

Cross-Border Issues for Digital Platforms: A Review of Regulations Applicable to Philippine Digital Platforms

Aiken Larisa O. Serzo



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Cross-Border Issues for Digital Platforms:
A Review of Regulations Applicable
to Philippine Digital Platforms

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Abstract

This Paper identifies certain policy issues in the existing regulatory infrastructure of the Philippines which may prevent digital platforms in the Philippines from innovating and participating in the global digital economy.

In brief, these policy issues relate to the incoherence between the national innovation strategy of the government and the mishmash of regulations that digital platforms are subjected to. In particular, this relates to investment regulations, regulations on mass media, retail, advertising, logistics, telecommunications, and education. Such landscape has led to a regulatory environment that is unable to provide certainty as to the legality of the activities of Philippine-based digital platforms.

There is a plethora of constitutional, statutory, and policy support for innovation, e-commerce, digitization, and entrepreneurship in the Philippines. However, there is a disconnect between these policies and the environment created by the actual implementation of the regulations.

After the Introduction, Part II of this Paper will be a brief survey of the relevant laws and regulations relevant to digital platforms. This will focus on the areas of innovation policy, general electronic contracting, payments, consumer protection, data protection, cybercrime, access to funding, and intellectual property. Part III will then discuss the gaps in the laws and regulations vis a vis digital platforms, and Part IV will present how these gaps impact digital platforms. Finally, Part V proposes areas for policy consideration and regulatory review that aims to contribute to the shaping of a coherent and viable regulatory policy for Philippine digital platforms.

Keywords: digital platforms, foreign direct investments, internet law, mass media, startups, internet economy, regulatory reform

Table of Contents

1. INTRODUCTION	5
1.1. CHALLENGES OF REGULATING PLATFORMS.....	6
1.2. REGULATION AND INNOVATION	7
2. SURVEY OF EXISTING LAWS AND REGULATIONS RELEVANT TO DIGITAL PLATFORMS IN THE PHILIPPINES.....	8
2.1. INNOVATION POLICY: POLICY PRIORITIES IN RECENT REGULATIONS AFFECTING DIGITAL PLATFORMS.....	8
2.2. FACILITATING ELECTRONIC TRANSACTIONS.....	10
2.2.1. ELECTRONIC CONTRACTS AND ELECTRONIC TRANSACTIONS	10
2.2.1.1. GENERAL	10
2.2.1.2. SIGNATURE AS A REQUIREMENT FOR CONTRACTS	11
2.2.1.3. CONTRACTS THAT MUST BE IN A PUBLIC DOCUMENT; NOTARIZATION	11
2.3. PAYMENTS AND MOVEMENT OF FUNDS.....	12
2.3.1. BSP: ELECTRONIC PAYMENTS AND MONEY SERVICE BUSINESS REGULATIONS.....	12
2.3.2. DTI: ENABLING DIGITAL GIFT CHECKS.....	14
2.3.3. SEC: VIRTUAL ASSETS AND VIRTUAL CURRENCIES AS SECURITIES	14
2.4. CONSUMER PROTECTION FOR DIGITAL TRANSACTIONS.....	15
2.4.1. GENERAL CONSUMER PROTECTION REGULATIONS.....	15
2.5. DATA PRIVACY; PROTECTION OF PERSONAL INFORMATION	16
2.5.1. SCOPE OF APPLICATION.....	16
2.5.1.1. ACCOUNTABILITY FOR PROCESSING.....	17
2.5.1.2. LEGAL PARAMETERS AND STANDARDS FOR PROCESSING PERSONAL DATA.....	18

2.5.2.	<i>CROSS BORDER TRANSFER OF INFORMATION BY ELECTRONIC MEANS</i>	19
2.5.3.	<i>LOCATION OF COMPUTING FACILITIES AND USE OF CLOUD TECHNOLOGY</i>	20
2.5.4.	<i>SECTOR SPECIFIC REGULATIONS ON DATA PROTECTION</i>	21
2.6.	<i>CYBERCRIME AND CYBERSECURITY</i>	23
2.7.	<i>ACCESS TO FUNDS: PHILIPPINE INVESTMENT POLICIES</i>	24
2.7.1.	<i>PHILIPPINE INVESTMENT POLICIES</i>	24
2.7.1.1.	<i>MASS MEDIA</i>	24
2.7.1.2.	<i>ADVERTISING</i>	25
2.7.1.3.	<i>RETAIL</i>	25
2.7.1.4.	<i>PUBLIC UTILITIES:</i>	26
2.7.1.4.1.	<i>COURIER SERVICES AND RIDE HAILING SERVICES</i>	26
2.7.1.4.2.	<i>TELECOMMUNICATIONS AND VALUE ADDED SERVICE PROVIDERS</i>	27
2.7.1.5.	<i>EDUCATION: MOOCS AND LEARNING PLATFORMS</i>	28
2.7.2.	<i>OTHERS</i>	28
2.7.2.1.	<i>CREATION OF GRANTS AND GOVERNMENT INVESTMENT FUNDS</i>	28
2.7.2.2.	<i>PERSONAL PROPERTY AS SECURITY</i>	29
2.8.	<i>INTELLECTUAL PROPERTY RIGHTS</i>	29
2.8.1.	<i>GENERAL IP LEGAL FRAMEWORK</i>	29
2.8.2.	<i>PROTECTING INVENTIONS, CODES</i>	30
2.8.1.	<i>LIABILITY OF PLATFORMS; SAFE HARBOR</i>	32
3.	<i>ANALYSIS: REGULATORY GAPS</i>	32
3.1.	<i>REGULATIONS THAT ENABLE DIGITAL PLATFORMS AND ELECTRONIC TRANSACTIONS</i>	32

3.2. REGULATORY RISKS, CONSTRAINTS AND GAPS.....	35
4. REGULATORY IMPACTS ON INDUSTRY GROWTH, COMPETITION, AND RELEVANT NATIONAL OBJECTIVES.....	38
4.1. REGULATIONS AS INNOVATION INHIBITORS	38
4.2. REGULATORY ARBITRAGE.....	42
4.2.1. CROSS-BORDER REGULATORY ARBITRAGE: DOING BUSINESS AND LOCATING IN THE PHILIPPINES	43
ABSOLUTE RELOCATION	43
HUB RELOCATION	43
FICTIONAL RELOCATION	44
4.2.2. REGULATORY ARBITRAGE WITHIN THE PHILIPPINES.....	45
5. A WAY FORWARD: POLICY CONSIDERATIONS AND SUGGESTIONS.....	45
5.1. IMPLEMENTING A COHERENT POLICY FOR PLATFORMS: A WHOLE OF GOVERNMENT APPROACH TO PLATFORM REGULATION.....	45
5.2. REGULATORY INTERSECTIONS	47
5.3. ASSESSING THE NECESSARY LEVEL OF REGULATORY INTERVENTION	49
5.4. CONCLUSION	52
6. BIBLIOGRAPHY.....	52

LIST OF TABLES

Table 1: GII - Knowledge and Technology Outputs; Selected ASEAN countries	31
Table 2: GII - Business Sophistication; Selected ASEAN countries	31
Table 3: GII - Infrastructure Pillar ranking	38
Table 4: Unicorns in ASEAN.....	39
Table 5: Volume and Number of Deals in Selected ASEAN Countries	41
Table 6: Internet Users in Selected ASEAN Countries 2019.....	44
Table 7: Outline of Restrictions and Possible Regulatory Adjustments to Address the Application of Restrictions to Digital Platforms.....	50

Cross-border issues for digital platforms: A review of regulations applicable to Philippine digital platforms

Aiken Larisa O. Serzo¹

1. Introduction

Economies are currently being transformed by the emergence of new business models involving the rise of technologies in the Industry 4.0. shifting from industries that focused on export and manufacturing, to industries that rely on internet and digital services.

The trend has been driven by the exponential improvements in computational capacity at negligible and decreasing costs. Platforms may serve as disruptors with the ability to replace pre-industry 4.0 market participants. Platforms also allow existing market participants to expand market reach, have additional functionalities, and offer more services. Many business services can now be provided over the internet at greatly reduced cost, and this trend is likely to accelerate.² The surge in digital platforms and online commerce are further fueled by foreign investments from Asia³ and the development of a nascent community of incubators and angel investors in the Philippines.

By cutting out the intermediary, platforms reduce the costs of transactions for both the provider and the consumer. Platforms host and encourage user-generated content; they match providers or producers with those in need of services or goods; and they can easily allow third party service providers to integrate and provide add-on services to the users of the digital platform. The rise of transactional and innovation digital platforms transformed the landscape of multiple industries in the Philippines such as transportation (e.g., Uber, Grab, Angkas, Gojek), hospitality (e.g., Airbnb, Agoda, Booking), payments (Apple Pay, Alipay, GCash, Paymaya, Grabpay); and software development and provision (e.g., Apple iOS, Google Android). Platforms that act as a marketplace of application program interfaces also democratized the creation of software applications and products.

The space is continuously and exponentially developing with the introduction of new technologies and processes. Products and services have increasingly been utilizing cloud computing in order to support a platform's need for agile and flexible storage and hosting services. Artificial intelligence and machine learning capabilities are also being integrated into various products to increase efficiency and accuracy in processes.

This Paper looks at the effect of existing legal frameworks and regulations on digital platforms and the latter's ability to remain innovative and competitive. It attempts to analyze whether existing regulations in the Philippines hamper innovation and provides for policy considerations which may improve the same.

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² Goswami et al. 2012. Exporting Services: A Developing Country Perspective. Washington DC: World Bank, as cited in Philippine Development Plan 2017-2022, Philippine Development Plan 2017-2022 17.

³ See UNCTAD. October 2016. Global Investment Trend Monitor.

Generally, innovation would refer to novel products and services. Under Philippine legislation, innovation is defined as the creation of new ideas that results in the development of new or improved products, processes, or services which are then spread or transferred across markets.⁴ Innovation is also defined by the Organisation for Economic Cooperation and Development (“OECD”)⁵ as the implementation of a new or significantly improved product or process, marketing method, organizational method in business practices, workplace organization or external relations.

The ability of platforms to innovate, create improved services, and compete with other platforms would depend on several factors which could be stifled or driven by regulations. This includes funding, product development, market size, and risk. Regulations may affect the foregoing factors positively or negatively. Securities and corporate regulations that provide various methods by which entrepreneurs can accept investments, or government programs that provide access to grants may enable innovation. Similarly, regulations that enable inventors to protect their intellectual property rights, or those that enable consumers to conclude contracts and perform digital payments will also drive technology use and innovation. However, regulations may stifle the ability of platform to innovate if it weakens property rights, or if the regulations cultivate uncertainties for platforms. Regulations that provide burdensome and capital-intensive requirements before an entrant can operate may also slowdown the entry or development or innovative firms.

For purposes of this Paper, the discussion will focus on government policies and regulations affecting the following: (i) general innovation policy, (ii) electronic contracting, (iii) payment solutions, (iv) consumer protection, (v) data protection and data privacy (including cross-border transfer of data), (vi) access to financing, and (vii) protection of intellectual property rights (the “Selected Areas”).

1.1. Challenges of Regulating Platforms

Crafting regulations to address innovative products, such as digital platforms and digital services, becomes challenging in light of the fluid nature of the target product or services of the regulations. Legislators and regulators may struggle to keep up with the changes.

Regulations must be crafted in order to address risks and potential harms presented by novel technologies. At the same time, these must be drafted in order to ensure that innovation and entrepreneurship are not unduly hampered. A careful balance must be struck between the government’s mandate to protect the public, and its mandate to promote innovation and economic growth.

The challenge of regulating platforms is further complicated by the cross-border nature of technological products and services. Digital platforms, by nature, are able to facilitate transactions beyond national borders. Hence, the movement of products, services, and payments occur between and among persons in different jurisdictions.

There are no laws or regulations in the Philippines that directly govern cross-border transactions through digital platforms. Each country is left to independently legislate and

⁴ Republic Act No. 11293.

⁵ Organisation for Economic Cooperation and Development (OECD). 2005. *The Measurement of Scientific and Technological Activities: Guidelines for Collecting and Interpreting Innovation Data: Oslo Manual, Third Edition*. Paris, France: OECD.

regulate the transactions falling within their respective jurisdiction, especially in the areas of cybercrime, finance, data protection, and e-commerce. As such, the regulatory environment for digital platforms differs per country. Digital platforms with regional or cross-border links may therefore be subject to the regulations of multiple countries.

Platforms are also multifaceted in terms of the products and services they provide such that a single platform may feature functionalities that would touch upon various fields of law and regulations. Aside from allowing the exchange of content and information between parties, platforms may also generate its own content, or directly engage in retail and commerce. Functionalities may further be integrated to payments and logistics. This may lead to confusion as to licensing and compliance issues due to conflicting or overlapping regulations.

1.2. Regulation and Innovation

The role of regulations is to correct perceived market failures or to encourage the subjects of the regulation to act according to behavior that is more socially desired. The OECD-Eurostat Entrepreneurship Indicators Program (“EIP”) identifies regulatory frameworks as 1 of 7 determinants⁶ affecting entrepreneurship. Regulatory frameworks would include issues related to the burden of government regulations, and costs required for starting a business.

The OECD⁷ recognizes that each country has varying conditions for innovation (level of economic development, geography, trade activities, and institutional characteristics), hence the choice and combination of innovation policies must be aligned with the capabilities of a country in terms of policy making and implementation. Essentially, the innovation policy must address the specific challenges that, in the determination of policymakers, will help drive sustainable and innovation-led growth.

Each country has unique challenges related to innovation which must be addressed on an ad hoc basis. This study does not attempt to provide specific policies for industry areas. Instead, consistent with the recommendations of United Nations Conference on Trade and Development (“UNCTAD”) and the OECD,⁸ the paper will look at the national innovation policy of the Philippines and analyze whether its existing regulations are aligned with the said policy. In the final analysis, this paper looks at the ability of the regulations to further stated innovation policy objectives. In addition, the analysis will include a determination as to whether the policy objectives as well as the actual implementation of such regulations are aligned with certain standards recommended by various international organizations, particularly the UNCTAD and OECD. This paper considers suggestions of the UNCTAD in its Digital Economy Report 2019 (the “Report”).⁹ The Report recommends that government must adopt a coordinated policy formulation and implementation, which should be holistic and multidisciplinary.

The UNCTAD Report provides high-level policy recommendation, based on the UNCTAD’s Rapid eTrade Readiness Assessments, insofar as they relate to the Selected Areas. On legal

⁶ Other determinants include market conditions, access to finance, creation and diffusion of knowledge, entrepreneurial capabilities, and entrepreneurship culture.

⁷ OECD. 2015. *The Innovation Imperative: Contributing to Productivity, Growth, and Well-Being*. Paris, France: OECD.

⁸ OECD. 2015. *The Innovation Imperative: Contributing to Productivity, Growth, and Well-Being*. Paris, France: OECD.

⁹ United Nations Conference on Trade and Development (UNCTAD). 2019. *Digital Economy Report 2019*. New York, USA: UNCTAD.

and regulatory frameworks –regulations must enable online transactions necessary for e-commerce, including the adoption of regulations on consumer protection, data protection, intellectual property, and cybercrime. The Report also stated that government should promote mobile payments and e-banking innovations. On access to funding, policies must encourage entrepreneurs to explore alternative funding models in addition to traditional financial institutions, including innovation grants and venture capital.

Part II shall provide an overview of the existing regulations in the Philippines.

2. Survey of Existing Laws and Regulations Relevant to Digital Platforms in the Philippines

This section will discuss 7 key policy areas: (i) general innovation policy, (ii) electronic contracting, (iii) payment solutions, (iv) consumer protection, (v) data protection and data privacy (including cross-border transfer of data), (vi) access to financing, and (vii) protection of intellectual property rights.

2.1. Innovation Policy: Policy Priorities in Recent Regulations Affecting Digital Platforms

Generally, high-level government policy has been supportive of innovation and entrepreneurship. Recognizing the need to harmonize the patchwork of existing regulations and policies, the recently enacted Philippine Innovation Act¹⁰ mandates all agencies and instrumentalities of the Philippine government to place innovation at the center of its development policies, guided by a clear and long-term set of goals that will take into consideration the key advantages of the country and the opportunities in the regional and global arena.¹¹ The policy objectives of the law are to:

- Promote a culture of strategic planning and innovation to encourage creative thinking and knowledge creation and dissemination towards expanding and maintaining economic competitiveness;
- Improve innovation governance in the country and compel the adoption of a long-term vision and focused priorities for innovation;
- Ensure effective coordination and eliminate fragmentation of innovation policies and programs at all levels;
- Strengthen the position of Micro, Small to Medium Enterprises (“MSMEs”) in the innovation system;
- Remove obstacles to innovation by suppressing bureaucratic hurdles, and adapting the regulatory framework to support the creation of and diffusion of new knowledge, products, and processes;
- Encourage entrepreneurial attitude in order to stimulate growth ambitions in businesses, especially among MSMEs;
- Explore, promote and protect the potentials for innovation of traditional knowledge, traditional cultural expressions and genetic resources; and
- Strengthen and deepen interactions and partnerships among different actors from the public and private sector, academe, MSMEs, research and development institutions

¹⁰ Republic Act No. 11293.

