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EDITOR'S NOTE

This issue marks the IBP Journal's re-orientation towards practitioner-driven and practice-oriented legal writing, departing from its previous academic focus. Contributions in this issue tackle two major themes: advancements in economic regulations, and proposed legal reform for improving the conditions for Persons Deprived of Liberty (PDLs). Issue contributors are a balance of seasoned legal practitioners and the new crop of lawyers, all attuned to emerging legal developments.

In *From BOT to PPP 2.0: The Salient Features and Undercurrents of Republic Act No. 11966 or the Public-Private Partnership Code of the Philippines*, Prof. Gwen Grecia-De Vera offers a comprehensive analysis of the newly enacted PPP Code. Prof. De Vera articulates how this legislation consolidates and streamlines previous laws on PPP into a unified framework, enhancing transparency and reducing investor confusion.

Shanica Sen V. Sollegue's *The Winner Takes It All: Defining Anti-Competitive Practices in the Context of Digital Economy* tackles the complex landscape of competition law as it intersects with digital market dynamics. Sollegue examines the monopolistic tendencies of major digital platforms and suggests that the Philippine Competition Act may need refinement to better address these modern challenges. Her article does so by comparing local regulatory frameworks with those in place in the U.S. and EU.

Alfierri E. Bayalan's *The Presumption of Innocence in the Philippines: Problems and Prospects* confronts the pressing issues related to pretrial detention and jail congestion. Bayalan critiques the current state of the legal system where prolonged detention not only undermines the presumption of innocence but also contributes to severe jail overcrowding. Bayalan offers the solution of summary hearings for bail applications and highlights a practical approach to upholding constitutional rights and improving judicial processes.

Lastly, Jamie Katherine L. Sio's *Restricting Post-Sentence Confinement to High-risk Convictions* argues for significant sentencing reform that emphasizes rehabilitation and risk assessment. Sio emphasizes the need to shift from a punitive model to one that better assesses tshe threat level of offenders, proposing alternative commitment forms that prioritize public safety and respect for human dignity. This approach discusses as well the conditions in prisons and the effectivity of the corrections system at large.

With the IBP Journal's foundational commitment for more extensive discussions through a wider variety of legal writing, this issue hopes to set the tone for broader insights from and for the Philippine legal community of practice.

* * *

FROM BOT TO PPP 2.0: THE SALIENT FEATURES AND UNDERCURRENTS OF REPUBLIC ACT NO. 11966 OR THE PUBLIC-PRIVATE PARTNERSHIP CODE OF THE PHILIPPINES

Gwen Grecia-De Vera[*]

Republic Act No. 11966,[1] also known as the Public-Private Partnership Code of the Philippines ("PPP Code"), is considered a piece of landmark legislation. It is intended to attract private sector investment in infrastructure and public services, improve the quality and efficiency of public-private partnership ("PPP") projects, and promote the country's economic growth and development. Enacted in December 2023, a few months after Senate Bill No. 2233 was certified as urgent,[2] the PPP Code has garnered significant attention for its potential to reshape the country's infrastructure development landscape. Implementing Rules and Regulations ("PPP Code IRR") was subsequently promulgated on March 22, 2024, to elaborate on the provisions of the new law and provide detailed guidelines for its practical application. The PPP Code IRR became effective on April 6, 2024, following its publication. This brief legislative note offers a non-exhaustive survey of lessons learned in the last decade or so of PPP programs as a backdrop to the presentation of the salient changes and innovations introduced by PPP Code and its IRR.

As of December 31, 2022, a total of 210 PPP projects have been awarded, 157 of which are on-going while 53 have either been terminated or concluded. Of the on-going projects, 48 are national

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[*] Associate Professor, University of the Philippines College of Law.

[1] Rep. Act No. 11966 [hereinafter "PPP Code"] (2023).

[2] President Ferdinand Marcos Jr., in a letter addressed to Senate President Juan Miguel Zubiri dated May 31, 2023, called for the immediate passage of Senate Bill No. 2233 or "An Act Strengthening Public-Private Partnerships." The House of Representatives passed the counterpart measure ahead, or in December 2022. *See New PPP bill certified as urgent,* PPP CENTER, June 15, 2023, *at* https://ppp.gov.ph/in_the_news/new-ppp-bill-certified-as-urgent/ (last visited December 18, 2023).

projects and 109 are local in nature. By the end of the Aquino Administration in 2016, 10 of these national project contracts were already being implemented.[3] Included in the list are projects signed between 2008 and 2020 under the regime of Republic Act No. 6957, as amended by Republic Act No. 7718, or the Build Operate Transfer Law ("BOT Law"), the Guidelines and Procedures for Entering into Joint Venture (JV) Agreements between the Government and Private Entities ("NEDA JV Guidelines"), local government PPP codes and JV ordinances. The list also includes legacy PPP projects signed before 2010.

Having only been recently enacted, the PPP Code's implications for the Public-Private Partnership landscape remain to be seen. However, its salient features suggest that legislators considered some of the challenging questions faced by infrastructure development initiatives from the launch of the revitalized PPP Program of the Aquino Administration in 2011[4] to President Rodrigo Duterte's Build! Build! Build! Program.[5] Indeed, the PPP Code has the potential to significantly improve the country's PPP framework and attract robust private sector participation in much needed infrastructure development. These legislated initiatives should be complemented by strategic implementation that will ultimately allow for adaptive regulation, evidence-based policy approaches, and impactful multi-stakeholder engagement. In this discussion, perspectives will be offered on the most significant aspects of implementing a

[3] DEV'T BUDGET COORD. COMM. (DBCC), 2015-2016 FISCAL RISKS STATEMENT 47 (2015).

[4] The Philippine Public-Private Partnership Program (2012), which states "[g]uided by the principles of transparency, accountability and sustained partnerships with the private sector, the Public-Private Partnership Program of the Philippines was established as a flagship program to realize the Philippine Public Investment Program that, in turn, supports the Philippine Development Plan 2011 to 2016." PPP CENTER, PUBLIC-PRIVATE PARTNERSHIP PROGRAM, May 2012, *available at* https://ppp.gov.ph/wp-content/uploads/2012/05/PPP-Brochure_May2012.pdf (last visited Dec. 18, 2023).

[5] Launched in 2017, the Build! Build! Build! Program is the centerpiece infrastructure development program of the Duterte administration that "aims to spur and sustain economic growth to usher the country's 'Golden Age of Infrastructure'." *SEE* CONG. POL'Y & BUDGET RES. DEP'T. (CPBRD), FACTS IN FIGURES NO. 14 (2020), *at* https://cpbrd.congress.gov.ph/images/PDF%20Attachments/Facts%20in%20Figures/FF2020_-14_BBB.pdf (last visited Dec. 18, 2023).

successful PPP program and the overarching policy direction and standards that have been legislated under the PPP Code, beginning with the essential reforms under the new law: from the reorganization of the Philippine legal and institutional framework for PPPs to the design, procurement, and development of PPPs. This will be followed by a brief exposition of some persistent issues that have arisen in previous PPP projects that may yet have to be addressed in either supporting legislation. While the new law offers several promising advancements, it is crucial to critically analyze its potential benefits and limitations.

I. Redefining the Modern PPP Landscape: Key Reforms Shaping the Future of Philippine PPPs

A. The Legal and Institutional Framework for PPP Development under the PPP Code

The PPP Code consolidates the existing fragmented legal framework by bringing various laws and regulations related to PPPs under a single, comprehensive document, with the intention of eliminating confusion and inconsistencies. It had been previously observed that the "[current] BOT Law is not the sole legal framework for PPPs, and this at times, can lead to investor confusion. Prospective investors lament that they find it cumbersome to familiarize themselves with various PPP frameworks, depending on the government agency implementing the project."[6] The consolidation under the PPP Code's unified framework is expected to foster a balance between predictability and transparency in the PPP process.

Prior to the passage of the PPP Code, Executive Order No. 423[7] delineated the various governing laws and rules for government contracts as follows:

[6] SENATE ECON. PLAN. OFFICE (SEPO), POLICY BRIEF NO. 23-03 6 (2023) *at* https://legacy.senate.gov.ph/publications/SEPO/SEPO%20Policy%20Brief_PPP_27Sept2023(1).pdf.

[7] Exec. Order. No. 423 (2005). Repealing Executive Order No. 109-A dated September 18, 2003, Prescribing the Rules and Procedures on the Review and Approval of all Government Contracts to Conform with Republic Act No. 9184, otherwise known as "The Government Procurement Reform Act."

a. contracts for the procurement of infrastructure projects, goods, and consulting services, as well as contracts for lease of goods and real estate shall be governed by Republic Act No. 9184 and its Implementing Rules and Regulations;

b. contracts for the acquisition of real property needed as right-of-way, site or location for national government infrastructure projects were then governed by Republic Act No. 8974;[8]

c. contracts undertaken through Build-Operate and Transfer (BOT) schemes and other variations were governed by Republic Act No. 6957, as amended by Republic Act No. 7718, and its Implementing Rules and Regulations; and

d. government contracts financed wholly or partly with Official Development Assistance ("ODA") funds shall be governed by Republic Act No. 4860, as amended, Republic Act No. 8182, as amended by Republic Act No. 8555, and Republic Act No. 9184 and its Implementing Rules and Regulations.

Under Executive Order No. 423, the Government Procurement Policy Board ("GPPB") is tasked to issue guidelines for government contracts financed with ODA funds, with the objective of cultivating transparency, competitiveness, and accountability in government transactions, and promoting compliance with the requirements of an open and competitive public bidding, consistent with Republic Act No. 9184 and its Implementing Rules and Regulations.[9]

Under the previous framework, joint venture agreements were segregated from the foregoing classification of government contracts and instead included in a separate section of Executive Order No. 423, which states that it is the National Economic and

[8] This has since been repealed by Rep. Act No. 10752 or the Right of Way Act enacted in 2016.

[9] *See* Rep. Act No. 9184 (2002), § 4.

Development Authority ("NEDA"), in consultation with the GPPB, which has the authority to issue guidelines regarding joint venture agreements with private entities, with the objective of promoting transparency, competitiveness, and accountability in government transactions, and, where applicable, complying with the requirements of an open and competitive public bidding. This led to NEDA's promulgation of the Guidelines and Procedures for Entering into Joint Venture (JV) Agreements between the Government and Private Entities ("NEDA JV Guidelines") in 2008, which defined a joint venture as a contractual arrangement whereby a private sector entity or a group of private sector entities on one hand, and a Government Entity or a group of Government Entities on the other hand, contribute money/capital, services, assets (including equipment, land or intellectual property), or a combination of any or all of the foregoing.

The NEDA JV Guidelines effectively provided for an alternative mode of procuring infrastructure projects. Unlike projects undertaken through the BOT Law, JVs as defined under the Guidelines were permitted to be implemented without NEDA evaluation and approval.[10] While it was reasonable to construe the express enumeration of contractual arrangements in the BOT Law as not exhaustive,[11] the subsequent issuance of the NEDA JV Guidelines, however, led a number of observers to believe that joint ventures, and corresponding agreements, had been removed from the relevant approval process; and consequently, were not adequately assessed for purposes of risk management, among others. For example, the NEDA JV Guidelines permitted the submission of unsolicited proposals. A proponent pursuing an unsolicited project under the BOT Law cannot rely on any direct government equity. Shifting to the unsolicited JV permits direct government equity without prior examination by an approving

[10] It is useful to note here that a government agency seeking to establish a GOCC or Related Corporation under the Corporation Code of the Philippines is required to submit its proposal to the GCG for review and recommendation to the President for approval before registering the same with the Securities and Exchange Commission ("SEC"). The SEC shall not register the articles of incorporation and by-laws of a proposed GOCC or Related Corporation, unless the application for registration is accompanied by an endorsement from the GCG stating that the President has approved the same (Rep. Act No. 10149, § 27).

[11] *See* Tatad v. Garcia, G.R. No. 114222, Apr. 6, 1995.

authority (such as NEDA). The PPP Code addresses this regulatory gap with the express inclusion of a joint venture agreement as one of the recognized PPP contractual agreements.

Not only has the PPP Code expressly integrated joint venture agreements within the PPP framework, it also now covers all contractual arrangements between an Implementing Agency[12] and a Private Partner[13] to finance, design, construct, operate, and maintain infrastructure or development projects and services which are typically provided by the public sector, where each party shares in the associated risks. The PPP Code offers a broad definition of PPP projects, that is intended to provide flexibility. Pursuant to the provisions of the PPP Code, a PPP is defined under the PPP Code IRR as a contractual arrangement between an Implementing Agency and a Private Partner to finance, design, construct, operate, and maintain, or any combination thereof, Infrastructure or Development Projects and Services which are typically provided by the public sector, where each party shares in the associated risks, and where the investment recovery of the Private Partner is linked to performance.[14]

Under the law, PPP Project encompasses public infrastructure, development projects and services.[15] Partnerships that have not been submitted through the administrative process remain within the PPP Code's scope, as long as they are PPPs as defined in the Code.[16] Consequently, the scope and coverage of PPPs have been expanded to cover other contractual arrangements

[12] PPP Code, § 3 (q). Implementing Agency refers to a department, bureau, office, instrumentality, commissions, authority of the national government, state university and college ("SUC"), local university and college ("LUC"), local government unit ("LGU"), and government owned or controlled corporation ("GOCC").

[13] A Private Partner is defined in the PPP Code, § 3 (z) as the private sector entity determined to be financially, legally, and technically capable to undertake obligations under an awarded PPP contract. The PPP Code separately defines a Private Proponent as the private sector entity which has submitted a bid in relation to a Solicited Project, or a private sector entity which has submitted an Unsolicited Proposal.

[14] PPP Code, § 4; Rep. Act No. 11966 Rules & Regs [hereinafter "PPP Code IRR"] § 4 (rr).

[15] PPP Code, § 3 (cc).

[16] PPP Code, § 2.

that were not previously and specifically identified in the BOT Law. The PPP Code now also covers:

a. Joint ventures,[17]
b. Toll operations agreements, or any contractual arrangements involving construction, operation, and maintenance, or a combination or variation thereof, of toll facilities,
c. Lease agreements providing for the rehabilitation, operation and/or maintenance, including the provision of working capital and/or improvements to, by the Private Partner, of an existing land or facility owned by the government for a fixed period of time covering more than one (1) year,
d. Lease agreements, when such lease is a component of a PPP project, and
e. All other contractual arrangements which possess characteristics or elements of a PPP as defined under this Code, or as may be approved by the appropriate Approving Body.[18]

The Code expressly excludes the following from its coverage:

a. infrastructure projects undertaken under Republic Act No. 9184 or the Government Procurement Reform Act,
b. management contracts,
c. service contracts,
d. divestments or dispositions,
e. corporatization,
f. incorporation of subsidiaries with private sector equity,
g. donations, whether gratuitous or onerous, and
h. joint venture agreements involving purely commercial arrangements that neither provide nor include public infrastructure or development services.[19]

[17] *See also* PPP Code, § 11 on Joint Ventures, which refers to contractual joint venture or incorporated JV.
[18] PPP Code, § 4.
[19] PPP Code, § 4.

The PPP Code attempts to further enhance the legal and regulatory framework for the delivery of PPPs in the country by stabilizing the institutional structure and defining the roles and responsibilities of different constitutive elements, including the PPP Governing Board ("PPPGB"), the Public-Private Partnership Center ("PPPC"), Implementing Agencies, and the private sector participants (Private Proponent and Private Partner). The legislative design under the PPP Code clarifies the institutional framework under two key government bodies with the expanded mandate of the Public-Private Partnership Center and institutionalization of the Public-Private Partnership Governing Board.

The Code provides for improved governance and oversight by the PPP Center, which was created under Executive Order No. 8 (series of 2010), as amended by Executive Order No. 136 (series of 2013), and further amended by Executive Order No. 30 (series of 2023). Under the new law, the PPP Center reports directly to the PPP Governing Board and shall be attached to the NEDA for purposes of policy and program coordination.

The Code also establishes the PPPGB[20] as a central governing board, with responsibility for overseeing and regulating PPP activities nationwide, as well as providing strategic guidance, thereby ensuring consistency and adherence to best practices. The PPPGB, previously created under Executive Order No. 136 (series of 2013), as amended by Executive Order No. 30 (series of 2023), is now institutionalized under the Code and granted overall policy-making body for all PPP-related matters. It is tasked with setting the strategic direction of the PPP Program and PPP Projects, as well as creating an enabling policy and institutional environment for PPP.[21] All the issuances, orders, resolutions, decisions, or other acts

[20] PPP Code, § 158. The PPPGB shall be composed of the following, who may designate their respective alternates: NEDA Secretary as Chairperson, Department of Finance Secretary as Vice-Chairperson, the Secretaries of the Department of Budget and Management, Department of Justice, Department of Trade and Industry, Department of Interior and Local Government, Department of Environment and Natural Resources, Chairperson of the Commission on Higher Education, the Executive Secretary, the Executive Director of the PPPC. The PPPGB shall appoint one private sector representative from the infrastructure sector.

[21] PPP Code, S§ 25.

of the PPPGB shall be binding, unless otherwise stated by the PPPGB.

An important aspect of strengthening the institutional framework for PPP under the Code is enhancing the role of local government units in promoting and undertaking PPP projects. Local governments already enjoyed the authority to undertake infrastructure development projects under the BOT Law. However, technical support and financial assistance were not specifically identified or readily available. Indeed, LGUs have undertaken successful PPPs, including a hospital pharmacy in the City of Makati[22] and, more recently, the Makati Life Medical Center, a PPP between the City of Makati and LifeNurture Incorporated, considered to be the largest hospital PPP in the Philippines.[23] There have also been disappointments, such as the Wag-wag Shopping Mall in Nueva Ecija.[24] As early as 1993, LGUs were encouraged to generate interest in PPPs and invite investment and expertise from entrepreneurs and contractors in developing projects under the BOT Law. Resort to PPPs was intended to support LGUs in procuring infrastructure projects, following the abolition of the budgetary aid to LGUs and other lump-sum funds under the National Assistance to LGUs as well as the subsequent integration and allocation of the these funds into the Internal Revenue Allotment pursuant to Republic Act No. 7160 or the Local Government Code of 1991.[25]

Previously, local chief executives were encouraged to establish a Public-Private Partnership (PPP) Sub-Committee in the Local Development Councils,[26] to promote PPPs and assist local development councils in the formulation of action plans and

[22] *See PhilHealth is a PPP,* PPP CENTER, Oct. 31, 2012, *at* https://ppp.gov.ph/in_the_news/philhealth-is-a-ppp/ (last visited Dec. 18, 2023).

[23] *Makati starts partial ops of P9.77-B PPP hospital,* PPP CENTER, May 10, 2023, https://ppp.gov.ph/in_the_news/makati-starts-partial-ops-of-p9-77-b-ppp-hospital/ (last visited July 3, 2024).

[24] Alvarez v. People, G.R. No. 192591, June 29, 2011 (dec.), July 30, 2012 (res.)

[25] *See* Dept. of Interior & Local Gov't ("DILG") Mem. Circ. No. 089-9.

[26] *See* DILG Mem. Circ. No. 2011-16 (2011). Establishment of Private-Public Partnership (PPP) Sub-Committee in the Local Development Councils (LDCs) of LGUs.

strategies related to the implementation of PPP programs and projects. In addition, under the BOT Law and its IRR, several provinces promulgated PPP codes, based on the PPP code drafted by former Department of Justice Secretary and Office of the Government Corporate Counsel Chief Alberto Agra,[27] leading to a further fragmentation of the PPP framework for local governments. Various LGUs also passed JV ordinances to facilitate collaboration with the private sector on local infrastructure projects. Upon effectivity of the PPP Code on December 23, 2023, no other JV guidelines, PPP guidelines, codes, or ordinances may be enacted, issued and used by any government entity to enter into PPPs, except those that are enacted, issued or used in accordance with the Code and its IRR.[28]

To be sure, the PPP Code recognizes the value of promoting local autonomy in implementing local PPP Projects. This means LGUs are empowered to initiate and implement local PPP projects tailored to their specific needs and priorities, with a streamlined approval process. LGUs are also encouraged under the Code to align their local PPP projects with national development plans, ensuring strategic coherence and effectiveness. This calls for a capacity building program to enable officials and LGUs to pursue PPP projects in full compliance with the PPP Code. Among the new features of the Code is the imposition of administrative, civil and criminal penalties for violation of its provisions. Lessons in this regard may be drawn from the case of *Alvarez v. People of the Philippines*.[29] While the case involves criminal charges against the local chief executive for violation of Republic Act No. 3019, or the Anti-Graft and Corrupt Practices Act, the Supreme Court referred heavily to the BOT Law and its IRR. The Supreme Court determined that the local chief executive was expected to know the proper procedure in the bidding and award of infrastructure contracts under the BOT Law and duty-bound to follow the same. His failure

[27] *See* DILG Mem. Circ. No. 2016-120 (2016). Guidelines for the Implementation of Public-Private Partnership for the People Initiative for Local Governments (LGU P4), which includes as Annex a template PPP Code drafted by former Secretary Agra.

[28] PPP Code, § 35 (e).

[29] Alvarez v. People, G.R. No. 192591, June 29, 2011 (dec.), July 30, 2012 (res.).

to discharge this duty constituted gross and inexcusable negligence under the Anti-Graft and Corrupt Practices Act. The Supreme Court found it necessary to reiterate the basic principles of public bidding in the Philippines, stressing the BOT Law's applicability to local government unit infrastructure projects. The Supreme Court agreed with the findings of the Sandiganbayan that the municipal mayor acted with manifest partiality and gross inexcusable negligence in awarding the BOT contract to an unlicensed and financially unqualified private entity. To exculpate himself, the mayor admitted that he was not familiar with the BOT law, resulting in, among others, his signing a notice without consulting the city's legal counsel and publication of an invitation for a submission period that was significantly shorter than that provided in the BOT Law. He also claimed that, as head of the Pre-Qualification Bids and Awards Committee, that it was the PBAC that recommended the award to the lone bidder. According to the Court, the mayor's claim of substantial compliance is unavailing given the lapses established:

> The substantial compliance rule is defined as "[c]ompliance with the essential requirements, whether of a contract or of a statute." Contrary to petitioner's submission, his gross negligence in approving API's proposal notwithstanding its failure to comply with the minimum legal requirements prevented the Sangguniang Bayan from properly evaluating said proponent's financial and technical capabilities to undertake the BOT project. Such gross negligence was evident from the taking of shortcuts in the bidding process by shortening the period for submission of comparative proposals, nonobservance of Investment Coordinating Committee of the National Economic Development Authority approval for the Wag-wag Shopping Mall Project, publication in a newspaper which is not of general circulation, and accepting an incomplete proposal from API. These forestalled a fair opportunity for other interested parties to submit comparative proposals. Petitioner's argument that there was substantial compliance with the law thus fails. The essential requirements of the BOT

> law were not at all satisfied as in fact they were sidestepped to favor the lone bidder, API.[30]

To be sure, the PPP Code now imposes enormous liability upon LGUs and local universities and colleges ("LUCs"). As Senator Grace Poe noted in her interpellation during the deliberations on Senate Bill No. 2233:

> While Senator Poe was pleased with the timely participation of LGUs in a number of PPP projects, she informed the Body that the Asian Development Bank found in 2020 that LGUs lacked the necessary expertise, technical resources, and to prepare for PPPs. She asked if LGUs would receive technical and financial assistance to enable them to study, prepare plans, and attract PPP investors. Senator Ejercito acknowledged that some LGUs lacked the capacity to undertake large infrastructure projects. In this regard, he informed the Body that the PPP Center and the Project Development and Monitoring Facility (PDMF) would provide the LGUs with technical knowledge and expertise so that they could manage said initiatives effectively.[31]

Implementing guidelines tailored to LGUs and LUCs, as well as capacity building programs, will be critical in sustaining the gains over the last ten to fifteen years of PPPs in the country. The Senate Economic Planning Office ("SEPO") reported that between 2010 and 2016, LGUs awarded a total of sixty-three (63) PPP projects, composed of thirty-two (32) BOT Law contractual variants and thirty-one (31) joint venture contractual arrangements.[32] The SEPO also noted that as of 2021, one hundred ninety-two (192) LGUs reported having their own PPP codes or JV ordinances.[33] It is expected that forthcoming guidelines and capacity building activities will help LGUs undertake successful PPP projects fully compliant with the new PPP Code.[34]

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[30] Alvarez v. People, G.R. No. 192591, June 29, 2011 (dec.), July 30, 2012 (res.).

[31] S. Journal, 11th Sess., 18 (Aug. 15, 2023).

[32] SEPO POLICY BRIEF NO. 23-03 3 (2023).

[33] *Id.*

[34] The PPPGB recently promulgated Resolution No. 2024-04-02, or the Interim Guidelines for the Approval of Local PPP Projects Pursuant to Section 7(e) of the PPP code and Section 42 of its IRR.

B. PPP Project Identification, Development, Approval, and Procurement

The PPP Code introduces measures to expedite project identification, development, and procurement. The law principally tasks Implementing Agencies with the responsibility of identifying, developing, and preparing their respective lists of PPP projects.[35] All Implementing Agencies are authorized to identify, develop, assess, evaluate, approve, negotiate, award, and undertake PPP Projects. Specifically, the PPP Code requires Implementing Agencies to identify in their development plans, strategies, and investment programs PPP projects that they intend to implement through the solicited mode, without prejudice to the submission by the private sector of unsolicited proposals.[36] This addresses previous difficulties encountered arising from the inconsistent application of the provision on identification of priority projects under the BOT Law, which appears to have led to the "crowd[ing] out of projects that ought to be in the priority list and jurisdiction of the national government."[37]

The PPP Code also decentralizes the approval of PPP projects. Under the new law, the authority to approve national projects with a Project Cost[38] of PhP 15 billion and above rests with the NEDA Board, upon recommendation of the NEDA Board

[35] Pursuant to Section 16 of the PPP Code IRR, the consolidated List of PPP Projects is available on the PPP Center website at https://ppp.gov.ph/list-of-projects/ (last visited July 3, 2024).

[36] PPP Code, § 6.

[37] Rep. Act No. 6597 [hereinafter BOT Law"] (1990), § 4; CPBRD, POLICY ADVISORY NO. 2008-4: REVISITING PUBLIC-PRIVATE PARTNERSHIP IN INFRASTRUCTURE DEVELOPMENT: IMPROVING BOT GOVERNANCE (2008).

[38] Project Cost is defined in Section 3(bb) of the PPP Code the total cost to be expended to plan, develop, and construct the project to completion stage, including cost of feasibility studies, engineering and design, construction, equipment, land/right-of-way (ROW), taxes imposed on said cost, and development cost. For Operations and Maintenance (O&M) PPP Projects without initial capital expenditures, the present value of costs incurred in delivering the contracted service, including any reinvestment requirements, shall be considered as the Project Cost.

Investment Coordination Committee ("NEDA Board-ICC").[39] The Head of the Implementing Agency is the approving authority for national projects falling below PhP 15 billion, subject to the exercise by the NEDA Board – ICC of its discretion to approve these projects in the situations contemplated by the law.[40] The NEDA Board-ICC also has the prerogative to review, evaluate, and update the threshold amount, the details on the promulgation of which may be expected to come in the implementing rules and regulations.

The PPP Code authorizes Implementing Agencies to establish PPP Units and build adequate capacity to procure and implement infrastructure projects. In the alternative, Implementing Agencies are permitted to assign responsibility to an existing and appropriate unit to act as its PPP unit, for the purposes of planning, overseeing, and monitoring PPP projects.[41] Where established, the PPP unit shall be led by a senior official and include as members, among others, technical, financial, and legal personnel knowledgeable in PPPs.[42] The PPP Center shall provide these units technical assistance and capacity development necessary for the effective performance of its roles and functions.

The decentralization of project approval at the national level is intended to facilitate the evaluation and clearance of proposals. Looking at the list of various projects in implementation from 2008 to 2020, only a handful of agencies appear to be involved in PPPs.[43] Granting Implementing Agencies with different administrative organizations and internal governance mechanisms may lead to inconsistencies in the implementation of the PPP Code's policy on project approval. A robust capacity building exercise will have to be immediately undertaken, otherwise, inexperience in evaluation, stakeholder engagement, and administrative decision-making for purposes of

[39] The NEDA Board–Investment Coordination Committee (ICC) Guidelines on the Review and Approval of the Public-Private Partnership Proposals Requiring ICC and/or NEDA Board Approval became effective on April 29, 2024.

[40] PPP Code, § 7(a)(1).

[41] PPP Code, § 28.

[42] PPP Code, § 28.

[43] *See* Table 1.

approval may lead to an inordinate reliance on the deemed approved provisions of the PPP Code and exposure to administrative, civil, and criminal liability.

Another issue that has been encountered in PPPs is the conflicting roles undertaken by government entities that act as implementing agencies, even as they exercise a regulatory mandate.[44] The PPP Code addresses this by explicitly providing that no Implementing Agency shall implement a PPP project that it regulates, provided that any regulatory body which shall implement a PPP project pursuant to its mandate shall adopt a conflict mitigation and management plan.[45]

The PPP Code also introduces revised approval thresholds for national and local PPP projects, based on project size and complexity, making the process more transparent and predictable. This is intended to expedite the approval process for smaller projects and reduce administrative burden and red tape.

Table 1: Project Approval Thresholds

Approving Body	**Thresholds or Conditions**
National PPP Project	
NEDA Board	a. Project Cost is equal to or greater than PhP15 Billion b. Favorable recommendation of the NEDA-Investment Coordination Committee
Head of Implementing Agency	Project Cost is less than PhP15 Billion
Local PPP Project	
Local legislative assembly or *sanggunian*	Local government unit projects
Local board	Projects of local universities and colleges

[44] *Francisco, Jr. v. Toll Regulatory Board*, G.R. No. 166910, October 19, 2010.

[45] PPP Code, Section 30 (b).

Projects below PhP15 Billion will require approval of the NEDA-ICC, where a project:

a. physically overlaps with a project approved by a government authority or with a project being developed by another government entity based on national or sectoral development plans;
b. negatively affects the economic benefits, demand, and/or financial viability of a project approved by a government authority or a project being developed by another government entity based on national or sectoral development plans;
c. requires financial government undertakings to be sourced and funded under the General Appropriations Act;
d. involves Availability Payments[46] to be sourced and funded under the GAA; and
e. the contribution of an Implementing Agency to a proposed joint venture exceeds fifty percent (50%) of its entire assets based on its latest audited financial statements and other pertinent documents.

The NEDA-ICC may review, evaluate and update the threshold of PhP15 Billion. For state colleges and universities ("SUCs") whose respective projects each have a cost equal to or greater than PhP15 Billion, the project may be processed through a green lane under guidelines to be implemented by NEDA-ICC.

