

**25 February 2020**

**H.E. Agus Suparmanto**  
**Minister of Trade of Republic of Indonesia**  
**Jl. M.I. Ridwan Rais No. 5**  
**Jakarta 10110, Indonesia**

**Cc.: I Gusti Ketut Astawa**  
**Director of Business and Distribution Affairs**  
**Directorate General of Domestic Trade, Ministry of Trade**

Dear Minister Suparmanto,

**Subject: Industry submission on Government Regulation no. 80 Year 2019 on e-Commerce (“GR 80”)**

On behalf of the Asia Internet Coalition (AIC) and its members, we write to express our concerns to the Government of Indonesia about the recently enacted [Government Regulation no. 80 Year 2019 on e-Commerce \(“GR80”\)](#).

AIC is an industry association comprised of leading Internet and technology companies in the Asia Pacific region with an objective to promote the understanding and resolution of Internet and ICT policy issues. Our members are Airbnb, Amazon, Apple, Booking.com, Expedia Group, Facebook, Google, LinkedIn, LINE, Rakuten, Twitter and Yahoo (Verizon Media).

AIC has been actively engaging with the Government of Indonesia on several policy issues and has contributed to policy dialogues and development to promote the country’s digital economy. In the past we have submitted key recommendations on best practices, particularly on data protection, cybersecurity, e-commerce and taxation, and we appreciate the government to consider our inputs in the policy making process. In 2019, we also submitted recommendations on regulation No. 210/PMK.010/2018 regarding the Tax Treatment of E-Commerce (“MOF Regulation 210”).

As part of our continuing policy advocacy efforts in Indonesia, we write to express our recommendations and concerns on GR 80. We commend the government on its principled approach in formulating the regulation, with an aim to stimulate the e-commerce sector in the country. These efforts are critical, particularly at a time when cross-border trade and data flows has taken a centre stage in Indonesia’s digital economy development, which is the largest and fastest-growing in the region and expected to reach \$130 billion by 2025. However, some of the proposed provisions raise significant concerns in relation to consistency, fairness and transparency.

Firstly we would like to emphasize the importance of adhering to due process in terms of industry consultation and transparency. The international business community and the industry had no opportunity to review GR80’s contents and provide feedback before it was issued and signed into law.

After closely examining the GR80, we are concerned by the profound impact the regulation would have on the e-commerce industry. The regulation restricts outbound transfers of

personal data out of Indonesia, requires firms to hand data over to the Government of Indonesia, imposes extraterritorial jurisdiction and taxation, and contradicts the other Indonesian laws. These moves depart from international best practices and represent greater regulatory fragmentation, which does not gel with Indonesia's desire to improve the ease of doing business and attract investments. The provisions in GR80 will have unintended negative impact on both Indonesian and foreign companies in Indonesia's e-commerce market. We are extremely concerned by the precedent set by the regulation's passage. While we understand that the digital economy, including e-commerce, is complex, fast moving, and requires a sound policy framework, we believe that the GR80, which dampens competition and restricts consumer choices, is against the interest of the Indonesian consumer and the Indonesian e-commerce ecosystem.

Excluding the international business community from the regulatory process will result in a weak policy environment and regulatory uncertainty. Given the concerns, we respectfully urge the government of Indonesia to postpone drafting the implementing regulation for GR80, and facilitate consultation with the wider business community, in which the AIC would like to actively engage. We would also request the Ministry of Trade to allow the AIC to participate in the relevant working group, that currently is only open to local association, to discuss the technical implementation of GR80 and share approaches and practices that best conform with Indonesia's ambitions.

We further recommend establishing a formal consultative mechanism for communicating new regulations under development. This will not only inform the business community about opportunities for engagement, including hearings, but is also aligned with international best practices such as the WTO Domestic Regulation provisions, in making the Government's regulatory processes more transparent and business friendly.

#### **A. Overarching comments**

The e-commerce industry in Indonesia is still very much in its nascent stage. E-commerce expenditure in Indonesia is still relatively low at 3% of total retail, as compared to 16% for China and 12% for US. Given e-commerce is still in an early stage of development, stringent regulations may halt the growth of the sector and diminish the economic as well as social benefits. It could also add to inequality as the burden of compliance will fall hardest on smaller entrepreneurs who are using e-commerce as ways to expand business, reach new customers, and manage risks. Furthermore, tax burden such as the one proposed in Indonesia may push sellers to go back to informal channels, inhibiting their growth and hence potentially reduce future tax base.

