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Policy Brief No. 8

Who is Responsible for User-Generated Content on Digital Platforms in Indonesia?

by Indra Setiawan



Key Messages

- User-generated content (UGC) is ethically and legally owned by the creator of the content. This ownership rule applies whether users promote a product or service online, express their views, or they publish news, analysis, or opinion pieces in text or multimedia format.
- UGC platforms are provided by electronic systems organizers (ESOs) that publish content created and uploaded directly by the users, not by the providers. UGC comprises a vast amount of extremely diversified information, including images, videos, comments, and product advertisements published on dedicated websites or exchanged on messaging applications.
- MOCI Regulation No. 5/2020 prohibits certain types of content, but does not provide clear definitions, especially what is considered to “agitate society and disturb public order”. Without a precise definition of prohibited content, the task of filtering and moderating the content on ESO platforms in line with government regulations is becoming more complex. This carries the risk that ESOs will follow the precautionary principle and excessively block lawful content due to remaining doubts about its legality.

- MOCI Regulation No. 5/2020 exempts online intermediaries that provide UGC from being liable for hosting prohibited content if they maintain an electronic information management system and reporting platform and satisfy content moderation requirements outlined in the regulation.
- Once notified of prohibited content found on their platform, ESOs need to take it down within 24 hours, or within 4 hours if the take down is considered urgent, such as for child pornography, terrorism, or content deemed capable of causing social unrest. With an unclear definition of content that agitates society and disturbs public order, this may not be sufficient time to check and respond to requests for removal.
- The legal exemption of ESOs for UGC remains vague saying UGC-based online intermediaries “can be exempted” from liability after they fulfil all content moderation requirements. This implies that online intermediaries can still be held liable even after they have fulfilled all requirements. Article 11 should be revised and clearly state that online intermediaries “shall be exempted” from liability instead of “can be exempted.”
- The government should consider to co-regulate UGC together with the private sector. A meaningful Public-Private Dialogue and shared responsibilities help the regulatory process to keep up with the fast-changing digital landscape and to stay open for innovation and technological progress.

User-Generated Content in Indonesia

Various internet intermediaries in Indonesia allow more than 175.4 million users to express their ideas and engage in economic activities (Hootsuite & We Are Social, 2020). Online intermediaries consist of internet service providers (ISPs), internet hosting services, social media platforms, and e-commerce platforms (Chander, 2016). In Indonesia, online intermediaries are legally categorized as Electronic Systems Organizers (ESOs) defined as any person, state actor, business entity, and community that provides, manages, and/or operates electronic systems individually or collectively for their users. They serve their own needs or those of other parties. Intermediaries are hosting, locating, and searching for user-generated content (UGC) and facilitate its distribution. This policy brief addresses the rules applicable to private ESOs.

UGC consists of images, videos, comments, product advertisements, content on messaging applications and other content that is being constantly produced by users, such as subscribers to social media platforms, or merchants on e-commerce platforms. The increasing spread of UGC has contributed to the landscape of the digital economy in Indonesia.

The vast number of people using UGC platforms illustrates the importance of UGC in Indonesia. The Digital 2020 Report states that there were approximately 160 million social media users in Indonesia and 95% were found to be actively engaged with or contributed to social media (Hootsuite & We Are Social, 2020). Indonesia has 57 million Instagram users and it has been estimated that they produce the most Instagram stories in the world (McKinsey, 2018). Meanwhile, Jakarta has previously been ranked as the city with the most active Twitter accounts in the world (McKinsey, 2018). Subscribers in Jakarta produced 2.4% of the 10.6 billion tweets posted between January and March 2014 (Carley, Malik, Kowalchuck, Pfeffer & Landwehr, 2015), which amounted to 116,000 tweets per hour.

UGC platforms for e-commerce add to the complexity. 4.5 million active merchants in Indonesia create their own content on online trading platforms. According to media reports, those platforms facilitated 140 million e-commerce transactions in the month of August 2020, equal to 188,000 transactions per hour (Tempo, 2020). The sheer volume of user-generated content on social media and in e-commerce illustrates its benefits for civic education, and also for the economy, for example through the empowerment of women entrepreneurs and increased financial inclusion. Controlling UGC is, therefore, not just a monumental task, but it also must abstain from overly reducing the benefits of UGC.

Internet platforms have been used to publish content that had been prohibited by the government of Indonesia. This includes pornography, online gambling, the sale of prohibited drugs and protected flora and fauna. As of 2019, the Indonesian Ministry of Communication and Informatics (MOCI) received more than 430,000 reports of prohibited content provided on platforms of online intermediaries (MOCI, 2020).

