SESSION 5C
TAXATION ISSUES AND TRENDS COMPETITION AND REGULATORY CHALLENGES IN THE DIGITAL ECONOMY, REGULATING TWO-SIDED MARKETS

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Agenda

1. The starting point has changed …
2. Economics of OTTs and Two-sided markets
3. How Europe is regulating the global Internet
4. Developments in other markets including ASEAN
5. Conclusions
1. The starting point has changed ...
1. The Starting Point has changed ...

When I worked on this ITU paper with ITU Expert, Scott Minehane (it was finished in mid 2017 but only released in 2018) the key question was, “Would OTT players be regulated?” “And what would be the US reaction to such regulation?”

The focus was on the economic impacts, on incumbent operators, MNOs, tax collections etc..

The game has fundamentally changed ...

The question is now: ‘how will that regulation take place’ – especially in smaller markets, eg, Sri Lanka and Myanmar, where there is now strong evidence it amplified social tensions – Facebook has few non-English speaker moderators so how will content in non-English speaking countries be moderated?

‘Where countries are tinderboxes and Facebook is a match’
New York Times

1. The Starting Point has changed ... 3

The political and privacy aspects of OTT services are now front-of-mind in the US and other developed markets

"Your user agreement sucks. I don’t want to vote to have to regulate Facebook, but by God I will. A lot of that depends on you.” Senator John Kennedy, Louisiana (R)

“It’s clear these platforms can’t police themselves,” US Senator Amy Klobuchar, Minnesota (D)

“Facebook is a virtual monopoly and monopolies need to be regulated,” Senator Lindsey Graham, South Carolina (R).

“If you don’t fix this, we’re going to fix it for you.” Buddy Carter, Georgia (R)

"We are looking at our national security, the consequences we have. By looking at your answers elsewhere, it is clear and you have confirmed that you will not decide if something is true or false, you will not take down something simply because it is false. You will take it down if there is a legal obligation on you. .... In essence, you would prefer to be regulating yourself with your internal guidelines. that is my sense of it”. Minister of Home Affairs and Law, K Shanmugam to Facebook 23 March 2018

“My position is not that there should be no regulation,” The real question, as the internet becomes more important in people’s lives, is what is the right regulation.” Mark Zuckerberg, Facebook"
2. Economics of OTTs and Two-sided markets
2. **Economics of OTTs and Two-sided markets (1)**

**OTT definitions**

- "Newcomers in the fields of broadcasting and content delivery, OTT content means online delivery of video and audio without the ISP being involved in the control or distribution of the content itself. The traffic is not managed"

- "Internet application that may substitute or supplement traditional telecommunication services, from voice calls and text messaging to video and broadcast services" (ITU, 2017)

- Services "... generally do not own an extensive infrastructure, but rather use the existing infrastructure of traditional telecommunications service providers (telcos) has led to disruptions in the traditional internet ecosystem"

- "Medium used for delivering diverse media content using the Internet. It is different from video-on-demand where the users need not subscribe to the traditional satellite or cable service such as Comcast and Time Warner Cable"

- The term that "encompasses an overtly broad category of services. Any service delivered over IP can fall in that category, despite having very different characteristics" (Digital Europe, 2017, p. 1)

- "Services as content, a service or an application that is provided to the end user over the open Internet" (BEREC, 2015).

