

## ICT regulation and regulatory authority

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The *Information Economy Report 2017* of the United Nations Conference on Trade and Development notes a rapid growth in the world's digital economy. From 2005 to 2016 alone, exports related to information and communications technology (ICT) increased at an average annual rate of 8 percent (UNCTAD 2017). The value of exports of information services also tripled from its 2005 value in 2016 at USD 26 billion (UNCTAD 2017).

Behind the growth of ICT trade is the development of key technologies and innovation. Such growth, however, brings with it new policy and regulatory challenges, such as uneven competition, inadequacy of tools and remedies for enforcement, and the need for international cooperation (UNCTAD 2017). The Philippines, as a developing country, is not alien to these concerns.

This *Policy Note* revisits the country's ICT regulation, particularly the laws, rules, and regulations governing the ICT sector. Given the intricacies of the recent convergence of the technologies, especially under the Fourth Industrial Revolution, it recommends measures to allow the country to maximize its benefits from ICT services and business models and promote trade and investment in the same.

### **Regulatory authority on ICT**

The Department of Information and Communications Technology (DICT) is the government arm mandated to develop policies and plans for ICT development in the country. Following the passage of the DICT Act (DICTA) of 2015, several agencies were attached to DICT, such as the National Telecommunications Commission (NTC), the National Privacy Commission, and the Cybercrime Investigation and Coordination Center. With this consolidation of authority, DICT exercises broad powers over telecommunications and broadcasting, data privacy, cybersecurity, consumer protection, as well as promotion of trade and investment in ICT and ICT-enabled services (ICT-ES).

This consolidation of functions over ICT matters under one department reflects the government's recognition of the convergence of technologies that has disrupted current business models. Garcia-Murillo and MacInnes (2002, p. 57–58) defined such convergence as “the coming together of telecommunications, computing, and broadcasting into a single digital bitstream”, or the takeover of “all forms of media by one technology, [that is] digital computers”, resulting in the “expansion of services in the traditional industries”. It challenges

established rules, regulations, and legal interpretation over services traditionally governed by their own separate legal and regulatory regimes. It also results in conflict in the application of laws and rules, thus creating barriers to trade and investment on ICT services.

This is evident in the implementation of the DICTA, which resulted in incompatible or overlapping functions with other departments. The law itself, in some instances, provides insufficient guidance on the scope of DICT's power. Nonetheless, this may be properly addressed by the issuance of relevant regulations or joint issuances with departments with overlapping functions. Some examples of these challenges are illustrated below:

- DICT absorbed from the then Department of Transportation and Communications the functions and responsibilities dealing with communications. Among these functions is that of the Postal Regulation Division, which regulates courier delivery services. However, such delivery service also includes online payments, which may properly be under the jurisdiction of the *Bangko Sentral ng Pilipinas*.
- While DICT is now the primary agency responsible for ICT development, the Department of Trade and Industry (DTI) still governs the promotion of trade and investments on e-commerce, the improvement of ICT skills of the labor force, network security, and connectivity. The delineation of functions between these two departments is not clear.
- DICTA is not clear as to the extent of the authority of the DICT over the various components of the ICT sector,<sup>1</sup> namely, telecommunications and broadcast

<sup>1</sup> As defined under DICTA, Sections 3(d) and (e), "ICT Sector" shall mean those engaged in providing goods and services primarily intended to fulfill or enable the function of information processing and communication by electronic means. The ICT sector includes telecommunications and broadcast information operators, ICT equipment manufacturers, and internet service providers, among others. "ICT-Enabled Services" or "ICT-ES" shall mean those engaged in providing services that require the intrinsic use of ICTs including engineering or architectural design, informatics service providers, offshoring and outsourcing service providers such as call centers, back office processing, software development, medical or legal transcription, animation, game development, and other services that require the intrinsic use of a networked information infrastructure.

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information operators, ICT equipment manufacturers, multimedia content developers, ICT solution providers, internet service providers, ICT training institutions, software developers, and ICT-ES providers. While the DICTA's policy objectives include fostering a policy environment for the ICT and ICT-ES sectors that promote a broad market-led development, a level playing field, strategic alliances between the public and private sector, including foreign investors, and balanced investments between high-growth and economically depressed areas, it is not clear if the DICT has broad powers to accomplish these policy objectives. The DICT is given powers for ICT policy development and planning, facilitating improved public access to ICT, promoting resource sharing and capacity building, and promoting consumer protection and industry development. Given the potential for overlaps with other government agencies, the lack of specificity in the extent of the powers of DICT creates uncertainty in the implementation and application of the DICTA in relation to the ICT and ICT-ES sectors.

