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Regulatory Measures Affecting Service Trade and Investment: Information and Communications Technology Services

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Regulatory Measures Affecting Service Trade and Investment: Information and Communications Technology (ICT) Services

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Abstract

Information and Communications Technology (ICT) infrastructure and services are necessary to spur economic growth especially in the digital age. The comparative advantage enjoyed by the Philippines in specific ICT and ICT-enabled services indicate the availability of competitive ICT to support services exports. ICT connectivity throughout the country needs to be significantly improved, however. Trade and investment in the sector must be further encouraged by creating an efficient regulatory framework to support sector development. In addition to market access restrictions, which will require amending the Constitution and other relevant laws, this review identified other critical issues. Priorities for reform that need to be addressed include improving transparency in legislative and regulatory procedures and requirements, establishing a mechanism to enforce competitive safeguards, strengthening the independence of the regulator, and better coordination among government agencies on ICT-related policies and programs.

Keywords:

Information and Communications Technology, digital, trade, investment, services, regulation, barriers, free trade agreements

Table of Contents

List of Tables

List of Figures

Regulatory Measures Affecting Services Trade and Investment: Information and Communications Technology (ICT) Services

Lai-Lynn Angelica B. Barcenas and Ramonette B. Serafica*

1. Introduction

1.1 Background and significance

The potential of services to drive growth and economy-wide upgrading remain limited due to the various regulations that govern the sector. According to Molinuevo and Saez (2014), creating and efficient regulatory framework to support sector development requires a comprehensive understanding of the laws, regulations, and practices affecting trade and investment in services. A mapping and assessment of regulatory measures will contribute to enhancing transparency and clarity on the regulatory regime governing services trade and investment in the Philippines and raise awareness on the extent of the barriers.

Following on from an earlier study on the regulatory measures affecting services trade and investment in the distribution, multimodal transport, and logistics services (Barcenas, et al. 2017) and in financial services (Sandoval and Milo, 2018*),* this study focuses on Information and Communications Technology (ICT) services.

This study is in line with the Philippine Development Plan 2017-2022 (NEDA 2017), which recognized the necessity of removing restrictions in the economy to expand economic opportunities in the country. This will entail amending restrictive economic provisions in the Constitution; repealing or amending regulations that impose restrictions on foreign participation in certain economic activities; and enhancing the competitiveness of the industry and services sector by ensuring that regulations promote fair competition and trade. The Plan also recognizes the need to improve the business climate by implementing structural reforms to create more open, well-functioning, transparent, and competitive markets as well as by simplifying rules and regulation on business registration and licensing.

1.2 Objectives

The objective of this assessment is to foster the development of the Philippines' services market by strengthening the regulatory framework environment affecting services trade and investment specifically in ICT services. Based on an assessment of laws and regulations affecting trade and investment in services, the exercise will propose measures that reduce the regulatory burden on services trade while ensuring adequate regulation of the services market. The assessment will also examine Philippines' policy regime on services trade in light of obligations in trade agreements. Specifically, the study will:

- Map laws and regulatory measures affecting trade and investment in information and communications technology (ICT) services.
- Identify (a) legal, regulatory, and administrative restrictions to trade and investment in the services sector; (b) potential inconsistencies between existing laws and regulations and obligations in World Trade Organization (WTO) or other trade agreements; and

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(c) missing laws and regulations needed to ensure the adequate functioning of the services sector and implement commitments in trade agreements.

- Propose guidelines and an action plan for implementing such policy measures by the relevant government agencies and other relevant actors.
- Propose reforms of existing laws and regulations where needed.

1.3 Organization of report

Chapter 2 provides an overview of the ICT sector including its definition, economic significance, and a discussion of some trends and issues related to ICT trade and investment. **Chapter 3** describes the legal and institutional setting for ICT development in the Philippines. The key regulations affecting trade and investment in this sector are then discussed in **Chapter 4**. In the next two chapters, **Chapter 5 and 6**, the relevant international agreements are reviewed and the country's compliance with these agreements are examined. Other constraints to trade and investment in the ICT services are highlighted in **Chapter 7**.

2. Overview of ICT services

2.1 Scope

The Department of Information and Communications Technology Act of 2015 (RA 10844, 2016) provides the following definitions:

- ***Information and Communications Technology* or *ICT*** shall mean the totality of electronic means to access, create, collect, store, process, receive, transmit, present and disseminate information.

- ***ICT Sector*** shall mean those engaged in providing goods and services primarily intended to fulfill or enable the function of information processing and communication by electronic means. The ICT sector includes telecommunications and broadcast information operators, ICT equipment manufacturers, multimedia content developers and providers, ICT solution providers, internet service providers, ICT training institutions, software developers and ICT-ES providers.

- ***ICT-Enabled Services* or *ICT-ES*** Sector shall mean those engaged in providing services that require the intrinsic use of ICTs including engineering or architectural design, informatics service providers, offshoring and outsourcing service providers such as call centers, back office processing, software development, medical or legal transcription, animation, game development, and other services that require the intrinsic use of a networked information infrastructure.

For statistical purposes, the latest version of the **Philippines Standard Industrial Classification (PSIC) 2009** includes an Information and Communication (IC) sector which covers: Publishing Activities; Motion Picture, Video, etc.; Programming and Broadcasting; Telecommunications; Computer Programming, Consultancy and related activities; and Information service activities.

Similarly, the **Survey on Information and Communication Technology (SICT)** conducted every two years by the Philippine Statistics Authority (PSA) has identified **CORE ICT industries** of the Information Economy, which is composed of the Information and Communication Technology Sector and the Content and Media Sector:

a. Information and Communication Technology

- ICT manufacturing industries – e.g. computers, consumer electronics, magnetic and optical media.

- ICT trade industries – e.g. wholesale of computers, radios and televisions, telephones.

- ICT service industries - Software publishing; Telecommunication services; Computer programming, consultancy and related services; Data processing, hosting and related activities; Web portals; and Repair of computers and communication equipment

b. Content and Media Industries

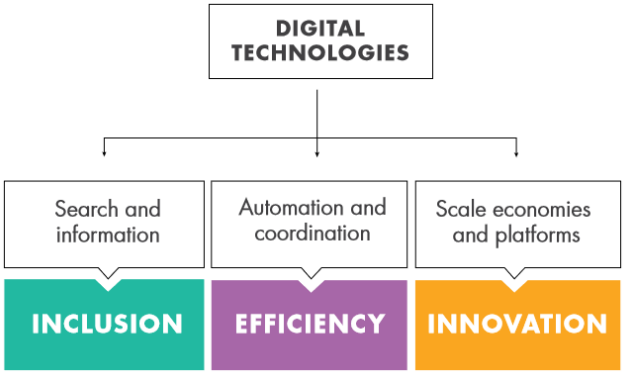
- Publishing activities – books, newspapers, news agency activities
- Motion picture, video and television programme production, sound recording and music publishing activities
- Programming and broadcasting activities – e.g. radio broadcasting, tv program production, internet television stations

Finally, the **Central Product Classification (CPC)** which is used in the negotiations of services trade agreements includes ICT products, and content and media products. As noted in IMF (2018) however, even the latest revisions to these classifications have not kept up with the recent growth of digital activities and products. The coverage of "online platforms" (e.g., Google, Facebook, Alibaba) and their products is incomplete. Platform products covered by the CPC include searches, content and media, and e-commerce. But matching services (e.g. Airbnb) and cloud computing are not covered. Finally, there is no explicit treatment of data as a product. Under current international guidelines databases are products, but not data itself.

2.2 Economic significance

In the last two decades, significant attention has been given to the contribution of ICT to the global economy in terms of fixed asset investment, innovation, aggregate value added and labor productivity. Policy recommendations from these studies highlight the need to encourage investment in ICT assets, innovation in ICT industries, and the adoption of ICT services in order to foster sustainable long run growth (Ciriani and Perin 2017). The mechanism by which the internet, for example, contributes to socio-economic development is illustrated in **Figure 1**.

Figure 1. The internet promotes development through three mechanisms



Source: WB 2016, p. 9

As explained in WB (2016), the internet has significantly lowered the cost of acquiring and using information, which in turn has lowered transaction costs—and often as a consequence, production costs. By lowering the cost of these transactions, the internet affects economic development in three major, interrelated ways. One is that the internet can help **overcome information problems**. The emergence of e-commerce platforms, for example, has made it much easier for small producers to find customers and allowed them to sell even to overseas markets. The internet also **augments the factors of production**. It reduces the cost of existing transactions (e.g. inventory management), which significantly improves efficiency allowing firms to make better use of their capital and labor. Higher efficiency can be experienced by

different sectors of the economy from households, enterprises, industries and the public sector as well. Finally, the internet enhances innovation by enabling firms to exploit **economies of scale** through online platforms and services that compete with conventional business models, for example in retail (e.g. Amazon), transport (e.g. Uber), and lodging (e.g. Airbnb). These three mechanisms contribute to economic growth by expanding trade, increasing capital and labor utilization, and by intensifying competition.

There are also direct contributions of the sector to the economy. Based on the Labor Force Survey, the Information and Communication (IC) sector accounts for close to 1% of total employment. This does not include those that are employed in other sectors in ICT-related occupations or undertaking ICT-related functions, which could be significant. See **Table 1**.

Table 1. Employed Persons by Major Industry Group, Philippines (2017 Average)

	In Thou	Share (%)
ALL INDUSTRIES	**40,334**	**100.00**
Agriculture	**10,261**	**25.44**
Agriculture, Hunting and Forestry	9,066	22.48
Fishing and Aquaculture	1,194	2.96
Industry	**7,370**	**18.27**
Mining and Quarrying	203	0.50
Manufacturing	3,481	8.63
Electricity, Gas, Steam and Air Conditioning Supply	80	0.20
Water Supply; Sewerage, Waste Management and Remediation Activities	69	0.17
Construction	3,537	8.77
Services	**22,703**	**56.29**
Wholesale and Retail Trade; Repair of Motor Vehicles and Motorcycles	7,900	19.59
Transportation and Storage	3,127	7.75
Accommodation and Food Service Activities	1,740	4.31
Information and Communication	397	0.98
Financial and Insurance Activities	506	1.26
Real Estate Activities	186	0.46
Professional, Scientific and Technical Activities	247	0.61
Administrative and Support Service Activities	1,475	3.66
Public Administration and Defense; Compulsory Social Security	2,408	5.97
Education	1,204	2.99
Human Health and Social Work Activities	484	1.20
Arts, Entertainment and Recreation	325	0.81
Other Service Activities (includes Activities of Households as Employers; Undifferentiated Goods and Services-producing Activities of Households for Own Use)	2,701	6.70
Activities of Extraterritorial Organizations and Bodies	2	0.00

Source: Philippine Statistics Authority (PSA), Labor Force Survey

Although the information and communication sector is typically associated with the large telecommunications companies, taken as a whole however, 9 out of every 10 establishments in the IC sector are actually micro establishments (employing less than 5 workers). As **Table 2**

shows, it has the highest share of micro establishments compared to any other major sector of the economy.

Table 2. Distribution of establishments by employment size (2017)

Sector		1-4	5-9	10-19	20-49	50-99	100-199	200 & Over
	Total num of establishments	Share in total of sector (%)						
PHILIPPINES	924,721	74.74	14.84	6.01	2.64	0.91	0.41	0.44
Agriculture, Forestry, and Fishing	9,209	47.77	25.89	11.60	8.54	3.13	1.40	1.68
Industrial Sector	124,052	68.83	17.00	6.43	3.84	1.78	1.01	1.11
Mining and Quarrying	930	40.54	29.68	9.57	11.18	3.55	2.04	3.44
Manufacturing	117,035	71.40	16.73	5.77	3.08	1.43	0.76	0.82
Electricity, Gas, Steam, and Air Conditioning Supply	1,234	18.80	15.88	21.88	20.58	7.78	7.94	7.13
Water Supply; Sewerage, Waste Management and Remediation Activities	1,466	25.58	24.83	21.49	15.76	7.16	3.34	1.84
Construction	3,387	24.68	19.87	16.18	16.71	8.83	5.85	7.88
Non-Industrial Sector	791,460	75.98	14.38	5.88	2.39	0.75	0.31	0.32
Wholesale and Retail Trade; Repair of Motor Vehicles and Motorcycles	424,061	79.94	13.31	4.50	1.55	0.42	0.18	0.10
Transportation and Storage	8,496	44.66	22.95	14.09	9.43	4.86	2.11	1.91
Accommodation and Food Service Activities	121,821	71.67	16.64	6.89	3.54	0.98	0.21	0.07
Information and Communication	35,730	91.07	4.14	1.90	1.58	0.62	0.30	0.38
Financial and Insurance Activities	41,143	57.11	26.65	11.80	3.15	0.68	0.29	0.32
Real Estate Activities	9,748	62.67	19.16	10.48	5.00	1.59	0.59	0.50
Professional, Scientific and Technical Activities	16,885	73.72	14.38	6.40	3.08	1.36	0.53	0.53
Administrative and Support Service Activities	16,194	61.60	15.49	7.56	4.54	2.71	2.14	5.95
Education	17,504	29.54	21.77	26.80	13.89	4.76	1.82	1.42
Human Health and Social Work Activities	27,422	83.37	8.61	3.81	2.02	0.96	0.56	0.67
Arts, Entertainment, and Recreation	14,956	76.20	15.18	6.27	1.58	0.38	0.18	0.21
Other Service Activities	57,500	82.24	12.94	3.99	0.71	0.08	0.02	0.02

Source: Philippine Statistics Authority, 2017 List of Establishments

The gross value added of the Information and Communication sector and its sub-industries cannot be determined from the current national accounts because GDP by industrial origin is still reported by the PSA using the old Philippine Standard Industrial Classification (PSIC) 1994, which captures IC activities under different sectors such as Manufacturing; Transport, Storage and Communications; Real estate, renting and business activities; and Other community, social and personal activities. The Annual Survey of Philippine Business and Industry however has already adopted PSIC 2009 and provides an estimate of the value added of the sector. Compared to the national accounts, the ASPBI does include public services. Moreover, unlike GDP estimates which are reported quarterly, the results of the ASPBI are released a few years later. As shown in **Table 3**, the value added from establishments in the IC sector make up 5% of total value added with labor productivity that is almost double that of national average.

Table 3. Economic indicators of the IC sector

Indicator	Philippines (all industries)	Information and Communication sector
Value Added (from Annual Survey of Philippine Business and Industry 2015)	4,560,030 (in million pesos) (100%)	227,682 (in million pesos) (5%)
Labor productivity or Value added per total employment (from Annual Survey of Philippine Business and Industry 2015)	780,635 pesos	1,533,145 pesos

Source: Philippine Statistics Authority

Although the IC sector as a whole enjoys a high labor productivity, there is great variability within the sector. See **Tables 4 and 5** for the value added per total employment arranged from highest to lowest, grouped according to the two components of the CORE ICT industries as defined in the PSA's SICT.

Table 4. Labor productivity in ICT Service Industries

RANK	SUB-CLASS (5 DIGIT)	PHP 1,000
1	Wired internet access service activities (e.g. dsl, leased line, dial-up)	26,432
2	Mobile telecommunications services	5,308
3	Wired (landline) services	4,615
4	Wireless internet access services (e.g. internet service provider, broadband)	2,423
5	Application hosting services	1,318
6	Other wired telecommunications activities	1,293
7	Satellite telecommunications activities	941
8	Computer consultancy and computer facilities management activities	869
9	Other telecommunications service activities, n.e.c.	835
10	Computer programming activities	809
11	Software publishing	756
12	Other information technology and computer service activities	701
13	Other wireless telecommunication services, n.e.c.	594
14	Repair of computers and peripheral equipment	433

15	Data processing	376
16	Repair of consumer electronics	249
17	Website hosting services	235
18	Internet access in facilities open to the public service activities	154
19	Repair of communications equipment	139

Not shown (Suppressed) - Wireless landline services, Telephone access in facilities open to the public service activities, Web portals

Source: Philippine Statistics Authority ASPBI 2015

Table 5. Labor Productivity in Content and Media industries (2015)

RANK	SUB-CLASS (5 DIGIT)	PHP (1,000)
1	Motion picture, video and television programme distribution activities	5,581
2	Other information service activities, n.e.c.	4,458
3	Television program production	3,496
4	News agency activities	2,584
5	Motion picture projection activities	1,933
6	Sound recording activities	1,742
7	Television broadcasting and relay stations and studios including closed circuit television services	1,507
8	Motion picture, video and television programme activities	1,016
9	Publishing of newspapers, journals and periodicals	599
10	Publishing of directories and mailing lists	539
11	Radio broadcasting and relay station and studios	466
12	Book publishing	438
13	Other publishing activities	407
14	Motion picture, video and television programme post-production activities	378
15	Publishing of music	327

Not shown (Suppressed): Radio program production

Source: Philippine Statistics Authority ASPBI 2015

2.3 Trade in ICT services

The WTO General Agreement on Trade in Services defines four modes of supply:

- Mode 1 or **cross border trade** is defined as the supply of a service from the territory of one Member to the territory of another Member.[1] It is analogous to goods traded and involves producing services in one country to be consumed in another;
- Mode 2 or **consumption abroad** is defined as the supply of a service in the territory of one WTO Member to the service consumer of another WTO Member.[2] It occurs when consumers travel across borders to consume services;
- Mode 3 or **commercial presence** is defined as the supply of service by a service supplier of one WTO Member, through commercial presence in the territory of any

[1] World Trade Organization (WTO) Trade in Services Agreement, Article I:2(a).
[2] Ibid., Article I:2(b).

other WTO Member.[3] It occurs when the producer of a service establishes a local presence in the country where the consumer is located; and

- Mode 4 or **temporary movement of labor** is defined as the supply of service by a service supplier of one WTO Member, through presence of natural persons of a WTO Member in the territory of any other Member.[4] It occurs when the producer travels across borders to provide a service. (Molinuevo and Saez 2014).

For Mode 4, traditional categories include (Stephenson and Hufbauer, 2010):

- *Business visitors and salespersons (BVs)* - These are foreign nationals who travel abroad for the purpose of negotiating a sale of a service or exploring the possibility FDI

- *Intracorporate transferees (ICTs)* - These are employees of a foreign provider of services (Mode 3)

- *Independent professionals (IPs).* These are self-employed persons who are supplying a service to a company or an individual in a host country.

- *Contractual services suppliers (CSSs*) - employees of a foreign provider that does not have a local presence. They are engaged under contract to provide a service to a local firm.

Examples of the four modes of supply in ICT services are provided in **Table 6**.

