26 August 2024

YAB Dato' Seri Anwar Ibrahim
Prime Minister of Malaysia
Office of the Prime Minister
Putrajaya, Malaysia

Dear YAB Dato' Seri,

Subject: Asia Internet Coalition (AIC) Industry Concerns on Upcoming Licensing for Social Media and Private Messaging Platforms

YAB Dato' Seri,

I hope this letter finds you well. On behalf of the Asia Internet Coalition (AIC), I am writing to express our concerns regarding the upcoming licensing regime for social media and private messaging platforms in Malaysia.

By way of introduction, the AIC is an industry association representing leading Internet and technology companies. We strive to promote dialogue between the public and private sectors across the Asia-Pacific region on Internet policy issues and best practices, particularly as they pertain to the growing digital economy.

We believe this licensing framework will adversely impact innovation by placing undue burdens on businesses. It will hinder ongoing investments and deter future ones due to the complexity and cost of compliance. The proposed regime also represents a significant shift in Malaysia's regulatory landscape, and introducing such a change without a clear roadmap or sufficient industry engagement risks destabilizing an ecosystem that relies on innovation, flexibility, and openness. This will have profound effects on established players, emerging startups, small businesses, and the broader digital economy.

In addition, there have been no formal public consultations on this matter before the publication of the Information Paper and FAQs on August 1, 2024. The absence of these critical discussions has created a great deal of uncertainty among the industry regarding the scope of the obligations and what exactly these platforms would be signing up for.

We are also particularly concerned on how the licensing framework will impact Malaysia's digital economy. Malaysia has become a key digital hub, attracting significant investments in 2024. The digital economy is an engine of growth, contributing 23.2% to Malaysia's GDP, with a projected rise to 25.5% by 2025, creating approximately 500,000 jobs. The proposed regulations could, unfortunately, disrupt this momentum by creating uncertainty and undermining investor confidence.

While we understand the government's commitment to addressing issues such as online harms against minors, scams, online gambling, and hate speech, we want to emphasize that AIC members share these concerns and are dedicated to collaborating on solutions that protect users while also fostering innovation. However, this regulation and the proposed implementation timeline leaves the industry with insufficient clarity and inadequate time to fully grasp the implications. We therefore urge the government to pause and carefully consider how this licensing regime aligns with its broader economic goals before proceeding further, and we strongly encourage meaningful collaboration with the industry to address the wide range of concerns raised, particularly given the far-reaching scope of the proposed regulations.

The industry stands ready to work together on these critical issues, but it is essential that this collaboration is grounded in transparency, fairness, and reasonable timelines to ensure an effective and sustainable outcome for all stakeholders. We have outlined our key concerns and recommendations in the attached Appendix I for your consideration. Should you have any questions or require further clarification, please do not hesitate to contact our Secretariat, Mr. Sarthak Luthra, at Secretariat@aicasia.org or +65 8739 1490. Thank you for your attention to this matter, and we look forward to continued collaboration with your esteemed office.

Thank you
Sincerely,

Jeff Paine
Managing Director
Asia Internet Coalition (AIC)

CC:

- YB Fahmi Fadzil, Minister of Communications of Malaysia

- Tan Sri Mohamad Salim Bin Fateh, Chairman of The Malaysian Communications and Multimedia Commission

APPENDIX I

Industry Concerns on Upcoming Licensing for Social Media and Private Messaging Platforms

Issue 1: Lack of Meaningful and Transparent Industry Consultation

One of the most significant concerns we have is the lack of meaningful or transparent consultations during the development of this licensing framework. In the past, when the Malaysian Communications & Multimedia Commission (MCMC) consulted with a small number of industry stakeholders and AIC, these meetings primarily revolved around the type of licensing that will be introduced without any concrete details on what the licensing regime will entail and which companies will fall in scope of the regulation.

