

IPBA Journal

September 2017

No **87**

NEWS & LEGAL UPDATE



INTER-PACIFIC BAR ASSOCIATION



Thailand Throws Down the Gauntlet to Online Digital Media Providers

This article offers a detailed insight into recent attempts by the Thai government to regulate online digital media providers in the form of legislation to counteract the perceived misuse of operators' networks. With the ever-increasing implications of social media becoming far more apparent, the Thai government is taking bold moves to introduce legislation which aims to control online digital media providers.

Background

The rise of large and small technology companies penetrating Thailand's online digital media market has caused regulators to consider employing a new 'over-the-top' ('OTT') framework. According to the National Broadcasting and Telecommunications Commission ('NBTC'), a new regulatory structure is under construction to be installed before the end of the year. However, the initiative to regulate OTT services has raised questions regarding its effects, enforcement and structure. Concerns over extra-territorial jurisdiction, international free trade contradictions and regulatory governance issues has caused private experts and public officials to thoroughly review issuing a new regulatory scheme.

OTT is the broadcasting of film and TV content via the internet without requiring users to subscribe to a traditional cable or satellite pay-tv service.¹ OTT services are commonly divided into two types: free platform (advertising-driven) and paid platform (monthly payment and pay-on-demand).² The services include mobile VoIP apps, mobile instant messaging, online video and TV and online music. Consumers can access OTT content through internet-connected devices such as smart phones and smart TVs, set-top boxes, gaming consoles, and computers.



In Thailand, free OTT platforms include Line TV, YouTube and some digital TV channels that broadcast their programs via OTT platforms such as channels 3, 7, 8 and Workpoint channel. Paid OTT platforms include Netflix, iflix, Hollywood HDTV, Primetime, AIS Play, and Truevisions Anywhere.

Innovation in OTTs has led to a rich and diverse internet, stimulating consumer demand for broadband Internet access. This is a key driver for network operators to upgrade and expand their networks as the increase in usage has caused a larger load on its infrastructure. Mandating OTT services to pay for upgrading infrastructure and data networks would require a implementing a new regulatory structure by either a taxes or royalties scheme.

However, attempts to impose additional regulation on OTTs may risk stifling innovation. Although various internet service and content companies are diverse and fast changing, regulatory regimes are slower

to react and adapt, often remaining static whilst technologies rapidly advance. This is particularly true in regards to technologies that do not yet exist. Prematurely implementing regulations risk becoming outdated due to unforeseen changes that make it economically or structurally inappropriate. Such unintended negative consequences could involve business uncertainty and lower economic growth and investment as a result of ambiguous or misapplied rules.³

Currently, international OTT operators such as Facebook, Netflix and Uber are not locally registered in Thailand. Thus, by acting under a 'branch-capacity' company, they are not required to pay taxes by revenues received through their platforms. OTT operators who ride on mobile operators' networks are not required to pay any licensing fee or corporate income tax to the Thai government, while digital TV operators and pay-TV broadcasters must be licensed by the NBTC and paying an annual license fee.



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This unregulated space in the OTT market has caused the NBTC to consider measures to set proper policies to govern the content and operations of OTT operators. In April, the NBTC passed a resolution to categorise video-on-demand by OTT operators as a broadcast business.⁴ Thereafter, an appointed subcommittee ordered such platform providers to register themselves with the NBTC by 22 July or 30 days after the framework was announced as completed. The reasoning behind the new regulatory police was to confront OTT operators not paying fees to the state from its advertising revenues, while significant changes in the TV/mobile viewing experience effected the state's overall social and digital infrastructure.

The NBTC attempted to sanction unregistered OTT platforms by forcing ad agencies and the top 50 online spenders to stop doing business with them. Three companies did not register—Facebook, YouTube and Netflix. The subcommittee's actions were seen as overly authoritative and in need of review due to fears the move would negatively impact the economy. On 5 July, the NBTC board decided to scrap their attempt and proceed with a new scheme. Nevertheless, critics aver that a regulatory framework could potentially deter players from entering the Thai market, creating competitive ripples in the digital economy.