We suggest adhering to the OECD guidelines and principles of neutrality, efficiency, certainty and simplicity. Given the OECD / G20 Inclusive Framework's ongoing work and commitment to reach an agreement on a consensus-based solution to address the tax challenges arising from digitization of the economy by end 2020, we respectfully urge the Indonesian Ministry of Trade to consider deferring the drafting of implementation regulations for the GR80 until such a multilateral solution is obtained. At a minimum, any income taxes suffered by e-commerce businesses under these regulations should be covered by Indonesia's tax treaty network.

E-commerce has been able to flourish around the world and in many developed and developing markets through a light-touch policy regime, bringing wealth creation, raising living standards, and making trade and export more inclusive for everyone. The combination

of the internet, technology and digital services are lowering the barriers to trade and making global export a feasible option for even micro and small businesses in developing economies. Research done by Sidley Austin on SMEs in developing markets found that over 95% of e-commerce enabled SMEs engage in exports. It also found that on average, these small businesses were able to reach more than 30 international markets.

We believe that under the right conditions and favourable regulatory environment, the e-commerce industry will be an enabler for growth in Indonesia and we look forward to building on our exchange and partnership with the Government of Indonesia to achieve that goal. Therefore, we strongly suggest extending the transition period beyond the current two-year window.

## **B. Key concerns and accompanying comments**

### **1. GR80 may prove contradictory to its underlying goals**

The new law requires e-commerce businesses to obtain a business license, report taxes, and uphold consumer protection and rights. Firstly we are concerned about the unduly burdensome licensing requirements. Secondly, the regulation resorts to extraterritoriality to regulate and tax the Indonesian operations of overseas based e-commerce providers which would most likely result in foreign providers ceasing to offer services to Indonesian consumers. The regulation could unintentionally damage the continued growth of both e-commerce and trade, international implications of which may hinder the ability of small businesses to compete globally and ultimately slow the potential growth of e-commerce. This could further stifle the growth of MSMEs in Indonesia. Given the underlying provisions in the regulation and its net negative impact, we urge the government to reconsider the regulation, which in its current form not only harms existing sellers that fall into the micro-enterprise category by imposing burdensome requirements, but also instils serious market access barriers, depriving consumers of their choice of services.

### **2. Approach to certain aspects of e-commerce are not aligned with current practices**

For example, a number of key aspects of GR 80 are clearly influenced by the EU's E-commerce Directive, which is now 20 years old and looks set to be reviewed in the near future (indeed, the new President of the European Commission, Ursula von der Leyen, has committed to upgrade the EU's liability and safety rules for digital platforms, safety and products with a new Digital Services Act). In addition, by comparison with the EU's recently adopted Digital Content Directive, there seem to be some significant areas of concern that have not been specifically addressed, or have been addressed only superficially, by GR80.<sup>1</sup>

- **E-commerce** is a form of commerce where transactions are conducted using electronic equipment and procedures (same definition as in the Trade Law). Unfortunately, this definition appears rather inadequate as it could conceivably be construed as encompassing, for example, a transaction

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<sup>1</sup> Directive 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0770>)

involving a medical examination or treatment at a doctor's surgery using electronic equipment where the patient is physically present, or the making available of electronic games in a video arcade where the customer is physically present. By contrast, the European Union's E-commerce Directive explains that e-commerce transactions (which are referred to in the directive as "information society services") are confined to those that are provided (a) via electronic means; (b) at a distance (which excludes the two examples above); and (c) at the individual request of the service recipient (thereby excluding such things as radio and TV broadcasts).

- **General Duty to Monitor.** Unlike the E-commerce Directive, which expressly prohibits EU member states from imposing a general obligation to monitor content on intermediary service providers, GR 80/2019 does precisely the opposite by requiring such providers to establish a technical content control mechanism and/or a mechanism through which the public can submit reports of or complaints on illegal content. In addition, intermediary service providers are required to impose terms of use or clauses in licensing agreements that require the recipients of services to use them in a legal manner.

