

**Cross-Border Regulatory Issues:**  
**Digital Platforms and E-commerce**

Atty. Lars O. Serzo  
UP Law Center  
*Technology Law and Policy Program*

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# Objective:

- Outline of Paper:
  - Survey of Regulations;
  - Identification of Gaps
  - Assessment of Impact
  - Policy recommendations
- Guidance to government in crafting appropriate policies and regulations
  - Analysis: Effect of existing regulatory environment on startups; digital economy
    - National innovation policy of PH (alignment with regulations)
    - Assess the ability of regulations to fulfill policy objectives
    - Analysis of whether the regulations are aligned with international standards

# Standards

**UNCTAD** - high-level policy recommendations based on Rapid eTrade Readiness Assessments in the following areas:

- **General innovation policy; electronic contracting; payment solutions; consumer protection data protection and data privacy; access to financing; protection of IP**

**OECD, APEC, WTO** - data privacy guidelines

# Standards

## **National Innovation Policy - PH Innovation Act**

- government to place innovation at the center of its development policies
- whole-of-government approach in ensuring policy coherence, alignment of priorities and effective coordination
- encourages greater interaction among stakeholders (business sector, academe, and better coordination among government agencies.
- encourage creative thinking and knowledge creation and dissemination towards expanding and maintaining economic competitiveness
- Remove obstacles to innovation
- Assist MSMEs from “incorporation to internationalization
- Creation of incentives for investment in innovation

\*Creation of the NIC

# Standards

UNCTAD standards:

- National strategy: whole of govt approach
- Adoption of baseline e-commerce regulations (consumer protection, data protection, IP, cybercrime)
- Strong data privacy regulations
- Supportive environment for e-payments and FinTech
- Cybercrime and cybersecurity

# Standards for Data Privacy

## **OECD Privacy Guidelines**

- Parameters for processing of data (limits to the collection, processing; relevancy to purpose of processing; implementation of safeguards; data subjects should have have rights over data; accountability for ensuring protection principles.

## **APEC Privacy Framework**

- general policy directives that instructs members to formulate rules that allow the recognition of cross-border rules across jurisdictions.
- APEC CBPR - voluntary

**WTO:** recognized that countries may implement measures to uphold privacy rights; but must not result in regulations that act as trade barriers / discriminatory

## Particular Areas:

- i. General Policy re: Innovation
- ii. Legal Foundations: Electronic transactions
- iii. Payments and Movement of Funds
- iv. Consumer Protection for Digital Transactions
- v. Data Protection; Data Privacy
- vi. Cybercrime and Cybersecurity
- vii. Investment policies
- viii. Intellectual Property Rights

# Regulations that Enable Digital Platforms and Electronic Transactions

# I. Innovation Policies

- Constitutional and statutory support for innovation
  - PH Innovation Act:
    - Whole-of-government approach to ensure policy coherence
    - Creation of an NIC
  - Innovative Startup Act
  - ARTA; Revised Corp Code
  - PhilSys - national ID system
- Various policy declarations
  - Administrative roadmaps; guidelines

## II. Facilitation of Electronic Transactions

- Equivalence between electronic and analog/physical transactions
  - Status of Electronic Documents
  - Status of Electronic Transactions
  - Contracts

# III. Payments and Movement of Funds

- BSP: Payments regulations; money service businesses
  - Supportive regulatory environment
  - Licensing and registration requirements
    - Remittance; ForEx; E-Money; Virtual Currency Exchanges
    - Electronic payment and financial services
    - Adoption of a national QR Code standard
  - Payments: requirement for integration with ACH
  - Operator of payment systems
- DTI: Gift check and gift credits
- SEC: Virtual assets as securities

## IV. Consumer Protection

- General Consumer Protection for Digital Transactions
  - General Consumer Protection for Digital Transactions
    - Consumer Act of the PH
    - E-Commerce Act
    - Cybercrime Prevention Act
- Other regulations
  - BSP Consumer protection standards

# V. Cybercrime and Cybersecurity

- Cybercrime offenses
  - Cybercrime Prevention Act of 2012
  - Increases penalties for offenses committed through ICT
  
- Law enforcement
  - Requirements on platform to assist law enforcement
  - Rules on Cybercrime Warrants
  - Multinational cooperation

# V. Intellectual Property Rights

- General IP Legal framework
  - WIPO; WTO; TRIPS
  - National IP Strategy
- Protection for inventions; Codes
  - Creative works (including software code) - copyright
  - Products and other solutions - patents
- Safe harbor provisions
  - Platforms generally insulated from content-based liability

## VI. Data Protection and Privacy

**Data Privacy Act of 2012: Broad scope of data protection regulations. Covers:**

- i. All types of personal information
- ii. All types of entities that **process** PI
- iii. Extra-territorial: covers processing offshore if involving a PH citizen or PH resident.

