

Matrix of Recommendations Regarding Draft Regulation on Application and/or Content Services through the Internet

Article Number	Content of Draft Regulation	Comment	Recommendation
1.3	<p>Defines OTT providers using two categories: (1) Providers of Application Services by the Internet, and (2) Providers of Content Services by the Internet.</p>	<p>Commonly understood, OTT services are apps that provide voice-calling services delivered over the Internet (e.g., Viber). As defined, the term OTT services covers everything that is available on the Internet and via mobile networks, including health, education, radio streaming and even emergency response services. This would not only cover big OTT businesses, but also potentially individuals, and small and medium enterprises (both local and international) as well as community services. We ask that the Ministry consider that, as of March 2017, 2.8 million apps are available on Android devices, and 2.2 million apps are available on Apple's app store.</p> <p>Indonesia's e-commerce sector has grown dramatically in recent years thanks in no small part to technology and skillset transfers combined with local dynamism, all of which have improved payment options, services delivery, logistics chains, and the scaling up of capacity-building. E-commerce and other platforms continually look to incorporate services and technology in their offerings, and are also looking increasingly to the international markets for financing and growth opportunities.</p> <p>The draft regulation in its current form creates a burdensome environment that would discourage online service providers (whether local or foreign) from continuing to invest in the Indonesian market and provide innovative leading-edge services to Indonesian consumers. This will be particularly challenging, if not prohibitive, for small-and medium-sized businesses.</p> <p>In addition, the definition of application service includes services on financial transactions, which are already heavily regulated through securities, banking and insurance laws in Indonesia, and these existing laws have licensing, supervisory and regulatory frameworks which are specific for financial services.</p> <p>We caution against unintended consequences of impact on other industries and initiatives, particularly those that the government is consciously looking to grow and support, such as financial inclusion, universal education and nationwide healthcare.</p>	<p>The scope and definition should be limited and narrowed according to the government's objective in regulating OTT.</p> <p>The scope and definition should be reconsidered in order to not go beyond what is necessary to achieve the government's policy objective.</p>
3.3	<p>Foreign OTT Service Provider as intended in paragraph (2) shall be in the form of:</p> <p>a. fixed place which is owned, rented, or controlled by Foreign OTT Service Provider or other party in Indonesia</p>	<p>Regardless of their countries of origin, OTT services are inherently global and the business models of most OTT service providers cannot accommodate a legal/physical presence in every country where services are available online (sometimes 200 or more countries). Compliance with diverse local regulations would fragment the global reach of the services, rendering the very utility of such services moot.</p> <p>Indonesia, as a G20 country, has been actively involved in the OECD/G20 initiative to address global international tax</p>	

	<p>permanently, which is utilized by Foreign OTT Service Provider; or</p> <p>b. presence of Foreign OTT Service Provider employees or other party in Indonesia permanently, who acts for and on behalf of Foreign OTT Service Provider.</p>	<p>issues related Base Erosion and Profit Shifting (“BEPS”). The BEPS initiative brings together the tax authorities of most significant countries in the global economy and to update current international tax norms and principles. In the Final Report on Action Point 1 BEPS, “Addressing the Tax Challenges of the Digital Economy”, it was stated that “Because the digital economy is increasingly becoming the economy itself, it would be difficult, if not impossible, to ring fence the digital economy from the rest of the economy for tax purposes...” From this, it follows that rules such as those on Permanent Establishments for tax purposes must be allied equally to any form of business. Under the Indonesian Income Tax Law, the definition of permanent establishment is already defined and generally includes a non-resident entity conducting business activities within Indonesia. Since most OTT companies currently do not have any office or employees in Indonesia, the Permanent Establishment (Bentuk Usaha Tetap, BUT) requirements under the Indonesian Income Tax Law are not fulfilled merely by an OTT company providing services to Indonesian customers from outside Indonesia.