Reasons to Regulate

The reasons to regulate include:

- (1) OTTs, particularly communications-based OTTs, provide the same services as traditional communications service providers, and thus a form of regulation is needed.
- (2) OTTs are free riding on operators' networks and provide minimal to no obligations to data servers or infrastructure. OTT providers may find themselves paying operators for the use of their networks.
- (3) OTT providers have a negative economic impact on operators, which hampers network build-out, traditional local operators, and investment.

There are currently no rules obligating OTT businesses to pay taxes, leading the Thai government to look at installing a regulatory structure. In this view, regulation is needed to remedy the existing structural imbalance and level the playing field between OTTs and traditional

operators. Any successful regulation is likely to need public agencies, regulators, and major international companies to cooperate in addressing the context of the OTT business based on the advantages and disadvantages to the public.

Although the NBTC emphasises the need to handle 'improper content' such as for social media streaming and create fair competition in the TV industry, the tax-related implications cannot be diminished.

Col Natee Sukolrat, chairman of the NBTC, has said that both free-TV and pay-TV operators must adjust their strategies with rapidly changing viewing habits. He has further explained the decision to implement a proper policy is based on the risks an unregulated structure would create to the ecosystem of the broadcasting and telecom industries. Thus, although fair regulations are essential to protect the public and the market, a newly devised framework may be more collaborative in nature. Specifically, by establishing an environment conducive to business growth while protecting consumers' interests and providing them with affordable access to more innovative services and options.



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implement OTT
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Issues

Major encompassing issues regarding a new regulatory framework include:

- lack of clear objectives;
- no clear classification of affected digital broadcasters;
- competitive disadvantage and chilling effects on tech companies (foreign and domestic);
- lack of clear governance structure for implementation and enforcement; and
- jurisdictional issues.

To properly implement OTT regulations, the objectives of the regulations should be clear. Here, critics argue the NBTC's goals seem unfocused and broad. Concerns over content control, fair competition and state tax collections have created a gap between the purpose of a new regulation and its targeted impact. Currently, the Thai government claims the primary aim is to create a level playing field between OTT services and competing traditional broadcasting/telecommunications industries. However, the financial impact of lost revenue from taxes cannot be minimised.

Adding to the issues is the difficulty to classify groups of broadcasters under the current digital convergence platform. Currently, there has been no clear definition of content on broadcast and telecom networks. There are also questions as to whether the NBTC has the authority, under existing legislation, to regulate OTT services, require registration or issue an OTT notification.