Table 6. Examples of different modes of trade for telecommunications sub-sectors

	Fixed line	Mobile	Internet
Mode 1: Cross border trade	Revenue from international calls or transmitted through the country		Revenues from interconnection with foreign networks or from services of signal treatment
Mode 2: Consumption abroad	Revenue from tourists and business travellers using the local network	Revenue from international roaming charges	Revenue from tourists and business travellers using local internet services
Mode 3: Commercial presence	Revenues from foreign branches, affiliates and joint ventures		
Move 4 Movement of people	Earnings by telecommunications professionals providing services abroad on a temporary basis		

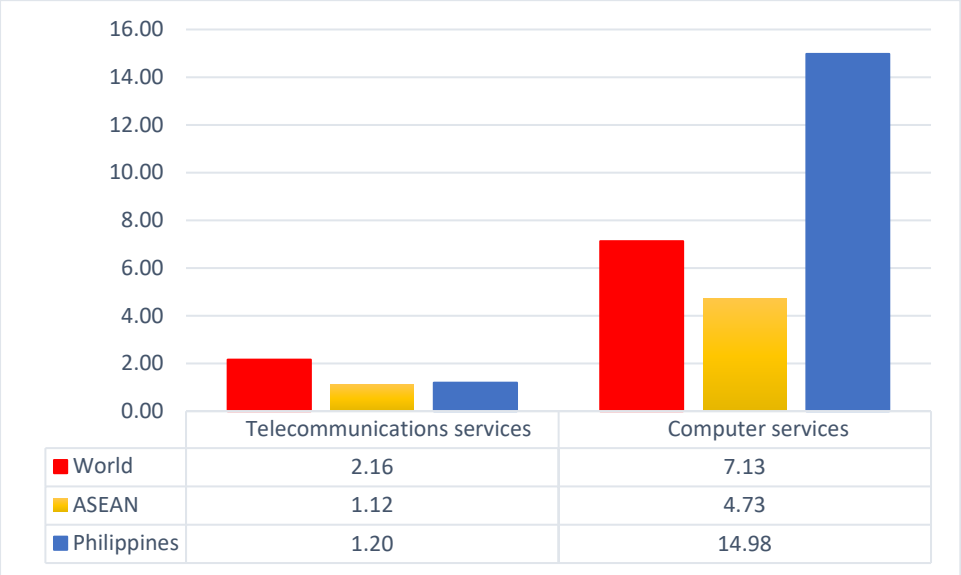
Source: Nordås, H. et al. (2014b, p. 8)

2.3.1 Cross-border trade

ICT services are those services that are used to facilitate information processing and communication. It includes telecommunications services, computer services, and charges for the use of intellectual property associated with computer software. For the Philippines, telecommunications and computer services represent 1.2% and 15%, respectively of total services exports[5]. See **Figure 2**.

[3] Ibid., Article I:2(c).
[4] Ibid., Article I:2(d).
[5] From the IMF BOP Manual: **Telecommunications services** – Covers the broadcast or transmission of sound, images, data, or other information by telephone, telex, telegram, radio and television cable transmission, radio and television satellite, electronic mail, facsimile, etc., and includes business network services, teleconferencing and support services. It does not include the value of the information transported. Also included are mobile telecommunications services, Internet backbone services and online access services, including the provision of access to the Internet. **Computer services** – Consist of hardware- and software-related computer services

Figure 2. Share in Total Services Exports (%), 2017

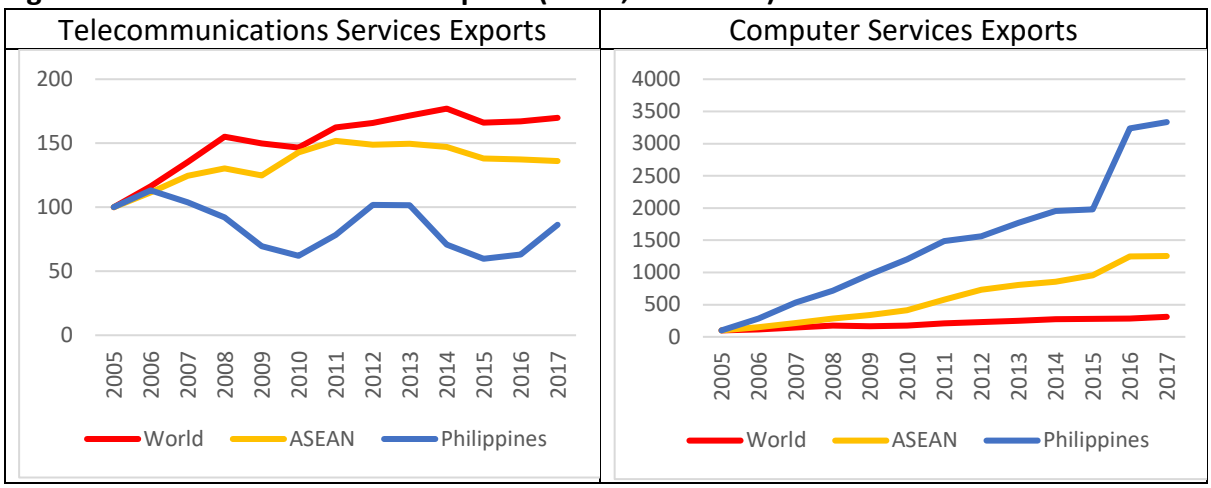


Note: World Telecommunications - estimate

Source: UNCTADSTAT https://unctad.org/en/Pages/statistics.aspx (accessed on November 22, 2018)

Between 2005 and 2017, Philippine exports of telecommunications declined by 13.6 percent while exports of computer services increased by 3,234%, significantly outpacing world and regional growth rates of 211% and 1,155%, respectively. See **Figure 3**.

Figure 3. Growth of ICT services exports (Index, 2005=100)



Note: World Telecommunications - estimate

Source: UNCTADSTAT https://unctad.org/en/Pages/statistics.aspx (accessed on November 22, 2018)

The performance of Philippine computer services is indeed impressive especially since the growth rate of cross-border trade in computer services has been among the highest of all services sectors (Nordas, et al. 2014a). For telecommunications, exports in the past were driven by the large Filipino community overseas and the imbalance in incoming and outgoing international calls. The need for long distance calls have diminished over time however, with the introduction of substitutes such as e-mails and VOIP applications.

The comparative advantage of the Philippines in computer services is shown in **Table 7**.[6]

Table 7. RCA index of the Philippines in computer services

YEAR	2011	2012	2013	2014	2015	2016	2017
Computer services	3.64	3.06	3.22	2.93	2.73	4.17	3.85

Source of data: UNCTADSTAT https://unctad.org/en/Pages/statistics.aspx (accessed on December 12, 2018)

In addition to computer services, the Philippines is also strong in Technical, trade-related, and other business services, particularly in Business Process Outsourcing (BPO) services. These are considered **ICT-enabled services (ITES)** which conceptually include "activities that can be specified, performed, delivered, evaluated and consumed electronically" (UNCTAD 2015, page 9). See **Table 8**.

Table 8. RCA index of the Philippines in ICT-enabled services

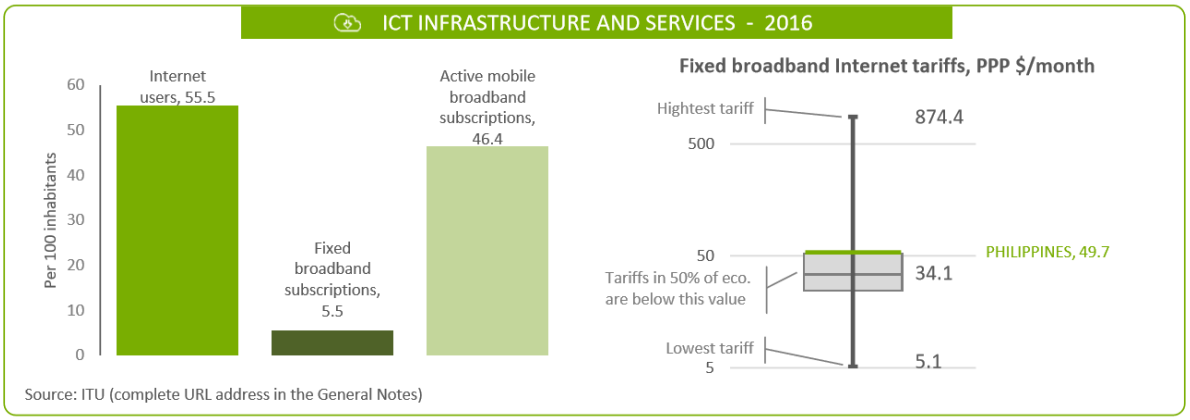
YEAR	2011	2012	2013	2014	2015	2016	2017
Technical, trade-related, and other business services	n.a.	7.72	8.57	7.67	9.22	7.67	7.75

Source of data: UNCTADSTAT https://unctad.org/en/Pages/statistics.aspx (accessed on December 12, 2018)

2.4 Investment in ICT

The comparative advantage of the Philippines in specific ICT and ICT-enabled services indicate that good quality ICT infrastructure and services are available that can support services exports. However, ICT connectivity is still a major concern for the country. As can be gleaned from **Figure 4**, ICT penetration is low, particularly for fixed broadband subscription which is enjoyed by only one out of every twenty Filipinos partly due to the price of fixed broadband internet which is above the world median. The speed of the internet connection has also been slow compared to other countries (Albert, et al. 2016). Encouraging foreign investment in ICT infrastructure and services (or Mode 3 supply), will contribute towards improving connectivity throughout the country.

Figure 4. Etrade readiness of the Philippines in terms of ICT infrastructure and services



Source: https://etradeforall.org/ (accessed on November 13, 2018)

According to UNCTAD (2017), three major reforms have emerged as important determinants for private investment in digital development:

[6] The RCA index, (Balassa Index), is the product's share in a country's exports divided by the product's share in world exports. An RCA value above one indicates a comparative advantage in the product.

- Privatization of the incumbent telecommunication operator,
- Opening of the sector to competition, and
- Establishment of an independent sector regulator.

Privatization not only provides the opportunity for investment, but it also indicates that the government will not favor the incumbent in policy or regulatory decisions. Opening the sector to more players signals the extent to which the sector will operate under market forces. Finally, establishing an independent regulatory agency further signals impartiality in decision-making. It also provides a measure of regulatory certainty regardless of changes in government. Collectively, these reforms send important signals to investors (UNCTAD 2017).

As discussed in Nordas, et al (2014b), while cross-border supply and commercial presence are the two most important channels of trade in telecommunications services, restrictions on commercial presence are the most prevalent. While liberalization is critical, it is not sufficient to attract investment in the sector. Telecommunications is characterized by a number of market imperfections that require regulation (i.e. lack of regulations can be a trade restriction). Thus, apart from market access, pro-competitive regulation is also important. The adoption of certain regulatory principles is therefore typically included in free trade agreements (FTAs). See **Table 9**.

Table 9. Market imperfections and trade enhancing regulatory responses

Market imperfection	Regulatory response
Network externalities or bandwagon access - Network effects arise because a network has a higher value to the individual the more people are linked to the network.	Universal service obligations Mandating interconnection Regulating the terms and condition of interconnection
Access to essential facilities - An essential facility is defined as a physical facility that is truly non-duplicable, owned by a monopoly and potential competitors cannot circumvent it.	Mandate the facility to be shared among rivals on reasonable conditions – Local loop unbundling (LLU) Regulating pricing and conditions of LLU
Switching cost - real or perceived costs that are incurred when changing supplier, but which are not incurred when remaining with the current supplier.	Number portability Number portability processes

Sources: Nordas, et al. (2014b); Faulhaber (2005) and Xavier and Ypsilanti (2008) as cited in Nordas, et al. (2014b)

In the case of Computer and related services, Nordas, et al. (2014a) note there are no particular market imperfections that require regulation. In this sector, cross-border supply dominates but usually in combination with commercial presence and the movement of natural persons, especially for higher value added computer services. While there are not a lot of barriers to trade, they note that the two most common impediments usually involve restrictions on the movement of people and the lack regulatory transparency (e.g. visa processing).

3. Legal and Institutional Regime for ICT Development

The ICT legal regime in the Philippines cover policies, laws, rules and regulations on ICT physical infrastructure, online transactions and the development of ICT policies to keep pace with technological developments, changes in business models and public need. ICT infrastructure is primarily provided by the telecommunications industry and is generally governed by laws, rules and regulations on telecommunications. Online commercial transactions are governed by laws on e-commerce and data privacy, while the further development of ICT policies is governed by laws creating institutions and mechanisms that provide the framework for the development of these policies.

3.1 Telecommunications

3.1.1 Regulatory Authority

The National Telecommunications Commission (NTC), created by Executive Order (Exec. Order) No. 546 (1979) is the agency authorized to regulate communications utilities and services, radio communications systems, wire or wireless telephone or telegraph systems, radio and television broadcasting system and other similar public utilities.[7] It was created pursuant to the then continuing authority of the President to reorganize the National Government under Presidential Decree No. 1416 (1978). NTC is also designated as the principal administrator of the Public Telecommunications Act (the "Telecoms Act"),[8] and mandated to implement its policies and objectives.

3.1.1.1 Organizational Structure

For purposes of policy and program coordination, NTC is attached to the Department of Information and Communications Technology ("DICT") under the Department of Information and Communication Technology Act of 2015[9] (the "DICTA").[10] Such policy and program coordination may be accomplished by requiring NTC comply with a system of periodic reporting reflecting the progress of its programs and projects and DICT providing general policies, which will serve as the framework for the internal policies of NTC.[11] As an attached agency to the DICT, NTC's general administration, support and operations is funded solely from the annual appropriations from Congress under DICT. This includes the operation of all its regional offices.[12]

NTC is composed of a Commissioner and two Deputy Commissioners, with one preferably a lawyer and another, an economist.[13] However, neither Exec. Order No. 546 or Rep. Act 7925 provide for their terms of office. They are thus holding office at the pleasure of the President. In addition, while NTC is authorized to determine its organizational structure and personnel, its determination is subject to the approval of the DICT.[14]

In terms of decision-making, in an Opinion dated January 11, 1984, the then Minister of Transportation and Communications declared that decisions of the NTC are not collegial in nature. He notes that the term "collegial" means "*marked by power or authority vested equally in each of a number or colleagues*." The two deputy commissioners of the NTC are considered

[7] Exec. Order No. 546, Section (15).
[8] Rep. Act 7925 (1995), otherwise known as the "*Public Telecommunications Policy Act of the Philippines*."
[9] Rep. Act No. 10844 (2015).
[10] *Ibid*., Section 15 (b)(1).
[11] Exec. Order No. 292, Section 38 (3)(a).
[12] *See* Republic Act 10964, Section XIV.D.
[13] Exec. Order 546, Section 16.
[14] *Ibid*., Section 16, 2nd par.

subordinate to the Commissioner, and thus not equal in authority to the Commissioner, to render collegial decisions.

NTC's decisions on quasi-judicial cases are appealable to the Court of Appeals under Rule 43 of the Revised Rules of Court.[15] Except for these cases,[16] any unresolved disagreement in the interpretation and application of telecommunications policies between the DICT Secretary and the NTC Commissioner shall be brought to the President for resolution and direction.[17]

3.1.1.2 Duties and Responsibilities

NTC is generally responsible for granting Certificates of Public Convenience and Necessity (CPCN) to franchise holders, regulation of the operations of CPCN grantees, allocating radio frequencies among telecommunications services providers, regulating the use of interconnection facilities, protect competition in the market and promote consumer welfare. In particular, it is responsible for the following:

a. Issuance of Certificates of Public Convenience and Necessity (CPCN) through a quasi-judicial process for the operation of communication utilities and services, radio communications systems, wire or wireless telephone or telegraph systems, and other similar public utilities;[18]

b. Regulate areas of operation of particular operators of telecommunications facilities, including adopting an administrative process that would facilitate the entry of qualified service providers, and adopt a pricing policy that would allow these operators to generate returns sufficient to cross-subsidize unserved and underserved areas at affordable rates to the public;[19]

c. Grant permits for the use of radio frequencies for wireless telephone and telegraph systems and radio communications systems including amateur radio stations and radio and television broadcasting systems;[20]

d. Sub-allocate series of frequencies of bands allocated by the International Telecommunications Union to the specific services;[21]

e. Establish and prescribe rules, regulations and standards, specifications in all cases related to the issued CPCN and administer and enforce the same;[22]

f. Supervise and inspect the operation of radio stations and telecommunications facilities;[23]

g. Undertake the examination and licensing of radio operators;[24]

h. Undertake the registration of radio transmitters and transceivers;[25]

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[15] Revised Rules of Court, Rule 43, Section 1.
[16] Exec, Order No. 546, Section 16, 3rd par; Rep. Act No. 7925, Section 6.
[17] Exec. Order No. 297, Section 38 (3)(b), in relation to Rep Act 10844, Section 15(b)(1).
[18] Exec. Order No. 546, Section 15 (a).
[19] *Ibid.*, Section 15(b); Rep. Act No. 7925, Section 5(a) and (c).
[20] *Ibid.*, Section 15(c).
[21] *Ibid.*, Section 15(d).
[22] *Ibid.*, Section 15(e).
[23] *Ibid.*, Section 15(h).
[24] *Ibid.*, Section 15(i).
[25] *Ibid.*, Section 15(j).

i. Ensure quality, safety, reliability, security, compatibility and inter-operability of telecommunications facilities and services in conformity with standards and specifications set by international radio and telecommunications organizations to which the Philippines is a signatory;

j. Mandate a fair and reasonable interconnection of facilities of authorized public network operators and other providers of telecommunications services through appropriate modalities of interconnection and at a reasonable and fair level of charges;

k. Foster fair and efficient market conduct through, but not limited to, the protection of telecommunications entities from unfair trade practices of other carriers;

l. Promote consumers welfare by facilitating access to telecommunications services whose infrastructure and network must be geared towards the needs of individual and business users;

m. Protect consumers against misuse of a telecommunications entity's monopoly or quasi-monopolistic powers by, but not limited to, the investigation of complaints and exacting compliance with service standards from such entity; and

n. In the exercise of its regulatory powers, continue to impose such fees and charges as may be necessary to cover reasonable costs and expenses for the regulation and supervision of the operations of telecommunications entities.[26]

For competition-related matters referred to in items (k) and (m) above, however, the Philippine Competition Act[27] grants original and primary jurisdiction to the Philippine Competition Commission (PCC). If the issue covers both competition and non-competition issues the PCC will consult the NTC and will be given a reasonable opportunity to submit its opinion and recommendation on the same before the PCC renders a decision.[28]

But for establishing telecommunications policy, research and development, and representation of the Philippines in international fora, NTC provides support to DICT. The DICTA provides that DICT, together with the NTC, is responsible for:

a. The development and maintenance of a long-term strategic national development plan for telecommunications to serve as a guide to the industry and potential investors as well as to the Commission;
b. the coordination of research and development activities in government with the work of other institutions in the field of telecommunications;
c. the representation and promotion of Philippine interests in international bodies, and the negotiation of the nation's rights and obligations in international telecommunications matters; and
d. the operation of a national consultative forum to facilitate interaction amongst the telecommunications industries, user groups, academic and research institutions in the airing and resolution of important issues in the field of communications.[29]

[26] Rep. Act No. 7925, Section 5(b) to (g).
[27] Rep. Act No. 10667 (2014).
[28] *Ibid.*, Section 32.
[29] Rep. Act No. 7925, Section 6, in relation to Rep. Act No.10844, Section 15(b)(1).

It is also notable that even while NTC is granted broad regulatory powers over the operations of telecommunications and broadcasting companies, its enabling laws do not require mandatory public consultations before the issuance of any regulatory decision. Mandatory public consultation is required only in relation to its quasi-judicial functions.