</p> <p>Further under most Indonesian double tax treaties, to create a “fixed place of business” Permanent Establishment, a party must have a specific physical presence fixed place of business in Indonesia <u>and</u> activities performed through that fixed place would need to go beyond a “preparatory or auxiliary” nature to be considered a Permanent Establishment (double tax treaties as <i>lex-specialis</i>, treated as a law), would override Indonesian laws. As well, foreign entities are generally prohibited from conducting more than “preparatory or auxiliary” activities through a representative office, and commercial branches are not permitted for most industries. Thus, requiring a fixed place of OTT service providers to exist in Indonesia, under the draft regulation, may be contrary to existing regulations and under tax law and treaty obligations, would not be effective in creating an Indonesian taxable Permanent Establishment of such entities if Indonesia is to adhere to its international treaty obligations. This would be the equivalent of requiring a manufacturer of products half way around the world, or a provider of technical services, with no physical presence in Indonesia whatsoever, to register a Permanent Establishment just on the basis that it ships goods or provides technical services to customers that happen to be in Indonesia. This is not in line with well-established international business and tax principles.</p> <p>Furthermore, creating the requirement to have a local presence in the form of a subsidiary company (foreign investment (PMA) company) may also be inconsistent with Indonesia’s current business regulatory environment with respect to foreign investment restrictions. Under the Negative List, not all OTT companies are able to set up a PMA company in Indonesia (for example e-commerce and</p>	
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4	<p>OTT service providers are obliged to submit an application to the Minister before providing service in Indonesia</p>	<p>Requiring online service providers to register creates a high barrier to entry in the Indonesian marketplace that will be insurmountable for many if not most providers, especially, Indonesian small business and start-ups. This would have the effect of denying Indonesian consumers access to new and innovative services and so would harm the Indonesian economy. It would also be virtually impossible to monitor and enforce, thus creating an uneven playing field for "good corporate citizens" that want to ensure compliance with laws, and those that practically will evade such a requirement.</p> <p>Lastly, we feel the requirement to submit such an application is contrary to President Joko Widodo's efforts to streamline business registrations by providing one-stop registration.</p>	<p>This requirement should be reconsidered or removed.</p>
5	<p>OTT service providers should comply with local laws and regulations.</p>	<p>Article 5 in general lacks clarity with respect to the OTT service providers' legal liabilities under Indonesia laws.</p>	<p>We recommend the Article identify the OTT service providers' responsibilities.</p>
5.1(a)	<p>OTT service provider shall: a. comply to rule of regulation in (10) tax</p>	<p>While requiring Foreign OTT companies to comply with tax laws is certainly reasonable, other requirements under this regulation may create a "forced" creation of a taxable presence for non-resident taxpayers that would not normally have such a presence under existing Indonesian tax laws and international tax norms regarding business practices and supply chains.</p> <p>This provision could also lead to Indonesian businesses paying lower taxes than foreign OTT service providers due to the potential of double taxation for those that are unfairly required to register as a BUT and deemed a Permanent Establishment, contrary to local tax laws and treaty obligations. This disparate treatment could potentially also violate the National Treatment provisions of Indonesia's General Agreement on Trade in Services (GATS) commitments. Indonesia's GATS Schedules all indicate "none" for the limitations on national treatment in the potentially affected sectors, including voice mail services, electronic mail services, electronic mail box, file transfer services, management information services etc.</p> <p>Some OTT companies providing services to consumers in Indonesia, especially to consumers that are corporate resident taxpayers, have already been paying taxes. The payments made from the consumers in Indonesia to these OTT companies are already subject to 20% withholding tax (or reduced withholding tax rates if the tax treaty protections are applicable). The consumers have deducted this withholding tax from the payment made to the OTT companies. Therefore, the statement that all OTT companies generate income but do not pay taxes in</p>	<p>We understand that Indonesia, as a member of the G-20, has actively participated in the Base Erosion and Profit Shifting¹ (BEPS) Project. The OECD / G20 BEPS Project formed the Task Force on the Digital Economy ("TFDE") for purposes of analyzing the tax treatment of the digital economy. In their final report, TFDE recommended countries collect VAT (Pajak Pertambahan Nilai/PPN) on cross-border B2C supplies of digital services and intangibles in a principled way and did not recommend the establishment of a local entity or a permanent establishment to address such issues.</p> <p>Indonesia may wish to adopt the approach of adopting an extraterritorial indirect tax regime applied to the remote delivery of digital goods and services, and allowing the OTT companies to be registered for VAT purposes only (without creation of a corporate tax Permanent Establishment). This might require amending certain Indonesian VAT law and/or regulations, but would permit foreign OTT providers to assist the Indonesian government in collecting VAT from consumers and</p>