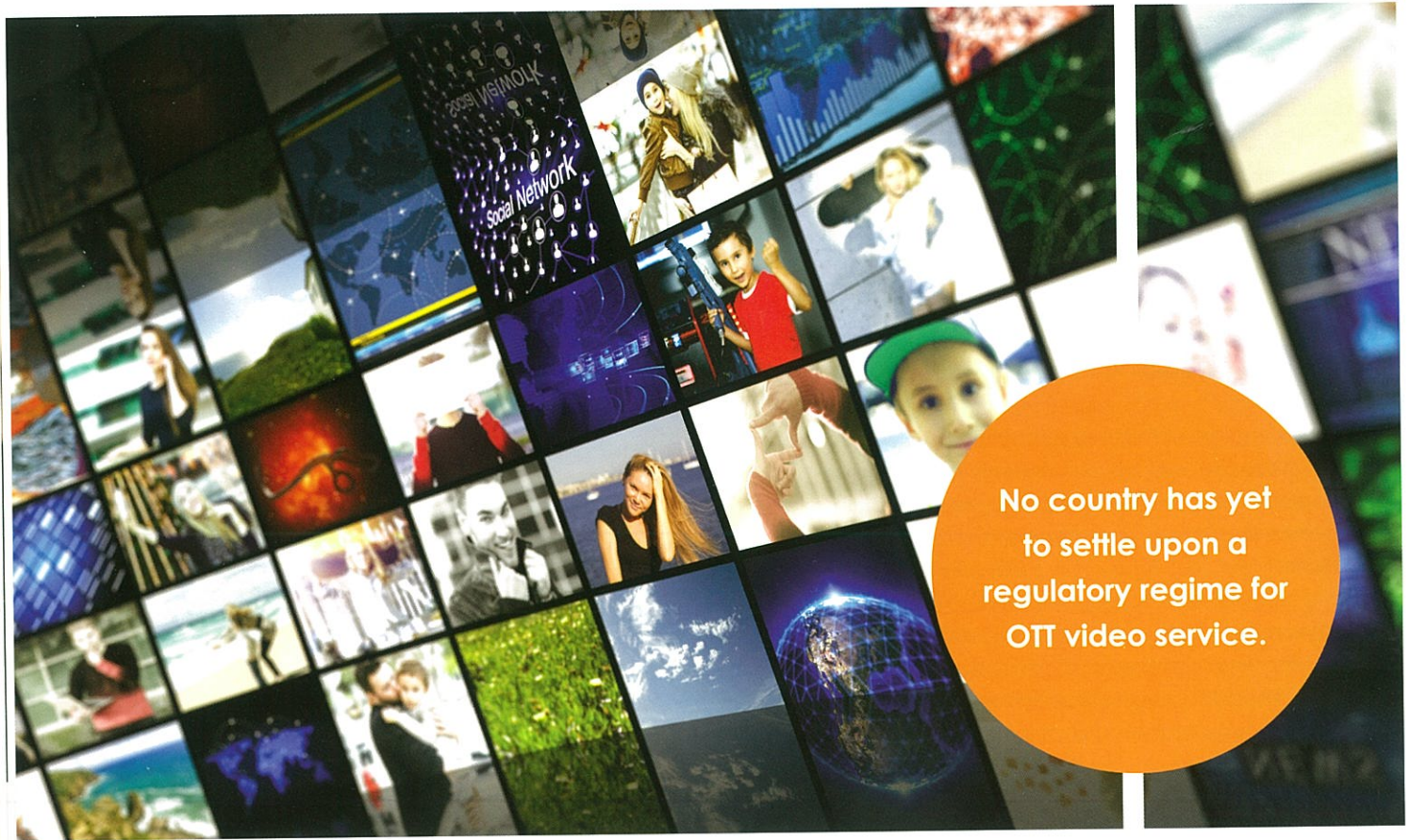
Established telecom providers globally have argued that regulation of OTT content causes competitive disadvantages for telecoms providers who are subject to sector-specific regulation while providers of OTT communication services are free from comparable regulatory burdens.

Critics have also expressed concern that imposing a fee might not only impact global OTT players, but could also affect local companies and startups whose inventions by definition entail the creation of OTT products and services. A way to mitigate this risk could be potentially done through a framework that outlines separate requirements or structures for foreign and local entities.

Structural governance issues also need addressing under a new regulatory framework. In Thailand, unregulated content on OTT platforms and state benefits from taxation are two reasons behind calls for regulation. However, controlling improper or illegal content via internet networks and taxation are handled separately by Thai state agencies.

The authority to govern improper content on internet networks is controlled by the Digital Economy and Society Ministry under the Computer Crime Act. The Technology Crime Suppression Division is also administered as a supplementary agency to take action against any illegal or harmful content. Income tax issues are overseen by the Revenue Department along with other parts of the Commerce Ministry. The NBTC however, only governs licenses awarded to internet service providers and mobile operators. Thus their only form of enforcement would be limited to revoking operators' licenses. Therefore, since the NBTC's concerns regarding OTT regulations are decentralised through various divisions of the government, a consolidated framework may be necessary for efficient implementation.





No country has yet to settle upon a regulatory regime for OTT video service.

Even when a policy has been implemented such as the NBTC's most recent, OTT operators have stated that the proposed regulatory framework is unclear. Moreover, even if such regulations were imposed, issues of enforcement have been brought to attention due to Facebook's and Google's leverage in their respective verticals.

No country has yet to settle upon a regulatory regime for OTT video service. One reason is jurisdiction because OTT is virtually operated and delivered via the internet, which is global by nature. This makes it difficult for each country to impose their own OTT regulation and enforce national obligations on traditional OTT providers. There are complexities as to how rules would or could be applied to OTTs without a physical presence in a country or are otherwise not subject to a particular country's legal jurisdiction. The underlying factor relates to the borderless nature of the internet. OTT operators generally do not have control over the access of their applications and where those users are located. This is especially true for OTTs that are freely available and do not rely on a subscription model.

In particular, identifying an OTT user's location is challenging even for subscription-based OTT operators due to the mobile nature of the internet. Proxies such as a virtual private network ("VPN") allows a subscriber or OTT user to mask their location when using a service in a different city, state or country from the billing address.