¹¹ Republic Act No. 11293.Sec. 2.

and communities towards promoting inclusive growth and improving the quality of life through innovation.¹²

The law institutionalizes the direction of the country to take a whole-of-government approach in ensuring policy coherence, alignment of priorities and effective coordination among various agencies and regulators for purposes of “promoting, innovation, internationalization, and digitization activities of MSMEs as driver of sustainable growth”.¹³ It also encourages greater interaction among stakeholders including the business sector, academe, and research institutions, and better coordination among government agencies.

The same law established the National Innovation Council (“NIC”) which is mandated to develop innovation strategies, coordinate with various sectors to promote program coherence. The NIC must monitor and assess innovation policies and implement an action agenda for the development of country’s capacity for and success in innovation, as measured by the Global Innovation Index and other indices.¹⁴ The NIC is in charge of developing the National Innovation Agenda and Strategy Document (“NIASD”)¹⁵ which is intended to be provide the long-term goals for innovation. Among other priority areas, the law includes digital economy as one of its priority areas.

Specific to MSMEs, the NIC must develop strategies to provide comprehensive support program, “from incorporation to internationalization”.¹⁶ The law and its implementing rules mobilize the government to work with private sector to provide technical and/or financial support programs for entrepreneurs.

The Innovative Startup Act¹⁷ seeks to foster inclusive growth through an innovative economy by encouraging a culture of innovation and streamlining government and non-government initiatives, in both local and international spheres, to create new jobs and opportunities, improve production and advance innovation and trade in the country.¹⁸ To this end, the law provides various channels for incentives to encourage the establishment and operation of innovative new businesses.¹⁹

The Board of Investments periodically issues a list of investment priority areas in its (“IPP”), the latest version of which was issued in 19 November 2020 and is set to take effect 15 days after its publication. Notably, the latest IPP includes as priority areas “Innovation Drivers”²⁰

¹² Republic Act. No. 11293, Sec. 4.

¹³ Implementing Rules and Regulations of Rep. Act No. 11293, Rule 4.

¹⁴ Republic Act No. 11293, Sec. 7.

¹⁵ Republic Act No. 11293, Sec. 9.

¹⁶ Implementing Rules and Regulations of Rep. Act No. 11293, Rule 12.

¹⁷ Republic Act No. 11337. An Act Providing Benefits and Programs to Strengthen, Promote and Develop the Philippine Startup Ecosystem

¹⁸ Id. at Sec. 3.

¹⁹ Id. at Sec. 3(2).

²⁰ Memorandum No. 50, s.2020, Sec. I(A)(9). The 2020 Investment Priority Plan issued by the Board of Investments defines “Innovation Drivers” to explicitly include “research and development activities, conduct of clinical trials, establishment of Centers of Excellence, innovation centers, business incubation hubs, smart cities and fabrication laboratories, co-working spaces, and development of mobility solutions and digital trade. This also covers commercialization of new and emerging technologies, uncommercialized patents on products and services, and products of locally-undertake R&D...”

which includes startup and startup enablers as defined under the Innovative Startup Act.²¹ This is in addition to the inclusion of creative industries and knowledge-based services such as contact centers, data analytics, animation, software development, information management systems and engineering design.

The E-Commerce Roadmap for 2016-2020²² also recognizes the important role of e-commerce in economic development. The Roadmap intends to set policy goals for various stakeholders in the areas of infrastructure, investment, innovation, intellectual capital, information flows, and integration.

Several laws enable digital transactions and digital entrepreneurship, such as the E-Commerce Act of 2000,²³ the law enabling the adoption of a national ID system,²⁴ a law providing more capital support for startups,²⁵ the Data Privacy Act of 2012,²⁶ and the Cybercrime Prevention Act of 2012.²⁷

Other than the general policy direction set by the Philippine Innovation Act, there is no singular and explicit overarching policy for digital platforms in the Philippines. Neither is a single regulator in charge of all platform activities. Instead, a digital platform is regulated depending on the activities it performs. This is understandable given the dynamic nature of the technology used by platforms and the wide variety of products and services offered by them.

The succeeding sections provide a discussion of the relevant laws which constitute the basic legal framework affecting digital platforms.

2.2. Legal Foundations: Facilitating Electronic Transactions

2.2.1. Electronic Contracts and Electronic Transactions

2.2.1.1. General

The E-Commerce Act of 2000²⁸ provides that communication and transactions done electronically are legal and enforceable, and should have the same effect as those done manually. The law seeks to facilitate transactions, agreement, contracts, and exchanges of information through the utilization of electronic, optical and similar technologies to recognize the authenticity and reliability of electronic documents and transactions.

Even absent the E-Commerce Act, it should be noted that agreements done electronically – including those done through email, SMS, or through the ticking of checkboxes – are generally

²¹ Republic Act No. 11337.

²² Department of Trade and Industry. 2016. Philippine E-Commerce Roadmap 2016-2020.

²³ Republic Act No. 8792. An Act Providing for the Recognition and Use of Electronic Commercial and Non-Commercial Transactions and Documents, Penalties for Unlawful Use Thereof, and Other Purposes.

²⁴ Republic Act No. 11055. An Act Establishing the Philippine Identification System.

²⁵ Republic Act No. 11337.

²⁶ Republic Act No. 10173. An Act Protecting Individual Personal Information in Information and Communications Systems in the Government and the Private Sector, Creating for this Purpose a National Privacy Commission, and for other Purposes.

²⁷ Republic Act No. 10175. An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and for other Purposes.

²⁸ Republic Act No. 8792.

recognized as valid and enforceable contracts in the Philippines. Under the law, the existence of contracts is established by the presence of the external elements of a contract: offer and acceptance. Provided that both elements are established, a contract is deemed valid and enforceable regardless of the medium through which it was made, provided that each party consented to the contract. An exchange of emails, SMS, or messages over a messaging application, or even an oral agreement,²⁹ showing both offer and acceptance would therefore be considered a valid contract. This stands even if no document is signed by the parties entering into the contract, or there is no signed written agreement at all.

2.2.1.2. Signature as a Requirement for Contracts

A signature is generally not a requirement for a contract to be valid. It should be noted, however, that there are certain documents³⁰ that must be signed in order to be valid.³¹ For cases like these, the E-Commerce Act provides the requirements³² that must be complied with in order for an electronic signature to be deemed the functional equivalent of a wet signature. Due to these requirements, the method of simply copy-pasting a digitized photo of one's signature will not be considered under the law as an electronic signature or the functional equivalent of a wet signature. In any case, most contracts necessary to perform transactions on digital platforms do not need to be signed in order to be valid. Proving consent through some method will be sufficient to bind the parties to their acts.

2.2.1.3. Contracts that must be in a Public Document; Notarization

There are documents which various laws and regulations require to be executed in a public document in order to be enforceable. Under Philippine law, a document becomes a "public document" when it is notarized.

²⁹ There are certain laws, however, that require certain types of contracts to follow a certain form in order to be valid and/or enforceable. The New Civil Code of the Philippines (the "Civil Code"), requires that certain contracts comply with the Statute of Frauds otherwise these may be unenforceable. The relevant provision states that in certain cases, an agreement made will be unenforceable unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party charged, or his agent. For purposes of complying with the Statute of Frauds, electronic documents will be considered as the legal equivalent of written documents.

³⁰ Examples of formal contracts that must be signed are: a holographic will,³⁰ donations of personal property in excess of PHP5,000.00,³⁰ written inventory attached to a contract of partnership,³⁰ power of attorney to sell land or any interest therein through an agent,³⁰ and marriage settlements and any modifications thereto.

³¹ Family Code, Art. 77.

³² Republic Act No. 8792, Sec. 8: A signature will be deemed the functional equivalent of a wet signature if it complies with the requirements of the E-Commerce Act, particularly:

1. The signature must comply with the definition of an electronic signature under Section 5(e) of the law (as cited in the preceding paragraphs);
2. There must be a prescribed procedure not alterable by the parties interested in the electronic document;
3. The procedure must utilize a method of identifying the party sought to be bound and indicating such party's access to the electronic document necessary of his other consent or approval through the electronic signature;
4. The said method is reliable and appropriate for the purpose for which the electronic document was generated in light of all circumstances including any relevant agreement;
5. It is necessary for the party sought to be bound, in order to proceed further with the transaction, to have executed or provided the electronic signature; and
6. The other party is authorized and enabled to verify the electronic signature and to make the decision to proceed with the transaction authenticated by the same.

Existing regulations will not allow parties to electronically sign documents that are notarized, even if such signature complies with the stringent requirements of the E-Commerce Act. The existing rules on notarial practice in the Philippines – the 2004 Rules on Notarial Practice³³ and the 2020 Interim Rules on Remote Notarization of Paper Documents³⁴ (collectively, the “Notarial Rules”) do not provide for a procedure by which notarial acts may be done through the execution of electronic signatures. Under the Notarial Rules, the parties signing the document must sign by hand, using “wet” signatures. The rules also contemplate that the physical document must be signed by the affiant and that such signing be done before the notary public (physically, or through video conference).

The Notarial Rules may therefore obstruct the seamlessness of executing digital transactions. Note, however, that except for documents³⁵ that the law requires must be in a public document, documents that are not notarized are still valid and enforceable. Most private commercial contracts, provided that these do not involve real estate or intellectual property transactions, may be valid and enforceable through electronic signatures or even if these are unsigned provided that the parties consented to the same. Users of websites or software may also generally be bound to terms and conditions or terms of use through any mechanism that can demonstrate consent.

2.3. *Payments and Movement of Funds*

Three main regulators have jurisdiction over the ability of platforms and consumers to make payments digitally: the Bangko Sentral ng Pilipinas (“BSP”), the SEC, and the Department of Trade and Industry (“DTI”).

2.3.1. *BSP: electronic payments and money service business regulations*

The existing legal framework for payments encourages the use of electronic payment and financial services (“EPFS”), and the use of various money service businesses. The National Strategy for Financial Inclusion of the BSP, launched in 2015, provides a comprehensive framework that underpins efforts of the government and private sector for financial inclusion.³⁶ The government’s thrust for financial inclusion created a climate conducive to the growth of

³³ Supreme Court, A.M. No. 02-08-13-SC. 2004 Rules on Notarial Practice.

³⁴ Supreme Court, A.M. No. 20-07-04-SC. 2020 Interim Rules on Remote Notarization of Paper Documents.

³⁵ Examples are contracts enumerated in the following laws and regulations whose validity and/or enforceability requires that the said contracts be executed in a public document: New Civil Code of the Philippines, Intellectual Property Code of the Philippines, National Internal Revenue Code, as amended, Securities Regulation Code, and other regulations issued by government agencies such as the Securities and Exchange Commission, the Intellectual Property Office of the Philippines, and the Bureau of Internal Revenue electronic notarization, it is legally impossible to satisfy the legal requirement. These kinds of documents are invalid in electronic form);

a. With respect to binding third parties in agreements related to third parties, the following must be notarized and submitted to the Register of Deeds: deeds, conveyances, encumbrances, discharges, powers of attorney and other voluntary instruments affecting registered or unregistered land.

b. Applications for land registration

³⁶ Bangko Sentral ng Pilipinas. 2019. 2019 Financial Inclusion Initiatives.

http://www.bsp.gov.ph/downloads/Publications/2019/microfinance_2019.pdfhttp://www.bsp.gov.ph/downloads/Publications/2019/microfinance_2019.pdf (accessed on 15 July 2020).

alternative providers of financial services and FinTechs. Aside from remittance service providers, the Philippine market now has e-money issuers, wallet providers, and virtual currency issuers and providers. There's also an increase in the number of lending platforms and other crowdfunding platforms. The importance of FinTechs in filling up the gap is doubly emphasized in the Philippines, where only 23% of adults³⁷ have a formal bank account.

Any financial institution may offer products or services to enable consumers to carry out or initiate electronic payments or financial transactions provided said entity complies with the regulations of the BSP on EPFS. The BSP provides a clear license and reporting procedure for EPFS entities.

The National Payment Systems Act³⁸ grants the BSP the power to oversee and regulate payment systems in the Philippines, and to coordinate with other regulators and agencies to avoid gaps, inefficiencies, duplications and inconsistencies in its regulation of other systems related to or interconnected with payment systems.³⁹

Generally, digital platforms may process payments in two ways: (i) The platform may perform the payment activities directly; or (ii) the platform may engage the services of payment providers. These payment providers may be banks or non-banking financial institutions that are authorized to engage in payments or money service business operations. Should the platform wish to perform the payment transactions directly, it may be required to procure the necessary registration with the BSP to operate as a payment system. Depending on its functionalities, the platform may also be required to procure licenses to allow it to provide EPFS and to engage in money service business operations.

The existing regulatory framework of the BSP further allows the operation of several payments and financial technology models that supports digital payments, particularly money service businesses, such as Remittance and Transfer Companies; Foreign Exchange and Money Change Dealers; Virtual Currency Exchanges.

Remittance and Transfer Companies refers to entities that provide Money or Value Transfer Service ("MVTS"). MVTS are financial services that involve the acceptance of cash, checks, other monetary instruments or stores of value, and the payment of a corresponding sum in cash or other form to a beneficiary by means of a communication, message, transfer or through a clearing network to which the entity engaged in MSB or MVTS belongs to.⁴⁰

³⁷ Bangko Sentral ng Pilipinas. 2019. Financial Inclusion Initiatives Survey.

<http://www.bsp.gov.ph/downloads/Publications/2019/2019FISToplineReport.pdf><http://www.bsp.gov.ph/downloads/Publications/2019/2019FISToplineReport.pdf> (accessed on 20 July 2020).

³⁸ Republic Act No. 11127.

³⁹ Bangko Sentral ng Pilipinas. 2018. BSP lauds the signing of the National Payment Systems Act.

<http://www.bsp.gov.ph/publications/media.asp?id=4886> (accessed on 15 July 2020).

⁴⁰BSP MORNBFI, Sec. 901-N: Remittance Agent refers to any entity that operates a remittance business network which includes any or combination of the following: (a) Remittance Direct Agent - refers to any entity that is covered by a direct contracted remittance agreement or similar agreement to act in behalf of a third party engaged in remittance business; (b) Remittance Agent Network Provider - refers to any entity that provides a network to perform remittance business; (c) such other similar entities as may be determined by the Monetary Board.

For digital platforms, a convenient payment option would be payment and settlement via e-money⁴¹ or monetary value that electronically stored including those made accessible through mobile phones or other access devices. E-money is regulated and allowed in the Philippines provided that the issuer is registered as an E-money issuer (EMIs) with the BSP.

The BSP also regulates virtual currency (“VC”) which is defined as a digital unit used as a medium of exchange or a form of digitally stored value created by agreement within the community of VC users.⁴² VCs may legally be exchanged for fiat and vice versa through licensed VC Exchanges. A VC Exchange refers to any entity that offers services or engages in activities that provide facility for the conversion or exchange of fiat currency to VC or vice versa.

In addition to the regulations on various money services businesses, the BSP mandated the adoption of a national quick response (“QR”) code standard to ensure the efficiency of payments systems in the country and to support inclusive economic development.⁴³ This applies to all payment service providers in consideration of the following principles: (i) interoperability to allow acceptance of multiple payment schemes through the National QR Code; (ii) simplicity to encourage usage of QR-enabled payment and financial services; (iii) accessibility where an open infrastructure is adopted to facilitate the acceptance of payments from various transaction accounts.

2.3.2. DTI: Enabling Digital Gift Checks

Digital platforms may also accept payments through the use of gift checks. Gift checks are beyond the ambit of the BSP and are instead regulated by the DTI.⁴⁴ A gift check is any instrument issued to any person, natural or juridical, for monetary consideration, honored upon presentation at a single merchant or an affiliated group of merchants as payment for consumer goods or services. A gift check may be in the form of paper, card, code, or other device, and shall remain valid until the cessation of business of the issuer.⁴⁵

Unlike e-money, gift checks may not be redeemed or withdrawn for cash. The value of gifts is also generally not transferable among the users of the gift check. Gift check issuers are also not required by the DTI to register or procure a license.

2.3.3. SEC: Virtual Assets and Virtual Currencies as Securities

Certain types of virtual assets and virtual tokens may fall under the jurisdiction of the SEC should said tokens have the characteristics of a security. Under the Securities Regulation Code, securities include “investment contracts”⁴⁶ which are defined as any “contract, transaction or

⁴¹ BSP MORNBFI, Sec. 702: E-money refers to monetary value that is: (i) Electronically stored in an instrument or device (cash cards electronic wallets accessible via mobile phone or other access device, stored value cards, etc.); (ii) Issued against receipt of funds of an amount not lesser in value than the monetary value issued; (iii) Accepted as a means of payment by persons or entities other than the issuer; (iv) Withdrawable in cash or cash equivalent; and (v) Issued in accordance with BSP regulations.