		<p>Indonesia is not correct. In terms of withholding taxes and other direct taxes, Indonesia already has an existing body of tax law and tax treaties that regulates the imposition and collection of such taxes. Consistent with BEPS Action Plan 1, the digital economy should not be segregated with respect to application of such taxes, but rather existing laws and principles should be revised and amended, in line with the OECD BEPS initiative, after careful study and alignment between participating countries. To rush through regulations that will not be enforceable under existing double tax treaties would be inefficient and would create further barriers to doing business in Indonesia, thus hindering future foreign direct investment. Rather, Indonesia should focus on the BEPS recommendations for other things such as “artificial avoidance of Permanent Establishment” as well as potential other ways of taxing OTT services, as per our recommendations.</p>	<p>would results in an extremely positive addition to Indonesia’s tax revenue raising initiative. It also would not contradict the existing Indonesian corporate tax Permanent Establishment rules nor be contrary to international tax treaties to which Indonesia is already a signatory (since VAT is not generally covered under double taxation agreements). Korea, Japan, New Zealand and Australia have all applied a simple registration and declaration process for Value Added Tax (VAT).</p> <p>Consideration could also be given to adopting a specialized deemed nominal “final” VAT regime for OTT services, similar to what Indonesian has done for several other industries</p>
5.1(c)	OTT service provider shall (c) conduct content filtering and censor mechanism	<p>We appreciate that certain contents need to be filtered and adjusted in accordance with the prevailing norms, culture and sense of decency in Indonesia. Major online platforms have already implemented proven, effective processes for responding to requests from government and law enforcement agencies to restrict content on the basis of violations of local law. In addition, these platforms allow users to directly report content that violates their terms of service. Online service providers have a natural business incentive to set and enforce content standards for their services that reflect their users’ expectations and ensure safety, and there is insufficient reason to obligate providers to do so.</p>	<p>Due to the global nature of the business, a more productive approach would be to encourage all players in the complex Internet ecosystem to work together to participate in the protection of consumers online as part of an overall framework of responsibility, trust and accountability. This would include educating and empowering consumers to have online experiences that are suitable for themselves and their families through methods such as parental controls, and transparent reviews and ratings. We also recommend utilizing notice and take down systems (which have been successfully adopted in various countries), which would be a better solution for search engines, aggregator and user-generated contents type of services.</p>
5.1(d)	OTT service provider Shall (d) utilize the national payment gateway, particularly for paid OTT service	<p>Requiring all OTT service providers use a single payment gateway would lead to a single point of failure for all payment transactions and would also invite hackers and cyber criminals to target that gateway. Given that most OTT service providers currently associate payment with entities not in Indonesia, transactions of this nature should be considered cross border.</p> <p>According to BI Regulation 19/8/2017, only domestic transactions need to be routed through the NPG (starting with domestic ATM/Debit transactions). There is no requirement currently to route credit transactions through the NPG.</p>	<p>Most payment for subscription OTT services is based on credit cards. Given that BI’s NPG regulation only requires domestic transactions be routed through the NPG (beginning with ATM/Debit) with a deadline of June 2018, the OTT regulation should clarify and reflect that there is no requirement for credit, online or cross-border transactions of any type to be routed through the NPG. Further, by allowing OTT service providers the choice of payment gateways, and allowing market competition to reduce payment processing charges, OTT service</p>

			providers will be able to keep prices low for their customers. Therefore, we recommend other gateways be permitted, in addition to a NPG.
