

Client Alert

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The Indonesian Government Resumes Discussions on Over-The-Top Regulation

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Recent developments

The Ministry of Communication and Informatics ("**MOCI**") has issued a new draft ministerial regulation on over-the-top ("**OTT**") services ("**2017 Draft OTT Regulation**"). The 2017 Draft OTT Regulation covers many of the same issues as were covered by the 2016 draft OTT regulation. The 2017 Draft OTT Regulation is still a work in progress and has not been formally issued as yet. Nor does the 2017 Draft OTT Regulation have any legal effect. The 2017 Draft OTT Regulation is still conceptual in nature and, as usual, principled based which leaves many questions unanswered.

As noted by the MOCI in its public expose on 7 August 2017, the MOCI will revise and further develop the 2017 Draft OTT Regulation. The 2017 Draft OTT Regulation will then be issued for public consultation and comments. Usually this public consultation period is quite short. It is likely that the MOCI will issue the revised 2017 Draft OTT Regulation through its official website (ie, www.kominfo.go.id) or by an official press release.

The 2017 Draft OTT Regulation will need to be supplemented by regulations from the Indonesian Tax Office ("**ITO**"), likely to be issued by the Director General of Taxation ("**DGT**"), or it will need to be made clear how existing regulations will apply in the context of the 2017 Draft OTT Regulation.

Implication for OTT Service Providers

OTT Service Providers must:

- consider how the 2017 Draft OTT Regulation will impact them
- lobby the MOCI to ensure that perhaps certain services are excluded and that adverse or unintended consequences are avoided (eg, foreign investment restrictions, whether agents can realistically perform etc)
- obtain clarity on the DGT's position on tax
- if enacted substantially in its current form, consider what approach will be taken to comply with the 2017 Draft OTT Regulation (including whether compliance is technically possible, the cost of compliance, actual operational and service issues etc).

We do appreciate that there needs to be more substance to the 2017 Draft OTT Regulation, as well as the MOCI describing clearly how the 2017 Draft OTT Regulation would actually be implemented.



2017 Draft OTT Regulation principal provisions

Broad coverage of OTT services

The MOCI and the DGT have acknowledged that the 2017 Draft OTT Regulation is conceptually identical to the 2016 draft OTT regulation.

The 2017 Draft OTT Regulation will cover all services that are offered through online platforms given the broad definitions in the 2017 Draft OTT Regulation.

Under the 2017 Draft OTT Regulation, OTT services cover both Application Service and Content Services, which are defined (article 1) as follows:

- "*Application Service*" means the usage of software applications that make possible communication service in forms of short messages, voice calls, video calls, electronic letters, and chatting/instant messaging, as well as financial transactions, commercial transactions, digital platforms, data records and retrieval, search machines, games, social networks and media, including their derivations by using an internet access service through a telecommunication network operation [*literal translation*].

The term "digital platform" is new wording under the 2017 Draft OTT Regulation (there was no specific reference to "digital platform" under the 2016 draft OTT regulation).

- "*Content Service*" means the provision of digital information in the forms of text, voice, image, animation, music, video, film, game or combination of some or all that includes streaming forms or download forms by using an internet access service through a telecommunication network operation [*literal translation*].

As with the 2016 draft OTT regulation, the definitions of "Application Service" and "Content Service" are very broad. Principally these definitions can cover anything that runs through the internet. The MOCI has indicated that this is its intention - as it seeks to bring offshore into Indonesia offshore platforms and services.

Further the concept of an OTT service covers any business or activities that generate revenue from customers in Indonesia, in any or a combination of the following forms (article 3(4)):

- i sales and marketing of the OTT service.
- ii advertisements for the OTT service.
- iii collection of customers' data.
- iv more importantly, any electronic transactions through an OTT service (eg, e-commerce activities).

The best approach for many clients would be to lobby to have narrower definitions to avoid the OTT regulation applying, when issued.



"OTT Service Provider" v. "Foreign OTT Service Provider"

The MOCI intends to distinguish between OTT Service Providers (which cover onshore OTT Service Providers) and Foreign OTT Service Providers, which are defined (article 1) as follows:

- "*OTT Service Provider*" means a party that provides, manages, and/or operates an OTT Service by its own or joined effort for OTT Service User for its own and/or other party's interest [*literal translation*].
- "*Foreign OTT Service Provider*" means an individual or public other than an Indonesian Citizen that is not established and not domiciled in Indonesia or a Public Institution other than Indonesian Public Institution that provides, manages, and/or operates an OTT Service, by its own or joined effort for OTT Service User for its own and/or other party's interest [*literal translation*].