\*Research exception

\*Exception for data collected abroad

## **PH Data Privacy Act of 2012.** Parameters for legal processing of data

Generally: **Legal criteria for processing (includes consent)**

Transparency and autonomy to the data subject:

- i. Description of PI
- ii. Scope and method of processing;
- iii. Recipients of the PI
- iv. Fact of automation
- v. Existence of rights
- vi. Period for processing

**PH Data Privacy Act of 2012: Provides rules on accountability for processing**

- i. Personal Information Controller vs Personal Information Processor
- ii. The Controller: responsible for the acts of its contractors or processors to whom it outsources processing activities
- iii. Processors may include cloud service providers, telecommunications providers, data management companies, and other subcontractors.

# Regulatory Landscape

**PH Data Privacy Act of 2012**: Provides substantial rights to data subjects and a method for enforcement.

- Right to be informed; to object to processing; to correction; to deletion; to file a complaint with the NPC
- **Criminalizes the following**: Unauthorized processing; accessing of personal information due to negligence; Improper disposal of personal information; Intentional Breach; Concealment of Security Breaches.

# Cross border Transfers

## **No prohibition on offshore transfers**

- No rules for data localization (except for banking and government data).
- But:
  - Processing includes transfer.
  - Standards for outsourcing or sharing of data
    - Contractual stipulations; conduct a privacy impact assessment
  - Other regulations (audit functions of BSP, Labor, Tax authorities).

# Data Privacy Regulations:

## **For Platform: Market strategy; Adds value**

- i. Builds trust with regulators and consumers
- ii. Competitive advantage
- iii. Allows startups to legally process data; add services and functionalities; additional revenue streams
- iv. Minimizes liability exposure

## **For Data Subjects:**

Transparency and autonomy

# Risks, Constraints and Gaps

# Contracting Issues/ Telco issues

- Electronic Contracting issues
  - Notarial rules
  - Electronic signature requirements
- Telecommunication restrictions
  - Tech companies as VAS
    - Ex ante regulations

# Investment Policies

- Various Restrictions on foreign participation
  - Mass Media
  - Advertising
  - Retail
  - Public Utilities
  - Education

# Regulatory Overlaps

- Regulatory overlaps
  - Nature of tech products = transaction or activity may fall under the jurisdiction of two or more regulators
    - E.g. Virtual assets and payment; Transportation sector

# Regulatory Divergence

	<b>Offshore transfers</b>	<b>Whitelist (adequacy)</b>	<b>Data localization</b>
<b>Indonesia</b>	Consent required	None	Yes, (electronic system providers “for public purposes”)
<b>Malaysia</b>	Consent required	Yes.	Yes, personal data about malaysians must be stored locally
<b>Philippines</b>	Consent optional	None	None
<b>Singapore</b>	Consent optional	Yes	None
<b>Thailand</b>	Consent optional (exception to whitelist requirement)	Yes	None.
<b>Vietnam</b>	Consent required	No	Yes (internet, Telco, VAS, other industries identified to have a national security impact)

	APEC CBPR
Indonesia	No intention to join
Malaysia	No intention to join
Philippines	Yes
Singapore	Yes
Thailand	No intention to join
Vietnam	No intention to join

# Data Privacy Regulations: Effect on Platforms

## **Increase in Operational and Compliance Cost**

- i. Transparency and autonomy rights of data subject = leads to granular processing audits
- ii. Conduct of privacy impact assessments
- iii. Dedicated data protection team

Hinders platforms from having seamless, interoperable platforms/operations

# Data Privacy Regulations: Effect on Platforms

## **Data protection and data localization as a nontariff trade barrier**

- **Uncertain; divergent; compliance cost**

Complex regulatory compliance considerations [Data transfers are necessary (regional operations; business continuity)]

# Findings: Effects on Data Subjects

## **a. Enables the Legal Exploitation of Data**

- i. Consent-based
- ii. Privacy policies
- iii. False sense of control over data

## **b. Data Protection Regulations empowers individual data subjects**

- i. Expansion of the scope of regulations
- ii. Grant of autonomy and control over personal information

Impact

# Regulations as Innovation Inhibitors

- Funding:
  - Context: Competing with offshore startups (first mover benefits + lock in effects of platforms) may require startups to take advantage of market differentiation or developing new products.
    - Requires extensive capital investment

# Regulations as Innovation Inhibitors

- Funding problem as a regional phenomenon; but PH still performing worse than other countries in the region
- Policy uncertainty vis a vis investment decisions
  - Digital platforms: capital intensive; competitive regulatory environments across the region
    - 2018 UNCTAD/ASEAN study: 50 most funded digital start-ups in ASEAN, only one registered the PH: PH startups are outfunded by SG and IND counterparts
    - OECD study: 1 out of 6 firms in Cambodia, Indonesia, and Lao PDR, and 1 out of 10 in Malaysia, Myanmar, Philippines, and Vietnam, cites access to finance as a major constraint.
    - Google Temasek study: cited regulatory uncertainties present in the three countries as a factor in the relative low amount of funding; PH ranks behind SG, Thailand, Indonesia, Malaysia, Vietnam in terms of size of deals and number of M&A deals.