5(e)	OTT service provider shall guarantee access for lawful interception and evidence taking for or investigation of criminal case by law enforcers	<p>We understand the need for assurance that OTT service providers comply with law enforcement requests. However, law enforcement agencies are already empowered to make these requests under existing laws and regulations. Also including this in the draft regulation is confusing and could be more widely interpreted as permitting unfettered access to data by the Government absent any legal process. That would extend beyond what is being stipulated by Telecommunication Law Year 1999 that states interception and access for information can be granted only with a written order from the Attorney General or the Chief of Police.</p> <p>We believe this provision should also take into consideration the international nature and scope of OTT services which would mean that any such access rights will be exercised to the extent that they are not contradictory to laws in other countries which may restrict the disclosure of information. The international nature of OTT services also means that the interception and collection of evidence would be better addressed by enhanced cooperation among international enforcement agencies.</p>	<p>Most large, global companies already have efficient voluntary processes for disclosing account records in accordance with terms of service and applicable laws. These processes work well internationally, and the Indonesian government should consider making increased use of these processes.</p> <p>We believe appropriate legal processes should be required before OTT service providers disclose user data. Any regulations regarding law enforcement access to data must be compliant with Indonesia's obligations under multilateral treaties as well as Indonesia's human rights commitments. We understand that the legal framework governing cross-border requests needs to be significantly improved and would like to explore opportunities to contribute to the development of the provisions of this article.</p>
5.1 (f)	OTT service providers shall (f) list information and/or guidance of service in Bahasa Indonesia.	As of March 2017, 2.8 million apps were available on Android devices, and 2.2 million apps were available on Apple's app store. Requiring each of these apps to provide guidance of service (have a user's manual) in Bahasa Indonesia regardless of the size of their presence in Indonesia, is not feasible. If the distribution is small and the services are marketed to a particular segment of the market, the use of the Indonesian language may not be necessary.	We recommend that flexibility be given to service providers on the choice of language.
6	In the matter where service content is not directly provided by OTT Service Provider, OTT Service Provider is obliged to inform and socialize matters involving issues on content obligations as stated in Article 5.1 to partner or direct provider of content by OTT Service.	<p>OTT service providers often have no control over other participators in the whole process.</p> <p>We recommend for KOMINFO to similarly apply to OTT players the safe harbor provisions that are available to e-commerce providers under "KOMINFO Minister Circular Letter 5 Year 2016 on Limitation and Responsibilities for E-Commerce Platforms Providers and Merchants". This will help provide consistency between regulations, improving legal and business certainties, which will help grow Indonesia's digital economy overall.</p>	<p>We request clarification on the legal responsibility of OTT service providers under this provision, distinguishing between the content developed by the providers and that developed by other participators.</p> <p>We recommend for KOMINFO to consistently apply the safe harbor provisions to all digital providers and platforms that utilize user-generated content, including OTT providers.</p>
7	In conducting business or activities in Indonesia, OTT Service Provider shall conduct the following activities:	While the exercise of authority to conclude contracts by a subsidiary in the name of the parent may indicate a permanent establishment in the subsidiary's country, such authority should not be a legal requirement. This authority is a function of business and market decisions, not tax decisions, despite potential tax implications. Internet	We recommend that flexibility be given to service providers on where the activities discussed in this provision must be conducted.

