

# Indonesia Implements a Safe Harbor Policy for E-Commerce (Marketplace) Platforms

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March 2017

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In light of rapid developments in the e-commerce industry in Indonesia, the Ministry of Communication and Informatics (“**MOCI**”) issued Circular Letter No. 5 of 2016 on the Limitations and Responsibilities of Platform Providers and Merchants in E-Commerce Using User-Generated Content Platforms (the “**Circular**”) on 30 December 2016. The Circular is a further step towards implementing the National Roadmap for E-Commerce announced by the Indonesian Coordinating Ministry of Economy back in February 2016. The Circular prohibits certain types of content from being posted on user-generated content e-commerce (marketplace) platforms. It also defines the obligations and responsibilities, and as a safe harbor policy limits the scope of liability, of the parties involved in such platforms. Key matters covered by the Circular are discussed below.

To begin, we clarify some core terms used in the Circular:

- *User-generated Content Platform (“**Platform**”)*: An application, website, or other internet-based content service used for transactions or trading activities via electronic systems, with content created or uploaded directly by the Merchants, not by the Providers. Put simply, a Platform is an online marketplace for sellers and buyers to transact business, where the sellers post information about their products to generate sales (for example, specifications, price), and prospective buyers view the information and may choose to buy the products.
- *Provider*: An individual, business or legal entity that provides a Platform.
- *Merchant*: An individual, group, business or legal entity that uses the Platform to offer their products to prospective buyers. Merchants can either be registered in the Platform or unregistered.
- *User*: A person who accesses, opens or engages in a transaction through a Platform. Users are both Merchants and buyers (including prospective buyers).

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## What Platforms does the Circular apply to?

The Circular applies to Providers and Users in connection with the contents appearing on a Platform using a C2C (customer-to-customer) model (for example, OLX and Tokopedia). The Circular does not regulate social media platforms (for example, Facebook and Instagram) as such platforms are expected to be further regulated by MOCI in the future.

## What does the Circular cover?

### Safe harbor policy

The Circular clarifies that Providers are deemed to be Electronic System Providers under the EIT Law<sup>1</sup>. Providers are accordingly primarily responsible for the operation of their electronic system (i.e. the Platform). However, Providers may be exempted from liability for failure to comply with the Circular or EIT Law in the event of force majeure, or errors or negligence on the part of a Platform User. Providers will only be responsible for prohibited contents posted on the Platform if they are unable to prove that the uploading of such contents was caused by the Users.

### Obligations and responsibilities of Providers

Providers are obliged to set out various terms and conditions in relation to the operation of the Platforms (“**T&C**”) which must at least include details of: (i) the rights and obligations of Users; (ii) the rights and obligations of the Provider; and (iii) provisions regarding accountability for the content uploaded.

Providers must set up a reporting facility that allows them to receive complaints about Prohibited Content (as set out below), and follow up on such complaints and delete or block any reported Prohibited Contents within specified timeframes. For example, the most serious types of Prohibited Contents, including, among others, content that relates to terrorism, human or human organ trafficking, threats to state security and products that threaten health, must be deleted or blocked within only one calendar day after the Provider receives a report or complaint.

In addition, Providers are obliged to actively evaluate and monitor Merchants’ activities on their Platforms. Sanctions for failing to do so are likely to be addressed in future regulations.

### Obligations and responsibilities of Merchants

The Circular requires Merchants to provide comprehensive and accurate information regarding the products offered and contractual terms of sale. Merchant’s must also ensure the contents which they upload are not prohibited under the Circular, the EIT Law or other applicable laws and regulations, and they have to attend to the reports or complaints made about their uploaded contents. Merchants must comply with their obligations under the T&C and other applicable laws and regulations.

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<sup>1</sup> Law No. 11 of 2008 on Electronic Information and Transactions as amended by Law No. 19 of 2016. To access our client alert outlining key amendments made to the EIT Law under Law No. 19 of 2016 effective 25 November 2016, click [here](#).

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## Prohibited contents

The Circular set out the types of contents that are prohibited from being posted on a Platform (“**Prohibited Contents**”). These Prohibited Contents are divided into negative and illegal contents, as follows:

### Negative Contents

- Pornography;
- Gambling, lottery, and/or betting-related contents;
- Provocative contents (such as discrimination, abuse, and hate crimes);
- Potentially frightening contents;
- Materials that infringe other parties’ intellectual property rights;
- Hacking and/or cracking services;
- Services related to provision of or access to narcotics;
- Misleading information (such as fraud and money-laundering schemes);
- Human or human organ trafficking;
- Cigarette-related materials.

### Illegal Contents<sup>2</sup>

- Weapons, military products, and/or explosives;
- Prohibited drugs, foods, and/or beverages;
- Protected flora and fauna;
- Prohibited and/or uncertified devices (such as telecommunication devices);
- Hazardous chemicals and substances;
- Government-subsidized housing;
- Services offering uncertified marriages;
- Health-related contents that do not comply with applicable laws and regulations.

## Sanctions

Failure to comply with the provisions under the Circular may trigger the imposition of sanctions provided under the EIT Law. Criminal sanctions in the form of imprisonment and fines for acts conducted on Platforms may be imposed for violations of the EIT Law, such as violation of privacy, indecent contents, insults or defamations, misleading information that could harm consumers, and hate speech or hostility against individuals with a certain ethnicity, religion or race. In addition, Providers and Merchants should also keep in mind the Indonesian Government’s authority to directly cut access to any prohibited content or request the Providers to delete or block such content.

## Concluding thoughts

The Circular provides some basic guidelines to support the safe harbor policy that aims to protect the e-commerce (marketplace) industry in general, and protect Providers in particular.

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<sup>2</sup> Illegal contents refer to products or services that require specific permits.

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It remains to be seen how the obligations and responsibility of Providers over contents uploaded on their Platform will be enforced. The Circular does not provide clear parameters on how Providers should actively monitor the uploaded contents. For example, it is unclear whether Providers can continue their common practice of making a disclaimer that they are not liable for the contents uploaded by the Merchants on the Platforms, relying only on the warranties under the T&C.

Further, it is not clear whether the obligation to “actively evaluate and monitor Merchants’ activities in their Platforms” will require Providers to establish an advanced contents filtering system in their Platforms. We await further clarification from the MOCI on these issues.

We are also looking forward to MOCI issuing a regulation to implement the safe harbor policy for online social media platforms

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