The absence of formal public consultations or even structured dialogues with key stakeholders has resulted in a regulatory proposal that feels disconnected from the realities of operating in the digital economy. As a result, the industry is left with numerous unanswered questions and growing concerns about the potential unintended consequences of the proposed framework.

For Consideration: Call for a more dedicated collaborative effort If the government is committed to creating a regulatory framework that truly addresses the issues at hand while supporting the continued growth of Malaysia's digital economy, it must engage in a serious, collaborative effort with the industry. Such collaboration requires a genuine willingness to engage with the broad range of concerns raised by stakeholders. The breadth and complexity of the issues involved demand a consultative process that includes industry voices at every stage—from the drafting of the regulations to the implementation phase. The industry has expressed a strong desire to work with the government to develop solutions that protect users and address the harms associated with online platforms, without stifling innovation or hampering economic growth. However, this collaboration must be rooted in transparency, fairness, and a shared commitment to developing a regulatory framework that balances innovation with public safety and accountability.

Issue 2: Regulatory Uncertainty and Impact to the Economy

Note: Based on the information paper released, Service Providers are expected to combat online harms such as cyberbullying, online scams, and child sexual abuse material during the grace period. Comprehensive guidelines detailing conduct requirements will be developed through public consultation.

In the absence of these guidelines, we are concerned about the regulatory uncertainty on addressing online harms along with potential additional content moderation obligations that could threaten the freedom of speech and expression in Malaysia. The licensing regime (for (C)ASP license) may come with a slew of obligations on content removal such as:

- Religious content must have been approved by the Department of Islamic Development Malaysia (Jabatan Kemajuan Islam Malaysia/JAKIM);
- Restriction of access or removal of a wide range of content requested by MCMC or be liable to enforcement actions by MCMC or law enforcement ; and
- Potential response and removal turnaround times that may not be practically feasible.

The AIC would like to caution that excessive regulatory requirements by the Government has been shown to be ineffective, costly and have generally had limited impact in addressing online harms. A case in point are two studies by the Computer and Communications Industry Association (CCIA) as below:

1. The CCIA Research Center's ex post cost-benefit analysis of Germany's Network Enforcement Act (Netzwerkdurchsetzungsgesetz or NetzDG), found that in 2022 NetzDG was:
    a. **An Ineffective Government Mandate:**
        i. **Low Incremental Takedowns**: The NetzDG resulted in only 5,138 incremental content takedowns across four major social media sites in 2022, despite these sites handling trillions of user-generated content annually

ii. **High False Positive Rate:** In addition to the above, 84.4% of all reports were false positives, and 98.8% of the remaining reports were already addressed by the platforms' community guidelines and standards.

b. **Costly Compliance:**

i. **Significant Compliance Costs:** The compliance regime required 441 staffers across the four social media sites, costing between USD$1,741 and USD$5,116 per incremental takedown

ii. **Economic Impact:** The broader cost to the German economy was estimated at USD$22.25 million per year, which is about USD$4,336 per incremental takedown

c. **Anti-Competitive Nature**

i. **Disproportionate Impact on Smaller Sites:** The high compliance costs create barriers to entry for smaller social media sites and startups, discouraging competition. Startups, having fewer resources, are more affected by the compliance requirements compared to larger, more established platforms

d. **Limited impact on harmful content:**

i. **Minor Reduction in Harmful Content:** The amount of user-generated content removed due to NetzDG was minimal, with fewer than 2,000 posts per site removed every six months on platforms that handle billions of posts per day.

2. CCIA also published a paper titled [The Unintended Consequences of Internet Regulation] and found that:

a. **Investment and Innovation Impact:**

i. Regulations such as Germany's NetzDG and the US's FOSTA-SESTA have shown significant unintended negative consequences on investment in social media companies and startups and may prohibit the introduction of new features in the market.

ii. The report indicates that these regulations decreased investment in covered startups by between 15.2% and 73.4%, highlighting the deterrent effect on innovation and new market entrants.

b. **Importance of Evidence Based Policymaking:**

i. **Consequences of Poorly Targeted Policies**: Many internet regulations are broad and poorly targeted, driving up compliance costs and making benefits hard to measure. This overbroadness can harm innovation and free speech while failing to achieve intended benefits.

ii. **Effect on Competition and Free Speech:** Regulations often empower governments to suppress critical speech and can drive revenue to local companies over foreign competitors, which might stifle competition and innovation.