### **Challenges arising from ICT convergence**

The extensive use of ICT in all transactions, both public and private, highlights the convergence between and among ICT actors.<sup>2</sup> As noted above, this convergence challenges established rules, regulations, and legal

<sup>2</sup> For Fransman (2007), these actors include the network element providers (those who provide the individual elements of networks), the network operators (those who create and operate networks), the platform, content, and applications providers (those who use elements and networks to provide content and applications), and the final consumers (divided into various subgroups).

interpretation over services traditionally governed by their own separate legal and regulatory regimes. It also results in conflict in the application of laws and rules, thus creating barriers to trade and investment on ICT services.

Among the most significant barriers are the following:

#### ***Tedious application process***

To engage in a telecommunications activity, an applicant needs to first secure a legislative franchise and a certificate of public convenience and necessity, among other permits and licenses. Given that the processing of the first two can take an average of five years, this slows down investment in telecommunications services. This, in turn, creates a domino effect on other ICT services and ICT-ES dependent on basic telecommunications services and infrastructure.

#### ***Constitutional limit on foreign participation***

Aside from requiring Filipino ownership of telecommunications, broadcasting, mass media, and advertising firms, the 1987 Philippine Constitution also limits to Filipino nationals the practice of profession, specifically those needed in ICT services. These provisions restrain the entry of foreign capital, technology, and skilled human resource that, together with the use of local resources, could be equally harnessed to spur ICT development.

#### ***Faulty interpretation of key policy concepts***

The government still needs to reconcile its objectives in regulating mass media, advertising, and the use of intellectual property with its objective in promoting ICT innovation. For example, in interpreting “internet business”, the Securities and Exchange Commission has applied established concepts of mass media and advertising to similar services provided online. By applying these established concepts, it considered similar services as either “mass media” or “advertising” subject to the constitutional ownership limitations. This interpretation is inconsistent with the widespread use of the internet as a medium of communication (SEC 2012, 2015, 2016a, 2016b, 2017, 2018a, 2018b).

The problem is further compounded by the lack of necessary tools of interpretation that will allow Philippine regulatory authorities to distinguish between online services and manual services. They are also not equipped nor supported by the necessary laws to impose targeted regulations aimed at achieving certain public welfare objectives while recognizing the present reality of convergence in the ICT sector. The country is thus caught in an absurd situation where Facebook and Twitter could potentially be required to be under wholly Filipino ownership to transmit news, advertising, and other information to a Filipino audience.

#### ***Overlapping functions***

In relation to competition, the Philippine Competition Commission (PCC) has original and primary jurisdiction over competition matters, even in sectors governed by other regulators. Nonetheless, it is required to consult the sector regulator to give the latter opportunity to submit its opinion and recommendation before PCC renders its decision, particularly on issues involving both competition and noncompetition matters.

However, the difference between competition and noncompetition concerns can be difficult to define. This is illustrated, for example, in the question of whether PCC can interfere with the co-use agreement between PLDT and Globe Telecom on the frequencies they acquired from San Miguel Corporation. While NTC has the authority to regulate the use of frequencies allocated by the International Telecommunications Union, PCC may also have jurisdiction over the same should such allocation have anticompetitive effects.

At present, no mechanism addresses such issue on a potential conflict of jurisdiction between NTC and PCC. Without such measure, PCC will be unable to properly safeguard competition in the telecommunications sector and promote the growth of the ICT sector.

#### ***Recommendations***

The legal and regulatory challenges noted above underline the need to rethink ICT regulation in

the country. As the Philippine experience shows, the convergence of technologies highlights the inadequacy of its laws, regulations, and institutions in maximizing the benefits of innovative ICT services and business models and promoting trade and investment in the same.

In addressing these challenges, the Philippine government may consider the following:

- Further strengthen the DICT's role in ICT matters by defining the extent of its functions in relation to the ICT sector and ICT-ES, as defined in the DICTA. This includes clarifying the role of DTI in promoting e-commerce.
- Remove unnecessary requirements in the establishment and operation of telecommunications and broadcasting services providers, particularly the need for a legislative franchise.
- Delineate the conditions when PCC can take cognizance of matters involving competition and noncompetition issues in the ICT sector, especially those where there is a potential overlap with the ICT regulator.
- With the challenges in the legal interpretation of "internet business", establish innovative measures that will encourage further innovation in the ICT sector. This could include the creation of regulatory sandboxes for businesses wishing to test an emerging technology without being bound by all the regulations that would normally apply. But for services that affect public interest, such as mass media, there is a need to study how to balance the need for innovation with the need to regulate content, such as child pornography, fake news, cyberbullying, and fraud, among others.

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- In the long-term implementation of DICTA, assess the adaptive capacity of the present regulatory structure to the convergence of technologies. The government may consider establishing just one ICT regulator that has authority on all ICT matters, including the power to regulate industries normally regulated by other regulatory authorities, if these are using ICT, and the authority to interpret ICT-related issues for the guidance of other regulators. 

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