3.1.2 Competition Environment

In 1993, then President Ramos issued several executive issuances that effectively de-monopolized the telecommunications industry to promote universal access to basic telecommunications services. Exec. Order No. 59 (1993), otherwise known as, "*Prescribing the Policy Guidelines for Compulsory Interconnection of Authorized Public Telecommunications Carriers in Order to Create a Universally Accessible and Fully Integrated Nationwide Telecommunications Network and Thereby Encourage Private Sector Investment in Telecommunications*," made it mandatory for NTC authorized public telecommunications carriers to interconnect their respective facilities to enable the subscribers of one carrier or operator to access or reach the subscribers of the other carriers or operators.[30]

As a means of further promoting universal access to basic telecommunications services, Exec. Order No. 109 (1993), otherwise known as the "Policy to Improve the Provision of Local Exchange Carrier Service," adopted the following policies and rules: (a) promote healthy competition among telecommunications service providers by "democratizing" the ownership and operation of these entities; (b) international gateway operators, cellular mobile telephone system (CMTS) service providers, and other non-basic telecommunications service providers are required to cross-subsidize local exchange services across the country; and (c) non-discriminatory interconnection among telecommunications service networks.[31]

The Telecoms Act consolidated and expanded the state policy of de-monopolization and promotion of competition in the telecommunications industry. Its fundamental objective is to establish an efficient, reliable and universal telecommunication infrastructure using the best available and affordable technologies. To achieve this end, it reiterates the promotion of a healthy competitive environment driven by the private sector, where radio frequency spectrum is granted to the best qualified, and rates and tariff charges and interconnection of facilities are fair, and reasonable.[32]

As noted above, the Philippine Competition Act grants original and primary jurisdiction to the PCC over all competition matters on sectors regulated by other regulatory agencies, such as the NTC. If the issue covers both competition and non-competition issues the PCC will consult the NTC and will be given a reasonable opportunity to submit its opinion and recommendation on the same before the PCC renders a decision.[33]

The delineation of NTC and PCC functions, however, have not yet been clearly marked as they are still in the process of drafting and agreeing on a Memorandum of Agreement that will define the same.

[30] Exec. Order No. 59, Section 2.
[31] Exec. Order No. 109, 4th Whereas clause; and Sections 2, 3, 4, 7, 8 and 11.
[32] Rep. Act 7925, Section 4.
[33] Rep. Act No. 10667, Section 32.

3.1.3 Philippine Regulatory Authority Benchmarked Against Internationally Recognized Regulatory Best Practices

The growing importance of ICT in almost all areas of the economy and society, as well as the speed of innovation in ICT services has presented regulatory challenges to government regulators. At the same time, as noted from key informant interviews of the team, investment in innovative ICT products in the Philippine is also constrained by burdensome regulations.

The International Telecommunications Union (ITU) has tracked the growth of ICT and how government regulations adopt to the same since 2000. Through the years it developed regulatory best practice guidelines for ICT regulators. These guidelines were incorporated into the ICT Regulatory Tracker, which ITU uses to benchmark the ICT regulatory environment of surveyed economies.

The Regulatory Tracker measures a country's ICT regulatory environment against internationally recognized regulatory best practices adopted by global ICT regulators. It is divided into 4 Clusters, to wit: (a) Regulatory Authority; (b) Regulatory Mandate; (c) Regulatory Regime; and (d) Competition Framework). These Clusters have a combined 50 indicators each of which are given a score of 0 to 2.34 The Cluster indicators are outlined in **Appendix A.**

In a Discussion Paper entitled, "Rebooting Philippine Telecommunications Through Structural Reform," Ortiz, et al (2017), used data produced by the Telecommunication Bureau of the ITU to determine whether there is a relationship between the indicators developed by ITU for its ICT Regulatory Tracker and the extent of the fixed broadband subscription across countries through time. The ITU-UNESCO Broadband Commission for Sustainable Development considers fixed broadband services as necessary to achieving the Sustainable Development Goals.

Ortiz, et al (2017) noted that the Regulatory Authority Cluster, in particular, has a significant and positive impact on fixed broadband subscription. Every increase in the score of the Regulatory Authority sees an increase in fixed broadband subscription. Having established the above correlation, they benchmarked the Philippine ICT regulatory environment against the ICT Regulatory Tracker, which the ITU has also benchmarked in its 2017 ICT Regulatory Tracker. Based on PIDS' and ITU's assessments of the Philippine ICT regulatory environment, the Philippines' performance fared only nearly or at least half of the highest score in the Regulatory Tracker (**Table 10**). This means that the Philippines needs to improve the quality and performance of its Regulatory Authority to expand its fixed broadband subscription.

Table 10. Philippine Performance – ICT Regulatory Tracker 2017 and PIDS Assessment

Cluster	C1. Regulatory Authority	C2. Regulatory Mandate	C3. Regulatory Regime	C4. Competition Framework	Overall Score
Max Score:	20	22	30	28	100
2017 ITU ICT Tracker	9	8	10	14.67	41.67
PIDS Assessment	13	10.5	7	22	52.5

Source: ITU ICT Regulatory Tracker 2017, ITU website, https://www.itu.int/net4/itu-d/irt/#/tracker-by-country/regulatory-tracker/2017; Ortiz, et al (2017).

[34] ITU website; Available at: https://www.itu.int/net4/itu-d/irt/#/about-tracker. Accessed December 8, 2018.

Building on Ortiz, et al.'s analysis, we discuss below relevant indicators reviewed under the Regulatory Authority Cluster and how NTC measure up:

3.1.3.1 Separate telecom/ICT regulator

Among the indicators under the Regulatory Authority Cluster, the Philippines does not do well in terms of having a separate independent regulatory authority. The ITU describes the best practice as being independent in terms of finance, structure, and decision-making from the operator(s) and the sector Ministry). Separation from other governmental agencies/ministries and service providers is generally seen as a factor that enables decisions to be taken in an impartial, fair and transparent manner (Ortiz, et al, 2017).

Brown, et al (2006) notes the following as mechanisms for ensuring independence of the regulator:

1. Regulatory agencies should be created by law as such legal standing enhances its independence by precluding any legal interference.

2. Powers and characteristics that regulatory agency should possess:

    a. Decision-making by a board of commissioners (vs. a single regulator)
    b. Have a stable and reliable source of revenue for their operations
    c. Can offer competitive compensation packages and career opportunities including training and education
    d. Have the power to establish the administrative structure of the agency and make all relevant personnel decisions
    e. Have the authority to set rules and polices needed to carry out responsibilities
    f. Have the authority to promulgate a code of ethics applicable to its personnel and to those who conduct business at the agency
    g. Be able to retain the services of independent experts as needed and justified
    h. Participate in relevant professional, research, and educational groups, as well as regional and international cooperative regulatory organizations.

3. Regulatory agency commissioners or directors should be appointed to fixed terms of office and their terms of office should not coincide with the terms of governments and legislature.

As discussed in 3.1 above, as an attached agency to DICT, NTC is not wholly independent from interference from other government agencies and the President. It needs to coordinate its policies and programs with DICT and its policy interpretations may be questioned by DICT and overruled by the President. In relation to research and development activities, DICT has the primary function of coordinating the same with other institutions in the field of telecommunications, with NTC providing collaborative support.

NTC was also created by executive issuance pursuant to the reorganization powers of the President. Its Commissioners and Deputy Commissioners are not appointed for fixed terms, which means that they can be removed anytime at the discretion of the President. Decision-making is vested in the Commissioner alone and is not collegial in nature. It also does not have fiscal independence as it sources its funds from the DICT annual appropriations from Congress.

3.1.3.2 Percentage of diversified funding

As noted above, NTC's source of funding is solely from funds annually appropriated by Congress to DICT. Fees it collects from industry stakeholders as part of its regulatory functions are remitted to the National Treasury for general appropriation purposes.

3.1.3.3 Public consultations mandatory before making decisions

Except for its decisions in quasi-judicial cases, NTC is not required under either Exec. Order No. 546 or Rep. Act 7925 to conduct mandatory public consultations before issuing any regulations affecting its stakeholders. However, Executive Order No. 292 (1987), or *the Administrative Code of 1987*, provides that, unless the applicable law requires otherwise, an agency must publish or circulate notices of proposed rules and afford interested parties the opportunity to submit their views prior to the adoption of any rule. In the fixing of rates the Administrative Code also requires that, to be valid, the proposed rates must be published in a newspaper of general circulation at least two (2) weeks before the first hearing of the same. [35]

3.1.3.4 Sanctions or penalties imposed by the regulator

In addition, administrative sanctions it is authorized to impose under the Comm. Act 146 (1936), or *the Public Service Act*, for violations of its certificates, orders, decisions or regulations is quite low, i. e., PhP200.00 fine for every day the violation continues.[36] Actions arising from such violations also prescribe after 60 days.[37]

The administrative fine that NTC may impose for violation of its certificates, orders, decisions or regulations is not only too low. It is also barred from disciplining any violator after 60 days from the commission of such violation, regardless of whether it has come to the attention of NTC or not. This makes any disciplining authority granted to NTC practically toothless.

3.1.3.5 Existence of competition authority

While Philippine Competition Act grants original and primary jurisdiction to the PCC over all competition matters on sectors regulated by other regulatory agencies, the absence of Memorandum of Agreement or any government issuance delineating the competition and regulatory functions of PCC and NTC makes competition enforcement a challenge.

3.2 E-Commerce

Electronic commerce or e-commerce is governed by the Electronic Commerce Act of 2000 (the "E-Commerce Act").[38] The E-Commerce Act promotes the use of ICT in the government and the private sector. To this end, it seeks to:

- make diverse ICT products available and affordable to the public;
- promote the primary role of the private sector in contributing investments in ICT services;
- improve the ICT skills in the labor force;

[35] Exec. Order 292 (1987), Book VII, Chapter 2, Section 9 (1) and (2).
[36] Comm. Act 146, Section 21.
[37] *Ibid.*, Section 28.
[38] Rep. Act No. 8792 (2000)

- facilitate technology transfer;

- ensure network security, connectivity and neutrality of technology; and

- support the operation of national information infrastructure, including their interconnectivity to global information networks with the necessary and appropriate legal, financial, diplomatic, technical framework systems and facilities.[39]

Its basic objective is to facilitate public and private transactions, both domestic and international by recognizing the validity of electronic information and documents.[40]

The Department of Trade and Industry (DTI) is the department primarily tasked to direct and supervise the promotion and development of electronic commerce in the country in coordination with relevant government agencies.[41] For online payments involving banks, for example, DTI coordinates with the Bangko Sentral ng Pilipinas (BSP); for government online payments, in addition to BSP, it also coordinates with the Department of Finance (DOF), Department of Budget and Management (DBM), Commission on Audit (COA) and Bureau of Treasury (BTr); for matters relating to data privacy, it coordinates with the National Privacy Commission (NPC); for cyber-security and cyber-crime, it coordinates with the Department of Information and Communications Technology (DICT) and the Department of Justice (DOJ); and for matters involving competition, it coordinates with the Philippine Competition Commission (PCC).

3.3 Development of ICT Policies

While the policy objectives of the E-Commerce Act are geared towards the promotion of the use of ICT by encouraging private sector investments to facilitate private and government transactions, its institutional framework and structure is insufficient to accomplish its objectives. For one, a significant part of its provisions involves the legal recognition of electronic information and documents, mechanisms to authenticate these information and documents, such as electronic signatures, and transactional matters.

As noted in 3.2 above, its institutional framework relies on *ad hoc* coordination among responsible government agencies, led by the DTI. The DICTA[42] seeks to fill this gap by consolidating the responsibility for all ICT matters in one department, the DICT.

The DICTA seeks to, among others:

- ensure the provision of a strategic, reliable, and cost-efficient ICT infrastructure, systems and resources;

- ensure universal access to quality, affordable, reliable and secure ICT services;

- promote the development and widespread use of emerging ICT and accelerate the convergence of ICT and ICT-enabled facilities;

- foster an ICT sector policy environment that will promote a broad market-led development of the ICT and ICT-enabled services (ICT-ES) sectors, a level playing

[39] *Ibid.*, Section 2.
[40] *Ibid.*, Section 3, and Chapters II and III.
[41] *Ibid.*, Section 29.
[42] Rep. Act No. 10844 (2015).

field, partnership between the public and private sectors, strategic alliance with foreign investors and balanced investments between high-growth and economically-depressed areas;

- promote and assist the development of local ICT content, applications and services, including support for ICT-based start-up enterprises;

- ensure the rights of individuals to privacy and confidentiality to their personal information;

- ensure the security of critical ICT infrastructure including information assets of the government, individuals and businesses; and

- provide oversight over agencies governing and regulating the ICT sector and ensure consumer protection and welfare, data privacy and security and foster competition and the growth of the ICT sector.[43]

Under the DICTA, DICT is authorized to implement its policy objectives, which includes to:

- develop policy and plans for the promotion of the development and use of ICT technologies taking into consideration the advantages of convergence and emerging technologies, including promoting ICT education and training;

- improve public access to ICT; and

- sharing of government resources and capacity building of government personnel; and

- promote consumer protection and trade and investment opportunities in ICT and ICT-ES sectors, in coordination with relevant agencies.[44]

In consolidating all ICT-related activities in a single department, the DICTA transferred agencies and personnel of the Information and Communications Technology Office (ICTO); National Computer Center (NCC); National Computer Institute (NCI); Telecommunications Office (TELOF); National Telecommunications Training Institute (NTTI); and all operating units of the then Department of Transportation and Communications (DOTC) (renamed "Department of Transportation) with functions and responsibilities dealing with communications,[45] including the Postal Regulation Division.

The following agencies are also attached to the DICT for policy and program coordination: National Telecommunications Commission (NTC); National Privacy Commission (NPC); Cybercrime Investigation and Coordination Center (CICC); and all powers and function related to cybersecurity.[46]

It is notable, as well, that given the highly technical nature of the work of the DICT, the DICTA requires that its top management, i. e., the Department Secretary, Undersecretaries and Assistant Secretaries must have, among others, at least 7 years of competence and expertise in any of the following: ICT, information technology service management, information security

[43] *Ibid.*, Section 2.
[44] *Ibid.*, Section 6.
[45] *Ibid.*, Section 15(a).
[46] *Ibid.*, Section 15(b).

management, cybersecurity, data privacy, e-commerce, or human capital development in the ICT sector.[47]

3.4 DTI and DICT Functions

DTI, under the E-Commerce Act, is mandated to direct and supervise the promotion of electronic commerce in the Philippines. DICT, on the other hand, is authorized to provide policy direction in the promotion of the development and use of ICT. A closer look at the E-Commerce Act and the DICTA though indicate an overlap between the functions of DTI and DICT in relation to ICT development.

The policy objectives of the law each of these Departments are tasked to implement indicate a convergence, particularly in the areas of consumer protection, promotion of trade and investments from the private sector, improvement of the ICT skills of the labor force through education and training, network security and connectivity. It is not clear where the functions of DTI as the promoter of e-commerce ends and those of DICT as a promoter of the use of ICT in government and private transactions begins.

[47] *Ibid.*, Section 11.

4. Regulatory Considerations Affecting Services Trade and Investment in ICT

4.1 Establishment and Operation of Telecommunications Service Providers, including Broadcasting

As discussed above, the telecommunications industry in the Philippines is governed primarily by the Telecoms Act. The Telecoms Act applies to the following categories of telecommunications entities:

- **Local exchange operator,** which refers to an entity providing transmission and switching of telecommunications services, primarily but not limited to voice-to-voice service, in a geographic area anywhere in the Philippines.[48]

- **Inter-exchange Carrier,** which refers to an entity, sometimes referred to as carrier's carrier or national backbone network operator, authorized to install, own and operate facilities which connect local exchanges within the Philippines and to engage in the business of inter-exchange national long distance services.[49]

- **International Carrier,** which refers to an entity primarily engaged in the business of providing transmission and switching of any telecommunications service between the Philippines and any other point of the world to which it has an existing correspondent or prospective interconnection agreements.[50]

- **Value-Added Service (VAS) Provider**, which refers to an entity that, relying on the transmission, switching and local distribution facilities of the local exchange and inter-exchange operators, and overseas carriers, offers enhanced services beyond those ordinarily provided for by such carriers.[51] Voice over Internet Protocol (VoIP) services that uses internet protocol (IP) technology, instead of the traditional circuit switched technology for the delivery of voice communications and multimedia sessions are considered VAS under NTC regulations.[52]

- **Mobile Radio Services Provider,** which owns and operates a mobile radio telephone system with its own switch, base stations and transmission facilities capable of providing high capacity mobile telecommunications by utilizing radio frequencies.[53]

- **Radio Paging Services Provider**.[54]

To engage in the above activities, a telecommunications service provider needs to comply with nationality requirements imposed by the Constitution and applicable laws. In particular, it is required to go through at least a two-step process to secure its authority to operate as a telecommunications service provider. It is also generally required to secure licenses to build its physical infrastructure, as well as, permits to perform the activities covered by these

[48] Rep. Act No. 7925, Section 3 (e).
[49] *Ibid.*, Section 3 (f).
[50] *Ibid.*, Section 3 (g).
[51] *Ibid.*, Section 3 (h).
[52] NTC Memorandum Circular No. 05-08-2005 (Voice Over Internet Protocol)
[53] Rep. Act No. 7925, Section 3 (j).
[54] *Ibid.*, Section 13.

licenses. In addition, the telecommunications provider will also require approvals of local government units where telecommunications facilities will be built.

These requirements are discussed in greater detail below.

4.1.1 Ownership Requirements for Entry

The Telecoms Act specifically provides that "*public telecommunications services shall be provided by private enterprises*."[55] This is consistent with the State policy enshrined in the Constitution of encouraging private enterprises, including corporations, cooperatives, and similar collective organizations, to broaden their base of ownership.[56] In addition, in promoting the growth and development of the telecommunications industry through the private sector, the Telecoms Act seeks to foster a healthy competitive environment.[57] For local exchange services, in particular, Exec. Order No. 109 (1993) adopted a general policy of democratization in the ownership and operation of telecommunication facilities and services.[58] Thus, as a matter of state policy, participation of private enterprise in the industry is encouraged, competition is encouraged, while monopolies are discouraged.

Note, however, that despite the above policy, foreign ownership in the telecommunications industry is limited. Art. XII, Section 11 of the Constitution provides that any franchise, certificate or other form of authorization to operate a public utility shall be granted only to Philippine citizens or to corporations at least 60% of whose **capital** is owned by Philippine citizens. The Supreme Court has defined "public utility" as "*a business or service engaged in regularly supplying the public with some commodity or service of consequences, such as electricity, gas, water, transportation,* ***telephone or telegraph service***."[59]

In addition, under Art. XVI, Section 11(1) of the Constitution, the ownership of mass media companies engaging in broadcasting services is limited to Filipino citizens, or corporations, cooperatives or associations wholly-owned and managed by Filipino citizens.

4.1.1.1 Judicial Interpretation of Nationality Requirement under the Constitution

In the case of *Gamboa v. Teves*,[60] the Supreme Court ruled that the term "capital" in the Constitution refers to controlling interest or shares entitled to vote the board of directors of a corporation. The Court read Section 11 with Section 19, Article II of the Constitution, which enunciates the State policy to develop a self-reliant and independent economy effectively controlled by Filipinos.[61] In this context, the term "capital" in Section 11, Article XII of the Constitution means that "full beneficial ownership of 60 percent of the outstanding capital stock, coupled with 60 percent of the voting rights, is constitutionally required for the State's grant of authority to operate a public utility."