⁴²BSP MORNBFI, Sec. 902.

⁴³ Bangko Sentral ng Pilipinas. 2019. The Bangko Sentral pursues adoption of a national QR code standard for payments. <http://www.bsp.gov.ph/publications/media.asp?id=5182&yr=2019> (accessed on 16 July 2020).

⁴⁴ Republic Act No. 10962. An Act Regulating the Issuance, the Use, and Redemption of Gift Checks.

⁴⁵ Republic Act No. 10962. An Act Regulating the Issuance, the Use, and Redemption of Gift Checks.

⁴⁶ Securities Regulation Code, Sec. 3.1(b).

scheme whereby a person invests his money in a common enterprise and is led to expect profits primarily from the efforts of others”.⁴⁷ It should further be noted that the regulations give the SEC the broad authority to consider any type of instrument, including those that are not enumerated in existing rules, to be securities.⁴⁸ Given the foregoing, virtual assets and tokens run the risk of being considered as securities.

Securities must be registered with the SEC prior to issuance and/or sale. Further, the issuers of such securities must also procure the proper license and/or permit from the SEC. In 2018, the SEC also issued draft rules on initial token offerings. Under the draft, all issuers of “digital tokens” should submit themselves to an initial assessment with the SEC in order for the regulator to determine whether the subject token is in the nature of a security or not.

Issuers of virtual currencies, who are currently left unregulated by the BSP rules on virtual currency, may therefore find themselves being regulated by the SEC. The similar treatment will be imposed on gift checks which may have certain functionalities that could render them as securities.

2.4. Consumer Protection for Digital Transactions

2.4.1. General Consumer Protection Regulations

Consumer protection for persons engaged in online transactions are generally governed by the Consumer Act, and the E-Commerce Act.

A perusal of the Consumer Act, enacted in 1992, would show that there are no specific provisions with regard to transactions covered by electronic data messages or electronic documents. The E-Commerce Act fills in this gap by providing that “[v]iolations of the Consumer Act and other relevant or pertinent laws through transaction covered by or using electronic data messages or electronic documents, shall be penalized with the same penalties as provided in those laws.”⁴⁹

Further, the DTI, Department of Health, and the Department of Agriculture prescribed additional rules and regulations (the “Joint Administrative Order”) for consumer protection in a transaction conducted through electronic means. The Joint Administrative Order extended the existing regulations for non-electronic commercial transactions to those conducted electronically.

Consumers of financial services from BSP-supervised financial institutions (“BSFI”) are provided with additional protection through the BSP’s consumer regulations and the BSP Consumer Assistance Mechanism. Briefly, BSFIs are required to provide the following:⁵⁰

- clear disclosures and adequate transparency about the products and services being offered to consumers in order to allow the consumers to make comparisons and informed financial decisions;
- Protection of client information;

⁴⁷ Securities and Exchange Commission. 2015 Implementing Rules and Regulations of the Securities Regulation Code. Rule 26.3.5.

⁴⁸ Securities Regulation Code, Sec. 3.1(g).

⁴⁹ Republic Act No. 8792, Sec. 33 (c).

⁵⁰ *Ibid.*

- Ensure that financial consumers are treated fairly honestly and professionally
- Effective recourse which provides accessible, affordable, dependent, fair, accountable, timely and efficient means for resolving complaints; and
- Financial education and awareness initiatives aimed to provide consumers the knowledge, skills, and confidence to understand and evaluate information and empower them to make informed financial decisions.

2.5. *Data Privacy; Protection of Personal Information*

Digital platforms are subject to data protection regulations in the Philippines. The processing of personal information, which includes the cross-border transfer of data, is generally governed by the Data Privacy Act of 2012 (“DPA”)⁵¹ and the implementing rules and regulations of the National Privacy Commission (“NPC”). Some specific types of personal data relating to banking and financial information, tax information, and employment information may additionally be regulated by banking, labor, and tax laws and regulations. However, the baseline regulation for all types of personal information is the DPA.

The key principles espoused by the law relates to the following: (i) the parameters for the legal processing of personal information; (ii) the provision of substantive rights of data subjects relating to their personal information; (iii) accountability of entities that process personal information; and (iv) enforcement of data privacy rights. In the Philippines, all types of personal information, regardless of category, is protected by the DPA. This is unlike other jurisdictions with sector-specific data protection regulation.

2.5.1. *Scope of Application*

The DPA covers all types of persons and entities, provided they are processing⁵² personal information, regardless of the type, size, or income of the organization. It will therefore apply even to sole proprietors, including informal and unorganized businesses (such as micro entrepreneurs, social media stores, and other unregistered enterprises), and individual professionals and contractors. As a general rule, the law will find application regardless of the citizenship of the data subjects whose personal information is being processed. The applicability will attach for so long as the processing activity is done in the Philippines. The term “processing” refers to “any operation or any set of operations performed upon personal data including, but not limited to, the collection, recording, organization, storage, updating or modification, retrieval, consultation, use, consolidation, blocking, erasure or destruction of data.”⁵³ Processing may be performed through automated means, or manual processing, if the personal data are contained or are intended to be contained in a filing system.⁵⁴ Furthermore, the DPA has extraterritorial application (i.e. it will apply to activities done offshore) when the data subject whose personal information is being processed is a Filipino

⁵¹ Republic Act No. 10173.

⁵² Implementing Rules and Regulations of Rep. Act No. 10173, Sec. 3(o): The term “processing” refers to “any operation or any set of operations performed upon personal data including, but not limited to, the collection, recording, organization, storage, updating or modification, retrieval, consultation, use, consolidation, blocking, erasure or destruction of data.”⁵² Processing may be performed through automated means, or manual processing, if the personal data are contained or are intended to be contained in a filing system.

⁵³ Republic Act No. 10173, Sec. 3(j).

⁵⁴ Implementing Rules and Regulations of Rep. Act No. 10173, Sec. 3(o).

citizen or a Philippine resident.⁵⁵ Digital platforms and services providers located offshore may therefore be subject to the regulatory reach of the NPC.

The definition of personal information is expansive as it includes any information, in whatever form, 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 the individual.⁵⁶ For digital platforms, the DPA will therefore apply even if the platform is a B2B product and does not have individual end users as customers. At a minimum, a B2B business will still be handling the personal information of its employees.

The law exempts from its application personal information originally collected from residents of foreign jurisdictions in accordance with the laws of those foreign jurisdictions, including any applicable data privacy laws, which is being processed in the Philippines.⁵⁷ This exception is relevant for Philippine entities that are primarily providing services to customers offshore. Provided that the personal information provided by the entity is limited to information pertaining to foreign nationals and these are collected pursuant to the law of the latter's jurisdiction, the DPA will not apply. However, the DPA will apply should the personal information of Filipino citizens located overseas be involved. Hence to minimize potential liability, it will be prudent for the local entity to simply comply with the DPA. Relevantly, even for instances falling under the defined exceptions, the entities involved in the processing of the data are legally obligated to comply with the requirements of implementing security measures for personal data protection.⁵⁸

In recognition of other existing banking and financial regulations, the DPA explicitly excludes from its scope personal information necessary for banks and other financial institutions to comply with anti-money laundering / security clearance with an access control system that records when, where, and by whom the data centers are accessed. The NPC also recommends ISO/IEC 27018 as the most appropriate certification for the service or function provided by a service provider.⁵⁹

2.5.1.1. *Accountability for Processing*

The legal obligations on data protection is primarily imposed on personal information controllers (the "Controllers").⁶⁰ Controllers must ensure that the processing activities

⁵⁵ Republic Act No. 10173, Sec. 6.

⁵⁶ Republic Act No. 10173, Sec. 3(g).

⁵⁷ Republic Act No. 10173, Sec. 4(g).

⁵⁸ Implementing rules and regulations of the Data Privacy Act of 2012, Republic Act No. 10173, Sec. 5 (2016).

⁵⁹ *Id.*, at Sec. 12.

⁶⁰ This is consistent with the principle of accountability provided under the DPA, to wit:

"SEC. 21. *Principle of Accountability.* – Each personal information controller is responsible for personal information under its control or custody, including information that have been transferred to a third party for processing, whether domestically or internationally, subject to cross-border arrangement and cooperation.

(a) The personal information controller is accountable for complying with the requirements of this Act and shall use contractual or other reasonable means to provide a comparable level of protection while the information are being processed by a third party.

undertaken pursuant to its purposes and instructions are compliant with the general data privacy principles of transparency, legitimate purpose, and proportionality, and other provisions of the DPA. The Controller will remain responsible for the acts of its contractors or processors to whom it outsources processing activities.⁶¹ Processors may include cloud service providers, telecommunications providers, data management companies, and other subcontractors.

Digital Platforms that outsource or share the personal information collected by them must therefore ensure compliance by their subcontractors and business partners, whether local or foreign, with the DPA.

The DPA penalizes⁶² any person who commits any of the offenses provided in the law. In cases of breach by subcontracted processors, the subcontracting controller shall be held responsible.⁶³

2.5.1.2. Legal Parameters and Standards for Processing Personal Data

The law grants data subjects transparency and data autonomy rights over their personal information. The Controller is responsible for making sure that these rights are respected and that mechanisms are in place to ensure that these rights may be exercised. In particular, data subjects are accorded with the right to be informed whether personal information pertaining to him or her is being processed. The data subject should be furnished with information containing (i) the description of the personal information being entered into a system; the purposes for which the data is being or to be processed; (iii) the scope and method of the processing; (iv) the recipients or classes of recipients to whom they are or may be disclosed; (v) the methods utilized for automated access; (vi) the identity and contact details of the personal information controller; (vii) the period for which the information will be stored; and (viii) the existence of the data subject's rights (such as the rights to access, correction, and the right to lodge a complaint before the NPC). The foregoing rights are relevant in relation to determining whether a digital platform, acting as a Controller, can lawfully process personal information.

For processing to be lawful, at least one of the conditions enumerated⁶⁴ by law must be present, such as the consent of the data subject or that the processing is necessary and is related to the fulfillment of a contract with the data subject.

(b) The personal information controller shall designate an individual or individuals who are accountable for the organization's compliance with this Act. The identity of the individual(s) so designated shall be made known to any data subject upon request."

⁶¹ Rep. Act No. 10173, Sec. 11.

⁶² Corporations, partnerships, and any juridical persons, are still liable for monetary penalties ranging from five hundred thousand pesos (PhP 500,000) to four million pesos (PhP 4,000,000). For penalties of imprisonment, the penalty shall be imposed upon the responsible officers. Further, the court may suspend or revoke any of its rights under the law.⁶² If the offender is an alien, he or she may be deported in addition to the penalties. If the offender is a public official or employee found guilty, in addition to the provided penalties, he or she may suffer perpetual or temporary absolute disqualification from office, as the case may be.

⁶³ Rep. Act No. 10173, Sec. 14.

⁶⁴ (i) the consent of the data subject; (ii) the processing is necessary and is related to the fulfillment of a contract with the data subject. (iii) the processing is necessary for compliance with a legal obligation; (iv) the processing necessary to protect vitally important interests of the data subject, including life and health; (v) the processing is necessary in order to respond to national emergency, to comply with the requirements of public order and safety, or to fulfill functions of public authority which necessarily includes the processing of personal data for the fulfillment of its mandate; or (vi) the processing is necessary for the purposes of the legitimate interests

Relevantly, the DPA also refers to “sensitive personal information”⁶⁵ which includes the age or government I.D. numbers of a data subject. The processing of sensitive personal information is prohibited except if the data subject gave his or her consent, specific to the purpose of the processing, or if one of the other instances⁶⁶ enumerated by law exists.

At times, digital platforms may collect sensitive personal information, such as birthday and government I.D.s as part of its operations. This is usually done during the onboarding process or during the facilitation of payments and movement of funds. This is especially the case for platforms that integrate payment and logistics services in its applications. To prevent fraudulent transactions, platforms will sometimes require the submission of copies of the government identification cards of users. To allow said platforms to process all of these data categories, the platform must therefore generally procure the consent of its users.

Consent must be freely given, specific, informed indication of will, where the data subject agrees to the collection and processing of personal information about and/or relating to him or her. Implied consent, therefore, is not valid under the law. The purposes behind the processing activities should also be declared to the data subject so that the latter can provide an informed consent.

2.5.2. Cross border transfer of information by electronic means

Without prejudice to regulations for financial and government data, existing regulations do not prohibit the transfer of personal information to foreign jurisdictions. There are also generally no rules requiring data localization. However, since “processing” includes the transfer of personal information, any transfers of personal data to offshore locations and storage therein would require the consent of data subjects.⁶⁷

There are regulations, however, that implies that arrangements for offshore processing of data must be able to accommodate certain audit activities by Philippine regulators. Various government agencies are given auditing, visitorial, and examining powers under the law. This includes the BSP, the Secretary of the Department of Labor and Employment, and the Bureau

pursued by the personal information controller or by a third party or parties to whom the data is disclosed, except where such interests are overridden by fundamental rights and freedoms of the data subject, which require protection under the Philippine Constitution.

⁶⁵ Refers to 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 of a person, or to any proceeding for any offense committed or alleged to have been committed by such person, the disposal of such proceedings, or the sentence of any court in such proceedings; (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.

⁶⁶ In addition to consent, sensitive personal information may be processed if (i) the processing of the same is provided for by existing laws and regulations; (ii) the processing is necessary to protect the life and health of the data subject or another person;⁶⁶ (iii) the processing is necessary to achieve the lawful and noncommercial objectives of public organizations and their associations; (iv) the processing is necessary for purposes of medical treatment; and (v) the processing concerns such personal information as is necessary for the protection of lawful rights and interests of natural or legal persons in court proceedings, or the establishment, exercise or defense of legal claims, or when provided to government or public authority.

⁶⁷ Id., Sec. 12(a).

of Internal revenue.⁶⁸ We note that by these grants of audit powers, the data, systems, and records stored in offshore locations must be accessible to and by Philippine authorities.

2.5.3. Location of Computing Facilities and Use of Cloud Technology

There are no regulations that require data localization. However, Controllers must ensure compliance with the minimum requirements of the DPA and other relevant regulations. Hence, if personal data is involved, the Controller should generally inform its data subjects should data be transferred to various jurisdictions. The entity processing the data should also comply with applicable outsourcing, security, and audit requirements which it may be subject to depending on the activity it conduct.

There are also no regulations in the Philippines prohibiting private entities from using cloud storage and cloud technology. There are, however, guidelines for government agencies and BSFIs on their use of cloud technology.

The government agency should be able to demonstrate to the NPC the former's control framework for data protections and/or that of its service provider, and must ensure compliance with the DPA.⁶⁹ All personal data digitally processed must also be encrypted, whether at rest or in transit, and the NPC recommends certain technical requirements⁷⁰ for government entities.⁷¹ There are no similar recommendations for private entities.

BSFIs may also use cloud storage facilities provided that the latter operates in a jurisdiction that upholds confidentiality. Consistent with the requirements of the BSP on outsourcing, as documents in its Manual of Regulations for Banks and Non-Banks, the BSFI must ensure that it performs the appropriate due diligence, assess the risks presented by the cloud technology to be implemented, and review the cloud provider's financial soundness, reputation, managerial skills, technical capabilities, operational capability and capacity.⁷² The BSFI must also comply with the minimum requirements of the BSP regarding provisions that must be present in the contracts between financial institutions and technology providers.⁷³ The regulations do not provide for particular technology or server requirements, however, BSFIs are required to ensure that it formalizes the performance standards against which the quantity and the quality of the service should be measured in appropriate service level agreements.⁷⁴ Financial

⁶⁸ National Internal Revenue Code, as amended by R.A. No. 10963, Sec. 270.

⁶⁹ NPC Circular No. 16-01 s. 2016, Sec. 7.

⁷⁰ Advanced Encryption Standard with a key size of 256 bits (AES-256) as the most appropriate encryption standard. Passwords or passphrases must be of sufficient strength to deter password attacks.⁷⁰ All data centers must also be restricted to agency personnel that have the appropriate security clearance with an access control system that records when, where and by whom the data centers are accessed. The NPC also recommends ISO/IEC 27018 as the most appropriate certification for the service or function provided by a service provider.⁷⁰ Sensitive personal information are considered restricted data and these should be stored on accredited public cloud or GovCloud, and should meet a higher set of security standards and encryption protocols

⁷¹ DICT Circular: Cloud First Policy, Sec. 9.2.

⁷² BSP MORNBF, Appendix 78.

