Asia Internet Coalition (AIC) Industry Submission on Digital Platform Services Subordinate Legislation (or Sub-Decrees)

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5 April 2023

To
Dr. Chaichana Mitrpant
Executive Director
Electronic Transactions Development Agency (ETDA)

The Asia Internet Coalition ("AIC") and its members would like to thank the Electronic Transaction Development Agency (ETDA) for the opportunity to submit our inputs on the recently released implementation of the Decree on the Supervision of Digital Platform Services, i.e., Digital Platform Services Subordinate Legislation (or Draft Sub-Decrees).

In the spirit of constructive collaboration with the Government's efforts, AIC seeks to put forth for your kind consideration key comments and recommendations regarding key provisions of the following Draft notifications:

1. **Section A (pg. 2):** Draft Regulation on the criteria for calculation of average monthly active usage : (AMAU Regulation); and

2. **Section B (pg. 7):** Draft Regulation on the types of digital platform services that do not require to notify prior to conducting business

We express our continued interest to participate in forthcoming industry consultations that define the sub-decrees on how specific clauses within the main decree should be implemented. AIC is aligned with the spirit of the decree and shares common goals with the Thai government in promoting fairness and transparency in the business environment, and enhancing national security, cybersecurity and consumer protection.

Before being able to progress in this area, there needs to be further in-depth analysis of the policy, economic, and regulatory implications of the development and availability of new services to consumers and businesses. The AIC looks forward to working closely with ETDA and the Thai government, as these Sub-Decrees cuts across multiple policy areas and risks introducing overlapping regulations.

As such, we respectfully request ETDA to consider industry concerns and recommendations provided in Section A and Section B of this submission, when reviewing the implementation of the Sub-Decrees.

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact us directly at Secretariat@aicasia.org or +65 8739 1490. Importantly,

we also look forward to offering our inputs and insights, directly through meetings and discussions with the ETDA and concerned stakeholders.

Thank you for your time and consideration.

Sincerely,

Jeff Paine
Managing Director
Asia Internet Coalition (AIC)

Detailed Comments and Recommendations

Section A: Regulation on the criteria for calculation of average monthly active usage (AMAU Regulation)

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a. Violation of users privacy (clause 7)

According to section 8(2) of the decree on digital platform service business, which requires notification, it is stipulated that digital platform services with more than 5,000 service users per month in Thailand, calculated from the average monthly usage according to the criteria specified by the ETDA Office, must comply. Therefore, the ETDA has proposed a method for calculating the AMAU of any digital service by counting unique users who actively use the service each month. Establishing the number of unique users specified in clause 7 of the draft AMAU Regulation may require digital platform service providers to perform specific tracking of individual users' behaviour, such as tracking from the identifier of IP address, RFID, cookies, device identification, or other methods, which unnecessarily impacts user privacy, creates excessive burdens for service providers to comply with the rules, and could potentially go against the ethos of data protection principles.

The above provision does not prevent the Digital Platform Provider from using other methods or indicators to identify the number of unique Users. As each nature of use for each platform is different, we believe that the determination of unique user should be conducted via each platform's normal operation. Therefore, in order to limit the operator's obligation in the

determination of unique user, we suggest that the provision should make it clearer that the determination shall be conducted in a normal operation, and not specific tracking of individuals online.

We would like to stress that platforms do not, and should not, track the activity of its users, much less their IP Address, Cookies, RFID Tags, or Device details. This fundamentally violates users' privacy rights.

Secondly, it would be costly and impractical to employ authentication to this level of granularity.

We therefore propose tracking MAUs by general methods *already done / implemented by the platforms, and nothing more*, e.g., those who have initiated sessions within the platform and, seeing that this decree seeks to protect consumers, those who have actually initiated or consummated a transaction within the platform. This could also include sessions whereby the users provide consent to a platform's Privacy Policy during the account creation process.

b. Identity verification process (Clause 8)

Clause 8 of the Draft AMAU Notification provides that, in order to calculate the unique users, the Operator and the Operator under Section 8 Paragraph Four should have in place an identity verification process, which is appropriate to the risks level of the Digital Platform Service.

As Clause 7 of this Draft AMAU Notification recognizes that the Digital Platform Service may or may not have an identity verification process, a suggestion to have in place an identity verification process in this Clause 8 would be contrary to such above Clause 7. In addition, as this Draft AMAU Notification is a legally binding sub-regulation, a mere suggestion which, in nature, is non-legally binding should not be included.