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[55] *Ibid.*, Section 4(e).
[56] Const., Art. XII, Section 1.
[57] Rep. Act No. 7925, Section 4(f).
[58] Exec. Order No. 109, Section 3.
[59] *JG Summit Holdings, Inc. v. Court of Appeals,* G. R. No. 124293, September 24, 2003; *National Power Corporation v. Court of Appeals*, G. R. No. 112707, September 26, 1997, *PHIVIDEC Industrial Authority v. Court of Appeals,* G. R. No. 113613, September 26, 1997. The Supreme Court further stated in JG Summit Holdings that "*the term public utility implies* ***public use*** *and* ***service to the public****. The principal* ***determinative characteristic*** *of a public utility is that of service to, or readiness to serve, an indefinite public or portion of the public as such which has a legal right to demand and receive its services or commodities. Stated otherwise, the owner or person in control of a public utility must have devoted it to such use that the public generally or that part of the public which has been served and has accepted the service, has the right to demand that use or service so long as it is continued, with reasonable efficiency and under proper charges*."
[60] *Gamboa v. Teves et al.*, G.R. No. 176759, 28 June 2011.
[61] Const., Article II, Section 19.

In implementing the *Gamboa* decision to all nationalized industries, SEC Memorandum Circular No. 8, series of 2013, required that "the required percentage of Filipino ownership shall be applied to both (a) the total number of shares of stock entitled to vote in the election of directors; and (b) the total number of shares of stock, whether or not entitled to vote in the election of directors."[62] That is, both the Voting Control Test and the Beneficial Ownership Test must be applied to determine whether a corporation is a "Philippine national." This means, that 60% of the common shares (entitled to vote the board of directors), and 60% of all outstanding common and preferred shares must by maintained to meet the nationality requirement for public utility corporations and other nationalized industries.

Because of the rule above, foreign service providers, i. e., foreign corporations intending to do business in the Philippines are not allowed to enter the telecommunications industry. They cannot even enter through a subsidiary in the Philippines, as their allowed ownership interest is only up to 40% of the total outstanding capital stock of a Philippine telecommunications company.

Note that under various Philippine statutes and regulations, a subsidiary or a majority-owned subsidiary is generally a corporation 50% or more than 50% of the voting stock of which is owned or controlled directly or indirectly through one or more intermediaries by another corporation, which thereby becomes its parent corporation.[63] It is established and registered to do business in the Philippines under Philippine corporation laws. Such subsidiary, even if owned by a foreign entity, is considered a domestic corporation.

The rule on foreign ownership applies to all categories of telecommunications services providers enumerated above.

4.1.1.2 Treatment of Internet Business

While the 11th Foreign Investment Negative List (FINL) issued on October 29, 2018 listed ownership in mass media as requiring 100% Filipino ownership under the Philippine Constitution, it expressly exempted from its application internet business as interpreted by DOJ Opinion No. 40, s. 1998. DOJ Opinion 40 referred to "*internet business*" as providing internet access by offering the "*owner of a computer the services of interconnecting the latter's computer to a network of computers thereby giving him access to the services offered by the internet*. This essentially covers internet service/access providers.

In SEC-OGC Opinion No. 18-21, dated November 28, 2018, the SEC clarified that DOJ Opinion 40 does not apply to services provided through the internet falling under the definition of "mass media" or "advertising activities," which is also subject to a foreign ownership limitation of 30% under the Constitution.[64] It reiterated its earlier opinions that online activities falling under the legal and regulatory definitions of mass media and advertising will continue to be considered as such and subject to all the limitations imposed by law and the Constitution.

[62] SEC Memorandum Circular No. 8, series of 2013, Section 2.
[63] Investment Company Act, Republic Act No. 2629 of 1960, Section 3(s), for publicly listed corporations; Revenue Regulations No. 17-10 (Consolidated Regulations Implementing Republic Act No. 7646, An Act Authorizing the Commissioner of Internal Revenue to Prescribe the Place for Payment of Internal Revenue Taxes by Large Taxpayers and Prescribing the Coverage and Criteria for Determining Large Taxpayers), Section 3.10, for tax purposes; Pres. Decree No. 2029 (1986), Defining Government-Owned or Controlled Corporations and Identifying their Role in National Development, Section 2, for government-owned and controlled corporations.
[64] Constitution, Art. XVI, Section 11(2).

For clarity, the SEC provided guidelines on when an online or mobile app platform operator is not deemed engaged in "mass media" and "advertising activities," as follows:

Table 11. Online Activities Not Deemed Mass Media or Advertising

No.	Mass Media	No.	Advertising Activities
1	There is no pervasive or indiscriminate display to the general public of any promotional materials or advertisements on the products or services being offered by the third-party clients or even the platform or mobile app itself.	1	It does not write or prepare commercial messages or materials for the products of their third-party clients to be posted in their platform.
2	Only the following information may be made available in the app, website or platform:	2	It does not select for or advise their third-party clients what medium or vehicle to use to disseminate the advertising materials and commercial messages.
	Enumeration of the services offered by the platform itself;		
	Instruction on how to use the said platform;		
	Enumeration of third-party partner, and this shall only be limited to the listing of the name or logo of the third-party client;		
	Any other information on the platform required to be disclosed by any law or regulatory measures		
3	The disclosure of the products and services offered by its third-party clients is only for the purpose of completing the transaction enabled by the app, website or platform.		

Source: SEC-OGC Opinion No. 18-21, dated November 28, 2018.

3.1.1.1.1. Mass Media

It should be noted though that the term "mass media" is not clearly defined under the Constitution. Its definition was drawn from DOJ (formerly Ministry of Justice) Opinions, certain Rules and Regulations on Mass Media, SEC Opinions and statutory definitions. A survey of these definitions indicate that mass media activities primarily entail the use of any medium of communication designed to disseminate information to the public and to reach and influence a large number of people. The Tobacco Regulation Act of 2003 expressly includes the internet as such medium of communication.[65]

[65] MOJ (now DOJ) Opinion No. 163, s. 1973 defines "mass media" as "*any medium of communication, a newspaper, radio, motion pictures, television, **designed to reach the masses** and that tends to set standards, ideals and aims of the masses*;" MOJ (now DOJ) Opinion No. 120, s. 1982 notes that the most "*distinctive features of any mass media undertaking is the **dissemination of information and ideas to the public**, or a portion thereof*;" A previous Rules and Regulations for Mass Media adopted by the Media Advisory Council states that mass media "*embraces means of communication that **reach and influence large numbers of people** including print media (especially newspapers, periodicals and popular magazines) radio, television, and movies, and involved the gathering, transmission and distribution of news, information, messages, signals and all forms of written, oral and visual communications*;" The Consumer Act defines mass media as "*any means or methods used to **convey advertising messages to the public** such as television, radio, magazines, cinema, billboards, posters, streamers, hand bills, leaflets, nails and the like*;" The Tobacco Regulation Act of 2003 refers to mass media as "*any medium of communication **designed to reach a mass of people***." It "*includes print media such as, but not limited to, newspapers, magazines, and publications; broadcast*

The SEC cited these definitions in a number of Opinions.[66] Based on the definitions, the SEC opined that entities providing the following online services are considered **disseminating information to the public,** and thus engaged in mass media:

- Providing an online platform for clients to create and design their customized branding environment;[67]
- Leasing and subleasing digital space to post advertisements;[68]
- Leasing out or subleasing advertising spaces, such as electronic LED displays;[69]
- Sale of vouchers or gift certificates online;[70]
- Operation of a voucher platform on the internet intended to increase the sales of a particular product or service;[71]

In its *en banc* Decision in *In Re: Rappler, Inc. and Rappler Holdings Corporation*,[72] following the Tobacco Regulation Act definition, which includes electronic media as part of the definition of mass media, the SEC interpreted this to mean that Congress intended to consider internet or online media as a type of mass media. The SEC notes in a 2018 Opinion that the basis for the 100% Filipino ownership requirement for mass media is to "*prevent the use of such facility by aliens to influence public opinion to the detriment of the best interests of the nation*."[73]

3.1.1.2.2 Advertising

Similar to mass media, the term "advertising" is not defined in the Constitution. The Consumer Act defines advertising as "*the business of conceptualizing, presenting, or making available to the public through any form of mass media, fact, data or information about the attributes, features, quality or availability of consumer products, services or credit*."[74] SEC Opinion No. 12-16 notes that advertising does not involve the dissemination of advertising materials. As long as advertising agencies do not operate or control any medium of communication designed to reach or influence the masses, it will not be considered engaged in mass media. In this case, it will be subject to the 30% foreign ownership limitation under the Constitution.

4.1.2 Other Requirements for Entry

In addition to securing its basic registration with the Securities and Exchange Commission (SEC) and complying with the nationality requirements imposed by the Constitution, a telecommunications service provider falling under the categories enumerated above, except Value Added Service (VAS) providers, will need to secure a legislative franchise from Congress and a Certificate of Public Convenience and Necessity (CPCN) from the National

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media such as, but not limited to radio, television, cable television, and cinema; ***electronic media such as but not limited to the internet.***"

[66] *See* SEC-OGC Opinion No. 18-21, 28 November 2018; SEC-OGC Opinion No.16-21, 31 August 2016; SEC-OGC Opinion No. 16-17, 11 July 2016; SEC Opinion No. 12-16, 13 September 2012.

[67] SEC-OGC Opinion No. 17-07, 24 July 2017.

[68] SEC-OGC Opinion No. 16-21, 31 August 2016.

[69] SEC-OGC Opinion No. 16-17, 11 July 2016.

[70] SEC-OGC Opinion No. 15-10, 02 September 2015.

[71] SEC-OGC Opinion No. 12-16, 13 September 2012.

[72] SP Case No. 08-17-001, 11 January 2018.

[73] SEC-OGC Opinion No. 18-21, November 28, 2018, *citing* Quisumbing-Fernando, Constitutional Law, 1984 ed., p. 345.

[74] Rep. Act No. 7394 (1992), Section 4(b).

Telecommunications Commission (NTC),[75] before it can engage in the telecommunications business. VAS providers, however are only required to register with the NTC and get prior approval to operate as such.[76]

Also, certain activities covered by a telecommunications franchise and license are subject to permit requirements from the NTC.

4.1.2.1 Legislative Franchise

In securing a legislative franchise, an applicant needs to find a Member of Congress who can sponsor a bill and usher it through the legislative mill to become law. Thus, the process of securing such franchise is similar to the passage of any ordinary law, as generally outlined below.

- *First,* the sponsoring legislator will draft a bill and submit the same to the Bills and Index Service where it is numbered and reproduced;

- *Second,* the reproduced bill is submitted to the plenary for First Reading, which consists of reading the title of the bill, and referral to the appropriate Congressional Committee. In the case of a bill for a legislative franchise, the bill will be referred to the Committee on Legislative Franchise if filed in the House of Representatives, or to the Committee on Public Services, if filed in the Senate;

In the House Committee on Legislative Franchise, the franchise applicant is also required to submit certain documentary requirements supporting the bill. This include information and documents showing the applicant's basic company registrations,[77] ownership, tax compliance, the company profile, market feasibility study, audited financial statements, if not a new company, proof bank cash balance, and program or undertaking for dispersal of ownership. A list of these requirements (for new applications and renewal of the same) from the House Committee on Legislative Franchises is attached as **Appendix B.**

- *Third*, the relevant Committee will consider the submitted bill. Where necessary, the Committee will conduct public consultations. The bill will then undergo Committee review and may also be substantially revised based on the result of the public consultations and discussions of the Committee members;

- *Fourth*, after the bill is revised and finalized at the Committee level, the Committee issues a Committee Report, with the revised draft of the bill;

- *Fifth*, the Committee Report and the revised bill is then submitted to the plenary for Second Reading before the Congressional body and for further deliberations. The Second Reading is the stage where the bill is sponsored and submitted for consideration of, and amendment by, the Congressional body;

[75] Rep. Act No. 7925, Section 16.
[76] *Ibid.*, Section 11; NTC Memorandum Circular No. 08-09-95, Rule 420.
[77] With the Securities and Exchange Commission (SEC), Department of Trade and Industry (DTI), National Electrification Administration (NEA), or Cooperative Development Authority (CDA), as the case may be.

- *Sixth,* after deliberations, the amendments from the floor are incorporated into the bill and approved by the Congressional body. It is then reproduced and presented to the same body for approval on Third Reading;

- *Seventh,* after approval of the bill on Third Reading the approved bill is then transmitted to the other body of Congress (Senate or House of Representatives, as the case may be) for concurrence, which will go through the same legislative process;

- *Eighth,* upon the concurrence of the other body of Congress, the bill will then be transmitted to the President for approval;

- *Ninth,* if the President has no objections to the bill, he approves the same by signing on the bill; and

- *Tenth,* upon the President's approval of the bill, the same becomes law and shall be transmitted to the House where the bill originated and to the Official Gazette for publication.[78]

Based on feedback from key informant interviews, the legislative process for the passage of a law granting a legislative franchise could take approximately 2 years. Note, however, that members of the House of Representatives have a term of 3 years[79] and 12 members of the Senate, while serving a term of 6 years are elected at 3-year intervals.[80] This means that members of Congress are elected every 3 years.

After every election, a new Congress is convened. As a result, all bills being considered at the time of an election are terminated upon the entry of such new Congress. These bills need to be re-filed, start from the first stage of the process and proceed through the process of first, second and third readings, as outlined above. Thus, if a bill for a legislative franchise is filed on the second year of the term of the members of Congress, there is a strong likelihood that it will not complete the legislative process until the next elections. Consequently, bills for legislative franchises could take up to 5 years before they become law. In the meantime, investments of the telecommunications service provider will be held up for at least that period.

4.1.2.2 Certificate of Public Convenience and Necessity (CPCN)

After the issuance of a legislative franchise from Congress, the telecommunications service provider will then secure a CPCN from NTC through a quasi-judicial process.[81] Such application may be opposed by affected parties, such as the existing authorized operator of the same service in the same service area being applied for, or those whose assigned frequencies will be affected. The Office of the Solicitor General, all Sangguniang Bayan/Panglungsod/Panlalawigan in the proposed service area and the concerned NTC Regional Office are also considered affected parties who may oppose the application.[82]

NTC issues a CPCN for a telecommunications service provider if the enfranchised applicant shows that: (a) it meets the nationality requirement discussed in 4.1.1 above; (b) it has the

[78] *See* Rules of House of Representatives, 16th Congress, as adopted by the 17th Congress, and Rules of the Senate; *See also* Legislative Information, House of Representatives website, available at http://www.congress.gov.ph/legisinfo/#FIRST, and Legislative Process, Senate of the Philippines website, available at https://www.senate.gov.ph/about/legpro.asp; *See also* Constitution, Article VI, Sections 26 to 27.
[79] Constitution, Article VI, Section 7.
[80] *Ibid.*, Article XVIII, Section 2.
[81] NTC Rules of Practice and Procedure, Rule 2, Section 1.
[82] *Ibid.*, Section 5.B.

financial capacity to undertake the proposed service and perform the responsibilities required for its operation; and (c) there is a public need for the service of the telecommunications service provider, or "*the operation of the service and the authorization to do business will promote the public interests in a proper and suitable manner*."[83]

Based on information gathered from key informant interviews, the hearing for an application for the issuance of CPCN's usually takes time. Thus, most often, NTC immediately issues provisional authority to operate to the applicant for a maximum period of 3 years, which may be extended. This allows the applicant to immediately start operations and prepare for its proposed roll-out plan.

Specific requirements for the issuance of a CPCN for each category of telecommunications service provider vary but are generally similar. In addition to the requirement of public need, international carriers are also required to: (a) provide local exchange services; and (b) demonstrably show technical and financial capability to install and operate an international gateway facility.[84] For cellular mobile telephone system (CMTS) operations in the Philippines, the availability of radio frequencies and the applicant's technical, financial and legal capabilities as determined by the NTC are required.[85]

CPCNs expire not less than 5 years but not longer than the life of the franchise. If the CPCN expires at the same time the applicable legislative franchise, it shall be deemed automatically renewed if the franchise is likewise renewed.[86] Otherwise, an application for renewal of the CPCN must be submitted to and processed by the NTC to secure such renewal.

4.1.2.3 Registration to Operate

As noted above, while most telecommunications services require legislative franchises from Congress and CPCN's from NTC, value added services require only registration and approval by NTC. Among the VAS for which the NTC issues registrations and approvals are Voice over Internet Protocol (VoIP). VoIP is "*an application that digitizes and transmits voice communications in packets via the Internet, enhances or improves upon traditional telephony that is conducted through circuit switched connections by allowing the convergence of voice with other data applications, and providing economic benefits in the form of greater efficiencies and lower costs*."[87]

Public telecommunications entities, such as local exchange and interchange operators and overseas carriers may offer VoIP services without further registrations, and use their existing networks. Network providers are required to provide equal access to VAS, such as VoIPs and, for those that are providing internet access to VAS providers and subscribers shall not impede such access unless it is shown that it threatens the integrity of their network or facilities.[88]

4.1.3 Regulatory Requirements to Operate

4.1.3.1 Licenses and Permits

Once a telecommunication service provider secures its legislative franchise and CPCN, in order to construct, install, establish, operate and maintain for commercial purposes its

[83] Kilusang Mayo Uno Labor Center v. Garcia, G. R. No. 115381, December 23, 1994; Comm. Act No. 146, as amended, Section 15.
[84] Rep Act No. 7925, Section 10.
[85] NTC Memorandum Circular No. 20-12-92, Section 3(d)
[86] Rep. Act No. 7925, Section 16.
[87] NTC Memorandum Circular No. 05-08-2005, 11th Whereas clause.
[88] *Ibid.*, Sections 5 and 6.

telecommunications facilities, it is also required to secure licenses and permits for these and related activities.

For example, a personal radio service provider is required to secure a Radio Station License before it can operate a personal radio station. It is also required to secure from the NTC a Permit to Purchase/Possess prior to the acquisition of the radio equipment for Personal Radio Service, as well as a Construction Permit prior to the construction and/or installation of a personal base radio station.[89]

There are no specific limitations on the number of licenses issued to applicants for the provision of telecommunications services, except for inter-exchange carriers. The number of entities allowed to provide inter-exchange national long-distance services may be limited by the NTC where it is more economically viable to maintain only at least 2 carriers.[90]

Licenses for telecommunications services requiring the use of radio frequency spectrum though are granted to the best qualified applicant that will be able to use the same efficiently and effectively to meet public demand and is capable of availing of new and cost-effective technologies.[91] Where demand for specific frequencies exceed availability, the NTC shall open tenders for, and ensure wider access to the same.[92]

4.2 Temporary Movement of Persons

For the supply of services under Mode 4, i.e., where services are supplied by natural persons by travelling from one State to the State where the service will be rendered, Philippine law and regulations impose certain restrictions and limitations. These natural persons may either be professionals or management or other skilled personnel and have their own set of entry restrictions and limitations.

Foreign nationals may be allowed to provide services in the Philippines either as consultants, or as employees in foreign funded projects or Philippine domestic companies or foreign companies authorized to do business in the Philippines. They may do so as professionals, or other skilled personnel. However, such provision of services is subject to the Constitutional policy of promoting the preferential use of Filipino labor,[93] and the sustained development of national talents through, among others, the limitation of the practice of profession to Filipino citizens, unless otherwise prescribed by law.[94]

In implementing such State policy, Philippine laws and regulations impose conditions for the provision of services of foreign nationals in the Philippines. These cover limitations in the practice of profession, employment and entry into the Philippines.

