

5 December 2020

His Excellency Mr. Imran Khan
Prime Minister of Pakistan
Prime Minister's Office, Islamabad, Islamabad Capital Territory

Dear Prime Minister Khan,

Subject: Removal and Blocking of Unlawful Content (Procedure, Oversight and Safeguards) Rules 2020.

On behalf of the Asia Internet Coalition (AIC) and its members, I would like to express our serious concerns on the latest announcement that Pakistan's Removal and Blocking of Unlawful Online Content (Procedure, Oversight and Safeguards) Rules 2020 ("Rules") has been notified and gazetted. We seek your assistance to ensure that your government makes critical changes to the Rules through a credible consultation process.

During these difficult times of COVID-19 economic recovery, policy certainty and predictability are fundamental to building investor trust and commitment to Pakistan. AIC members are alarmed by the scope of Pakistan's new Rules, as well as the opaque process by which these rules were finalized. The extensive and broad-based consultation [that you had promised stakeholders](#) in February never occurred. PTA had committed during bilateral meetings with AIC and its member companies to share a draft copy of the Rules. Furthermore, the Ministry of Information Technology and Telecommunication recently updated the Rules on their website without explanation or due process. Industry stakeholders have therefore lost trust in the consultation process because it is neither credible nor transparent.

As an industry association, AIC strongly believes in the potential for multi-stakeholder dialogue to shape policies and legislation to foster innovation and technological advancement. However, the Rules, as currently notified and gazetted, would make it extremely difficult for AIC Members to make their platforms and services available to Pakistani users and businesses. If Pakistan wants to be an attractive destination for technology investment and realise its goal of digital transformation, we urge the Government to work with industry on practical, clear rules that protect the benefits of the internet and keep people safe from harm. The AIC and its members have made a number of offers to undertake this partnership previously and we reiterate to you today this commitment.

Instead of clarifying the scope of the powers given to the PTA, these rules create further confusion for both users and online platforms in Pakistan. Large portions of the Rules are not only unworkable for global internet platforms, they go beyond the scope of the Parent Act (PECA 2016), putting their legality into question. In particular, the data localization requirements in the Rules will prevent Pakistani citizens from accessing a free and open internet and shut Pakistan's digital economy off from the rest of the world. Moreover, the PTA's powers have been expanded excessively, allowing them to force social media companies to violate established human rights norms on privacy and freedom of expression. Further details can be found in the [Appendix](#) attached to this letter.

We would request for a credible consultation process where AIC members can provide substantive suggestions. AIC is not against regulation of social media, but we believe that the Rules must address crucial issues such as internationally recognized rights to individual expression and privacy. Holding a transparent consultation where stakeholder feedback is acknowledged and reflected in draft revisions will instil trust in the policymaking process and allow AIC and its members to further develop effective solutions to support Pakistan's continued digital growth and transformation.

Mr. Prime Minister, we know that you share our vision of a dynamic digital economic ecosystem for Pakistan, where platforms such as those of our members continue to drive substantial economic growth. We now need your full and direct support in ensuring that Pakistan does not go down a highly counter-productive path that could derail the efforts that your government and the ICT industry have painstakingly invested in for many years. Thank you.

Respectfully,

A handwritten signature in blue ink, appearing to read "Paine".

Jeff Paine
Managing Director
Asia Internet Coalition (AIC)

CC:

- Barrister Dr. Muhammad Farogh Naseem, Federal Minister for Law and Justice (minister@molaw.gov.pk)
- Mr. Syed Amin Ul Haque, Minister of Information Technology and Telecommunication (minister.it@moitt.gov.pk)
- Mr. Shoaib Ahmad Siddiqui, Federal Secretary, Ministry of Information Technology and Telecommunication (secretary@moitt.gov.pk)
- Major General (Ret.) Amir Azeem Bajwa, Chairman, Pakistan Telecommunication Authority (PTA) (chairman@pta.gov.pk)
- Dr. Shireen M Mazari, Federal Minister for Human Rights (fmhumanrights@mohr.gov.pk)
- Chaudhry Fawad Hussain, Federal Minister for Science and Technology (minister@most.gov.pk)
- Barrister Maleeka Ali Bukhari, Parliamentary Secretary for Law and Justice (maleeka.rsw@na.gov.pk)
- Sardar Ahmad Nawaz Sukhera, Cabinet Secretary (secretary@cabinet.gov.pk)
- Dr. Arslan Khalid, Focal Person to the Prime Minister on Digital Media, Prime Minister's Office (digital.media@pmo.gov.pk)