The review and approval period provided under the law is set at one hundred twenty (120) calendar days from receipt of complete project requirements. Favorable action by the Approving Body includes the approval of the project parameters, terms, and

[46] Availability Payments refer to predetermined payments by the Implementing Agency to the Private Partner in exchange of delivering an asset or service in accordance with the PPP Contract. Availability Payments shall not be construed as Government Undertakings, Subsidy, or government contribution. PPP Code, § 3(b).

conditions or PTCs.[47] The approved PTCs shall be the basis for drafting and approval of tender documents and PPP contract and shall include, among others, the project scope, required levels of service and key performance indicators, safeguards that will protect the interests of the government and the public, and contractual penalties to be imposed for failure of any party to deliver obligations under the PPP contract.[48] An executed PPP contract that contains provisions contrary to the approved PTCs and are grossly disadvantageous to the government shall be considered null and void, without prejudice to the determination of liability and imposition of the appropriate penalty under the law.[49]

In the event the Approving Body fails to render a decision on the PPP project within the120-day review period, the PPP project shall be deemed approved.[50] This is without prejudice to the liability that may be incurred by the negligent officials or employees, whether under the Code or other applicable laws. The Approving Body's decision to approve a project for development and implementation is final and executory, unless the Implementing Agency is able to submit a justifiable reason to convert the PPP project to another project under a different procurement modality.[51]

The Code promotes transparency and accountability in the entire PPP project cycle, from project preparation, tender and selection to contract implementation. As early as project identification by the Implementing Agency, the Code states that the development of a PPP project shall only be undertaken after the conduct of stakeholder consultation.[52] This is expected to ensure the responsiveness of PPP projects to the needs of the country and the relevant stakeholders. The PPP Code's

[47] The use of PTCs was formally introduced as part of the required submission for project approval in the October 2022 Implementing Rules and Regulations of the BOT Law.

[48] PPP Code, § 14.

[49] PPP Code, § 8.

[50] PPP Code, § 7 (d).

[51] PPP Code, § 7 (g).

[52] PPP Code, § 6.

implementing rules and regulations should provide guidance on the conduct of stakeholder consultation to ensure fairness and transparency is consistently observed by the various Implementing Agencies. In addition, the implementing rules and regulations should clarify the consequences of a failure to conduct the required stakeholder consultation.

The Head of the Implementing Agency ("HIA") shall be accountable for PPP Projects undertaken under the Code. The Private Partner shall likewise be held accountable for the works it has delivered and services it has rendered for a PPP Project. The failure of the HIA to comply with the obligations imposed under the PPP contract shall allow the Private Partner to avail itself of the appropriate remedy, without prejudice to the application of penalties under the Code.[53]

As a matter of policy, the PPP Code states that the State shall affirm open, fair, transparent, and competitive selection as the central tenet for securing private investment in PPP Projects. Further, the State shall implement a policy of full disclosure of all its transactions involving public interest,[54] including project proposals, contracts, and financial reports. The Code requires copies of all tender documents and PPP contracts to be considered as public documents and to be appropriately stored and preserved as such. The Implementing Agency and the PPPC shall publish, through their respective websites, copies of all tender documents and PPP contracts. In case of PPP contracts with proprietary material, or which may pose threats to national security or public safety, the procedures for the disclosure and publication of such contracts shall be consistent with existing and applicable laws, rules and regulations.[55] As a further measure to enhance transparency and accountability, PPP Projects awarded under the Code are expressly made subject to the Government Auditing Code of the Philippines and the 2009 Revised Rules of Procedures of the Commission on Audit ("COA").

[53] PPP Code, § 31.
[54] PPP Code, § 2.
[55] PPP Code, § 29.

II. Paving the Road to Progress: Tackling Legal Challenges Associated with PPPs

Recognizing the invaluable experience garnered through thirty years under the BOT Law and its role in shaping the country's PPP landscape, the principal author of Senate Bill No. 2233 aimed to refine and revitalize the program through the crafting of the comprehensive PPP Code. The PPP Code seeks not only to incorporate best practices but also to address persistent challenges that have hampered PPP implementation at both national and sub-national levels. By acknowledging the past, learning from successes and shortcomings, and actively shaping a more robust future, the PPP Code strives to usher in a new era of efficient and impactful infrastructure development for the nation.[56] With this solid foundation, the new law aims to accelerate infrastructure development and guarantee the PPP program's long-term viability and resilience for the future. Part II delves deeper into these persistent issues, seeking solutions to pave the way for a more efficient and effective PPP landscape.

A. Eligible Infrastructure Projects

A significant shift away from the BOT Law's approach is evident in the PPP Code's treatment of eligible projects. While RA No. 7718, the curative amendment to the BOT Law, meticulously listed infrastructure projects open for PPP development,[57] the PPP Code takes a broader, more flexible stance. Instead of an enumeration, it defines PPP Project as encompassing "any public infrastructure or development project and services" implemented under its provisions.[58] This departure from a rigid list reflects a recognition that the infrastructure landscape evolves, and future-proofing the PPP framework necessitates adaptability. It is still important to bear in mind, however, that the BOT Law's enumeration proved particularly crucial when considering development of soft infrastructure projects, which often fall outside traditional infrastructure categories. The Philippine

[56] *See* S. Journal, 74th Sess., 7-8 (May 24, 2023).
[57] Rep. Act No. 7718, amending Rep. Act No. 6957, § 2(a).
[58] PPP Code, § 3(cc).

government was able to successfully pursue infrastructure development in education without much question because educational and health facilities are expressly included in the enumeration of private sector infrastructure or development projects under the BOT Law[59] and its IRR. It is expected that the PPP Code's open-ended definition complemented by the non-exhaustive list of eligible types of projects in Section 15 of the PPP Code IRR, will permit greater flexibility in embracing such projects and adapting to future infrastructure needs, potentially unlocking new avenues for development.

B. Risk allocation and Managing Contingent Liability

It is well understood that public-private partnership arrangements are designed to offer an efficient way by which to allocate risks between the government and the private sector.[60] Under the BOT Law and its October 2022 Implementing Rules and Regulations, this was sought to be achieved by requiring the submission of PTCs. A PTC form dedicated to the declaration of proposed risk allocation and contingent liabilities of the government was specifically developed for this purpose.[61] It is now a statutory requirement that all PPP contracts to be entered into by the Implementing Agency shall, to the extent possible, adhere to the principles stipulated under the Generic Preferred Risk Allocation Matrix ("GPRAM"),[62] or the document issued by the NEDA Board-ICC to guide government entities and the private sector in the optimal allocation of risks in structuring PPP projects.[63]

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[59] Rep. Act No. 7718, amending Rep. Act No. 6957, § 2(a).

[60] UNCITRAL, LEGISLATIVE GUIDE ON PUBLIC-PRIVATE PARTNERSHIPS [HEREINAFTER "UNCITRAL LEGISLATIVE GUIDE"] 54, ¶ 23-24 (2020); CPBRD, POLICY BRIEF NO. 2021-02: STRENGTHENING THE POLICY FRAMEWORK FOR PUBLIC PRIVATE PARTNERSHIP (PPP) IN INFRASTRUCTURE DEVELOPMENT 2 (2021), which states "a key feature of a PPP arrangement is the division of responsibilities that allows both parties to a project to take on the risks they are best suited to manage. Typically, it is assumed that the government is in a better position to mitigate political and regulatory risks."

[61] *See PTC Form 4: Proposed Risk Allocation and Contingent Liabilities of the Government*, PPP CENTER (2022). *at* https://ppp.gov.ph/wp-content/uploads/2022/12/NEDA_15-PTC-Form-4.pdf .

[62] PPP Code, § 3(h).

[63] PPP Code, § 7(2)(b).

Adequate guidance and clarity should be provided to Implementing Agencies in the preparation of the GPRAM. According to the PPP Center, "since commitments under PPP arrangements are written in the contract, one way to limit government liability is to identify, assess, and control risk events." The PPP Center, in a limited study, found that contractual provisions on risk events varied across 48 PPP contracts:

> a. In one of the contracts, failure to disclose any third-party agreement that would affect the project was absorbed as a risk event on the part of the Implementing Agency. The other contracts examined did not contemplate this risk event.
> b. Conditions precedent for construction or operations and maintenance to start varied across the 48 PPP contracts.
> c. Some contracts impose liquidated damages for failure to achieve a condition precedent, while others do not.
> d. The private sector's obligation to deliver and maintain performance security also varied across the 48 PPP contracts.
> e. The 48 PPP contracts varied on what events are considered Material Adverse Government Action ("MAGA") or considered force majeure. Materiality thresholds, caps for contingent liability, and mitigation strategies are also varied across the contracts.
> f. Not all contracts provide liability on the part of the private sector for failure to hand back the assets under required conditions.
> g. Computation of termination payments varied across the 48 PPP contracts in terms of ground for termination, timing of termination, expenses of the project proponent to be covered by the termination payment, and kinds of lender's debts that would be paid.[64]

In terms of the project risks, the Code encourages the appropriate allocation and sharing of risks between the

[64] DBCC, 2023 FISCAL RISKS STATEMENT 50-51, ¶ 118 (2023).

government and its private sector partners, leading to more efficient and sustainable projects. The Code allows for use of a wider range of PPP models and contract modalities, including unsolicited proposals and innovative financing structures, to cater to diverse project needs. The Code also establishes mechanisms for effective monitoring and evaluation of PPP projects under implementation, to ensure their completion and effectiveness.

Despite efforts to efficiently allocate risk, managing contingent liabilities in PPPs remains a complex and ongoing challenge. A limited review of three local PPP projects undertaken by the PPP Center, disclosed limited safeguards to manage contingent liabilities.[65] The Development Budget Coordinating Committee identified the liabilities that may arise under a PPP contract as follows:

SUMMARY OF LIABILITIES UNDER A PPP CONTRACT[66]

Liabilities of Implementing Agencies	Equity Contributions of IAs	Liabilities of Project Proponents
Firm liabilities: ▪ owed to project proponents ▪ owed to third-parties		Firm liabilities: ▪ fixed concession fee ▪ variable concession fee ▪ lease payment ▪ fees collected from users and then remitted to the IA
Contingent liabilities: ▪ failure to fulfill obligations		Contingent liabilities: ▪ obligations covered by a performance security

[65] *Id.* at ¶119.
[66] DBCC, 2022 FISCAL RISKS STATEMENT 57.

Liabilities of Implementing Agencies	Equity Contributions of IAs	Liabilities of Project Proponents
▪ material adverse government actions or MAGA ▪ act of a third party ▪ event of default ▪ force majeure		▪ obligations covered by liquidated damages ▪ charge for failure to achieve a targeted Key Performance Indicator or KPI ▪ revenue share that is contingent on the project reaching a project internal rate of return target
Liabilities for contract variation		
Other liabilities of IAs claimed by the project proponent		
Contingent liabilities of guarantor-agencies		
Liabilities to the PDMF		

The Development Budget Coordinating Committee did not indicate that equity contributions were required or to be provided by an Implementing Agency in the relevant projects above.[67]

The experience of the 1997 Asian financial crisis highlights the acute vulnerability that contingent liabilities pose to government finances, as exemplified by their swift transformation into concrete obligations during the crisis.[68]

> Recently, the Development Budget Coordinating Committee, in its Financial Risks Statement for 2021, estimated that the country's contingent liabilities could

[67] "None of the 18 contracts required an equity contribution from an IA." *Id.* at 57-58.

[68] CPBRD, POLICY BRIEF NO. 2021-02 8 (2021).

> swell to P311.8 billion under a "worst-case scenario" when the 24 new PPPs could fail—i.e. wherein projects do not generate sufficient revenues to pay off debt or when regulatory authorities fail to approve tariff adjustments, triggering termination payments from the government. The DBCC particularly has identified the construction of big-ticket projects such as the Cavite-Laguna Expressway, MRT 7, Metro Manila Skyway (Stage 3), and Clark International Airport Expansion Project, as sources of significant contingent liabilities in its estimation of the country's future stock of contingent liabilities arising from possible unsuccessful PPPs (Laforga, 2021). The BOT Law's implementing rules and regulations (IRR) provide that in the event of contract termination or cancellation, the government, in accordance with the contract through no fault of the project proponent, shall compensate the private investor for its actual expenses incurred in the project plus a reasonable rate of return not exceeding that stated in the contract.[69]

To ensure that the government will be able to settle contingent liabilities as they arise, a number of solutions have been offered since the launch of the PPP program in 2011, including the Public-Private Partnership Support Fund ("PPPSF") and the Risk Management Program, which has been in place since 2014.[70] A policy advisory prepared by the Congressional Planning and Budget Department of the House of Representatives indicates that as of 2006, about P569.93 billion in contingent liabilities have been registered in the books of the government. The rise in the amount of contingent liabilities has been attributed in part to infrastructure projects including those pursued under the BOT Law. The policy advisory states that "[t]he determined effort by the government to bring in the private sector through solicited and

[69] *Id.* at 10.

[70] DBCC, 2018 FISCAL RISKS STATEMENT, ¶ 95 (2018). 2017 Fiscal Risks Statement, ¶ 93 states that the Risk Management Program was first incorporated into the budget under the Unprogrammed Fund with an amount of PHP20 billion. In 2015 and 2016, the amount of PHP 30 billion was provisioned for each year, followed by PHP30 billion in 2017.

unsolicited projects, joint venture and concession agreements, has given rise to contingent liabilities."[71] PPP arrangements –

> [e]xpose the country to a diverse, complex and often large array of fiscal risks. Performance undertakings or acknowledgments of Government obligations are issued for projects undertaken by line agencies through PPPs. Fiscal risks stemming from these projects include risks related to right-of-way, political/regulatory risk, change in law, currency convertibility, events of termination, events of force majeure, and take- or-pay arrangements, among others. Some of these eventualities translate to actual liabilities and should be included in the government's budget when they do. The contingent obligations associated with the performance undertakings arise in case of delay or default on the part of Government in executing its deliverables and have varying probabilities of becoming real and having an impact on the budget.[72]

The DBM previously recommended "provisioning for such contingencies needs to be reflected in the annual budget and clear mechanisms to cover them in case such guarantees are called need to be established (e.g., the government could explore reserve-type, insurance-type, and other mechanisms)." The National Economic and Development Authority Investment Coordinating Committee proposed that the national government should integrate contingent liabilities accounting into its budgeting and financial programming framework and process. To accomplish this, the government should first develop a database of national government exposure to contingent liabilities, which can be based on a review of all contractual provisions that have contingent liability implications.

Proactive regulatory strategies are essential to address the persistent challenges of managing contingent liabilities within PPP arrangements. Contingent liabilities expose the government to the possibility of unexpected and substantial obligations over a short period of time and could lead to a severe strain on its fiscal

[71] CPBRD, POLICY ADVISORY NO. 2008-4 (2008).
[72] DBCC, 2012 FISCAL RISKS STATEMENT (2012).

resources. Given that the impact of guarantees come due only if triggered by a particular event or economic shock, any constraint on the ability of fiscal authorities to respond could worsen fiscal and macroeconomic vulnerabilities. Provisioning for such contingencies needs to be reflected in the annual budget, and clear mechanisms to cover them in case such guarantees are called need to be established.[73]

These concerns are now partly addressed in the PPP Code. To ensure fiscal sustainability and better financing terms of PPP projects, the PPP Code establishes the Risk Management Fund, which shall be funded by: (a) general appropriations, (b) income from existing PPP projects, (c) other sources to be determined by the Development Budget Coordination Committee or the DBCC. The PPP Center will manage the PPP Risk Management Fund.[74]

Adherence to the risk allocation for a particular project requires consistency in terms of the corresponding contractual commitments, such as the following:

1. Commit only to obligations and due dates that are within the Implementing Agency's capability to fulfill.
2. Consider allocating the risk of brownfield assets requiring restoration to the project proponent.
3. Plan and monitor obligations and due dates to avoid penalties.
4. Seek remedies other than payment of penalty for failure to fulfill obligations. Alternative modes of compensation should not be at the sole discretion of the private party.
5. Put a cap payment on penalty payments.[75]

Adequate investment in creating PPP units and capacitating human resources will be necessary to ensure the approved allocation of risks is reflected in the resulting PPP contract.

[73] Fiscal Risks Statement of the Department of Budget and Management (2012).

[74] PPP Code, Sec. 27.

[75] 2022 Fiscal Risks Statement, p.58, par. 133 (b).

In addition to the challenges of efficiently allocating risks, the potential liability that may arise from the occurrence of Material Adverse Government Action or MAGA has been controversial across PPP projects in the country, resulting in shifting definition of MAGA under the different implementing rules and regulations of the BOT Law from 2012 to 2022.

2012 - 2016	**2016 - 2022**	**2022 BOT Law IRR**
Material Adverse Government Action (MAGA) means: (a) any act or omission of a national government agency, (b) Lapse in Relevant Consent (National), or (c) a Change in Law; which in each case has a material adverse effect on: (i) any of the rights and privileges of the Concessionaire under this Concession Agreement, or (ii) a Project Milestone or the Concessionaire's ability to comply with its financial and/or other contractual obligations.	Material Adverse Government Action means: (a) any act or omission of the executive branch of the Government, (b) any action by [the Implementing Agency] or the executive branch of the Government to disallow the Concessionaire to collect any approved fees, (c) a Lapse in Relevant Consent (National), (d) a Lapse in Relevant Consent (Local), or (e) a Change in Law, which in each case has a material adverse effect on:	*OCTOBER 2022* *Material Adverse Government Action (MAGA) refers to any act of the government which the Project Proponent had no knowledge of, or could reasonably be expected to have had knowledge of, prior to the effectivity of the contract; and that occurs after the effectivity of the contract, other than an act which is authorized or permitted under the PPP contract, which:* *(a) Specifically discriminates against the sector, industry, or project; and* *(b) Has a material adverse effect on the ability of the Project Proponent*

2012 - 2016	2016 - 2022	2022 BOT Law IRR
	(i) any of the rights and privileges of the Concessionaire under this Concession Agreement, or (ii) the O&M Concessionaire's ability to comply with its obligations under this Concession Agreement.	*to comply with any of its obligations under the approved contract.* *For purposes of the contract, the provisions on MAGA shall also provide for the rules on materiality or amount threshold, nature and manner of recourse, and a cap in case of monetary compensation.* *The previous version which became effective earlier in 2022 and subsequently superseded stated:* *Material Adverse Government Action (MAGA) refers to any act of the executive branch, which the Project Proponent had no knowledge of, or could not reasonably be expected to have had knowledge of, prior to the effectivity of the contract; and that occurs after the effectivity of the contract, that:* *(a) specifically discriminates*

2012 - 2016	2016 - 2022	2022 BOT Law IRR
		against the Project Proponent; and *(b) has a material adverse effect on the ability of the Project Proponent to comply with any of its obligations under the contract.* *This shall not include acts of the Agency/LGU and Approving Body, as well as acts of the executive branch, made in the exercise of regulatory powers; and acts of the legislative and judicial branches of government.* *For purposes of the contract, the provisions on MAGA shall also provide for the rules on materiality or amount threshold, nature and compensation, cap on monetary compensation, conditions for termination and termination payment due to MAGA.*

In July 2020, a MAGA claim arose amounting to P0.185 billion due to a government guideline mandating social distancing during the COVID-19 pandemic.[76] Under the most recent Fiscal Risks Statement, it has been recommended for MAGA events to be narrowly tailored and to exclude acts attributable to local, judicial or legislative agencies, as well as action taken to protect public health and safety.[77] A materiality threshold and cap on payment should be set out in the PPP contract.[78]

C. Contracting Modalities and Contract Clauses

The PPP Code omits the enumeration of a specific contractual modalities. This absence necessitates careful consideration in refining and reinstating a list that will ensure clarity in implementation. The BOT Law and its IRR defined each contractual modality, along with the distinctive elements and corresponding recovery schemes. The previous regulatory regime for PPPs permitted resort to contract structures that were not expressly provided on the condition that the selected modality carried the approval of the President.[79] The approval is considered to have been granted by the President if the latter presided over the NEDA Board meeting at which the project was approved. This regime permitted the adoption of the Rehabilitate-Operate-Expand-Transfer modality for the rehabilitation and optimization of the Ninoy Aquino International Airport ("NAIA") through a PhP170.6 Billion PPP Project.[80]

The PPP Code IRR now provides a non-exhaustive list of PPP contractual arrangements, as follows:

a. JVs as defined in the PPP Code and the IRR,
b. Toll operation agreements or supplemental toll operation agreements, or any contractual arrangements involving the

[76] 2024 Fiscal Risks Statement, p. 51.
[77] DBCC, 2024 FISCAL RISKS STATEMENT 51 (2024).
[78] DBCC, 2022 FISCAL RISKS STATEMENT 58, ¶ 133 (c) (2022).
[79] Rep. Act No. 6957 Rules & Regs [hereinafter "BOT Law IRR"], § 2.13.
[80] *Ninoy Aquino International Airport (NAIA) Public-Private Partnership Project,* PPP CENTER, *at* https://ppp.gov.ph/ppp_projects/naia-ppp/ (last visited July 3, 2024).

Construction, O&M, or a combination or variation thereof, of toll facilities in accordance with Presidential Decree ("PD") No. 1112 (s. 1977), PD No. 1113 (s. 1977), and PD No. 1894 (s. 1983),

c. Lease agreements providing for the rehabilitation, operation, and/or maintenance, including the provision of working capital and/or improvements to, by the Private Partner of an existing land or facility owned by the government for a fixed period of time covering more than (1) year,
d. Lease agreements, when such lease is a component of a PPP Project, as defined in the PPP Code and the IRR,
e. Build-Operate-Transfer ("BOT") and its variants such as, but not limited to, Build-and-Transfer ("BT"), Build-Lease-Transfer ("BLT"), Build-Own-Operate ("BOO"), Build-Transfer-and-Operate ("BTO"), Contract-Add-and-Operate ("CAO"), Add-Operate-and-Transfer ("AOT"), Develop-Operate-and-Transfer ("DOT"), Rehabilitate-Operate-and-Transfer ("ROT"), and Rehabilitate-Own-Operate ("ROO"), and
f. O&M.

For further clarity, the PPP Code IRR provides that the following procurement methods and contract structures are outside the scope of the PPP Code:

a. Procurement under RA No. 9184, or the Government Procurement Reform Act;
b. Projects procured or exclusively funded through foreign loans and grants under RA No. 8182, as amended, or the Official Development Assistance law, unless agreed otherwise between the Philippines and the foreign grantor or international financing institution;
c. Management contracts that do not possess elements of a PPP;
d. Service contracts;
e. Divestments or dispositions of government assets;
f. Corporatization or transfer of any government assets and liabilities, staff, and the ongoing business of a utility into a public corporation;
g. Incorporation of subsidiaries with private sector equity;
h. Onerous and gratuitous donations; and
i. Joint venture and lease agreements involving purely commercial arrangements that neither provide nor include

public infrastructure or development services and do not satisfy the elements of a PPP.

These details, now supplied by the PPP Code IRR, should serve to eliminate doubt on what are legally acceptable PPP contractual approaches; projects may be unduly exposed to challenge in view of the adoption of a contract structure not specifically recognized under the law or implementing rules and regulations.[81] In addition, clarity on permissible contracting approaches is expected to streamline project preparation and approval, as Implementing Agencies develop their respective projects and assume the role of approving authority. This approach should contribute to enhanced transparency and further enable agile responses to evolving project requirements.

Explicitly reinstating the list of permissible contractual modalities will also allow Implementing Agencies to draw from Supreme Court decisions, various legal opinions issued by the Department of Justice and other government agencies, as well as the experience on PPPs under the BOT Law, to inform project structuring and contracting approaches. For example, in the Development Budget Coordinating Committee's ("DBCC") 2022 Fiscal Risks Statement, the Build-Transfer-and-Operate, Build-Transfer, and Build-Lease-Transfer contractual arrangements were determined as giving rise to high financial exposure on the part of Implementing Agencies. To minimize such level of exposure it was suggested for these contractual arrangements to be subject of competitive bidding.[82]

A number of provisions introduced in the PPP Code are drawn from or based upon antecedents in the various implementing rules and regulations of the BOT Law, NEDA issuances, and PPPGB guidelines. Beginning with the 2012 BOT Law IRR, mandatory PPP contract clauses have been identified, which were most recently refined in the October 2022 BOT Law IRR. Instead of codifying this enumeration, the PPP Code takes an

[81] Tatad v. Garcia, G.R. No. 114222, Apr. 6, 1995.
[82] DBCC, 2022 FISCAL RISKS STATEMENT 58, ¶ 133 (2022).

intermediate approach by identifying specific issues to be addressed in the PPP contract.[83] The PPP Code IRR, in Section 84, now requires specific mandatory provisions in PPP contracts. Certain mandatory contract provisions have been taken from the BOT Law IRR, with notable additions requiring gender, social, disability, and environment safeguards,[84] ownership or retention of patents, technology and consultant reports,[85] and monitoring and evaluation for all safeguard-related mandatory provisions of the PPP contract.[86]

It is worth noting that, at the local government level, the PPP Center initiated a pilot review of three PPP contracts, the results of which indicate the necessity of offering training on contract drafting, negotiation and monitoring. The three contracts indicate:

a. There are no explicit timelines for construction completion across the three LGU contracts.
b. One LGU contract provides for consequences or penalties to be imposed for late delivery of right-of-way or asset, delay in achieving financial close, and failure to achieve financial close.
c. Across the three LGU contracts, there are no clear set of rules in determining fees and charges, key performance indicators, termination and termination payment, asset turnover, among others.
d. Across the three LGU contracts, loan agreements and other finance documents were not required to be disclosed to the public or to the IA.[87]

An area that is often the subject of much discussion in Project preparation and contract drafting is termination of the PPP agreement and the contractual regime for termination payments. The 2023 Fiscal Risks Statement sets out the following

[83] UNCITRAL LEGISLATIVE GUIDE, *supra* note 60, at 135.
[84] PPP Code IRR, § 84(t).
[85] PPP Code IRR, § 84(v).
[86] PPP Code IRR, § 84(w).
[87] DBCC, 2023 FISCAL RISKS STATEMENT 51, ¶ 119 (2023).

recommendations with respect to managing risks of termination payments.

1. Establish a clear policy on termination payment – events of default and the costs that would be reimbursed.
2. The occurrence of a pandemic should be considered as event an event of force majeure in any PPP contract.
3. For termination payment arising from a project proponent's event of default:

    a. Reimbursement of the cost of commercial assets, even if partially, should be excluded. This should be true even for IA's event of default
    b. Payment of future cash flows from commercial activities should be excluded
    c. Any reimbursement for cost of works should be restricted to the leveraged book value of the core assets (excluding commercial assets).[88]

The PPP Code seeks to address contract termination and termination payment issues under specific provision on Contract Termination and defining Termination Payment. All PPP contracts shall define all events that may lead to termination, including but not limited to, events of default, force majeure and other no-fault termination events, and other termination events, as may be agreed upon by the parties to the PPP contract. In addition, the PPP Code provides that for contract termination events, the PPP contract shall provide remedies, curing periods, lender step-in rights, remittance procedures, default interest rates, and written notice requirements agreed upon by both parties.[89] Consequently, contract termination shall take place only upon failure to remedy or cure the default in accordance with the PPP contract. The PPPGB is tasked to issue guidelines on the determination of Termination Payments and related reportorial requirements.[90]

[88] DBCC, 2022 FISCAL RISKS STATEMENT 58, ¶ 133 (d) (2022).
[89] *See* PPP Code IRR, § 84(m).
[90] PPP Code, § 21. Note that the PPPGB, on March 25, 2015, issued guidelines on Termination Payment for Public-Private Partnership (PPP) Projects.

D. Investment Recovery Mechanisms

Recent contractual disagreements involving PPP projects have underscored the challenge of ensuring private partner revenue generation. These disputes center around the private partner's inability to recoup its investment or achieve anticipated revenue, primarily due to discrepancies between the projected tariffs and user fees and the unrealized adjustments. The Fiscal Risks Report for 2015-2016 indicates claims for revenue losses were made in two projects in the water sector,[91] while notices of disputes were made under two toll road projects for non-implementation of toll rate increases.

To recover its investments, the BOT Law allowed several repayment schemes to the private proponent, based on the specific contracting modality undertaken.[92] For projects undertaken through Build-Operate-Transfer contractual modality for example, the project proponent may be repaid by authorizing it to collect reasonable tolls, fees, and charges for a fixed term not to exceed fifty (50) years.

Official reports indicate that Implementing Agencies have been involved in disputes with the private sector arising from the implementation of contractual tariff regulation. These cases were at various stages of litigation and cover a diverse set of claims and possible resolutions. By way of example, the Fiscal Risks Statement from 2015-2016 provides the following information:

a) Philippine International Air Terminals Co. Inc.

   The Supreme Court ordered the government to pay USD510.3 million to PIATCO as just compensation for the expropriation of the International Passenger Terminal 3 of the Ninoy Aquino International Airport (NAIA). The amount is under appeal.

b) Maynilad Water Services, Inc.

[91] DBCC, 2015-2016 FISCAL RISKS STATEMENT, ¶ 103 (2015).
[92] BOT Law, § 6.

> Maynilad Water is seeking P3.44 billion in compensation for revenue losses from the non-implementation of tariff increases for the period January 2013 to February 2015. Additionally, Maynilad is seeking P208 million for every month of delayed implementation.

c) Manila Water Company, Inc.

> Manila Water is seeking compensation for revenue losses stemming from alleged changes in the implementation of the water concession agreement. Manila Water is seeking compensation of P572 million for 2015 and P79 billion for the period 2016 to the end of the concession period.

d) Manila North Tollway Corporation

> Manila North Tollway Corporation sent a Notice of Dispute for non-implementation of the toll rate increases claiming revenue losses of P2.44 billion.

e) Cavitex Infrastructure Corporation

> Cavitex Infrastructure Corporation sent a Notice of Dispute for non-implementation of the toll rate increases claiming revenue losses of P719 million.[93]

There is a new approach in the PPP Code to implement a transparent and predictable tariff regime for PPP projects, thereby safeguarding public interest and ensuring fair pricing for users. The PPP Code provides a framework for setting the initial tariff adjustment for PPP projects, to ensure that the resulting fees are fair to the public, Implementing Agencies and private partner. Among the measures included in the law are mechanisms to ensure affordability and sustainability in tariff adjustments during the implementation of the PPP project. The PPP Code also enhances regulatory scope by emphasizing the independence of sector regulators in overseeing the tariff setting regime and ensuring compliance with the relevant laws and issuances.

[93] DBCC, 2015-2016 FISCAL RISKS STATEMENT, ¶ 103 (2015).

E. Efficient Mechanisms for PPP Contract Dispute Resolution

Disputes may arise at any stage of the PPP project, from bidding to implementation. Disputes between the Implementing Agency and the project proponent are often those specifically covered in PPP contract clauses. For example, it has been reported that four project proponents filed claims for compensation with a cumulative amount of P9.089 billion for failure by the Implementing Agency to fulfill its obligations.[94] There are others that may arise from a PPP project, such as those: (a) between the project proponent and contractors or suppliers, (b) between the project proponent and end users, (c) between the project proponent and other stakeholders in relation to the validity of the tender process, and (d) public interest litigation.

The PPP Code incorporates the provisions of existing laws prohibiting the issuance of injunctive orders as provisional remedies. It further provides that decisions can no longer be the subject of an appeal, establishes a protest mechanism across the stages of procurement process, and adopts the use of alternative disputes resolution mechanism in PPP contracts. In addition, the law places emphasis on efficient risk allocation and management, as well as contract monitoring, as tools for dispute avoidance and mitigation.

Under the PPP Code, the following are not appealable: (a) the decision of the Approving Body to approve and implement the PPP project under any of the contractual arrangements or variations, which shall be final and executory, (b) the decision of the Implementing Agency on Unsolicited Proposal, and (c) the decision to reject an Unsolicited Proposal, following a detailed evaluation. During the procurement process of a PPP project, the mechanism for protest shall be resolved in the most expeditious manner not exceeding forty-five (45) calendar days. In addition, a motion for reconsideration or an appeal from any decision by the bids and awards committee, HIA, or Department Secretary stay or delay the

[94] DBCC, 2023 FISCAL RISKS STATEMENT 58, ¶ 117 (2023).

bidding process. However, an award of a project cannot be made until a decision pending any appeal is rendered.[95]

Under the Code, all PPP contracts shall include provisions on the use of dispute avoidance and ADR mechanisms pursuant to Republic Act No. 9285, otherwise known as the Alternative Dispute Resolution Act of 2004. The contracting parties shall be given complete freedom to choose which ADR mechanisms to be followed, subject to applicable laws, rules, and regulations.[96] It is unclear, however, whether Executive Order No. 78 (s. 2012) and its Implementing Rules and Regulations have effectively been superseded. Executive Order No. 78 mandates the inclusion of provisions on the use of alternative dispute resolution mechanisms in all contracts involving public-private partnership projects, build-operate and transfer projects, joint venture agreements between the government and private entities and those involving local government units. Notably, recourse to international arbitration under the Implementing Rules and Regulations of Executive Order No. 78 is contingent upon the execution of a separate written agreement, despite the potential presence of an arbitration clause within the original PPP contract. This dual-agreement requirement, coupled with a mandatory consultation process involving the Department of Foreign Affairs, has raised concerns about its potential to undermine the enforceability of existing arbitration agreements embedded in PPP contracts.

