



Philippine Legislation in the Pipeline: Can Local Authorities Regulate the “Internet”?

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The electronic commerce industry is expected to expand by five to seven percent in the coming years while the streaming services business is also expected to exponentially grow, with more and more Filipinos opting to do their transactions online, as well as accessing Internet-based content and entertainment. Philippine authorities are inevitably focusing their regulatory gaze on these enterprises.

- A. [Philippine Congress Pushes for Internet Transactions Act, Targets Non-Resident Online Platforms](#)
- B. [Philippine Classification Board Eyeing Streaming Services](#)
- C. [Proposed Amendments to the Public Service Act May Allow Increased Foreign Participation in Public Services](#)

A. **Philippine Congress Pushes for Internet Transactions Act, Targets Non-Resident Online Platforms**

In light of the growth of electronic commerce (eCommerce) and the increase in online sales brought about by the COVID-19 pandemic, the Philippine Congress has shown even greater interest in regulating internet transactions. Two bills currently pending at the committee level of both houses of Congress – *House Bill No. 6122*¹ and *Senate Bill No. 1591*² – both provide for an “*Internet Transactions Act*” that aims to regulate eCommerce transactions including (a) internet retail of consumer goods; (b) online travel services; (c) digital media providers; (d) ride-hailing services; and (e) financial services offered through digital online platforms. A more recent one, *Senate Bill No. 1808*,³ provides for an “*Online Transactions Act*” and tracks the language of House Bill No. 6122, but introduces certain new provisions.

¹ Currently pending with the House Committee on Rules. See http://www.congress.gov.ph/legisdocs/basic_18/HB06122.pdf.

² Currently pending with the Senate Committee on Trade, Commerce, and Entrepreneurship as of July 29, 2020. See <http://legacy.senate.gov.ph/lisdata/3301729864!.pdf>.

³ Currently pending with the Senate Committee on Trade, Commerce, and Entrepreneurship as of September 7, 2020. See <http://legacy.senate.gov.ph/lisdata/3346330284!.pdf>.

Philippine Legislation in the Pipeline: Can Local Authorities Regulate the “Internet”?

The bills provide for the rights and obligations of online merchants, online eCommerce platforms, and consumers, but exclude from their scope consumer-to-consumer transactions. They require online merchants and online eCommerce platforms to register and obtain a license to operate. They also create an eCommerce Bureau under the Department of Trade and Industry (DTI) which shall be the government agency responsible for regulating online transactions and act as a “virtual one-stop shop for consumer complaints on internet transactions.” Furthermore, the bills provide for an eCommerce Philippine Trustmark for online merchants “to provide assurance of safety and security in internet transactions.”

An interesting aspect of these proposed laws is that they specifically refer to non-resident online enterprises. House Bill No. 6122 and Senate Bill No. 1591 provide that non-residents who engage in eCommerce “by marketing goods or services that are accessible in the Philippines may not evade legal liability in the Philippines owing to the fact of non-residency[.]” On the other hand, Senate Bill No. 1808 provides that a non-resident who “in the ordinary course of business, engages in eCommerce transactions in relation to digital products, by marketing goods or services, that are accessible in the Philippines or made available to consumers in the Philippines, may not evade legal liability in the Philippines owing to the fact of non-residency.”

This text implies that Philippine law may apply to non-residents in terms of non-compliance with consumer protection provisions, but at least in the case of House Bill No. 6122 and Senate Bill No. 1591, it is not clear whether this also means that a non-resident whose goods and services can be availed of by Philippine-based customers would have to comply with any local licensing requirements.

Some Philippine legislators appear to have been alerted to this issue and want to provide that such non-residents must accomplish some form of local registration. Recently, *House Bill No. 7805*⁴ was prepared in the House of Representatives in substitution of House Bill No. 6122 and amends certain provisions, now providing for an extra-territorial application whereby a non-resident engaging in eCommerce who “purposefully avails of the Philippine market shall be deemed as doing business in the Philippines and be subject to applicable Philippine laws and regulations[.]”

That a non-resident is considered “doing business in the Philippines” usually means that it would have to set up a legal presence in the Philippines, such as a subsidiary or a branch. House Bill No. 7805, however, imposes what appears to be a special form of registration requirement on non-residents as well as a need for a resident agent – this seems to indicate that non-resident operators would only need to comply with these requirements and not have to establish a local juridical entity. The problem though is that the bill also states that the non-resident would be deemed as “doing business in the Philippines.”

⁴ Currently pending with the House Committee on Rules. See http://www.congress.gov.ph/legisdocs/first_18/CR00543.pdf.

Philippine Legislation in the Pipeline: Can Local Authorities Regulate the “Internet”?