⁷³ *Ibid.*

⁷⁴ BSP MORNBF, Appendix 3.2, Section 3.2.

institutions must disclose certain information⁷⁵ to the BSP with respect to the chosen cloud service providers and ensure that the BSP will be able to audit the cloud service provider.

2.5.4. Sector Specific Regulations on Data Protection

Government Data. Where personally identifiable information is stored on the cloud by government agencies, these agencies should ensure that the cloud service provider meets the security assurance requirements. The Department of Information and Communication Technology (DICT) through its Cloud First Policy circular ("Government Cloud Policy"),⁷⁶ directs government agencies to use cloud technology. The policy provides different level of standards for non-sensitive or unclassified data, restricted sensitive data, and confidential or above-sensitive data. The first two types of data may be stored on accredited public cloud or the accredited government cloud service provider (GovCloud). However, the storage of sensitive personal information, which are considered restricted data, should meet a higher set of security standards and encryption protocols.⁷⁷ For confidential or above-sensitive data,⁷⁸ government is advised to utilize private cloud deployments to store or process the same.

The Government Cloud Policy requires that the utilization of public cloud or GovCloud meet security requirements and be verified by internationally recognized security assurance frameworks such as ISO/IEC 27001, Service Organization Controls Report (SOC) 1 and 2, and the Payment Card Industry Data Security Standard (PCI DSS). The policy further requires that data be encrypted using industry-tested and accepted standards and algorithms, such as AES (128 bits and higher), TDES (minimum double-length keys), RSA (1024 bits or higher), ECC (160 bits or higher), and ElGamal (1024 bits or higher).⁷⁹

⁷⁵ The following information must be disclosed to the BSP with respect to the outsourcing of activities to the cloud service provider ("CSP"):

- All proposed activities and operations to be outsourced to the CSP
- The CSP engaged, its company profile or background, as well as vendors or subcontractors in the critical path of the CSP
- The data to be processed or stored by the CSP
- The type of cloud services (i.e. SaaS, PaaS, IaaS) and cloud deployment model (i.e. Public, Private, Community or Hybrid) will be implemented
- If done offshore, from which territories will the cloud services be provided

The BSP will also require an assessment of the following:

- How the BSFI would ensure consumer protection and the grant of BSP access to CSP's infrastructure (to assess compliance)
- The justification for outsourcing to a CSP and the use of a cloud
- If it has the necessary policies in place (outsourcing, audit process, privacy, business continuity, etc.)
- CSP selection process and criteria
- Agreements with the CSP (e.g. MOA, SLA)
- The security controls are in place to protect the transmission and storage of information/data within the CSP infrastructure, and other security and privacy concerns

⁷⁶ DICT Circular No. 2017-002.

⁷⁷ *Id.* at 9.2.

⁷⁸ *Id.* at Sec. 9: which enumerates the types of confidential data: political documents, technical matters of military value, trade secrets. etc.

⁷⁹ *Id.*, at Sec. 11.3., *Id.*

Financial Data. The BSP provides further regulations for data processed by BSFIs. On data ownership, should the BSFI utilize cloud service providers or other third party contractors, the BSFI must contractually stipulate that it retains exclusive ownership over all of its data.⁸⁰ The regulations do not prohibit a provider from housing the outsourced data offshore. However, the provider must have reliable means to ensure that the data of the BSFI is stored and processed in specific jurisdictions as declared to the BSFI.⁸¹ This is to enable the parties to identify the various regulations which may be applicable to the processing of the data.

As a minimum, the contract of the BSFI and the provider must specify each party's obligations with respect to compliance with the Law on Secrecy of Deposits, Foreign Currency Deposit System, Anti-Money Laundering act, E-Commerce Act, Cybercrime Prevention Act, General Banking Law, and BSP regulations on IT risk management, electronic banking, consumer protection, and security.⁸² As mentioned, the provider should also be able to grant the BSP access to its cloud infrastructure to determine compliance with regulations and assess the soundness of risk management processes and controls in place.

The BSFI must ensure that it complies with the BSP regulations on risk management and outsourcing. The regulations do not provide for particular technology or server requirements, however, BSFIs are required to ensure that it formalizes the performance standards against which the quantity and the quality of the service should be measured in appropriate service level agreements.⁸³ Financial institutions must disclose certain information⁸⁴ to the BSP with respect to the chosen cloud service providers.

Health Data. There is no central government agency that regulates health data. However, entities processing data should be aware of the confidentiality obligations imposed by various

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ BSP MORNBFI, Appendix 3.2, Sec. 3.2.

⁸⁴ The following information must be disclosed to the BSP with respect to the outsourcing of activities to the cloud service provider ("CSP"):

- All proposed activities and operations to be outsourced to the CSP
- The CSP engaged, its company profile or background, as well as vendors or subcontractors in the critical path of the CSP
- The data to be processed or stored by the CSP
- The type of cloud services (i.e. SaaS, Paas, Iaas) and cloud deployment model (i.e. Public, Private, Community or Hybrid) will be implemented
- If done offshore, from which territories will the cloud services be provided

The BSP will also require an assessment of the following:

- How the BSFI would ensure consumer protection and the grant of BSP access to CSP's infrastructure (to assess compliance)
- The justification for outsourcing to a CSP and the use of a cloud
- If it has the necessary policies in place (outsourcing, audit process, privacy, business continuity, etc.)
- CSP selection process and criteria
- Agreements with the CSP (e.g. MOA, SLA)
- The security controls are in place to protect the transmission and storage of information/data within the CSP infrastructure, and other security and privacy concerns

statutes. The Philippine AIDS Prevention and Control Act of 1998⁸⁵ mandates medical confidentiality in handling all medical information, particularly the identity and status of persons with HIV.⁸⁶ The Magna Carta of Disabled Persons⁸⁷ and the Mental Health Act⁸⁸ also mandate medical confidentiality and provide criminal penalties for the unauthorized access or use of health information.

2.6. *Cybercrime and Cybersecurity*

The Cybercrime Prevention Act of 2012 penalizes offenses made via the use of ICT. The law punishes three types of offenses made through the use of ICT: offenses against the confidentiality, integrity, and availability of computer data and systems, computer-related offenses, and content-related offenses. The first type includes illegal access to computer systems, illegal interceptions of computer data, data interference, system interference, and misuse of devices. The second type covers computer-related forgery, fraud, and identity theft. The third type of offenses include cybersex, child pornography, and libel.

Through this law, developers and platform operators may therefore have better protection against persons that access data (of whatever nature) illegally, or those that abuse platform functionalities, or interfere with the operations of computer systems.

The penalties for offenses covered by other laws were also increased by the Cybercrime Prevention Act should such offenses be done through the use of ICT.⁸⁹

The law also provides greater protection to the public by providing mechanisms that would require platforms to cooperate with investigations involving potential cybercrimes, and by penalizing persons who may knowingly be aiding and abetting cybercrimes. Digital platforms may be liable under the law for content or activities made through their websites, should the complainant be able to prove that the platform willfully abetted or aided in the commission of any cybercrime.⁹⁰

The Supreme Court issued its Rules on Cybercrime Warrants to aid law enforcement agencies in investigations of alleged cybercrime offenses. Warrants issued under the foregoing Rules would enable law enforcement to issue orders for disclosure of computer data (such as subscriber information, traffic data, and other relevant data). It may also enable law enforcement personnel to intercept data, and seize data, subject to the fulfillment of certain requirements.

It should be further noted that under the Cybercrime Prevention Act, service providers (which may include digital platforms) are required to keep, retain, and preserve the integrity of traffic data and subscriber's information for a minimum period of 6 months from the date of the transaction. Content data must be similarly preserved for 6 months if the service provider receives an order from law enforcement authorities requiring its preservation.⁹¹

⁸⁵ Republic Act No. 8504.

⁸⁶ *Id.*, at Art. VI.

⁸⁷ Republic Act No. 7277, Sec. 33.

⁸⁸ Republic Act No. 11036.

⁸⁹ Republic Act No. 10175, Sec. 6.

⁹⁰ Republic Act No. 10175, Sec. 5.

⁹¹ Republic Act No. 10175, Sec. 13.

2.7. Access to Funds: Philippine Investment Policies

2.7.1. Philippine Investment Policies

Despite national policies that seek to encourage investment and internationalization of MSMEs, existing regulations on mass media, advertising, telecommunications, retail, logistics and education restrict digital platforms in the Philippines from receiving foreign investments.

2.7.1.1. Mass Media

Under the 1987 Constitution the ownership and management of entities engaged in mass media is reserved only to Filipino nationals or to entities wholly owned by Filipinos.

The Consumer Act⁹² 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, handbills, leaflets, mails and the like.” The Tobacco Regulation Act of 2003⁹³ thereafter specifically included the internet in this definition.

The Department of Justice (“DOJ”)⁹⁴ and the Securities and Exchange Commission (“SEC”) issued opinions to the effect that internet platforms publishing information to the public are engaged in mass media. This policy from both agencies effectively subjected platforms and websites to the foreign equity restriction on mass media. This position was reiterated in a number of other SEC Opinions. In a 2017 Opinion,⁹⁵ the SEC further clarified that the corporation does not need to be the creator of the message or information to be considered as a mass media entity. The dissemination of information to the public is sufficient to constitute a platform as a mass media entity.

In the most recent Foreign Investment Negative List issued last 2018 (11th FINL),⁹⁶ “internet business” was declared by the President to be open for foreign ownership, the same not being considered as a mass media activity. Nonetheless, the SEC in a later Opinion⁹⁷ clarified that “internet business” refers to internet access providers that merely serve as carriers for transmitting messages, rather than being the creator of messages/information. As to the other aspects of the internet, where information is transmitted to and intended to influence the masses, these are still covered by the definition of mass media.

It is worth noting that the 2018 SEC Opinion⁹⁸ also included guidelines which platforms are advised to consider in order not to be engaged in mass media:

- There is no pervasive or indiscriminate display to the general public of any promotional materials on the products or service being offered by the third party clients, or even the platform, or mobile app itself;

⁹² Republic Act No. 7394. The Consumer Act of the Philippines.

⁹³ Republic Act No. 9211. An Act Regulating The Packaging, Use, Sale, Distribution And Advertisements Of Tobacco Products And For Other Purposes

⁹⁴ Department of Justice Opinion No. 40, s. 1998.

⁹⁵ SEC-OGC Opinion No. 17-07.

⁹⁶ Executive Order No. 65, s. 2018.

⁹⁷ SEC-OGC Opinion No. 18-21

⁹⁸ *Ibid.*

- Only the following information may be made available in the app, website, or platform: (i) enumeration of the services offered by the platform itself; (ii) instruction on how to use the said platform; (iii) enumeration of the third party partner, and this shall only be limited to the listing of the name or logo of the third-party client; and (iv) any other information on the platform required to be disclosed by any law or regulatory measure.
- 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.

The foregoing guidelines would still consider platforms that feature products and services provided by users and third parties to be engaged in mass media. This will include online marketplaces, online learning providers, and other publishers of third-party content. Further, platforms that publish ads will also be considered as engaged in mass media, thus affecting the ability of digital platforms to earn revenue.⁹⁹

2.7.1.2. *Advertising*

Advertising is currently a protected industry under the Constitution and is limited to Filipino citizens or corporations with foreign equity of not more than 30%.

The restriction is imposed against persons that act as advertising agencies or “service organizations or enterprises creating, conducting, producing, implementing, or giving counsel on promotional campaigns or programs through any medium for an in behalf of any advertiser.”¹⁰⁰ The DOJ and the SEC classified as advertising agencies entities that “serve as agents or counselors of advertisers by writing, preparing, or producing the commercial messages or materials used by advertisers in selling their goods and services and by selecting and recommending the medium or media to be used as the vehicle for disseminating such messages to the public.”¹⁰¹

2.7.1.3. *Retail*

Retail trade is defined as any act, occupation or calling of habitually selling direct to the general public merchandise, commodities or goods for consumption, subject to certain exception exceptions.¹⁰²

Generally, retail enterprises with paid-up capital of the equivalent of USD2,500,000 are reserved for Filipino citizens and corporations wholly owned by Filipinos. Foreign retailers wanting to engage in retail trade in the Philippines must meet the qualifications in RA 8762, including: (i) a paid up capital of at least USD2,500,000 and a minimum of USD200,000,000 net worth in its parent corporation;¹⁰³ (ii) five (5) retailing branches or franchises in operation anywhere around the world unless such retailer has at least one (1) store capitalized at a minimum of USD25,000,000; and a (iii) five (5)-year track record in retailing.

⁹⁹ SEC-OGC Opinion No. 16-21.

¹⁰⁰ Republic Act No. 7394, Sec. 4(c).

¹⁰¹ SEC-OGC Opinion No. 14-06.

¹⁰² Republic Act No. 8762.

¹⁰³ For retailers of high-end luxury goods, the requirement for capitalization is USD250,000.00 and the retailer’s parent company must have a minimum of at least USD50,000,000.00 net worth in its parent corporation.

The regulations further prohibit foreign retailers from using mobile or rolling stores or carts, sales representatives, engaging in door-to-door selling, and such other similar retailing activities. The limitation on the geographic extent where retailers may conduct business in the Philippines puts into question whether digital stores made available on websites or mobile applications are considered as violations of the law.

Aside from the steep capitalization requirements, the requirements on minimum number of existing physical branches and a 5-year retailing track record eliminates the possibility for wholly digital foreign retailers to enter the Philippines.

Platforms that are designed as two-sided marketplaces (where sellers and buyers are allowed by the platform to conduct transactions) will not be considered as engaged in retail. However, note that platforms that feature information about the goods of third parties (such as two-sided marketplaces) may fall within the definition of mass media, as discussed in the preceding sections.

2.7.1.4. Public Utilities:

2.7.1.4.1. Courier Services and Ride Hailing Services

The Constitution provides that public utilities are allowed up to 40 percent foreign equity only. Delivery services and ride-hailing may be considered as public utilities under existing regulations.

The Postal Services Act of 1992,¹⁰⁴ explicitly states that the delivery of parcels is “a basic and strategic public utility”, thus clearly classifying couriers and parcel delivery services as public utilities.

Due to Department of Transportation (“DOTr”) regulations,¹⁰⁵ ride hailing service providers fall under the definition of public service¹⁰⁶ under the Public Service Act and therefore subject to the restrictions on public utility. In 2015, the DOTr released an administrative issuance defining and regulating Transportation Network Companies (TNCs) and Transport Network Vehicle Services (TNCs) effectively categorizing such entities as public service providers.

¹⁰⁴ Republic Act No. 7354. An Act Creating the Philippine Postal Corporation, Defining its Powers, Functions and Responsibilities, Providing for Regulation of the Industry and for Other Purpose Connected Therewith.

¹⁰⁵ DOTr Department Order No. 2015-11.

¹⁰⁶ “Public service”, under the Public Service Act “includes every person that now or hereafter may own, operate, manage, or control in the Philippines, for hire or compensation, with general or limited clientele, whether permanent, occasional or accidental, and done for general business purposes, **any common carrier, railroad, street railway, traction railway, sub-way motor vehicle, either for freight or passenger, or both with or without fixed route and whether may be its classification**, freight or carrier service of any class, express service, steamboat or steamship line, pontines, ferries, and water craft, engaged in the transportation of passengers or freight or both, shipyard, marine railways, marine repair shop, [warehouse] wharf or dock, ice plant, ice-refrigeration plant, canal, irrigation system, gas, electric light, heat and power water supply and power, petroleum, sewerage system, wire or wireless communications system, wire or wireless broadcasting stations and other similar public services...”

This classification appears to extend to motorcycle taxis given the rejection¹⁰⁷ of the Land Transportation Franchising Regulatory Board of the proposed entry of Indonesian ride-hailing platform company, Gojek on the basis of the failure of the local subsidiary to comply with the 60-40 limitation for public utilities.

2.7.1.4.2. *Telecommunications and Value-Added Service Providers*

Telecommunications in the Philippines is considered a public utility which is subject to the 60-40 limitation. Public telecommunications entities (“PTE”) are further required to procure a franchise from Congress prior to operating. PTE, based on the the Public Telecommunication Policy Act, refers to any “person, firm, partnership or corporation, government or private, engaged in the provision of telecommunications services to the public for compensation.”¹⁰⁸ Under the same law, generally, any process which enables an entity to relay and receive voice, data, electronic messages, written or printed matter, fixed or moving pictures, words, music or visible or audible by wire, radio or other electromagnetic, spectral, optical or technological means will fall within the ambit of “telecommunications”.¹⁰⁹ Digital platforms will not necessarily be classified as PTEs unless they fall under this definition. However, digital platforms may be considered as value-added service (“VAS”) providers. VAS refers to entities which rely on the facilities of the local exchange, inter-change operators or and overseas carriers, and offers enhanced services beyond those ordinarily provided for by such carriers.¹¹⁰

The following services, which are usually provided by digital platforms, are explicitly classified by the National Telecommunications Commission (“NTC”) as VAS: audio and video conferencing, electronic mail service, information services (including all types of information delivered to/accessed by the users/subscribers such as road traffic information, financial information), electronic gaming services, applications service (including mobile banking, payments), and content and program services (including all types of content delivered to/accessed by the users such as music, ring tones, logos, video clips).¹¹¹

VAS providers are generally considered public utilities. As such, they will be subject to the constitutional limitation on foreign equity for public utilities which is set at 40%. The exception to this rule is if the VAS provider provides services to an existing telecommunications

¹⁰⁷ Department of Transportation (DOTr). 2019. LTFRB rejects Go-Jek subsidiary’s Accreditation Bid as Local TNC for Failure to Pass Nationality Requirements. <https://www.dotr.gov.ph/55-dotrnews/815-ltfrb-rejects-go-jek-subsiary-s-accreditation-bid-as-local-tnc-for-failure-to-pass-nationality-requirements.html>. (accessed on 5 August 2020).