### 3. GR80 imposes restrictions on cross border data flows

By imposing restrictions on cross-border data flows, Indonesia would itself be shutting the doors for creation of high-value digital products in the country. It would also dampen the ability of Indonesian exporters - both large and small - to access external markets and leverage productivity-boosting technology applications such as cloud computing which requires cross-border data transfers. Indonesia's ability to compete in a free and fair global digital economy could be severely undermined. Cross-border flow of data is a reality as well as necessity in the connected global ICT ecosystem and supply chain, and placing undue restrictions in this regard could severely impact the ease of doing business in Indonesia. GR80 appears to envisage a movement towards data localization. Data localization requirements do not effectively serve the objectives of greater privacy protection and regulatory oversight and are harmful as they inhibit access to services of value to consumers and to industries.

Countries that enact barriers to data flows make it harder and more expensive for their businesses to gain exposure and to benefit from the ideas, research, technologies, and best practices that accompany data flows and the innovative goods and services that rely on data. Restrictions on cross-border data flows also create trade barriers and impact business models. Studies show that data localization and other barriers to data flows impose significant costs: reducing U.S. GDP by 0.1-0.36%; causing prices for some cloud services in Brazil and the European Union to increase 10.5 to 54%; and reducing GDP by 0.7 to 1.7% in Brazil, China, the European Union, India, Indonesia, Korea, and Vietnam, which have all either proposed or enacted data localization policies.

On the contrary, cross-border data flows can enhance data security in technologies such as cloud computing by allowing greater geographic diversity for data storage. Cross-border data flows are essential to trade and for companies to make the most of the global economic opportunity. International flow of data contributed USD2.8 trillion to the global economy in 2014, a figure that could reach USD11 trillion by

2025. Over the past decade, data flows have increased world GDP by 10.1%. Thus, enabling cross-border data flows could result in a positive impact on Indonesia's GDP. This is supported by the evidence that efforts to reduce barriers to cross-border data traffic have been shown to drive growth.

**4. Requiring non-domestic e-commerce providers to be present physically to carry on business on a permanent basis in Indonesia would act as market access barriers and restrict competition**

GR80 requires e-commerce platform service providers to incorporate in Indonesia as a precondition to providing services in Indonesia. This is not only enormously trade restrictive and discriminatory, it would also deprive consumers of the flexibility that has been offered to them through the development of various innovative e-commerce platforms that provide technology services on a cross border basis while connecting consumers and goods/service providers locally. For global players, the idea of incorporation in every country of operation exposes them to a plethora of regulatory issues and tax incidences, which would serve as an enormous disincentive against doing business in Indonesia.

Any tax rules should be easy for foreign companies to comply on a scalable and consistent manner without having the burden of individualized local requirements. As a suggestion, Indonesia may wish to look at legislation implemented by Singapore which provides simplicity of compliance such as electronic registration and compliance, a simple 'pay only' model with no input credits and make away with invoicing requirements.

It is submitted that the GR80 does not recognize the innovative potential of an open market in devising ways and means of safeguarding consumer interest. Thus, it may impede the growth of many consumer protection innovations, which has been possible due to a relatively light touch regulatory framework. Further, it is not clear what kind of additional local incorporation / registration requirements from a consumer protection perspective are envisaged in the regulation. Therefore, any additional measures without adequate rationale would add to the multiplicity of registration requirements and would constitute an unduly trade restrictive measure which should be avoided. Moreover, provisions such as this and prioritization for domestic products are discriminatory to foreign businesses and potentially in contravention of Indonesia's WTO National Treatment obligations.

**5. The definition of PPMSE (E-Commerce Operator) under GR 80/2019 is very broad**

Any business enterprise that facilitates electronic communications for the purposes of commerce or trading can potentially fall under the definition of e-commerce operator. Therefore, the implementing regulation should consider different business models of the e-commerce operators. Some businesses do not have payment and logistics features. Some businesses do not have storage. Thus, the responsibilities for each business model are different. For illustration, responsibility of delivery (Article 65) is not suitable with the business model of C2C Platform because responsibility of delivery lies at the hand of the seller and logistic service, while platform only provides the platform to connect people. A remedy for this may come



in the form of introducing the concept of categorization of the range of businesses that are captured. For instance, there may be a category for full-fledged marketplaces (Tokopedia, Bukalapak, Lazada etc.); classified ads (Kaskus, OLX, Facebook Marketplace etc.), Netflix and Google App stores; and other categories as deemed fit.

