Private sector Electronic System Providers must register!

Overview
A very significant regulation, Minister of Communications and Informatics (MoCI) Regulation No.5 of 2020 on Electronic Service Providers in the Private Sector (Reg 5/2020), came into force on 24 November 2020, although it was not made public until later last year. Reg 5/2020 revokes MoCI Regulation No.36 of 2014 on the Registration Procedure for Electronic System Providers, as its preceding regulation, and MoCI Regulation No.19 of 2014 on the Handling of Internet Websites Containing Negative Content (MoCI Reg 19/2014).

Key Provisions
Government Regulation No.71 of 2019 on Implementation of Electronic Systems and Transactions (GR 71/2019), which is still effective, already addresses several aspects of the ESP regime (please refer to our Client Update on GR 71/2019 here).

However, Regulation 5/2020 provides more comprehensive provisions, specifically for private sector Electronic Service Providers (Private ESPs). This Client Update focuses on certain requirements impacting Private ESPs, including their registration, content moderation, content takedowns, electronic system access and penalties.

1. Private ESP registration
Private ESPs must be registered through the Online Single Submission (OSS) system before being used by users. This requirement applies to Private ESPs supervised by specific institutions (such as the Financial Services Authority (OJK)) and Private ESPs that own portals, websites or applications that are used to:
   (a) facilitate, manage or offer goods/services;
   (b) facilitate, manage or operate financial services transactions;
   (c) transmit paid-for digital materials using a data network, by downloading from a portal or site, sending via e-mail, or via other applications, to a user’s device;
   (d) provide, manage or operate communications services, including short messages, voice calls, video calls, e-mail, etc. on digital platforms, including social media;
   (e) provide a search engine service or act as an information provider; and/or
   (f) process personal data for operational activities for the public in relation to electronic transactions.

This registration requirement now also applies to Private ESPs established and domiciled outside of Indonesia (foreign ESPs) that provide services, conduct business, and/or provide an electronic system that is used or offered in Indonesia. Such registration must also be conducted through the OSS system.

As of 5 February 2021, our research indicates that OSS and MoCI are still developing a facility for foreign ESP registration through OSS, so such a facility is not yet available.

2. Content moderation
Under Reg 5/2020, Private ESPs are required to comply with several content moderation obligations, particularly to:
   (a) provide guidelines for the electronic system in the Indonesian language;
   (b) ensure that no prohibited information or documents exist within the electronic system; and
   (c) ensure that the electronic system does not facilitate the spread of prohibited information or documents.
Reg 5/2020 has expanded the scope of prohibited electronic information and documents (which, under MoCI Reg 19/2014, only referred to “pornography and other illegal activities”) to now cover any electronic information/document (Prohibited Content) that:

(a) violates the prevailing laws and regulations;
(b) disturbs society and public order; and/or
(c) provides methods or access to prohibited information or documents.

Reg 5/2020 also addresses specific obligations for user-generated content Private ESPs and cloud computing Private ESPs, as further described below.

**User-generated content Private ESPs (UGCs)**

UGCs are defined under Reg 5/2020 as Private ESPs where subscribers can provide, present, upload and/or exchange electronic information and/or documents. UGCs are required to exercise governance on the use of their information technology by establishing procedures (Procedural Governance) and reporting tools for the public to report or submit complaints about any Prohibited Content (Reporting Tools). UGCs will be exempt from Prohibited Content violations under Reg 5/2020 if the UGC:

(a) complies with the obligation to ensure that the electronic system neither contains nor facilitates the spread of Prohibited Content;
(b) complies with the obligation to provide Procedural Governance and Reporting Tools;
(c) provides the relevant subscriber information of the user that has uploaded Prohibited Content in the context of law enforcement/ supervision; and
(d) takes down the Prohibited Content.

**Cloud computing private ESP (Cloud ESPs)**

Cloud ESPs are defined under Reg 5/2020 as Private ESPs that provide, organise, manage and/or operate cloud computing services. To comply with the requirement for an electronic system to neither store nor spread Prohibited Content, Cloud ESPs must also exercise Procedural Governance, which must include at least having in place guidance on:

(a) users’ rights and obligations to use the relevant cloud computing services;
(b) the cloud computing provider’s rights and obligations; and
(c) users’ accountability, if the user stores Prohibited Content.

**3. Content takedowns and electronic system access**

**Content takedowns**

Private ESPs are required to take down Prohibited Content (including any means that can facilitate the spread of such Prohibited Content). Takedowns can be requested by:

(a) the public;
(b) ministries or institutions;
(c) law enforcement authorities; and/or
(d) judicial institutions.

**Electronic System access**

Private ESPs are required to give access to their electronic systems/data upon receiving a written request from a relevant ministry, government agency and/or law enforcement authority. To facilitate the access request, Private ESPs are also required to appoint a contact person in Indonesia.

**4. Penalties**

For Reg 5/2020 violations, MoCI has the authority to impose various administrative penalties (written warnings, temporary suspensions, takedowns, revocation of Private ESP Registration Certificate and fines), depending on the violation.
If a Private ESP’s access is blocked, the Private ESP can submit a written request to MoCI to unblock access.

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Conclusions

Both domestic and foreign Private ESPs that own portals, websites or applications used for a broad range of purposes (referred to in section 1 above) must register through the OSS system. However, up until this publication’s date, foreign Private ESPs are still unable to register, as such facility is still undergoing development.

Private ESPs are also required to comply with the new content moderation obligations, takedown orders and make their electronic systems accessible to regulators upon written request. Private ESPs in existence before Reg 5/2020 came into force have been given a grace period of six months to register (that is, until 24 May 2021).

With the strong international growth of e-commerce business models and e-communications, Private ESPs are expected to be a significant growth area within Indonesia’s digital economy. Together with such growth, further regulations are inevitable. We will continue to monitor such future regulatory developments and will report them in future client updates as soon as they occur.

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*If you would like to discuss any aspect of this update, please feel free to contact us.*

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