A clear mechanism for VAT would increase INGOs' chances of securing more funds for Vietnam.

An ongoing struggle for many INGOs in Vietnam is a lack of clear regulations for international volunteers. International volunteers are not specifically mentioned in Article 20 of Decree 12 or Article 12 of Circular 5, but in practice it is understood that they are not exempted from work permit requirements. Obtaining work permits for international volunteers is a lengthy and cumbersome process. Often, by the time work permits are approved and issued, international volunteers are at the end of their short-term assignments. Granting international volunteers an exemption from work permits would have positive consequences for INGOs.

Importation of goods and commodities, stipulated in Article 22 of Decree 12 and Article 13 of Circular 5, has been conducted without difficulty by the majority of INGOs in Vietnam. Some INGOs have experienced delays from different authorities of up to four months, which has negatively impacted on the quality of imported goods and incurred costs for INGOs due to extra charges for extended storage.

Implementation of the responsibilities of international NGOs

INGO reporting is clearly stipulated in Article 18 of Decree 12 — INGOs are required to submit six-month and annual reports to COMINGO and People's Committees every year. The same requirements described in Article 17 of Circular 5 are more elaborate — it stipulates "coordination" with the Ministry of Finance, the INGOs' chosen banks in Vietnam, MOFA, COMINGO and People's Committees. In practice, COMINGO receives regular INGO reports via PACCOM. Requesting that INGOs send reports in different formats every six months to six different government recipients, in addition to reports for INGOs' own headquarters and several donors, has the potential to be onerous both for INGOs and for relevant government agencies.

There are numerous legal documents regulating or referring to Personal Income Tax for expatriate INGO staff: Law on Tax Administration (2006), Law on Personal Income Tax (2007), Circular 55 (2007), Decree 100 (2008), Circular 84 (2008), Circular 62 (2009), Circular 160 (2009), Decree 93 (2009), Circular 2 (2010), Circular 12 (2011), Law 26 (2012), Decree 12 (2012), Circular 5 (2012), Decree 65 (2013), Decree 215 (2013), Law 71 (2014), Decree 12 (2015), Decision 6 (2016), Circular 96 (2016) and potentially others. That represents one to three legal documents released every year for the past 12 years, totalling 19 regulations. Some recent PIT-related documents refer to some old regulations listed above. Therefore, it is impossible for INGO staff to decipher which documents are still valid and which documents may no longer be valid.

In practice in the past, expatriate INGO staff did not pay PIT. It is understood that previous Framework Agreements, signed between COMINGO and INGOs, carried the necessary legal weight to grant PIT exemption to expatriate INGO staff. The original Decree 12 came into force with the intention of improving the legal environment and creating a more conducive space for INGOs in Vietnam, which it did for the most part. Unfortunately, it also introduced a change in Framework Agreements, which have been stripped of the legal basis that enabled them to grant a PIT exemption. Since 2012, Framework Agreements are signed between VUFO and INGOs, and as a result are not considered international treaties by the General Department for Taxation. In early 2017, the General Department of Taxation began to send letters requesting that INGOs deduct, declare and (retroactively) pay PIT for current expatriate staff, as well as many former expatriate staff who have left Vietnam. This was done even though there are no clearly defined roles for the Departments of Taxation in Decree 12 or Circular 5.

Finally, Article 14 of Circular 5 merely lists a shorter set of legal document than the list above, without providing any information or specific guidelines related to PIT for expatriate INGO staff. It is out of date.

2. Suggestions and recommendations

Decree 12 and Circular 5 — introduce new articles in both documents that will: a) cover the VAT refund for INGOs; and b) include work permits and visa procedures for international volunteers.

Article 17 of Circular 5 on reporting responsibilities of INGOs — streamline and adjust to reflect the reporting requirements for INGOs clearly defined in Article 18 of Decree 12. Share the existing INGO reports submitted to COMINGO regularly via PACCOM, as well as the existing audit reports prepared by independent auditors and submitted to INGOs' headquarters and/or donors, with Ministry of Finance, banks, MOFA and People's Committees. That way the need for information-sharing with all relevant government agencies will be met without duplicating efforts.