A regulatory framework determines liabilities to prevent the spread for prohibited content. In 2017, for example, MOCI held Facebook responsible for hosting online activities of Saracen, a group that was found guilty of disseminating hate speech on social media (Islami, 2017). In Indonesia's relatively young democracy, hate speech and hoaxes are considered harmful and have been included in the category of prohibited content. MOCI announced they will fine social media platforms that facilitate the distribution of hoaxes (MOCI, 2018).

Regulations Concerning User-Generated Content

MOCI Regulation No. 5/2020 regarding Private Electronic System Organizers (private ESOs) defines private ESOs as electronic systems run by individuals, business entities, and communities. In this regulation, MOCI mandates private ESOs to ensure their platforms do not contain or facilitate the transmission of prohibited content. Prohibited content is defined as violating Indonesian laws and regulations or anything that agitates society or disturbs public order. This definition is in line with Government Regulation No. 71/2019 regarding the Implementation of Electronic Systems and Transactions, which is the legal basis of MOCI Regulation No. 5/2020.

The definition of prohibited content has undergone changes in previous regulations. MOCI Regulation No. 19/2014 regarding the Handling of Negative Content in Internet Websites rather broadly considered content as prohibited when it was negative, such as pornographic material, content considered illegal by laws and regulations, or other content reported by ministries or agencies. Two years later, MOCI Circular Letter 5/2016 concerning Limitations and Responsibilities of UGC-Based E-Commerce divided prohibited content into negative content and impermissible content. It only regulated e-commerce platforms and excluded social media channels. Negative content consisted of pornography, gambling, provocative and frightening content, materials that violate intellectual property rights, hacking and access to narcotics services, misleading information (fraud and money laundering scheme), human and organ trafficking, and material related to cigarettes (Molina, 2017). Meanwhile, impermissible content referred to services and products that must not receive a permit to be sold online, such as weapons, prohibited drugs and foods, and protected flora and fauna. This definition was more detailed compared to the previous regulation.

MOCI Regulation No. 5/2020 revoked MOCI Regulation No. 19/2014. Consequently, the term “negative content” is no longer used but, despite efforts to clarify the definition of prohibited content, ambiguities remain. In a country where a rather conservative citizenship coexists with some progressive urban centres there is no consensus on what constitutes pornography. It also remains unclear what agitates society and disturbs public order. Given these ambiguities, some ministries, agencies, and law enforcement authorities provide their own definitions to control the content on internet platforms. This causes differing and confusing interpretations. The absence of a clear definition of prohibited content results in the increased complexity of content moderation by private ESOs. This carries the risk that online intermediaries will block even permissible UGC due to doubts regarding its legality (De Streel et. al., 2020).

Excessive controls or preventive self-censorship can threaten the freedom of expression in Indonesia. According to the International Covenant on Civil and Political Rights, which was ratified by the Indonesian government on 28 October 2005, governments can limit the freedom of expression for the purpose of national security and for the protection of human dignity from racism, hoaxes, hate speech, and defamation (ICCPR 1966, 1976). These limitations need to be exercised through laws and regulations. Nonetheless, with an unclear definition of prohibited content, current limitations could worsen the freedom of expression in Indonesia. A 2020 survey by Indonesian National Human Rights Commission on the state of the freedom of speech, expression, and assembly in Indonesia found that 29% of the respondents were afraid to criticize the government and 36.2% were afraid to express their opinions on the internet (Indonesian National Human Rights Commission, 2020). The Human Rights Commission considers this an alarming signal for Indonesia to protect its democracy and freedom of expression (Indonesian National Human Rights Commission, 2020).



MOCI Regulation No. 5/2020 implicitly acknowledges the principle that UGC is ethically and legally being owned by the creator of the content. Ownership remains with the individual creator, whether the content promotes a product or service, or whether it contains news, general information, analysis, or opinions. With this, Indonesia follows international standards. Intermediaries in the United States can freely expand and innovate without fear of lawsuits. Under Section 230 of the Communications Decency Act of 1966, they enjoy immunity from legal actions resulting from unlawful user content. With this regulation, the U.S. government intends fostering innovative solutions for online intermediaries and allowing them to establish their own community standards for UGC (Chander, 2016; Kosseff, 2017).

However, MOCI Regulation No. 5/2020 only exempts online intermediaries in Indonesia from liabilities for UGC, if they ensure their platforms do not contain and facilitate prohibited content. Moreover, the regulation merely stipulates that online intermediaries “can be exempted” from liability if they fulfil all content moderation requirements (Article 11) mentioned further below. The ambiguity of the wording in article 11 suggests that the exemption is just an option and that online intermediaries can still be held liable even if they have fulfilled the requirements. This, again, leads to uncertainties for private ESOs and undermines international “safe harbor” standards not to hold intermediaries liable.