The difference can also be seen in the provisions that are applicable to an OTT Service Provider or a Foreign OTT Service Provider (as discussed below).

Presence of foreign OTT Service Providers

Generally an offshore entity can only have a presence in Indonesia in the form of (i) a foreign investment (PMA) company if the business activities generate revenue in Indonesia or (ii) a representative office if the business activities are promotion, preparatory or auxiliary activities.

Under the 2017 Draft OTT Regulation, foreign OTT Service Providers that intend to offer their services to Indonesian customers must have a presence in Indonesia. The requirement under Article 3 ("Article 3(3) requirement") provides that a Foreign OTT Service Provider can do business from offshore, but the Foreign OTT Service Provider must have some sort of a presence in Indonesia (eg, have a permanent venue, employees or agent in Indonesia) ("**Onshore Liaison Presence**"). The Onshore Liaison Presence is then deemed to be domestic and an OTT Service Provider. How this will all work is very unclear and an individual is unlikely to want to undertake the responsibilities under the 2017 Draft OTT Regulation imposed on OTT providers, and be the intermediary between the MOCI and the Foreign OTT Service Provider; which then leaves only government institutions as currently drafted (see discussion below on registration requirements).

A Foreign OTT Service Provider must do the following onshore activities through the Onshore Liaison Presence (article 7):

- contracts closure, sales activities and billing (if the Foreign OTT Provider charges fees)
- have an Indonesian bank account for the receipt of the Foreign OTT Provider's revenue in Indonesia
- provide internal legal service, after sales service and a contact information center.

Again, the MOCI is pushing the concept of an agent or representative for the Onshore Liaison Presence (who will be considered an OTT Service Provider), so



that the Onshore Liaison Presence will be answerable to the Government (eg, the MOCI, the DGT and any other government authorities).

For a Foreign OTT Service Provider, complying with the 2017 Draft OTT Regulation (when issued), can be done by:

1. Onshore Liaison Presence - setting up a permanent business entity ("**BUT**") (article 3(3))

The 2017 Draft OTT Regulation gives examples of a local presence for Foreign OTT Service Providers such as a permanent venue, employees or an agent in Indonesia. However it is unclear how the Onshore Liaison Presence will be able to comply with certain obligations under article 5 (eg, guaranteeing access for lawful interception etc.).

While the 2017 Draft OTT Regulation does not specifically mention a BUT like the 2016 draft OTT regulation, the concept and intention remain the same. Unfortunately, the concept of BUT in Indonesia is vague and basically this will create a tax permanent establishment (and consequently make the presence subject to a higher tax rate (ie, the offshore entity must pay taxes at an effective corporate income tax of 40% namely 25% corporate income tax plus 20% branch profit tax)).

2. Moving onshore - Incorporation of a company

We appreciate that as a general rule many Foreign OTT Service Providers are not seeking to bring Indonesian business onshore into Indonesia.

However this approach involves setting up an Indonesian company to carry out the full OTT services in Indonesia. Relevant foreign investment restrictions will apply to the Indonesian company depending on the nature of the OTT business and the specific Indonesian business lines available and the Indonesian company will be subject to Indonesian licensing in order to carry out the activities.

While setting up an Indonesian company is more complicated than setting up a BUT (there are clearly market entry issues, costs, and operational issues), the company, while subject to income tax, would be taxed at a lower rate than a BUT (corporate tax is 25%).

Under the Negative List (a list of business activities that are open with conditions, or that are limited or closed for investment), not all business lines are open for foreign investment. Unfortunately there is no one category that would suit a multiple faceted offshore OTT provider and business lines would need to be identified depending on the nature of the service offerings. For example:

- (i) the advertising business line is generally closed for foreign investment, with the exception of up to 51% for ASEAN investors but otherwise closed for other investors. However do note that the advertising business line is intended for a whole range of



advertisement production activities and not just for advertisement publishing activities.

- (ii) data center service activities are covered under the data hosting business line, which is open 100% for foreign investment.
- (iii) the software publishing business line is open 100% for foreign investment.
- (iv) the marketplace business line is limited to 49% foreign participation if the investment is less than IDR 100 billion or open 100% for foreign participation if the investment is more than IDR 100 billion.
- (v) the mobile content service business line is limited to 67% foreign participation.

Unless stated above, each business line requires a minimum IDR 10 billion in capital (depending on the business plan).