For Consideration:

The AIC is deeply concerned in the absence of a well-thought-out plan that considers how this licensing regime will impact Malaysia's digital economy. The current approach to licensing shows little evidence of strategic planning regarding its potential impact on this vital sector.

As shown in the studies above, introducing regulations without a clear assessment of their long-term economic consequences could jeopardize Malaysia's competitive standing in the region. This lack of foresight could lead to a decline in foreign investment, a slowdown in innovation, and an erosion of the progress that has been made in developing Malaysia's digital economy. We urge the government to pause and carefully consider how this licensing regime aligns with its broader economic goals before proceeding further. The AIC also suggests for the Government to consider the following when developing the guidelines.

Collaboration with Content Forum:

- **Self-Regulation Model:** AIC members are open to working with the Content Forum on a self-regulation model. This approach can be effective in addressing inappropriate content online, either on its own or as part of a broader policy framework.

Advantages of Self-Regulation:

- **Public Policy Aims:** Meets public policy goals for online safety.
- **Informed by Practice:** Leverages the practical knowledge of internet companies.
- **Adaptability:** Quickly evolves to address new threats, as seen during the COVID-19 pandemic when platforms swiftly updated policies to combat health misinformation.
- **Collaboration and Dialogue:** Facilitates ongoing collaboration between industry and other stakeholders, including government and civil society.
- **Evidence Gathering:** Allows for data and evidence collection, aiding in the consultation process for developing new laws.

Principles for Self-Regulation:

1. **Promote Safety:** Ensure a safe digital environment for users.
2. **Respect Freedom of Expression:** Address harmful content without infringing on free speech.

3. **Protect User Privacy:** Actions to tackle harmful content should respect user privacy.
4. **Global Nature of the Internet:** Recognize the need for scalability and cross-border cooperation.
5. **Broad Applicability:** Encourage participation from diverse digital platforms.
6. **Systems-Based Standards:** Focus on systems, policies, and processes.
7. **Proportionality and Necessity:** Responses should be proportionate to the level of harm.
8. **Whole-of-Society Collaboration:** Engage various stakeholders in addressing online safety.
9. **International Coordination:** Align with global frameworks and initiatives for content governance.

Existing Practices:

- **Aotearoa New Zealand Code of Practice for Online Safety and Harms:** In 2022, Netsafe and NZTech launched the Aotearoa New Zealand Code of Practice for Online Safety and Harms, joined by tech firms Meta, Google, TikTok, Twitch and X (formerly Twitter). We are committed to reducing the risk of online content that may cause harm to New Zealanders.
- **Digital Trust & Safety Partnership (DTSP):** Provides a common framework for addressing content and conduct-related risks, offering a flexible approach adaptable to new threats and trends.

Issue 3: Localization, Proposed Licensing Regime, Intermediary Liability and Threshold for Licensing Requirement

Note: The information note highlights that the establishment of a locally incorporated entity is a pre qualifying criterion for licensing. However, under sub-regulation 23(2) of the LR 2000, the Minister has the discretion to allow a foreign company to be registered as a class licensee on a case-to-case basis.