Online intermediaries need to establish complaint reporting tools and an electronic information/document governance system to take down prohibited content. MOCI Regulation No. 5/2020 gives online intermediaries 24 hours to remove prohibited content after it has been found and the company was notified. The deadline has been shortened to four hours in case content is considered urgent because it contains material related to terrorism, child pornography, and content causing social unrest. Given the volume of UGC generated at any time, this is a relatively short period to check the reported content, verify that it falls under prohibited content, decide on corporate action, and finally block or remove the content. Germany’s Network Enforcement Act (NetzDG) also mandates to remove content containing threats of violence and slander within 24 hours, but it only applies this to online platforms with more than two million users. It also allows for a seven day period for legally more complex cases (APC, 2018).

In Indonesia, the timeframe applies to all types of online intermediaries regardless of the company size. While it is a challenge for large online intermediaries to act so quickly, it becomes a disproportionately larger burden for smaller intermediaries with less resources to provide the necessary corporate infrastructure. If large online intermediaries are foreign-owned, while smaller ones are Indonesian, the short timeframe may also discriminate against domestic enterprises.

Failure to meet content moderation obligations and take down requirements will result in the imposition of sanctions. This has been established by Government Regulation No. 71/2019 and was also reinstated by MOCI Regulation No. 5/2020 holding ESOs liable for hosting prohibited content. Fines for violations can amount to IDR 100 - 500 million (MOCI, 2019). MOCI can block the internet access of online intermediaries if they do not take down content or fail to pay the fines. MOCI will notify online intermediaries to remove the content prior to blocking access. Should the access be blocked, online intermediaries can unlock access by fulfilling the responsibilities they previously failed to fulfil. Again, this puts smaller intermediaries at a disadvantage due to their limited resources.

Co-regulation as a Meaningful Step Forward

Co-regulation should be considered in the regulatory process as it provides an option to improve the effectiveness of preventing prohibited UGC. Co-regulation is a regulatory approach that emphasizes public-private dialogue as well as responsibility-sharing between the government and a broad spectrum of non-state actors. It focuses on collaboration in the creation, adoption, enforcement, and evolution of policies and regulations (Aprilianti & Dina, 2021). This collaboration facilitates regulatory enforcement and it also takes the interests of the private sector into account, thereby giving the needed space and incentive for innovation and growth.

In a co-regulatory environment, the government sets out general codes, for instance setting the heaviest content removal requirements for planned terrorist attacks or child abuse. At the same time, private ESOs will formulate a code of conduct or code of practice that determines detailed arrangements on what type of content or behaviours are acceptable on their platforms. These shared responsibilities make the regulations more flexible in responding to the changing digital landscape with ever new business models and services available. Co-regulation allows a substantial increase of compliance levels as the private sector works alongside the government with the shared goal of improving industry-wide performance (APC, 2019).

Similar to Indonesia, the United Kingdom currently protects online intermediaries from legal liabilities for hosting harmful content until they have received notification of its existence on their platforms. The Online Harms White Paper of the UK government now considers introducing co-regulation for harmful UGC. The UK government plans to work with industry players and the civil society to tackle harmful content, such as developing technologies for a safer online environment. The resulting regulations are meant to follow a risk-based approach to introduce proportionate measures (UK Government, 2019). Rather than requiring the removal of specific content, regulations will focus on prioritising actions to tackle harmful content when it is perceived as an extraordinary threat or causing the greatest harm. Evidence gathered on all sides will be used to formulate practicable recommendations considering the nature of the harm, the risk of the harm, and the technology available to the companies to counter harmful content (UK Government, 2019).

The immediate first step of co-regulation is the involvement of a broad range of private stakeholders in the policy formulation through Public-Private Dialogue (PPD). PPD improves the transparency, quality, and effectiveness of the regulation as the relevant actors are directly involved in policy formulation (OECD, 2007). PPD allows MOCI to explore best practices and to ensure that regulations lead to sustainable and effective content moderation, while also allowing for the freedom of expression, an open civil dialogue and prospering e-commerce. MOCI has already engaged private ESOs in the policymaking process and found it beneficial, for instance when reviewing the Personal Data Protection Bill. The Ministry has also been open to public consultations regarding regulations on UGC (Park, 2020).

Co-regulation is needed to evaluate MOCI Regulation No. 5/2020. Given the regulation has now been implemented, future co-regulation efforts will allow for the assessment of the strengths and the weakness of the regulation. In a co-regulatory process, MOCI Regulation No. 5/2020 can be evaluated against reliable evidence from the industry. This allows for the adjustment of the regulation to the real circumstances faced by the industry and to their actual capacities to tackle prohibited and harmful content.

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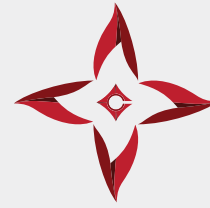
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