Foreign investment restrictions were a major concern in the 2016 draft OTT regulation, and, although recast, the issue has not been addressed in the 2017 Draft OTT Regulation. There should be a new general business line, open to 100% foreign ownership, if the Government requires companies to be established.

In discussions with BPKM, the Capital Investment Coordination Board, which approves foreign investment, it is clear these issues have not as yet been considered in any detail.

The two approaches above are not ideal solutions for establishing a presence in Indonesia. However, given the 2017 Draft OTT Regulation, these are the only options as the 2017 Draft OTT Regulation requires the offshore presence/entity to conduct full business activities in Indonesia (eg, conclude contracts, open a bank account for the revenue and have after sale services and an information center). A representative office structure (where activities of the representative office are merely preparatory and/or auxiliary activities, eg, conducting promotion activities) would not meet the requirements under the 2017 Draft OTT Regulation.

Registration requirements - article 4

The MOCI indicated in the public expose on 7 August 2017 that the OTT registration will be done online through the MOCI's online system (which is similar to the electronic system operator registration). Registration must occur before service can be provided - although there is a one year transitional period.

We suspect the registration process would be equivalent to an "application", as typically the MOCI will (i) review a request for registration (including supporting documents) and (ii) give their comments (if any) before the MOCI issues a registration certificate. The MOCI could approve or reject a registration.

Given the registration requirement, the MOCI is pushing the concept of an agent or representative for the Onshore Liaison Presence. In other words, a Foreign



OTT Service Provider will need to appoint an Indonesian individual or government institution as its agent or representative in Indonesia (it is not clear why the 2017 Draft OTT Regulation specifies only individuals and government institutions as other entities should be permitted (eg, foreign investment or wholly Indonesian owned companies)).

General obligations - article 5

1. Indonesian law compliance

OTT Service Providers are subject to Indonesian laws and regulations on (a) anti-monopolies and trade practices; (b) trade; (c) costumer protection; (d) intellectual property rights; (e) broadcasting; (f) film; (g) advertising; (h) anti-pornography; (i) anti-terrorism; (j) tax; (k) transportation and logistics; (l) tourism and hotels; (m) monetary; (n) health; (o) others related regulations. So a very broad requirement to ensure that the provision of onshore and offshore OTT Services comply with Indonesian law. This goes further than even some of the laws themselves (for example the Consumer Protection Law only applies domestically and has no extraterritorial reach).

In addition, the 2017 Draft OTT Regulation acknowledges that OTT Service Providers' operations must comply with other related laws and regulations that cover their scope of operations. So the entire effect is to ensure that services are regulated under Indonesian law. Sanctions for violating the above regulations will be based on the relevant regulations, rather than the 2017 Draft OTT Regulation.

2. Data protection

OTT Service Providers must comply with data protection and data privacy regulations. That is, generally for any personal data consent for the manner and purpose for which the data will be used must be obtained.

There is no specific data localization requirement in the 2017 Draft OTT Regulation. However for onshore OTT Service Providers the provisions under Government Regulation No. 82 of 2012 on the Implementation of Electronic System and Transaction ("**GR82**") would still be applicable and would apply.

3. Content filtering obligation

OTT Service Providers must undertake content filtering and have in place censorship mechanisms. OTT Service Providers would need to filter and censor content in accordance with Indonesian law. Clearly this is relevant for more open systems and not encrypted closed systems (such as cloud).

In practice, an OTT Service Provider can receive take down requests from the MOCI. While the OTT Service Provider should not be liable for the user generated content (given the safe harbor concept), the OTT Service Provider must comply with the take down requests in order to avoid any allegations that the OTT Service Provider is keeping negative content on its platform. Negative content under Minister of Communication and Informatics Regulation No. 19 of 2014 on Negative Internet Content ("**Negative**



Content Regulation") is defined as pornography and other "illegal content". There is no specific definition of "illegal content". Under the Negative Content Regulation the MOCI and/or other relevant Government institutions may determine what can be consider as other illegal content, based on reports, but arguably this must be illegal in context. Consequently the term "negative content" covers content that can result in piracy, copyright infringement, defamation, pornography, hate speech, etc.

4. National payment gateway

All OTT Service Providers, including any Onshore Liaison Presence, must use the new national payment gateway, if they offer paid OTT Services.

5. Obligation to provide MOCI with information

OTT Service Providers must provide a statement letter/information/data on the OTT Services if requested by the MOCI. The MOCI intends to cover any information and data related to the OTT Services. In other words, the MOCI may ask for any information or data from the OTT Service Providers so long that the requested information or data is related to the OTT Services. This is a very broad approach, and many Foreign OTT Service Providers will be uncomfortable with this approach.