2. Economics of OTTs and Two-sided markets (2)

**OTT Services**

**PRINT MEDIA**
- content
- fact checking
- curation
- distribution
- ‘publishing’
- storage
- distribution
- ‘feeds’

**TELEVISION**
- content
- UGC video
- publishing
- access
- VOD
- community service programming

**OTT SERVICES**
- social media
- 2-sided market
- services – matching, co-ordination

**MOBILE OPERATORS**
- infrastructure
- customer service
- universal service
- QoS

- text
- voice
### Advantages and disadvantages OTT Services

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<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
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<tr>
<td>High adoption rate of OTT services by end-users</td>
<td>Low customer retention</td>
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<tr>
<td>Benefits from worldwide coverage via the Internet, and also quick to deploy</td>
<td>Lack of a reliable and high-speed network</td>
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<td>Exploits different economical scales, and cheaper with increased usage</td>
<td>Declining demand for traditional voice and text messaging services</td>
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<td>Broadband connectivity support, and pushes the demand for broadband (data usage) services</td>
<td>Increasing traffic load</td>
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<td>Benefits from publicity revenues, and offers cost-efficient ways to market a product/business</td>
<td>Increasing the investment need of ISPs and operators to meet increasing data demand</td>
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<tr>
<td>High negotiation power with suppliers in terms of generating revenues</td>
<td>Despite the discussions on increasing competition with new competitors coming into the market, there is also another debate as to whether OTT services and network operators can jointly operate within the same market</td>
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<tr>
<td>Increasing demand for data</td>
<td>Difficulties in ensuring end-to-end quality control, and in maintaining QoS across different domains</td>
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<td>Increasing data revenue for operators</td>
<td>Proximity issues, and consumer experience related requirements</td>
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<td>Dynamic customer base</td>
<td>Lower capability for national dependent services, and inability to contain an operational model within a jurisdiction</td>
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<td>Low switching costs</td>
<td>Lack of contribution to the USF, and difficulty in generating OTT revenue towards USF</td>
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<td>Rise in consumer interest in online media contents accessible over multi-screen platforms</td>
<td>Revenue loss in voice and messaging services despite adoption of mobile handsets and SIM cards</td>
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<td>Problem of OTT tax evasion in non-domicile jurisdictions</td>
<td>Personal data protection and privacy issues hardly addressable by national regulation</td>
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<tr>
<td>Security concerns, as users have no control over data collected</td>
<td>The lack of direct and clear regulation on OTT</td>
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### 2. Economics of OTTs and Two-sided markets (3)

Comparison of the regulation area between OTT and telco services

<table>
<thead>
<tr>
<th>Regulation area</th>
<th>Telco industries</th>
<th>OTT services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bank-to-government guarantee</td>
<td>Yes</td>
<td>No services offered without any relationship to the underlying cost of the network</td>
</tr>
<tr>
<td>Fees</td>
<td>Customer fees support the financial costs to back the network</td>
<td>No investments in networks that reach end users; telcos are obligated to deliver competitive services regardless of the impact on their networks</td>
</tr>
<tr>
<td>Infrastructure/network</td>
<td>Investing in networks to deliver services to end users; Available technologies to use resources efficiently (e.g., multicasting)</td>
<td>No such interconnection required as they are “OTT” networks</td>
</tr>
<tr>
<td>Interconnection</td>
<td>Yes, required as part of stipulated regulations. Requirement to interconnect involves financial incentives</td>
<td></td>
</tr>
<tr>
<td>Licensing</td>
<td>Yes, different licenses and their associated costs including licensing fee</td>
<td>No licensing or related fees required</td>
</tr>
<tr>
<td>Net neutrality</td>
<td>Must offer best effort in data transport without discrimination, and independent of source or nature of data</td>
<td>No obligations (control over content and freedom of choice concerning customers)</td>
</tr>
<tr>
<td>Number portability</td>
<td>Obligation to offer number portability between providers</td>
<td>OTT services are independent of mobile numbers</td>
</tr>
<tr>
<td>Operating area</td>
<td>Only serves customers within the regulated jurisdiction</td>
<td>Serves any user globally</td>
</tr>
<tr>
<td>Price changes</td>
<td>The approval of regulators is needed in advance</td>
<td>No need for authorization; Loose agreement is offered which is subject to change at any time Practiced on a limited and generally voluntary basis</td>
</tr>
<tr>
<td>Content and Privacy</td>
<td>Strict data protection and privacy requirements for users</td>
<td>Required through other acts</td>
</tr>
<tr>
<td>Proper record keeping including methodology</td>
<td>Required</td>
<td></td>
</tr>
<tr>
<td>Public safety services</td>
<td>Mandatory</td>
<td>No such obligations</td>
</tr>
<tr>
<td>QoS</td>
<td>Licenses include requirements for SLAs</td>
<td>No QoS guarantee; QoS issues blamed on network provider</td>
</tr>
<tr>
<td>Space related charges</td>
<td>Needs to handle the costs</td>
<td>No such costs</td>
</tr>
<tr>
<td>Spectrum allotment and use</td>
<td>Needs to bear the cost burden and adhere to rules</td>
<td>No such costs</td>
</tr>
<tr>
<td>Spectrum related charges</td>
<td>Needs to handle the costs</td>
<td>No such costs</td>
</tr>
<tr>
<td>Taxes</td>
<td>Local and national taxes</td>
<td>Locating operators in low-cost locations and tax havens</td>
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2. Economics of OTTs and Two-sided markets (4)