APPENDIX – ANALYSIS OF CRITICAL PROVISIONS

1. Fixed turnaround times for blocking content – Rule 6(2)

The exact time frame for complying with a notice is not something that should be stipulated in the Rules, as it will vary from case to case, depending on the complexities and volume of content under consideration. There are also legitimate variations between different technologies, types of businesses, and contexts.

Social media companies need a reasonable period of time in which to assess the take down request once all the required information has been provided by the requesting individual. Social media companies regularly receive overly broad removal requests, and analyses of cease-and-desist and takedown letters across several jurisdictions have found that many seek to remove potentially legitimate or protected speech.

Instead, we propose that requests should be responded to within a reasonable timeframe, or “without undue delay.”

2. Thresholds for enforcement – Rules 6(5) and 8

Effective enforcement should focus on systemic, intentional failures. We recognize the need for appropriate sanctions for a social media company’s systemic failure to comply with requests. Then, social media companies need a clear understanding of what constitutes “systemic failure” so they have a reasonable path to action.

An assessment of systemic failure should take into account:

- The overall scale at which social media companies operate;
- Their overall success rate at addressing problematic content;
- The risks to legitimate speech from precipitous action; and
- The need to take the time to orient to and understand novel issues as they arise.

PTA’s primary means of identifying systemic failures should be the transparency reports produced by social media companies. This will enable PTA to investigate a social media company’s suspected failure to effectively implement its content guidelines.

Where systemic failures are suspected, information and/or enforcement notices should privately be given to a social media company, affording it a reasonable opportunity to investigate and – if necessary – take appropriate action.

If identified issues continue unrectified, then PTA should be permitted to issue proportionate sanctions for systemic failures. These sanctions should take into account the scale of the systemic failure, and be careful to avoid perverse incentives for companies to block legitimate content to avoid harsh penalties. Enforcement should also afford social media companies the opportunity to provide clarifications or appeal the decision. Sanctions may include the ability to issue information and enforcement notices, and to “name and shame” uncooperative and non-compliant platforms – and as a last resort, to impose fines where necessary.

3. Registration, permanent office, and data localization requirements – Rule 9(5)

3.1. Overbroad Scope

These provisions fall outside the scope of the parent legislation, namely section 37 of PECA, which tasks PTA to develop rules on safeguards, transparent processes, and effective oversight mechanisms for the exercise of its powers to block certain types of content. Narrowly scoping the rules around this objective will help to provide the clarity that platforms need in order to fulfill their legal responsibilities, including removal obligations. A narrow scope will also allow PTA to define and draw clear lines between legal and illegal speech and content, based on evidence of harm consistent with both international norms and Articles 10A, 19 and 19A of the Constitution of Pakistan.

3.2. Local incorporation and physical office

Any requirement for forced local incorporation and physical office presence will have a deleterious impact on foreign direct investment, economic growth, and [Pakistan's growing IT industry](#). Instead of forcing companies to open local offices, Pakistan should be encouraging and facilitating foreign investment through incentives, creating an enabling environment, and growing the base of internet-connected consumers. Furthermore, the effectiveness with which social media companies moderate online content does not depend on having local presence, but rather on having well established processes and product-specific policies, clear local laws to guide the process, and properly informed and valid requests for takedowns.