Therefore, we suggest that this provision be removed to reduce inconsistency within the law.

c. Concerns Regarding the Issuance of Guidelines Identifying Active Users (Clause 9)

Referring to clause 9 of the draft AMAU Regulation, it states that monthly active users should be counted from activities that indicate the actual use of the service based on the nature and type of each digital platform service. Examples of such activities may be considered from those that ETDA will announce at a later stage.

It is important to note that the number of AMAU may change over time with monthly variations, i.e., some months may reach the threshold and some months may not. Therefore, the law should take into account such volatilities of each platform service, rather than imposing strict guidelines.

This clause is quite vague and may open to broad interpretation. As different Digital Platforms are of several different natures, it would be difficult in practice to define the "activity" to be calculated for each platform. In addition, as different Digital Platforms are of several different

natures, we suggest that the manual to be prescribed by the ETDA should be a mere suggestion/guidance and should not be legally binding.

We propose that the number of monthly active users should reflect only the users who actually intend to engage with the service, and users who use the service more than once in a month should only be counted once to reflect their monthly active usage individually. The engagement should be limited to activities that pose potential risks to user rights and prevent damage that may occur to users. Activities such as logging in or signing into the service or searching for a product without making a purchase transaction should not be counted as indicators of active users.

As such this clause should focus on result based outcome rather than regulations driven with strict numbers and should be open to adjustment due to the nature of platform services that may change overtime.

Primarily we recommend that this provision be deleted. If the ETDA intends to publish guidelines later, then industry participants should be first consulted, and should agree as to which activities should count towards a user being included in the MAU count. ETDA should also consider activities by assessing the potential risks from the user's activity, rather than indicating too broadly. A public hearing to share the contents of the guideline should be held before ETDA announces such a guideline.

d. Concerns regarding consideration while calculating active users (Clause 10)

Clause 10 of the Draft AMAU Notification provides that, for the benefits of calculating the active users under Article 9, the following, among others, must be considered: (i) not to include Service Users who are merely exposed to the Digital Platform Service via a search engine or a link, but have no activity which indicates actual usage of such Digital Platform; (ii) not to include interactions or calculations by non-humans or bots; and (iii) not to include indirect usage by relevant service providers (e.g., logistics or warehouse service providers) unless such service providers are main Service Users of the Digital Platform Service, etc.

As different Digital Platforms are of several different natures, a requirement to consider certain factors as specified under this Clause may not be suitable for all types of Digital Platform Services. Therefore, we suggest that the term "shall" in this Clause should be revised to "may" in order for such factors to be mere guidance to the Operators, but not mandatory obligations.

e. Concerns regarding calculation of MAU for each category of the Service Users (Clause 11)

Clause 11 of the Draft AMAU Notification provides that, where the Operator or the Operator under Section 8 Paragraph Four provides the Digital Platform Service to multiple categories of Service Users, the MAU shall be calculated for each category of the Service Users.

As the main Royal Decree itself does not require that the MAU shall be calculated for each category of the Service Users, prescription of such a requirement in this Draft AMAU Notification, which is a sub-regulation thereto, would be beyond the scope of the Royal Decree.

Per the general concept of hierarchy of law, the sub-regulation should not add more legal burden to the main Royal Decree which is of higher hierarchy.

In addition, as certain Service Users could fall into multiple categories of Service Users (for example, one Service User can be considered as a business user and a consumer at the same time), calculating the MAU separately for each category of the Service Users would cause duplicate results. Hence, the number of MAU would not be considered unique as required under this Draft AMAU Notification.

Therefore, we suggest that this Clause should be removed.

f. The criteria for calculation the number of AMAU cannot be applied in practice (Clause 13)

Clause 13 of this Draft AMAU Notification provides that, the calculation of the AMAU shall be made by dividing the number of the MAU by the number of the months pursuant to the following criteria:

> (i) for notification by the Operators who have operated the Digital Platform Service before the effective of the Royal Decree (Section 43 of the Royal Decree), the number of months shall be calculated from the first month of service in 2023 to the month notified to the ETDA prior to the operation;
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> (ii) for notification by the Operators who have already notified its operation with the ETDA and the Operator under Section 8, the number of months shall be calculated from January (or the month notified to the ETDA) to December;
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> (iii) for notification of business cessation, the number of months shall be calculated from January (or the month notified to the ETDA) to the last month where the cessation is notified to the ETDA).