1. **Concerns on Localization:** Local incorporation requirements should not be considered as a pre-qualifying criteria. Local incorporation for platforms could deter foreign investments, harming Malaysia's competitiveness in the global market. Further there are other economic considerations which include:
    a. **Increased Costs:** Requirements for local presence significantly raise costs for businesses. For instance, a 2015 study by Leviathan Security Group found that localization requirements can increase business costs by 30-60%, affecting small and medium enterprises (SMEs) particularly hard.

b. **Global Competitiveness:** Forced localization reduces a country's competitiveness across all economic sectors and hampers the global economy by raising the cost of international business. For example, an European Centre for International Political Economy study found negative GDP impacts in various countries due to forced localization: Brazil (-0.2%), China (-1.1%), EU (-0.4%), India (-0.1%), Indonesia (-0.5%), Korea (-0.4%), Vietnam (-1.7%).

2. **Concerns on Licensing:**
    a. **AIC's View on Licensing:**
        i. The proposed licensing regime for social media and private messaging platforms represents a shift in the regulatory landscape for digital businesses in Malaysia. Introducing such a significant regulatory change without a clear roadmap or adequate industry engagement risks destabilizing an ecosystem that thrives on innovation, flexibility, and openness. Given the pervasive role that digital platforms play in modern communication and commerce, the impact of this licensing requirement will be profound, affecting not only established players but also emerging startups, small businesses, and the broader digital economy.
        ii. There is also a fundamental difference between services that are delivered over the internet and more traditional, linear broadcasting services or historic telecom services. Licensing is usually required where resources are scarce and operators obtain something of value in turn for a license, such as spectrum for mobile, TV or radio channels. When it comes to online services, there is a virtually infinite number of services that can be offered which do not require the allocation of such finite resources.
        iii. As such, we do not believe that a licensing or authorisation regime is appropriate or necessary for online applications and services. This is the case in a number of jurisdictions around the world with best practice, such as the UK. Online services marketed for use in the country are subject to the local legal framework, with no need for a formal and cumbersome licensing procedure.
        iv. Together with regulatory complexity, introducing licensing requirements brings a layer of concern and regulatory unpredictability and may send the wrong signal to potential investors and new entrants in the Malaysian market at a time where Malaysia has recorded encouraging digital investments.

b. **Tailored Approach Needed:** Given the unique nature of social media and private messaging services, a one-size-fits-all model is inappropriate. A more tailored regulatory approach is required.
c. **Annual Licensing Term:** The one-year term and annual re-registration requirement could discourage long-term investment and prompt platforms to deprioritize Malaysian operations due to the existential risk posed by this instability.

Note: Service Providers operating without a license from 1st January 2025 onwards will be subject to actions under section 126 of the CMA 1998. If convicted, the Service Providers shall be liable to a fine not exceeding RM500,000 or five (5) years imprisonment, or both, and shall also be liable to a further fine of RM1,000 for every day or a part of a day during which the offense is continued after conviction.

3. **Concerns on criminal liability for representatives**: The imposition of criminal liability on Service Providers is both unnecessary, counterproductive and should be removed from the regulation. Protecting platforms through safe harbor provisions and reasonable liability limitations is essential to foster a thriving digital economy and uphold fundamental rights.

Note: Under this regulatory framework, all Internet messaging service and social media service providers ("Service Providers") with eight (8) million or more users in Malaysia must apply for Applications Service Provider Class Licence ("ASP (C)") under the CMA 1998.

4. **Threshold for licensing:** For context, during the limited consultation held by MCMC with AIC and selected Members, this threshold was never disclosed. As such, we would like the Malaysian Government to reconsider the eight million threshold for users in Malaysia given that many companies who have not been consulted by MCMC in the past may now find themselves in scope of this new regulation.

   Further to this, several countries that impose specific obligations on digital platforms based on their user base have user thresholds that remain at very large numbers. As an example:
   a. **European Union:** Platforms with more than 45 million monthly active users in the EU are classified as "Very Large Online Platforms" (VLOPs).

b. **Japan:** Act on Improving Transparency and Fairness of Digital Platforms (TFDPA), the exact threshold varies, but large-scale platforms are typically those with tens of millions of users.

In addition, the sources of determining the number of users remain unclear in the information note provided by MCMC.