In certain policy areas, regulators may find it suitable to 'level down' the regulatory environment and de-regulate providers of traditional broadcasters and telecommunications services thereby encouraging competition and innovation. It will be critical that new regulations in Thailand do not act as an unnecessary barrier to entry into the market for OTT services. Increasing compliance costs imposed by a strict and unyielding regulatory framework may ultimately reduce competition.

Impact

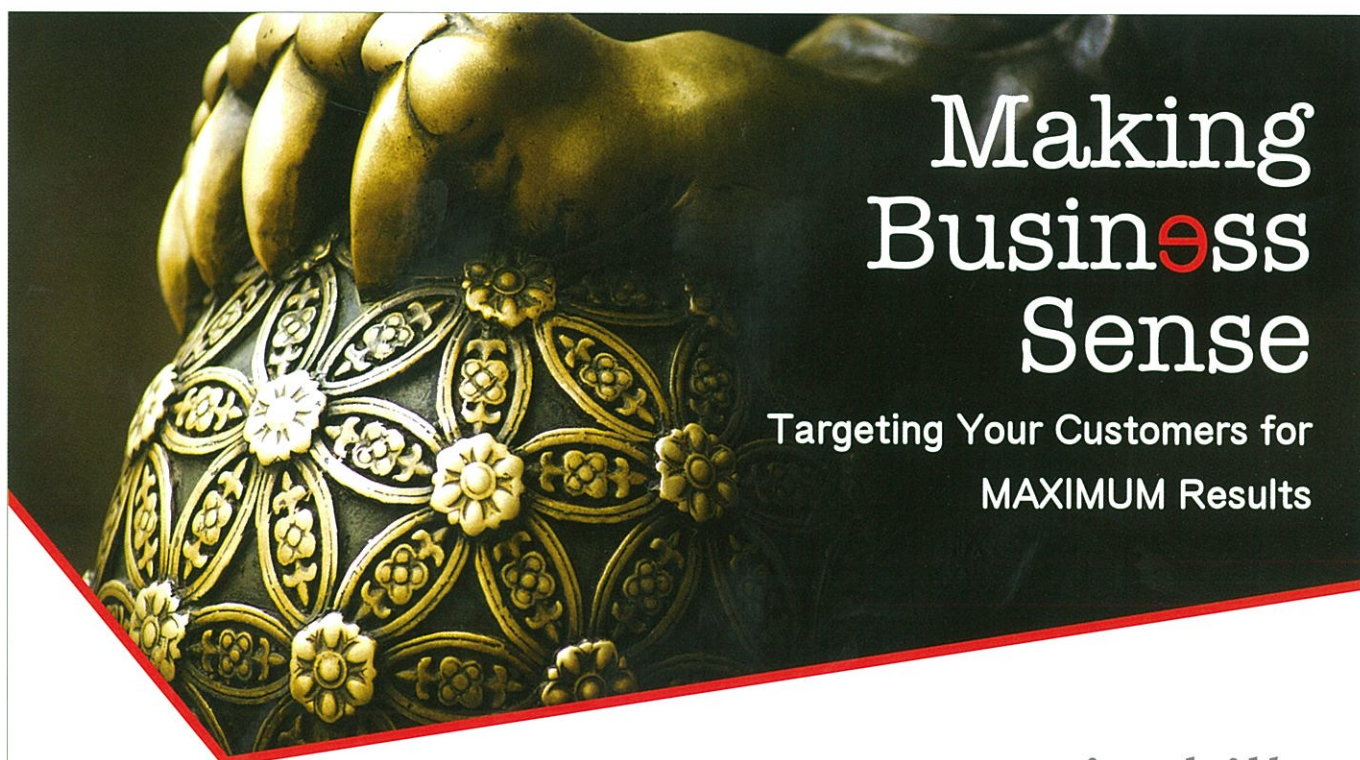
Because the internet is inherently global, regulation in one country can adversely impact innovation, economic growth and the availability of services in another. Imposing a rule to protect a state's own operators or

users may start a trend in other surrounding countries. Such an occurrence is possible as Thailand is among the more developed ASEAN nations to which surrounding countries often look to for regulatory guidance. Thus, Thailand installing a regulatory practice on OTTs could cause regionally similar countries to raise entry barriers for innovative digital products from international providers.