Where any month is not a full month, the active users in such month shall not be calculated.

In practice, not all service providers currently collect the number of monthly active users (MAU) required for notification to the ETDA. Collecting the MAU data requires a preparation period for service providers to develop front-end and back-end systems for tracking users' behaviour. In addition, service providers have to receive users' consent before collecting personal data to comply with the Personal Data Protection Law.

Clause 13(1) of the draft AMAU Regulation states that the method to identify the average monthly active users (AMAU) will be calculated from the MAU, starting to count the number of months from the first month of service in 2023 until the notification month with ETDA prior to conducting business. As previously mentioned, existing service providers may encounter difficulties in complying with this regulation, as they may not have collected individual users' behaviour data before. We believe that the wording of clause 13(1) will pose practical obstacles for compliance, as the service providers are required to have such data since January 2023 for AMAU calculation.

Moreover, we disagree with the requirement for the retrospective collection of information under clause 13(1) while the regulation is not yet in force. We believe that this clause contradicts the principle of "*Ex post facto law"* which only applies the law to future events from the enforcement date, without retroactively changing the legal consequences or status of relationships that existed before the law's enactment.

As it is unclear whether what is considered a full month pursuant to the last paragraph of this Clause, we suggest that the language of such provision should be revisited (for example, for clarity, the last paragraph should be revised to "where the Digital Platform Service is not provided throughout any month, the active users in such month shall not be calculated").

We propose that this clause should be amended to count the number of months starting from the regulation's effective date, and ETDA should provide a grace period of at least one year from the regulation's enforcement date for service providers to prepare internal operations and systems, which will help the platforms to better understand MAU calculation.

g. Obligations on operators to notify outlier figure of MAU (Clause 14)

Currently, Clause 14 of the Draft AMAU Notification does not require that the operator shall notify the ETDA of the unforeseeable event and the reason for not including the outlier MAU for calculation. The further requirement that the Operators must also provide the outlier figure, along with the reason for not including such figure in the calculation of AMAU would put more burden on the Operators. Thus, we respectfully do not agree with this proposal for additional notification requirement and opine that it should be removed.

h. Methodology for determination of an outlier figure

Tukey's fences method is a statistical method used in the determination of an outlier figure by examining the range between all available figures in order to determine the normal or expected range of the figures (interquartile range), then using that range to calculate the upper fence above the highest figure and the lower fence below the lowest figure. Any new figure which falls above or below the fences would be considered as an outlier figure.

Since this method still provides room and flexibility in the case where the number of user increases or decreases beyond the available statistic, we view that the application of Tukey's fences method is reasonable.

i. Information on the method to identify and calculate AMAU is the trade secret of each service provider (Clause 15)

Clause 15 of this Draft AMAU Notification provides that, where the number of the AMAU of any Digital Platform Service exceeds 5,000 per month, the Operator shall notify the business operation of the Digital Platform Service to the ETDA using the form as to be prescribed by the ETDA and explain the method for calculation of the AMAU. Where the number of the AMAU of any Digital Platform Service does not exceed 5,000 per month, the Operator under Section 8 Paragraph Four shall notify the brief particular to the ETDA as per the form as to be prescribed by the ETDA

This Clause repeats the same requirements as already prescribed under the Royal Decree, namely the requirements to notify the business operation and the brief particular to the ETDA, which are also not relevant to the purposes of this Notification i.e. to prescribe the criteria for calculating the AMAU. As it would require certain resources and investment in order to invent a method for calculation of the AMAU in case of non-registered users, such methods are generally kept confidential by businesses. If such methods are disclosed, the level of competition in the relevant markets could be reduced.

The requirement to declare the method of AMAU calculation of each service provider, according to clause 15 of the draft AMAU Regulation, may force service providers to reluctantly disclose the trade secret of their service businesses. Customer data is the company's competitive edge, and each company has spent time and budget to implement and develop IT security systems to protect against cyber threats, including preventing important information leakage.

Companies should not be compelled to disclose their methodologies for determining their AMAU. Different companies measure this differently, and the manner by which they compute the same may be unique. Asking each company to divulge may result in them losing competitive advantage.