6. Lawful interception

OTT Service Providers must guarantee access for lawful interception and extraction of evidence for investigative purposes or crime investigations by law enforcers. This is in line with (i) Law No 36 of 1999 on Telecommunication ("**Telecommunication Law**") and (ii) Law No. 11 of 2008 as amended by Law No. 19 of 2016 on Electronic Information and Transaction ("**EIT Law**"). Under the Telecommunication Law, an interception of telecommunication networks is only lawful if the interception is requested by the attorney general, the chief of the Indonesian police force, or investigators for criminal proceeding purposes. Under the EIT Law, an interception or wiretap of any electronic information and/or electronic documents is only lawful if the interception or wiretap is requested by the police, the attorney general or other authorized institutions for law enforcement purposes.

In addition to the above, the 2017 Draft OTT Regulation (when it is issued) would make lawful interception process easier than before given all of the services and related documents should be available/accessible in Indonesia.

Data retention - article 9

On its face, the MOCI has relaxed the onshore data center requirements (which were previously reflected in the 2016 draft OTT regulation). However, there is no explicit exemption on the onshore data center and disaster recovery center requirements.

The 2017 Draft OTT Regulation now requires that an OTT Service Provider retain the transaction and traffic data (i) for at least three months or (ii) until such



time as a court proceeding is stopped or a court decision is final and binding (if there is any request from law enforcers for court proceeding purposes). Further, implicitly an Foreign OTT Service Provider must meet this data retention requirement through the Onshore Liaison Presence. This will be cumbersome if all data were required to be held by the Onshore Liaison Presence or some third party, and clearly raises issues of privacy, confidentiality, use etc of the data.

Cooperation with local telecommunication operators - article 10

OTT Service Providers and Foreign OTT Service Providers (after they have an Onshore Liaison Presence) can cooperate with local telecommunication operators.

Application Services

We appreciate that not all OTT Service Providers need to cooperate with local telecommunication operators, as some application services can be directly accessed through the internet (without any involvement of a local telecommunication operator).

Content Services

The MOCI wants to encourage OTT Service Providers and Foreign OTT Service Providers to cooperate with a local telecommunication operator for the provision of Content Services in Indonesia, which is actually in line with Minister of Communication and Informatics Regulation No. 9 of 2017 on the Provision of Content Service in Cellular Mobile Network.

However, if a Foreign OTT Service Provider were to cooperate with a local telecommunication operator for Content Services in a cellular mobile network, the MOCI would need to clarify whether the Foreign OTT Service Provider (or its Onshore Liaison Presence) would be considered a content service provider under the Telecommunication Law (which requires a specific telecommunication service license).

Reporting obligations - article 13

OTT Service Providers are required to submit an annual report to the Minister of Communication and Informatics. The report must include at least (i) the number of customers in Indonesia; and/or (ii) service traffic statistics on users in Indonesia. At this stage, there is no further explanation on this reporting obligation and, based on the 2017 Draft OTT Regulation, further provisions on the format of the report will be stipulated by the Minister (presumably under a circular letter).

OTT service policy national forum - articles 14-17

The Minister can establish an OTT Service Policy National Forum to help the Minister determining policies on OTT services in Indonesia. The intent is that the National Forum will assist and advise the Minister in monitoring the implementation of the OTT regulation.



Bandwidth management - article 18

The 2017 Draft OTT Regulation gives authority to telecommunication operators to conduct bandwidth management on an OTT Service Provider based on a Minister's decision. The concept of bandwidth management is an internet traffic management process by the telecommunication operators, which includes the limitation of service traffic, the provision of priority access for certain services within certain periods and other traffic engineering processes.

During the public expose on 7 August 2017, questions were raised, specifically on (i) how this bandwidth management will be implemented, (ii) whether a telecommunication operator can conduct a bandwidth management without a Minister's decision if it determines an OTT Service Provider violates the OTT regulation, and (iii) whether this bandwidth management means that a telecommunication operator can increase the bandwidth of one OTT Service Provider and decrease another OTT Service Provider's bandwidth.

The MOCI was not able to give clarification on how bandwidth management would work and said that bandwidth management is still being discussed.

Conclusion

The Indonesian government intends to force Foreign OTT Service Providers to establish a presence in Indonesia in order to protect the interests of the Indonesian public and local telecommunication companies and create consumer protection certainty (from the MOCI's perspective), as well as ensuring that revenue received from Indonesian customers is taxable (from the DGT's perspective).

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