¹⁰⁸ Republic Act No., 7925, Sec. 3 (b).

¹⁰⁹ Republic Act No., 7925, Sec. 3 (a).

¹¹⁰ Republic Act No., 7925, Sec. 3 (h).

¹¹¹ NTC Memorandum Circular No. 02-05-2008.

company, and not the general public.¹¹² An NTC Opinion also implied that this limitation will not apply if the service is limited in scope and availability.¹¹³

VAS providers do not need to secure a franchise or a special license to operate but will need to register with the NTC.¹¹⁴ The registration will require said providers to have a lease agreement with telecommunications entities, and to submit systems configuration and operational documents, among other documentary requirements, to the regulator.

2.7.1.5. *Education: MOOCs and Learning Platforms*

Under the Constitution, educational institutions (other than those established by religious groups and mission boards, or those established for short term high-level skills development that do not form part of the formal education system) are allowed up to 40 percent foreign equity.

“Formal education” is the “hierarchically structured and chronologically graded learning organized and provided by the formal school system and for which certification is required in order for the learner to progress through the grades or move to higher levels.”¹¹⁵

Relevant to digital platforms is the inclusion of “work education” and “practical arts” in the definition of a “formal education system”.¹¹⁶ This inclusion renders providers of online training courses (that are not part of the primary, secondary or tertiary education levels), such as massive open online courses providers, as educational institutions that are part of the formal education system, and therefore subject to restrictions on foreign equity. In an Opinion, the SEC extended the definition of “educational institution” to providers of online language tutorial services, and diving.¹¹⁷ It should be noted that the Constitution and the 11th FINL, exempts those “for short-term high-level skills development” from the application of the restriction. However, no definitive guidance as to the definition of “short-term high-level skills development” has been provided by the regulator.

2.7.2. *Others*

2.7.2.1. *Creation of Grants and Government Investment Funds*

The Philippine Innovation Act created an Innovation Fund (intended to be given as grants) to strengthen entrepreneurship and enterprises engaged in developing innovative solutions. This

¹¹² See: DOJ Opinion No. 2 s. 2009 which stated that “A VAS provider only becomes a public utility if it holds itself out to whoever may wish to avail of its services. On the other hand, a VAS provider cannot be regarded as a public utility, if it extends its services to a particular telecommunications company covered by a private contract, which owns and operates the transmission, switching and distribution facilities and as such is the public utility contemplated under the Constitution. Therefore, the nationality requirement imposed under the 1987 Constitution will only apply to the first, but not to the second.”

¹¹³ See *NTC Opinion dated 7 December 2009*, where the NTC opined that that “a corporation offering VAS did not have to comply with the nationality requirement if “it will not offer its services to whoever may wish to avail it but will offer it to the tenants of the building it owned.”

¹¹⁴ Republic Act No., 7925, Sec. 11.

¹¹⁵ *Id.* at Sec. 20.

¹¹⁶ *Id.* at Sec. 24.

¹¹⁷ SEC-OGC Opinion No. 17-05.

fund, from which grants shall be issued, will be administered by the NIC which shall screen and approve qualified proposals. Subject to availability of funds, a revolving fund in the initial amount of One Billion Pesos (₱1,000,000,000.00), is allocated for the initial year's implementation of the Act, and such funds necessary for its continuous and effective implementation must thereafter be included in the annual General Appropriations Act.

The same law also created an innovation development credit and financing program by requiring all banking institutions, whether government or private, to allot at least 4% of their total loanable funds for innovation development credit.¹¹⁸ The loans and other financing activities under this agreement must be granted to borrowers for purposes of the development of new technologies, product innovation, process innovation, organizational innovation, and marketing innovation.¹¹⁹

These are further supplemented with the grants and investment funds intended for startups under the recently enacted Innovative Startup Act.¹²⁰

2.7.2.2. *Personal Property as Security*

The Personal Property Security Act,¹²¹ enacted in 2018, established a unified and modern legal framework for securing obligations with personal property.¹²² This law allows persons to use any personal property (including intangible rights and intellectual property rights) as a security in a simple manner, with minimal cost. This law is expected to promote economic activity by increasing access to low cost credit, particularly for MSMEs.

2.8. *Intellectual Property Rights*

2.8.1. General IP Legal Framework

The intellectual property rights legal framework in the Philippines provides a supportive environment for creators, entrepreneurs, and inventors.

The Philippines is a signatory to treaties that enable Philippine intellectual property owners to seek international protection for their rights. The Philippines is a member of the World Intellectual Property Organization (“WIPO”) and the World Trade Organization (“WTO”). By virtue of the WTO membership, the Philippines is also a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).

The Berne Convention,¹²³ supplemented by the TRIPS, provides that works originating in any of the contracting states must be given the same protection in each of the other contracting states. This provides a comprehensive protection to authors of literary and artistic works in the Philippines, including developers of computer code. The Philippines is also a member and/or signatory to the following: the Paris Convention for the Protection of Industrial Property, the International Convention for the Protection of Performers, Producers of Phonograms and

¹¹⁸ Joint NEDA-DOST-DTI Administrative Order No. 01, s. 2020, Rule 23.

¹¹⁹ Joint NEDA-DOST-DTI Administrative Order No. 01, s. 2020, Rule 22.

¹²⁰ Republic Act No. 11337.

¹²¹ Republic Act No. 11057.

¹²² *Id.*, at Sec. 2.

¹²³ Berne Convention for the Protection of Literary and Artistic Works.

Broadcasting Organizations, the Patent Cooperation Treaty, Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled.

The Intellectual Property Office of the Philippines (“IPOP HL”), with the support of the WIPO, issued the National Intellectual Property Strategy 2020-2025 (“NIPS”) last 9 December 2019. Through NIPS, the IPOP HL aims to (i) ensure a robust, predictable, and efficient IP system and enforceable IP rights; (ii) improve knowledge protection; (iii) develop a culture of innovation, creativity, and respect for IP through mainstreaming IP in the educational system and key sector; enhance the productivity of selected priority industries where IP plays a major role; (v) consider improvements in certain areas of IPOP HL operation, and other government agencies; (vi) promote the effective use of the IP system as a tool for economic, cultural, and scientific development.

2.8.2. Protecting inventions, codes

Digital platforms and participants, whether Philippine residents or from offshore, may seek to protect and enforce their intellectual property rights in the Philippines through IPOP HL.

Creative works that are made through digital tools are protected in the Philippines by copyright. Software codes may also be protected in the Philippines with copyright. Copyright vests in the author from the moment of creation and this requires no registration with government. Products and processes, including processes enabled by technology, that provide any technical solution to a problem may be protected by a patent provided that these are new and inventive. Marks and name may also be protected by registering these as trademarks with IPOP HL.

In 2019, IPOP HL began its operation as an International Searching Authority and International Preliminary Examining Authority.¹²⁴ This allows IPOP HL to conduct search and examination of international patent applications filed.

As mentioned, rights owners may also take advantage of the various treaties and agreement which the Philippines is a party to in order to extend the protection to offshore jurisdictions. Depending on the work sought to be protected, the protection may be in the form of copyright, trademarks, trade secrets, patents, designs, and utility models.

In the Global Innovation Index (“GII”) 2020 rankings, the Philippines ranked 50th among 131 economies.¹²⁵ This is the best ranking that the country has recorded in the GII and is an improvement from its 2019 ranking of 54th and its 2018 ranking of 73rd. Notably, Singapore (8th), Malaysia (33rd), Vietnam (42nd), and Thailand (44th) ranked higher than the Philippines. The GII is co-published by Cornell University, INSEAD and the WIPO, and ranks world

¹²⁴ Intellectual Property Office of the Philippines. 2019. IPOP HL expands service for Filipino inventors, starts operation as international authority. <https://www.ipophil.gov.ph/news/ipophil-expands-service-for-filipino-inventors-starts-operation-as-international-authority/> (accessed on 22 November 2020).

¹²⁵ Cornell University, INSEAD, and WIPO. 2020. *The Global Innovation Index 2020: Who will Finance Innovation?* Ithaca, Fontainebleau, and Geneva: WIPO.

economies according to the latter’s innovation capabilities based on several pillars.¹²⁶ Note that this index is relevant as the Philippine Innovation Act explicitly mentions the GII as a benchmark for innovation policy.

The IPOPHL attributes the ranking of the Philippines to the increase in invention and utility model filings. The IPOPHL cited the growing network of IPOPHL’s Innovation and Technology Support Offices (“ITSOs”), composed of 100 higher-education institutions and research for development centers, as a driver of increased IP protection filings.¹²⁷ The management by the IPOPHL of the ITSOs has also been lauded by the WIPO as a global model that several other economies can replicate.¹²⁸

Compared to other economies in South East Asia, East Asia and Oceania, the Philippines is above average in two of the seven GII pillars: knowledge and technology outputs and business sophistications. The following table shows the performance of the Philippines on Knowledge and Technology Outputs and Business Sophistication, in comparison with selected ASEAN countries. Singapore, Malaysia, Vietnam, and Thailand placed higher than the Philippine in the overall rankings. However, the Philippine remains relatively competitive in these 2 areas.

Table 1: GII - Knowledge and Technology Outputs; Selected ASEAN countries

	Knowledge and Technology Outputs	Knowledge creation ¹²⁹	Knowledge impact ¹³⁰	Knowledge diffusion ¹³¹
Philippines	26 th	65 th	34 th	8 th
Singapore	1 st	1 st	2 nd	17 th
Malaysia	38 th	70 th	22 nd	18 th
Vietnam	37 th	75 th	21 st	14 th
Thailand	44 th	54 th	32 nd	36 th

Table 2: GII - Business Sophistication; Selected ASEAN countries

	Business Sophistication	Knowledge workers ¹³²	Innovation linkages ¹³³	Knowledge absorption ¹³⁴
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¹²⁶ Institutions, Human Capital & Research, Infrastructure, Market Sophistication, Business Sophistication, Knowledge and Technology Outputs, Creative Outputs.

¹²⁷ Intellectual Property Office of the Philippines. 2020. IPOPHL Expressed Confidence in PH Increasing Innovation Ranks at 61st WIPO General Assembly. <https://www.ipophil.gov.ph/news/ipophil-expressed-confidence-in-ph-increasing-innovation-ranks-at-61st-wipo-general-assembly/>

¹²⁸ Intellectual Property Office of the Philippines. 2019. IPOPHL Rationalises Guidelines that Push Innovation Hubs to Bring Genuine Innovation Impact. <https://www.ipophil.gov.ph/news/ipophil-rationalises-guidelines-that-push-innovation-hubs-to-bring-genuine-innovation-impact/> (accessed on 22 November 2020).

¹²⁹ Consisting of: patents by origin/bn PPP\$ GDP, PCT patents by origin/bn PPP\$ GDP, utility models by origin/bn PPP\$ GDP, scientific and technical articles/bn PPP\$ GDP, citable documents H-index

¹³⁰ Consisting of: growth rate of PPP\$ GDP/worker %, new business/th pop.15-64, computer software spending % GDP, ISO 9001 quality certificates/bn PPP\$ GDP, high and medium-high tech manufacturing %

¹³¹ Consisting of: intellectual property receipts % total trade, high-tech net exports % total trade, ICT services exports % total trade, FDI net outflows % GDP

¹³² Consisting of: knowledge-intensive employment %, firms offering formal training %, GERD performed by business % GDP, GERD financed by business %, females employed with advanced degrees

¹³³ Consisting of: university/industry research collaboration, state of cluster development, GERD financed by abroad % GDP, JV-strategic alliance deals, patent families 2+ offices/bn PPP% GDP.

¹³⁴ Consisting of: intellectual property payments % total trade, high-tech imports % total trade, ICT services imports % total trade, FDI net inflows % GDP, research talent % in business enterprise.

Philippines	29 th	45 th	64 th	7 th
Singapore	6 th	7 th	18 th	2 nd
Malaysia	31 st	53 rd	33 rd	22 nd
Vietnam	39 th	63 rd	75 th	10 th
Thailand	36 th	51 st	6 th	15 th

2.8.1. Liability of Platforms; Safe Harbor

Local regulations provide protection for digital platforms and intermediaries which may unknowingly host infringing content. Under the E-Commerce Act and the Intellectual Property Code, platforms will not be liable with respect to content published on their sites or applications if such liability is founded on the publication, or distribution of such material or any statement in such material. Platform may take advantage of this safe harbor provision even if the content is infringing. However, the platform may be liable if the platform (i) has actual knowledge or is aware of the facts or circumstance from which it is apparent, that the making, publication, dissemination or distribution of such material is unlawful or infringes any rights subsisting in or in relation to such material; (ii) knowingly receive a financial benefit directly attributable to the unlawful or infringing activity; or directly commit any infringement or other unlawful act and does not induce or cause another person or party to commit any infringement or other unlawful act and/or does not benefit financially from the infringing activity or unlawful act of another person or party.

The conditions which an intermediary must comply with in order to take advantage of the safe harbor provisions would force and incentivize the intermediary to develop mechanisms that will allow rights holders to protect their rights. This could include notification and take-down procedures. It may also include active efforts on the part of the platform to discourage the use of infringing content.

3. Analysis: Regulatory Gaps

Part II shows that certain regulations in the Philippines provide an enabling environment for digital platforms. The national innovation policy of the Philippines and the regulations on basic contracting, payments regulations, consumer protection, cross-border data movement and data protection, and intellectual property protection are consistent with the objective of the Philippine Innovation Act and the UNCTAD Report recommendations. Section 3.1 includes a discussion on this point.

There are, however, apparent gaps in the regulations relating to notarization and contracting, and access to funding which may be characterized as manifestations of policy incoherence. The breadth of the scope of the investment restrictions largely renders investment in Philippine platforms as a high-risk activity for foreign investors. This may disincentivize platforms from allocating resources into its operations. There are also regulatory overlaps which may lead to operational delays and contribute to regulatory uncertainties for market participants. A more comprehensive discussion on this point is in Section 3.2.

3.1. Regulations that Enable Digital Platforms and Electronic Transactions

The UNCTAD, as discussed in Part I, offered recommendations regarding certain regulatory areas in order for a country to support a digital economy. Assessed against such recommendations, the country's policies on e-commerce, consumer protection, data protection, and payments are consistent with the requirements of a digital economy. The present state of regulations in these areas are also aligned with the goals of the Philippine Innovation Act regarding digitization and the promotion of innovation, and in improving the rank of the Philippines in the GII.

The UNCTAD recommends a national strategy that adopts a whole-of-government approach, and the adoption of baseline e-commerce regulations that will enable e-commerce, particularly regulations on consumer protection, data protection, intellectual property, and cybercrime. The Philippine Innovation Act is consistent with the recommendation on a national strategy. The country also has baseline legislation to address the requirements on enabling regulations for e-commerce.

The country's general e-commerce regulations gives legal status to electronic transactions and electronic contracting. This removes doubts as to the validity and enforceability of transactions concluded digitally.

Existing regulations on consumer protection and a relatively novel data protection legislation empower digital platform operations by addressing security and privacy risks posed by digital transactions. Consumer protection regulations also specifically address digital transactions and provide redress mechanisms for issues arising from cross-border transactions.

The DPA's stringent provisions on accountability and consent provides autonomy to data subjects and, theoretically, allows data subjects to control how their personal information will be processed by platforms. The protection afforded by the DPA is further bolstered by explicit provisions that extend the scope of law even to entities and transactions that occur offshore. The extraterritorial provisions on accountability requirements will force controllers to ensure that its partners in other jurisdictions are compliant with the requirements of the DPA. This will therefore enable Philippine platforms to legally transfer data offshore. Generally, the DPA satisfies the basic principles of the OECD Privacy Guidelines¹³⁵ on national privacy policies. The OECD sets forth certain principles with regards to national policies on data privacy including guidelines and limitations on processing, , data quality, purpose specification, , individual participation, and accountability. The consent requirements of the DPA, and the accountability structure of the law, are in line with the standards of the General Data Protection Regulation (GDPR) of the European Union. The DPA is also similar with the GDPR in its rationale which is to protect the privacy rights of the individual while still enabling the free flow of information. Philippine-based platforms that are compliant with the DPA may therefore be in a better position to legally transfer personal data to other jurisdictions with similar standards, such as the EU. However, despite efforts by Philippine regulators in ensuring that protection provided to personal data is at par with global standards, the ability of local platforms to transfer data is hampered by the divergence in data protection regulations among different jurisdictions. In the absence of binding, regional data protection frameworks, platforms must comply with the minimum data protection requirements in all the jurisdictions that they are operating in.