It is significant that the law incorporates the prohibition on the issuance of temporary restraining orders, preliminary injunctions, preliminary mandatory injunctions and similar prohibitions.[97] Such orders shall not be issued by any court, except

[95] PPP Code, § 12.

[96] PPP Code, § 14; PPP Code IRR, § 84 (u).

[97] This operates as a specific anti-injunction statute that now includes all PPP projects. Previously, Republic Act No. 8975 (or An Act to Ensure the Expeditious Implementation and Completion of Government Infrastructure Projects by Prohibiting Lower Courts from Issuing Temporary Restraining Orders. Preliminary Injunctions or Preliminary Mandatory Injunctions, Providing Penalties for Violations Thereof, and for Other Purposes), prohibited the issuance of injunctive relief against national government infrastructure projects and right-of-way acquisition. In 2013, a regional trial court judge dismissed an injunctive

the Supreme Court, against any Implementing Agency or the PPP Center, its officials or employees, or any person or entity, whether public or private acting under government direction to enjoin the enumerated acts. The prohibition applies in all cases, disputes, or controversies instituted by any person, including cases filed by bidders or those claiming to have rights through such bidders. It shall not apply when the matter is of extreme urgency involving a constitutional issue, such that unless temporary restraining order is issued, grave injustice and irreparable injury will arise. Any order issued in violation of these provisions is void and of no effect.[98]

F. Other Significant and Innovative Features

Among other noteworthy features of the PPP Code are the following.

1. Changes to the conditions for accepting unsolicited proposals and clarification on what constitutes government undertaking

Previously, any infrastructure and development project[99] duly identified by the national government departments and agencies, as well as LGUs, and approved pursuant to the BOT Law may be undertaken through the contractual arrangements provided in the BOT Law. However, priority projects,[100] as identified by the national government departments and agencies and LGUs, were ineligible to undergo the unsolicited BOT process under the BOT Law, except when they involve a new concept or technology.[101] These priority projects include but are not limited to those identified in the Medium-Term Philippine Development Programs ("MTPDP"), Medium-Term Public Investment Programs

petition against the Mactan Cebu International Airport Project citing lack of jurisdiction on the basis of Republic Act No. 8975. *See Court journks case vs Cebu airport project,* RAPPLER, Sept. 20, 2013, *at* https://www.rappler.com/business/39420-rtc-junks-injuction-case-against-dotc-for-the-cebu-airport-project/ (last visited Dec. 18, 2023).

[98] PPP Code, § 23.

[99] BOT Law, as amended, § 2(a).

[100] BOT Law IRR, r. 2, § 2.4.

[101] BOT Law IRR, r. 10, § 10.1-.2.

("MTPIP"), Regional Development Programs ("RDPs"), Regional Development Investment Programs ("RDIPs"), and specific LGU development plans. The PPP Code now permits unsolicited proposals even if included in the list of solicited PPP projects, so long as the private sector reimburses the Implementing Agency for development costs incurred as well as a portion of the Project Cost.

Unlike the regime under the BOT Law which required the Implementing Agency to conduct a completeness view of the unsolicited proposal, this task now belongs to the PPP Center and must be completed within ten (10) calendar days from receipt of the proposal. Should the PPP Center find that the proposal is complete, it will then submit the same to the Implementing Agency for the conduct of a detailed evaluation within a 90-day period. If the Implementing Agency fails to act within the review period, the project is deemed approved. The following government undertakings are not permitted in unsolicited proposals: viability gap funding ("VGP") and other forms of subsidy, payment of right-of-way costs, additional exemptions from any tax other than provided by law, guarantee on demand, guarantee on loan repayment, guarantee on private sector return, government equity (except in the case of JV arrangement), and contribution of assets, properties and rights. Payment of ROW costs and contribution of assets and rights shall not be considered a form of government undertaking if the latter receives compensation that is greater than or equal to the cost of usufruct of the assets, properties and rights.

While the BOT Law included a process whereby a private sector proponent may submit a proposal to an implementing agency without a formal solicitation from the government, otherwise called the unsolicited mode, this approach has come with a number of legal issues. It is worth noting that the unsolicited mode was included only in Republic Act No. 7718, and a few projects that have been approved under this mode proved to be controversial (Ninoy Aquino International Airport International Airport Terminal III Project ("NAIA IPT III")[102] is an example). Arangkada Philippines 2010, published by the Joint Foreign

[102] Agan v. Philippine International Air Terminals Co. Inc. (PIATCO), G.R. No. 155001, May 5, 2003.

Chambers, states that "too many contracts are awarded under the unsolicited mode," and claims that through connivance with implementing agencies, projects are delisted from priority list so as to qualify for the unsolicited process. The challenge is how to bring quality control and transparency in the unsolicited projects so as not to completely exclude proposals from the private sector from the PPP program. After all, "government has no monopoly of foresight and expertise in planning,"[103] and unsolicited proposals provide an opportunity to determine how responsive market is likely to be.

Under the BOT Law, an unsolicited proposal may be accepted for consideration and evaluation by the implementing agency, provided it involved a new concept or technology and/or was not part of the list of the priority projects, and did not include a direct government guarantee, equity or subsidy. This is consistent with the UNCITRAL Legislative Guide, which points to the relevance of allowing the government to tap private sector resources involving the most advanced processes, designs, methodologies or engineering concepts with demonstrated ability to enhance output.[104]

There is justification for retaining the unsolicited mode, subject to protective modifications and clarification of terms direct government guarantee, equity or subsidy. Among these measures are (i) retention of comparative tender with an extended period for the right to match, (ii) requirement that unsolicited proposals be taken from the priority list, (iii) retention of restriction against government guarantee, subsidy and equity[105] (subject to clarification of definitions), (iv) require submission of complete proposal (with sufficient identification of what documents are to form part of the submission)[106] and provision that imposes stringent requirements before projects are de-listed and made eligible for unsolicited process. Best practices also

[103] Felicito C. Payumo, *Public-Private Partnership Pitfalls and Opportunities,* PHIL. DAILY INQUIRER, Mar. 27, 2011.
[104] UNCITRAL LEGISLATIVE GUIDE, *supra* note 60, at 123.
[105] *Id.* at 125.
[106] *Id.*

suggest measures to protect the proponent by (i) providing for confidentiality and (ii) adequate period and parameters on the assessment of the right to match.

The PPP Code helps resolve some of these issues in defining government undertaking whereas previously. Determining whether a direct government guarantee, subsidy or equity has been extended in an unsolicited project can be problematic in the absence of specific and consistent guidance.[107]

There are different views on what constitutes direct government guarantee, subsidy or equity that is prohibited in an unsolicited proposal. The Philippines Supreme Court in *Agan v. PIATCO*,[108] involving the unsolicited build operate and transfer proposal for the development and construction of NAIA IPT III, ruled that the contract stipulation granting the government the right to take-over the project and assume the project's loan obligations in the event of default constituted a prohibited government guarantee. In an opinion issued by the Department of Justice ("DOJ") in 1995, the DOJ took the view that what is prohibited is a direct assumption of responsibility by the government for the payment of debt directly incurred by the project proponent. The question presented to the Justice Department then involved budgetary support required from the government that was meant to extend additional funding to defray project cost. The DOJ viewed the allotment as necessary to enable

[107] Under the BOT Law, a direct government guarantee refers to an agreement whereby the Philippine Government guarantees to assume responsibility for the repayment of debt directly incurred by the Project Proponent in implementing the project in case of a loan default. A direct government subsidy refers to an agreement whereby the government will: (i) defray, pay for or shoulder a portion of the project cost or the expenses and costs in operating or maintaining the project; (ii) condone or postpone any payments due from the Project Proponent; (iii) contribute any property or assets to the project; (iv) in the case of LGUs, waive or grant special rates on real property taxes on the project during the term of the contractual arrangement; and/or (v) waive charges or fees relative to business permits or licenses that are to be obtained for the construction of the project, all without receiving payment or value from the Project Proponent and/or facility operator for such payment, contribution or support. Direct government equity refers to the subscription by the government of shares of stock or other securities convertible to shares of stock of the project company, whether such subscription will be paid by the money or assets.

[108] G.R. No. 155001, Jan. 21, 2004.

the agency involved to comply with its undertakings to pay various fees and charges.[109] In the same year, the DOJ issued an opinion in which it said that a performance undertaking in a build, own and operate project may be extended, as it is an investment incentive allowed under the BOT Law and its IRR.[110] The DOJ issued opinions consistent with this view in 2002 and 2003, amplifying in one 2003 opinion that a performance undertaking may be validly issued, as long as the Government is not required to guarantee the obligations of the project proponent to its lenders, or to assume responsibility for repayment of debt in case of default.[111] In 2010, the DOJ issued an opinion stating that a take-or-pay scheme (similar to an off-take agreement) which requires the government to deposit a certain amount in escrow, in case the minimum guaranteed volume for a project is not achieved for a given year, is tantamount to a direct government guarantee, subsidy, or equity, which is prohibited under the BOT Law. [112]

With the introduction of Government Undertaking, Guarantee on Demand, Guarantee on Loan Repayment, and Guarantee on Private Sector Return, Viability Gap Funding, the PPP Code's implementation is expected to remove the confusion with respect to permissible elements of an unsolicited project Guarantee on Demand refers to an agreement where the Implementing Agency undertakes to assume the market demand risks associated with the PPP Project,[113] while Guarantee on Loan Repayment refers to an agreement where the Implementing Agency guarantees to assume responsibility for the repayment of debt directly incurred by the Private Partner in implementing the PPP Project in case of a loan default.[114] A Guarantee on Private Sector Return refers to an agreement where the Implementing Agency guarantees to provide a predetermined rate of return on the investment of the Private Partner.[115]

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[109] Dep't of Justice (DOJ) Op. No. 062 (June 23, 1995).
[110] DOJ Opinion No. 097 (Oct. 3 1995).
[111] DOJ Opinion No. 072 (Sept. 17 2003).
[112] DOJ Opinion, Unnumbered (June 1, 2010); DOJ Opinion No. 49 (Oct. 20, 2010).
[113] PPP Code, § 3(n).
[114] PPP Code, § 3(o).
[115] PPP Code, § 3(p).

2. Claw-back of returns in excess of the prescribed reasonable rate of return

The DBCC noted that, in one contract, the Implementing Agency's share in the revenues was designed to be contingent on the project achieving 7.03% internal rate of return. The contract also appears to have stipulated that the share in revenues could be reduced if the project internal rate of return falls below target.[116] To address these issues and maximize the public sector's share in the revenue, the DBCC suggested to use revenue share as the bid parameter, while ensuring that the resulting PPP contract structure maintains the affordability of public services. The DBCC also concluded that revenue share agreements in PPPs are typically structured as firm payments and suggested setting revenue share that is contingent on a project achieving a target project internal rate of return.[117] These specific solutions are likely to be reflected in the tender documents and contract structure. The PPP Code introduces a claw-back mechanism as a way for government to receive a share in revenue. Under the new law, Reasonable Rate of Return ("RROR") is defined as the net gain of an investment over a specified time period, expressed as an annualized percentage as prescribed by the Approving Body and reflected in the PPP contract. The Code provides that, in case of a single complying and responsive bid, the Approving Body shall set an RROR, which shall be provided in the PPP contract.[118] Where the realized rate of return exceeds the prescribed reasonable rate of return, the excess shall be remitted to the National Treasury.[119]

3. Expansion of funding sources

While funding for PPP projects is generally recognized as among the contributions of the private sector, the PPP Code permits PPP projects to be financed partly from direct government appropriations and from Official Development Assistance ("ODA")

[116] DBCC, 2022 FISCAL RISKS STATEMENT 58, ¶ 132 (2022).
[117] *Id.* at ¶ 133 (e).
[118] PPP Code IRR, § 90.
[119] PPP Code, § 3 (dd).

of foreign governments or international financial institutions. The new law also recognizes that ODA, when used as a source of financing for PPP projects shall include blended finance where the partner government, bilateral or multilateral agency, or intentional or multilateral lending institution may mobilize financing from private or commercial institutions in funding the loan or loan grant.[120] Other sources of financing include green financing, which refers to investments that create environmental benefits in support of green growth, low-carbon avoidance and sustainable development.

4. Adoption of land value capture strategies

The PPP Code defines Land Value Capture Strategies ("LVCS") as the set of strategies used to recover and re-invest land-based value increases that arise in the catchment area of public infrastructure investments. LVCS may be employed to optimize the financial and economic efficiency of a PPP project. The sponsor of Senate Bill No. 2233 explained as follows.

> [S]enator Ejercito described it [LVCS] as 'a set of mechanisms used to monetize the increase in land values that arise in the catchment area of public infrastructure projects.' He explained that the PPP project design would contemplate adopting Land Value Capture Strategies in order to optimize the project's financial and economic value. In rail PPP projects, for instance, he suggested a model in which the implementing agency or transit operator grants or sells commercial development rights in rail stations or properties along the railway to private developers; then, bringing large number of commuters to a new rail station would create opportunities for retail and commercial development, and that it would be reasonable to consider the value under, over, and surrounding the new asset. By selling rights, profit sharing, creating a joint venture, establishing a PPP contract depending on the government's risk appetite and available funding, he noted that the implementing agency may recoup much of the cost of the new infrastructure. He stated that

[120] PPP Code, § 4.

the MTR, a Hong Kong railway, is also a commercial hub with many shops and commercial spaces available for lease.[121]

5. Imposition of criminal penalties

The PPP Code's introduction of administrative, civil, and criminal penalties marks a significant departure from the BOT Law's absence of penalty provisions. While the absence of similar provisions in the BOT Law did not preclude prosecutions under the Anti-Graft and Corrupt Practices Act, as evidenced by past conviction,[122] the lack of accountability for controversies surrounding nullified or illegal PPP projects continued to draw concerns. Notably, Senate deliberations highlighted the absence of prosecutions against government officials in controversial projects.[123] The inclusion of penal provisions in the PPP Code aims to address this gap and achieve several objectives. Firstly, it seeks to promote diligence and accountability among Implementing Agencies and HIAs by deterring misconduct and ensuring high-quality projects that are responsive to the needs of the Filipino people. Secondly, these provisions complement the Code's deemed approved regime, which is intended to fast-track project approval, by incentivizing expeditious action within established legal and ethical boundaries.

Project Preparation and Submissions	**Anti-Competitive Conduct**
▪ Downgrading the category of Project Cost for purposes of evading the required approvals ▪ Failing to exercise due diligence to ensure compliance with the approved PTCs and the signed PPP contract, by approving, issuing, or	▪ Performing any act which restricts transparency or tend to restrain the natural rivalry of parties or operates to stifle or suppress competition in the PPP process ▪ In case of two or more project proponents agreeing and submitting different

[121] S. Journal, 11th Sess., 22-23 (Aug. 15, 2023).

[122] Alvarez v. People, G.R. No. 192591, June 29, 2011 (dec.), July 30, 2012 (res.).

[123] S. Journal, 11th Sess., 19 (Aug. 15, 2023).

Project Preparation and Submissions	Anti-Competitive Conduct
confirming any certification, required documents, or deliverables of the project proponent which are non-compliant, erroneous, not authentic, or fraudulent ▪ Knowingly or with gross negligence approving any PPP contract that is contrary to law or manifestly and grossly disadvantageous to the government and to the public ▪ Neglecting or refusing to act upon an unsolicited proposal within the prescribed period ▪ Opening any proposal or any sealed bid prior to the appointed time for their public opening ▪ Unduly influencing or exerting undue pressure on any member, officer, or employee of the Approving Body or Implementing Agency to take a particular action with the intent to, or tends to favor a particular project proponent ▪ Submitting false information or falsified documents or concealing information at any stage of the PPP that may affect the eligibility of the project proponent	bids as if bona fide, with the knowledge that such will not be accepted and that the PPP contract will be awarded to the pre-arranged most responsive bid ▪ Maliciously submitting different bids through two or more entities in which a project proponent has interests to create appearance of competition that does not in fact exist ▪ Two or more project proponents entering into an agreement which call upon one of them to refrain from bidding or participating in a PPP project, or which call for withdrawal of bids already submitted, or which are otherwise intended to secure an undue advantage to one of them ▪ Withdrawing a bid, after it shall have been declared the winner, or refusing an award without just cause for the purpose of forcing the Implementing Agency to award the PPP contract to another bidder; this includes the non-submission requirements preparatory to the final award of the contract, such as performance security

No administrative, criminal, or civil proceedings shall lie against any person for having committed any of the foregoing in the regular performance of his duties in good faith.

Criminalization of these acts appear to complement the governance, transparency and accountability provisions of the PPP Code, by deterring the commission of graft and corrupt practices in PPP projects. However, the penalties imposed may instead dissuade Implementing Agencies from pursuing infrastructure development under the PPP Code. This can happen if the implementation of the law is not supported by knowledge sharing and training that will capacitate Implementing Agencies and their PPP Units.

In addition, the imposition of criminal penalties on certain forms of anti-competitive conduct under the PPP Code may have created a jurisdictional question in relation to the investigation and prosecution of these activities.

III. Future-Proofing Partnerships: Adapting the PPP Code to Recurring and Emerging Challenges

A. Effect of Deemed Approved Regime

It has been observed that some BOT projects were of low quality at the entry level, even ahead of preparation stage. The deterioration in quality has been attributed in part to Implementing Agencies in endorsing projects to the NEDA Board-ICC without prior evaluation and full assessment. This resulted in delays in the final approval process. An important measure to ensure successful implementation of PPP projects is to require the conduct of proper preliminary assessment of the project's feasibility, including economic, financial aspects, estimated cost and potential revenue anticipated from the operation of the infrastructure facility and the environmental impact of the project. The assessment should identify the expected output, provide sufficient justification for the investment, propose modality, and

describe the solution to the output requirement.[124] The PPP Code, cognizant of the historical challenges of agency inaction leading to protracted PPP project approval timelines, implements two critical safeguards: (i) a predefined timeframe for project evaluation, and (ii) a deemed-approval regime, as outlined in Section 6 of the PPP Code. This provision stipulates that in the event of an Approving Body's failure to act within the statutory 120-day period, the project shall be considered automatically approved.

The deemed-approval regime presents a complex policy issue with potential benefits and drawbacks. Striking a balance between expediting project delivery and ensuring high-quality projects through rigorous preparation and adherence to established procedures requires careful consideration.[125] The impact of this regime on project outcomes and its potential influence on the importance of due diligence and compliance merit further monitoring and critical analysis.

B. Addressing Appropriation Risks in Availability PPPs

In case of government support funded by direct government appropriations, a Multi-Year Contractual Authority ("MYCA") must be secured from the Department of Budget and Management ("DBM"). The MYCA is required in multi-year projects where the total costs are not provided for in the current budget of the agency. Multi-year projects refer to projects, which take more than one year to complete[126] and which require multi-year appropriations. To secure the MYCA, the Implementing Agency commits to include the annual budgetary requirements of the project in its annual budget proposals to the DBM, which will then be submitted to Congress. An MYCA, however, is not a guarantee that payment will be made upon the realization of the event or contingency. The MYCA merely obligates the implementing agency to include the amount in its budget proposal; it is not a commitment that the

[124] UNCITRAL LEGISLATIVE GUIDE, *supra* note 60, at 59, ¶ 25.
[125] *See* S. Journal, 10th Sess., 9 (Aug. 14, 2023).
[126] Dep't of Budget & Mgmt. (DBM) Circ. Letter No. 2023-7 (May 17, 2023). Prescribed Guidelines on the Issuance of Multi--Year Contractual Authority (MYCA).

amount will be approved and appropriated by Congress. In an interview with the Department of Budget and Management in 2012 regarding use of the Multi-Year Obligational Authority ("MYOA") (the MYCA's antecedent instrument), it was explained that, in the event the proposed budget is not approved by Congress, recourse to use of savings is possible, with the approval of the President.[127]

In relation to government support, "experience showed that the inability of the government to support BOT projects with cost-recovering tariffs creates an incentive for government guarantees."[128] It is worth mentioning here the case of *Francisco v. Toll Regulatory Board*,[129] in which the Supplemental Toll Operation Agreement ("STOA") contained a stipulation allowing the operator to recover in the event the toll fee adjustment under the STOA's adjustment formula was not granted by the Toll Regulatory Board ("TRB"). According to the Supreme Court, the obligation of the TRB may be construed as a grant of a guarantee by the Philippine Government. Apart from the prohibition in the law against the guarantee of a security in the financing of the toll operator, the Supreme Court found that the clause violated the Constitution,

[127] *But consider* a Commission on Audit (COA) Decision where the DILG, Region X, utilized the savings of the AAPBP for the grant of the Monetary Award and Medical Allowance to each of its agency official and employee. Upon post-audit by COA, the payments of the allowances were found to be irregular. The management countered that the use of agency savings was pursuant to DILG Circular No. 2003-5 and the DILG Operations Manual of the Financial Management Services. The Commission on Audit held that if savings are earned by a particular agency, the said agency may not, on its own, disburse the same as it wishes, including for the grant of extra remunerations to its personnel. Section 28 of Chapter 4, Book VI of the 1987 Administrative Code governs the disposition of the unutilized balances of appropriations in the GAA. The savings from the appropriation for a given year, after the completion of the activities for which they were allotted, revert to the unutilized surplus of the General Fund and cannot he available for expenditure except by ensuing authorization from the legislature. The cited DlLG issuances are not the legislative authorization required for the use of the savings for the payment of the subject Monetary Award, Medical Allowance and Rice Allowance. In re: Motion of DILG Regional Director Rene K. Burdeos, COA Dec. No. 2011-111 (COA Dec. 29, 2011).

[128] Gilberto M. Llanto, *Dealing with Contingent Liabilities: The Philippines*, *in* FISCAL POLICY AND MANAGEMENT IN EAST ASIA (Takashi Ito & Andrew K. Rose, eds., 2007). *available at* https://www.nber.org/system/files/chapters/c0894/c0894.pdf (last visited Dec. 18, 2023).

[129] G.R. No. 166910, Oct. 10, 2010.

which provides in Article VI, Section 29 that "no money shall be paid out of the Treasury except in pursuance of an appropriation made by law." Executive Order No. 292 or the 1987 Revised Administrative Code implements the constitutional mandate by expressly prohibiting entering into contracts involving the expenditure of public funds unless two prior requirements are satisfied – an appropriation and a certification by the proper official that funds have been appropriated by law and that such funds are available. Sections 85, 86 and 87 of the Government Auditing Code of the Philippines (Presidential Decree No. 1445), an earlier law, contain the same provisions.

A contractual workaround involves making the obligation of the public sector conditional. For example, the Implementing Agency may undertake to pay the difference between the current tariff and the rate adjustment that was disapproved, subject to prior appropriation by Congress. Recent PPP contracts carry analogous provisions. However, this point is worth clarifying to avoid adverse interpretative decision that can reasonably be anticipated given Justice Antonio Carpio's Dissenting Opinion in the case of *Suplico v. NEDA*,[130] in which he expressed the view that the law prohibits the entering into a contract without the corresponding appropriation from Congress. It does not matter whether the contract is subject to a condition as to its effectivity, such as a subsequent favorable legal opinion by the Department of Justice. He stated that "the Administrative Code of 1987 and the Government Auditing Code expressly mandate that '[n]o contract involving the expenditure of public funds . . . shall be entered into or authorized unless the proper accounting official . . . shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and that the amount necessary to cover the proposed contract for the current fiscal year is available for expenditure.' This means that the certificate of appropriation and fund availability must be issued before the signing of the contract.

[130] G.R. No. 178830, July 14, 2008.

C. Right of Way Acquisition

For national government projects, acquisition of right-of-way, project site or location is governed specifically by Republic Act No. 10752 or the Right-of-Way Act, which repealed Republic Act No. 8974. National government project refers to all national government infrastructure projects and its public service facilities, engineering works and service contracts, including projects undertaken by government-owned and -controlled corporations, all projects covered by the BOT Law, and other related and necessary activities, such as site acquisition, supply and/or installation of equipment and materials, implementation, construction, completion, operation, maintenance, improvement, repair and rehabilitation, regardless of the source of funding. LGUs may also adopt the law's provisions for use in the acquisition of right-of-way for local government infrastructure projects.

It is worth noting that the National Housing Authority, in coordination with the local government units and implementing agencies concerned, shall establish and develop resettlement sites for informal settlers, including the provision of adequate utilities and services, in anticipation of informal settlers that have to be removed from the right-of-way or site of future infrastructure projects. When applicable, the concerned local government units shall provide and administer the relocation sites. In case the expropriated land is occupied by informal settlers, the court shall issue the necessary writ of demolition for the purpose of dismantling any and all structures found within the subject property, upon mandatory compliance with the requisite prior notice upon the affected persons, adequate consultation with the representatives of the affected community, provision of adequate relocation, whether permanent or temporary.

While adequate appropriations for the acquisition of right of way has been a persistent issue in PPPs,[131] the Right-of-Way Act addresses what was a significant hurdle in undertaking subway projects. The law states that when it is necessary to build,

[131] AZIZ HAYDAROV, ASIAN DEVELOPMENT BANK, PHILIPPINES: PRIVATE SECTOR DEVELOPMENT CHALLENGES AND POSSIBLE WAYS TO GO 43 (Aug. 2011).

construct, or install on the subsurface or subterranean portion of private and government lands owned, occupied, or leased by other persons, such infrastructure as subways, tunnels, underpasses, waterways, floodways, or utility facilities as part of the government's infrastructure and development project, the government or any of its authorized representatives shall not be prevented from entry into and use of the subsurface or subterranean portions of such private and government lands by surface owners or occupants, if such entry and use are made more than fifty (50) meters from the surface. categorically states that the government shall provide adequate appropriations that will allow the concerned implementing agencies to acquire the required right-of-way, site or location for any national government infrastructure. Lack of adequate funding for right of way acquisition is only one hurdle. Just before the launch of the PPP Program of the Aquino Administration in November 2010, the failure of the government to deliver right of way in the Tarlac-Pangasinan-La Union Expressway (TPLEX) was cited as the cause of six-month delay. TPLEX is the first project pursued under the BOT Law that was awarded to an all-Filipino consortium and which received local financing, with BDO Capital and Investment Corporation and Development Bank of the Philippines as arrangers. For this project, a contractual workaround was provided to resolve the right of way issue. First, the parties agreed upon an ESA, allowing the contractor to commence work in stages, on strength of authority (less than the land title) such as a writ of possession. Second, the proponent also agreed to advance the right of way costs. But it was reported that farmer-owners claimed to have not been paid the value of their property taken under right of way for the TPLEX project.[132]

CONCLUSION

The PPP Code is expected to attract more private sector investment, improve project quality, and ultimately lead to better

[132] Yolanda Sotelo, *Expressway almost complete, but farmers yet to be paid*, INQUIRER.NET, Jan. 23, 2012, *at* https://newsinfo.inquirer.net/133055/expressway-almost-complete-but-farmers-yet-to-be-paid#ixzz8kgCaQLTP.

infrastructure and services for Filipinos. In this manner, the PPP Code presents both opportunities and risks for the Philippines. While its potential to accelerate infrastructure development and economic growth is significant, it is crucial to remain cognizant of lessons learned from the country's experience in PPPs.

This brief analysis has underscored the multifaceted nature of the recently passed legislation, highlighting both its immediate benefits and inherent challenges. While the new law represents a significant step forward for the Philippines' infrastructure development efforts, several key issues warrant further attention, particularly regarding its impact on PPP stakeholders, and the need for robust oversight mechanisms. It is crucial to monitor the PPP Code's implementation closely, ensuring that its intended goals are met without unintended consequences. Moving forward, policymakers must prioritize the careful crafting and timely release of comprehensive guidelines and relevant implementing instruments. This will be essential to ensure the law's effectiveness, promote equitable outcomes, and ultimately achieve its stated objectives. This ongoing process of refinement and adaptation will be vital to harnessing the full potential of the PPP Code, as the country's primary and comprehensive infrastructure procurement law.

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THE WINNER TAKES IT ALL: DEFINING ANTI-COMPETITIVE PRACTICES IN THE CONTEXT OF DIGITAL ECONOMY*

*Shanica Sen V. Sollegue***

ABSTRACT

The monopolistic attributes exhibited by dominant firms in the digital economy pose a threat to consumer welfare and economic competition, especially in this age of information where technology has become an essential part of our daily lives. With the novel market development outpacing our regulatory framework on competition, this paper thus proposes guiding principles on defining and identifying anti-competitive practices in the digital economy.

I. INTRODUCTION

Competition Law in the Philippines is a relatively new legislation. In essence, Republic Act No. 10667—*Philippine Competition Act* ("PCA") penalizes three acts: (1) anti-competitive agreements,[1] (2) abuse of dominant position,[2] and (3) merger or acquisition agreements that substantially prevent, restrict, or lessen competition in the relevant market.[3]

Along with the novelty of a competition law in the Philippines is the emergence and prevalence of the digital economy. In 2021, the Philippine digital economy's value reached PhP 1.87 trillion, contributing 9.6% to the country's GDP.[4] A 2022

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[1] Rep. Act. No. 10667, §14.

[2] §15.

[3] §20.

[4] Press Release, *Country's Digital Transactions Reached PhP 1.87 Trillion in 2021, with 9.6 Percent Contribution to the Gross Domestic Product*, PHIL. STAT.

e-Conomy South East Asia ("SEA") Report also noted that the Philippines is the SEA country with the fastest growing digital investments sector, with a 63% growth rate from 2021 to 2022.[5] While much of the growth in the digital economy is attributable to the quarantine measures imposed during the COVID-19 pandemic, it is foreseen that continuous innovations in such market would maximize the long-term economic benefits of digitalization at a nationwide level.[6]

Despite the share of the digital economy in the Philippine market, a perusal of the Philippine Competition Commission's ("PCC") published decisions[7] shows that the Commission has yet to directly rule on violations of the PCA by a digital platform, save for two instances.[8] Both cases entailed the application of the PCA's relevant provisions on merger and acquisition agreements only. Guiding principles on other anti-competitive acts identified in the PCA, as applied to digital markets, remain lacking.

In view of the scant application of the PCA on the digital market/digital economy, this paper thus aims to define and identify anti-competitive practices in the Digital Economy on the basis of foreign jurisprudence, with focus on American ("US") and European Union ("EU") legal frameworks under which the PCA is patterned. A review of the bill deliberations prior to the passing of the PCA shows that its provisions on *per se* anti-competitive agreements were lifted from US competition law[9] primarily the

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AUTH., Oct. 28, 2022, *at* https://psa.gov.ph/content/countrys-digital-transactions-reached-php-187-trillion-2021-96-percent-contribution-gross.

[5] Bernie Cahiles-Magkilat, *PH digital economy seen at $35 B in 2025 – report*, MANILA BULL., Nov. 24, 2022.