- *Non-tariff barrier to trade:* Requiring local incorporation and presence unnecessarily discriminates against foreign businesses, poses a non-tariff barrier to trade, and unfairly tilts the playing field in favour of domestic players. This is particularly stark in view of the nature of the services provided through the internet, which can be provided on a cross-border basis without the need for physical presence. By instituting local presence requirements, Pakistan is deviating from established international trade norms and practices, and erecting unnecessary barriers to cross-border services trade. Furthermore, if other countries reciprocate and impose similar requirements on Pakistani businesses, the negative impact on Pakistan's local IT exporters and burgeoning freelancing industry will be significant.
- *Limiting consumer access to technology:* The global nature of the Internet has democratized information and made it available to anyone, anywhere in an infinite variety of forms. The economies of scale achieved through globally located infrastructure have contributed to the affordability of services on the Internet, where several prominent services are available for free. Companies are able to provide these services to users even in markets that may not be financially sustainable as they don't have to incur additional cost of setting up and running local offices and legal entities in each country where they offer services. Therefore, these new rules will harm consumer experience on the open internet and increase costs.

3.3. Data localization

As with the provisions on local incorporation and registration, there is no nexus of this requirement to the purpose of these Rules, which is to regulate online content. Setting aside this issue, the forced data localization requirements as contemplated under Rule 9(5) would significantly increase costs for businesses and consumers; harm local businesses that are seeking access to a globally competitive network of service providers; decrease the security of user data; inhibit cross-border cooperation; and threaten the open, transnational nature of the internet. Social media companies and the Asia Internet Coalition have outlined these negative impacts at great length and detail in their submissions on Pakistan's draft Personal Data Protection Bill, which are available [here](#) and [here](#).

4. Requirement to provide user data in decrypted format – Rule 9(7)

This provision contravenes existing law on user data disclosure. Specifically, it contravenes the scheme of PECA, under which PTA may only seek removal of unlawful online content, and agencies authorised under Section 29 may seek user data pursuant to an order from a competent court for seeking disclosure/production of documents, as per the procedure laid down under PECA.

Chapter III of PECA provides for the manner in which an agency authorised under Section 29 of PECA may seek user information from service providers. Notably, the authorised officer must obtain a warrant from a competent court after satisfying the Court regarding the existence of circumstances and criteria under Sections 33 to 35 of PECA. However, this Rule, along with Rule 9(7), seeks to authorise PTA to directly seek such user data, without any requirement of a court order requirement and is therefore *ultra vires* the parent legislation, PECA.

Further, any social media company that is a US domiciled entity is subject to US laws that regulate the circumstances under which a U.S. based electronic communications provider may disclose user information.

U.S. companies are generally prohibited from disclosing the content of a user's communications except in response to a search warrant issued under U.S. law, 18 U.S.C. § 2702(a), as construed by the U.S. Court of Appeals for the Sixth Circuit in *United States v. Warshak*, 631 F. 3d 266, 282-288 (6th Cir. 2010).

As this Rule appears to require any US-domiciled social media company to provide content data in decrypted format, it is unworkable in view of the conflict of laws.

5. Prevention of Live Streaming – Rule 9(9)

The proactive filtering obligations contemplated under this Rule are contrary to Section 38(5) of PECA, which expressly rejects imposition of any obligation on intermediaries or service providers to proactively monitor or filter material or content hosted, transmitted or made available on their platforms.

Provisions like Section 38(5) PECA are appropriate in that they encourage platforms to take a balanced approach to content removals. This is also in line with the United Nations' Joint Declaration on Freedom of Expression on the Internet, which affirms that "intermediaries should not be required to monitor user-generated content." Mandating proactive monitoring, on the contrary, creates a risk that platforms will instead take a "better safe than sorry" approach—blocking content at upload or implementing a "take down first, ask questions later (or never)" approach.

As recognised in the 2019 UK White Paper on Online Harms, an approach that forces companies to monitor and detect all problematic content on their services would be impossible for platforms hosting large amounts of content. The notice and takedown system is the only pragmatic approach to tackle online content that may be unlawful, as determined by the relevant competent authority.