# Regulations as Innovation Inhibitors

- Compliance issues
  - For compliance-driven platforms -- affects ability to roll out products
    - E.g. Amazon vs a drone research
    - CEZA vs virtual currency exchanges
    - Ride hailing services in ASEAN

# Regulations as Innovation Inhibitors

- Regulatory Arbitrage
  - Regulatory risk and uncertainty in one jurisdiction -
    - encouraging entities to locate in other areas where risk is more manageable.
    - Redefining activities or structure in order to take advantage of less stringent regulations within a single jurisdiction.

# Regulatory Arbitrage

- Absolute Relocation:
  - where a Philippine-based digital platform decides to locate and operate in an offshore jurisdiction with friendlier regulations
- Hub Relocation:
  - platform may relocate its head office in a Preferred Jurisdiction and maintain a presence in the PH in order to take advantage of certain regulations that could be favorable to the digital platform.
- Fictional Relocation
  - When a platform does not organize a body corporate in the PH and yet does business in the country.

# Regulatory Arbitrage

## Regulatory Arbitrage within the Philippines

- To take advantage of overlaps and enforcement issues among regulators
  - E.g. regulation of virtual assets
  - E.g. characterization of riders as independent contractors

# Policy Considerations and Suggestions

# Policy Considerations

- Implementing a Coherent Policy for Platforms: A Whole of Government Approach to Platform Regulation
  - Reevaluate objectives behind restrictive policies
    - Assess whether the impact on the regulated entities are aligned with the stated objectives
      - (e.g. mass media restrictions in the 21st century; transport regulations and its effects on tech enablers, not transport providers).
    - Effect on other areas such as government revenue, consumer protection, and labor

# Policy Considerations

- Encourage and Make Use of Regulatory Intersections
  - Each regulator has an expertise
  - Create efficient and effective redundancies; regulatory “safety nets”
    - Scope and objectives must be clear
  - Avoid duplication

Intersections/cooperation between financial regulators

# Policy Considerations

- Regular Assessment/Re-assessment of regulatory intervention
  - Conduct of continuous studies on whether regulation (and what level of regulation) is necessary to achieve policy objectives
    - Wait-and-see-approach
    - Pre-emptive actions
    - Light-touch approach
  - Level of intervention also dependent on the legal basis of the questioned regulation and time constraints.

<b>Protected Activity</b>	<b>Basis of Restriction</b>	<b>Basis of Application of Restriction to Digital Platforms</b>
Mass Media	Constitution:  The Constitution does not define “mass media”.	DOJ and SEC Opinions Extended this to dissemination via the internet on the basis of the Tobacco Regulation Act.
Retail	Law: Retail Trade Liberalization Act, which imposes qualification requirements that are not applicable to digital retailers.	Law: Retail Trade Liberalization Act, which imposes qualification requirements that are not applicable to digital retailers.

<p>Public Utilities</p>	<p>Constitution: reserves public utility to Filipinos or entities owned at least 60% by Filipinos.</p> <p>The Constitution does not define “public utility”.</p>	<p>Public Service Act: defines what constitutes as public service.</p> <p>Philippine Postal Code: classifies courier service as a public utility.</p> <p>LTFRB regulations and advisories classify TNCs and TNVS as public utilities.</p>
<p>Education</p>	<p>Constitution: reserves educational institutions that are part of the formal education system to Filipinos or entities at least 60% of the capital is owned by Filipinos.</p> <p>The Constitution does not define “formal education system”.</p>	<p>Education Act of 1982 considers “work education,” “practical arts,” and “technical-vocational education” as part of the “formal education system.”</p>

# Closing

- Regulations: must create a more accommodating and enabling environment for Philippine digital platforms to be more competitive, in line with the country's innovation policy, and at the same time drive towards inclusive and sustainable economic growth.
  - Regulatory frameworks play a key role in driving digital platforms
  - regulations may have to be evaluated against the country's national innovation policy vis a vis specific policy objectives (general innovation strategy, government revenue, consumer protection, and labor welfare).
  - Policy should also provide regulators with tools and frameworks that will allow them to navigate uncertainties and overlaps.
  - Intergovernmental regulation for data privacy

Thank you. [lars.serzo@disini.ph](mailto:lars.serzo@disini.ph)