¹³⁵ OECD. (2013). OECD Guidelines Governing The Protection of Privacy and Transborder Flows of Personal Data.

The Cybercrime Prevention Act further pushes platforms into acting more responsibly by providing provisions that would obligate platforms to cooperate with law enforcement agencies in evidence-gathering and by providing higher penalties¹³⁶ for offenses committed through the use of ICTs. Digital Platforms considered as “Service Providers”¹³⁷ are required, for example to (i) preserve and retain the integrity of the subscriber information¹³⁸ and integrity data¹³⁹ for a certain period of time.

The regulations on payments have been adaptive to novel technologies and business models. The relative success of the regulator in this space is attributable to the ability of the BSP to understand the industry and the legislative support received by the BSP from Congress.

Consistent with UNCTAD recommendations, the BSP allows the provision of electronic payment and financial services. Mobile payments, remittances, e-money, and virtual currencies are also regulated and encouraged. Entities that provide electronic financial services are also required by the BSP to make their fund transfer functionality interoperable with other market participants, thus further reinforcing the use of such services.

The BSP exhibited ability to work closely with market participants when crafting regulation. In 2004, the Central Bank developed a sandbox-type space for mobile payments which later on contributed to the e-money regulations issued in 2009.¹⁴⁰ The absence of legislation on electronic financial services and money service businesses has not paralyzed the BSP in ensuring that businesses involving the movement of funds remain operational. Formal legislative authority over payments and money service businesses was only granted to the BSP in 2019 with the passage of the New Central bank Act. Prior to the passage of the National Payment Systems Act, the rules on remittance activities have solely been regulated via administrative issuances of the BSP. The administrative regulations allowed remittance businesses to operate legally and under clear rules even without a supporting law directly providing for the same. Financial services are also fully liberalized activities and are not subject to any foreign restriction.

¹³⁶ Republic Act No. 10175, Sec. 6: All crimes defined and penalized by the Revised Penal Code, as amended, and special laws, if committed by, through and with the use of information and communications technologies shall be covered by the relevant provisions of this Act: *Provided*, That the penalty to be imposed shall be one (1) degree higher than that provided for by the Revised Penal Code, as amended, and special laws, as the case may be

¹³⁷ Implementing Rules and Regulations of the Cybercrime Prevention Act of 2012, Sec. 3(ff) Service Provider refers to (i) any public or private entity that provides users of its service with the ability to communicate by means of computer system; and (ii) any other entity the processes or stores computer data on behalf of such communication service or users of such service.

¹³⁸ Implementing Rules and Regulations of the Cybercrime Prevention Act of 2012, Sec. 4(gg): Subscriber’s Information refers to any information contained in the form of computer data or any other form that is held by a service provider, relating to subscribers of its services, other than traffic or content data, and by which any of the following can be established: (i) The type of communication service used, the technical provisions taken thereto and the period of service; (ii) the subscriber’s identity, postal or geographic address, telephone, and other access number, any assigned network address, billing and payment information that are available on the basis of the service agreement or arrangement.

¹³⁹ *Id.*, Sec. 3(m): Content data refers to the content of the communication, the meaning or purported meaning of the communication, or the message or information being conveyed by the communication, other than traffic data.

¹⁴⁰ Bangko Sentral ng Pilipinas (BSP). 2018. The Bangko Sentral Review.

Technology developers and inventors are also amply supported by protection mechanisms under the intellectual property regulations of the Philippines. The IPOPHL has invested resources in ensuring that the procedure for applying and registering for trademarks, utility models, and patents are clear and understandable. The improvement in the ranking of the Philippines in the GII is a testament to the efforts of the regulator in creating a better IP regime.

3.2. *Regulatory risks, constraints and gaps*

In spite of the existence of a national innovation policy, the regulatory landscape of the Philippines is still hounded by various gaps that contribute to the regulatory burden faced by digital platforms. The gaps are due to prohibitions for certain elements of contracting, uncertainties regarding the application and enforcement of regulations, and regulatory overlaps.

There are still areas in the general framework for electronic commerce that act as roadblocks for the greater adoption of digital transactions. Existing regulations and the actual application of the enforcement powers of regulators provide an uncertain regulatory environment for platforms looking for foreign investments or foreign leadership.

Electronic Contracting. In the area of electronic contracting, the main obstacle for implementing seamless electronic transactions is the absence of rules allowing electronic notarization. Since there are various laws requiring notarization in order for some contracts to be enforceable, the lack of rules on electronic notarization decreases the types of contracts which may be executed electronically. It should also be noted that several government agencies require that reports and other submissions be notarized to be deemed complete or valid.

The issues on electronic notarization may be resolved through the issuance of additional notarial rules by the Supreme Court. Similarly, government agencies may review their respective internal processes and try to minimize the types of documents that requires notarization.

Telecommunications. As demonstrated, digital platforms fall within the definition of VAS providers under the law and must therefore obtain prior registration with the NTC prior to offering its services in the Philippines, along with the submission of information regarding their systems and operations.

The Public Telecommunications Act, which is the basis for VAS regulations, gives the NTC the authority to administer and facilitate the entry of service providers that the Commission considers as “qualified”.¹⁴¹ Such controls are implemented to encourage service providers to provide telecommunications services and allocate investments in improving their services, with the assumption that such providers must be given some level of protection before they will be willing to provide quality service. There is therefore a need to reevaluate the application of such controls to digital platforms. Providing ex ante regulations may make sense for telecommunications where the necessity for intensive capitalization and physical asset-heavy investments are necessary to provide basic services. In systems like this, government may need to step in and provide assistance to telecommunication entities and allow them to recoup

¹⁴¹ Republic Act No. 7925, Sec. 5.

investments made. However, such assumptions are not applicable to digital platforms which are more democratized – any person with access to the internet can provide services online.

Investments and Funding. The UNCTAD recommends that MSMEs and entrepreneurs must be encouraged, through policy, to consider funding other than those provided by traditional financial institutions. MSMEs should consider innovation grants, loan guarantees, incubators, and venture capital. There are new laws that provide government-funded grants. However, there are no government measures to encourage privately-funded grants or private venture capital. The current state of investment regulations may serve to limit the availability of such private initiatives. Digital platforms, based strictly on existing language of the regulations, may fall under the definition of mass media, thus limiting platform ownership and control to Filipino nationals. Telecommunication regulations also classify digital platform and software applications as VAS, thus rendering such entities as public utilities not allowed to take in foreign equity in excess of 40%.

Except for retail, the investment restrictions discussed in this Paper are grounded in the Constitution. However, the extension of the application of these constitutional restrictions to digital platforms are attributable to legislative acts from Congress and administrative issuances from regulators. These restrictions may therefore arguably be lifted through legislative amendments and regulatory action.

It should be noted that violations of foreign equity restrictions and telecommunication regulations may lead to administrative penalties such as the imposition of fines and the suspension or revocation of an entity's license to do business. These may also lead to civil and criminal cases against the directors and officers of a company for violations of various foreign investments and telecommunications regulations.

Interestingly, despite the number of Opinions issued by the SEC to the effect that platforms may be classified as mass media, it is public knowledge that foreign platforms remain operational and accessible in the Philippines. There has been no enforcement action against digital platforms and operators of software applications on the ground of violating mass media or VAS regulations until the singular SEC mass media case in 2018.¹⁴² The 2018 case demonstrates that regulators may still choose to enforce such regulations, albeit rarely, against online platforms and therefore increases the level of regulatory uncertainty.

Regulatory Overlaps. Regulatory uncertainty is also aggravated by regulatory overlaps. Due to the wide scope of services which may be offered by digital platforms, a transaction or activity may fall concurrently within the jurisdiction of two or more regulators.

An illustrative example would be the regulations on virtual currencies, which was briefly discussed in Part II. Generally, virtual currencies are within the purview of the BSP. However, the existing regulations on securities and investments in the Philippines (and the draft rules on digital asset exchanges¹⁴³) gives regulatory authority to the SEC to regulate virtual currencies or tokens that are designed as securities. Virtual tokens used for payment, that are in the nature of gift checks, are also regulated by the DTI. This potential overlap may be costly to a platform considering that the SEC and the BSP requires compliance with ex ante regulations even before

¹⁴² See SEC, In Re: Rappler, Inc., and Rappler Holdings Corporation, SP Case No. 08-17-001, where the SEC classified Rappler, a social media news network, as a mass media entity, and therefore prohibited from entering into an arrangement which would grant control over the company to foreign investors.

¹⁴³ SEC 2019 Proposed Rules on Digital Asset Exchanges.

an entity can commence its operations. Further, the procurement of a license or authority from one regulator will not preclude another regulator from taking enforcement action. The cost would be attributable to compliance requirements as well as opportunity cost arising from delay in launching.

An overlap also exists in the regulation of motorcycle couriers and motorcycle taxis. As discussed in Part II, the supervision over parcel delivery is lodged with the DICT as the agency in charge of regulating all postal services. Public transportation, on the other hand, is regulated by the Department of Transportation, particularly the LTFRB. However, motorcycle taxis and other ride-hailing applications usually provide both courier and transportation services, thus placing them under the jurisdiction of both the DICT and the LTFRB. Motorcycle taxis that are granted with the necessary postal service authority by the DICT may therefore still be apprehended by the LTFRB for violating transportation regulations which do not recognize the legality of two-wheeled vehicles serving as public utilities.

The transport industry is further plagued by vacuums in the regulations. The regulatory framework for motorcycle taxis and ride-hailing services are underpinned by the inability of existing transportation laws to (i) fit service providers that merely provide the technology or platform to enable transport services; and (ii) fit two-wheeled vehicles within the classification of vehicles that can provide transportation services to the public. Hence, in the absence of an enabling law, regulators may apprehend and shut down such services.

However, the brief history of ride-hailing applications in the Philippines has demonstrated that after initial bans, the regulator has managed to issue interim administrative regulations to allow the temporary and limited operations of such services under the concept of pilot runs or trial runs.

When Uber launched in the Philippines without any formal license, both the House Committee on Transportation and the House Committee on Metro Manila Development deemed it unfair that Uber could provide the same service with that of taxis without any regulation and called for bans.¹⁴⁴ Eventually, however, the DOTr released a Department Order to include Transportation Network Vehicle Services and Transportation Network Companies in the list of public conveyances, thus making the Philippines the first country in the world¹⁴⁵ to regulate and “legalize” Uber.

Due to such regulatory vacuum, the LTFRB considers motorcycle taxis as illegal and “colorum”. The LTFRB, together with the police, have cracked down and apprehended several motorcycle drivers¹⁴⁶ offering rides through various apps. The Land Transportation and Traffic Code only allows motorcycles to be registered either as private or government vehicles, and not as public vehicles. Only “public vehicles” can apply for permits and franchises with the LTFRB to offer rides to the public. In addition, motorcycles will not fit the TNVS regulations as the latter failed to include two-wheeled vehicles in the list of vehicles that can register under

¹⁴⁴ Cupin, B. 2014. Philippine Congressmen want Uber to stop operations ASAP. Rappler.

<http://www.rappler.com/nation/75284-philippines-uber-taxi-regulation> (accessed on 10 November 2020).

¹⁴⁵ 2015. Philippines Becomes First Country to Regulate Uber Nationwide. Aljazeera America.

<http://america.aljazeera.com/articles/2015/5/12/philippines-becomes-first-country-to-regulate-uber.html>

¹⁴⁶ Motorcycle-hailing app Angkas shut down for lack of permits. 2017. CNN Philippines.

<https://cnnphilippines.com/transportation/2017/11/09/Angkas-motorcycle-hailing-app-closed.html> (accessed on 14 November 2020).

the said regulations. Eventually, the DOTr created a technical working group and launched a pilot for motorcycle ride-hailing forms in 2019.¹⁴⁷

The foregoing examples show how regulatory certainties, in its many forms, can affect digital platform operations. In its GII ranking, the Philippines ranked lowest in the “Institutions” pillar (91st). The Institutions pillar takes into account a country’s political environment (consisting of political and operational stability, and government effectiveness), regulatory environment (consisting of regulatory quality, rule of law, cost of redundancy dismissal), and business environment (consisting of ease of starting a business and ease of resolving insolvency). For comparison, the table below provides the ranking of Singapore, Malaysia, Vietnam, Thailand, and the Philippines under the Infrastructure pillar:

Table 3: GII - Infrastructure Pillar ranking

	Institutions	Political Environment	Regulatory Environment	Business Environment
Philippines	91 st	72 nd	104 th	94 th
Singapore	1 st	1 st	2 nd	17 th
Malaysia	40 th	28 th	64 th	50 th
Vietnam	83 rd	55 th	98 th	101 st
Thailand	65 th	51 st	113 th	20 th

Such ranking may be attributable to the various manifestations of regulatory uncertainties faced by business, specially innovative ones, in the Philippines.

4. Regulatory Impacts on Industry Growth, Competition, and Relevant National Objectives

4.1. Regulations as Innovation Inhibitors

Despite the presence of a national policy on innovation, the legal framework applicable to digital platforms appears to be lagging in some areas and demonstrates the inability of regulations to create an enabling environment for platforms and innovation. The identified restrictions on contracting may present questions on enforceability of contracts and the analog notarization requirements may also delay contract executions. These translate to opportunity costs that could be due to loss of time and money, as well as investment opportunities. Uncertainties and the failure of novel business models to fit into the traditional boxes of regulations present additional costs due to the continuous threat of possible administrative, civil and criminal sanctions. Investment regulations and the extension of certain definitions to platforms and internet business are further roadblocks to funding options. These are disincentives against allocating resources to platforms in the Philippines.

Scholars¹⁴⁸ have conducted studies on how policy uncertainty may negatively affect the decision of investors to engage in mergers or acquisitions. A study of publicly listed companies in the United States found that policy uncertainties have a stronger negative effect for

¹⁴⁷ Galvez, D. 2019. 2 new operators to rival Angkas as pilot run extended for 3 months. Inquirer.

<https://newsinfo.inquirer.net/1203867/angkas-pilot-run-extended-for-3-months-2-new-operators-to-join-in>

¹⁴⁸ Baker, S.R., N. Bloom, and S.J. Davis. 2016. *Measuring economic policy uncertainty*. manuscript, Stanford University, as cited in Bonaime, Alice A., H. Gulen, and M. Ion. 2018. Does Policy Uncertainty Affect Mergers and Acquisitions? *Journal of Financial Economics* 129(3): 531-558.

investment deals that are irreversible and are more capital intensive.¹⁴⁹ The study explains that higher levels of uncertainties, especially in the area of regulations, can increase the value of the real option to delay investments.

Effective investments that could use and revenue in digital platforms could be capital intensive. Although the numbers of platforms are steadily increasing, platforms from developing countries may find it difficult to compete with global startups due to the first-mover benefits enjoyed by the latter and the lock-in effects of digital platforms.¹⁵⁰ As such, platforms may attempt to compete by taking advantage of possible market differentiations, or developing entirely novel product categories. These strategies would require rapid capital infusion. Delaying development may weaken the ability of platforms to compete since the passage of time will merely allow global or regional competitors to take more of the market or improve its services. Investments made in platforms may also be irreversible due to the uncertainty in the legality of foreign participation in said entities. There is a risk that a regulator may decide to enforce existing regulation and shut down a company’s operations, or impose fines.

A study on medical devices by Stern¹⁵¹ found that pioneer innovators that are early entrants are subject to delays in regulatory approvals and therefore higher opportunity costs. Stern found that that the delay is attributed not to the novelty of the technology, but the lack of clarity in regulatory approvals and guidelines.

A 2018 report by the UNCTAD and the ASEAN¹⁵² revealed that of the 50 most funded digital start-ups in ASEAN, only one registered the Philippines as its home country. Indonesia, Malaysia, and Thailand had more startups in the list than the Philippines while sixty-two percent of the startups in the list were from Singapore. The report attributed such dominance by the Singapore startups to the country’s developed digital ecosystem, competitive investment landscape, and the presence of more venture capital and private equity firms.

Relevantly, a more recent report by UNCTAD and ASEAN¹⁵³ listed the largest unicorns in Southeast Asia in 2019 in terms of valuation. Out of the 8 unicorns cited, 7 are technology companies, with 5 of them engaged in e-commerce, and 2 in mobile application transportation services.