[6] WORLD BANK, PHILIPPINES ECONOMIC UPDATE (JUNE 2022 EDITION): STRENGTHENING THE DIGITAL ECONOMY TO BOOST DOMESTIC RECOVERY 9, *available at* https://thedocs.worldbank.org/en/doc/d92d769b42180bed2bb65428c683df2f-0070062022/original/World-Bank-Philippines-Economic-Update-June-2022.pdf.

[7] *See* PCC Commission Decisions, PHIL. COMP. COMM'N WEBSITE, *available at* https://www.phcc.gov.ph/category/news-updates/phcc-decisions/.

[8] *See* Acquisition by Grab Holdings, Inc. and MyTaxi.PH Inc., of Assets of Uber B.V and Uber Systems, Inc., PCC Case No. M-2018-001 (PCC Aug. 10, 2018), and Acquisition by Alipay Singapore Holding Pte. Ltd. of shares in Globe Fintech Innovations Inc., PCC Commission Decision No. 21-M-005-2017 (PCC Aug. 23, 2017).

[9] Other U.S. laws which formed as basis of the PCA are as follows: Clayton Act of 1914, the Celler-Kefauver Amendments of 1950 and the Hart-Scott-Rodino

Sherman Anti-Trust Act of 1890,[10] while PCA provisions on anti-competitive agreements other than those *per se* prohibited[11] as well as those on abuse of dominant position[12] were lifted from Articles 101 and 102 of the EU's governing law on competition which is the Treaty on the Functioning of the European Union. PCA provisions on mergers and acquisitions, on the other hand, were a combination of the Association of Southeast Asian Nations ("ASEAN") and EU models.[13] Accordingly and to ensure the proper enforcement and interpretation of the PCA, it is appropriate that the scope of this paper be limited to the examination of US and EU jurisprudence under which competition laws have already been applied specifically to the digital market.

II. THE DIGITAL ECONOMY AND THE NEED FOR REGULATION OF ANTI-COMPETITIVE PRACTICES

A. Innovation, value creation, and *possible* disruption

The European Commission notes that "there is no official definition of the digital economy." Albeit encompassing "businesses that sell goods and services via the internet, and digital platforms that connect spare capacity and demand … no single defining feature of new ways of doing business in the digital space and the different aspects are often combined in a single business."[14] Nonetheless, a review of foreign legal frameworks shows that the Australian Department of Broadband, Communications and the Digital Economy has adopted an official definition, i.e., "the global network of economic and social

Antitrust Improvements Act. *See* Plenary Hearing dated 03 March 2015 on the Consideration of House Bill No. 5286 on Second Hearing, page 73.

[10] Plenary Hearing dated 03 March 2015 on the Consideration of House Bill No. 5286 on Second Hearing, 67 (2015).

[11] Plenary Hearing dated 01 January 2015 on the Consideration of House Bill No. 5286 on Second Hearing, 68 (2015).

[12] Comm. on Econ. Affairs, Bicameral Conference Committee on the Disagreeing Provisions of House Bill No. 5286 and Senate Bill No. 2282 (Fair Competition Act of 2015) 16th Cong. (2015).

[13] Plenary Hearing dated 03 February 2015 on the Consideration of House Bill No. 5286 on Second Hearing, 96 (2015).

[14] European Commission, *Digital economy,* EUROFOUND WEBSITE, Dec. 17, 2018, *at* https://www.eurofound.europa.eu/en/european-industrial-relations-dictionary/digital-economy.

activities that are enabled by information and communications technologies, such as the internet, mobile and sensor networks."[15] The Group of 20 ("G20")[16] Digital Economy Task Force employs a similar definition, *viz:*

> [B]road range of economic activities that include using digitized information and knowledge as the key factor of production, modern information networks as an important activity space, and the effective use of information and communication technology (ICT) as an important driver of productivity growth and economic structural optimization.[17]

In all these definitions, a commonality surfaces: information and communications – which were once dominantly in the form of physical transactions and interactions in brick-and-mortar businesses. Two scenarios likely result therefrom – either the competition between physical stores and digital markets or the integration of digital innovations by companies into their operations while still retaining their brick-and-mortar stores.

In the first scenario, the digital market may partake the nature of what academic Clayton M. Christiansen coined as *disruptive innovation*, which is "the process in which a smaller company ("entrant"), usually with fewer resources, is able to challenge an established business (often called an "incumbent") by entering at the bottom of the market and continuing to move up-market."[18] Disruption successfully occurs once mainstream consumers start patronizing the entrants' offerings in volume.[19]

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[15] AUSTRALIAN GOVERNMENT–DEPARTMENT OF BROADBAND, COMMUNICATIONS, AND THE DIGITAL ECONOMY, AUSTRALIA'S DIGITAL ECONOMY: FUTURE DIRECTIONS iv (2009).

[16] The G20 comprises 19 countries (Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Türkiye, United Kingdom and United States) and the European Union).

[17] Ke Rong, *Research agenda for the digital economy,* 1 J. DIG. ECON. 20 (2022), *citing* G20 Digital Economy Task Force, *G20 Digital Economy Development and Cooperation Initiative* (2016).

[18] Chris Larson, *Disruptive Innovation Theory: What It Is & 4 Key Concepts,* HARV. BUS. SCH. ONLINE, Nov. 15, 2016, *at* https://online.hbs.edu/blog/post/4-keys-to-understanding-clayton-christensens-theory-of-disruptive-innovation.

[19] Clayton M. Christensen, Michael E. Raynor, & Rory McDonald, *What Is Disruptive Innovation?,* HARV. BUS. REV., Dec. 2015, *available at* https://hbr.org/2015/12/what-is-disruptive-innovation.

The novel means by which digital markets create value are indeed disruptive to existing markets: for Netflix, it is the servicing of a broader market for online video streaming by "offering a wider selection of content with an all-you-can-watch, on-demand, low-price, high-quality, highly convenient approach;"[20] for Airbnb,[21] it is the provision of "large-scale rental of spaces from one ordinary person to another," vastly contributing to the rise of another novel market development known as the sharing economy;[22] and for Amazon, its systemic process of innovation through idea generation, incubation, and scaling enabled it "to move into new businesses in cloud services, third-party fulfillment, logistics, retail sales, and consumer technology."[23] Nonetheless, Christiansen cautions against the misapplication of the disruption theory on digital markets. He takes Uber – a ride-hailing platform – as an instance, which, rather than being a disruptive technology as what various academic literature have posited, is more aptly classified as a sustaining innovation.[24]

The concept of sustaining innovation finds relevance in the second scenario mentioned above in which digitalization is adopted by existing brick-and-mortar businesses into their processes and operations. Defined as those that "improve the performance of established products along the dimensions of performance that mainstream customers in major markets have historically valued," Christiansen posits that "most technological advances in a given industry are sustaining in character."[25] Such performance improvements of "offline" markets are amplified in the digital space where platforms create value in many ways.[26]

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[20] *Id.*

[21] Airbnb is an online platform that allows property owners to rent out their properties to guests for a limited period of time.

[22] Daniel Guttentag, *Airbnb: disruptive innovation and the rise of an informal tourism accommodation sector,* 18 CURRENT ISSUES IN TOURISM 1194, 1195 (2015).

[23] Charles O'Reilly & Andrew J. M. Binns, *The Three Stages of Disruptive Innovation: Idea Generation, Incubation, and Scaling,* 61 CAL. MGM'T REV. 49, 66 (2019).

[24] Christensen, Raynor, & McDonald, *supra* note 19.

[25] CLAYTON M. CHRISTIANSEN, THE INNOVATOR'S DILEMMA 43 (1997).

[26] *How platforms create value for their users: implications for the Digital Markets Act,* Oxera 14 (2021).

Value creation enabled by digital technologies shapes competition for the primary customer interface.[27] Reinartz et al. (2019) summarizes the five sources of value creation that the digital market offers:

(1) *Automation*, which as a selling point of digital markets centers its significance on convenience insofar as it eliminates routinary processes for consumers.[28] On the supply side, the same is posited in that it improves logistical and productive efficiency;[29]

(2) *Individualization*, specifically through personalization algorithms that utilize consumers' online data result to data "much more granular than knowledge produced by traditional market research," ultimately improving product and/or service matching for customers and maximizing profit for businesses;[30]

(3) *Ambient embeddedness of digital markets* or the "integration of processes, products, and communications into customers' routines," which have been propelled by the proliferation of smartphones that transformed face-to-face transactions into a few clicks on a pocket-sized gadget;

(4) *Interaction*, the processes of which has evolved most especially during the COVID-19 pandemic, either by "enrich[ing] traditional interactions or [enabling] new ones along the entire consumer decision and use process;"[31] and

[27] Werner Reinartz, Nico Wiegand, & Monika Imschloss, *The impact of digital transformation on the retailing value chain,* 36 INT'L J. RES. IN MKT'G 350, 351 (2019).

[28] *Id.* at 355.

[29] E. R. Guzueva, T. G. Vezirov, D. K. Beybalaeva, A. A. Batukaev, & Kh. G. Chaplaev, *The impact of automation of agriculture on the digital economy,* 421 IOP CONFERENCE SERIES: EARTH AND ENVIRONMENTAL SCIENCE 4 (2020).

[30] Baptiste Kotras, *Mass personalization: Predictive marketing algorithms and the reshaping of consumer knowledge*, BIG DATA & SOCIETY 2 (2020).

[31] Reinartz et al., *supra* note 27, at 356.

(5) *Transparency and control*, which is perhaps the most contentious as will be further discussed in this paper, insofar as digital markets have allegedly promoted consumer empowerment[32] through information-based decision-making.

B. Monopolistic tendencies

Theoretically, the addition of entrants in a market, along with the advantages resulting from the innovative means that digitalization introduces, results to the furtherance and promotion of economic competition. However, empirical studies on the market behavior of firms in the digital economy show that this does not necessarily hold true.

The innovations introduced by digital markets allow firms to develop competitive advantage over their competitors. When left unchecked, these competitive advantages permit them to establish dominance in the market, more so as digital platforms tend to exhibit monopolistic attributes by virtue of high barriers to entry through exploitation of economies of scale and scope. Such qualities, together with winner-takes-all and network effects, result to a blurred distinction between legitimate conduct and anticompetitive behavior of platforms.[33]

i. Economies of scale and scope

As in any market, total cost incurred by firms consists of fixed cost and variable cost. Fixed costs refer to "expenses that must be paid even if the firm produces zero output" while variable costs are those that "vary as output changes."[34] Economies of scale result when the total cost per unit of producing an output declines as output increases.

[32] *Id.*

[33] OLGA BATURA ET AL., E-CONOMICS, ONLINE PLATFORMS AND THE EU DIGITAL SINGLE MARKET: A RESPONSE TO THE CALL FOR EVIDENCE BY THE HOUSE OF LORD'S INTERNAL MARKET SUB-COMMITTEE (2015).

[34] PAUL SAMUELSON & WILLIAM NORDHAUS, ECONOMICS 127 (2010).

In the digital economy, the decline in total cost per unit is caused by low to negligible variable costs albeit entailing very high fixed cost, thus allowing firms in the digital economy to take advantage of economies of scale.[35] Similar with other markets, fixed costs incurred by digital markets include high investments on research and development ("R&D") on technological innovations.[36] However, a distinct quality of scale economies in the digital market is its ability to *scale without mass*, i.e., firms can grow in trans-continental scale without an increase in the firms' physical presence in the location of the user or the customer's market.[37] Goods and services offered by firms in the digital economy can reach clients from across the world by providing the same digitally and online. It is this capability to scale without mass that reduces the variable costs of digital markets to a negligible amount. The evident advantages therefrom and the contribution of internal learning processes to scale economies in the digital economy have in fact been recognized under the laws of Germany's *Bundeskartellamt* ("Federal Cartel Office") as of particular importance, "which now explicitly mention[s] economies of scale as a contributor to market power."[38]

Utilization of data acquired through digital platforms also allows firms to operate on a massive scale and at a much broader front.[39] The same data that may be a critical input for different products and services further permit digital platforms to enjoy strong economies of scope – or the ability to produce a number of different products more efficiently together than apart[40] – in which they enter vertical or adjacent markets and develop new products

[35] Michael Spence, *Government and economics in the digital economy*, 3 J.L GOV'T & ECON. (2021).

[36] Filippo Bertani, Linda Ponta, Marco Raberto. Andrea Teglio, & Cincotti, Silvano, *The complexity of the intangible digital economy: an agent-based model*, 129(C) J. BUS. RES. 527 (2019).

[37] Andrés Felipe Ramírez Ocampo, *Scale Without Mass: Permanent Establishments in the Digital Economy,* 13 Revista Direito Tributário Internacional Atual 14 (2019).

[38] OECD, THE EVOLVING CONCEPT OF MARKET POWER IN THE DIGITAL ECONOMY: COMPETITION POLICY ROUNDTABLE BACKGROUND NOTE (2022).

[39] Spence, *supra* note 35.

[40] SAMUELSON & NORDHAUS, *supra* note 34, at 116.

at lower costs than other entrants or even incumbents.[41] As an example, SEA company Grab has exemplified such feature when, from beginning as a Transportation Network Vehicle ("TNV") service provider, it later on branched onto other economic activities such as food delivery, grocery shopping, and courier services.

ii. Information asymmetry and the Big Data

While information asymmetry[42] is expected to be reduced in view of the accessibility of information in the digital space, it is not always the case for the digital economy. Kajtzasi concludes that "the digital economy represented by digital information has not changed information exchange itself, only its environment," adding that in the digital market, "digital information has become convenient but not necessarily accurate."[43]

The information asymmetry that besets the digital economy tilts in favor of firms that are capacitated to collect, process, and analyze data at a massive scale. The information control and negotiation process – i.e., how the application platform acts as "mediator" between firms in the digital market and supplier of goods or between consumers and such suppliers – in the sharing economy application are dominated by application providers,[44] allowing them to "preempt rivals on critical resources and secure competitive advantage."[45] Although more apparent in the sharing economy, this position may be extended to the digital market as a whole with the advent of Big Data, which is equally responsible

[41] Filippo Lancieri & Patricia Morita Sakowski, *Competition in Digital Markets: A Review of Expert Reports*, 26 STAN. J.L. BUS. & FIN. 83 (2021).

[42] Samuelson and Nordhaus (2010) define asymmetric information as "a situation where one party to a transaction has better information than the other party. This often leads to a market failure or even to no market at all." *See* SAMUELSON & NORDHAUS, *supra* note 34, at 364.

[43] Miranda Kajtazi, *Information Asymmetry in the Digital Economy, in* i-SOCIETY, PROCEEDINGS OF THE IEEE INTERNATIONAL CONFERENCE ON INFORMATION SOCIETY 148-55(Charles A. Shoniregun ed., 2010).

[44] Dodi Dermawan et al., *Asymmetric Information of Sharing Economy*, 144 ADVANCES IN ECON., BUS. & MGM'T RES. 29, 30 (2019).

[45] Carmelo Cennamo, *Competing in Digital Markets: A Platform-Based Perspective*, *in* ACADEMY OF MANAGEMENT PERSPECTIVES 37 (2019), a*vailable at* https://ssrn.com/abstract=3410982.

with technological innovations, if not the most, for the rise of the digital economy.

Defined by De Mauro et al. as "[i]nformation assets characterized by such a High Volume, Velocity and Variety to require specific Technology and Analytical Methods for its transformation into Value,"[46] Big Data has enabled the utilization of large quantities of data for behavior or trend analysis, as well as tailor-fitting of products and services to consumer needs and preferences, among others. Fast et al. mention that the service quality improvements and personalization made possible through Big Data have been found to improve consumer satisfaction, retention, cross-selling opportunities, and customer loyalty brought about by low search and transaction costs arising from such quality upgrades: through the analysis of individual clickstream data, online searches, and response to incremental updates and offerings, firms can determine consumer behavior and consequently use the same findings in adopting quality improvement mechanisms, while aggregation of data lets firms to devise individual user profiles that approximate users' interests and preferences which is the core of personalization algorithms.[47] Spence argues otherwise in suggesting that consumers – more so those who are uneducated, poor, or technologically-challenged – generally lack awareness of the digital firms' offerings and that the benefits of data accrue more to such firms insofar as it provides them critical information about consumer tastes, price sensitivities, and population distribution.[48] This argument is likewise affirmed by Lancieri et al. in stating that "new digital markets are unique in their scale, their capacity to collect and process information, and their pronounced information asymmetries that, in many cases, prevent consumers from properly comprehending the extent of data collection and how these data can be used to personalize goods and services."[49]

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46 Andrea De Mauro, Marco Greco, & Michele Grimaldi, *What is Big Data? A Consensual Definition and a Review of Key Research Topics*, INT'L CONF. ON INTEG. INFO. (2015).

47 Victoria Fast, Daniel Schnurr, & Michael Wohlfarth, *Regulation of data-driven market power in the digital economy: Business value creation and competitive advantages from big data,* J. INFO. TECH. (2023).

48 Spence, *supra* note 35.

49 Lancieri & Sakokswki, *supra* note 41, at 82.

The ability to utilize Big Data – while not in and of itself resulting to competitive harm – arguably constitutes as barrier to entry in the same way that R&D and other innovations do, and thus may be a potential consideration for the extent of antitrust market power that firms in the digital economy may exercise.[50] Difficulties arising from obtaining the type of data material to competition are present due to issues on data generation, access, or substitutability with other forms of data. Such issues contribute to a competitive advantage that poses a challenge for other firms to replicate.[51] Notwithstanding, Fast et al. argue that competitive advantage may be upheld "even if competitors can replicate a firm's access to data or find alternative input data sets…because of its inimitable capability to process big (user) data more efficiently."[52]

iii. Price discrimination

Corollary to personalization is the opportunity of firms to undertake price discrimination "where the same product is sold to different consumers for different prices."[53] Through analysis of data on consumer preference collected by the digital platform, firms can offer different prices for identical goods or services.[54] Typically, these data are sourced from a cookie,[55] an Information Protocol address,[56] or a user log-on information that allows digital markets to identify a consumer.[57] Azzolina et al.'s study on the online airline market – an industry notorious for such practice –

[50] John M. Yun, *The Role of Big Data in Antitrust,* 7 The Global Antitrust Institute Report on the Digital Economy (Nov. 11, 2020).

[51] Lancieri & Sakokswki, *supra* note 41, at 65.

[52] Fast et al., *supra* note 47.

[53] SAMUELSON & NORDHAUS, *supra* note 34 at 670.

[54] Frederik Zuiderveen Borgesius & Joost Poort, *Online Price Discrimination and EU Data Privacy Law*, 40 J. CONSUMER POL'Y 347, 348 (2017).

[55] Google defines a cookie as "small pieces of text sent to your browser by a website you visit. They help that website remember information about your visit, which can both make it easier to visit the site again and make the site more useful to you. Other technologies, including unique identifiers used to identify a browser, app or device, pixels, and local storage, can also be used for these purposes."

[56] The Merriam Webster dictionary defines an IP address as "the numeric address of a computer on the Internet."

[57] Borgesius & Poort, *supra* note 54, at 352.

sheds light on how online data may be utilized to personalize prices, *viz*:

> Online sellers may collect data in infinitely many ways: there are session-only tracking mechanisms, but also storage-based, cache-based, supercookies, fingerprinting. Browser cookies allow a web server to store a small amount of data on the devices of visiting users, which is then sent back to the web server upon subsequent request. Moreover…it is possible to track by means of first-party cookies or third-party ones. While the former are used transparently by online platforms to recognize users, the latter are those that come from third parties, they are more invasive and provide content external to the first-party page. By using these tools, online platforms may personalize search paths and results, recording user information and exploit targeted advertising or selling the information to other platforms. An online platforms [sic] in fact could recognize the user profile over time (through the use of cookies) and gradually increase the selling price, exploiting he fear that the price could rise again and encourage the user to purchase.[58]

A 2018 study by the Organization for Economic Co-operation and Development ("OECD") found that price discrimination results in pro-competitive benefits by "substantially improv[ing] allocative efficiency, by enabling companies to supply to low-end consumers who would otherwise be underserved." However, the same study warns against the potential harm resulting from exploitation of customers, perception of unfairness, and encouragement of rent-seeking activities as a result of such practice.[59] While generally not harmful to consumers, Borgesius and Poort argue that "there might be winners and losers among consumers: consumers with low willingness-to-pay will tend to

[58] Stefano Azzolina, Manuel Razza, Kevin Sartiano, & Emanuel Weitschek, *Price Discrimination in the Online Airline Market: An Empirical Study*, 16 J. THEORETICAL & APPLIED ELEC. COMM. RES. 2282, 2289 (2021).

[59] OECD, PERSONALISED PRICING IN THE DIGITAL ERA 5–7 (2018).`

benefit from personalized pricing, while consumers high willingness-to-pay will tend to be hurt."[60]

iv. Switching costs and multi-homing

Switching costs are those "real or perceived costs incurred by a consumer when changing suppliers for similar goods or services."[61] In the digital economy, switching costs differ for consumers and suppliers offering goods and services through the digital platform. Park et al. find that for consumers, these costs are affected by a number of factors, such as transferability of data inputted in one platform to another, accounts "tied to an entire ecosystem of linked platforms"[62] (e.g. a Google Mail account linked with YouTube account), and learning curve associated with the usage of a new platform,[63] among others. The same study concludes that switching cost of suppliers of goods and services through a digital platform may be influenced other factors such as contractual stipulations including most favored nation ("MFN") clauses that "require suppliers and retailers to publish on a price comparison tool of online marketplace the same or better price and conditions as those published on any other sales channel"[64] or tying or exclusivity arrangements, as in the case of ride-hailing digital platforms where an incumbent "locks in" drivers through agreements having the effect of preventing the latter to render services to competing platforms.[65] Furthermore, some digital platforms tend to have a closed ecosystem that "significantly increases switching costs, in particular for app developers who need to code on two different systems."[66] As profit-maximizing firms, digital platforms are incentivized to restrict access and

[60] MARC BOURREAU & ALEXANDRE DE STREEL, OECD, THE REGULATION OF PERSONALISED PRICING IN THE DIGITAL ERA (2018).

[61] CYN-YOUNG PARK, JAMES VILLAFUERTE, & JOSEF T. YAP, ASIAN DEVELOPMENT BANK, MANAGING THE DEVELOPMENT OF DIGITAL MARKETPLACES IN ASIA 35 (2021).

[62] *Id.*

[63] Ulrich Schwalbe, *Market definition in the digital economy: An overview of EU and national case law*, CONCURRENCES 4 (2019).

[64] PARK ET AL., *supra* note 61 at 224.

[65] *Id.*

[66] Lancieri & Sakokswki, *supra* note 41, at 99.

interoperability to protect their ecosystem in order to maintain a dominant position in the market.[67]

Consequently, the high or low switching costs determine the probability of single- or multi-homing. The former allows a user to use only platform, unlike the latter in which users can use multiple platforms at the same time if cost of doing so is low.[68] Examples are when an application developer offers its products or services for multiple mobile ecosystems such as Google Android and Apple iOS,[69] or when a consumer uses more than one platform offering similar goods or services such as Grab and Uber. Multi-homing is theoretically seen to improve competition insofar as it widens consumer choice. However, where a firm exercises overwhelming market power and utilizes data effectively, policies in multi-homing may not fully foster competition, as shown by Grab's ride-hailing experience in the Philippines[70] or by the concentration of platform usage only among the few "Big Tech" platforms such as Alphabet Inc. ("Google"), Amazon, Meta ("Facebook"), Apple, and Microsoft.

v. Network effects

Network effects, or those that "arise when the value a customer derives from a good or service grows as other customers adopt compatible products,"[71] are "in theory, beneficial for consumers, as they provide a wide range of services that can be obtained on demand and at lower costs, with consumers benefiting

[67] *Id.*

[68] PARK ET AL., *supra* note 61, at 225.

[69] Sami Hyrynsalmi, Tuomas Makila, Antero Jarvi, Arho Suominen, Marko Seppanen, & Timo Knuutila, CEUR-WS, *App Store, Marketplace, Play! An Analysis of Multi-Homing in Mobile Software Ecosystems*, *in* PROCEEDINGS OF THE FOURTH INTERNATIONAL WORKSHOPS ON SOFTWARE ECOSYSTEMS, CEUR WORKSHOP PROCEEDINGS 879, 59–72.(2012).

[70] Philip Libre, Ryan Jacildo, Kimberly Diet, & Jessmond Elvina, Asian Development Bank, *Promoting Competition in the Digital Platform Economy, in* MANAGING THE DEVELOPMENT OF DIGITAL MARKETPLACES IN ASIA 216 (Cyn-Young Park, James Villafuerte, & Josef T. Yap eds., 2021).

[71] Andrei Hagiu & David B. Yoffie, *Network Effects, in* THE PALGRAVE ENCYCLOPEDIA OF STRATEGIC MANAGEMENT (Mie Augier & David J. Teece eds., 2017).

from a one-stop-shop."[72] However, network effects may tip the digital market towards a monopoly if the following are present: (1) the value of the network effects outweigh the benefits of differentiation for users; (2) users have high multi-homing costs; and (3) users have high switching costs.[73] The OECD explains how direct and indirect network effects contribute to the monopolistic market of digital markets, *viz:*

> The existence of positive feedback loops that strengthen network effects have been the focus of some authorities. In the case of the direct network effects, an increase in usage of a digital service will increase the value of the service, thus attracting more users and creating a self-perpetuating cycle. With respect to indirect network effects…a growth of users on one side of a platform can increase the value to advertisers, which enables further investments in the platform attracting more users on the original side, thus continuing the cycle. When sufficiently strong, these feedback loops can lead a market to "tip" into monopoly, in particular if no competitor or potential entrant can match the attractiveness of the platform (as enhanced through network effects).[74]

The World Bank notes that not all network effects are positive. Congestion resulting to a decline in quality and performance of a digital platform is a negative network effect that diminishes its value to its consumers.[75] Data privacy concerns and disassociation to a platform stereotyped to cater to a particular group are other negative network effects that may impact the value ascribed to a digital platform.[76]

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[72] ASIA PACIFIC ECONOMIC COOPERATION (APEC), COMPETITION LAW AND REGULATION IN DIGITAL MARKETS 14 (2022).

[73] Hyrynsalmi et al., s*upra* note 69, at 1105.

[74] OECD, *supra* note 38, at 10.

[75] World Bank, *Explanation of externalities on digital platforms,* DIG. REG. PLATFORM, Aug. 8, 2020, *at* https://digitalregulation.org/explanation-of-externalities-on-digital-platforms/.

[76] Catherine Tucker, *Network Effects and Market Power: What Have We Learned in the Last Decade,* 32 (2) ANTITRUST 72, 78 (2018).

In the context of competition, a study by the Asia Pacific Economic Cooperation notes how network effects may be utilized to further anti-competitive practices, *viz:*

> Anti-competitive behavior may occur when dominant players leverage network effects to diminish competition, for example using exclusivity clauses that restrict merchants from engaging with competing platforms, or where dominant positions are utilized to unfairly undermine competition and consumer choice, such as through the modification of algorithms, using vertical integration or performing 'killer acquisitions'. To address these issues, competition authorities need to be able to identify market power and anticompetitive behavior in digital markets, which traditional assessment methods and approaches may not pick up on.[77]

III. RELEVANT MARKET: THE SPRINGBOARD OF ANTI-TRUST CASES

An important step prior to *any* assessment or finding of anti-competitive practice – i.e. without regard whether the market concerns the digital economy or otherwise – is the identification of its relevant market,[78] which is defined under Section 4(k) of the PCA, *viz*:

> (k) Relevant market refers to the market in which a particular good or service is sold and which is a combination of the relevant product market and the relevant geographic market, defined as follows:
>
> (1) A relevant product market comprises all those goods and/or services which are regarded as interchangeable or substitutable by the consumer or the customer, by reason

[77] APEC, *supra* note 72, at 16.

[78] Fed. Trade Comm'n. v. Qualcomm Inc., 969 F.3d 974, 992 (9th Cir. 2020).

> of the goods and/or services' characteristics, their prices and their intended use; and
>
> (2) The relevant geographic market comprises the area in which the entity concerned is involved in the supply and demand of goods and services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring areas because the conditions of competition are different in those areas.

The delineation of markets serves paramount in identifying exclusionary conducts undertaken by firms as well as agreements aimed to thwart competition.[79] By accurately defining the relevant market, the extent of a firm's market power – which the US Supreme Court referred to as "the power 'to force a purchaser to do something that he would not do in a competitive market'"[80] – over its competitors, consumers, and customers (i.e., vertical and horizontal relationships) can be estimated. Market power as an indicator of competition effects finds support in various decisions of Germany's Federal Cartel Office, which declared three "Big Tech" firms, namely, Amazon,[81] Google,[82] and Meta,[83] of "paramount significance for competition across markets."

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[79] Sarah Oxenham Allen, Brian Christensen, Joseph Conrad, Nicholas Grimmer, & Jennifer Pratt, *Market Definition in the Digital Economy: Considerations for How to Properly Identify Relevant Markets* (Am. Antitrust Inst., 2020).

[80] Matt Koehler, *The Importance of Correctly Identifying the Consumer for an Antitrust Relevant Market Analysis,* 67 UMKC L. REV. 521, 526 (1999), *citing* Eastman Kodak Co. v. Image Technical Serv.'s, Inc., 504 U.S. 451,464 (1992).

[81] *See* Bundeskartellamt [BKartA] [Federal Cartel Office] July 5, 2022, B2-55/21 (Ger.). Amazon: paramount significance for competition across markets pursuant to Section 19a(1) of the German Competition Act (GWB).

[82] *See* BKartA July 5, 2022, B7-61/21 (Ger.). Google: Determination of paramount significance for competition across markets.

[83] *See* BKartA June 30, 2022, B6-27/21 (Ger.). Meta: paramount significance for competition across markets pursuant to Section 19a(1) of the German Competition Act (GWB).

In the context of the three (3) major categories of anti-competitive practices, the identification of markets permits a more detailed analysis of the competitive conditions as follows: where the competition case involves agreements that are anti-competitive, the relevant market analysis finds importance in the determination of "actual or potential adverse impact on competition in the relevant market caused by the alleged agreement or conduct, and if such impact is substantial and outweighs the actual or potential efficiency gains that result from the agreement or conduct."[84] In cases where abuse of dominant position is alleged, the relevant market limits the analysis to be undertaken when computing the market share of an entity and thereon allows the determination of an entity's ability to fix prices unilaterally or restrict supply in such market.[85] Lastly, in merger and acquisition cases, defining the relevant market is "a step in the analytical process which helps in determining whether the merged entity possesses or will, post-merger, possess market power."[86]

An inaccurate definition of a relevant market is pivotal in the outcome of a competition case. Relevant market definitions thus additionally function as a screening device since high market shares or concentration indices calculated on such basis may warrant further investigations of cases that would otherwise have been dismissed at an early stage[87] or wrongly decided by a lower court. This has proven to be the case even in decisions involving digital firms. In *America Online, Inc. ("AOL"). v. GreatDeals.Net,*[88] where defendant alleged that plaintiff violated antitrust laws by engaging in monopolization and attempted monopolization through blocking the transmission of its unsolicited bulk e-mail advertisements from reaching plaintiff's subscribers, the US District Court rejected defendant's restriction of the relevant

[84] Rep. Act. No. 10667, §26(b).

[85] §27(a).

[86] PCC Rules on Merger Review Procedure [hereinafter "PCC Merger Review Guidelines"], item 5.3.

[87] CHRISTIAN A. MELISCHEK, THE RELEVANT MARKET IN INTERNATIONAL ECONOMIC LAW: A COMPARATIVE ANTITRUST AND GATT ANALYSIS 39 (2012).