In a one-sided market, there is a simple direct relationship between seller and buyer.
In a two-sided market the platform provider positions itself between two groups and attempts to extract commercial benefits from the interactions between the two groups.
3. Regulatory approaches in the EU
EU’s General Data Protection Regulation (GDPR)

- The privacy standards are the most stringent in the world
- In theory, the GDPR only applies to EU citizens’ data, but the global nature of the internet means that nearly every online service is affected, and the regulation has already resulted in significant changes for all global users as companies scramble to adapt.
- By default, any time a company collects personal data on an EU citizen, it will need explicit and informed consent from that person. Users also need a way to revoke that consent, and they can request all the data a company has from them as a way to verify that consent. This is a change for an industry that’s used to collecting and sharing data with little to no restriction, that means rewriting the rules of how ads are targeted online.
- Under GDPR rules companies are subject to penalties if they use or collect personal information without consent – this fine can be up to 4% of annual revenue
- GDPR Will come into affect on 25 May 2018
- Facebook has been required to adopt it .. will ask every user to review their privacy choices
- Facebook are likely to expand these privacy controls to the world

How Europe’s new privacy rule is reshaping the internet

This May, the GDPR will give companies a new set of rules for sharing data online
3. Regulatory approaches in the EU ... (2)

Digital Taxation

On 21 March 2018, the European Commission proposes new measures to ensure that all companies pay fair tax in the EU. There are two distinct legislative proposals: The first initiative aims to reform corporate tax rules so that profits are registered and taxed where businesses have significant interaction with users through digital channels. This forms the EC’s preferred long-term solution. The second proposal responds to calls from several Member States for an interim tax which covers the main digital activities that currently escape tax altogether in the EU.

A digital platform will be deemed to have a taxable 'digital presence' or a virtual permanent establishment in a Member State if it fulfils one of the following criteria:
• It exceeds a threshold of €7 million in annual revenues in a Member State
• It has more than 100,000 users in a Member State in a taxable year
• Over 3000 business contracts for digital services are created between the company and business users in a taxable year.

The new rules will also change how profits are allocated to Member States in a way which better reflects how companies can create value online: for example, depending on where the user is based at the time of consumption. Ultimately, the new system secures a real link between where digital profits are made and where they are taxed.
Digital Taxation continued

This indirect tax would apply to revenues created from certain digital activities which escape the current tax framework. This system will apply only as an interim measure, until the comprehensive reform has been implemented. The tax will apply to revenues created from activities where users play a major role in value creation and which are the hardest to capture with current tax rules, such as those revenues:

• created from selling online advertising space
• created from digital intermediary activities which allow users to interact with other users and which can facilitate the sale of goods and services between them
• created from the sale of data generated from user-provided information.