The suggested clause triggers all sorts of questions. For one, what does “purposefully avail of the Philippine market” mean? Any platform that is generally available to persons with an Internet connection could be accessed by the Philippine market. Is that enough purposefulness? And by stating that in doing so, it would be considered as “doing business,” legislators might not be fully mindful of the well-established body of law on “doing business” in the Philippines. For one, a non-resident that is doing business in the Philippines would already need to set up a juridical entity here, such as a branch or a subsidiary. It would therefore seem pointless to require a special type of registration. Perhaps more importantly, “doing business” principles recognize that there are no hard and fast rules for determining when a foreign entity should be considered as engaged in business in the Philippines, and the Supreme Court has set down fact-based parameters to guide regulators and courts. Current law and case law may, in fact, provide sufficient bases and guidelines for determining when a non-resident entity is already engaged in business in the Philippines. Accordingly, providing that a broadly worded activity such as “purposefully availing of the Philippine market” would constitute doing business may be superfluous (soliciting contracts from Philippine residents is already included as an example of doing business under the Foreign Investments Act).

This is why Senate Bill No. 1808 may be more problematic. Section 8 of Senate Bill No. 1808 outright requires registration with the Securities and Exchange Commission (SEC): “Foreign corporations who are not registered or duly licensed by the SEC, but who are otherwise doing or engaged in the eCommerce business within the Philippines, including maintaining active websites which generate sufficient business over the internet from Philippine consume [sic], should acquire registration with the SEC, as may be determined by the SEC under the rules and regulations.”

Thus, this bill does impose a local registration requirement, even as it legislates a form of doing business – “maintaining active websites which generate sufficient business over the internet from Philippine consumers.” The bill does not explain what is meant by “sufficient business”. The definition throws an extremely wide net that appears to discard intent, and will likely catch very many site operators and enterprises that are going to be called on to set up a company or branch in the Philippines.

Setting aside questions of enforceability and, arguably, the effective creation of trade barriers that could result in one clear problem for this proposed law is that it may well be asking online enterprises to do something impossible. For one, a number of them, if they were to set up here, could be subject to nationality requirements. The best examples would be those caught by the characterizations that the Philippine SEC has made of certain online platforms (characterizations based on circa Martial Law-era definitions of mass media), where they view these as being engaged in mass media and/or advertising. The SEC has opined that platforms that disseminate information to the general public could be viewed as engaged in mass media, an activity that is 100% reserved to Philippine nationals. Assuming that legislators have no issue with this administrative interpretation, the various platforms and sites that they may be expected to set up shop here because of this proposed bill may in fact be constitutionally prohibited from doing so.

Philippine Legislation in the Pipeline: Can Local Authorities Regulate the “Internet”?

As economic borders disappear, there are bound to be gaps, and legislators cannot be faulted for desiring to address them, especially when it comes to the protection of local consumers and businesses. It may be helpful, however, for proposed laws to be discussed in the full context of the legal regime they will enter, to ensure that their implementation will not result in, for instance, less trade or interest in the Philippine market or other consequences inimical to local consumers. The government has always pushed an ease-of-doing-business policy, and clear, harmonious laws that do not impose unworkable requirements would be key to that.

Meanwhile, for businesses in the eCommerce space, it will be important for them to follow this local policy trend and try to track the broader impact of any new rules on for example, licensing, compliance, and taxation.

B. Philippine Classification Board Eyeing Streaming Services

With the tremendous popularity of streaming services in the Philippines, the country’s Movie and Television Review and Classification Board (MTRCB) seems eager to be part of the action – but from a regulatory perspective. The agency is seeking a mandate to review and classify content on services such as those of Netflix and Amazon.⁵

The MTRCB was created in 1985 by the former Philippine President Ferdinand Marcos through Presidential Decree No. 1986. The board is mandated to issue guidelines to regulate and classify motion pictures, television programs, and publicity materials including the issuance of the necessary permits. It also has the power to classify, screen, and review motion pictures, television programs and similar shows. This includes the power to disapprove or delete objectionable portions and prohibit its distribution.

Since the decades-old mandate of the board does not refer to streamed content, it is unclear if the body has any jurisdiction to require streaming service providers to comply with MTRCB rules and allow the board to review their programs. The MTRCB itself has publicly stated that the law is silent on this issue.⁶

⁵ MTRCB wants content in Netflix, other video streaming sites regulated; <https://newsinfo.inquirer.net/1330862/mtrcb-wants-content-in-netflix-other-video-streaming-sites-regulated>; last visited September 15, 2020 at 9:24PM.

⁶ Prudence in classifying content on video streaming platforms sought; http://legacy.senate.gov.ph/press_release/2019/1007_gatchalian1.asp; last visited September 15, 2020 at 9:50PM.