4.2.1 Professionals

As indicated above, in general, the practice of all professions in the Philippines is limited to Filipino citizens, **except in cases prescribed by law**.[95] A professional is defined under Philippine laws[96] as a person who is registered and licensed to practice a regulated profession

[89] NTC Memorandum Circular No. 11-21-88. "*Implementing Rules and Regulations Governing the Authorization, Installation, Operation, etc. of the Personal Radio Station Service in the Philippines*."
[90] Rep. Act No. 7925, Section 9.
[91] *Ibid.*, Section 4(c).
[92] NTC Memorandum Circular No. 03-03-96, Section 604.
[93] Constitution, Art. XII, Section 12.
[94] *Ibid.*, Section 14.
[95] Constitution, Art. XII, Section 14.
[96] Rep. Act No. 10912, otherwise known as the "*Continuing Professional Development Act of 2016*,"

in the Philippines and who holds a valid Certificate of Registration and Professional Identification Card (PIC) from the Professional Regulation Commission (PRC).[97] The practice of profession, on the other hand, is defined by PRC Resolution No. 2012-668 as "an activity/undertaking rendered by a registered and licensed professional or a holder of a Special Permit as defined in the scope of practice of a professional regulatory law."[98]

Thus, under Philippine law a professional is a natural person who, before he can provide professional services in the Philippines, is required to be registered with, and secure a license or permit from the PRC. But while the practice of profession is generally open to Filipinos, foreign professionals may be allowed to practice in the Philippines under the following circumstances:

i. Upon issuance of a **Certificate of Registration/License** and professional identification card upon recommendation of the Professional Regulatory Board (PRB) concerned and approval of the Professional Regulatory Commission (PRC), subject to certain conditions;[99] or

ii. Upon issuance of a **Special Temporary Permit** (STP) by the PRC to foreign professionals, under reciprocity or other international agreements; to consultants in foreign-funded joint venture or foreign-assisted government projects; to employees of Philippine or foreign private firms or institutions as provided by law; and to health professionals engaged in humanitarian mission for a **limited period of time**.[100]

iii. Former Filipino professionals who have acquired foreign citizenship but wish to practice their profession in the Philippines, may do so, after securing a **special permit** and updated professional identification card from the applicable PRB and approved by the PRC, and upon payment of the appropriate permit and annual registration fees.[101]

For professionals in the ICT sector, the following specific conditions apply:

4.2.1.1 Electronics Engineer

In the provision of ICT services, the technical aspects of the same are generally performed by professional electronics engineers, electronics engineers and technicians. These professionals are governed by Republic Act No. 9292 (2004), otherwise known as the "*Electronics Engineering Law of 2004*."

Electronics engineers are classified under the Electronics Engineering Law as electronics engineers, professional electronics engineers and electronics technicians. The scope of practice of electronics engineers consists of the application of engineering sciences and principles to various activities in the field of electronics, including ICT; the administration, management, supervision and regulatory aspects of these activities; and teaching and training activities on

[97] *Ibid.*, Section 3(t).
[98] Professional Regulation Commission (PRC) Resolution No. 2012-668, Section 1(b).
[99] The professional license may be issued by PRC under the following conditions: (a) the concerned Professional Regulatory Board (PRB) recommends to the Professional Regulatory Commission (PRC) the issuance of a certificate of registration/license and professional identification card to a foreign professional, with or without a qualifying examination; (b) the foreign national is a registered professional under the laws of his country of origin; (c) such registration has not been suspended or revoked; and (d) the licensing requirements of the country where the foreign national is registered are substantially the same as that required under Philippine laws, and in accordance with the rule of reciprocity. (Rep. Act 8981 (PRC Modernization Act of 2000), Section 7(j)).
[100] Republic Act No. 8981, Section 7(j).
[101] Presidential Decree No. 541 of Aug. 20, 1974, *Allowing Former Filipino Professionals to Practice Their Respective Professions in the Philippines,* Section 1; Republic Act No. 8981, Section 7(l).

electronic engineering fundamentals and related advanced knowledge in electronics engineering.[102]

Professional electronics engineers, in addition to performing the services above, have the sole authority to provide consulting services[103] and to sign and seal electronics plans, drawings, permit applications, specifications, reports and other technical documents prepared by himself/herself and/or under his direct supervision.[104]

Electronics technicians, on the other hand, perform non-engineering work relating to activities on any electronic components, devices, products, apparatus, instruments, equipment, systems, networks, operations and processes located on land, watercraft, aircraft, industrial plants or commercial establishments; and teaching and training activities in related subjects.[105]

3.1.1.1.2. Qualifications to Practice

To qualify to practice as an electronics engineer, a natural person must be a Filipino citizen or a foreign national of a country that admits Filipino citizens to practice as electronics engineer, professional electronics engineer or electronics technician within its jurisdiction.[106] Electronics engineers must take the requisite licensure examinations after obtaining the required bachelor degree.[107] Following the provisions of Rep. Act 9292, the 11th Foreign Investment Negative List (FINL) issued on October 29, 2018 lists the electronic engineering profession as among those professions allowing foreign professionals whose home country allows Filipinos to practice their profession in such country, to practice in the Philippines.[108]

Electronics technicians may take a licensure examination after graduating from the required vocational course or completing a minimum number of units of the required bachelor degree.[109] They may, however, opt not to take the licensure examinations if they graduated from the required vocational course and have been in practice for at least 7 years.[110]

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[102] Rep. Act 9292, Section 5(a). The scope of practice include "*any work or activity relating to **the application of engineering sciences and/or principles** to the investigation, analysis, synthesis, planning, design, specification, research and development, provision, procurement, marketing and sales, manufacture and production, construction and installation, tests/measurements/control, operation, repair, servicing, technical support and maintenance of electronic components, devices, products, apparatus, instruments, equipment, systems, networks, operations and processes in the fields of electronics, **including communications and/or telecommunications, information and communications technology (ICT), computers and their networking and hardware/firmware/software development and applications**, broadcast/broadcasting, cable and wireless television, consumer and industrial electronics, electro-optics/photonics/opto-electronics, electro-magnetics, avionics, aerospace, navigational and military applications, medical electronics, robotics, cybernetics, biometrics and all other related and convergent fields; it also includes the **administration, management, supervision and regulatory aspects of such works and activities**; similarly included are those **teaching and training activities** which develop the ability to use electronic engineering fundamentals and related advanced knowledge in electronics engineering, including lecturing and teaching of technical and professional subjects given in the electronics engineering and electronics technician curriculum and licensure examinations.*"

[103] Consulting services is defined by, Section 3(m), as including "*services requiring adequate technical expertise, experience and professional capability in undertaking advisory and review, pre-investment or feasibility studies, design, planning, construction, supervision, management and related services, and other technical studies or special studies in the field of electronics engineering.*"

[104] Rep. Act 9292, Section 5(b).

[105] *Ibid.*, Section 5(c). The scope of practice covers "*non-engineering work or activity relating to the installation, construction, operation, control, tests and measurements, diagnosis, repair and maintenance, manufacture and production, sales and marketing of any electronic component/s, device/s, products, apparatus, instruments, equipment, system/s, network/s, operations and processes located on land, watercraft, aircraft, industrial plants or commercial establishments, including the teaching and training of technical and professional subjects given in the electronics technician curriculum and licensure examinations.*"

[106] *Ibid.*, Sections 14(a) and 33.

[107] *Ibid.*, Section 14(b).

[108] Exec. Order No. 65 (2018), Promulgating the Eleventh Regular Foreign Investment Negative List, Annex on Professions.

[109] Rep. Act 9292, Section 14(c).

[110] *Ibid.*, Section 20.

Professional electronics engineers are licensed electronics engineers who, among others, are members of accredited professional organizations and have at least 7 years relevant experience, 2 years of which are in responsible charge of significant engineering work.[111]

Generally, the Electronics Engineering Law requires that Filipino electronics engineers are given preference over foreign professionals. Such foreign professionals may only be temporarily employed by the Philippine government or private firms without taking the licensure examination and registering with the PRC if:

(a) No qualified equivalent Filipino professional is available for the specific item of work to be rendered, as certified by Accredited Professional Organization;
(b) The employment is temporary in nature;
(c) in accordance with the Philippines' international trade commitments, such as under the WTO General Agreement on Trade In Services, ASEAN Mutual Recognition Agreements, and other international agreements to which the Philippines is a signatory, subject to certain conditions.[112]

3.1.1.1.3. ASEAN Chartered Professional Engineer

In addition to the above conditions for the practice of engineering profession by foreign nationals in the Philippines, the ASEAN Mutual Recognition Arrangement (MRA) on Engineering Services allows licensed engineers in ASEAN countries to practice in other ASEAN countries. Such engineers are designated as ASEAN Chartered Professional Engineers (ACPE), after compliance with the prescribed conditions in the MRA.[113]

But they may only practice their profession in ASEAN Member States, other than theirs, if they register in the Professional Regulatory Authority of the Host Country: PRC, in the case of the Philippines. Once registered, they can then practice as Registered Foreign Professional Engineers in the Philippines. However, they cannot engage in independent practice and must work in collaboration with professional engineers in the Philippines (if the Philippines is the Host Country).[114]

4.2.2 Management Personnel

With respect to the management of telecommunications service providers, Art. XII, Section 11 of the Constitution provides that foreign investors may be elected as Board of Directors of the

[111] *Ibid.*, Section 18.
[112] *Ibid.*, Section 26. The conditions referred to are as follows:
(1) The said foreign professional is legally qualified to practice his/her profession in his/her own country in which the requirements for licensing and registration are not lower than those specified in this Act;
(2) The work to be performed by said foreign professional shall be limited only to the particular work or project for which he/she was specifically contracted;
(3) Prior to commencing the work, the foreign professional shall secure a Special Permit from the Board, which shall be subject to the approval of the Commission; *Provided*, That no working visa and/or permit shall be issued by concerned government agencies unless such Special Permit has been granted first;
(4) The same foreign professional shall not engage in private practice on his/her own account;
(5) For every foreign professional contracted for the work or project, at least two (2) corresponding Filipino professionals who are registered under this Act shall be employed as counterparts by the Philippine Government or the private firm utilizing the services of such foreign professional for at least the same duration of time as the foreigner's tenure of work; and
(6) The Special Permit herein granted shall be valid only for a period of not more than six (6) months and renewable every six (6) months thereafter subject to the discretion of the Board and the approval of the Commission: *Provided*, That said permit shall cease to be valid if the foreigner terminates his/her employment in the work or project for which said permit was originally granted and thereafter engages in an occupation that requires another Special Permit or registration under this Act.
[113] ASEAN Mutual Recognition Arrangement on Engineering Services, Section 3.1.
[114] *Ibid.*, Section 3.3.

telecommunications company only up to the extent of their equity participation. However, all the executive and managing officers of such company must be Philippine citizens.

4.2.3 Other Requirements for Foreign Professionals and Other Skilled Personnel

For other skilled personnel, a foreign person employed as technical personnel in a wholly or partially nationalized industry, such as telecommunications, is also required to secure an Authority to Employ Alien from the Department of Justice (DOJ).[115]

In addition to the above requirements, foreign professionals and non-professionals who wish to seek gainful employment in the Philippines need to secure an **Alien Employment Permit** (AEP) from the Department of Labor and Employment (DOLE). Gainful employment is defined in DOLE Department Order No. 146-15, series of 2015 as "a state or condition that creates an **employer-employee relationship** between the Philippine based company and the foreign national where the former has the power to hire or dismiss the foreign national from employment, pays the salaries or wages thereof and has authority to control the performance or conduct of the tasks and duties."[116]

The AEP is required pursuant to the State policy of giving preference to Filipino labor, and is mandated by the Philippine Labor Code after a determination of the non-availability of a person in the Philippines who is competent, able and willing at the time of application to perform the services required from the foreign person.[117]

The AEP requirement does not, however, apply to the following:

i. Members of the governing board with voting rights only and do not intervene in the management of the corporation or in the day to day operation of the enterprise;

ii. Corporate officers of a corporation, such as President or Treasurer;

iii. Those providing consultancy services who do not have employers in the Philippines;

iv. Intra corporate transferee who is a manager,[118] executive[119] or specialist[120] and an employee of the foreign service supplier for at least one (1) year prior to deployment to a branch, subsidiary, affiliate or representative office in the Philippines;

v. Contractual service supplier who is a manager, executive or specialist and an employee of a foreign service supplier which has no commercial presence in the Philippines:

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[115] *The Anti-Dummy Law,* Commonwealth Act No. 108, as amended by Pres. Decree No. 715 (1975), Section 2-A; Anti-Dummy Ministry Order No. 210, December 1, 1980.
[116] Department of Labor Employment (DOLE), Department Order No. 146-15, Section 1.
[117] Presidential Decree No. 442 of May 1, 1974, *A Decree Instituting a Labor Code Thereby Revising and Consolidating Labor And Social Laws To Afford Protection To Labor, Promote Employment And Human Resources Development And Insure Industrial Peace Based On Social Justice*, Article 40.
[118] Defined as "a natural person within the organization who primarily directs the organization/department/subdivision and exercises supervisory control functions over other supervisory, managerial or professional staff; does not include first line supervisors unless employees supervised are professionals; does not include employees who primarily perform tasks necessary for the provision of the service." (DO 146-15, Section 3(d)(ii)).
[119] Defined as "a natural person within the organization who primarily directs the management of the organization and exercises wide latitude in decision making and receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the business; an executive would not directly perform tasks related to the actual provision of the service or services of the organization." (DO 146-15, Section 3(d)(i)).
[120] Defined as "a natural person within the organization who possesses knowledge at an advanced level of expertise essential to the establishment/provision of the service and/or possesses proprietary knowledge of the organisation's service, research equipment, techniques or management; may include, but is not limited to, members of a licensed profession." (DO 146-15, Section 3(d)(iii)).

a. who enters the Philippines temporarily to supply a service pursuant to a contract between his/her employer and a service consumer in the Philippines;

b. must possess the appropriate educational and professional qualifications; and

c. must be employed by the foreign service supplier for at least one year prior to the supply of service in the Philippines.[121]

The following foreign persons are also exempted from the coverage of the AEP requirement:

i. All members of the diplomatic service and foreign government officials accredited by and with reciprocity arrangement with the Philippine government;

ii. Officers and staff of international organizations of which the Philippine government is a member, and their legitimate spouses desiring to work in the Philippines;

iii. All foreign nationals granted exemption by law;

iv. Owners and representatives of foreign principals of POEA-accredited companies who come to the Philippines for a limited period and solely to interview Filipino applicants for employment abroad;

v. Foreign nationals who come to the Philippines to teach, present and/or conduct research studies in universities and colleges as visiting, exchange or adjunct professors under formal agreements between the universities or colleges in the Philippines and foreign universities or colleges; or between the Philippine government and foreign government. Such exemption must be on a reciprocal basis;

vi. Quota immigrants as defined in the Philippine Immigration Act of 1940.[122]

Based on the above, foreign nationals employed by domestic enterprises, whether as professionals or otherwise are generally required to secure AEPs before they can be employed and perform services in the Philippines. Executive officers and specialists of these entities are, however, not considered employees subject to the AEP requirement.

The rule does not generally apply to individual consultants independently providing services in the Philippines, or employees of foreign service providers not doing business in the Philippines and temporarily providing services in the country as part of a contract between the foreign service provider and a Philippine service consumer.

3.1.2. Visa Requirements

Other than the limitations on the practice of profession, labor market test and reciprocity requirements imposed under the laws and agreements discussed above, Philippine laws also imposes conditions on the entry of foreign nationals into the Philippines for employment or engage in services trade.

Foreign nationals entering the country on a pre-arranged employment is required to secure a Working Visa under Section 9(g) of the Philippine Immigration Act of 1940. To eliminate the duplication of requirements for the issuance of work permits to foreigners, the DOLE and

[121] DOLE, Department Order No. 146-15, Section 3.
[122] *Ibid*., Section 2.

Bureau of Immigration (BI) agreed not to require AEPs from foreign nationals who will work in the Philippines for a period not exceeding 6 months. Instead, the BI shall issue Special Work Permits (SWP) to these foreign nationals. The application for AEP shall serve as Provisional Permit to Work (PPW) while the AEP is being processed for foreign nationals intending to work in the Philippines for more than 6 months but not more than 1 year.[123] If the foreign national continues to work in the Philippines for more than 6 months, he will be required to secure both an AEP from DOLE and a Working Visa (9(g) visa) from the BI.

Based on the survey of applicable laws above, it is clear that Philippine laws impose a significant amount of barriers to the entry of foreign nationals intending to engage in the practice of the engineering profession and/or provide ICT or ICT-related services in the Philippines. To illustrate an extreme example, a foreign professional temporarily employed as an electronics engineer in a telecommunications company will need to secure a STP from the PRC, an Authority to Employ Alien from the DOJ, an AEP from DOLE and a Working Visa (whether SWP, PPW, or a full Working Visa) from the BI to be able legitimately perform services in the Philippines. If these are ASEAN Chartered Professional Engineers, they will need to work in collaboration with Philippine professional electronics engineers to practice their profession. These barriers affect not only Mode 4, but also Mode 3, as it limits the ability of domestic corporations or foreign corporations registered to do business in the Philippines to employ foreign professionals they may deem qualified to perform the services required by Philippine customers.

4.3 Government Procurement

The recent passage of Rep. Act No. 11032, otherwise known as the "*Ease of Doing Business and Efficient Government Service Delivery Act of 2018*," (the EODB Law) will increase the demand for government ICT infrastructure and facilities. The Act requires all government offices, including local government units (LGUs), government-owned and controlled corporations, and other government instrumentalities to reduce red tape by simplifying and automating business and non-business transactions. This includes developing an interconnectivity infrastructure through the Department of Information and Communications Technology (DICT).

The government demand for ICT infrastructure and facilities provides opportunities for private developers and other ICT market players to participate in government ICT projects, in accordance with its procurement laws. Government procurement is governed by two laws: Rep. Act No. 9184 (2003), otherwise known as the "*Government Procurement Reform Act*;" (the Government Procurement Act) and Rep Act No. 6957 (1990), as amended by Rep. Act No. 7718 (1994), sometimes referred to as the "*Build-Operate-and Transfer Law of 1990*" (the BOT Law).

[123] Bureau of Immigration (BI), Memorandum Order-AFFJr. No. 05-009, Sections 1 and 2; BI, Memorandum Circular No. AFF-05-01.

4.3.1 Government Procurement Reform Act

The Government Procurement Act applies to all "procurement of infrastructure projects,[124] goods[125] and consulting services,[126] regardless of sources of funds, *whether local or foreign*," by all branches of government, including government-owned and controlled corporations.[127] The Revised Implementing Rules and Regulations of Rep. Act 9184 (Rep. Act 9184 IRR), however, imposes limitations on foreign participation in government procurement.