[88] America Online, Inc. v. GreatDeals.Net, 49 F. Supp. 2d 851 (E.D. Va. 1999).

market to solely e-mail advertising as numerous substitutes for e-mail advertising exist, *viz:*

> There are numerous substitutes for e-mail advertising, some of which are less expensive, including use of the World Wide Web, direct mail, billboards, television, newspapers, radio, and leaflets, to name a few. Even if the Court restricted the market to e-mail advertising, interchangeable substitutes include other paid e-mail subscription services such as Microsoft Network or Prodigy, or free e-mail services like Hotmail and Yahoo…The Court will not restrict the market to AOL subscribers because it is improper to define a market simply by identifying a group of consumers who have purchased a given product. Instead, the market consists of the array of "interchangeable" products that those consumers confronted when making their product selection. Here, AOL subscribers could have chosen another paid e-mail service or a free e-mail service. Thus, those entities are part of the relevant market. Defendants could have advertised through another e-mail service and still reached the Internet-accessing public.

The *AOL* case further discussed the accessibility of the Internet in relation to relevant geographic markets, *viz:*

> With respect to the relevant geographic market in which competition takes place, the Court finds that the Internet cannot be defined with outer boundaries. It is not a place or location; it is infinite. The Internet is a "giant network which interconnects innumerable smaller groups of linked computer networks." The network "allows any of literally tens of millions of people with access to the Internet to exchange information." Defendants ignore the fact that they have multiple means of advertising their computer equipment to the Internet-accessing public. The geographic market may not be restricted to AOL subscribers not only because there are other persons with access to the Internet, but also because

> there are other means of advertising to those persons and to AOL subscribers.

In *In Re American Online, Inc.,*[89] which likewise involved AOL, the US District Court also dismissed plaintiff Galaxy's complaint against AOL for failing to adequately allege the relevant market. By merely stating the Internet Service Market as the relevant market, Galaxy failed to specify which aspects of the Internet Service Market AOL is attempting to monopolize. The specificity required by the Court was not satisfied in this case when Galaxy described varying markets for ISPs, such as "dial-up access to the internet, email services and possibly other services, such as web hosting, domain name service and proprietary online services available only to subscribers." Furthermore, Galaxy did not indicate the geographic scope of the relevant market, leading to uncertainties on whether its allegations may pertain only to the Massachusetts market – where Galaxy provides dial-up Internet services – or the entire United States.

Lastly, in *Dreamstime.com v. Google,*[90] where plaintiff alleged that that Google violated Section 2 of the Sherman Act by maintaining a monopoly in the online search advertising market, the US Court of Appeals ("US CA") rejected plaintiff's argument as to the District Court's incorrect definition of the relevant market. The appellate court found that plaintiff failed to allege such market not only in its pleadings filed with the lower court but as well as during the hearings conducted for the case, wherein it was given multiple opportunities to clarify the relevant market it sought to establish.

In all the foregoing cases, the US Court found no violation of antitrust laws.

A. The SSNIP test, the *Amex* case, and their limitations

The identification of the relevant market is a complex process requiring economic analysis. To aid in such determination,

[89] *In re* American Online, Inc., 168 F. Supp. 2d 1359 (S.D. Fla. 2001).
[90] Dreamstime.com v. Google, No. 20-16472 (9th Cir. 2022).

competition authorities such as the PCC employ the Hypothetical Monopolist Test or the Small and Significant but Non-Transitory Increase in Price (SSNIP) Test, which determines "whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5 per cent to 10 per cent) but permanent relative price increase in the products and areas being considered."[91] Should substitution be sufficient so as to result in unprofitability because of the resulting loss of sales, additional substitutes and areas are included in the relevant market [92] until such point where a hypothetical monopolist exercises market power that would allow it to profitably impose a SSNIP in the candidate market.[93]

Regrettably, the SSNIP test is regarded in literature to be lacking as the same assumes a "brick-and-mortar" market. Unlike in the traditional market, coordination in the digital market is achieved through a platform and data-sharing, consequently generating a reciprocal positive externality between two distinct groups.[94] This and all other factors unique to the digital market are regarded to be equally important in the determination of the relevant market in the digital economy. In view thereof, the SSNIP test falls short in instances where a product or service is offered free of charge to one side of a market (e.g., online search services costing zero for consumers but at a fee for advertisers, or "free" registration to online services at the expense of a customer's personal data), where different firms offering substitutable services have different business models,[95] and where ecosystems – i.e., platforms offering multiple services at once – exist in a particular digital platform.[96]

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[91] RICHARD WHISH AND DAVID BAILEY, COMPETITION LAW 32 (7th ed. 2012).

[92] *Id.*

[93] PCC Merger Rules, item 5.10.

[94] Dr. Tilottama Raychaudhuri. *Abuse of Dominance in Digital Platforms: An Analysis of Indian Competition Jurisprudence,* 1 COMP. COMM'N INDIA J. COMP. L. & POL'Y 1 (2020).

[95] EUROPEAN COMMISSION, SUPPORT STUDY ACCOMPANYING THE COMMISSION NOTICE ON THE EVALUATION OF THE DEFINITION OF RELEVANT MARKET FOR THE PURPOSES OF COMMUNITY COMPETITION LAW 56 (2021)

[96] Magali Eben & Viktoria H.S.E. Robertson, *The Relevant Market Concept in Competition Law and Its Application to Digital Markets: A Comparative Analysis of the EU, US, and Brazil* (Graz Law Working Paper Series 2, 2021).

Most importantly, the SSNIP test fails to capture an important aspect of the digital markets, i.e., that these are two- and/or multi-sided.[97] Two-sided markets refer to those that facilitate "interactions and transactions between producers of goods on one side and buyers or users on the other," such as buyers and sellers in Amazon's Marketplace, developers and users of Apple and Google's application stores, hosts and guests utilizing Airbnb, and drivers and passengers connected through Uber.[98] Multi-sided markets, on the other hand, are those wherein "platform firms operate businesses which act as intermediaries between multiple groups of participants who are looking to benefit from interacting with other participants with complementary needs."[99] Simply put, digital firms are multi-sided in the sense that these connect consumers, suppliers, advertisers, merchants, and other groups of people through a single platform. By failing to account for this attribute, the SSNIP test falls short of measuring the network effects present in digital markets.[100] Eben and Robertson further note that "if a platform is viewed as a single market, authorities may fail to identify the competitive constraints that undertakings with other monetization strategies represent for at least one side of the platform,"[101] as what critics of the US case of *Ohio v. Amex*[102] opine. While the US District Court recognized in this case that the market for credit cards is two-sided comprising the cardholders and the merchants on each side, the US Supreme Court reversed such finding. It essentially held that a finding of anti-competitive conduct must exist not only in relation to the merchants, as what the District Court had done, but as well as in relation to the cardholders.

Amex provides guidelines in defining the relevant market of a two-sided market that partakes the nature of a transaction

[97] EUROPEAN COMMISSION, *supra* note 95, at 11.

[98] Jørgen Veisdal, *The dynamics of entry for digital platforms in two-sided markets: a multi-case study,* 30 ELEC. MKT. 539, 539-40 (2020).

[99] *Id.*

[100] Iakovos Sarmas, *Market Definition for Two-Sided Platforms: Why Ohio v. American Express Co. Matters for the Big Tech*, 19 FSU BUS. REV. 199, 203 (2020).

[101] Eben & Roberston, *supra* note 96.

[102] Ohio v. American Express Co., 138 S. Ct. 2274 (2018).

platform, or those which "are characterized by the presence and observability of a transaction between the two groups of platform users,"[103] such as online marketplaces. This is in contrast with non-transaction platforms wherein the transaction between the two sides of the market is absent, and even though present, is usually unobservable, as in the case of online media markets.[104] In determining whether both sides of a two-sided platform should be considered in defining the relevant market, the Supreme Court in *Amex* ruled that "a market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor." Consequently, where there are strong indirect network effects in a transaction platform, it becomes necessary to consider both sides of the platform.

By lumping together both the cardholders and merchants into a single market, Justice Stephen Breyer, in his dissenting opinion, argued that the majority failed to account for the fact that the "relationship between merchant-related card services and shopper-related card services is primarily that of complements,[105] not substitutes." Moreover, by including the cardholders in the relevant market, the majority failed to note of the ruling in *Times-Picayune Publishing Co. v. United States*[106] that "an antitrust court should begin its definition of a relevant market by focusing *narrowly* on the good or service directly affected by a challenged restraint." Lastly, Justice Beyer emphasized that where there is "proof of actual adverse effects on competition, [it is], a fortiori, proof of market power." Accordingly, the Supreme Court's determination of the relevant market is unwarranted in view of the District Court's finding that there was a violation of anti-trust law. Regardless of the supposed irrelevance of the relevant market in the *Amex* case, critics argue that by expanding the relevant market to include cardholders, the manifest anti-competitive effects of

[103] Lapo Filistrucchi, Damien Geradin, Eric van Damme, & Pauline Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice* (TILEC Discussion Paper 6, 2013).

[104] *Id.*

[105] Justice Beyer notes in his dissent notes that complements are "goods or services that are used together with the restrained product, but that cannot be substituted for that product."

[106] Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 610 (1953).

Amex's conduct in relation to merchants are ignored. As a result, the burden of proof becomes greater on the part of plaintiffs "even where there is a clear interference in the process of competition with no offsetting justification."[107] Rose and Sallet (2022) offer a similar criticism of the *Amex* decision, *viz:*

> As we have emphasized, a prime risk of the overapplication of Amex is that by too broadly combining distinct user groups, the role of market definition can be distorted to serve as a means of cloaking, not identifying, market power. That can happen where harm can be inflicted to the users on one side without harming users on another such as where geographic markets differ or in the case of labor markets or more generally where companies compete on one "side" of a platform but not on the other. Moreover, "[p]utting production complements into the same market simply because making a deal requires both introduces economic nonsense into the law and economics of market power."[108]

Albeit not involving the digital market *per se*, the *Amex* case is a vital decision insofar as it recognizes the uniqueness of two-sided transaction markets and sets precedent for defining the relevant market thereof. Its implications in the definition of the relevant market in the digital economy, where the attributes of two-/multi-sided markets and non-transaction markets are also present, have thus been examined by various authors. Manne cites Uber and Lyft as examples, suggesting that if Uber was alleged to have been engaging in anti-competitive practices, *Amex* proves favorable in Uber's defense as it requires the court to assess if such conduct makes Uber's services more attractive to its passengers notwithstanding the direct evidence of harm onto Lyft, its direct competitor.[109] As to Amazon Marketplace, which has been riddled with allegations of foreclosing its competitors and engaging in

[107] Dennis W. Carlton, *The Anticompetitive Effects of Vertical Most-Favored-Nation Restraints and the Error Of Amex,* 2019 (1) COLUM. BUS. L. REV. 105 (2019).

[108] Nancy L. Rose & Jonathan Salle, *Ohio v. American Express: The Exception That Should Not Become a Rule,* 36 ANTITRUST 76, 80 (2022).

[109] Geoffrey A Manne, *In defence of the Supreme Court's 'single market' definition in Ohio v American Express,* 7 J. ANTITRUST ENF'T 104, 125 (2020).

predatory pricing, there is a need to prove that the "foreclosure effect on merchant customers is not offset by price reductions and/or output growth enjoyed by consumers."[110] Hence, it has been repeatedly emphasized in literature that the *Amex* ruling only applies in two-sided transaction markets in order to avoid its misapplication in the digital economy as a whole.

B. Policy considerations for defining the relevant market in the digital economy

The European Commission has attempted to define the relevant market in various digital firms without resort to the SSNIP test. In *Google and Alphabet v. Commission (Google Android)*,[111] the European Commission has utilized the Small but Significant Non-Transitory Decrease in Quality (SSNDQ) test in lieu of the SSNIP test. The SSNDQ test, "which envisages the quality degradation of [a] product at issue, constitute[s] relevant evidence for the purpose of defining the relevant market. Competition between undertakings can indeed take place in terms of price, but also in terms of quality and innovation." However, the European Commission, in applying the SSNDQ test, stresses that "…defining a precise quantitative standard of degradation of quality of the target product cannot be a prerequisite for the application of the SSNDQ test…All that matters is that the quality degradation remains small, albeit significant and non-transitory."

Others have similarly proposed various economic methods to capture the relevant market in the digital market more accurately. Patakyova acknowledges the limitation of the SSNIP test when applied to the digital economy, concluding that "feasible solution is to put more emphasis on the qualitative method of the relevant market definition – distinctive characteristics of products and territories –, possibly backed-up by as many empirical and objective evidence as possible."[112] Through the conduct of market

[110] Sarmas, *supra* note 100, at 207.

[111] Judgment of 14 September 2022, Case T-604/18, (Google Android) Google and Alphabet v. Commission, EU:T:2022:541.

[112] Mária T. Patakyová, *Competition Law in Digital Era – How to Define the Relevant Market?, in* EMAN 2020 – ECONOMICS AND MANAGEMENT: HOW TO COPE WITH DISRUPTED TIMES (2020).

studies, user and competitor perspectives, sensing surveys, and review of internal documents of firms,[113] a better approximation of the digital platform's qualitative features, and consequently, its relevant market, is measured. Cennamo offers a far more radical position in stating that product market boundaries prove to be irrelevant in defining competition and identifying the relevant competitors due to "value shifting increasingly from standalone product to platform systems."[114] As discussed above, value creation of platforms have different sources.

The EU itself has recognized the necessity of updating the definition of the relevant market in view of technological, legal, and economic developments in the market.[115] In its comprehensive study, the EU compiled guidelines based on analytical tools, literature, and case law in defining the markets for multi-sided markets, digital ecosystems, data itself as a separate market, and e-commerce.[116] The EU affirms that consideration of all sides of a market,[117] strength and relationship (i.e., whether unidirectional or bi-directional) of indirect network effects,[118] and qualitative and quantitative analysis of substitutability[119] are crucial in arriving at a properly-defined relevant market for multi-sided markets. For digital ecosystems in particular, its separate or adjacent analysis may be necessary for specific products.[120] Digital ecosystems have gained traction in Germany's competition law and ultimately became the basis for the determination of the market power exercised by Apple, Amazon, and Meta. Under the decisions, Germany's Federal Cartel Office held that digital firms having their own digital ecosystems may exercise gatekeeping functions that could lead to possible competition risks. Data as a separate market likewise finds support in Bagnoli's study as Big Data itself offer "information that give the holder the ability to establish business strategies and, in some situations, may be characterized as an

[113] EUROPEAN COMMISSION, s*upra* note 95, at 64.
[114] Cenamo, *supra* note 45, at 1.
[115] European Commission, *Competition: Commission seeks feedback on draft revised Market Definition Notice*, Nov. 8, 2022.
[116] EUROPEAN COMMISSION, s*upra* note 95.
[117] *Id.* at 51.
[118] *Id.* at 56.
[119] *Id.* at 61.
[120] Eben & Robertson, *supra* note 96.

essential facility, providing its owner with market power and even a dominant position to unilaterally interfere in the functioning of the market."[121] Finally, for e-commerce, the EU notes its relevant market are influenced by factors such as price dimension, product quality, customer service quality, delivery times, consumer habits, and strategy of players.[122]

IV. ANTI-COMPETITIVE PRACTICES IN THE DIGITAL ECONOMY

As stated, the subsequent discussion on anti-competitive practices in the digital economy shall give emphasis on US and EU anti-trust cases decided by their respective competition authorities and judicial bodies in view of the import of our competition law.

A. Anti-competitive Agreements

Anti-competitive agreements under the PCA are bifurcated on the basis of the relationship between and among firms, i.e., either horizontal or vertical. In any case, these agreements may come in "any type or form of contract, arrangement, understanding, collective recommendation, or concerted action, whether formal or informal, explicit or tacit, written or oral."[123]

Horizontal agreements, or those that are entered into by and between two (2) or more competitors, are categorized by the PCC as (1) price fixing, (2) bid rigging, (3) output limitation, and (4) market sharing,[124] and defined under Section 14 of the PCA in such order, *viz*:

> Section 14. Anti-Competitive Agreements. –
>
> (a) The following agreements, between or among competitors, are *per se* prohibited:

[121] Vicente Bagnoli, *The Big Data Relevant Market,* 23 CONCORRENZA E MERCATO 93 (2016).

[122] EUROPEAN COMMISSION, *supra* note 95, at 96.

[123] Rep. Act. No. 10667, §4(b).

[124] PCC, ON ANTI-COMPETITIVE AGREEMENTS – SELF-STUDY MODULE NO. 2, *available at* https://www.phcc.gov.ph/wp-content/uploads/2017/04/PCC-MODULE-2-1.pdf.

> (1) Restricting competition as to price, or components thereof, or other terms of trade;
> (2) Fixing price at an auction or in any form of bidding including cover bidding, bid suppression, bid rotation and market allocation and other analogous practices of bid manipulation;
>
> (b) The following agreements, between or among competitors which have the object or effect of substantially preventing, restricting or lessening competition shall be prohibited:
>
> (1) Setting, limiting, or controlling production, markets, technical development, or investment;
> (2) Dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers or any other means;

Price fixing and bid rigging are deemed prohibited *per se* under the PCA and accordingly "require no further inquiry into their actual effect on the market or the intentions of the parties who engaged in the illegal act or agreement." In contrast, "other anti-competitive agreements prohibited by the law which have the object or effect of substantially preventing, restricting, or lessening competition," such as output limitation and market sharing under Section 14(1)(b), and vertical agreements under Section 14(c), are not prohibited *per se.* As such acts are not illegal in itself, the PCC must first conduct inquires in order to determine if the agreement has the object or effect of substantially preventing, restricting or lessening competition.[125]

Vertical agreements, which are those "entered into by and between two (2) or more entities at different levels of distribution or production chains such as those entered into by suppliers, manufacturers, distributors, and retailers,"[126] are referred to under Section 14(c) of the PCA. The provision serves as a catch-all

[125] PCC, COMPETITION LAW 101, *available at* https://www.phcc.gov.ph/competition-law-bar-reference-materials/.

[126] PCC, *supra* note 124

provision insofar as it covers agreements other than those between and among competitors, *viz:*

> Section 14. Anti-Competitive Agreements. –
>
> xxx
>
> (c) Agreements other than those specified in (a) and (b) of this section which have the object or effect of substantially preventing, restricting or lessening competition shall also be prohibited: *Provided*, Those which contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation of this Act.

Hence, agreements on price fixing, bid rigging, output limitation, market sharing, and all those other which substantially prevents, restricts, or lessens competition, when entered into vertically, are punishable under Section 14(c) of the Act.

The inclusion of a proviso under Section 14(c) requires vertical agreements to be analyzed under the *rule of reason* approach in which authorities must first determine if the pro-competitive effects of an agreement outweigh its anti-competitive effects.[127] The proviso traces its source to Article 101(3) in relation to Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU"), *viz:*

> 3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
> - any agreement or category of agreements between undertakings,
> - any decision or category of decisions by associations of undertakings,
> - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting

[127] David Bailey, *Rule of Reason,* Concurrences (Jan. 1, 1990).

> technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
>
> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
>
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. (*Emphasis supplied*)

In the EU, it is worth emphasizing that unlike in the PCA, Article 101(1) of TFEU – the import of Section 14 of the PCA – does not distinguish between horizontal and vertical anti-competitive agreements, *viz:*

> 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. (*Emphasis supplied*)

With reference to Article 101(3) thereof, both vertical and horizontal agreements are thus not *per se* prohibited in EU unlike

in the Philippines with respect to the latter. This finds support in EU's Horizontal Block Exemption Regulations, specifically the European Commission's *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, viz:*

> 2. Horizontal co-operation agreements can lead to substantial economic benefits, in particular if they combine complementary activities, skills or assets. Horizontal co-operation can be a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster.
>
> 3. On the other hand, horizontal co-operation agreements may lead to competition problems. This is, for example, the case if the parties agree to fix prices or output or to share markets, or if the co-operation enables the parties to maintain, gain or increase market power and thereby is likely to give rise to negative market effects with respect to prices, output, product quality, product variety or innovation.
>
> 4. The Commission, while recognising the benefits that can be generated by horizontal co-operation agreements, has to ensure that effective competition is maintained. Article 101 provides the legal framework for a balanced assessment taking into account both adverse effects on competition and pro-competitive effects.

As to price fixing under the PCA, a similar provision is found under the Sherman Anti-Trust Act of 1890 ("Sherman Act"), the first federal act that outlawed monopolistic business practices in the US.[128] Section 1 thereof declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." While seemingly not distinguishing between vertical and horizontal price fixing agreements, US decisions show

[128] 26 Stat. 209, 15 U.S.C. §§ 1–7 (1890). Sherman Anti-Trust Act.

that such a distinction is present and arguably more in line with our law. In *United States v. Apple Inc.,* [129] the Court reiterated that horizontal price fixing agreements are "with limited exceptions, *per se* unlawful, while [vertical price fixing agreements] are unlawful only if an assessment of market effects, known as a rule-of-reason analysis, reveals that they unreasonably restrain trade."[130]

i. Price Fixing

The standards required for allegations of parallel conduct amounting to a violation of Section 1 of the Sherman Act to prosper are prescribed in *Starr v. Sony BMG,*[131] in which buyers of digital music brought an action against major record labels for fixing prices of digital music sold over the Internet. In deference to the ruling in *Bell Atlantic Corp. v. Twombly ("Twombly"),*[132] the US CA reiterated that "allegations of parallel conduct must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." To the mind of the court, the factual allegations in the case, when taken together, confirm parallel conduct indicative of a preceding agreement since: (1) defendants control over 80% of Digital Music sold to end purchasers in the United States, signifying the likelihood that non-competitive price coordination is present on account of their huge market shares; (2) "one industry commentator noted that "nobody in their right mind" would want to use MusicNet or pressplay (defendants' digital platforms for sale of music) on account of its unreasonable prices, suggesting that some form of agreement among defendants would have been needed to render the enterprises profitable; (3) Warner Music Group Corp.'s Chief Executive Officer, in a statement, stated that pressplay was formed expressly as an effort to stop the "continuing devaluation of music;" (4) defendants attempted to hide their Most-Favored Nation ("MFN") clauses because they knew

[129] United States v. Apple, Inc., No. 13-3741 (2d Cir. 2015).
[130] United States v. Apple, Inc., No. 13-3741 (2d Cir. 2015) *citing* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007).
[131] Starr v. Sony BMG, No. 08-5637 (2d Cir. 2010).
[132] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

they would attract antitrust scrutiny; (5) whereas eMusic –a digital music platform with whom defendants refuse to do business – charges $0.25 per song, defendants' wholesale price is about $0.70 per song; (6) defendants' price-fixing is the subject of a pending investigation by the New York State Attorney General and two separate investigations by the Department of Justice; and (7) defendants raised wholesale prices from about $0.65 per song to $0.70 per song, even though defendants' costs of providing Internet Music had decreased substantially due to completion of the initial digital cataloging of all Internet Music and technological improvements that reduced the costs of digitizing new releases."

Interestingly, in *United States v. Apple Inc.,*[133] the US Court of Appeals held Apple liable for facilitating a horizontal price fixing conspiracy among five out of the "Big Six" publishing companies ("Publisher Defendants") to raise the prices of digital books ("e-books") despite its relationship with the publishers being one that is vertical in nature. Apple, becoming aware of the threat to printed books that that the "Big Six" publishers faced with Amazon's low e-book pricing at $9.99, contracted with Publisher Defendants for the sale of e-books on its upcoming platform, the iBookstore, under an agency model where the publisher sets the price of each e-book – capped $14.99 maximum, with 30% thereof being paid to Apple as a commission. This model is in contrast with Amazon's "wholesale" model where publishers received a wholesale price for each e-book and Amazon determined the retail price of e-books. To ensure that e-books are sold at a "realistic" price, Apple required that Publisher Defendants switch other retailers of e-books such as Amazon to an agency model. In the alternative, an MFN clause was stipulated in the contract requiring "publishers to offer any e-book in Apple's iBookstore for no more than what the same e-book was offered elsewhere, such as from Amazon."

Citing *Apex Oil Co. v. DiMauro,*[134] the US Court found that the instant case is replete with direct and/or circumstantial

[133] United States v. Apple, Inc., No. 13-3741 (2d Cir. 2015).
[134] Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir. 4 1987).

evidence[135] that allow the inference of a conspiracy when viewed in conjunction with the parallel acts: by making Publisher Defendants much worse off in the form of lower short-term revenues and lack of control over pricing, the MFN clause incentivized Publisher Defendants to direct Amazon and other e-book resellers to adopt an agency model. In effect, "Apple wanted quick and successful entry into the e-book market and to eliminate retail price competition with Amazon. In exchange, it offered the publishers an opportunity 'to confront Amazon as one of an organized group . . . united in an effort to eradicate the $9.99 price point.'" The US CA further held that Publisher Defendants' very act of signing a Contract with Apple containing an MFN Clause "signaled a clear commitment to move against Amazon, thereby facilitating their collective action." Without Apple's key role in facilitating the collusion, from holding constant discussions with Publisher Defendants to ensuring that the latter sign the agreements, the horizontal price-fixing would not have been possible. This becomes more glaring as "Apple understood that its proposed Contracts were attractive to the Publisher Defendants only if they collectively shifted their relationships with Amazon to an agency model — which Apple knew would result in higher consumer-facing e-book prices."

The EU has also treated facilitators of horizontal price fixing agreement as violators of anti-trust law. In *Eturas et al v. Lietuvos Respublikos konkurencijos taryba,*[136] the Court did not dispute the Lithuanian Competition Council's verdict that plaintiff Eturas, a provider of online travel booking systems, facilitated the agreement of competing travel agencies to limit the price discounts being offered through plaintiff's system. This is notwithstanding the finding that Eturas was not active in the market in question.

Correspondingly, where there is no indication that digital firms "asserted their market power vertically to induce a horizontal agreement among a group of competitors," the claim of

[135] United States v. Apple, Inc., No. 13-3741 (2d Cir. 2015), *citing* Mayor & City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013).

[136] Judgment of 21 January 2016, Eturas and Other, Case C-74/14, EU:C:2016:42.

a horizontal price-fixing conspiracy would not prosper, as held by the US District Court in *In Re: Online Travel Company (OTC) Hotel Booking Antitrust Litigation,*[137] *viz:*

> *The fact that a relatively small group of competitors (the nine [Online Travel Agency ("OTA")] Defendants) hold a large share of the OTA-booking market* (94% of OTA-booking in 2011) may be a characteristic that is consistent with a conspiracy. But without more, OTA Defendant's market share, like the ambiguous facts discussed before, *merely indicates that a conspiracy could have formed. It certainly does not create the sort of circumstances presented in cases in which a powerful defendant or group of defendants asserted their market power vertically to induce a horizontal agreement among a group of competitors. Unlike those cases, the purportedly dominant entities in this case, OTA Defendants, built up their market share (by 2011) more than seven years after the conspiracy allegedly formed (2003).* And none of the Complaint's other factual allegations show that, by 2003, the OTA Defendants held the sort of market power or influence over Hotel Defendants seen in cases like Toys "R" Us and Interstate Circuit. Accordingly, that OTA Defendants accounted for 94% of OTA bookings in 2011 is a fact that is merely consistent with the other ambiguous conspiracy allegations. (*Emphasis supplied*)

In Re: OTC further suggests that vertical price fixing agreements do not necessarily result to a violation of anti-trust laws notwithstanding the presence of an MFN clause. In this case, each defendant hotel chain entered into individual yet similar Resale Price Maintenance ("RPM") Agreements with each defendant OTA. Under said agreements, defendant hotel chains are required to establish and publish their "Best Available Rates" or "Lowest Rates," with such published rates to be charged by defendant OTAs when selling rooms to consumers. Moreover, the agreement included an MFN clause which provided that "(a) the published

[137] In Re: Online Travel Company (OTC) Hotel Booking Antitrust Litigation, No. 3:2012cv03515 - Document 136 (N.D. Tex. 2014).

rates offered by the OTA would be as favorable as the published rate offered to any OTA competitor and (b) the rates published on the internet site operated by the hotel itself." In disposing of the case, the Court characterized the agreements as a valid exercise of rational business interests of both defendant OTAs and defendant hotel chains, *viz:*

> Like in *Twombly*, Plaintiffs' conclusory assertion that Defendants shared a common motive is, at best, merely consistent with a conspiracy. True, both the Hotel and OTA Defendants would benefit from the elimination of price competition in the sale of hotel rooms online. But these "common motives" just as well explain why Hotel Defendants *(because each wanted to control online prices for its own rooms)* and OTA Defendants *(because each wanted an assurance the minimum price it must publish would not be undercut)* individually entered into RPM agreements. Just because Defendants' rational business interests can be recast in a suspicious light does not mean the allegations actually suggest a conspiracy was formed. (*Emphasis supplied*)

Still on the basis of *Twombly,*[138] the Court ruled that the individual RPM agreements, albeit similar across each pair of hotel chain and OTA defendants, do not cause suspicion nor suggest parallel conduct indicative of a preceding agreement. Rather, the individual agreements are a product of independent action by each of the defendants.

In contrast with *In Re: OTC,* Germany's Federal Cartel Office held in *HRS Hotel Reservation Service*[139] that MFN clauses in agreements between hotels and online hotel booking portals are anti-competitive. In this case involving the HRS, a firm operating the electronic hotel portal HRS.de, the Federal Cartel Office found that the MFN clauses "remove the economic incentive for hotel portals to offer lower commissions to the hotel partners of HRS in

[138] United States v. Apple, Inc., No. 13-3741 (2d Cir. 2015).

[139] BKartA Dec. 20, 2013 Case B9-66/10 (Ger.). HRS-Hotel Reservation Service.

order to have in turn rooms provided at lower prices and at more favourable conditions," thus restricting intra-brand competition and increasing barriers to entry for new players. The MFN clauses also affect competition between the hotels as it consequently enabled HRS to increase its commissions "without having to fear that its hotel partners will pass on the increase in the commission to hotel customers."

ii. Output limitation agreements

The PCA's prohibition of output limitation agreements, as noted above, is heavily lifted from Article 101(1)(b) of the TFEU. A violation of such provision was held in *Vendita prodotti Apple e Beats su Amazon Marketplace,*[140] where the Italian Competition Authority imposed sanctions on Apple and Amazon for entering into an agreement restricting certain resellers of Apple products from accessing the online marketplace of Amazon in Italy (Amazon.it), *viz:*

> According to the Authority, in absence of a selected distribution system based on clear and objective criteria, Amazon and Apple through the agreement introduced a purely quantitative restriction on the number of resellers operating on Amazon.it, identified in a discriminatory manner, thus preventing them from accessing Italy's most important distribution channel for online sales, especially for small and medium sized enterprises. Moreover, the agreement restricted cross-border sales, as it prevented sales of Apple and Beats products to resellers established outside certain EU Member States. These resellers were also discriminated against because of their geographical origin. Finally, according to the AGCM, the agreement affected the discounts available for Amazon and Beats products sold on Amazon.it. In particular, the Authority argued that, by restricting the number of resellers allowed to use Amazon.it,

[140] I842 - Vendita Prodotti Apple e Beats su Amazon Marketplace, Infringement Decision No. 29889 (2020).

> the general level of discounts decreased to the detriment of consumers.[141]

It should be emphasized that Apple and Amazon, while both being digital platform giants, are not competitors in this case. Rather, Apple and Amazon's relationship is one between a manufacturer and a distributor. Accordingly, the agreement entered into by the two digital firms can be characterized as a vertical output limitation agreement under the purview of Section 14(c) of the PCA when juxtaposed with our law.