Furthermore, due to the broad definition of e-commerce operator, many companies that already have existing business permits to operate in Indonesia will need to apply for additional licenses that are related to e-commerce. The obligation to obtain an additional business permit that has been imposed on companies categorized as e-commerce operators will be burdensome. This measure will increase costs for doing business, impair the ability of both large businesses and startups to grow.

**6. Requiring all Business Players (including sellers and traders) to be licensed to conduct business activity creates a regulatory hurdle.**

In the digital world with a significant e-commerce potential, this obligation will burden new entrepreneurs and hamper the growth of Micro, Small and Medium Enterprises (MSMEs) and impact the ease of doing business level. The obligation to obtain business licenses for MSMEs will be an entry barrier for MSMEs to enter the e-commerce market in the country and in result, may not be in line with the principal intention of the Government to empower MSMEs. Our recommendation would be for the government to encourage Business Players to register with the government instead of creating a license. The process should be simple and fuss free to minimize inertia. The government could also work with the respective platforms to encourage sign up rates.

**7. Article 12 (1) requires Business Players to prioritize the trade of Goods and/or services that are produced domestically; and increase the competitive edge of domestic goods and/or service.**

While the AIC supports the growth of Indonesia and its local ecosystem through our members' investments and jobs created for locals, we hold reservations on Article 12 (1) as this seems to run contrary to PP 80/19's principles of being "fair and conducive" and "impartiality". In addition, this provision may contradict the WTO's Principle on Non-discrimination (National Treatment: Treating foreigners and locals equally<sup>2</sup>). Our recommendation is to remove these distinctions, including differentiation in classification and treatment of foreign versus domestic Business Players.

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<sup>2</sup> [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm)

**8. Article 22(2) stipulates the need for “immediate action” to erase illegal electronic information upon knowing or being aware.**

Given that platforms have their own processes which involve internal investigations, we would like to suggest a tweak in the language from “immediate action” to “action as soon as possible” instead.

**9. Requiring e-commerce operators to monitor merchant registration is onerous.**

We strongly recommend that e-commerce operators should not be responsible or held liable for monitoring merchant registration to the Ministry of Trade (MoT). Furthermore, we view that the regulation does not provide a clear explanation on the role and responsibility for e-commerce operators in gathering and processing merchant registration. E-commerce operators should not be responsible to gather and process merchant registration, but they can help the government to encourage sellers to register. We strongly view that forcing merchants to register could be burdensome and is counter intuitive to the mission of digitizing conventional Indonesia businesses.

**10. Content and ads takedown should not be the e-commerce operator’s responsibility.**

The regulation wants e-commerce operators to be more proactive in managing negative content on their platforms. Firstly, this is not in line with Indonesia’s safe harbor policy where platform operators should not be held responsible for user generated content. Secondly, this is also not in line with best practices in other markets in managing user generated content such as the UK E-Commerce Directive. Furthermore, the regulations give a mandate to MoT to be able to request platforms to takedown content. This creates confusion, as thus far, all the authority for takedown requests is under the purview of the Ministry of Informatics and Communications Technology (MCIT).

**11. Consumer protection requirements are burdensome for e-commerce operators.**

E-Commerce operators are obliged to provide complaint services for consumers that at least cover address and contact, procedure, follow-up mechanism, a competent officer to process the service, and timeline for settlement. This regulation is very burdensome for companies, MoT should give flexibility for companies to decide what type of consumer services (e.g. phones and address vs electronic emails) will be suitable for their business.

**12. No clarity has been provided regarding the objective of the provision on data collection and the type of data required to be collected.**

There should be transparency regarding the purpose of data collection and how the data will be used. The requirement should also take into account principles of personal data protection.

To that end, we greatly appreciate the opportunity to provide inputs and look forward to facilitating Indonesia's e-commerce landscape. It is our hope that as you continue this effort, we will be able to engage in dialogue and constructively contribute to working group meetings and consultative processes. In this regard, further clarification and guidance on the regulation should be issued as soon as possible.

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact our Secretariat Mr. Sarthak Luthra at [Secretariat@aicasia.org](mailto:Secretariat@aicasia.org) or at +65 8739 1490.

Sincerely,

A handwritten signature in blue ink that reads "Paine".

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