Table 4: Unicorns in ASEAN

Company	Location	Current Valuation (USD Billion)	Primary Industry	Verticals
Grab	Singapore	14.0	Transportation Services	Mobile Apps

¹⁴⁹ Gulen, H. and M. Ion. 2015. Policy Uncertainty and Corporate Investment. *Review of Financial Studies*, Vol. 29(3) 523-564.

¹⁵⁰ United Nations Conference on Trade and Development (UNCTAD). 2019. Digital Economy Report 2019.

¹⁵¹ Stern, A. D. 2017. Innovation under Regulatory Uncertainty: Evidence from Medical Technology. *Journal of Public Economics* 145: 181-200.

¹⁵² United Nations Conference on Trade and Development (UNCTAD) and the Association of Southeast Asian Nations (ASEAN). 2018. ASEAN Investment Report 2018: Foreign Direct Investment and the Digital Economy in ASEAN. https://unctad.org/en/PublicationsLibrary/unctad_asean_air2018d1.pdf (Accessed on 3 August 2020).

¹⁵³ United Nations Conference on Trade and Development (UNCTAD) and the Association of Southeast Asian Nations (ASEAN). 2019. ASEAN Investment Report 2019, FDI in Service: Focus on Healthcare. https://unctad.org/en/PublicationsLibrary/unctad_asean_air2019d1.pdf (Accessed on 3 August 2020).

Gojek	Indonesia	9.5	Transportation Services	Mobile Apps
Tokopedia	Indonesia	7.0	Internet	E-commerce
Traveloka	Indonesia	4.1	Travel & leisure	E-commerce
Lazada	Singapore	3.2	Internet	E-Commerce
VNG	Vietnam	1.6	Software	E-commerce, processing and payment infrastructure, cloud computing
Bukalapak	Indonesia	1.0	Internet	E-commerce, mobile apps
Revolutionary Precrafted	Philippines	1.0	Commercial property	...

Source: ASEAN Investment Report 2019, FDI in Service: Focus on Healthcare.

Although the UNCTAD-ASEAN Investment Report may show that Philippine startups are being out-funded by its Indonesian and Singaporean counterparts, various studies confirm that funding problem is a challenge faced by startups in different countries in the region. A World Bank Enterprise Survey, cited by the OECD¹⁵⁴ pointed out that 1 out of 6 firms in Cambodia, Indonesia, and Lao PDR, and 1 out of 10 in Malaysia, Myanmar, Philippines, and Vietnam, cites access to finance as a major constraint.

Google, Temasek, and Bain Capital in its E-economy SEA Report¹⁵⁵ attributes the lack of funding received by Malaysia, Philippines and Thailand to the lack of homegrown Unicorns. This despite the strong market presence of regional companies like Grab, Lazada, Shopee, and Traveloka in all three markets. The 2019 report particularly cited regulatory uncertainties present in the three countries as a factor in the relative low amount of funding. As an example, they cited the uncertainties faced by ride hailing entities with regard to strict licensing schemes which “led to an insufficient supply of drivers and a lack of competition to meet rising consumer demand.”¹⁵⁶

An ASEAN Coordinating Committee on MSMEs (ACCMSME) study,¹⁵⁷ citing a report from the ASEAN-Republic of Korea (ROK) Startup Ecosystem, showed that ACCMSME members cited the following as constraints to startup development: (i) access to capital; (ii) access to talent; (iii) burdensome regulations, including overlapping regulations across sectors; and (iv) access to mentoring networks and advisory services. A study¹⁵⁸ on startups in the areas of Greentech, agritech, edtech, and healthtech in Cambodia, Thailand, Vietnam, and India found that funding from foreign venture capitalists may be difficult for early stage startups due to

¹⁵⁴ OECD. 2020. Alternative Financing Instruments for ASEAN SMEs.

www.oecd.org/finance/alternativefinancing-instruments-for-ASEAN-SMEs.htm.

¹⁵⁵ Google & Temasek / Bain. 2019. E-Conomy SEA 2019.

¹⁵⁶ Google & Temasek / Bain. 2019. E-Conomy SEA 2019.

¹⁵⁷ ASEAN. 2020. *ASEAN Guidelines on Fostering a Vibrant Ecosystem for Startups Across Southeast Asia*. [https://asean.org/storage/41-ASEAN-Guidelines-on-Fostering a-Vibrant-Ecosystem-for-Startups_12-Oct-2020_endorsed-by-AEM.pdf](https://asean.org/storage/41-ASEAN-Guidelines-on-Fostering-a-Vibrant-Ecosystem-for-Startups_12-Oct-2020_endorsed-by-AEM.pdf) (accessed on 20 November 2020).

¹⁵⁸ Vandenberg, P., Aimee Hampel-Milagrosa, and Matthias Helble. 2020. Financing of Tech Startups in Selected Asian Countries. ADBI Working Papers No. 1115. Pasig City, Philippines: Asian Development Bank Institute.

regulation in legal processes in the said countries. It should be noted, however, that this study did not consider purely-online digital platforms.

The 2020 Google e-economy SEA report¹⁵⁹ shows that the Philippines still lags behind its neighbors in terms of the total volume of investments and number of investment deals made in the internet sector:

Table 5: Volume and Number of Deals in Selected ASEAN Countries

	2018		2019		1 st Half 2020	
	Deal value in US\$_M	No. of deals	Deal value in US\$_M	No. of deals	Deal value in US\$_M	No. of deals
Philippines	310	57	221	72	169	22
Indonesia	3,800	349	3,200	355	2,800	202
Malaysia	403	164	373	147	267	61
Singapore	9100	581	7100	675	2500	325
Thailand	125	118	183	110	199	45
Vietnam	351	137	935	151	327	73

So although access to funding is a regional phenomenon, the Philippines is unable to generate as much investment deals compared to other countries in the region. The volume of investments received by a country may have a correlation to the ability of the country’s regulatory framework to provide some level of certainty and stability.

Aside from its effect on funding, regulations may also affect the ability of firms to roll out products and prevent consumers from accessing the same.¹⁶⁰

In 2013, Amazon set up its drone research and development in Canada and the United Kingdom. During this time, the Federal Aviation Administration in the United States had strict rules on unmanned aerial activity and applicants had to wait a long time before the FAA would issue permits for drone testing.¹⁶¹ Congress eventually ordered the FAA to issue more permissive regulations for drone testing in 2018.

Closer to home, the issuance by the Cagayan Economic Zone Authority of a licensing regime for offshore cryptocurrency operations attracted investment commitments of US\$8.13 billion in 2018.¹⁶² Cryptocurrency exchanges and their service providers around the world were willing to comply with CEZA’s capitalization and investment requirements in exchange for the opportunity to be recognized by a government regulator.

This is also seen in the experience of ride-hailing services and motorcycle taxis in the Philippines and its push and pull routine with the local regulators.

¹⁵⁹ Google & Temasek / Bain. 2020. E-Economy SEA 2020.

¹⁶⁰ Lev-Aretz, Y., and K. Standburg. 2020. Regulation and Innovation: Approaching Market Failure from Both Sides. *Yale Journal on Regulation Online Bulletin* 2.

¹⁶¹ Murgia, M. 2017. Amazon primed for UK expansion with AI and drones. *Financial Times*. <https://www.ft.com/content/8d045294-2c2c-11e7-9ec8-168383da43b7> (accessed on 21 November 2020).

¹⁶² Campos, O. 2019. CEZA registered \$8b worth of investment commitments in 2018. *Manila Standard*. <https://manilastandard.net/business/economy-trade/285549/ceza-registered-8b-worth-of-investment-commitments-in-2018.html> (accessed on 20 November 2020).

Gojek has repeatedly tried to enter the Philippine market but has been unable to get a license due to nationality restrictions.¹⁶³ This is in addition to the general inability of local regulations to consider motorcycle taxis as legal public transportation vehicles.

The evolution of such services has taken a similar route in Indonesia and Malaysia, albeit with less regulatory hurdles due to the absence of foreign equity issues.

According to the CEO and co-founder Nadiem Makarim, Gojek was a response to the traffic situation in Jakarta and the existence of Ojek drivers, or informal motorcycle taxis, who would offer rides and negotiate fares with potential commuters. When it launched in 2010, Gojek started as a call center and eventually launched a mobile application in 2015. Motorcycle taxis and mobile application-enabled taxis had no legal basis in Indonesia's transportation regulations. There was a declaration by the Ministry of Transportation in 2015 to ban motorcycle taxis and mobile-application taxis. However, encouraged by public demand, government eventually overturned the ban and the local regulator allowed the operation of Gojek pending the formulation of regulations for motorcycle taxis, which were eventually released in March 2019.¹⁶⁴

In January 2020, Malaysia allowed GoJek and Malaysia startup Dego Ride to operate under a proof-of-concept basis. The POC period is meant to enable "the government and participating firms to gather data and evaluate demand for the service, while the government works on drafting legislation to govern bike-hailing."¹⁶⁵

The stifling effect of regulations may at times have the limited effect of preventing foreign participants from entering the Philippines, such as when the restrictions is limited to foreign investments. However, if the regulation has the effect of restricting entire business models (such as transportation regulations vis a vis ride-hailing and motorcycle taxis), the negative regulatory impact on innovation becomes heavier. Due to network effects and advantages enjoyed by early entrants in the realm of digital platforms, the dilatory or chilling effects of burdensome regulations may have the effect of stunting homegrown platforms who are unable to launch services as early or as quickly as its competitors.

4.2. *Regulatory Arbitrage*

The level of regulatory risk and uncertainty in one jurisdiction may have the effect of encouraging entities to locate in other areas where risk is more manageable. Overlaps and uncertainties may also lead to regulatory arbitrage where platforms seek to cosmetically redefine themselves in order to take advantage of less stringent regulations within a single jurisdiction.

¹⁶³ Nathani, K. 2019. Go-Jek grabs Singapore After the Philippines' Rejection. Entrepreneur. <https://www.entrepreneur.com/article/326140> (accessed on 12 November 2020).

¹⁶⁴ Yasmin, N. 2019. Finally, an Ojek Law. Jakarta Globe. <https://jakartaglobe.id/context/finally-an-ojek-law/> (accessed on 11 November 2020).

¹⁶⁵ Ride-hailing firm Gojek, others to start pilot run in Malaysia in January. 2020. The Straits Times. <https://www.straitstimes.com/asia/se-asia/ride-hailing-firm-gojek-others-to-start-pilot-run-in-malaysia-in-january> (accessed on 11 November 2020).

4.2.1. *Cross-border Regulatory Arbitrage: Doing Business and Locating in the Philippines*

Given the regulatory landscape in the Philippines and the risks involved, digital platforms that are risk averse, or those that want to take in foreign equity or provide participation rights to foreigners in the management of the company may resort to different levels of regulatory arbitrage vis a vis locating in the Philippines.

Absolute Relocation

This refers to an arrangement where a Philippine-based digital platform decides to locate and operate in an offshore jurisdiction with friendlier regulations (“Preferred Jurisdiction”), devoid of any contact in the Philippines. It will not hire service providers in the Philippines, neither will it provide any product or service in the Philippines or to the Philippine market.

A similar phenomenon was observed in the US due to its differing state regulations on fintech services. When New York implemented its licensing regime for Bitcoin businesses in 2015, at least ten Bitcoin startups stopped providing their services in the state and moved out of the state.¹⁶⁶ In contrast, Bitcoin has a heavy presence in Texas due largely to the regulatory support from the state’s legislators.¹⁶⁷

Absolute relocation may be the most logical, risk-free choice for digital platforms whose business model itself is considered illegal in the jurisdiction being considered. In the Philippines, prudent platforms with foreign participation that serve advertisements and publish third-party content may choose to relocate due to the restrictive regulations on mass media and VAS.

However, even compliant digital platforms may still end up providing services and earning revenue from the Philippines, albeit unintentionally, due to the borderless nature of platform services. Unless the local regulator blocks access to the platform’s website, consumers in the Philippines may continue to access such service. Thus allowing the platform to continue earning from taking advantage of the market without being subject to local regulations.

Hub Relocation

Platforms may also slice up its operations and maintain limited operations in the Philippines for certain aspects of its business in order to take advantage of certain regulatory benefits. A digital platform may relocate its head office in a Preferred Jurisdiction and maintain a presence in the Philippines in order to take advantage of certain regulations that could be favorable to the digital platform.

The relatively low-cost labor market in the Philippines may be one consideration that would encourage digital platforms to retain service centers or support centers in the country. The regulations on special economic zones and related tax incentives are contributing factors. These

¹⁶⁶ Roberts, D. 2015. Behind the "Exodus" Of Bitcoin Startups From New York. Fortune. <http://fortune.com/2015/08/14/bitcoin-startup-leave-new-york-bitlicense> (accessed on 15 November 2020).

¹⁶⁷ World Economic Forum. *Rethinking Financial Innovation: Reducing Negative Outcomes While Retaining the Benefits*. Geneva, Switzerland: World Economic Forum. <http://www3.weforum.org/docs/WEFFSRethinkingFinancialInnovationReport2012.pdf> (accessed on 15 November 2020).

local companies would, however, only provide services to digital platforms. The local entities could pertain to software development services, customer support, contact centers, and back office support. Arguably, such activities may be beneficial for the labor market in the country, however these activities are not directly related to the development of more local digital platforms or digital products.

Another example would be the relocation of platform headquarters to take advantage of tax regimes such as how Facebook relocated to Ireland in order to take advantage of the latter’s tax regime. Interestingly, to minimize its obligations under the GDPR, Facebook also modified its terms and conditions¹⁶⁸ to state that data will be processed in the United States (with weaker data protection regulations) although its headquarters is based in Ireland.

Fictional Relocation

Some platforms, may also choose not to organize a body corporate in the Philippines and yet continue to engage in business in the country. This refers to an arrangement that’s similar to the Hub Relocation, but instead of maintaining cost centers, the digital platform would keep active operations in the Philippines by providing goods and services to customers in the Philippines. Such platforms may also maintain a workforce in the Philippines without creating an employer-employee relationship. Instead, such personnel may be classified as independent contractors, based in the Philippines, that provide services to the parent company.

A factor that may make it desirable for platforms to maintain a presence in the Philippines, despite restrictions, would be the size of the consumer market in the country that could potentially be a revenue source for platforms engaged in e-commerce, and provision of software products. In a 2019 study by Google and Temasek, the Philippines had the second highest number of internet users after Indonesia:

Table 6: Internet Users in Selected ASEAN Countries 2019

Country	Number of internet users
Philippines	68 million
Indonesia	152 million
Malaysia	26 million
Singapore	5 million
Thailand	47 million
Vietnam	61 million

Logistics hubs and local marketing arms may be set up in order to service Filipino consumers. Such arrangements may be structured by platforms such that the sales transactions occur offshore, and only fulfillment services are done locally. Since the sales are concluded offshore, the offshore platforms may avoid the payment of taxes arising from such transactions.

The implementation of any of the three subtypes involves potential revenue loss for the Philippines government. These platforms would continue to earn from the Philippines market and Philippine consumers. However, the ability of the government to impose taxes and to enforce regulations are lost.

¹⁶⁸ 2018. Facebook to exclude billions from European privacy laws. BBC. <https://www.bbc.com/news/technology-43822184> (accessed on 15 November 2020).

The absence of a local entity would also pose potential harms to consumers due to the difficult faced by regulators and law enforcement agencies in enforcing consumer protection regulations and other laws beyond national borders. Legally, the Philippine regulations on data protection and cybercrime extend the application of local laws to offshore activities if there's a Philippine element involved. However, practically speaking, the difficulty of going after offshore perpetrators may negate the ability of such regulations to function as a deterrent against violations.

The existence of operations in the Philippines and in the Preferred Jurisdiction may also lead to inequities in labor where the digital platform employs personnel in two different jurisdictions subject to different labor laws and standards. For example, a software developer hired in the Philippines to provide maintenance services to the platform will be paid lower than a software developer hired in the Preferred Jurisdiction to perform the same type of work.

4.2.2. Regulatory Arbitrage within the Philippines

Entities may also take advantage of jurisdictional overlaps and loopholes within the Philippines in order to minimize its legal obligations.

In the area of payments, a platform may design its e-money systems to mirror the features of a gift check to escape stringent central bank regulations on e-money and to avoid having to comply with anti-money laundering regulations, central bank consumer protection regulations, and other risk management policies imposed on financial services. Similarly, the issuer of a crypto-token with investment features may insist that it's merely virtual currency in order to avoid being regulated as a security by the SEC.

In the area of transportation and shared services, digital platforms have resorted to classifying service providers as independent contractors. This is a worldwide phenomenon that's not unique to the Philippines. The "independent contractor" classification allows platforms to deny employer-employee relationships with their workers in order to minimize operational expenses. In the Philippines, employers are required to observe minimum occupational safety and health requirements with regard to its employees. Employers must also comply with minimum wage requirements, premium pay on overtime and night differentials, and other mandatory labor benefits.