Article 23 of Decree 12 and Article 14 of Circular 5 on Personal Income Tax for expatriate INGO staff — both articles need more elaborate guidelines and an updated list of relevant legal documents. Kindly note that the PIT section in Decree 12 is under Chapter III: Rights and Responsibilities of INGOs; however, the same section in Circular 5 is under Chapter II: Registration Procedures for INGOs in Vietnam. This needs to be harmonised.

Article 2 of Circular 5 on registration of INGOs and Framework Agreements — clarify which Vietnamese authority is competent to sign Framework Agreements with INGOs in a way that will enable the same authority to grant PIT exemptions for expatriate INGO staff. INGOs would like to suggest MOFA or COMINGO.

III. Comments on Implementation of the Responsibilities of Competent Authorities

1. Provision of information and guidance to implement regulations

There are several areas in Decree 12 and Circular 5 where information and guidance on the implementation of regulations can be strengthened, including the following: PIT exemption; work permit exemption and office closure. There are two government bodies which are involved in the daily operation of INGOs but whose roles are not clearly defined in Decree 12 and Circular 5: Department of Taxation and PACCOM. If the Department of Taxation has authority over INGOs, this should be set out in the main legal document (Decree 12) which covers the management of INGO operations in Vietnam. PACCOM plays many important roles in INGOs' daily operations and this should be reflected in Decree 12 and Circular 5.

Feedback from relevant Vietnamese authorities would be helpful and would enable INGOs to comply with the relevant requirements more easily. Regular reports prepared by relevant Vietnamese authorities and submitted to MOFA, as described in Article 18 of Circular 5, seem like the best source of feedback and should be shared with INGOs. Also, INGOs would welcome feedback from MOFA and People's Committees on their reports.

2. Issuance, renewal, amendment and re-issuance of certificates

See Comments on Registration Procedure for International NGOs in Vietnam (Page 2)

3. Provision of information and facilitation of international NGOs' operations at field sites (no comments)

4. Suggestions and recommendations

See the section Registration Procedure for International NGOs in Vietnam (Page 3)

IV Other Issues

INGOs may have further comments in this section following future drafts of the revised Decree 12.

The list of INGOs that participated or supported this evaluation is available on the following page.

These joint comments and recommendations are submitted to the Ministry of Foreign Affairs via People's Aid Coordinating Committee, with the support of the undersigned organisations:

1. ActionAid Vietnam
2. American Red Cross
3. Animals Asia
4. AFAP in Vietnam
5. Bread for the World
6. BORDA Vietnam
7. CARE International
8. Catholic Relief Services
9. CBM
10. ChildFund in Vietnam
11. Clinton Health Access Initiative
12. DKT International
13. FHI 360
14. Friedrich Ebert Stiftung
15. German Red Cross
16. Golden West Humanitarian Foundation
17. Habitat for Humanity Vietnam
18. Heifer Vietnam
19. HELVETAS Vietnam
20. Institute of International Education
21. Kenan Institute Asia
22. Konrad-Adenauer-Stiftung
23. Life Project 4 Youth Foundation
24. MAG Vietnam
25. Marie Stopes International Vietnam
26. MCNV
27. Medecins du Monde
28. Mennonite Central Committee
29. Netherlands Development Organization—SNV
30. Norwegian Mission Alliance Vietnam
31. Norwegian People's Aid
32. Oxfam in Vietnam
33. Pacific Links Foundation
34. Plan International Vietnam
35. Saigon Children's Charity
36. Save the Children Vietnam
37. Swiss Red Cross
38. The Asia Foundation
39. The Danish Association of the Physically Disabled
40. TRAFFIC International
41. Vietnam Assistance for the Handicapped
42. VinaCapital Foundation
43. VUFO-NGO Resource Centre
44. Wildlife Conservation Society
45. Woolcock Institute of Medical Research
46. World University Service of Canada
47. World Vision Vietnam