For the procurement of goods, only Filipino citizens/sole proprietorships, cooperatives, or partnerships, corporations, and joint venture arrangements with 60% Filipino ownership are eligible to participate in the bid. Foreign suppliers may be eligible to participate under the following conditions: (a) when a treaty or international agreement of which the Philippines is a party provides for it; (b) where the country where the foreign supplier is a citizen (if individual) or is organized (if corporate entity) provides reciprocal benefits to Filipino citizens; (c) when the goods procured are not locally available; or (d) to prevent situations that defeat competition or restrain trade.[128]

For the procurement of infrastructure projects,[129] including the civil works component of information technology projects, only Filipino citizens/sole proprietorships, cooperatives, or partnerships, corporations, and joint venture arrangements with 75% Filipino ownership are eligible to participate in the bid. If the structures to be built require the application of techniques and/or technologies that are not adequately possessed by a firm with 75% Filipino ownership, firms with a maximum 75% foreign ownership may participate in the bid. Foreign nationals and foreign-owned firms may also participate when a treaty or international agreement of which the Philippines is a party provides for it.[130] Government-owned and controlled corporations (GOCCs) may be eligible to participate in the bid if they can establish that they (a) are legally and financially autonomous, (b) operate under commercial law, and (c) are not attached agencies of the Procuring Entity.[131]

For the procurement of consultancy services, only Filipino citizens/sole proprietorships, cooperatives, or partnerships, corporations, and joint venture arrangements with 60% Filipino ownership are eligible to participate in the bid. If the consulting service require the practice of profession regulated by law, those who will actually perform the service must be Filipino

[124] Infrastructure projects include the construction, improvement, rehabilitation, demolition, repair, restoration or maintenance of roads and bridges, railways, airports, seaports, communication facilities, civil works components of information technology projects, irrigation, flood control, and drainage, water supply, sanitation, sewerage, and solid waste management systems, shore protection, energy/power and electrification facilities, national buildings, school buildings, hospital buildings and other related construction projects of the government. (GRPA, Article I, Section 5.k)

[125] Goods refer to all items, supplies, material and general support services, except consulting services and infrastructure projects, which may be needed in the transaction of public businesses or in the pursuit of any government undertaking, project or activity, whether in the nature of equipment, furniture, stationary, materials for construction, or personal property of any kind, including nonpersonal or contractual services such as the repair and maintenance of equipment and furniture, as well as trucking, hauling, janitorial, security, and related or analogous services, as well as procurement of materials and supplies provided by the procuring entity for such services. (GRPA, Article I, Section 5.h)

[126] Consulting services refers to services for infrastructure projects and other types of projects or activities of the Government requiring adequate external technical and professional expertise that are beyond
the capability and/or capacity of the government to undertake such as, but not limited to: (i) advisory and review services; (ii) pre-investment or feasibility studies; (iii) design; (iv) construction supervision; (v) management and related services; and (vi) other technical services or special studies. (GRPA, Article I, Section 5.f)

[127] Rep. Act 9184, Article I, Section 4.

[128] Rep. Act 9184 IRR, Rule VIII, Sections 23.4.1.1 and 23.4.1.2.

[129] Under Rep. Act 9184, Section 5(k), "infrastructure projects" include the construction, improvement, rehabilitation, demolition, repair, restoration or maintenance of roads and bridges, railways, airports, seaports, communication facilities, **civil works components of information technology projects,** irrigation, flood control and drainage, water supply, sanitation, sewerage and solid waste management systems, shore protection, energy/power and electrification facilities, national buildings, school buildings, hospital buildings and other related construction projects of the government.

[130] Rep. Act 9184 IRR, Rule VIII, Section 23.4.2.1 and 23.4.2.2.

[131] *Ibid.*, Rule VIII, Section 23.5.

citizens and registered professionals under the PRC or other professional regulatory body. Foreign consultants may only be hired and eligible to participate in the bid if Filipino consultants do not have sufficient expertise and capability to render the services required under the project.[132]

4.3.2 BOT Law[133]

Rep. Act No. 6957, otherwise known as "An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and For Other Purposes," as amended by Rep. Act No. 7718 (1994), entitled "An Act Amending Certain Sections of Republic Act No. 6957" (the BOT Law). It governs the partnership between the government and the private sector in infrastructure and development projects normally financed by the government.[134]

Private sector infrastructure or development projects[135] covered by the BOT Law include the following contractual arrangements:

- Build-Operate-and-Transfer (BOT). A contractual arrangement where the project proponent undertakes the Construction, including financing, of a given infrastructure facility, and its operation and maintenance. The project proponent operates the facility for a fixed term not to exceed fifty (50) years during which it charges facility users appropriate tolls, fees, rentals and charges to the extent that it recovers on its investment and the operation and maintenance of the facilities. It then transfers the facility to the government agency or local government unit concerned at the end of the fixed term.[136]

- Build-and-Transfer (BT). A contractual arrangement where the project proponent undertakes the financing and construction of an approved project and after its completion turns it over to the government agency or local government unit, which will in turn pay the proponent its investment in the project plus a reasonable rate of return.[137]

- The Build-Own-and-Operate (BOO). A contractual arrangement where the project proponent is authorized to finance, construct, own, operate and maintain an infrastructure or development facility from which the Project Proponent is allowed to recover its total investment, operating and maintenance costs plus a reasonable return thereon by collecting tolls, fees, rentals or other charges from facility users. The proponent who owns the assets of the facility may assign its operation and maintenance to a Facility operator. Such projects are also approved by the President of the Philippines upon recommendation of the National Economic Development Authority.[138]

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[132] *Ibid.*, Rule VIII, Sections 24.3.1, 24.3.2 and 24.3.3.
[133] *See* Barcenas (2015)
[134] Rep. Act 6957, as amended by Rep. Act 7718, Section 1.
[135] Defined as "The general description of infrastructure or development projects normally financed and operated by the public sector but which will now be wholly or partly implemented by the private sector, including but not limited to, power plants, highways, ports, airports, canals, dams, hydropower projects, water supply, irrigation, telecommunications, railroads, and railways, transport systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, markets, slaughterhouses, warehouses, solid waste management, information technology networks and database infrastructure, education and health facilities, sewerage, drainage, dredging, and other infrastructure and development projects as may be authorized by the appropriate agency/LGU pursuant to this Act. Such projects shall be undertaken through contractual arrangements as defined . . .and such other variations as may be approved by the President of the Philippines." (BOT Law, Section 2.a)
[136] Rep. Act 6957, as amended by Rep. Act 7718, Section 2.b.
[137] *Ibid.*, Section 2.c.
[138] *Ibid.*, Section 2.d.

- The Build-Lease-and-Transfer (BLT). A contractual arrangement where a project proponent is authorized to finance and construct an infrastructure or development facility and upon its completion turns it over to the government agency or local government unit concerned on a lease arrangement for a fixed period, after which ownership of the facility is automatically transferred to government agency and local government unit.[139]

- Build-Transfer-and-Operate (BTO). A contractual arrangement where a government agency or local government unit contracts out the construction of an infrastructure facility to a private entity such that the contractor builds the facility on a turnkey basis, assuming cost overruns, delays, and specified performance risks. Once the facility is commissioned satisfactorily, title is transferred to the implementing government agency or local government unit. The contractor, however, operates the facility on behalf of the implementing government agency or local government unit under an agreement.[140]

- Contract-Add-and-Operate (CAO). A contractual arrangement where the project proponent adds to an existing infrastructure facility which it is renting from the government and operates the expanded project over an agreed franchise period. There may or may not be a transfer arrangement with regard to the added facility provided by the project proponent.[141]

- Develop-Operate-and-Transfer (DOT). A contractual arrangement where favorable conditions external to a new infrastructure project which is to be built by a project proponent are integrated into the arrangement by giving that entity the right to develop adjoining property, and thus, enjoy some of the benefits the investment creates such as higher property or rent values.[142]

- Rehabilitate-Operate-and-Transfer (ROT). A contractual arrangement where an existing facility is turned over to the project proponent to refurbish, operate and maintain for a franchise period, at the expiry of which the legal title to the facility is turned over to the government. The term is also used to describe the purchase of an existing facility from abroad, importing, refurbishing, erecting and consuming it within the host country.[143]

- Rehabilitate-Own-and-Operate (ROO). A contractual arrangement where an existing facility is turned over to the project proponent to refurbish and operate with no time limitation imposed on ownership. As long as the operator is not in violation of its franchise, it can continue to operate the facility in perpetuity.[144]

While the BOT Law allows the project proponent to obtain financing from either a Filipino or foreign source and/or engage the services of a foreign and/or Filipino contractor during the construction stage, it provides the following limitations on foreign participation and preferential treatment for Filipinos:

- for infrastructure or a development facility operations requiring a public utility franchise, the facility operator must be Filipino or if a corporation, it must be duly

[139] *Ibid.*, Section 2.e.
[140] *Ibid.*, Section 2.f.
[141] *Ibid.*, Section 2.g.
[142] *Ibid.*, Section 2.h.
[143] *Ibid.*, Section 2.i.
[144] *Ibid.*, Section 2.j.

registered with the Securities and Exchange Commission and owned up to at least sixty percent (60%) by Filipinos;

- in case of foreign contractors, Filipino labor shall be employed or hired in the different phases of the construction where Filipino skills are available; build-and-transfer or build-lease-and-transfer arrangements give preference to Filipino contractors when such contractors submit an equally advantageous bid with exactly the same price and technical specifications as those of a foreign contractor;[145]

- in a build-operate-and-transfer arrangement that involves a supply-and-operate situation, i. e., where the supplier of the equipment and machinery of an infrastructure facility operates the facility, the supplier is required to provide technology transfer and training to Filipino nationals;[146] and

- in cases of difficulty in sourcing funds, the project may be financed partly from direct government appropriations and/or from Official Development Assistance [ODA] of foreign governments or institutions that may not exceed fifty percent [50%] of the project cost. The balance may then be provided by the project proponent.[147]

Philippine government procurement laws give preference to Filipino suppliers and service providers, unless goods are not locally available, or Filipino service providers do not have the required expertise and capacity. This affect trade and investment in modes 1, 3 and 4 in the modes of supply of services.

4.4 Regulations on Data Flow

Regulations on data flows are governed by the E-Commerce Act and Rep. Act No. 10173 (2012), otherwise known as the "*Data Privacy Act of 2012*" (the Data Privacy Act). The development of cybersecurity policies, on the other hand, is under the responsibility of the Department of Information and Communication Technology (DICT), through the DICTA.[148]

4.4.1 Promotion of E-Commerce

The E-Commerce Act aims to facilitate domestic and international transactions and exchanges, store information through electronic, optical and similar medium, recognize the authenticity and reliability of electronic documents, and promote the universal use of electronic transactions in the government.[149] It allows the legal recognition of electronic data messages, electronic documents, electronic signatures for purposes of enforcement of the content of such electronic communication, and their admissibility as evidence in court.

4.4.2 Data Privacy Protection

While the E-Commerce Act promotes the free flow of information through electronic means, the Data Privacy Act seeks to secure and protect certain types of information to protect a person's right to privacy. It specifically protects:

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[145] *Ibid.,* Section 2(a).
[146] *Ibid.*, Section 2 (b).
[147] *Ibid.*, Section 2.a, 2nd para.
[148] Rep. Act 10844, Sections 2(m) and 6.IV(n).
[149] *An Act Granting the Princess Urduja Communications, Inc., A Franchise to Construct, Establish, Install, Maintain, and Operate Local Exchange Network in the Provinces of Pangasinan, Pampanga and Bulacan,* Republic Act No. 8792, Section 3.

a. personal information, which refers to information from which the identity of an individual is apparent or can be reasonably and directly ascertained by the entity holding the information, or when put together with other information would directly and certainly identify and individual;[150] and

b. sensitive personal information, which refers to personal information:

i. about an individual's race, ethnic origin, marital status, age, color and religious, philosophical or political affiliations;

ii. about an individual's health, education, genetic or sexual life, or to any court proceedings for an offense or alleged offense of an individual and its disposition;

iii. issued by government agencies peculiar to an individual which includes, but not limited to, social security numbers, previous or current health records, licenses or its denials, suspension or revocation and tax returns; and

iv. specifically established by an executive order or an act of Congress to be kept classified.[151]

The Data Privacy Act applies to the above personal information and controllers and processors of the same who use equipment located in the Philippines (even if such controllers and processors are not located in the Philippines), or those who maintain an office, branch or agency in the Philippines.[152] It also applies to acts performed outside the Philippines if: (a) the act relates to personal information about a Philippine citizen or resident; (b) the entity has a link with the Philippines and processing personal information in the Philippines, or even if done outside the Philippines, the information pertains to Philippine citizens or residents.[153]

However, the Data Privacy Act expressly exempts from its protection personal information originally collected from residents of foreign jurisdictions pursuant to its laws, including any applicable data privacy laws, which is being processed in the Philippines.[154] On the other hand, other countries also impose limitations on the transfer of data to countries that do not meet the standards of their data protection laws.

For example, the European Union prohibits the transfer of personal data to third countries unless the third country ensures an adequate level of protection under its domestic laws or international commitments.[155] The adequacy of the level of protection is determined by the European Commission upon its assessment of the circumstances surrounding a data transfer operation or set of data transfer operations with particular consideration to be given to *"the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied within that country*."[156]

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[150] Rep. Act No. 10173, Section 3(g).
[151] *Ibid*., Section 3(l).
[152] *Ibid*., Section 4.
[153] *Ibid*., Section 6.
[154] *Ibid*., Section 4(g).
[155] EC Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 (on the protection of individuals with regard to the processing of personal data and on the free movement of such data), Article 25(6).
[156] EC Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 (on the protection of individuals with regard to the processing of personal data and on the free movement of such data), Article 25(2); So, far only the following countries have been found by the EC to have met the EU standard of "adequate level of protection:" Andorra, Argentina, Canada,

For countries, like the Philippines, that the EU deems not to have met its standard of "adequate level of protection," the European Commission issued Model Contracts for the transfer of personal data to third countries, which third countries should follow to meet the EU's standard of protection. The Model Contract clauses consists of two sets for data transfers between an EU data controller to a non-EU/European Economic Area (EEA) data controller,[157] and one set for data transfer from an EU data controller to a non-EU/EEA data processor.[158]

This means that for European companies to be able to contract with Philippine companies for the transmission to, and processing of data in the Philippines, the Philippine company must agree to the standard clauses provided under the Model Contract clauses mentioned above.

At the same time other countries, like Australia under its Privacy Act of 1988 impose restrictions on the cross-border data flows, such as holding the Australian entity disclosing personal information overseas accountable for any violation of the Privacy Act.[159]

This gives rise to a situation where the Philippines is not bound to provide protection of personal information originally collected from residents of foreign jurisdiction but it is forced to do so by the data privacy laws of these countries. And because the data privacy laws of different countries vary, business process outsourcing and data processing firms located in the Philippines with clients from the Philippines, EU and Australia, for example, will be forced to set up different sets of data privacy policy guidelines within their firms to comply with applicable Philippine, EU and Australian data privacy laws. This increases the administrative cost of legal and contractual compliance with data protection laws and related contracts of these Philippine firms.

However, the present difficulty in the application of Philippine data privacy laws cannot be addressed by the act of the Philippines alone. Even if Congress amends the Data Privacy Act to include personal information originally collected from residents of foreign jurisdictions in its protection, it will not change the present data privacy laws of other countries such as the EU and Australia and how they apply these to cross border data flows.

There is thus a need to go beyond national borders and to consider other means of ensuring that personal information of all individuals collected and processed within and across national borders are protected. Initial efforts to harmonize data privacy rules were made by the Organization for Economic Cooperation and Development (OECD) through the OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data. There has also been an observed convergence of basic principles among data privacy legislations, which have generally revolved around four standards, to wit: (a) data quality; (b) transparency or openness of processing; (c) treatment of particularly sensitive data; and (d) enforcement mechanisms.

However, the implementation and interpretation of these basic principles across countries differ. Sometimes data privacy principles are balanced against equally important values, such

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Faeroe Islands, Geurnsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland and Uruguay. The EU-US Safe Harbour was declared invalid by the Court of Justice of the EU, which led to a new agreement on transatlantic data flows between the EU and the US, the EU-US Privacy Shield, Commission decisions on the adequacy of the protection of personal data in third countries, http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index_en.htm. (accessed on November 2017).

[157] Commission Decision 2001/497/EC: Set I (as amended by Commission Decision C(2004)5271) and Commission Decision 2004/915/EC: Set II.

[158] Commission Decision 2010/87/EU.

[159] Australian Privacy Principle (APP) 8.1 and Privacy Act, Section 16C.

as freedom of information. These differences in implementation and interpretation make harmonization difficult.

Reidenberg (1999) notes the usefulness of establishing international technical standards, such as in the technical design of certain electronic infrastructure that are independent of the governance structure of states. These standards may be implemented in technical codes of conduct, where data privacy principles are embedded, and which developers, technical designers and users of ICT are bound to follow (Ibid).

Other mechanisms that may limit divergence would be the WTO General Agreement on Trade in Services (WTO GATS), which allows the adoption of data privacy laws by the individual Member States up to the extent that these do not "*constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services*."[160] The limitation against discrimination or trade restriction in trade in services under the WTO and other applicable free trade agreements can be a disciplining mechanism in the application of data privacy laws.

The chapeau in Article XIV (General Exceptions) of the GATS, cited above, is the same as the chapeau in Article XX (General Exceptions) in the WTO General Agreement on Tariff and Trade (GATT). In interpreting the GATT Article XX chapeau, the WTO Appellate Body ruled that authorities must strike a balance between the right of the Member State to invoke the exceptions under Article XX, and its duty to respect the treaty rights of the other members, i. e., their rights to market access and against discrimination.[161] It notes though that "the location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as facts making up specific cases differ."[162] This means that each data privacy measure must be analyzed on a case to case basis or specific parameters may be agreed on in a more detailed international agreement on data privacy.

However, Mattoo (2015) notes that, while trade disciplines are useful, these are inadequate in limiting national discretion in implementing policies. This is best illustrated in the interpretation of the Exceptions clause in GATT Article XX, which may be applied to GATS Article XIV, as discussed above. Because of the latitude given to states to interpret and implement WTO Agreement provisions, the net effect is that states still enjoy wide latitude in implementing these provisions. This, together with the different regulatory environment among states lead to different regulatory regimes that make harmonized implementation of trade rules difficult, if not impossible. Mattoo proposes, thus, to make regulatory cooperation a pre-condition to liberalization. This could take the form of a trade facilitation agreement in services to address the procedural aspects of regulation.

Whatever mechanisms will prove effective, the most obvious need in the implementation of data privacy laws particularly with respect to cross border data flows, is for states to work together to find an international mechanism that would address divergence in implementation and interpretation.

[160] WTO General Agreement on Trade in Services, Article XIV(c)(ii).
[161] United States-Import Prohibition of Certain Shrimp and Shrimp Products, adopted 12 October 1998, WT/DS58/AB/R, para.156.
[162] *Ibid*., para. 159.

4.4.3 Cybersecurity

Among the biggest threats to the use of ICT in private and government transactions is the rising incidence of cyber-attacks. Over the past few years, the incidence of cyber-attacks has increased. This included the cyber-attacks on Singapore's SingHealth in 2018,[163] Instagram and Equifax in 2017, Ashley Madison in 2015, bank accounts in South Korea in 2014, Adobe in 2013, Target in 2013, Sony in 2011, various attacks on Yahoo, and the theft of over 1 billion logins and passwords by Russian hackers in 2014.[164]

These cyber-attacks lower trust and confidence in the use of ICTs and discourage trade and investment in ICT and ICT-related services. To address these risks, the DICT has adopted the National Cybersecurity Plan 2022 (the "Plan") in 2016. The Plan provides a broad framework for the development a cybersecurity strategy. It covers, among others, the protection of critical information infrastructure, protection of government networks, supply chain protection, protection of individuals, the approaches to take in addressing cybersecurity risks.[165]

To implement the Plan, DICT has issued a Computer Emergency Response Team (CERT) Manual (the "Manual") in preparation for the creation of the Computer Emergency Response Team Management Plan. The Manual provides the framework for the incident response plan that will be the basis for creating the CERT of each organization. In addition, DICT is in the process of setting up a cybersecurity body, which will be DICT's official contact point for all cybersecurity matters.[166] It is also in the process of bidding for the National Cyber Intelligence Platform.[167]

The Cybercrime Prevention Act,[168] likewise, provides for the legal framework for the detection, investigation and prosecution of cybercrimes, both at the national and international levels. It also created the Cybercrime Investigation and Coordinating Center (CICC) for policy coordination among concerned agencies and for the formulation and enforcement of the national cybersecurity plan.[169] CICC is an attached agency to the DICT for purposes of policy and program coordination. [170]

The impact of the efforts of DICT is not clear at this time since it is still in the process of implementing the elements of the Plan. What is clear though is that while these elements are not yet in place, public and private online transactions continue to be vulnerable to cyber-attacks. As the government continues to strengthen the country's cybersecurity it would be useful to seek guidance from international best practice.