5. A Way Forward: Policy Considerations and Suggestions

5.1. Implementing a Coherent Policy for Platforms: A Whole of Government Approach to Platform Regulation

The necessary regulatory framework reform would largely depend on the policy objectives of the government concerning not only digital platforms and digital technologies, but also considerations affecting taxation, consumer protection, data privacy, and labor. This is especially true for foreign investment restrictions due to the potential implications of trade liberalization on labor, data protection, cross-border transactions, and taxation.

On the investment front – policymakers should reevaluate the objectives behind restrictions on mass media, advertising, retail, telecommunications, and education and assess whether its

extension to digital platform services is necessary. If the regulations seek to provide protection from perceived societal harms brought about by foreign participation, government can consider whether alternative regulatory modalities may be implemented to address such harms instead of an outright prohibition on foreign participation.

Foreign investment restrictions are driven by the desire to protect the interest of both the Filipino consumer and the Filipino producer. The 1987 Constitution reiterates as a state policy that “the State shall protect Filipino enterprises against unfair foreign competition and trade practices”. In the 1986 Constitutional Commission debates, Commissioner Villegas stated that “the government can declare as unfair anything that hurts Filipino enterprises and that the word ‘unfair’ does not partake of any unique economic or legal interpretation given by international organizations since we can declare as unfair anything that hurts Filipino enterprises.” Commissioner Bernas, a member of the Commission, clarified that despite such language, “there is no intention to protect Filipino industries from foreign competition at the expense of consumers”.¹⁶⁹ Later laws that implement foreign limitations identify the need to “promote consumer welfare”¹⁷⁰ and “enable Philippine goods and services to be globally competitive;”¹⁷¹ and the need to encourage foreign investments “in enterprises that significantly expand livelihood and employment opportunities for Filipinos; enhance economic value of farm products; promote the welfare of Filipino consumers; expand the scope, quality and volume of exports and their access to foreign markets; and/or transfer relevant technologies in agriculture, industry and support services.”¹⁷²

A review of the application of existing regulations is therefore merited to determine whether recalibration is needed to align such regulations with policy objectives. This is highlighted by the mandate given to government, specifically the NIC, to monitor policies insofar as it affects innovation.

For example, the rationale behind the strict regulation on information dissemination (mass media), may have been crucial in the mid-1900s when there were limited channels by which information may be communicated, such that the state had to make sure that these were not being controlled by foreign entities. However, the harms sought to be avoided may not have the same gravity in an era where the channels and cost for communication are respectively rendered unlimited and cost-free. Similarly, there may be merit in regulating tech companies that facilitate transportation services in order to ensure the safety of the riding public and the protection of the labor interests of the drivers. However, the barriers to entry for tech enablers, as opposed to operators that directly provide the transportation service, may have to be adjusted.

The enactment of the Philippine Innovation Act presents an opportunity to recalibrate the existing legal framework on innovation and the development of platforms in the Philippines. This law mandates all agencies and instrumentalities of the Philippine government to place innovation at the center of its development policies, guided by a clear and long-term set of goals that will take into consideration the key advantages of the country and the opportunities in the regional and global arena.¹⁷³ Various departments and agencies of government are required to implement a "whole of government" approach that will ensure policy coherence,

¹⁶⁹ Bernas, J. 2009. *The 1987 Constitution of the Philippines: A Commentary*. Quezon City: Rex Bookstore Inc.

¹⁷⁰ Republic Act No. 8762, Sec. 2.

¹⁷¹ Republic Act No. 8762, Sec. 2.

¹⁷² Republic Act No. 7042, Sec. 2.

¹⁷³ Republic Act No. 11293, Sec. 2.

alignment of priorities, and effective coordination in program delivery. The Philippine Innovation Act is essentially a call to all government agencies and instrumentalities to align their respective policies and programs in a unified and cohesive manner and thus enable various sectors (government, academe, MSMEs, and the scientific community) to adopt innovation and be more competitive globally.

Regulatory review should also take into consideration the Philippine Development Plan 2017-2022 issued by the National Economic Development Authority (the “Plan”) which recognizes innovation and the growth of the knowledge economy as necessary areas that will accelerate growth.¹⁷⁴ The Plan states that regulatory policy should promote competition, reduce barriers to entry including regulatory burden and cost, and ensure consumer protection.¹⁷⁵

Considering that various agencies are mandated to collaborate and develop the NIASD and the Philippine Startup Development Program, a more focused long-term plan for digital platforms that takes into consideration investment concerns should be incorporated into these policy documents.

The stifling effect of regulations on innovation may not always mean failure of the regulations, but may also be considered as a sign that the regulations are working.¹⁷⁶ This Paper recognizes that there are valid policy considerations that should be taken into account which may push for regulations that have the unfortunate effect of adding compliance burdens. This includes regulations concerning heavier security standards or privacy protection for financial services, for example, or requiring capitalization and insurance requirements from public transportation providers.

Policy should provide signposts that would allow regulators to identify policy priorities and align these with specific regulations.

The effects of regulations on government revenue, consumer protection, and labor (among other areas) in the Philippines should thus be considered when recalibrating innovation policies, and other regulations that affect digital platforms.

5.2. *Regulatory Intersections*

This Paper does not recommend that regulatory overlaps be eliminated or that platforms be subject to a singular regulator. Ahdieh¹⁷⁷ comprehensively discussed the importance and necessity of regulatory interdependence and overlaps. Each regulator, presumably, possesses expertise and know-how in their respective areas and jurisdictional overlap may offer benefits. Interactions among regulators may provide a better understanding of the subjects of the regulations, and encouraging regulatory innovation.¹⁷⁸

¹⁷⁴ NEDA. Philippine Development Plan 2017-2022.

¹⁷⁵ *Id.* at 10.

¹⁷⁶ Lev-Aretz, Y., and K. Standburg. 2020. Regulation and Innovation: Approaching Market Failure from Both Sides. *Yale Journal on Regulation Online Bulletin* 2.

¹⁷⁷ Ahdieh, R. 2006. Dialectical Regulation. *Connecticut Law Review* 38(5): 863-927.

¹⁷⁸ Ahdieh, R. 2006. Dialectical Regulation. *Connecticut Law Review* 38(5): 863-927.

Regulatory overlaps may also have some disadvantages, as discussed comprehensively by Aagaard¹⁷⁹ overlaps may present duplication, where multiple regulators are given similar authorities and policy objectives. Duplications are inefficient and a waste of government resources. It may also result in conflicting regulations which undermine the effectiveness of regulations and increase compliance burden. Coordination, albeit workable, entails additional resources for regulators and the subjects of the regulation overlapping regulations may result in uncertainties and confusion as to how subjects are to be compliant, thus again resulting in onerous regulatory requirements. Nonetheless, citing several scholars, Aagaard argues that the factors which make overlaps undesirable are also the reasons that contribute to its advantages. Redundancies increase the reliability of regulations by decreasing or disincentivizing errors. Regular interactions among regulators, involving subject matters relevant to each agency, will also encourage policy innovation by allowing regulators to exchange strategies and plans of action.¹⁸⁰ Overlaps also create “regulatory safety nets”¹⁸¹ which guard against scenarios where a regulator may be unduly influenced by a single group. This may be especially relevant in the digital economy where informational asymmetries and market share present potential antitrust issues.

Sharing of strategies and regular interaction among regulators become increasingly necessary in areas where information about the subject matter of the regulation is incomplete or in instances where the subject of the regulations is complex. Digital platform technologies are characterized by its dynamic and fluid development. Hence, regulators must be given the opportunity to understand the technologies themselves as well as the potential effect of policy to innovation, and other areas which may be relevant to each regulator.

Instead of balkanizing industries or platform activities, policy makers may consider creating frameworks or methods which regulators may adopt when faced by regulatory overlaps. Regulators may be provided with guidance and systemic support in dealing with a platform which may be regulated by several agencies. Instead of aiming for exclusive allocation of regulatory jurisdictions, policy may instead consider various regulatory modalities that will induce the benefits of regulatory overlap.

The NIC should further push for mandatory and regular interactions among regulators, especially in areas where overlaps exist. Regulators in the financial services (the SEC, BSP, Insurance Commission, and the Philippine Deposit Insurance Corp), for example, have voluntarily created the Financial Sector Forum to provide “an institutionalized framework for coordinating the supervision and regulation of the financial system while preserving each agency’s mandate” and “to provide a venue for the agencies to update each other on the latest developments in their respective industries and any concerns that may have systemic repercussions.”¹⁸² A similar initiative may be done by regulators in other industries.

¹⁷⁹ Aagaard, T.S. 2011. Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities. *Virginia Environmental Law Journal* 29(3): 237-303.

¹⁸⁰ Aagaard, T.S. 2011. Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities. *Virginia Environmental Law Journal* 29(3): 237-303, citing M. Landau. 1969. Redundancy, Rationality, and the Problem of Duplication and Overlap. *Public Administration Review* 23(346): 346-51.

¹⁸¹ Engel, K.H. 20016. Harnessing the Benefits of Dynamic Federalism in Environmental Law. *Emory Law Journal* 56(159): 178-79.

¹⁸² Funa, D. 2017. Financial Sector Forum. *Business Mirror*.

<https://businessmirror.com.ph/2017/04/25/financial-sector-forum/> (accessed on 20 November 2020).

In the realm of intellectual property protection, an interagency body called the National Committee on Intellectual Property Rights that's composed of the IPOPHL, DTI, DOJ, and 9 other agencies¹⁸³ have been formed with the goal of formulating and implementing policies on intellectual property enforcement.

Clarity in the steps and approval process which platforms should take, when engaged in several regulated activities, will prevent delays arising from navigating interlocking or seemingly conflicting regulatory landmines. This will also decrease uncertainties as to the legal status of such platforms and the legality of its activities.

The NIC may further consider enabling regulators to implement experimentation and interactions with market participants that will encourage the former to run proof-of-concept or trial periods for innovative technologies. This may be done through various modalities including suggestions made to Congress with the aim of providing legislative support for the conduct of such experimentations.

5.3. *Assessing the Necessary Level of Regulatory Intervention*

Relevant to the development of a national policy on digital platform is the conduct of continuous studies on whether regulation (and what level of regulation) is necessary to achieve policy objectives.

There may be instances where a wait-and-see approach is more advisable rather than immediate legislative or regulatory action. Legislators and regulators may be tempted to immediately legislate or regulate a new business model or technology. However, a preemptive action by the regulator, especially legislators,¹⁸⁴ may lead to poorly written laws that could hamper the growth of nascent industries. In the United States, the preemptive regulations issued during the early years of cable television crippled the development of the industry.¹⁸⁵ Regulating too early, without sufficient information on subject matter being regulated and its potential harm to society, could discourage experimentation and innovation.

A light-touch approach may also be considered by regulators. Regulators may make use of various tools to provide oversight: this includes the issuance of best practices guidelines, warnings and advisories, and conducting meetings with industry participants. Regulators may also resort to sandbox regimes and experimentations. This allows the government to supervise developments in certain industries and study how it could affect the market and consumer interests, while still allowing the underlying technology to operate and grow.

The BSP is currently implementing such an approach with regard to the implementation of regulatory sandboxes for certain entities, as well as in its light touch regulations for payment systems. Payment systems are required to register but the registration is not onerous as it may be done by submitting a form online along with supporting documents such as corporate documents and basic information on the entity's payment operations. There are also no capitalization or heavy technical requirements during the first stage of the registration. The

¹⁸³ Bureau of Customs, Food and Drug Authority, National Bureau of Investigation, Philippines National Police, Optical Media Board, National Book Development Board, Office of the Special Envoy on Transnational Crime, Department of Interior and Local Government, and the National Telecommunications Commission.

¹⁸⁴ Wu, T. 2011 Agency Threats. *Duke Law Journal* 60: 1841-1857.

¹⁸⁵ Wu, T. 2011 Agency Threats. *Duke Law Journal* 60: 1841-1857.

regulations allow the BSP to determine down the line whether a payment system is involved in critical systems that present certain financial risks and should thus be subject to more stringent regulations. The DOTr eventually took a similar approach in its regulations for motorcycle taxis, albeit characterized with more push and pull negotiations with the market participants.

A reevaluation of the mass media and VAS regulations may be considered where regulators will be allowed to implement stricter requirements should a platform be determined to pose harm to information systems or communications systems. However, classifying platforms outright as mass media may not be the most ideal method of regulation.

The level of intervention necessary will also depend on the legal basis of the questioned regulations and time constraints. Constitutional amendments may take longer and will be the most difficult approach to consider. However, this will not be necessary even for restrictions and gaps that are hinged on constitutional provisions if the restrictions may be lifted through legislative or regulatory action. The table below outlines the restrictions and how each restriction may be adjusted to accommodate digital platforms, without constitutional amendments:

Table 7: Outline of Restrictions and Possible Regulatory Adjustments to Address the Application of Restrictions to Digital Platforms

Protected Activity	Basis of Restriction	Basis of Application of Restriction to Digital Platforms	Statutory or Regulatory Adjustments that will Accommodate Foreign Investments
Mass Media	<p>Constitution: Reserves mass media to Filipino nationals.</p> <p>The Constitution does not define “mass media”.</p>	<p>DOJ and SEC Opinions defining mass media as the dissemination of information to the general public and such information is designed to affect or influence the people’s way of thinking. Extended this to dissemination via the internet on the basis of the Tobacco Regulation Act.</p> <p>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, mails and the like.</p> <p>Tobacco Regulation Act of 2003, which extended the definition of mass media to</p>	<p>The application of mass media regulations to digital platforms may be clarified through subsequent regulatory issuances, or through the FINL issued by the President.</p> <p>The application of the Tobacco Regulation Act may be delimited by the implementing agencies to clarify that it refers to the publication of materials relating to tobacco products. This is consistent with the policy objectives and purpose clauses of the law.</p>

		the dissemination of information to the internet.	
Retail	Law: Retail Trade Liberalization Act, which imposes qualification requirements that are not applicable to digital retailers.	Law: Retail Trade Liberalization Act, which imposes qualification requirements that are not applicable to digital retailers.	Foreign digital retailers may be accommodated by the law by adjusting the qualification requirements particularly the requirements on (i) capitalization, (ii) physical retailing branches, and (iii) track record requirement.
Public Utilities	Constitution: reserves public utility to Filipinos or entities owned at least 60% by Filipinos. The Constitution does not define “public utility”.	Public Service Act: defines what constitutes as public service. Philippine Postal Code: classifies courier service as a public utility. LTFRB regulations and advisories classify TNCs and TNVS as public utilities.	Amend the law to clarify that “public service” does not render an entity a “public utility”. Notably, there is a pending bill seeking to narrow down the definition of “public service” ¹⁸⁶ . Issue regulations to clarify scope of regulation over platforms that provide or enable (i) ride hailing/ride sharing services, (ii) motorcycle taxis and (iii) parcel/courier services.
Education	Constitution: reserves educational institutions that are part of the formal education system to Filipinos or entities at least 60% of the capital is owned by Filipinos. The Constitution does not define “formal education system”.	Education Act of 1982 considers “work education,” “practical arts,” and “technical-vocational education” as part of the “formal education system.”	MOOC providers may be accommodated by amending the law to clarify that MOOCs that do not represent to provide TESDA diplomas, or primary, secondary, or tertiary education diplomas be excluded from the ambit of the “formal education system”. The next version of the FINL may also provide further guidance on the exemption granted to, and the scope of, “short term high-level skills development”.

¹⁸⁶ De La Cruz, J. 2020. House approves on final reading bill amending Public Service Act. <https://businessmirror.com.ph/2020/03/10/house-approves-on-final-reading-bill-amending-public-service-act/> (accessed on 11 August 2020).

5.4. Conclusion

Regulatory frameworks play a key role in driving digital platforms and shaping them into contributors for sustainable and inclusive growth. Regulations may impact the growth of digital platforms positively or negatively, depending on policy directives and implementation.

Certain regulatory frameworks in the Philippines are able to address innovation roadblocks through a combination of adaptive regulations, the regulator's ability to address regulatory overlaps and willingness to engage with stakeholders, and engage in experimentation. However, certain regulations may still have to be calibrated in order to address possibly unintended anti-innovation effects. For the latter, these regulations may have to be evaluated against the country's national innovation policy vis a vis specific policy objectives. Alongside the general innovation strategy of government, regulatory reform should consider the effects of rules and laws on other areas such as government revenue, consumer protection, and labor welfare. Policy should also provide regulators with tools and frameworks that will allow them to navigate uncertainties and overlaps.

Addressing the weakness in the country's regulatory framework will hopefully create a more accommodating and enabling environment for Philippine digital platforms to be more competitive, in line with the country's innovation policy, and at the same time drive towards inclusive and sustainable economic growth.

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