Tax revenues would be collected by the Member States where the users are located, and will only apply to companies with total annual worldwide revenues of €750 million and EU revenues of €50 million. This will help to ensure that smaller start-ups and scale-up businesses remain unburdened. An estimated €5 billion in revenues a year could be generated for Member States if the tax is applied at a rate of 3%.

Next Steps: The legislative proposals will be submitted to the Council for adoption and to the European Parliament for consultation.
4. ASEAN Regulatory approaches
Australia retains its focus ...(1)

Australia remains focused on the money .... While still looking at the other aspects ..

Multinational Anti-Avoidance Law (‘MAAL’)  
Enacted in 2015 to combat tax avoidance by multinationals operating in Australia. 
• Aims to counter BEPS schemes used by multinationals  
• Significant global entities = global income > A$1 billion  
• Only applies to global entities with an annual turnover exceeding AUD 1 billion  
• Penalty rates are double the maximum administrative penalties for tax avoidance  
• In November 2017, it had identified more than AUD5 billion in liabilities

Treasury Laws Amendment (Income Tax Consolidation Integrity) Act 2018  
• Aims to close loopholes in the tax consolidation. Passed on 22 March 2018.

Diverted Profits Tax  
• The DPT came into effect on 1 July 2017 and imposes a 40% tax.  
• Aims to ensure that the tax paid by) reflect the economic substance of activities in Australia and prevent diversion of profits offshore
The Australian Federal Government amended the Goods and Services Tax (GST) law to ensure digital products and services receive an equivalent tax of 10 percent, whether they are provided by Australian or foreign entities.

Base Erosion Profit Shifting (BEPS) and information sharing

- Base Erosion: global taxable income is reduced by exploiting difference in treatment of transactions in different jurisdiction
- Profit Shifting: shifting profits from where economic activity occurs to low or no tax jurisdictions

Has significant detrimental market consequences due to a possible reduction in domestic tax collected.
On 4 December 2017, the Australian Treasurer, directed the ACCC to conduct an inquiry into digital platforms. The inquiry will look at the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets.

On 26 February 2018 the ACCC released an issues paper seeking feedback on issues relevant to its Digital Platforms Inquiry. The ACCC is focused on:

• assessing the market power of digital platforms
• the implications of digital platforms for media content creators, advertisers and consumers
• longer term trends in the media and advertising services markets
• the effectiveness of existing regulation and proposals for change.

Submissions to the issues paper will close on 3 April 2018.

The preliminary report is due by 3 December 2018, with a final report due by 3 June 2019.
ASEAN Regulatory approach: Singapore (1)

Amendment of Films Act and Broadcasting Act

- Application of content regulation to OTT video providers.

- Films (Amendment) Bill passed 27 February 2018 aims to clarify the application of content regulation to ‘over the top’ (OTT) video providers. The Amendment also regulates through licensing the public exhibition in a place in Singapore of film content streamed digitally from any other place in or outside Singapore.

Automatic Exchange of Information

- Singapore has also agreed to the Automatic Exchange of Information, an initiative led by the Organisation for Economic Cooperation and Development (OECD) to boost tax transparency and to combat cross-border tax evasion.

- In 2018, Singapore activated 61 AEOI relationships reaffirming the commitment to transparency.
ASEAN Regulatory approach: Singapore (2)

Social Media Regulation

Singapore aims to combat fake news online and is looking to introduce legislation

Facebook was questioned by Singapore Parliament over user data breach:

• Approximately 1.1 million users affected by the breach. Facebook’s Public Policy chief apologized to those affected

• The company faces threat of an audit or a shut down over The Cambridge Analytica breach

• Singapore police are investigating whether Facebook breached a government decree on private data protection and a law on electronic information and transaction

• Expression of concern over Facebook’s possible involvement in the upcoming elections

There will be further regulation in Singapore.
Anti-Fake News Act 2018 was passed by the Malaysian Parliament on 2 April 2018.