For Consideration:

If despite the comments above, if Malaysia wishes to proceed with localization, the AIC requests for:

1. **Third-Party Representatives:** Platforms be allowed to appoint third-party representatives instead of direct incorporation in order to fulfill the localization requirement. Removal of criminal liability from any proposed regime for appointed representatives.
2. **Safe Harbour Provisions:** Safe harbour protections should be explicitly maintained to reassure platforms of limited liability for user-generated content. Platforms, functioning as intermediaries, are distinct from the creators of content and should not be held responsible for user-generated posts over which they have no control. Holding platforms criminally liable ignores the practical reality that these platforms serve as neutral conduits for information rather than the authors or publishers of content. Such liability can lead to over-censorship, as platforms would likely take a "better safe than sorry" approach by preemptively removing or blocking content to avoid legal consequences.

Issue 4: Universal Service Provision (USP) Fund Contribution

Note: MCMC stated that the USP contribution will apply to both OTT messaging and social media but are of the view that no company will make the threshold of >RM2 million garnered locally in Malaysia's borders

1. **Different Business Models -Social Media & OTT Messaging vs Traditional Telcos:** Over-the-top (OTT) messaging services and social media platforms operate on different business models from traditional telecom services. They use existing internet infrastructure and lack the regulatory protections or spectrum allocations that traditional telecom providers benefit from.

2. **USP Objectives:** Social media and internet messaging services also do not clearly fall within the USP objectives, which are focused on network facilities, provision of network services, and provision of application services to provide collective and individual access to basic telephone and internet access services. MCMC has exempted cloud service providers in the past, and should likewise do so for social media and internet messaging service providers, failing which MCMC should justify its reasoning.

3. **Potential Increase to Operational Costs:** Imposing additional financial obligations will increase operational costs for OTT and social media services. This could lead to higher costs for consumers or reduced investment in service improvements and innovations.

4. **Impact on global competitiveness:** Unique financial obligations imposed in Malaysia could make the market less attractive for global OTT and social media providers, potentially reducing the availability and quality of these services for local users.

5. **Impact on potential investments:** The requirement may have a chilling effect on investments. This year alone Malaysia has recorded billions of dollars in investments from tech companies. This signifies the encouraging investment climate that the Malaysian government has created. However, the licensing proposal and USP fund contribution could depart from the good practices that the Government has maintained.

6. **Seen as a Digital Service Tax:** MCMC imposing Universal Service Provision (USP) Fund Contribution for social media and OTT messaging may be seen as a digital service tax. This goes against the Malaysia's Government's commitment on the OECD Global Minimum Tax (GMT).
    a. In Budget 2024, the Malaysian Government has reaffirmed its commitment to the implementation of the GMT in the Budget and has announced that the expected implementation date is to be shifted from the earlier announced timing of 2024 to 2025.

For Consideration:

1. **No extension of the USP Fund Contribution to social media and OTT:** There should be no extension of USP Fund Contribution for Social media and OTT Messaging.
2. **Contribution to Economy:** OTT and social media services contribute to the economy through taxes, job creation, and by driving demand for broadband services. These indirect benefits support the broader goal of universal service by fostering a vibrant digital economy.

Issue 5: Grace Period and Implementation Timeline:

Note: Service Providers have a grace period of five (5) months from the date of Gazettement (1st August 2024) to apply for the ASP (C) license and comply with the licensing requirements.

The grace period of five months for compliance is insufficient for service providers to adequately prepare for the new licensing requirements, particularly given that the guidelines have not yet been finalized.

Currently, the industry currently lacks sufficient clarity on what obligations companies will be expected to meet under the new framework. We urge the Government to defer the implementation of the new framework until such clarity is obtained, in particular at minimum for a formal public consultation to be held. We also urge the Government to reconsider the grace period to at least 12 months from the time that the regime takes effect to allow Member companies to better understand the regulatory framework, implement any changes and comply.