The ITU in its National Cybersecurity Strategy Guide provided some basic guidelines on how to establish a country's national cybersecurity policies and strategies. The ITU though emphasized that countries should use national values as the basis for its strategies for two reasons: One, "*culture and national interests influence the perception of risk and the relative*

[163] Matthew Field, "Cyberattack on Singapore health database steals details of 1.5 million including prime minister," The Telegraph, 20 July 2018. Available at [https://www.telegraph.co.uk/news/2018/07/20/cyber-attack-singapore-health-database-steals-details-15m-including/]
[164] Top 10 of the world's biggest cyberattacks, Outpost 24. Available at [https://outpost24.com/blog/top-10-of-the-world-biggest-cyberattacks]
[165] *See* National Cybersecurity Plan 2022.
[166] Ong, Michelle, "Gov't to set up cybersecurity body," ABS-CBN News, May 02, 2018. Available at [https://news.abs-cbn.com/business/05/02/18/govt-to-set-up-cybersecurity-body]. Accessed 16 December 2018.
[167] Cordero, Ted, "DICT to award Philippine cybersecurity platform this year," GMA News, September 26, 2018. Available at [https://www.gmanetwork.com/news/scitech/technology/669153/dict-to-award-philippine-cyber-security-platform-contract-this-year/story/]. Accessed 16 December 2018.
[168] Rep. Act No. 10175 (2012).
[169] *Ibid.*, Section 24.
[170] Rep. Act No. 10844, Section 15(b).

success of defenses against cyber threats;" Two, "*a strategy rooted in national values is likely to gain support of stakeholders such as the judiciary and the private sector*."[171] For these reasons, it is important that the development of a cybersecurity strategy must take on a multi-stakeholder approach that involves, not only the executive branch of government, but the legislative and judiciary, as well as private sector stakeholders, including critical infrastructure owners, law enforcement, the intelligence community, vendors, the academe, international partners, and citizens.[172]

While encouraging countries to consider culture and national interests, the ITU suggested some basic elements that should appear in a country's National Cybersecurity Programme. These elements are outlined in **Table 12** below.

Table 12. Elements of a National Cybersecurity Programme

# Item	Elements
1	**Top Government Cybersecurity Accountability** Top government leaders are accountable for devising a national strategy and fostering local, national and global cross-sector cooperation
2	**National Cybersecurity Coordinator** An official or individual oversees cybersecurity activities across the country
3	**National Cybersecurity Focal Point** A multi-agency body serves as a focal point for all activities dealing with the protection of a nation's cyberspace against all types of cyber threats
4	**Legal Measures** Typically, a country reviews and, if necessary, drafts new criminal law, procedures, and policy to deter, respond and prosecute cybercrime
5	**National Cybersecurity Framework** Countries typically adopt a Framework that defines minimum or mandatory security requirements on issues such as risk management and compliance
6	**Computer Incident Response Team (CIRT)** A strategy-led programme contains incident management capabilities with national responsibility. The role analyses cyber threat trends, coordinates response and disseminates information to all relevant stakeholders.
7	**Cybersecurity Awareness and Education** A national programme should exist to raise awareness about cyber threats.
8	**Public-Private Sector Cybersecurity partnership** Governments should form meaningful partnership with the private sector
9	**Cybersecurity Skills and Training Programme** A programme should help train cybersecurity professionals
10	**International Cooperation** Global cooperation is vital due to the transnational nature of cyber threats.

Source: Elements of a National Cybersecurity Programme (Fig. 1), ITU National Cybersecurity Strategy Guide.

5. International Trade Agreements Affecting Telecommunications

The Philippines' international trade commitments on telecommunications are governed by or generally patterned after the WTO General Agreement on Trade in Services (WTO-GATS) and its specific agreements on telecommunications, to wit: (a) WTO-GATS Annex on Telecommunications, the Fourth Protocol to the GATS Agreement (the "Agreement on Basic

[171] ITU National Cybersecurity Strategy Guide, p. 5.
[172] *Ibid.*, pp. 27-30.

Telecommunications"); and (b) WTO Basic Telecommunications Reference Paper. The Philippines' Schedule of Specific Commitments in all its free trade agreements limit market access based on the constitutional limitations on ownership of telecommunications entities discussed above.[173]

5.1 World Trade Organization General Agreement on Trade in Services (WTO-GATS)

5.1.1 General Obligations under the WTO-GATS

Under the WTO-GATS, Member States have the general obligation to accord most-favoured-nation (MFN) treatment to services and service suppliers covered by their respective Schedule of Specific Commitments to other Member States, subject to exemptions they maintained in the Annex on Article II Exemption.[174] The Philippines made exemptions in the entry and temporary stay of persons in the Philippines, maritime transport, and banking and other financial services based primarily on reciprocity.[175]

A Member State's Schedule of Specific Commitments consists of its Market Access Commitments to the other Member States, where it is obligated to accord MFN treatment to other Member States.[176] The Philippines Schedule of Specific Commitments covered financial services, communication services, transport services, and tourism.[177]

For services covered by a Member's Schedule of Specific Commitments, the Member State has the obligation to:

1. Be transparent and promptly publish all measures of general application applicable to matters covered by the WTO-GATS.[178]
2. Accord most-favoured-nation (MFN) treatment to services and service suppliers covered by their respective Schedule of Specific Commitments to other Member States, subject to exemptions they maintained in the Annex on Article II Exemption.[179]
3. Ensure that applicable domestic regulations to such services are administered in a reasonable, objective and impartial manner.[180]
4. Treat the service and service suppliers in sectors covered by its Schedule of Specific Commitments of other Member States no less favorable than its own services and service suppliers (National Treatment).[181]

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[173] *See* ASEAN-China FTA Trade in Services, Philippines – Schedule of Specific Commitments, 2nd Package of Commitments, AC/TIS/SC2/PHI; ASEAN-Korea Agreement on Trade in Services, The Philippines – Schedule of Specific Commitments, 1st Package of Commitments, ANNEX/SC1; Philippines-EFTA Free Trade Agreement, Trade in Services, Appendix 1 – Philippines – Schedules of Specific Commitments referred to in Article 6.16; ASEAN-New Zealand FTA, Chapter 8. Annex on Telecommunications and Annex 3 – Philippines Schedule of Specific Services Commitments.
[174] WTO-GATS, Article II.1 and 2.
[175] List of Article II (MFN) Exemptions, Supplement 2, GATS/EL 70/ Suppl. 2, 25 February 1998; List of Article II (MFN) Exemptions, Supplement 1, GATS/EL/70/Suppl.1, 28 July 1995; Final List of Article II (MFN) Exemptions, GATS/EL/70, 15 April 1994.
[176] WTO-GATS, Article XVI.1.
[177] Philippines Schedule of Specific Commitments, Supplement 3, GATS/SC/70/Suppl. 3, 26 February 1998; Philippines Schedule of Specific Commitments, Supplement 2, GATS/SC/70/Suppl. 2, GATS/SC/70/Supp. 2, 11 April 1997; Philippines Schedule of Specific Commitments, Supplement 1, Revision, GATS/SC/70/Suppl. 1/Rev.1, 4 October 1995; Philippines Schedule of Specific Commitments, Supplement 1, GATS/SC/70/Suppl. 1, 28 July 1995; Philippines Schedule of Specific Commitments, GATS/SC/70, 15 April 1994.
[178] WTO-GATS, Article III.
[179] *Ibid.*, Article II.1 and 2.
[180] *Ibid.*, Article VI.
[181] *Ibid.*, Article XVII.

5.1.2 Annex on Telecommunications of the WTO-GATS

The Annex on Telecommunications of the WTO-GATS applies to all measures of Member States affecting access to and use of pubic telecommunication transport networks and services.[182]

As applied to trade in services, the Annex, consistent with the requirement of **transparency** under Art. III of WTO-GATS, requires that all relevant information on **conditions affecting access to and use of public communications transport networks and services should be publicly available.** This includes tariffs and other terms and conditions of service; specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registration or licensing requirements, if any.[183]

With respect to access to and use of public telecommunications transport networks and services, the following rules apply:

a. In general, each Member State is required to allow any service supplier of other Member States **access to and use of public telecommunications transport networks** and services on reasonable non-discriminatory terms and conditions.[184]

b. In allowing access to public telecommunications transport networks, each Member State shall ensure that suppliers are permitted to:

   i. **purchase or lease and attach terminal** or other equipment which interfaces with the network and which is necessary to supply a supplier's services;

   ii. **interconnect private leased or owned circuits** with public telecommunications transport networks and services or with circuits leased or owned by another service supplier; and

   iii. **use operating protocols of the service supplier's choice** in the supply of any service, other than as necessary to ensure the availability of telecommunications transport networks and services to the public generally.[185]

c. Service suppliers of any other Member may use public telecommunications transport networks and services for the **movement of information within and across borders**, including for intra-corporate communications of such service suppliers, and for **access to information contained in data bases** or otherwise stored in machine-readable form in the territory of any Member.[186]

d. a Member may take such measures as are necessary to ensure the **security and confidentiality of messages,** subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.[187]

[182] WTO-GATS, Annex on Telecommunications, Section 2(a).
[183] *Ibid.*, Section 4.
[184] *Ibid.*, Section 5(a).
[185] *Ibid.*, Section 5(b).
[186] *Ibid.*, Section 5(c).
[187] *Ibid.*, Section 5(d).

e. Member States shall **not impose conditions to access to and use** of public telecommunications transport networks and services **except as may be necessary to**: (i) safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services; (ii) protect the technical integrity of public telecommunications transport networks or services; and (iii) ensure that **service suppliers** of any other Member **do not supply services unless permitted** pursuant to commitments in the Member's Schedule.[188]

f. If the criteria in Item e above are present, a Member State **may impose conditions to the access** to and use of public telecommunications transport networks and services, which may include; (i) restrictions on resale or shared use of such services; (ii) a requirement to use specified technical interfaces, including interface protocols, for inter-connection with such networks and services; (iii) requirements, where necessary, for the inter-operability of such services; (iv) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks; (v) restrictions on inter-connection of private leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier; and (vi) notification, registration and licensing.[189]

5.1.3 The WTO Agreement on Basic Telecommunications

The WTO Agreement on Basic Telecommunications provides the Schedules of Specific Commitments and Lists of Exemptions of the Member States from the Most-Favored Nation principle under Article II of the GATS WTO. The terms of the Philippines' Schedule of Specific Commitments, Supplement 2 (1997) on Telecommunications (GATS/SC/70/Suppl2) are more specifically described in the attached **Table 13** below.

The **regulatory framework** for the telecommunications industry is provided for in the WTO Reference Paper on Basic Telecommunications. The Member States committed to implement such regulatory framework within their respective jurisdictions, which has the following elements:

Table 13. Elements of Regulatory Framework under the Reference Paper

No.	Elements	Description
1	Competitive Safeguards	Maintenance of measures designed to prevent major suppliers, either acting alone or with others, from engaging in or continuing anti-competitive practices
2	Interconnection	Suppliers providing telecommunications transport networks are linked with other service suppliers to allow users of one supplier to communicate with users of another supplier and to access services provided by another supplier. Such interconnection must be ensured; procedures for interconnection negotiations are publicly available; interconnection arrangements are transparent; and there are mechanisms for interconnection dispute settlement
3	Universal service	Universal service obligations may be defined by each Member State provided that these are administered in a transparent, non-discriminatory and competitively neutral manner and are not burdensome than necessary for the kind of universal service defined by the Member State

[188] *Ibid.*, Section 5 (e).
[189] *Ibid.*, Section 5 (f).

4	Public availability of licensing criteria	Licensing criteria, if required, must be made publicly available and should cover the following: (a) all licensing criteria and the period required to decide on a license application; and (b) the terms and conditions of the individual licenses. Upon request of the applicant, the reasons for denial of a license must also be made known
5	Independent regulators	The regulatory body must be separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.
6	Allocation and use of scarce resources	Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required.

Source: WTO Reference Paper on Basic Telecommunications; Author's Compilation

In its Schedule of Specific Commitments, the Philippines also committed to adopt the principles in the WTO Reference Paper as the basis for its regulatory framework in basic telecommunications. In particular, the Philippines made the following commitments:

Table 14. Philippines' Commitments on its Regulatory Framework for Basic Telecommunications

No.	Elements	Description
1	Competitive Safeguards	Appropriate measures shall be maintained for the purpose of preventing suppliers from engaging in or continuing anti-competitive practices
2	Interconnection	• In order to achieve viable, efficient, reliable and universal telecommunications services, a fair and reasonable interconnection of facilities of authorized public network operators and other providers of telecommunications services shall be provided. • Interconnection shall be at any technically feasible point in the network, under non-discriminatory terms and conditions, in a timely fashion, and on terms and conditions that are fair, transparent and reasonable. • A service supplier requesting interconnection with another supplier will have recourse after a reasonable period of time which has been made publicly known to an independent domestic body, which may be a regulatory body referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.
3	Universal service	• Universal service obligations, as may be defined by the appropriate Authority, shall be administered in a transparent, non-discriminatory and competitively neutral manner.

		• Authorized international gateway and mobile cellular telephone service providers are required by law to install a set number of local exchange lines in designated areas.
4	Public availability of licensing criteria	• Where a license is required, the following shall be made publicly available: (a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a license; (b) the terms and conditions of individual licenses • The reasons for the denial of a license will be made known to the applicant upon request.
5	Independent regulators	• The regulatory body is separate from, and not accountable to, any supplier of a basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants. • The regulation of telecommunication suppliers shall rely principally on an administrative process that is stable, transparent and fair, giving due emphasis to technical, legal, economic and financial considerations, and with due regard to the observance of due process at all times. • A national consultative forum shall be maintained to allow interaction among the telecommunications industries, user groups, and academic and research institutions on important issues in the field of communications.
6	Allocation and use of scarce resources	Any procedures for the allocation and use of scarce resources which are frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required.

Source: Philippines' Schedule of Specific Commitments, GATS/SC/70/Suppl2, 11 April 1997; Author's Compilation

6. Philippines' Compliance with its International Trade Obligations

As noted above, the ownership limitations on telecommunications in the Philippines have been incorporated in the Philippines' Schedule of Specific Commitments in all its international trade agreements, whether in bilateral trade, regional or multilateral trade agreements. We will thus examine the Philippines' compliance with its international trade obligations in relation to its general commitments and commitments on its regulatory framework.

6.1 Transparency

As noted above, the Philippines committed in all its FTAs to ensure transparency of all conditions affecting access to and use of public communications transport networks and services by making these publicly available. The Philippines have generally complied with this commitment in the granting of CPCN's, issuances of licenses and permits, and issuance of regulations affecting the operations of telecommunications providers.

However, the requirements for granting a legislative franchise to qualify an entity to apply for a CPCN are not as transparent and as publicly available. The requirements for securing a legislative franchise are not available on the websites of Congress. These may only be secured in hard copies from the responsible Congressional Committees.

Also, while the Congressional Committees require the submission of documentary requirements, it is not clear what the applicant need to show to qualify for a legislative franchise. Most of the requirements show the ownership structure of the applicant, and its legal and financial capacity. However, the level of financial capacity required is not disclosed to the public. There is also no requirement to show technical capacity to operate a telecommunications entity.

While a legislative franchise is required both by law and the Constitutions, the substantive requirements to qualify for the same is not clearly disclosed to the public. Such qualifications are determined at the NTC level when the applicant applies for the CPCN.

6.2 Access to and Use of Public Telecommunications Networks

As noted above, a WTO Member State, the Philippines in this case, is generally required to allow service suppliers of other Member States access to and use of public telecommunications transport networks on a reasonable non-discriminatory terms and conditions. This means allowing these suppliers to interconnect with public telecommunications networks.

6.2.1 Interconnection

The WTO Basic Telecommunications Reference Paper defines interconnection as "linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken."[190] The Telecoms Act defines it as the "linkage, by wire, radio, satellite or other means, of two or more existing telecommunications carriers or operators with one another for the purpose of allowing

[190] WTO Basic Telecommunications Reference Paper, Section 2.1.

or enabling the subscribers of one carrier or operator to access or reach the subscribers of the other carriers or operators."[191]

Under its Schedule of Specific Commitments, the Philippines committed to:

a. provide a fair and reasonable interconnection facilities of authorized public network operations and other telecommunications service providers;

b. interconnection is made at a technically feasible point in the network, under non-discriminatory terms and conditions, in a timely fashion and under fair, transparent and reasonable conditions; and

c. provide a service supplier to an independent domestic body to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time.

The Philippines laws and regulations are generally compliant with its interconnection obligations, subject to its commitments under its Schedule of Specific Commitments. The Telecoms Act adopted the policy of providing a fair and reasonable interconnection of facilities of authorized public network operators and other providers of telecommunications services. It also encourages the Philippine international carriers to establish interconnection with other countries to provide access to international communications highways on a competitive basis.[192] Note, however, the finding of Uy and Villamil that NTC is unable to compel telecommunications entities to reveal interconnection terms with other carriers. They noted that interconnection terms between telecommunications entities are not disclosed to relevant parties, except for general agreement terms. Thus, in practice, it appears that the Philippines is not compliant with its trade obligations to allow interconnection under fair, transparent and reasonable conditions.

NTC Memorandum Circular No. 14-7-2000 provides that points of interconnection must be established and maintained at any mutually agreed technically feasible point/s in the carrier's system and/or network or at point/s as may be mandated by the Commission.[193]

The Telecoms Act also mandates equality of treatment in the telecommunications industry. As such, any advantage, favor, privilege, exemption, or immunity granted under existing franchises, or may be granted in the future, will also be immediately and unconditionally granted to existing franchises.[194]

While access arrangements between interconnecting entities are made on a negotiated basis, in the case of disagreement on the terms and conditions of the same, the parties may submit the same to the NTC for resolution. In resolving the dispute, the NTC shall ensure equity, reciprocity and fairness among the parties concerned.[195]

NTC Memorandum Circular No. 10-7-2007 mandates the development of reference access offers (RAOs).[196] A RAO is the default offer of a public telecommunications entity for access services provided to requesting service providers (or access seeker). It contains prices and

[191] Rep. Act No. 7925, Section 3(k); similar to the definition under Exec. Order No. 59, Section 2.
[192] *Ibid.*, Section 4(g) and (h).
[193] NTC MC No. 14-7-2000, Art. VII, Section 22.
[194] Rep. Act No. 7925, Section 23.
[195] *Ibid.*, Section 18.
[196] NTC MC 10-7-2007, Section 3.2.

sufficient details to allow an access seeker to weigh the offer without having to negotiate directly with the access provider.

Uy and Villamil (2016)[197] notes that, while a RAO is provided in NTC regulations, it is not widely implemented. According to them, some private stakeholders maintain that the NTC cannot compel telecommunications entities to reveal interconnection terms with other carriers, characterizing such information as trade secrets. Thus, interconnection agreements between telecommunications remained undisclosed to both the public and NTC, except for very general terms that do not disclose costs and pertinent terms and conditions.