Traditional licensing and regulatory frameworks may also be ill suited to the dynamic and emerging services available in a developing markets such as Thailand. Typically, traditional regulatory frameworks have been characterised by high barriers to entry and other specific local requirements. Such regulations may not fit well in competitive markets with Internet-based services, which tend to be global in nature. OTTs would also be potentially subject to vastly different and burdensome regulatory obligations in every country around the world. This would create a redundancy and possibly an additional barrier to investment or growth.⁵

An additional wary impact to imposing regulations on OTT services is the potential harmful impacts on the internet networks. Domestic localisation requirements could force inefficient and uneconomic network structural designs, raising costs and limiting consumer choices. To mitigate this effect, a proposed framework may be to bring OTT providers directly under local jurisdiction. Bringing offshore OTTs under local jurisdiction would impose data localisation laws on OTT providers and require them to install servers locally to allow government access and monitoring, as well as subject providers to the state's laws.

Although banning a handful of websites or domain names is a possibility, subjecting potentially hundreds (or more) OTT providers from around the world to licensing and regulatory obligations would require a strict governmental control system in constantly monitoring citizens' access to information. This would may lead to increased costs as well as difficulties to establish liability and enforcement. Certain procedural or instructive



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guidelines may be necessary to objectively determine which OTT contents and applications would be deemed unlawful. However, whether major international powerhouse OTT operators would consent to such a structure remains to be seen.

Study

Many countries have attempted to control content such as hate speech or fake news in cyberspace. Indonesia's attempt to regulate OTT video services provides some context. There, a circular was implemented regulating OTT service providers currently operating in the ASEAN outside a specific legal and tax framework. The regulation was targeted at application and content services. The circular instructed OTT operators to comply with Indonesian laws and regulations on monopolies and unfair competition, trade, consumer protection, intellectual property rights, broadcasting, advertisement, anti-terrorism, taxation, and illicit content.⁶ The practices include content filtering and censorship in accordance with prevailing laws and regulations.

More notably, offshore OTT services targeting Indonesia could find themselves subject to the payment of domestic corporate income tax in the country. The country's Director General of Tax issued an additional circular building on the guidance set by Circular Letter No. 3/2016. The 2016 Circular states that applications and/or content services delivered over the internet can be provided by a foreign individual or business entity if they have a 'permanent establishment'.⁷

Although economic fairness and competition factors provide substantive reasons for OTT regulation, the primary aim may be seen as a method to establish a criteria to ensure that owners and operators of foreign OTT services are subject to the paying domestic corporate income taxes. The expansive technological development and change in the broadcasting industry has made the issue inevitable for government regulators to address.

Conclusion

OTT services' increasing popularity and traditional media's decline has led to OTT TV viewership habits to drastically change. This has created a sub-effect on TV advertising businesses, subscriptions, and consumer engagement. Such alterations in the digital media industry has the NBTC looking to devise a new framework. However, the complexities involving legal

jurisdictional issues, economic impacts, and structural governance between public and private players has left many experts and industry leaders puzzled as to the type of framework that will be implemented.

Thailand may look to Indonesia in installing a similar framework to target foreign OTT services to realize lost revenues through taxation or fees. Although it is unclear how the government will consolidate all the moving parts of the different government divisions with the private and public sector's interests, a collaborative scheme may prove beneficial for all parties. The agency is expected to install a new regulation on the matter by the end of the year after the drafting and commenting/hearing stages conclude.

Notes:

- 1 Hun Media Law, National Media and Infocommunications Authority, Hungary.
- 2 *Ibid.*
- 3 <http://www.asiainternetcoalition.org/wp-content/uploads/2015/10/AIC-White-Paper-on-OTT.pdf>.
- 4 <http://www.bangkokpost.com/news/general/1288507/how-not-to-make-a-regulation>.
- 5 <http://www.asiainternetcoalition.org/wp-content/uploads/2015/10/AIC-White-Paper-on-OTT.pdf>.
- 6 Minister of Communication and Information Technology of the Republic of Indonesia No. 3 of 2016, No.19/M-IND/PER/3/2016, March 31, 2016.
- 7 *Ibid.*



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