	<p>(a) closing of contract, sales or service handover, and billing, related to Foreign OTT Service Provider that charge fees; (b) own bank account as means of holding for the sales or service delivery proceeds at bank in Indonesia; and (c) provide internal legal service, part-sales service, and information call center.</p>	<p>companies often operate in a centralized structure as much of the risks, assets, and other functions occur outside of the country in question.</p> <p>Article 7.a could be interpreted to create a *per se* permanent establishment, irrespective of any extrinsic evidence that the subsidiary has any *actual* authority to close contracts and therefor creates a permanent establishment for tax purposes. This runs counter to the established OECD commentary relating permanent establishment to the authority to close contracts. Lastly, from a practical perspective, a closing contract requirement would frustrate the purpose of existing tax norms regarding the ability to close contracts. Article 7.a would create significant complexity for the revenue authority to determine which contracts concluded by a subsidiary are under an *actual* grant of authority that is indicative of a permanent establishment, rather than a contract executed as a matter of course to comply with the new rule under Article 7.a. This would make any analysis difficult for the taxing authority, and have a negative impact on companies considering activities in Indonesia.</p> <p>A requirement to maintain an Indonesian bank account is inappropriate considering the global nature of online services, particularly for services that are provided at no charge to users.</p>	
8.3	<p>Each query and/or complaint from the user as referred to in paragraph (8.2) must be responded no later than 2 x 24 hours after the query and/or complaint is received.</p>	<p>The requirement is not feasible and not implementable considering the variety of resources and capabilities that OTT have to serve their consumers.</p>	<p>We consider the window required for response be longer than 48 hours.</p>
9.1	<p>OTT Service provider must store the data of transaction record and traffic of OTT Service for the last 3 (three) months.</p>	<p>It is unclear how and when this requirement would apply, and may run contrary to data privacy principles.</p> <p>In addition, requiring OTT service providers to store 3 months' worth of data for all of its users may not be feasible for certain startup OTT service providers as that would impose capital investment.</p>	<p>We request clarification on this provision, including the intention.</p>
9.2	<p>In the matter of law enforcement request for trial process in accordance to rule of regulation, OTT service provider shall keep records data that is directly relevant to the request until trial process is ended and/or court decision has permanent legal power.</p>	<p>This provision implies that OTT service providers must be aware of all proceedings and the extent of data to retain. This is too broad and not a practical to implement.</p>	<p>We suggest that the obligation to retain data be required only when notified by a valid court order stipulating the extent of the retention required.</p>

11	<p>(1) User is entitled to compensation from OTT service provider on failure and/or negligence by OTT service provider which causes losses to the User.</p> <p>(2) Compensation as intended in paragraph (1) is limited to direct losses suffered by User from failure and/or negligence by OTT service provider.</p>	<p>Smart, flexible and enabling laws that create a safe harbor for online platforms that meet certain conditions and protect them from liability for the third party actions (like the Digital Millennium Copyright Act, DMCA, in the US or the Ecommerce Directive in the European Union) have been crucial to these benefits and growing innovations across these markets.</p> <p>We would like to clarify what this provision implies when OTT services are provided free of charge. We are concerned that this clause could give rise to spurious and unwarranted claims for compensations and consequently would further discourage entry into the OTT market. We should note that the free service model is a proven model to start up an OTT business. Imposing an unwarranted liability on them would also be a disincentive to the development of such businesses.</p> <p>We also would like to note that Indonesian Civil Code already provides the right to claim compensation due to losses suffered by users as a result of OTT service providers' negligence. Maintaining this provision appears redundant with prevailing Indonesian laws.</p>	<p>We feel this provision is not necessary and can be deleted, considering Indonesia already has clear tort rules under civil code.</p> <p>Requiring service providers, including OTT companies to be responsible for lost revenue due to possible system outages is unprecedented and contrary to global norms.</p> <p>Furthermore, we recommend the regulation include explicit protection from liability for online platforms that meet certain conditions. Safe harbors should also protect platforms from liability for taking actions in good faith to prevent use of their platform for illegal activities</p>
12	Minister conduct mediation over disputes involving with charging, regulatory compliance, and/or OTT Service based upon requests by said parties	There is uncertainty on whether this would supersede commercial contracts assigning mediation and arbitration to a specific body, e.g. International Arbitration Centers.	
13	<p>(1) OTT Service provider must deliver a report to the Minister annually.</p> <p>(2) The report as referred to in paragraph (1) shall include:</p> <p>a. Total users in Indonesia; and/or</p> <p>b. Statistic of the service traffic accessed by users in Indonesia.</p>	<p>It is unclear what information the report would be expected to include and what the objective is. For example, would information on all web traffic, including websites visited by OTT users, be required?</p> <p>We feel this would be overly inclusive. The data requested for the annual report might also be business confidential information that cannot be disclosed. We would like to note that no country in the world requires such a reporting requirement.</p>	We wish to request KOMINFO clarify the contents of this report.