It should be noted though that under the Philippines' Schedule of Specific Commitments, it has expressly limited access to Philippine telecommunications to Filipino citizens or corporate entities having at least 60% Filipino ownership and, at most, 40% foreign ownership.

6.2.2 Movement of Data Across Borders

The Philippines is also generally compliant with its obligations to allow the movement of information within and across borders and access to information contained in databases. In fact, the E-Commerce Act expressly mandates the facilitation of domestic and international transactions and exchanges, storage of information through electronic, optical and similar medium, recognizes the authenticity and reliability of electronic documents, and promotes the universal use of electronic transactions in the government.

6.2.3 Security and Confidentiality of Messages

The Philippines has adopted the Data Privacy Act to ensure the security and confidentiality of messages. It is also applied uniformly across all sectors within its scope and coverage.[198]

6.2.4 Conditions to Access

As indicated above, the Philippines has imposed conditions to access to the Philippines telecommunications industry under its Schedule of Specific Commitments, primarily in the ownership of telecommunications entities and the rule of reciprocity.

6.3 Regulatory Framework

6.3.1 Competitive Safeguards

In the Philippines' Schedule of Specific Commitments for Telecommunications in the WTO-GATS, and adopted in most of its other FTAs, it committed to maintain appropriate measures to prevent suppliers from engaging in or continuing anti-competitive practices. Under present conditions, the Philippines is not in full compliance of its obligations.

As noted above, the PCA grants the PCC original and primary jurisdiction over competition matters in sectors governed by other regulators. But if the issue covers both competition and non-competition issues, the PCC is required to consult the sector regulator, such as the NTC, to give the latter a reasonable opportunity to submit its opinion and recommendation on the same before the PCC renders a decision.[199]

[197] Uy, Krystal T. and Isabela Rosario G. Villamil, *Philippine Telecommunications Laws and Regulations: A TPP Gap Analysis*, Philippine Journal of Development, Volume 43 (2016) Number 1.
[198] WTO-GATS, Annex on Telecommunications, Section 5(d).
[199] Rep. Act No. 10667, Section 32.

However, the delineation between competition and non-competition concerns is never clear. This is evident, for example, in the question of whether or not PCC can interfere with the co-use agreement between PLDT and Globe Telecom, Inc. on the frequencies assigned to them by NTC after their acquisition of San Miguel Corporation's Vega Telecommunications, Inc.[200] On the one hand, NTC has the authority to allocate and regulate the use of frequencies allocated by the ITU. But on the other hand, if the allocation of such frequencies would have anti-competitive effects, the PCC will have jurisdiction over the same.

At present though, there is no mechanism that define when a telecommunications issue falls under the regulatory jurisdiction of the NTC or of the PCC. Without such mechanism or measure, the PCC will be unable to properly safeguard competition in the telecommunications sector. Such measures may be in the form of a Memorandum of Agreement between the NTC and the PCC, which the PCC has done with other agencies (such as the Department of Justice, Ombudsman and Public Private Partnership Center), or through the issuance of a joint regulation.

6.3.2 Independent Regulator

Under the WTO Basic Telecommunications Reference Paper, a regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. Its decisions and procedures used must be impartial with respect to all market participants. In relation to market participants, institutionally, NTC is independent and its procedures generally allow its impartial implementation.

However, when benchmarked against other international best practice guidelines such as the ITU ICT Regulatory Tracker, NTC is not entirely independent. It is attached to DICT for purposes of policy and program coordination. It is thus not wholly independent, particularly in deciding on its policy direction and hiring of personnel. Its Commissioner and Deputy Commissioners do not have fixed terms, and thus, serve at the pleasure of the President. It is also not fiscally independent, as its funding is entirely depended on Congressional appropriations to DICT.

Sanctions for violation of telecommunication laws and NTC rules and regulations are also quite low. It is barred from disciplining any violator after 60 days from the commission of such violation, regardless of whether it has come to the attention of NTC or not. This makes any disciplining authority granted to NTC practically toothless.

6.3.3 Allocation and use of scarce resources

The WTO Basic Telecommunications Reference Paper provides that "any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, must be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required."

Philippine laws and regulations are generally compliant with the Philippines' commitment under free trade agreements where it is a party.

[200] The case is pending litigation and is now in the Supreme Court. *See* Panaligan, Rey, "SC acts on petition challenging frequency assignments by NTC," Manila Bulletin, November 6, 2018. Available at [https://news.mb.com.ph/2018/11/06/sc-acts-on-petition-challenging-frequency-assignments-by-ntc]. Accessed 16 November 2018.

The Telecoms Act pursues the policy of administering the radio frequency spectrum in the public interest and in accordance with international agreements and conventions (including free trade agreements) to which the Philippines is a party and granted to the **best qualified**. The best qualified service providers are those who will use the allocated frequency spectrum efficiently and effectively to meet public demand for telecommunications service and may avail of new and cost-effective technologies in the use of methods for its utilization.[201]

Where demand for specific frequencies exceed availability, the NTC shall open tenders for, and ensure wider access to the same.[202] The radio spectrum allocation and assignment is also subject to NTC review,[203] in accordance with NTC Memorandum Circular No. 3-3-96.

Rules on physical co-location are provided under NTC Memorandum Circular No. 14-7-2000, which provides that an access provider shall provide physical colocation and virtual colocation to access seekers on a first come-first served basis, subject to fair and non-discriminatory compensation arrangements and to the extent that it is technically feasible. Any delay in the negotiation for and execution of compensation arrangements shall not cause the delay in the execution of interconnection agreement and actual interconnection of the parties.[204]

However, based on feedback from key informant interviews (KIIs), among the constraints to the establishment of telecommunications networks are the acquisition of right-of-way and other permits from local government units where the physical telecommunications infrastructure will be built. This can be time-consuming and costly to telecommunications service providers, which affects the Philippines' compliance to its international trade obligations.

A review of Philippine regulatory measures on Information and Communications Technology measured against general trade obligations under the WTO Agreement and other free trade agreements of which the Philippines is a signatory is attached as **Appendix C.**

[201] Rep. Act 7925, Section 4(c).
[202] NTC Memorandum Circular No. 03-03-96, Section 604.
[203] Rep. Act No. 7925, IRR, Section 600.
[204] NTC MC No. 14-7-2000, Art. XV, Section 65.

7. Other Constraints to Trade and Investment in ICT

In addition to the constraints to ICT trade and investment noted in Chapter 6 above as measured against the Philippines international trade obligations, the following limit the growth of trade and investment in ICT and ICT-related services:

a. the overlapping policy objectives of DTI and DICT in relation to ICT development and promotion of investment in the same under the e-Commerce Act and DICTA. This creates a conflict as to the extent of the powers of each agency in adopting the relevant policies and programs;

b. the 60-40 ownership limitation with respect to telecommunications service providers under the Constitution. With the strict interpretation of the 40% foreign ownership limitation under current jurisprudence, the Philippines is unable to maximize foreign capital and technology in ICT development;

c. the requirement for a legislative franchise for telecommunications service providers that takes a long time to secure;

d. the interpretation of internet business according to traditional interpretations of mass media and advertising without taking into consideration the nature and requirements of innovation in the ICT sector;

e. the significant barriers in the temporary movement of persons to the Philippines as skilled professionals, consultants, or employees that discourages investment in the development of ICT technology in the Philippines;

f. limitation in government procurement that gives preference to Filipinos;

g. underdeveloped institutions responsible for cybersecurity, as well as inadequate cybersecurity infrastructure, policy and strategies. The attendant risk to poor cybersecurity strategies lowers trust and confidence in the use of ICT thus discouraging trade and investment in related services.

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9. Appendix A. ICT Regulatory Tracker Indicators

No.	Cluster 1: Regulatory Authority	No.	Cluster 2: Regulatory Mandate
			Who is in charge of regulating the following:
1	Separate telecom/ICT regulator	11	Quality of Service obligations measures and service quality monitoring
2	Autonomy in decision-making	12	Licensing
3	Accountability	13	Interconnection rates and price regulation
4	Percentage of diversified funding	14	Radio frequency allocation and assignment
5	Public consultations mandatory before decisions	15	Spectrum monitoring and enforcement
6	Enforcement power	16	Universal service/access
7	Sanctions or penalties imposed by regulator	17	Broadcasting (radio and TV transmission)
8	Dispute resolution mechanism	18	Broadcasting content
9	Appeals to decisions	19	Internet content
10	Existence to Competition authority	20	IT
		21	Consumer issues
No.	**Cluster 3: Regulatory Regime**	**No.**	**Cluster 4: Competition Framework**
			Competition exists in the following market segments:
22	Types of licenses	37	Local and long distance (domestic and international) fixed line services
23	License exempt	38	IMT (3G, 4G, etc.) services
24	Operators required to publish Reference Interconnection	39	Cable modem, DSL, fixed wireless broadband
25	Interconnection prices made public	40	Leased lines
26	Quality of Service monitoring required	41	International Gateways
27	Infrastructure sharing for mobile operators permitted	42	Status of the main fixed line operator (public, partially or fully private)
28	Infrastructure sharing mandated	43	Legal concept of dominance or SMP
29	Co-location/site sharing mandated	44	Criteria used in determining dominance or SMP
30	Unbundled access to the local loop required		Foreign participation/ownership in:
31	Secondary spectrum trading allowed	45	Facilities-based operators
32	Band migration allowed	46	Spectrum-based operators
33	Number portability required from fixed-line operators	47	Local service operators/long-distance service operators
34	Number portability required from mobile operators	48	International service operators
35	Individual users allowed to use VoIP	49	Internet Service Providers (ISPs)
36	National band that involves broadband	50	Value-added service providers

Source: ICT Regulatory Tracker 2017, ITU website. Available at https://www.itu.int/net4/itu-d/irt/#/about-tracker. Accessed on December 8, 2018.

10. Appendix B. Documentary Requirements for New/Renew Franchise Application

No.	**Documentary Requirements for Franchise Application** (to be submitted in 75 copies, folders and with Table of Contents)	**New Applicant**	**Existing Franchise Grantee**
1	Copy of the House Bill for grant or extensions as filed with the Bills & Index Service	✓	✓
2	Copy of the old/existing franchise law, if applicable	N/A	✓
3	Certified copy of applicant's Certificate of Registration from the SEC, DTI, NEA, CDA or any related government agency	✓	✓
4	Articles of Incorporation and By-Laws of the Applicant Corporation, if applicable	✓	✓
5	Articles of Incorporation and By-Laws by a Holding Company which owns the applicant, if any	✓	✓
6	Articles of Incorporation and By-Laws by the Corporate Stockholder of the applicant, if any	✓	✓
7	Latest General Information Sheet of the a. Applicant b. Corporate Stockholder, if any c. Holding Company as owner, if any	✓	✓
8	Resume of major stockholders/officers of the applicant and their Income Tax Return for the last three (3) years (page 1 only of BIR form 1700 or 2316)	✓	✓
9	Company profile or Executive summary of the historical accounts of the company (maximum of 5 pages)	N/A	✓
10	Copy of the existing operating permit/s or temporary permit/s to operate from NTC, CAB/CAAP, ERC, NEA or any other concerned agency, and Certificate of Good Standing from concerned regulatory agency	N/A	✓
11	Market Feasibility Study; three-year (for local) or five-year (for national) Development Plan or Business Plan, and Plans and Designs for the Project Additional requirement: Five-Year Expansion Plan (for those with expansion)	✓	Required if expanding
12	Certified true copy of the Audited Financial Statements/ Profit and Loss Statement submitted to SEC, including the Certified True Copy of the Corporate ITR (page 1 of Form 1702) for the last three years	N/A for new companies	✓
13	BIR Tax Clearance	✓	✓
14	SEC Certificate Of Good Standing (Updated Reportorial Requirements, GIS, Compliance, Fees, Etc.)	✓	✓
15	Certificate of the Applicant's Cash on Bank	✓	Furnish if expanding
16	Program or undertaking for Dispersal of Ownership	✓	✓

Source: House of Representatives, Committee on Legislative Franchises

11. Appendix C. Philippine Sector Measures – Information and Communications Technology

1. The Appendix C lists existing Philippine regulatory measures that affect trade in services in the information and communications technology sector and differentiate treatment between domestic and foreign service suppliers/investors.

2. The lists specify the FTA obligations which the regulatory measures are not in conformity.

Sector	Information and Communications Technology
Sub-Sector	Telecommunications
Obligations Concerned	Market Access National Treatment
Level of Government	Central
Measure	Article XII, Section 11, Constitution
Description	Foreign Ownership Limitation Any franchise, certificate or other form of authorization to operate a public utility shall be granted only to Philippine citizens or to corporations at least 60% of whose capital is owned by Philippine citizens. Telecommunications is considered a public utility

Sector	Information and Communications Technology
Sub-Sector	Broadcasting
Obligations Concerned	Market Access National Treatment
Level of Government	Central
Measure	Article XVI, Section 11(1), Constitution
Description	Foreign Ownership and Management Limitation The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens.

Sector	Information and Communications Technology
Sub-Sector	Internet Business (characterized as mass media by Philippine regulators)
Obligations Concerned	Market Access National Treatment
Level of Government	Central
Measure	Article XVI, Section 11(1), Constitution, relevant DOJ and SEC Opinions
Description	Foreign Ownership and Management Limitation The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens.

Sector	Information and Communications Technology
Sub-Sector	Internet Business (characterized as advertising by Philippine regulators)
Obligations Concerned	Market Access National Treatment
Level of Government	Central
Measure	Article XVI, Section 11(2), Constitution
Description	Foreign Ownership and Management Limitation Only Filipino citizens or corporations or associations with at least 70% Filipino ownership shall be allowed to engage in the advertising industry. The participation of foreign investors in the governing body of entities in such industry shall be limited to their proportionate share in the capital thereof, and all the executive and managing officers of such entities must be citizens of the Philippines.

Sector	Information and Communications Technology
Sub-Sector	Telecommunications
Obligations Concerned	Domestic Regulation
Level of Government	Central
Measure	Article XII, Section 11, Constitution; Section 16, Rep. Act 7925
Description	Requirement for a Legislative Franchise No person shall commence or conduct the business of being a public telecommunications entity without first obtaining a franchise. Basis for granting a legislative franchise and period for granting the same is not clear.

Sector	Information and Communications Technology
Sub-Sector	Telecommunications
Obligations Concerned	Market Access
Level of Government	Central
Measure	Section 15, Comm. Act 146, as amended; Kilusang Mayo Uno Labor Center v. Garcia, G. R. No. 115381, December 23, 1994
Description	Certificate of Public Convenience and Necessity - Requirement for Showing of Public Need There is a public need for the service of the telecommunications service provider, or the operation of the service and the authorization to do business will promote the public interests in a proper and suitable manner.

Sector	Information and Communications Technology
Sub-Sector	Professionals – Electronics Engineer (access allowed to a limited extend within ASEAN, and under the principle of reciprocity)

Obligations Concerned	National Treatment Market Access
Level of Government	Central
Measure	Article XII, Section 14, Constitution; Sections 14(a) and 33, Rep. Act 9292; Executive Order No. 65 (2018), Annex on Professions; ASEAN Mutual Recognition Agreement on Engineering Services, Sections 3.1 and 3.3
Description	<u>Recognition</u> The practice of all professions in the Philippines is limited to Filipino citizens, except in cases prescribed by law. But foreign electronic engineers are temporarily allowed to practice if no domestic engineer with equivalent qualification is available. For ASEAN engineers, they are not allowed to independently engage in the practice of profession. They should always work in collaboration with Filipino engineers.

Sector	Information and Communications Technology
Sub-Sector	Telecommunications
Obligations Concerned	National Treatment Market Access
Level of Government	Central
Measure	Article XII, Section 11, Constitution
Description	<u>Executive and Managerial Officers</u> Foreigners are not allowed to act as executive and managing officers of a telecommunications service provider.

Sector	Information and Communication Technology
Sub-Sector	Telecommunications and Broadcasting
Obligations Concerned	National Treatment Market Access – Labor Market Test

Level of Government	Central
Measure	Section 2-A, Comm. Act 108, as amended by PD 715 (1975); Anti-Dummy Ministry Order No. 210, December 1, 1980
Description	Employment of a Foreign Technical Personnel by a Wholly or Partially Nationalized Industry Required to secure an Authority to Employ Alien from the Department of Justice (DOJ)

Sector	Information and Communications Technology
Sub-Sector	All Sectors
Obligations Concerned	National Treatment Market Access – Labor Market Test
Level of Government	Central
Measure	Article 40, PD 442 (1974); DOLE Department Order 146-15, series of 2015
Description	Employment of Any Foreign National Any foreign professional or non-professional who seeks gainful employment in the Philippines must secure an Alien Employment Permit from DOLE, subject to exceptions.

Sector	Information and Communications Technology
Sub-Sector	Telecommunications and Broadcasting
Obligations Concerned	Market Access – Economic Needs Test
Level of Government	Central
Measure	Rule VIII, Sections 43.4.2.1 and 23.4.4.2, Implementing Rules and Regulations of Rep. Act 9184
Description	Procurement of Contractors for Government ICT Infrastructure Projects For the procurement of infrastructure projects, including the civil works component of information technology projects, only Filipino citizens/sole proprietorships, cooperatives, or partnerships, corporations, and joint venture arrangements with 75% Filipino ownership are eligible to participate in the bid. If

	the structures to be built require the application of techniques and/or technologies that are not adequately possessed by a firm with 75% Filipino ownership, firms with a maximum 75% foreign ownership may participate in the bid. Foreign nationals and foreign-owned firms may also participate when a treaty or international agreement of which the Philippines is a party provides for it.

Sector	Information and Communications Technology
Sub-Sector	Telecommunications and Broadcasting
Obligations Concerned	Market Access – Economic Needs Test
Level of Government	Central
Measure	Rule VIII, Sections 24.3.1, 24.3.2 and 24.3.3, Implementing Rules and Regulations of Rep. Act 9184
Description	Procurement of Consultancy Services for Government ICT Infrastructure Projects Only Filipino citizens/sole proprietorships, cooperatives, or partnerships, corporations, and joint venture arrangements with 60% Filipino ownership are eligible to participate in the bid. If the consulting service require the practice of profession regulated by law, those who will actually perform the service must be Filipino citizens and registered professionals under the PRC or other professional regulatory body. Foreign consultants may only be hired and eligible to participate in the bid if Filipino consultants do not have sufficient expertise and capability to render the services required under the project

Sector	Information and Communications Technology
Sub-Sector	Telecommunications
Obligations Concerned	Market Access
Level of Government	Central
Measure	Section 2(a), Rep. Act 6957, as amended by Rep. Act 7718
Description	Infrastructure or Development Facility Operations of a Public Utility For infrastructure or a development facility operations requiring a public utility franchise, the facility operator must be Filipino or if a corporation, it must be duly registered with the Securities and

	Exchange Commission and owned up to at least sixty percent (60%) by Filipinos

Sector	Information and Communications Technology
Sub-Sector	Telecommunications
Obligations Concerned	Market Access
Level of Government	Central
Measure	Section 2(a), Rep. Act 6957, as amended by Rep. Act 7718
Description	Foreign Contractors In case of foreign contractors, Filipino labor shall be employed or hired in the different phases of the construction where Filipino skills are available; build-and-transfer or build-lease-and-transfer arrangements give preference to Filipino contractors when such contractors submit an equally advantageous bid with exactly the same price and technical specifications as those of a foreign contractor.