In 2022, ICA's findings were annulled by the Italian Administrative Court based on procedural grounds as the ICA failed to give Apple and Amazon sufficient time to prepare their respective defenses.[142]

B. Abuse of Dominant Position

Section 15 of the PCA prohibits one or more entities to abuse their dominant position by engaging in conduct that would substantially prevent, restrict, or lessen competition. Such conduct provided for under Section 15 are classified into as follows: (1) predatory pricing,[143] (2) imposing barriers to entry, (3) tying and/or bundling, (4) discriminatory behavior, (5) exclusive dealing, refusal to deal, price-fixing, and other restrictions on the lease or contract for sale or trade of goods or services, (6) monopsony,[144] (7)

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[141] ITALIAN COMPETITION AUTHORITY (AGCM), ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN ITALY 2021 10-11 (2022), *citing* I842 - Vendita Prodotti Apple e Beats su Amazon Marketplace, Infringement Dec. No. 29889 (ICA Nov. 16, 2021).

[142] Digital Policy Alert, *Italy: Italian court cancels fine against Apple and Amazon imposed by Italy's Competition Authority*, *citing* Italian Regional Administrative Court of Latium, Apple / Amazon, Case No. 12507/2022 REG.PROV.COLL, Judgement, 3 October 2022 (Italian).

[143] Section 15(a) of the PCA defines predatory pricing as "selling goods or services below cost with the object of driving competition out of the relevant market: *Provided*, That in the Commission's evaluation of this fact, it shall consider whether the entity or entities have no such object and the price established was in good faith to meet or compete with the lower price of a competitor in the same market selling the same or comparable product or service of like quality."

[144] Section 15(g) of the PCA refers to monopsony as "conduct by which a dominant firm directly or indirectly imposes unfairly low purchase prices for the goods or services of, among others, marginalized agricultural producers,

imposing unfair purchase or selling price, and (8) output limitation. Such conduct may be "any type or form of undertaking, collective recommendation, independent or concerted action or practice, whether formal or informal."[145]

A preliminary step prior to the determination of conduct amounting to abuse of dominant position is the establishment of a firm's dominance in a particular relevant market pursuant to Rule 8 of the PCA Implementing Rules and Regulations ("IRR"). A rebuttable presumption of a market dominant position arises if the market share of an entity in the relevant market is at least fifty percent (50%), unless a new market share threshold is determined by the Commission for that particular sector.[146]

The US' Sherman Act does not define nor mention abuse of dominance as an anti-competitive conduct. Thus, dominant digital platforms "have the incentive and ability to abuse their dominant position against third-party suppliers, workers, and consumers. Some of these business practices are a detriment to fair competition, but they do not easily fit the existing categories identified by the Sherman Act, namely "monopolization" or "restraint of trade.""[147] This becomes more apparent in the succeeding US cases to be discussed, where much of digital firms in the US do not incur any liability for alleged abuses of dominant position. Notwithstanding the absence of such provision, a review of US decisions on abuse of dominance shows that the same are often premised on the violation of Section 2 of the Sherman Act which provides that:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with

fisherfolk, micro-, small-, medium-scale enterprises, and other marginalized service providers and producers."

[145] Rep. Act No. 10667, §4(c).

[146] §27, par. 2.

[147] STAFF OF SUBCOMM. ON ANTITRUST, COMM'L, AND ADMIN. LAW OF THE COMM. ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, 117 CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 334 (2022).

> foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof; shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

In addition, the Clayton Antitrust Act of 1936 ("Clayton Act"), as amended, supplements the provisions of the Sherman Act by punishing exclusionary conduct such as price discrimination,[148] exclusive dealing,[149] and mergers and acquisitions that substantially lessen competition.[150]

Meanwhile, Article 102 of the TFEU defines the following conduct as abuse of dominant position, *viz:*

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
> Such abuse may, in particular, consist in:
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 102 of the TFEU replicates price fixing and output limitation as defined under Article 101(1) of the TFEU on anti-

[148] *See* 15 USC 12 et seq. [hereinafter "Clayton Act"], §2.
[149] *See* Clayton Act, §3.
[150] *See* Clayton Act, *as amended by* Robinson-Patman Act, §7.

competitive agreements. Price discrimination[151] and tying/bundling,[152] as likewise defined under anti-competitive agreements of the TFEU, are also conduct that may constitute abuse of dominance in the EU.

i. Imposing barriers to entry

Section 15(b) of the PCA prohibits abusive conduct of dominant firms through imposing barriers to entry or committing acts that prevent competitors from growing within the market in an anti-competitive manner. Those that develop in the market as a result of or arising from a superior product or process, business acumen, or legal rights or laws, however, are exempted.

The imposition of barriers to entry had been the subject of Apple's ten-year legal battle against anti-trust allegations in the US case of *The Apple iPod iTunes Antitrust Litigation*.[153] In this case, Apple was alleged to have been abusing its dominant position when it introduced the iTunes 7.0 update[154] which disabled iPods[155] loaded with iTunes 7.0 to play songs bought from another Internet media service. Disputing the accusations, Apple averred that the "iTunes 7.0 was designed to prevent iPod corruption as follows: (1) third-party applications like RealPlayer could corrupt the iPod by modifying the iPod's internal database and adding foreign files to it and (2) to guard against the risk of corruption, the new code included in iTunes 7.0 ensured that only iTunes could write to the iPod's internal database."[156] In 2014, an eight-member jury in Oakland Federal Court characterized Apple's introduction of iTunes 7.0 as genuine product improvements[157] and hence not anti-

[151] *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 15, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter "TFEU"], art 101(1)(d).

[152] *See* TFEU, art 101(1)(e).

[153] Apple Ipod Itunes Antitrust Litigation, Case No.: 05-CV-0037 YGR (N.D. Cal. Nov. 25, 2014).

[154] iTunes is the digital platform developed by Apple where users can purchase music.

[155] A music-playing device developed by Apple in 2001.

[156] In re Apple iPod iTunes Antitrust Litig., 796 F. Supp. 2d 1137, 2011 U.S. Dist. LEXIS 77155 (N.D. Cal. May 19, 2011)

[157] Brian X. Chen, *Apple Wins Decade-Old Suit Over iTunes Updates,* The N.Y. TIMES, Dec. 16, 2014.

competitive nor violative of Section 2 of the Sherman Act as what plaintiffs had claimed.

ii. Tying/Bundling

An import of the Article 102(d) of the TFEU, tying and/or bundling are acts prohibited under Section 15(c) and (f) of the PCA, *viz:*

> Section 15. Abuse of Dominant Position. – It shall be prohibited for one or more entities to abuse their dominant position by engaging in conduct that would substantially prevent, restrict or lessen competition:
>
> xxx
>
> (c) Making a transaction subject to acceptance by the other parties of other obligations which, by their nature or according to commercial usage, have no connection with the transaction;
>
> xxx
>
> (f) Making supply of particular goods or services dependent upon the purchase of other goods or services from the supplier which have no direct connection with the main goods or services to be supplied;

PCC Commissioner Amabelle C. Asuncion differentiates tying from bundling as follows: "tying occurs when the sale of goods (the tying product) is conditional upon the purchase of a different (tied) product, or upon the buyer agreeing not to purchase the tied product from another seller." Tying can either be contractual where the firm "imposes the tie as a condition on the buyer" or technological in which the "tied product is physically integrated into the tying product such that it is impossible to purchase the latter without the former." Bundling, on the other hand, occurs when a "package of two or more products is offered at a discount." It can either be pure wherein "two products can only

be bought together and are unavailable for purchase separately" or mixed "when two products are available for sale separately but are sold at a discount when bought together."[158]

In *Epic Games v. Apple Inc.* ("Epic Games"),[159] where plaintiffs claimed that Apple "is forcing distributors who use the iOS app distribution platform (the alleged tying product) to also use its in-app payment system ("IAP"; the alleged tied product), the US District Court ruled that the IAP is not a product. Rather, it is a comprehensive system integrated into the iOS devices designed to collect Apple's 30% commission and manage in-app systems. Accordingly, it is not bought or sold separately. Moreover, no evidence proves that consumer demand for IAP as a standalone product exists. Thus, "whether analyzed as an integrated functionality or from the perspective of consumer demand, IAP is not a separate product from iOS app distribution."

In *Google and Alphabet v Commission (Google Android),*[160] the UK General Court largely affirmed the European Commission's findings that Google has abused its dominant position through contractual restrictions it imposed against its contracting parties. In one claim, Google was alleged to have been engaging in the exclusionary conduct of tying through restrictions contained in its Mobile Application Distribution Agreements ("MADAs"), under which Google required Original Equipment Manufacturers ("OEMs") to pre-install its general search app ("Google Search") and browser app ("Chrome") in order for them to be able to obtain a license to use its app store ("Play Store"). As correctly found by the European Commission, and based on data and evidence from other OEMs, app developers, and operating systems providers, and consumer groups, the pre-installation requirements set in the MADAs enabled Google to take advantage of the status quo bias whereby "the user is more likely to turn to a pre-installed app or one that is set as default than to download an alternative product."

[158] Amabelle C. Asuncion, *Christmas bargains, bundling, and competition,* PCC WEBSITE, Dec. 5, 2018.

[159] Epic Games v. Apple Inc, 559 F.Supp.3d 898 (2021).

[160] Judgment of 14 September 2022, Case T-604/18, (Google Android) Google and Alphabet v. Commission, EU:T:2022:541.

Moreover, "the pre-installation of the Google Search and Chrome apps under the conditions laid down by the MADA makes it possible to 'freeze the situation' and to deter users from turning to a competing app." This is evident since the pre-installation was further coupled with a premium placement that set Google Search as a default setting on a very large number of Google Android devices (76% in Europe and 56% worldwide in 2016). The UK General Court additionally noted that "even if a competing browser were pre-installed on a Google Android device, it cannot be set as the default browser," mainly due to the revenue share agreements ("RSAs") executed by Google with such OEMs and other mobile operator networks ("MNOs") where the latter should "undertake to set Google Search as default on the various entry points of their Google Android devices, including their own browser" in order to be entitled to revenue sharing. Hence, "from 2011 to 2016, more than 50% of Google Android devices sold in the European Economic Area were covered by RSAs concluded with Google […] all of which required Google Search to be set as the default search engine on pre-installed browsers and prohibited the installation of a competing search service."[161]

The significant competitive advantage that Google has acquired from the MADAs cannot be easily overcome by competitors of Google Search and Google Chrome. The barriers to entry established by the MADA requires competitors to spend resources to be able to compete in the relevant market. Accordingly, incentives for innovation by other competitors are affected insofar as they would need to "balance the potential revenues that they would receive […] with the cost of such a transaction and other costs related to factors such as user experience and support."[162] Google also failed to convince the Court that the pro-competitive effects of the conduct outweigh its restriction on competition.

In *Case No. A528 – ABA Amazon*, the Italian Competition Authority imposed fines against Amazon for violating Article

[161] *Id.*
[162] *Id.*

101(2) of the TFEU when the latter "leveraged to favour the adoption of its own logistics service - Fulfilment by Amazon (FBA) - by sellers active on Amazon.it to the detriment of the logistics services offered by competing operators, as well as to strengthen its own dominant position." Specifically, Amazon exercised such abuse by tying "to the use of FBA the access to a set of exclusive benefits essential for gaining visibility and increase sales on Amazon.it," the most relevant of which is the Prime label, "which makes it easier to sell to the above 7 million most loyal and high-spending consumers members of Amazon's loyalty program." By preventing third-party sellers from associating the Prime label with offers not managed with FBA, such sellers were deprived of crucial benefits in the form of increased visibility and sales. The damage resulting from the abuse has further extended to competing marketplaces: "because of the cost of duplicating warehouses, sellers who adopt Amazon's logistics are discouraged from offering their products on other online platforms, at least with a product range as wide as that on Amazon.it."[163]

iii. Discriminatory Behavior

Lifted from Article 102(c) of the TFEU, discriminatory behavior as defined under Section 15(d) of the PCA refers to "setting prices or other terms or conditions that discriminate unreasonably between customers or sellers of the same goods or services, where such customers or sellers are contemporaneously trading on similar terms and conditions, where the effect may be to lessen competition substantially." Exempted from its application, however, are permissible price differentials, *viz:*

> (1) Socialized pricing for the less fortunate sector of the economy;
> (2) Price differential which reasonably or approximately reflect differences in the cost of manufacture, sale, or delivery resulting from differing methods, technical conditions, or

[163] AGCM, *A528 - Italian Competition Authority: Amazon fined over € 1,128 billion for abusing its dominant position,* Dec. 9, 2021.

> quantities in which the goods or services are sold or delivered to the buyers or sellers;
> (3) Price differential or terms of sale offered in response to the competitive price of payments, services or changes in the facilities furnished by a competitor; and
> (4) Price changes in response to changing market conditions, marketability of goods or services, or volume;

As mentioned above, claims of abuse of dominance in the US, such as price discrimination, are chargeable under the Clayton Act. However, *Shulman v. Facebook*[164] clarifies that an advertising space is not a commodity as contemplated under said Act. Accordingly, plaintiff's claim that defendant Facebook engaged in price discrimination through an advertising system that allegedly benefits only "big brands" was found by the US District Court to be baseless. Notwithstanding, the Sherman Act remains to be of use insofar as monopolization and its attempts through abuse of dominance are concerned. In *Dreamstime.com v. Google*[165] ("Dreamstime.com"), the District Court emphasized that "harm to a single customer does not, by itself, constitute "harm [to] the competitive process" that "thereby harm[s] consumers" as a whole." As Google's alleged harm to one of its own online search advertising customers – specifically that Google allegedly favored contractual stock photo partners resulting to Dreamstime.com's diminishing performance in Google's unpaid, organic search results – does not exclude its competitors in the online search advertising market, Dreamstime.com's allegations thus do not constitute anticompetitive conduct. Further, Google's partnership with Dreamtime.com's competitors and its alleged preferential treatment towards such partners are not anticompetitive conduct under Section 2 as the Sherman Act, as the Act "aims to 'preserve the right of freedom to trade,' and does not infringe upon a company's right 'freely to exercise [its] own independent discretion as to parties with whom [it] will deal.'"

[164] Shulman v. Facebook.com et al, No. 2:2017cv00764 - Document 111 (D.N.J. 2018).

[165] Dreamstime.com, LLC v. Google LLC, No. 20-16472 (9th Cir. 2022).

Contrary to *Dreamstime.com,* the EU in *Google and Alphabet v Commission ("Google Shopping")*[166] found Google liable for abuse of dominance in thirteen EU countries by favoring its own comparison shopping service – a specialized search service – over competing comparison shopping services. By displaying results from its own comparison shopping service in a manner that was "prominently positioned within Google's general search results, displayed in rich format with pictures and information on the products and could not be demoted by the adjustment algorithms," in contrast with its competitors wherein results are shown merely "in the form of simple blue links without pictures or additional information on the products and prices," Google's comparison shopping service has significantly benefited from increased visibility and search traffic. Furthermore, Google's alternative remedy for competing comparison shopping services, i.e., to appear in Google's Shopping Units where groups of product advertisements are shown, results to a change in the latter's business model "in that their role then involves placing products on Google's comparison shopping service as a seller would do, and no longer to compare products. Accordingly, in order to access Shopping Units, competing comparison shopping services would have to become customers of Google's comparison shopping service and stop being its direct competitors." Totality of the evidence considered, Google's argument that the conduct constitutes quality and service improvements does not outweigh its anti-competitive effects.

Still involving Google, in *Google Search (AdSense),*[167] the company was alleged to have been engaging in exclusionary conduct through self-preferencing methods such as the inclusion of Premium Placement and Minimum Google Ads Clause in its General Services Agreements ("GSAs") that it executed with its large customers of online search advertising intermediation services ("Direct Partners"). The Commission noted that Google "required Direct Partners to reserve the most prominent and

[166] Google and Alphabet v. Commission, Judgement of 10 November 2021, CASE T-612/17.

[167] Google Search (AdSense), Commission Decision of 20 March 2019, Case AT.40411.

therefore most profitable space on their search results pages for Google search ads, and to refrain from placing competing search ads in a position immediately adjacent to or above Google search ads." Further, it "obliged Direct Partners to fill the most prominent space on their search results pages with a minimum number of Google search ads." The Commission found the Premium Placement and Minimum Google Ads Clause to be anti-competitive as it "(i) deterred Direct Partners from sourcing competing search ads; (ii) prevented access by competing providers of online search advertising intermediation to a significant part of the European Economic Area ("EEA")-wide market for online search advertising intermediation; (iii) may have deterred innovation; (iv) helped Google to maintain and strengthen its dominant position in each national market for online search advertising in the EEA, except Portugal; and (v) may have harmed consumers."[168]

In France, under *Decision 21-D-11 of 7 June 2021 regarding practices implemented in the online advertising sector (Google),* Google was likewise held liable for self-preferencing in the online advertising sector. In this case, online press publishers who monetized advertising space in their respective websites and mobile applications utilized Google's two advertising technologies, Doubleclick for Publishers ("DFP") and Doubleclick AdExchange ("AdX"). The former is utilized for serving of advertisements while the latter functions as a bidding platform for online advertising space. The claims of anti-competitive conduct arose when DFP supposedly favored AdX compared to other bidding platforms where publishers also bid, specifically by transmitting to the latter the price offered by competing platform, thus allowing AdX to optimize commission "according to the intensity of competition." In addition, Google imposed technical and contractual limitations on the use of the AdX platform through a third-party ad server, resulting to inferior modalities of interaction offered to third-party servers compared to those between DFP and AdX.

The French Competition Authority ruled in favor of the publishers. Apart from impairing the attractiveness of prices

[168] Google Search (AdSense), Summary of Commission Decision of 20 March 2019, Case AT.40411, EUR-LEX.

offered by competing platforms, Google's practice was further found to result to foreclosure given that DFP has a share of over 60% on such market. It also limits the investment capacity of competing platforms as they must cover the same fixed costs while their capacity to generate revenue is impaired. Further, data show that "since 2015, AdX has been able to maintain a stable and, at the end of the period, higher revenue share than the average of its direct competitors, without this hindering its growth." This is supported by the publishers' statements to the effect that they anticipate higher revenues from using DFP due to its interoperability with AdX.

Still in France, under the French Competition Authority's *Decision 19-D-26 of 19 December 2019 regarding practices employed in the online search advertising sector,* the ambiguity of Google's Rules on the functioning of its Google Ads platform, as well as the sudden shifts in its application and changes in provisions which effectively left much of the Rules' interpretation at the whim of Google, ultimately resulted to discrimination as similar advertisers were treated differently. The French Competition Authority stressed that the conduct negatively impacts not only competition but also consumer protection given that it is "likely to discourage the entry of innovative sites while failing to bar sites that are potentially harmful for consumers."

In Poland, the e-commerce platform Allegro.eu was found by the Office of Competition and Consumer Protection to "had favoured its own online store on the Allegro.pl platform at the expense of independent traders who offered the same or similar products" with such conduct being attributed to "the company playing a "double role" combining its shopping platform business with retail sales on the domain."[169]

iv. Exclusive Dealing, Refusal to Deal, Price-Fixing, and Other Restrictions on the Lease or Contract for Sale or Trade of Goods or Services

[169] *Allegro.eu's Polish unit fined $48 mln for violation of competition rules,* REUTERS, Dec. 30, 2022.

Section 15(e) of the PCA prohibits "imposing restrictions on the lease or contract for sale or trade of goods or services concerning where, to whom, or in what forms goods or services may be sold or traded." These include "fixing prices, giving preferential discounts or rebate upon such price, or imposing conditions not to deal with competing entities, where the object or effect of the restrictions is to prevent, restrict or lessen competition substantially." However, the provision exempts the following agreements from its application: (1) permissible franchising, licensing, exclusive merchandising or exclusive distributorship agreements such as those which give each party the right to unilaterally terminate the agreement; or (2) agreements protecting intellectual property rights, confidential information, or trade secrets.

A reading of the provision vis-à-vis Section 3 of the Clayton Act, as amended, shows similarities in wording, *viz:*

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, *or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition* or tend to create a monopoly in any line of commerce. (*Emphasis supplied*)

Exclusive Dealing and Refusal to Deal

Notorious in the EU for abuse of dominant position is Google, which has been found guilty of abuse of dominance in two separate decisions. The abovementioned *Google Android*[170] case likewise involved restrictions contained in the Anti-Fragmentation Agreements ("AFAs"), under which OEMs that wished to pre-install Google apps could not sell devices running versions of Android that were not approved by Google. As correctly found by the European Commission, evidence including Google's internal email communication and information from Android's website show that the AFAs aimed to prohibit non-compatible Android *forks*[171] and that Google "sought to reserve access to the 'ecosystem' to Android-compatible forks" and "prevent [its] partners and competitors from developing standalone versions of Android." The threat to Google's competitive advantage is highlighted by the finding that both Android- and non-Android forks belong to the same market for licensable operating systems, accordingly resulting to a competitive relationship between the two products.

While Google's products may be considered proprietary, the Court, citing *Generics (UK) and Others,*[172] underscores that intellectual property may not be used to shield abuses of dominance, *viz*:

> Indeed, the exercise of an exclusive right linked to an intellectual property right is one of the rights of the holder of such a right, and consequently the exercise of that right, even when done by a dominant undertaking, cannot in itself constitute an abuse of

[170] Judgment of 14 September 2022, Case T-604/18, (Google Android) Google and Alphabet v. Commission, EU:T:2022:541.

[171] As stated in the case, "a fork [is] a new software created from the source code of existing software. The Android source code released under an open-source licence (Android Open Source Project licence; 'the AOSP licence') covers the basic features of an OS, but not the Android applications ('apps') and services owned by Google. Original equipment manufacturers ('OEMs') who wish to obtain Google apps and services must therefore enter into agreements with Google. Google also enters into such agreements with mobile network operators ('MNOs') who wish to be able to install Google's proprietary apps and services on devices sold to end users."

[172] Generics (UK) and Others, C 307/18, EU:C:2020:52, ¶¶ 150–51.

> the dominant position. However, such conduct cannot be accepted when its purpose is precisely to strengthen the dominant position of the party engaging in it and to abuse that position.

In this case, the Court notes that the OEMs' entry into AFAs was incentivized by their intent to avail of Google's proprietary application programming interface. However, the AFAs objective of protecting proprietary products does not outweigh nor balance its anti-competitive effect of limiting the markets for non-compatible Android forks. Further, contrary to the goal of intellectual property protection, which is to incentivize innovation, the Court in this case affirmed the European Commission's finding that the AFAs deterred innovation: "by preventing the development of different variants of the OS, the practice of excluding non-compatible Android forks that was established in the AFAs had thereby hindered opportunities for innovation and deprived users of functionalities distinct from those offered by Android-compatible forks or additional to them."

In the above-discussed *Google Search (AdSense)*[173] case, the European Commission found that Google engaged in exclusionary conduct not only through self-preferencing but also through the stipulation of exclusivity clauses in its GSAs. The exclusivity clauses required the latter to source all their search ads requirements from Google. Further, Direct Partners could not remove websites from the scope of a GSA without Google's permission. In ruling against Google, the European Commission noted that the exclusivity clauses "(i) deterred those Direct Partners from sourcing competing search ads; (ii) prevented access by competing providers of online search advertising intermediation services to a significant part of the EEA-wide market for online search advertising intermediation; (iii) may have deterred innovation; (iv) helped Google to maintain and strengthen its dominant position in each national market for online search

[173] Google Search (AdSense), Commission Decision of 20 March 2019, Case AT.40411.

advertising in the EEA, except Portugal; and (v) may have harmed consumers."[174]

In Germany, the ticketing company Eventim, which offers online ticketing system services, was found by the Federal Cartel Office to have abused its dominant position through exclusivity clauses in the agreements it executes with its promoters and advance booking offices. The exclusivity clauses provided that promoters and advance booking services shall either exclusively, or for a considerable amount of tickets, utilize Eventim's online ticketing system – EVENTIM.NET – for sale (or purchase, in the case of advance booking offices) of tickets. After determining that Eventim holds a dominant position in the market for ticketing system services, the Federal Cartel Office ruled that the abuse of dominance was abetted by indirect network effects in the multi-sided market. Consequently, such network effects give rise to the possibility of foreclosure, more so as the exclusivity clauses covered a large number of transactions on the side of both the promoters and advance booking offices.[175]

In the Netherlands, Apple was found by the Authority for Consumers & Markets ("ACM") to have abused its dominant position when it prevented dating app providers from using alternative payment systems in order to process payments received for various paid services in the app. The ACM held that the conditions posed threat to competition by limiting the app providers' freedom to choose how to process payments for the digital content and services they sell. Furthermore, Apple's policy of restricting access to consumer data prevents app providers from contacting their app users directly for consumer service purposes, such as those relating to invoicing, cancellations, and refunds.[176] At the risk of facing penalty amounting to 50 million euros, Apple has thus removed such restrictions in 2022.[177]

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[174] Google Search (AdSense), Summary of Commission Decision of 20 March 2019, Case AT.40411, EUR-LEX.

[175] BKartA Dec. 4, 2017, Case B6-132/14 (Ger.). CTC Eventim.

[176] ACase no. ACM/19/035630, 24 August 2021.

[177] Autoriteit Consument en Markt [Neth. Auth. for Consumers & Markets], ACM: Apple changes unfair conditions, allows alternative payments methods in dating apps, Jun. 11, 2022, ACM.NL, at https://www.acm.nl/en/publications/acm-

Price Fixing

In *De Coster et al v. Amazon.com Inc.,*[178] Amazon's MFN policies that forbid third-party merchants from listing their goods online at prices lower than those in Amazon, despite being couched in various nomenclature such as "Retail Competitive Price Provision," "Anti-Gouging Policy," "Fair Pricing Policy," and "Price Parity Clauses" under "Business Solutions Agreement," failed to convince the US District Court of "a lack of concerted action, or that concerted action is implausible." The Court further underscores that the case is not one that involves vertical nor horizontal agreements in which there an explicit or tacit agreement between two parties, stressing that the third-party merchants of Amazon are "active participants who set their prices and otherwise engage with Amazon's policies in an active, albeit allegedly unwilling, way," thus affecting competitors in a unique manner. Accordingly, the causal injury suffered by plaintiffs in the form of paying "supra-competitive" prices directly to Amazon was deemed valid by the Court.

Other Restrictions on the Lease or Contract for Sale or Trade of Goods or Services

The *Google Android*[179] case also discussed the restrictions contained in the Revenue Share Agreements ("RSAs"), under which Google granted OEMs and MNOs a percentage of its advertising revenue, provided that those manufacturers or operators had agreed not to pre-install a competing general search service on any device within an agreed portfolio ("portfolio-based RSAs"). The Court held in this case that in order to determine whether the portfolio-based RSAs were anticompetitive "depends in particular on two sets of considerations: first, examination of the coverage of

apple-changes-unfair-conditions-allows-alternative-payments-methods-dating-apps.

[178] De Coster et al v. Amazon.com Inc, No. 2:2021cv00693 - Document 59 (W.D. Wash. 2023).

[179] Judgment of 14 September 2022, Case T-604/18, (Google Android) Google and Alphabet v. Commission, EU:T:2022:541.

that practice and, second, the results of the As Efficient Competitor ("AEC") test." The AEC test is explained by the Court, *viz:*

> The AEC test concerns a competitor which hypothetically is equally efficient and which, it is assumed, charges customers the same prices as those charged by the dominant undertaking, while facing the same costs as those borne by that undertaking. Furthermore, in addition to price, in order to be considered 'as efficient' as the dominant undertaking, that hypothetical competitor must also be as attractive to that undertaking's customers in terms of choice, quality or innovation.
>
> The AEC test, mentioned in the Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings , seeks to distinguish conduct in which a dominant undertaking may not engage from conduct in which it may. The AEC test thus constitutes a possible framework for analysing exclusionary effects in relation to a given case and the exclusionary effects alleged. However, it is only one of several factors that may be applied in order to establish, by means of qualitative or quantitative evidence, whether anticompetitive foreclosure exists for the purposes of Article 102 TFEU.
>
> xxx
>
> As regards exclusivity payments, the AEC test is designed to assess whether a competitor which hypothetically is at least as efficient as the dominant undertaking would have been capable of matching or exceeding those payments.

Applying the two considerations mentioned by the Court, it first held that, contrary to the European Commission's finding, data show that "the coverage of the contested practice which the Commission considered significant is, as such, considerably lower than that previously accepted by the Commission in practice. According to data provided by Google in that respect, it is less than

5% of the market defined by the Commission." It further found that "the arguments advanced by the Commission in the contested decision relate either to just one segment of the various relevant markets, that of general search queries from a smart mobile device, or to matters unrelated to the effect of the contested practice on those markets." Accordingly, as to the first consideration, the Court ruled against the Commission. As to the second consideration, i.e, the application of the AEC test, the Court notes that the European Commission's finding does not stand on any ground in view of the procedural and substantial deficiencies attending its determination. Among others, it found that the Commission committed errors as to "the estimate of the costs attributable to such a competitor; the assessment of the competitor's ability to obtain pre-installation of its app; and the estimate of likely revenues on the basis of the age of mobile devices in use."[180] As to this particular allegation, the Court therefore also ruled in favor of Google.

In the above-mentioned *Google (AdSense)*[181] case, the European Commission assessed the competition effects of the Authorising Equivalent Ads Clause in the GSAs which "required Direct Partners to seek Google's approval before making any change to the display of competing search ads." The European Commission held that such clause was capable of limiting competition as it similarly "(i) deterred Direct Partners from sourcing competing search ads; (ii) prevented Google's competitors from having access to a significant part of the EEA-wide market for online search advertising intermediation; (iii) may have deterred innovation; (iv) helped Google to maintain its dominant position; and (v) may have harmed consumers."[182] In all instances, including those which relate to the above-discussed clauses, no objective

[180] Court of Justice of the European Union Press Release No. 147/22, The General Court largely confirms the Commission's decision that Google imposed unlawful restrictions on manufacturers of Android mobile devices and mobile network operators in order to consolidate the dominant position of its search engine (Sept. 14, 2022).

[181] Google Search (AdSense), Commission Decision of 20 March 2019, Case AT.40411.

[182] Google Search (AdSense), Summary of Commission Decision of 20 March 2019, Case AT.40411, EUR-LEX.

justification was present which would outweigh the anti-competitive effects of the conduct.

Exceptions Under Section 15(e) of the PCA

The cited US case of *Epic Games*[183] falls under the exception of Section 15(e) of the PCA. Apart from the aforementioned allegations, plaintiff was also suing Apple for anti-competitive terms in its Developer Product Licensing Agreements in which developers may distribute their apps to consumers only via Apple's App Store and that, within apps, transactions between consumers and developers occur exclusively through in-app purchasing system enabled by the App Store. The US District Court held that Apple is not liable as monopolist under Sherman Act pursuant to a rule-of-reason analysis given the pro-competitive justifications for Apple's restrictions on app distribution – i.e., security, including privacy and fraud prevention, collection of its commission, and compensation for its intellectual property. However, Apple's inclusion in its license agreement of anti-steering provisions – i.e. provisions "prohibiting apps from including "buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase," and from "encourag[ing] users to use a purchasing method other than in-app purchase" either "within the app or through communications sent to points of contact obtained from account registrations within the app (like email or text)"" – limited the developers' ability to communicate with consumers about alternatives to Apple's in-app purchasing system and thus constituted unfair practice prohibited under California's Unfair Competition Law. The US CA upheld such ruling in 2023.[184]

v. Imposing Unfair Selling Price

As a general rule, Section 15(h) of the PCA prohibits the direct or indirect imposition of unfair purchase or selling price on their competitors, customers, suppliers or consumers. Exempted

[183] *Supra* note 159.