14	Minister may establish a National Forum on OTT Service Policy to assist the Minister in policymaking related to the provision of OTT Service in Indonesia	In reference to the existing Telecommunication Law article 5, Government may involve public participation when formulating the policy and regulation. The mechanism of public participation has been regulated under article 5. Therefore, we believe the establishment of a National Forum is not necessary. If the government wants to set up a different mechanism, it should be regulated under the Government Regulation, and government should allow participation of all the stakeholders (both foreign and domestic) to ensure a level playing field.	<p>We recommend removing this article, and involve multiple stakeholders, both domestic and foreign, in formulating policy and regulation under article 5 of Telecommunication law number 36/1999.</p> <p>If the National Forum on OTT will serve as an Expert Forum similar to Negative Content Forum, then we</p>

		<p>This Forum will have broad powers and policy influence in relation to “OTTs”, and although the Draft Regulation calls for members representing Telecommunications Operators and ISPs to serve in the Forum, as proposed there would be no member representing online service providers, especially foreign companies.</p> <p>As drafted, we are concerned about the authority granted to the National Forum. For example, the Forum as proposed would have powers to “follow up” on complaints about online service providers. Having such forum with overreaching mandate would dilute the function of the existing telco regulatory body, BRTI.</p>	<p>suggest to limit the function of National Forum on OTT not to include the policymaking and regulatory making.</p>
17	National Forum decision-making process	<p>It is unclear if all National Forum members must be present during the decision-making process or what would constitute a quorum for the meeting. In addition, there is no clarity on how much time must pass without consensus before a vote is taken or how a split vote would be resolved.</p>	<p>We request KOMINFO clarify the decision-making process of the National Forum.</p> <p>We recommend removing this article, and involve multiple stakeholders, both domestic and foreign, in formulating policy and regulation under article 5 of Telecommunication law number 36/1999.</p>
18	OTT Service Provider that violates the provisions as referred to in Article 3 paragraph (3), Article 4 paragraph (1), Article 7, Article 8, and Article 9, shall be imposed with the sanction in the form of and bandwidth management.	<p>Reliance upon Domestic Telcos for enforcement effectively places a competitor in the position of enforcer, and increases the probability that they will be able to reduce or control competition in the market.</p> <p>This in turn would lead to a skewed marketplace that punishes startups, kills innovation, and is not optimized for the benefit of consumers. Anti-competitive behavior of the operators viz-a-viz OTT providers should be addressed.</p> <p>In addition, more time should be given for a proper objection/appeals process.</p> <p>The role and responsibility of National Forum is too broad and encompassing the role and responsibility of the government agency.</p> <p>The OTT industry request Government to apply the regulation equally to all OTT players who provide services in Indonesia. There will be too many OTT players in the world which Indonesian citizen and population can access to the services, whether the OTT players fulfill the requirements in Article 3, 4, 7, 8 and 9.</p> <p>We suggest Government to continue to ease of doing business, so that there will be more companies willing to open the office in Indonesia voluntarily, thus will bring more taxes, instead of burdening the industry with cumbersome regulations which will discourage investment and innovation.</p>	<p>We would recommend that instead of focusing on regulating OTT service providers and enforcement mechanisms to police onerous obligations, KOMINFO could consider methods to improve broadband availability and affordability, which would stimulate the growth of new and innovative services in Indonesia and the overall digital economy.</p> <p>Government should make the regulation which apply equally to all players, domestic, foreign, small and big players.</p>
21	OTT Service Provider shall adapt to the provisions in this ministerial regulation within 1 (one) year	<p>The one year grace period is not sufficient to comply with these requirements as currently drafted, due to their lack of clarity and new and lengthy registration requirements.</p>	<p>While this regulation should be wholly reconsidered, even if passed, considering the degree of complexity of this regulation, we expect it will take at least 24-36 months for OTT</p>

	since this Ministerial Regulation comes into effect.		service providers to understand and comply with the regulation. Consideration should also be given to the capacity of the regulators to handle an influx of registrations should the requirements remain and the regulations be implemented.
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