Philippine Legislation in the Pipeline: Can Local Authorities Regulate the “Internet”?

The board’s statements may be said to be part of the recent Philippine policy trend focusing on online businesses. For example, *House Bill No. 7425*⁷ (which substitutes the proposed Digital Economy Taxation Act) is seeking to subject online services to value-added tax even if digital services are provided to Philippine buyers through an online platform maintained offshore. A digital service is defined as “any service that is delivered or subscribed over the internet or other electronic network and which cannot be obtained without the use of information technology and where the delivery of the service may be automated.” Streaming services could be made subject to *House Bill No. 7425*. Meanwhile, *House Bill No. 6122 (Internet Transactions Act)* and other bills, if enacted, may require non-resident online businesses to comply with a registration requirement and appoint a local resident agent.

Recently the MTRCB has announced that it has already finalized draft guidelines dealing with the board’s power to review streaming content, and is in the process of consulting stakeholders.⁸ The MTRCB Chairperson has stated that given the limited resources of the MTRCB, only post-monitoring of content will be implemented.⁹ These guidelines have yet to be published.

C. Proposed Amendments to the Public Service Act May Allow Increased Foreign Participation in Public Services

The House of Representatives has recently approved a bill that seeks to amend the Public Service Act (Commonwealth No. 146, as amended). This bill -- *House Bill No. 78*, entitled “*An Act Providing for the Definition of Public Utility, Further Amending for the Purpose Commonwealth Act No. 46, Otherwise Known as the “Public Service Act (PSA)”, as Amended*”¹⁰ -- may cause telecommunications companies to be excluded from the definition of “public utility” which is subject to a Philippine nationality requirement of at least 60% under the Philippine Constitution.

Under the bill, a “public utility” is “a person that operates, manages, and controls for public use” the distribution of electricity, transmission of electricity, and a “water pipeline distribution system or sewerage pipeline system...” It also states that “no other person shall be deemed a public utility... unless otherwise subsequently provided by law.” A telecommunications company is not included in the limited definition of “public utility” under the bill but it will still be a company that provides a “public service.”

⁷ Currently pending with the House Committee on Rules. See http://www.congress.gov.ph/legisdocs/first_18/CR00426.pdf.

⁸ Regulating content on Netflix, other streaming services to ‘empower’ viewers: MTRCB; <https://news.abs-cbn.com/business/09/04/20/regulating-content-on-netflix-other-streaming-services-to-empower-viewers-mtrcb>; last visited September 15, 2020 at 9:31PM.

⁹ <https://mb.com.ph/2020/09/04/mtrcb-seeks-only-post-monitoring-says-head-as-plan-to-regulate-netflix-meets-stiff-opposition/>; <https://mb.com.ph/2020/09/04/mtrcb-seeks-only-post-monitoring-says-head-as-plan-to-regulate-netflix-meets-stiff-opposition/>; last visited September 15, 2020 at 9:35PM.

¹⁰ Eighteenth Congress, First Regular Session, House Bill No. 78, available at http://congress.gov.ph/legisdocs/basic_18/HB00078.pdf last accessed September 16, 2020 at 12:02 PM.

Philippine Legislation in the Pipeline:
Can Local Authorities Regulate the “Internet”?

The National Economic and Development Authority and the Philippine Competition Commission are authorized under House Bill No. 78 to make recommendations to Congress on whether a public service should also be a public utility based on criteria such as that “the commodity or service is necessary to the public and a natural monopoly that needs to be regulated when the common good so requires.” The relevant government agency is authorized under the bill to set the maximum rate or revenue of a public service and to “establish and enforce a methodology for setting rates...”.

House Bill No. 78 has been approved by the House of Representatives and has been endorsed to the Senate for concurrence.¹¹ The bill is pending with the Senate’s Committee on Public Services and Committee on Economic Affairs.¹²

There is a report that the amendments to the PSA might be taken up by the Senate only towards the end of the year.¹³

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¹¹ House Bill No. 78 Status available at <http://congress.gov.ph/legisdocs/?v=bills> last accessed September 16, 2020 at 12:58PM.

¹² Senate Journal, Session No. 63, Monday to Wednesday, May 4 to 6, 2020, available at <http://legacy.senate.gov.ph/lisdata/3274729608!.pdf> last accessed September 16, 2020 at 12:08 PM.

¹³ See PSA amendments put on back burner, available at <https://www.bworldonline.com/psa-amendments-put-on-back-burner/> last accessed September 16, 2020 at 1:00 PM.

Philippine Legislation in the Pipeline:
Can Local Authorities Regulate the “Internet”?

This briefing was prepared by the Telecommunications, Media and Technology (TMT) practice group, under the firm’s Special Projects Department.

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