Therefore, we are concerned that any compliance with the law by disclosing trade secret information to ETDA, will ETDA have a sufficiently secure system, and if such information is leaked due to ETDA's mistake, unintentional or negligent actions, who will be liable and responsible for the damage? We would like to stress that the platforms have a responsibility to protect their users' data and therefore we would need further understanding on "how" ETDA can guarantee and ensure that the numbers collected from the platform services will not be "leaked". To substantiate our comment above, we would like to point ETDA towards the recent leak of 55 million population ID cards in Thailand.

Therefore, we suggest that this Clause should be removed.

We also propose that ETDA provide a template for service providers to identify the AMAU of their services in tiers of AMAU rather than requesting service providers to disclose the exact AMAU amount of the service. We believe that there are no reasons for ETDA to know the exact amount since the tiered information could also help ETDA achieve service classification objectives.

Section B: Regulation on the types of digital platform services that do not require to notify prior to conducting business

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a. Effectivity of Draft Characteristics Notification (Clause 2)

Clause 2 provides that the Draft Characteristics Notification shall be effective from 20 August 2023 to 19 August 2024.

We suggest the removal of this provision. In the event that the ETDA or Electronic Transactions Commission wish to add or amend any Digital Platform Services that has been exempted, they can do so by issuing a new notification or revoke any existing one. In such case, the existing exemption would continue to be in effect without the need of renewal after the initial period had passed.

b. The exemption of business services (Clause 3)

Referring to section 3 of the decree of digital platform service businesses that must be notified, it stipulates the definition of "Digital Platform Service," which does not include digital platform services that are intended to offer products or services of business providers. Therefore, if any services fall into the definition of an exemption in section 3, such service providers are not obligated to comply with the requirements under the decree. However, clause 3 of the draft regulation requires websites or applications that are intended to sell products or services of service owners only but have only provided services of (1) web boards and (2) hyperlinks or banners to inform ETDA briefly prior to conducting business. We view that clause 3 of the draft regulation is an additional obligation that exceeds the legal obligation stipulated in the decree of digital platforms, considered the main law for the regulation of digital services in Thailand.

With these classifications of exempt platforms, particularly (2), shouldn't "search engines", by their very nature, also be exempted from the Notification requirement? If so, then the ETDA should explore likewise classifying search engines under this sub-regulation, rather than lumping it together with other Digital Platforms under Section 16.

Notably, the regulation on illegal content are already set out under the Computer Crime Act. Hence, the requirement for the operator of (2) to have in place a measure to control or manage that no illegal hyperlinks/banner are shown would be redundant with the obligations that are already existed under the Computer Crime Act. In addition, such requirement is likely beyond the scope and the purposes of the Royal Decree. We suggest that this requirement should be removed.

c. Reportorial requirements (Clause 4 and 5)

Clause 4. The Digital Platform Provider which provides the Digital Platform Services specified in Clause 3 herein shall provide the following list of brief information to the ETDA before the operation of business:

1. Information about the person wishing to operate the Digital Platform Service:
   (a) Name-surname or juristic person name;
   (b) Identification number or juristic person registration number;
   (c) Address;
   (d) Annual fiscal year, in the case of a juristic person; and
   (e) Contact details.

2. Information about the Digital Platform:
   (a) Name of the Digital Platform Services;
   (b) Type of Digital Platform Services; if the Digital Platform Provider provides various types of services, all such services provided in Thailand shall be specified; and
   (c) Channel through which the Digital Platform Service is provided, such as URL or application.

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Clause 5. The Digital Platform Provider who provides the Digital Platform Services specified in Clause 3 shall submit the information specified in Clause 4, as well as the following information, to the ETDA on an annual basis within sixty (60) days from the end of a calendar year, in the case of a natural person, or sixty (60) days from the end of a fiscal year, in the case of a juristic person. ….....

These Sub-regulations go beyond what the decree provides. If a platform is exempt from notification, then it should not likewise be subject to these reportorial requirements at all.

d. Services that are already explicitly regulated should be added to this draft regulation

We propose that services that are already regulated by other laws and have explicit regulators should be added to one of the exemption services under the draft regulation. Services regulated by specific laws, such as the Direct Marketing Act, already have strict obligations and regulations governing the management of risks arising from service operation for the purpose of protecting customer rights. This would decrease unnecessary burdens on service providers to comply with redundant laws.

e. Request for transition period

We request for the transition period for the service providers under this draft regulation that almost all of service is as low impact, so it should be appropriated if ETDA provides more grace period for the service providers of at least 1 year from the date at which this draft regulation comes into force.