[184] Kellen Browning, *Apple Largely Prevails in Appeal of Epic Games' App Store Suit*, The New York Times, April 24, 2023.

from such rule, however, are "prices that develop in the market as a result of or due to a superior product or process, business acumen or legal rights or laws."

U.S. District Courts have generally resisted claims of supracompetitive pricing where a digital firm has imposed a certain fixed price prior to attaining market dominance, and where such price remained the same even after achieving market power and during periods of intense competition.

In *Wolfire Games LLC et al v. Valve Corporation,*[185] the Court noted that defendant has always charged a 30% commission towards game publishers "after 2001, when the PC desktop game "digital distribution" market was in a "fledgling stage," yet Defendant did not become "dominant" in the market until 2013." Similarly, in *Sommers v. Apple,*[186] the claim that Apple's iTunes Music Store charged supercompetitive prices for music (99 cents per music) was found baseless since such prices "remained the same since Apple entered the market in 2003, including prior to purportedly obtaining a monopoly in the market, and after Apple's share declined."

In *Epic Games,*[187] however, the US District Court generally found Apple's imposition of a 30% commission towards app developers to be "inflated," ruling that "the developer's use of the App Store platform, license to Apple's intellectual property, and access to Apple's user base only justifies a commission, not the rate itself. Nor is the rate issue addressed when Apple claims that it would be entitled to its commission even for games distributed outside the App Store because it provides the device and OS that brings users and developers together." Despite the potential anti-competitive effects of the commission's rate, the Court found that "Epic Games did not challenge the rate. Rather, Epic Games challenged the imposition of any commission whatsoever." Hence, the Court still entitled Apple to its counterclaim against plaintiff.

[185] Wolfire Games LLC et al v. Valve Corporation, No. 2:2021cv00563 - Document 67 (W.D. Wash. 2021).
[186] Somers v. Apple, Inc., No. 11-16896 (9th Cir. 2013).
[187] Epic Games v. Apple Inc, 559 F.Supp.3d 898 (2021).

vi. Output Limitation

Apart from being punishable under Section 14 of the PCA on anti-competitive agreements, the PCA also considers output limitation as an abuse of dominance. Section 15(i) of the Act prohibits "limiting production, markets or technical development to the prejudice of consumers," with the exception of "limitations that develop in the market as a result of or due to a superior product or process, business acumen or legal rights or laws."

In Italy, the Italian Competition Authority found Google to have abused its dominant position when it prevented Enel X Italia, a provider of electronic vehicle solutions, from developing a version of its app compatible with Android Auto, "a specific Android feature that allows apps to be used while the user is driving in compliance with safety, as well as distraction reduction, requirements." In doing so, Google prevented interoperability – and consequently technical developments – which ultimately disadvantaged consumers by limiting their choice to use the Enel X Italia app when driving and recharging an electric vehicle.[188]

vii. Exception to abuse of dominance

The discussion above shows that the law provides exceptions to various conducts of abuse of dominance. Nonetheless, paragraph 3, Section 15 of the PCA functions as a catch-all provision insofar as all conducts of abuse of dominance are concerned, *viz:*

> *Provided, further*, That any conduct which contributes to improving production or distribution of goods or services within the relevant market, or promoting technical and economic progress while allowing consumers a fair share of the resulting

[188] Italian Competition Authority Press Release, *A529 – ICA: Google fined over 100 million for abuse of dominant position,* May 13, 2021, *at* https://en.agcm.it/en/media/press-releases/2021/5/A529.

> benefit may not necessarily be considered an abuse of dominant position.

The above-stated provision recognizes the contribution of intellectual property to technical and economic progress and accordingly may be a defense for claims of abuse of dominance. Notwithstanding, PCC Commissioner Johannes Benjamin R. Bernabe stresses that the PCA may still be applied even in cases where intellectual property is invoked as a defense, *viz:*

> …in the EU in the *Magill*[189] case that a refusal to provide basic information, even if protected by copyright, which results in preventing the appearance of a new product, which the copyright owners did not offer and for which there is a potential demand among consumers, constitutes abuse. Similarly, in another case (IMS Health v NDC Health),[190] it was ruled that in balancing the need to protect the economic rights of an intellectual-property rights holder and the need to protect competition, the latter can prevail where the refusal to grant a license prevents the development of a secondary or a neighboring market to the detriment of consumers. The same competition principles were upheld in cases involving Microsoft in cases more recently decided in the EU.[191]

Indeed, as gleaned from the above-discussed cases, there are instances wherein the defense of intellectual property, or the introduction of any technological development for that matter, fails to convince. In all these cases, the importance of competition authorities in the proper balancing of interests of all sides of the market cannot be overemphasized.

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[189] *See* Radio Telefis Eireann v Commission of the European Communities, Case T-69/89.

[190] *See* IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG, Case C-418/01.

[191] Johannes R. Bernabe, *A conflict of laws?,* PCC WEBSITE, Sept. 25, 2019, *at https://www.phcc.gov.ph/column28-bm-cjrb-ipo-comp-conflict-of-laws/.*

C. Prohibited Mergers and Acquisitions

The PCA does not prohibit mergers and acquisitions per se. It is only when such mergers and acquisitions will result to a substantial prevention, lessening, or restriction of competition that such transactions are prohibited.[192]

Mergers and acquisitions with transaction values exceeding such threshold as may be set by the PCC are prohibited from consummating their agreement until thirty (30) days after providing notification to the Commission.[193] Pursuant to PCC Commission Resolution No. 01-2024, in compliance with the compulsory notification for mergers and acquisition under Section 17 of the PCA, parties to a merger or acquisition are required to provide notification when the Size of Party[194] exceeds PhP7.8 Billion and the Size of Transaction[195] exceeds PhP3.2 Billion.

The *PCC Merger Review Guidelines* details comprehensively how mergers and acquisitions should be analyzed in relation to its effects on competition. Among others, the PCC considers the structure of the relevant markets concerned, the market position of the entities concerned, the actual or potential competition from entities within or outside of the relevant market, the alternatives available to suppliers and users, and their access to supplies or markets, and any legal or other barriers to entry.[196]

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[192] Rep. Act No. 10667, §20.

[193] Rep. Act No. 10667, §17.

[194] As defined under I.1.3. of the PCC Guidelines on the Computation of Merger Notification Thresholds, the size of party pertains to the computation of the aggregate value of the assets in the Philippines and revenues from sales in, into, or from the Philippines of the filing Ultimate Parent Entity ("UPE"), including all entities that it controls, directly or indirectly.

[195] As defined under I.1.4. of the *PCC Guidelines on the Computation of Merger Notification Thresholds*, the size of transaction pertains to the computation of the value of the assets being acquired or/and gross revenues generated by the assets being acquired, or of the acquired entity and entities it controls, depending on the type of transaction provided under Rule 4, Section 3(b) and (d) of the PCA IRR, as amended.

[196] Merger Review Guidelines, item 4.6.

i. Killer and nascent acquisitions

Anti-competitive mergers and acquisitions in the digital economy are often characterized as *killer acquisitions,* under which incumbents acquire nascent competitors – usually start-ups – in an effort to discontinue the latter's provision of goods and services.[197] Such acquisitions are harmful to competition in instances when "the target has recently introduced a product that directly competes with the acquirer's products; when the target's products are weak substitutes for the acquirer's but they may grow closer in time; or when the target will in the future introduce a competing product in current or new product markets." Not surprisingly, "Google, Apple, Facebook, and Amazon have used killer acquisitions and acquisitions of nascent competitive threats to increase their market dominance and neutralize competitive threats."[198]

For Facebook, its most famous acquisition is arguably that of Whatsapp, an online messaging platform. The EU, in *Case No. COMP/M.7217 – Facebook/Whatsapp,* held that due to the differences in the parties' offerings in consumer communication apps, such as identifiers, source of contacts, user experience, privacy policy, and intensity with which the apps are used, Facebook Messenger and Whatsapp are not close competitors and accordingly would not substantially affect competition post-acquisition. Further, a number of alternative providers of communications app would still be present despite the acquisition. As to barriers to entry, the European Commission found that no significant "traditional" barrier exists in the market in view of the various alternatives, relatively insignificant time and investment in the development of a consumer communications app, lack of any known patents, know-hows, or intellectual property rights, and lack of foreclosure effects. As to the provision of social networking services, the transaction is likewise said to have insignificant impact in view of the presence of alternatives. Finally, as to the

[197] OECD, OECD HANDBOOK ON COMPETITION POLICY IN THE DIGITAL AGE 48 (2022).

[198] Mikah Roberts, *Killer Acquisitions and the Death of Competition in the Digital Economy,* 24 TRANSACTIONS: TENN. J. BUS. LAW 64 (2022).

provision of online advertising services, no horizontal overlaps are found as only Facebook is engaged in such service.[199]

Likewise, Apple's acquisition of Shazam, a music recognition platform, was cleared by the European Commission.[200] As summarized by the European Commission, *viz:*

> • the merged entity would not be able to shut out competing providers of digital music streaming services by accessing commercially sensitive information about their customers. In particular, access to Shazam's data would not materially increase Apple's ability to target music enthusiasts and any conduct aimed at making customers switch would only have a negligible impact. As a result, competing providers of digital music streaming services would not be shut out of the market;
>
> • the merged entity would not be able to shut out competing providers of digital music streaming services by restricting access to the Shazam app. This reflects the fact the app has a limited importance as an entry point to the music streaming services of Apple Music's competitors; and
>
> • the integration of Shazam's and Apple's datasets on user data would not confer a unique advantage to the merged entity in the markets on which it operates. Any concerns in that respect were dismissed because Shazam's data is not unique and Apple's competitors would still have the opportunity to access and use similar databases.[201]

[199] Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004, Case M.7217 – Facebook/ WhatsApp.

[200] European Commission Decision of 6 September 2018 declaring a concentration to be compatible with the internal market and the EEA Agreement, Case M.8788 – Apple/Shazam.

[201] European Commission Press Release, *Mergers: Commission clears Apple's acquisition of Shazam,* Sept. 6, 2018, EUR. COMM'N, *at* https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5662.

Google deems its acquisition of Android its "best acquisition ever."[202] However, as demonstrated in the discussion above, such acquisition has been proven to restrict competition in more ways than one.

ii. PCC cases on mergers and acquisition in the digital economy

In *In the Matter of the Acquisition by Grab Holdings, Inc. and MyTaxi.PH, Inc.* ("Grab") *of Assets of Uber B.V., Inc. and Uber Systems, Inc.* ("Uber") which involved firms rendering TNV services, the PCC ultimately held that it will take no further action with respect to Grab's acquisition of Uber's assets provided that the former complies with its Undertaking which prohibits exclusivity commitments and sets fare pricing standards, among others.[203] However, in 2019, the PCC ordered Grab to refund PhP 5.05 Million to customers for breaching its pricing commitments under the aforesaid Undertaking.[204] In 2023, Grab was also held liable under the PCA for failing to comply with its undertaking with the PCC, specifically its failure to refund overcharged fares to customers.[205]

In another case involving the acquisition by Alipay Singapore Holding Pte. Ltd. ("Alipay") of shares in Globe Fintech Innovations Inc. ("Mynt") for purposes of providing digital financial services, the PCC ruled that the acquisition is not one that would "result in a substantial lessening of competition in the market".[206]

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[202] Don Reisinger, *Google: Android was our best acquisition ever,* CNET, Oct. 28, 2010, *at* https://www.cnet.com/home/smart-home/google-android-was-our-best-acquisition-ever/.

[203] Acquisition by Grab Holdings, Inc. and MyTaxi.PH Inc., of Assets of Uber B.V and Uber Systems, Inc., PCC Case No. M-2018-001 (PCC Aug. 10, 2018).

[204]Raymond Carl Dela Cruz, *Grab ordered to pay P5.05-M refund to customers,* PHIL. NEWS AGENCY, Nov. 18, 2019, *at* https://www.pna.gov.ph/articles/1086350.

[205] Press Release, *PCC Slaps Fresh P9-million Fine On Grab Amid Refund Delay*, PCC WEBSITE, May 15, 2023, *at* https://www.phcc.gov.ph/press-releases/pcc-slaps-fresh-p9-million-fine-on-grab-amid-refund-delay/.

[206] Acquisition by Alipay Singapore Holding Pte. Ltd. of shares in Globe Fintech Innovations Inc., Commission Decision No. 21-M-005-2017 (PCC Aug. 23, 2017).

V. CONCLUSION AND RECOMMENDATIONS

The foregoing case decisions and jurisprudence emphasize the similarity of entities involved in suits relating to the digital economy, highly suggesting that the market is indeed susceptible to monopolization and consequently antitrust activities. It is just proper that competition policies keep abreast of such developments, for as proven above, anti-competitive and unfair practices will always surface notwithstanding the increasing availability of information in this information era.

As a concluding note, this paper further summarizes below foreign competition statutes and policies on digital markets. Pending policies in the Philippines for competition in the digital economy, these foreign digital market statutes may be of use as guidelines in promoting effective competition therein in addition to the extensively-discussed EU and US jurisprudence above.

In defining firms that holds a dominant position in the digital economy, the PCC may borrow the definition of a gatekeeper under the EU's Digital Market Act.[207] The DMA considers an undertaking providing core platform services[208] as a gatekeeper if (1) it has a significant impact on the internal market; (b) it provides a core platform service which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.[209] Consideration may likewise be given to the definition of firms with dominant position

[207] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [hereinafter "Digital Markets Act"].

[208] Core platform services, as defined under Article 2, Section 2 of the Digital Markets Act, mean any of the following: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i).

[209] Digital Markets Act, article 3, § 1.

under Germany's *Gesetz gegen Wettbewerbsbeschränkungen* ("GWB") Digitalisation Act's definition of firms with dominant market position, which the GWB Digitalisation Act sets to at least 40% of market share and may be designated by the Federal Cartel Office as a firm of "paramount significance for competition across markets" with an expiration period of five years. In its determination, the following factors shall be taken into account: (1) dominant market position in on or more several markets, (2) financial strength or access to other resources, (3) vertical market integration and its activities on otherwise connected markets, (4) access to data relevant for competition, and (5) relevance of its services for the access of third parties to supply or sales markets as well as its related influence on the business activities of third parties.[210]

Abuse of dominant position with specific reference to the digital economy have likewise been taken into account under the foregoing statutes which the PCC may further use as basis in crafting its own digital economy policy. Under Article 5 of the DMA, exclusivity agreements and conditions are prohibited, *viz:*

> 3. The gatekeeper shall not prevent business users from offering the same products or services to end users through third-party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper.
>
> xxx
>
> 7. The gatekeeper shall not require end users to use, or business users to use, to offer, or to interoperate with, an identification service, a web browser engine or a payment service, or technical services that support the provision of payment services, such as payment systems for in-app purchases, of that gatekeeper in the context of services provided by the

[210] *Id.*

> business users using that gatekeeper's core platform services.
>
> 8. The gatekeeper shall not require business users or end users to subscribe to, or register with, any further core platform services listed in the designation decision pursuant to Article 3(9) or which meet the thresholds in Article 3(2), point (b), as a condition for being able to use, access, sign up for or registering with any of that gatekeeper's core platform services listed pursuant to that Article.

To ensure fair competition in competing platforms, the DMA likewise mandates all gatekeepers to give users the option to uninstall pre-installed softwares and platforms and to allow the utilization of third-party applications, *viz*:

> 3. The gatekeeper shall allow and technically enable end users to easily un-install any software applications on the operating system of the gatekeeper, without prejudice to the possibility for that gatekeeper to restrict such un-installation in relation to software applications that are essential for the functioning of the operating system or of the device and which cannot technically be offered on a standalone basis by third parties.
>
> The gatekeeper shall allow and technically enable end users to easily change default settings on the operating system, virtual assistant and web browser of the gatekeeper that direct or steer end users to products or services provided by the gatekeeper…
>
> 4. The gatekeeper shall allow and technically enable the installation and effective use of third-party software applications or software application stores using, or interoperating with, its operating system and allow those software applications or software application stores to be accessed by means other than the relevant core platform services of that gatekeeper. The gatekeeper shall, where applicable, not prevent the downloaded third-party software

> applications or software application stores from prompting end users to decide whether they want to set that downloaded software application or software application store as their default. The gatekeeper shall technically enable end users who decide to set that downloaded software application or software application store as their default to carry out that change easily.

In relation to the above, interoperability of software and platforms shall not be restricted under the DMA, *viz:*

> 6. The gatekeeper shall not restrict technically or otherwise the ability of end users to switch between, and subscribe to, different software applications and services that are accessed using the core platform services of the gatekeeper, including as regards the choice of Internet access services for end users.
>
> 7. The gatekeeper shall allow providers of services and providers of hardware, free of charge, effective interoperability with, and access for the purposes of interoperability to, the same hardware and software features accessed or controlled via the operating system or virtual assistant listed in the designation decision pursuant to Article 3(9) as are available to services or hardware provided by the gatekeeper. Furthermore, the gatekeeper shall allow business users and alternative providers of services provided together with, or in support of, core platform services, free of charge, effective interoperability with, and access for the purposes of interoperability to, the same operating system, hardware or software features, regardless of whether those features are part of the operating system, as are available to, or used by, that gatekeeper when providing such services.

Lastly, discriminatory behavior, including self-preferencing, is prohibited under the Act, *viz:*

> 5. The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking.
>
> xxx
>
> 12. The gatekeeper shall apply fair, reasonable, and non-discriminatory general conditions of access for business users to its software application stores, online search engines and online social networking services listed in the designation decision pursuant to Article 3(9).

Relatedly, the GWB Digitalization Act provides that firms of paramount significance for competition across markets may be prohibited by the Federal Cartel Office from doing the following acts, *viz:*

> • treating its own services and products more favorably than those of its competitors, in particular by favoring them in displays or by pre-installing its services or products on devices or integrating them otherwise in offers of the company;
>
> • taking measures that would interfere with other companies' business activities on supply or sales markets, if such activities are relevant for access to these markets, in particular measures that lead to an exclusive pre-installation or integration of offers of the company or measures that prevent or make it more complicated for other companies to advertise their own services or to reach customers through alternative online services than the ones provided by the company;
>
> • directly or indirectly impeding competitors in a market where the company, even without having a dominant market position, may expand its influence quickly, in particular by automatically combining the

> use of one product of the company with the use of another product which is not necessary for it or by making the use of one product of the company dependent on the use of another product of the company;
>
> • limiting or hindering market access noticeably or otherwise impeding other companies by processing data collected by the company that is relevant for competition or by stipulating terms and conditions that allow for such processing;
>
> • disallowing or impeding the interoperability of products and services or the portability of data and thereby distorting competition;
>
> • providing other companies with inadequate information regarding the scope, quality, or success of provided or requested services or otherwise hindering their ability to evaluate the value of these services; or
>
> • requesting benefits for handling offers of other companies that are disproportionate to the service provided, in particular by demanding the transfer of data or rights that are not necessary for the service or by making the quality of the presentation of the offer dependent on the transfer of data or rights that are disproportionate to the service.[211]

As to reporting and monitoring mechanisms, Japan's Act on Improving Transparency and Fairness of Digital Platforms may be of guidance to the PCC. Under the Act, platform providers must "disclose terms and conditions of trading and other information, develop procedures and systems in a voluntary manner and submit a report every fiscal year on the overview of measures and businesses that they have conducted, to which self-assessment results are attached."[212] Furthermore, the Federal Trade

[211] *Id.*

[212] Ministry of Econ., Trade, & Industry (METI), *Key Points of the Act on Improving Transparency and Fairness of Digital Platforms (TFDPA),* April 16, 2021, METI WEBSITE, *at*

Commission of Japan is mandated under the Act to take action on any finding of not only impediments on transparency and fairness of digital platforms but as well as unfair practice and/or monopolization by such.

Consideration may likewise be given to competition policies enforced by the ASEAN countries due mutual economic cooperation among countries therein and commonalities in their respective competition laws.[213] As a matter of fact, it was stated during that bill deliberations the ASEAN model for competition policies is likewise patterned on EU's laws.[214]

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https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/tfdpa.html.

[213] *See* Rachel Burgess, ASEAN, *Commonalities and Differences across Competition Legislation in ASEAN and Areas Feasible for Regional Convergence* (2nd ed. 2022).

[214] Plenary Hearing dated 03 March 2015 on the Consideration of House Bill No. 5286 on Second Hearing, 67 (2015).

THE PRESUMPTION OF INNOCENCE IN THE PHILIPPINES: PROBLEMS AND PROSPECTS

Alfierri E. Bayalan[*]

ABSTRACT

In the Philippines, the presumption of innocence tasks the prosecution to prove the guilt of the accused. This legal presumption is defeated only by establishing guilt with proof beyond reasonable doubt. It is superior to the presumption of regularity in the performance of official duty. When the evidence of the prosecution and of the defense are of equal weight after trial, the presumption of innocence tilts the scale in favor of acquittal.

Recognizance and bail help ensure that the government interest in securing the attendance of the accused during trial by preventive detention infringes reasonably upon the latter's freedom. However, preventive detention becomes punitive due to the prolonged deprivation of liberty of the accused and the severe congestion in our jails. This is especially true for persons accused of offenses punishable by death, *reclusion perpetua*, or life imprisonment.

It is impracticable to set an exact period for the courts and the prosecution to determine the propriety of granting bail due to heavy workload. Yet, it is also a denial of the right to be presumed innocent of the accused to be detained in congested jails for too long. As a middle ground, it is suggested to summarily resolve an application for bail in offenses punishable with death, *reclusion perpetua*, or life imprisonment.

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INTRODUCTION

Laws serve as constraints to human behavior. The Constitution is a control to the immense powers of the government,[1] ultimately acting through individuals. Some statutes are promulgated to deter and punish acts or omissions frowned upon by society.[2] On one side of the coin, these laws limit the permissible range of actions of an individual that are harmful to others. On the other side, these legislations aim to protect the innocent and the weak, as well as to prevent the creation of victims or to vindicate their rights.

Philippine law recognizes the existence of the right to be presumed innocent.[3] Related to this right is the opportunity to post bail before conviction.[4] Yet, the stay of the accused, also known as persons deprived of liberty, seems to act as punishment even before they are finally adjudged guilty or acquitted due to congestion of our detention facilities. As of September 2022, the average congestion rate of jails across the country is at 370% or five detention prisoners in every 4.7 m^2 cell area.[5] This is far from the ideal maximum of one detainee per 4.7 m^2 cell area, the model habitable floor area of each detainee under the implementing rules and regulation of The Bureau of Corrections Act of 2013.[6] To help address this problem, it is necessary to minimize the detention time of a person charged with an offense and still awaiting the final verdict by the courts.

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[1] Angara v. Electoral Commission, G.R. No. L-45081, July 15, 1936.

[2] A prime example is Act No. 3815 or the REV. PEN. CODE. It defines and punishes crimes against national security and the law of nations, the fundamental laws of the state, public order, public interest, public morals, those committed by public officers, against persons, liberty and security, property, chastity, civil status of persons, honor, and criminal negligence. Another is Rep. Act No. 9165 (2002) or the Dangerous Drugs Act of 2002 that punishes the trafficking and use of dangerous drugs and other similar substances.

[3] CONST. art. III, § 14 (2).

[4] *Id.,* §13.

[5] *See* BJMP JAIL FACILITY CONGESTION RATE STATUS AT 4.7 SQ. M. FOR EVERY PERSON DEPRIVED OF LIBERTY, September 2022, available at https://bjmp.gov.ph/images/data_and_stats/09-30-22/Congestion_Rate_sep_2022.png (last accessed Sept. 19, 2023).

[6] IRR of Rep. Act No. 10575 (2016), Rule VII, § 7 (a)(1)(1.1).

News about suspected criminal infractions is readily accessible through social media. In August 2023, a video of Wilfredo "Willie" Gonzales pulling out a gun and physically attacking a biker in Quezon City caught the attention of the public and of government officials.[7] This incident cost Gonzales his license to own and possess a firearm,[8] his police retirement benefits,[9] and his current job.[10] At the same time, he earned a criminal complaint[11] and the scrutiny of Senate.[12]

Earlier, in March 2023, Negros Oriental Governor Roel Degamo and others were shot dead in his residence in the municipality of Pamplona while attending a social welfare program.[13] The family of Governor Degamo publicly called for Arnolfo "Arnie" Teves, Jr., Negros Oriental Third District

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[7] Aaron Dioquino, *Mayor Joy orders probe in viral QC road rage video*, MANILA BULLETIN, Aug. 27, 2023, *available at* https://mb.com.ph/2023/8/27/mayor-joy-orders-probe-in-viral-qc-road-rage-video (last accessed Sept. 19, 2023).

[8] John Mendoza, *PNP revokes gun license of ex-cop in viral road rage clip*, INQUIRER.NET, Aug. 28, 2023, *available at* https://newsinfo.inquirer.net/1822960/fwd-pnp-revokes-gun-license-of-retired-cop-in-viral-road-rage-case (last accessed Sept. 19, 2023).

[9] GMA Integrated News, *Retirement pay na nakuha ng ex-cop na nagkasa ng baril sa biker, pinababalik ng PNP*, GMA NEWS, Sept. 4, 2023, *available at* https://www.gmanetwork.com/news/balitambayan/balita/881068/retirement-pay-na-nakuha-ng-ex-cop-na-nagkasa-ng-baril-sa-biker-pinababalik-ng-pnp/story/ (last accessed Sept. 19, 2023).

[10] Abby Boise et al., *Ex-cop's road rage costs him his Supreme Court job; QCPD head quits*, PHILIPPINE DAILY INQUIRER, Aug. 31, 2023, *available at* https://cebudailynews.inquirer.net/524801/ex-cops-road-rage-costs-him-supreme-court-job-qcpd-head-quits (last accessed Se. 19, 2023).

[11] Faith Argosino, *QCPD files alarm and scandal complaint vs ex-cop in road rage video*, INQUIRER.NET, Aug. 29, 2023, *available at* https://newsinfo.inquirer.net/1823440/fwd-qcpd-files-alarm-and-scandal-complaint-vs-dismissed-cop-in-rage-video (last accessed Sept. 19, 2023).

[12] Marlon Ramos, *Cyclist, 'road rage' ex-cop meet again in Senate*, PHILIPPINE DAILY INQUIRER, Sept. 6, 2023, *available at* https://newsinfo.inquirer.net/1827176/cyclist-road-rage-ex-cop-meet-again-in-senate (last accessed September 19, 2023).

[13] *Marcos: Degamo's killing 'unacceptable'*, PTV NEWS AG, Mar. 6, 2023, *available at* https://ptvnews.ph/marcos-degamos-killing-unacceptable/ (last accessed Sept. 19, 2023).

Representative who was then outside of the country, to face the accusations that he was involved in the murder.[14] Days later, the Department of Justice confirmed that Teves "appears to be" the main mastermind in killing Governor Degamo.[15] The National Bureau of Investigation later charged Teves for murder.[16] He moved for the dismissal of the complaint against him[17] and for the inhibition of the Department of Justice in the preliminary investigation of the case for alleged partiality against him.[18]In 2022, then Bureau of Corrections Chief Gerald Bantag became a suspect in the shooting that killed Percival Mabasa, also known as Percy Lapid, a journalist.[19] The Department of Justice resolved to accuse Bantag, among others, in court for murder.[20] The National Bureau of Investigation and the Department of Justice posted a P2-

[14] *Degamo kin to Teves: Come home, face charges*, PANAY NEWS, Mar. 14, 2023, *available at* https://www.panaynews.net/degamo-kin-to-teves-come-home-face-charges/ (last accessed Sept. 19, 2023).

[15] *DOJ: Teves alleged 'main mastermind' of Degamo slay*, PTV NEWS CF, April 3, 2023, *available at* https://ptvnews.ph/doj-teves-alleged-main-mastermind-of-degamo-slay/ (last accessed Sept. 19, 2023).

[16] Beatrice Puente, *HOT WATER: Teves faces multiple murder case over Degamo killing after NBI files complaint*, TV5, May 17, 2023, *available at* https://news.tv5.com.ph/breaking/read/hot-water-teves-faces-multiple-murder-case-over-degamo-killing-after-nbi-files-complaint (last accessed Sept. 19, 2023).

[17] Joel San Juan, *Teves Jr. moves for dismissal of criminal charges for killing of Degamo, 9 others*, BUSINESS MIRROR, July 18, 2023, *available at* https://businessmirror.com.ph/2023/07/18/teves-jr-moves-for-dismissal-of-criminal-charges-over-killing-of-degamo-9-others/ (last accessed Sept. 19, 2023).

[18] *Teves camp seeks DOJ inhibition from Degamo slay case*, SUNSTAR, Sept. 19, 2023, *available at* https://www.sunstar.com.ph/article/1964705/manila/local-news/teves-camp-seeks-doj-inhibition-from-degamo-slay-case (last accessed Sept. 19, 2023).

[19] Jim Gomez, *Philippine prisons chief charged in journalist's killing*, ASSOCIATED PRESS, Nov. 7, 2022, *available at* https://apnews.com/article/crime-asia-shootings-prisons-45cca8aa30ed2e96106827baaff37693 (last accessed Sept. 19, 2023).

[20] Joahna Casilao, *Online DOJ prosecutors indict Bantac, Zulueta for murder over Percy Lapid Slay*, GMA INTEGRATED NEWS, Mar. 14, 2023, *available at* https://www.gmanetwork.com/news/topstories/nation/863801/doj-prosecutors-indict-bantag-zulueta-for-murder-over-percy-lapid-slay/story/ (last accessed Sept. 19, 2023).

million reward to anyone who can provide information that can lead to the arrest and prosecution of Bantag.[21]

Members of the public may have already formed their own opinion or gut feeling on the innocence or guilt of these personalities. However, the courts have yet to decide on the culpability of these individuals who have been put to the limelight. Are persons like Gonzales, Teves, Bantag, or anyone who has not yet been convicted of a crime by a competent court entitled to the presumption of innocence? To what extent do they, or any person accused of committing a criminal offense, benefit from this presumption?

The presumption of innocence, as a constitutional right, mandates the government to treat an accused as blameless before the finality of his conviction. Though an accused's freedom may be restricted to ensure his attendance in trial, curtailing his right to liberty must be minimized. Existing rules on bail and recognizance seek to limit the constraint to liberty of an accused preventively detained. The efficacy of these rules in securing the freedom of an accused in cases where bail is not a matter of right may be further enhanced by hearing and deciding applications for bail in a summary fashion.

Part I of this paper surveys the existing literature on the presumption of innocence in the Philippines and in foreign jurisdictions. Part II examines how Philippine laws protect the right to be presumed innocent of persons accused with an offense. Part III explores the problems of preventive detention and offers a proposal for a speedy procedure to settle petitions for bail as a possible solution. This paper concludes by reflecting on the legal situation presently faced by a detained accused and suggesting a way towards lessening the impingement on his liberty only to the point necessary.

[21] Gaea Cabico, *Reward up for info on Bantag, Villamor over Percy Lapid killing*, PHILSTAR.COM, June 19, 2023, *available at* https://www.philstar.com/headlines/2023/06/19/2275042/reward-info-bantag-villamor-over-percy-lapid-killing (last accessed Sept. 19, 2023).