Defines fake news as

“any news, information, data and reports, which is wholly or partly false, whether in the form of features, visuals or audio recordings or any other form capable of suggesting words or ideas”

- The Act makes it an offence to create and disseminate fake news or provide financial assistance to facilitate the spread of fake news. Maximum jail term for offenders is six years with a maximum fine of MYR500,000 Malaysian. This law is also applicable to non-citizens “in any place outside Malaysia”
ASEAN Regulatory approach: Indonesia

On 6 February 2017, the Director General of Tax issued Circular Letter No. SE – 04/PJ/2017 on Determination of Permanent Establishments for Foreign Tax Subjects which are Providers of Applications and/or Content Services through the Internet (“CL No. 4/2017”).

• According to CL No. 4/2017, foreign providers of OTT services (which may be an application service or a content service) having a permanent establishment in Indonesia would have to pay tax in Indonesia.

• A foreign OTT service provider may be regarded as having a permanent establishment in Indonesia if (i) it owns, leases or controls any fixed premises in Indonesia, which may include a computer, a server, a data centre, an electronic agent or other automatic equipment; or (ii) it has employees or parties acting for or on its behalf to conduct business activities in Indonesia.

Kominfo has issued a draft regulation on OTT services (“Draft Regulation”) which would apply to both onshore and offshore OTT service providers. The Draft Regulation requires an offshore OTT service provider to have a permanent establishment in Indonesia in accordance with CL No. 4/2017.

The Draft Regulation was first published in May 2016, and a second draft was released in August 2017 following a public consultation. It is unclear if the second draft will be the final text.

Kominfo’s current target is to pass the Draft Regulation by the second quarter of 2018. And I am able to confirm it is certainly in drafting given some feedback I got from the Minister.
ASEAN Regulatory approach: Thailand

In Thailand in April 2017, NBTC suggested introducing bandwidth fees for online content providers, and proposed bringing OTT service providers under an operating licence framework, taxing them and making them liable for illegal content. NBTC sought to require both onshore and offshore OTT service providers to complete a registration form by 22 July 2017, but such registration requirement was revoked prior to that deadline.

On 17 January 2018, the Thai Revenue Department issued a draft value added tax bill (the Draft VAT Bill) to amend the current VAT law related to services rendered by e-business operators in foreign countries. This VAT specific development follows the draft tax proposal on foreign e-business activities, introduced and opened for a public consultation last year. The amendment primarily focuses on the collection of VAT on services rendered by foreign e-business operators to individuals in Thailand due to the limitations in enforcing a reverse charge mechanism under the current VAT law.

A “digital platform” to mean an electronic channel that facilitates the business operator’s provision of services to its customers, and provided some examples – website, application and online market place.

Thailand also has a digital assets tax on cryptocurrencies.
NBTC is currently in the process of passing a new notification regime for OTT service providers. NBTC has not put forward a plan for a licensing regime for OTT service providers. Instead, a complaint based approach has been proposed whereby NBTC will only investigate or intervene in OTT operations when it receives a complaint. NBTC has also considered setting up a control list setting out the top 100 social media content providers or users who influence public opinion, and these companies may be required to register with NBTC.

Further, an OTT working group committee has been set up by NBTC to develop a new OTT regulatory framework. The framework would cover, amongst other things, the effect of OTT-related financial services and the impact on OTT-related telecommunications services. NBTC has also indicated that a fee needs to be imposed on OTT service providers, probably later in 2018.
4. Conclusion
4. Conclusions

It is now clear that OTT/Social media and other digital platforms will be regulated in some form. The recent privacy breach by Facebook has exposed how important OTT regulation is and triggered a global focus on privacy protection in many jurisdictions.

As the political processes are very focused on ‘fake news’, privacy and the possible impacts on political processes. Ensuring there is a level playing field is critically important. It would seem that some countries are more focused on this than others. ASEAN as an advocacy grouping has an important role to play...
Thank you

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