I. THE CONCEPT OF PRESUMPTION OF INNOCENCE

Under Philippine law, the constitutional right to the presumption of innocence is a procedural guarantee that sets the threshold of conviction for criminal cases; it is not a source of substantive rights. The similar carceral conditions between detainees awaiting trial and of convicts may already serve as punishment for the former.[22]

The Supreme Court first declared the right to be presumed innocent in *United States v. Asiao*,[23] when the Philippines was still under American hegemony.[24] In the United States, the presumption of innocence is a doctrine that deals with the allocation of the burden of proof.[25] The same can be said of the United Kingdom, where the prosecutor also has the duty to prove the accusation against an accused.[26]

The presumption of innocence prohibits the factfinder from factoring into the determination of guilt circumstances that are not part of the evidence such as official suspicion, or the fact of the accused being custody or undergoing trial.[27] The presumption is also viewed as showing the respect due to the accused by withholding judgment of being a wrongdoer without very powerful proof,[28] and a practical attitude that guides actors in the justice system in the conduct of their duties.[29] This presumption is characterized as a propositional imagining of an accused's

[22] Allan Nadate, *Articulating the Right to the Presumption of Innocence as a Constitutional Imperative for Critical Carceral Reforms*, 91 PHIL. L.J. 135 (2018).

[23] G.R. No. 310, July 30, 1902.

[24] Allan Nadate, *supra* note 22.

[25] Bell v. Wolfish, 441 U.S. 520, 533 (1979).

[26] Sheldrake v. DPP, 1 AC 264, 292-293 (2005).

[27] Richard Friedman, *A Presumption of Innocence, Not of Even Odds*, 52 STAN. L. REV. 873, 880 (2000), *citing* Taylor v. Kentucky, 436 U.S. 478, 485 (1978).

[28] Victor Tadros, *The Ideal of the Presumption of Innocence*, 8 CRIM. L. AND PHIL. 449, 458-59 (2014).

[29] Pamela Ferguson, *The Presumption of Innocence and its Role in the Criminal Process*, 27 CRIM. L. FORUM 131 (2016).

innocence that motivates behavior as if such person was innocent.[30]

This presumption operates in United States courts only during trial. However, there are proposals to apply it even during pretrial by limiting pretrial restraints on proper bases, such as ensuring the accused's attendance during trial, protecting the legal process from interference by the defense, and protecting the facility where an accused is detained.[31] Alternatively, the presumption of innocence may be characterized as protection from excessive punishment of even convicted persons, either through legislative enactment or during sentencing.[32]

Posner proposes that the trier of fact, to be considered unbiased, must believe that that there is a 50% probability that the prosecution's case has merit.[33] Kaye and Balding offer another perspective that the presumption of innocence means that the factfinder must consider the accused as no more likely guilty as anyone else. In probabilistic terms, this translates to a small but non-zero probability prior the introduction of any evidence.[34]

A study in the United States indicates that potential jurors believe that the supposed accused is probably guilty with 50% chance before the introduction of evidence.[35] A later experiment found that jurors who are instructed to presume an accused innocent do so, while those not instructed considered official suspicion and the fact of being charged as evidence of guilt.[36]

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[30] Forest Yu, *Putting the 'Presumption' Back in the 'Presumption of Innocence'*, 26 INT'L J. OF EVID. & PROOF 342 (2022).

[31] Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723 (2011).

[32] Patrick Tomlin, *Could the Presumption of Innocence Protect the Guilty?*, 8 CRIM. L. AND PHIL. 431, 432 (2014).

[33] Richard Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L.REV. 51 1477, 1514 (1999).

[34] David Kaye and David Balding, *Probability and Proof in State v. Skipper: An Internet Exchange*, 35 JURIMETRICS J. 277, 293 (1995).

[35] Nicholas Scurich et al., *Quantifying the Presumption of Innocence*, 15 L. PROBABILTY AND RISK 71 (2016).

[36] Nicholas Scurich and Richard John, *Jurors' Presumption of Innocence*, 46 JOURNAL OF LEGAL STUDIES 187 (2017).

To ensure that preventive detention does not become a punishment, Kitai-Sangero proposed that there must be that:

> 1) strong evidence of dangerousness;
> 2) such must be for a limited time;
> 3) there be proportionality as to the nature of the risk posed to the public and the degree of harm to the individual;
> 4) the detainee be compensated for the deprivation of liberty; and
> 5) the conditions of confinement be pleasant.[37]

II. LEGAL MECHANISMS UPHOLDING THE RIGHT TO BE PRESUMED INNOCENT

A. The Mechanics and Application of the Presumption of Innocence in the Philippines

Flowing from the constitutional guarantee of the right to be presumed innocent,[38] the public prosecutor representing the *People of the Philippines* in whose behalf criminal cases are brought, has the burden of proof in a criminal litigation.[39] The presumption is rebutted only if the prosecution established the guilt of the accused with proof beyond reasonable doubt.[40] The prosecution must prove every element of the crime charged in the *information* to merit a guilty verdict or for any other crime necessarily included therein.[41] Moreover, the conviction of the accused must not rely on the weakness of the defense, but on the strength of the prosecution.[42]

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[37] Rinat Kitai-Sangero, *The Limits of Preventive Detention*, 40 MCGEORGE L.REV. 903, 904 (2016).

[38] CONST. art. III, § 14 (2).

[39] People v. Arposeple, G.R. No. 205787, Nov. 22, 2017.

[40] People v. Luna, G.R. No. 219164, March 21, 2018. Proof beyond reasonable doubt has been defined in RULES OF COURT, Rule 133, § 2 as requiring only moral certainty, or that degree of proof which produces conviction in an unprejudiced mind.

[41] *Id.*

[42] People v. Ferrer, G.R. No. 213914, June 6, 2018.

The prosecution evidence, by itself, must be strong enough to overcome the presumption even before the court considers the defenses of the accused.[43] Unless the prosecution discharges its burden of proof, the accused would be entitled to an acquittal.[44]

This presumption of innocence has, for numerous times, been pitted against the presumption of regularity in the performance of duty. The latter presumption provides that a public officer shall not be civilly liable for acts done in the performance of his official duties, unless there is a clear showing of bad faith, malice or gross negligence.[45] The presumption of regularity in the performance of official duty is a disputable presumption under the Rules of Evidence.[46]

The presumption of regularity is important because: *first*, innocence is presumed; *second*, an official oath "will not be violated"; and, *third*, a republican form of government will collapse unless controversies are restricted, and a certain level of trust and confidence is reposed in governmental departments or agents by every other such department or agent, "at least to the extent of such presumption."[47] Presuming regularity is an evidentiary tool to avoid establishing every detail of the performance of duties by government officials.[48] While essential in the function of government, the constitutional presumption of innocence trumps the presumption of regularity in the performance of official duty.[49] Government authorities cannot hide behind the presumption of regularity, especially when lapses in the observance of the law were committed lapses in the conduct of official duties.[50]

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[43] People v. Abdula, G.R. No. 212192, Nov. 21, 2018.

[44] Marcos v. Sandiganbayan, G.R. No. 126995, Oct. 6, 1998 (res.), *citing* People v. Ganguso, G.R. No. 115430, Nov. 23, 1995.

[45] ADM. CODE, § 38 (1).

[46] RULES OF COURT, Rule 131, § 3 (m).

[47] People v. Reyes, G.R. No. 199271, Oct. 19, 2016, *citing* People v. Mendoza, G.R. No. 192432, June 23, 2014.

[48] Casona v. People, G.R. No. 179757, Sept. 13, 2017.

[49] People v. Belmonte, G.R. No. 224588, July 4, 2018. *See* People v. Mola, G.R. No. 226481, Apr. 18, 2018; People v. Battung, G.R. No. 230717, June 20, 2018.

[50] People v. Supat, G.R. No. 217027, June 6, 2018; People v. Fatallo, G.R. No. 218805, Nov. 7, 2018; People v. Rivera, G.R. No. 225786, Nov. 14, 2018; People v.

Further, the presumption may function as a tiebreaker in the legal "truth contest" between the state and the accused. When the scale of evidence hangs equally, the presumption weighs in and tilts the verdict in favor of the accused under the equipoise rule.[51]

Included in the presumption is the right to liberty and to freedom of movement.[52] It is fundamentally subsumed in the right of every person not to be held answerable for a criminal offense without due process of law.[53] This presumption can even be treated as an additional buffer against governmental breach of one's liberty of abode[54] and of the right against cruel, degrading, or inhuman punishment.[55]

> Any person within Philippine territory benefits from this presumption. By any person means *anyone*, not only those who are arrested or detained, or those charged with a criminal offense, or those undergoing trial, or those whose cases are for promulgation of judgment, or even those who are convicted and are appealing their conviction.[56] While the constitutional right to be presumed innocent is textually limited to criminal proceedings, the Supreme Court it even to administrative cases involving lawyers,[57] judges[58] and

Dela Cruz, G.R. No. 234151, Dec. 5, 2018; People v. Caranto, G.R. No. 217668, Feb. 20, 2019.

[51] People v. Urzais, G.R. No. 207662, Apr. 13, 2016.

[52] People v. O'Cochlain, G.R. No. 229071, Dec. 10, 2018.

[53] Ocampo v. Enriquez, G.R. No. 225973, Aug. 8, 2017 (res.), citing CONST. art. III, § 14 (1).

[54] CONST. art. III, § 6.

[55] CONST. art. III, § 19 (1).

[56] Ocampo v. Enriquez, G.R. No. 225973, Aug. 8, 2017 (res.).

[57] Goopio v. Maglalang, A.C No. 10555, July 31, 2018; Lampas-Peralta v. Ramon, A.C. No. 12415, March 5, 2019; Tiongson v. Flores, A.C. No. 12424, Sept. 1, 2020; Capinpin v. Espiritu, A.C. No. 12537 (res.), Sept. 3, 2020; Moya v. Oreta, A.C. No. 13082, Nov. 16, 2021; Gonzaga v. Abad, A.C. No. 13163, March 15, 2022; McKinney v. Bañares, A.C. No. 10808, Apr. 25, 2023.

[58] *Re* Abul, A.M. No. RTJ-17-2486, Sept. 8, 2020; Delagua v. Batingana, A.M. No. RTJ-20-2588, Feb 2, 2021.

court employees,[59] detained persons before military tribunals,[60] and employees in labor cases.[61]

B. Laws and Rules Upholding the Presumption of Innocence and Related Rights

There are laws and rules protecting the rights of the accused or those detained exist, in keeping with their right to be presumed as innocent. These protections attach from the moment a person is taken into custody and is singled out as a suspect in the commission of an offense, when law enforcement begin asking questions on a person's participation or to elicit an admission.[62] Meanwhile, the deprivation of liberty after due process of law starts only upon execution of a final conviction.[63]

1. Rights of Persons Arrested, Detained or Under Custodial Investigation (R.A. No. 7438)

Republic Act No. 7438 details the rights of persons arrested, detained, or under custodial investigation and the concomitant duties of their arresting, detaining, or investigating officers set out in the Constitution.[64] Under this statute, persons arrested, detained, or under custodial investigation are guaranteed the right to counsel.[65] Said persons have the right to be informed of their right to remain silent and to have their own or be provided with competent and independent counsel.[66] It is also the duty of the investigating officer to reduce into writing the custodial investigation report, which must be understood and signed or thumb marked by the arrested or detained persons, as assisted by

[59] Son v. Salvador, A.M. No. P-08-2466, Aug. 13, 2008.

[60] *In re* Go v. Olivas, G.R. No. L-44989, Nov. 29, 1976; and *In re* Romero v. Enrile, G.R. No. L-44613, Feb. 28, 1977.

[61] Gubac v. NLRC, G.R. No. 81946, July 13, 1990; Gargoles v. Del Rosario, G.R. No. 158583, Sept. 10, 2014.

[62] People v. Cabanada, G.R. No. 221424, July 19, 2017.

[63] RULES OF COURT, Rule 114, § 22 (2).

[64] Specifically, Rep. Act No. 7438 (1992) can be viewed as an implementing law of CONST. art. III, § 12.

[65] Rep. Act No. 7438 (1992), § 2 (a).

[66] § 2 (b).

counsel.[67] The law also requires that an extrajudicial confession or waiver of the right against delay in the delivery to judicial authorities be in writing and signed in the presence of counsel.[68] Covered persons also have the right to visitations by their immediate family, counsel, or non-government organizations.[69] Violation of these rights is punishable by fine and imprisonment.[70]

2. Regulations on the Right to Bail

Next, consistent with the right to be presumed innocent, the Constitution guarantees the right—though qualified—to bail before conviction, even when the privilege of the writ of *habeas corpus* is suspended.[71] The Rules of Court regulate the right to bail.[72] Bail is the security given for the release of a person in custody of the law, furnished by them or a bondsman, to guarantee their appearance before any court as required under the conditions specified in the rules. It may be a corporate surety, property bond, cash deposit, or recognizance.[73]

A person arrested has the right to bail with sufficient sureties before or after conviction by first-level courts[74] and before conviction by Regional Trial Courts (RTCs) for an offense not punishable by death, *reclusion perpetua*, or life imprisonment.[75] On the other hand, the grant of bail for a convict of an offense not punishable by death, *reclusion perpetua*, or life imprisonment, rests on the sound discretion of the RTC.[76] The judge has the duty

[67] § 2 (c).
[68] § 2 (d) and (e).
[69] § 2 (f).
[70] § 4
[71] CONST. art. III, § 13.
[72] RULES OF COURT, Rule 114.
[73] *Id.,* § 1.
[74] The first-level courts are the Metropolitan Trial Courts, Municipal Trial Courts in Cities, Municipal Trial Courts, and Municipal Circuit Trial Courts created under Batas Blg. 129 (1981), ch. III.
[75] RULES OF COURT, Rule 114, § 4.
[76] Rule 114, § 5.

to fix a reasonable amount of bail considering, among others, the circumstances of the accused and of the offense charged.[77]

Public prosecutors, in their duty to assist the courts in determining the amount of bail to be granted, are guided by the 2018 Bail Bond Guide in recommending bail for the provisional liberty of an accused. The recommended bail, depending on the offense charged, may be none or up to a maximum of P200,000.00.[78] When the accused is an indigent, prosecutors are enjoined to recommend as bail only half of the amount as stated in the 2018 Bail Bond Guide or P10,000.00, whichever is lower.[79] The presumption of innocence terminates and the constitutional right to bail ends after conviction by the trial court.[80] The bail of an accused is cancelled upon his surrender to the authorities, his demise, his acquittal, the dismissal of the case against him, or the execution of the judgment against him.[81]

3. Recognizance Act of 2012 (R.A. No. 10368)

Aside from posting bail, a person under legal custody may also be released on his own or on another responsible person's recognizance.[82] A person preventively detained for a period equal to or more than the minimum of the principal penalty for the offense charged, without application of the Indeterminate Sentence Law or any modifying circumstance, shall be released on reduced bail or recognizance, at the discretion of the court.[83] The law requires courts to allow the release of a detained accused who is unable to post bail due to abject poverty.[84]

[77] Rule 114, § 9.

[78] DOJ Circ. No. 13, s. 2018.

[79] DOJ Circ. No. 11, s. 2023.

[80] Leviste v. Court of Appeals, G.R. No. 189122, March 17, 2010, *citing* Obosa v. People. G.R. No. 114350, Jan. 16, 1997 & Yap v. Court of Appeals, G.R. No. 141529, June 6, 2001.

[81] RULES OF COURT, Rule 114, § 22.

[82] Rule 114, § 15.

[83] Rule 114, § 16 (3).

[84] Rep. Act No. 10389 (2012), § 3.

Collectively, the rights of detainees, the right to bail and to be released on recognizance temper the prerogative of the state to capture a possible criminal. The law directs public officers to guarantee full respect of a detainee's rights.[85] The right to bail, in particular, relieves an accused from the rigors of imprisonment until conviction while securing his appearance at the trial.[86] The provisional liberty proceeding from posting bail may assist the accused in proving innocence and obtaining acquittal,[87] since they can personally attend to mounting defense and preserving evidence in their favor—things one can hardly do behind bars. More importantly, while on bail or recognizance, an accused can still relish ordinary liberties, albeit regulated by the conditions of said bail.

However, bail is not an absolute right. A person accused of a crime punishable by death, *reclusion perpetua*, or life imprisonment may be denied bail when evidence of guilt is strong.[88] The prosecution has the burden to show this strong evidence of guilt.[89] No law or rule specifies limits on how long the prosecution may show that the evidence of guilt is strong for the purpose of granting or denying bail. This time may stretch to the entire presentation of the prosecution's evidence until it rests its case. Thus, the number of days—or years—of preventive detention of an accused who is still presumed innocent is in the hands of the prosecution.

III. THE PUNITIVE EFFECT OF PROLONGED PREVENTIVE DETENTION IN CONGESTED JAILS: PROBLEMS AND POSSIBLE SOLUTIONS

A. The Problem: Preventive Detention and Jail Congestion

Persons deprived of liberty are presumed innocent by law, yet are detained in dire conditions due to the length of preventive detention and the congestion problem in our jails. These inmates

[85] Rep. Act No. 7438 (1992), § 1.
[86] Paderanga v. Court of Appeals, G.R. No. 115407, Aug. 28, 1995.
[87] Nava v. Gatmaitan, G.R. No. L-4855, Oct. 11, 1951.
[88] RULES OF COURT, Rule 114, § 7.
[89] Rule 114, § 8.

are not convicted felons but only accused of a wrongdoing. While still presumed innocent, they are already uprooted from their daily lives and forced to live in inhumane conditions for days, if not for years.

Preventive detention of a person charged with an offense is considered a measure to assure his attendance in trial.[90] Deprivation of liberty of this kind may also serve to prevent the detainee from causing public harm.[91] The arrest and temporary detention of accused persons is not considered as a penalty.[92] On the other hand, imprisonment after conviction is a penalty that seeks to repress undesirable behavior[93] and reform and rehabilitate offenders.[94] The period of preventive detention is considered and deducted from the term of imprisonment guilt is legally established.[95]

The duration of preventive detention varies. A person charged and found guilty of murder and frustrated murder arrested in 2005 and was finally convicted in 2009 suffered more than four years of preventive detention.[96] In another case, a person acquitted for illegal sale of dangerous drugs was preventively detained for seven years.[97] An accused for murder, later found guilty for death inflicted under exceptional circumstances,[98] suffered detention before conviction for almost 12 years.[99] Individuals charged with rebellion were under detention for more than 18 years and seven months before they were convicted.[100]

[90] Enrile v. Sandiganbayan, G.R. No. 213847, Aug. 18, 2015.

[91] Rinat Kitai-Sangero, *The Limits of Preventive Detention*, 40 MCGEORGE L. REV. 903, 904 (2016).

[92] REV. PEN. CODE, art. 24 (1).

[93] Art. 5 (1).

[94] International Covenant on Civil and Political Rights, Dec. 19, 1966 (Oct. 23, 1986), U.N.T.B.D.

[95] REV. PEN. CODE, art. 29.

[96] People v. Lacaden, G.R. No. 187682, Nov. 25, 2009.

[97] People v. Romano, G.R. No. 224892 (Notice), June 15, 2020.

[98] REV. PEN. CODE, art. 247.

[99] People v. Bastasa, G.R. No. L-32792, Feb. 2, 1979.

[100] Baking v. Director of Prisons, G.R. No. L-30364, July 28, 1969.

Further, jails are congested. As of September 30, 2022, the Bureau of Jail Management and Penology reports that the average nationwide congestion rate of its facilities is at 370% or five detainees in every 4.7 m^2 cell area. The regions with the most congested jails are Region IV-A with an average congestion rate of 698%, followed by National Capital Region at 638%, and Region IX at 509%. The most congested jail facility is the Dasmariñas Female Dormitory in Region IV-A that has a 2,720% congestion rate or 28 detainees staying at a 4.7 m^2 cell area at a given time.[101] Worse, only about 18% of pretrial detainees are eventually convicted while the remaining 82% are acquitted or have their cases dismissed.[102] A majority of these detainees already served the time equivalent to their imposable penalties, even if later acquitted.[103]

To emphasize, the duration of detention is beyond the control of an accused in a crime punishable by death, *reclusion perpetua*, or life imprisonment. Rather, it rests with the hands of the judge who grants or deny bail, and equally with the prosecutor that intends to prove that the inmate's guilt is strong. While there is no statute or rule that limits the period in bail hearings for the prosecution to establish that strong evidence of guilt, it might be impractical to fix such a period for determination as they have heavy caseloads. Still, it is an injustice to and already a denial of the right to be presumed innocent to suffer imprisonment for an indefinitely long time inside congested jails.

At present, it is not unusual for the prosecution to present all its witnesses for the bail petition and adopt the same as its evidence for the entire case. For courts with a clogged docket, a case may be calendared for hearing once a month, at most.

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[101] *BJMP Jail Facility Congestion Rate Status at 4.7 sq. m. for every Person Deprived of Liberty as of September 30, 2022*, BJMP, *available at* https://bjmp.gov.ph/images/data_and_stats/09-30-22/Congestion_Rate_-_sep_2022.png (last accessed Sept. 19, 2023).

[102] Raymund Narag, *Freedom And Death Inside The Jail*, xvi (2005).

[103] Raymund Narag, *Understanding Factors Related to Prolonged Trial of Detained Defendants in the Philippines*, INT'L J. OF OFFENDER THERAPY AND COMP. CRIMINOL. 1, 13 (2017).

Assuming that there is no resetting, this translates to roughly one witness per month. Yet during this period, the accused is detained.

The interests of the state and of the individual then appear to be at loggerheads. For the prosecution, it is to ensure the attendance of the accused during trial. On the part of the individual charged with an offense punishable by death, *reclusion perpetua*, or life imprisonment, it is to enjoy the presumption of innocence and not to be incarcerated without due process of law.

B. A Possible Solution: Summary Hearing of Bail Cases

To strike a balance between these competing interests, it is recommended that the hearing of a petition for bail in such cases be made summarily. The prosecution may be required to submit affidavits of its witnesses and other pieces of evidence, documentary or object, to substantiate its claim that there is strong possibility that the accused committed the offense. To shorten the proceedings, the affidavits of witnesses may serve as the direct testimony of the prosecution witnesses for the bail hearing. The accused may then be allowed to propound questions, through written interrogatories, to the select prosecution witnesses. Such presentation of witnesses through affidavits may be made in one or in successive days. Hearings for petitions for bail may even be given preference in scheduling over cases where a decision on bail was already granted. At all times, the judge must have control of the proceedings.

Based on the evidence produced by the prosecution, the judge may determine the suitability of granting or denying bail within 30 days from date of the first hearing.[104] When bail is granted, the state may move for reconsideration for five days, and the motion is to be resolved in another 10 days.[105] Should the challenge of the prosecution be unsuccessful, the accused must be immediately entitled to provisional release, unless detained for other lawful causes. With this timeline—and considering the

[104] *See* OCA Circ. No. 243-2022.
[105] *Id.*

number of witnesses to be examined and the caseload of the court—the release of an accused facing weak evidence may be had in about two months.

Under this proposal, the pieces of evidence adduced during the bail hearings will form part of the evidence for the prosecution for the entire case. After the bail hearing phase, the prosecution may produce additional evidence in support of its duty to prove the accused's guilt beyond reasonable doubt.

CONCLUSION

The presumption of innocence, under Philippine law, is a constitutional right. Laws and rules are in place to promote the right to be presumed innocent in the Philippine legal system, along with other fundamental rights such as the right to liberty. While the government has the legitimate interest of securing the attendance of the accused during trial and upon passing of judgment, this interest must not weigh heavily upon the freedom of the accused who, under the eyes of the law, is still blameless.

Even if preventive detention of the accused is not intended as a penalty but to serve public interest, it practically becomes punitive due to the prolonged deprivation of liberty for months or years. The length of preventive detention punitive is exacerbated by jail congestion. The resulting punitive nature of preventive detention is intensified for individuals accused of crimes punishable by death, *reclusion perpetua*, or life imprisonment, as the earliest opportunity for them to post bail depends on the duration of the presentation of prosecution evidence and on how full is the docket of the court.

Hastening bail proceedings may remedy the dire situation of prolonged detention in inhumane conditions of persons still presumed innocent. Doing so will respect their guaranteed constitutional rights as accused by being held only for a time necessary for the court needs to make a determination of the propriety of bail. Such is not to primarily enable the accuser to establish their case beyond reasonable doubt. Likewise, the

requirement of the state to secure the attendance of the accused during trial and ensure the safety of society are met. Expediting the resolution of petitions for bail may also help in decongesting jails by allowing deserving detainees freedom within months—not years—while awaiting the court's judgment.

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RESTRICTING POST-SENTENCE CONFINEMENT TO HIGH-RISK CONVICTIONS

Jamie Katherine L. Sio[*]

ABSTRACT

The reality of the deplorable and deteriorating living conditions of prisoners places the Philippine Corrections System in a *state of humanitarian emergency*. As prison-level solutions continue to fail in addressing the problem of prison overcrowding, there arises the fundamental need to reform sentencing research and policy for effective prison decongestion through the reduction of the continuous inflow of inmates and the enactment of alternative forms of commitment.

This paper presents proposed policy changes on the proportionality of crime and punishment in an attempt to solve the mismanaged and overcrowded incarceration system in the Philippines by adjusting the current penalty system to a new model that performs risk assessments of the defendant's behavioral autonomy in order to justify post-sentence detention or diversion programs. This new system of classification based on the criminogenic factors of behavioral autonomy and risk of harm and dangerousness can replace the current sentence-based classification while maintaining correction and reformation as the purpose of punitive detention.

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Arguments on post-sentence confinement center significantly on the deprivation of substantive or procedural due process of offenders, which remain as the main constitutional consideration for its adoption as an additional rehabilitative and preventive measure in the sentencing system of the Philippines. Sentencing decision-making should be guided by the recognition that it is processual, interpretive and performative of expected roles on fairness in post-sentence criminal due process.

INTRODUCTION

An offender must be afforded his or her rights throughout the stages of the Philippine criminal justice system that is composed of 1) *law enforcement,* for the prevention and control through the enforcement of law and arrest of offenders, 2) *prosecution,* for the investigation and determination of probable cause, 3) *courts,* for proof of the innocence or guilt of the accused, 4) *corrections,* for the reformation and rehabilitation of persons deprived of liberty (PDLs), and 5) *community,* for the reintegration of the convicted offender to society. Systemic issues arise from each stage with the Philippine Corrections System having the largest and most longstanding crisis of prison overcrowding, which the International Committee of the Red Cross (ICRC) has described to be in a state of "humanitarian emergency[1]."

A denial of human dignity appears from the two to 32[2] PDLs occupying a 4.7-square meter cell area underlying the range of one to 2,699[3] congestion rates[4] of BJMP jails as of May of 2021. A "jail," as distinguished from a "prison," is a Department of Interior and Local Government (DILG)-supervised place of confinement for inmates undergoing trial or serving short-term sentences. *Prisons*—used here as a generic term covering the large range of

[1] Marianne Dardard, Système D dans les prisons surpeuplées des Philippines, LE TEMPS, May 6, 2016.

[2] Joy Datan, Congestion Rate, BUREAU OF JAIL MANAGEMENT AND PENOLOGY: DATA AND STATISTICS (2021).

[3] *Id.*

[4] Definition: 1-(actual occupancy/ideal capacity) × 100.

places of detention—refer to the national prisons or penitentiaries managed by the Bureau of Corrections. Irrespective of the sentencing status of PDLs, common to all these places of detention is the continuing increase in prison population that cruelly opposes the preconceived notions of what can be humanly tolerated.

The correction and rehabilitation of PDLs is a human rights issue. The Philippines has, as a party to specific international human rights instruments that provide for the norms, standards, and principles for the protection of the basic rights of prisoners and detainees, adopted several of these standards and principles as already embodied in the Bill of Rights[5], several national statutes, jurisprudence, and rules and regulations that ensure that the human rights of inmates are protected, promoted, and respected.

Consistent with its constitutionally-declared policy that "[t]he State values the dignity of every human person and guarantees full respect for human rights[6]" and that "[t]he Philippines… adopts the generally accepted principles of international law…[7]" the Philippines adheres to the International Covenant on Civil and Political Rights,[8] the UN Standard Minimum Rules for the Treatment of Prisoners,[9] and other international human rights instruments that define and guarantee the rights of PDLs. Section 19, Article III of the 1987 Constitution further mandates "[t]he use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law". In the

[5] CONST. art. III.

[6] CONST. art. II, § 2.

[7] CONST. art. II, § 2.

[8] "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." International Covenant on Civil and Political Rights (ICCPR), March 23, 1976, 999 UNTS 171, art. 10.

[9] "All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times." UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), resolution/adopted by the General Assembly, A/RES/70/175, Jan. 8, 2016, Rule 1.

pursuit of changes in the corrections system as mandated by these Constitutional provisions and international standards, the government has undertaken and continues to take several concrete measures to improve prison conditions and the treatment of offenders, but studies[10] show the inadequate management of the corrections system results in the system lagging behind the government's machinery for corrections and restoration activities.

> All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.[11]

Commonly accepted recommendations and standards[12] provide that there should be a maximum of five or six people to a 20-square meter cell. While overcrowded prisons with 40 to 100 are categorized to be critical situations, the 32 people to a 4.7-square meter cell area in the Philippines translates to 136 people to a 20-square meter area widening the gap in the duty of care required for human beings and underscoring the "humanitarian emergency" that inexorably worsens year after year.

DETENTION RULES IN EXISTING PHILIPPINE PENAL LAWS

A crime is the punishable contravention or violation of the limits on human behavior as imposed by national criminal legislation[13]. Imprisonment as a punishment is imposed on offenders based on the nature of crime and their corresponding penalties. Crimes under the Revised Penal Code of the Philippines (RPC) are classified[14] into the four different titles of 1) crimes

[10] Mildred Alvor, *The Philippine Corrections System: Current Situation and Issues*, US DEPARTMENT OF JUSTICE (2005).

[11] On accommodation, *UN Standard Minimum Rules for the Treatment of Prisoners*.

[12] Vincent Balloon, *Overcrowding: Nobody's fault? When some struggle to survive waiting for everyone to take responsibility*. INTERNATIONAL REVIEW OF THE RED CROSS (2016).

[13] United Nations Office on Drugs and Crime, *International Classification of Crime for Statistical Purposes (ICCS)*, Mar. 2015.

[14] H. No. 2300, 16th Cong. (2013). Philippine Code of Crimes.

against the State, 2) crimes against persons, 3) crimes involving marriage, and 4) crimes against property. The RPC punishes crimes for the purposes of retribution, deterrence, correction, and reformation of prisoners and detainees. The distinction between prisoners and detainees dictates the corresponding detention facilities where they shall be placed, and such distinction lies on their sentences and their position in the stages of the corrections system.

A *prisoner* is an inmate who is convicted by final judgment of the court. Generally, prisoners sentenced to a prison term of three years or less are housed in jails, while those sentenced for a longer term must stay in penitentiaries. According to the length of their sentence, prisoners are grouped into classes[15]: 1) *Insular or national prisoners,* those sentenced to a prison term of three years and one day to death and must serve their sentence in the penal institutions of the Bureau of Corrections; 2) *Provincial prisoners*, those sentenced to a prison term of six months and one day to three years and must serve their sentence in the provincial jail under the Office of the Governor; 3) *City prisoner*s, those sentenced to a prison term of one day to three years and are committed to city jails managed by the BJMP; and 4) *Municipal prisoner*s, those sentenced to a prison term of one day to six months and are committed to municipal jails managed by the BJMP.

A *detainee* is an individual accused before a court or authority and is temporarily confined in jail though he or she has not yet been convicted of a crime. There are three types of detainees[16]: 1) those undergoing investigation; 2) those awaiting or undergoing trial; and 3) those awaiting final judgment.

The corrections system is founded on the theory that persons who are charged or convicted of crimes are segregated from society to promote public order and safety while giving them the opportunity to be corrected, rehabilitated, or reformed. While detained, prisoners and detainees must retain human rights and fundamental freedoms, aside from those limited by the fact of

[15] BJMP COMPREHENSIVE OPERATIONS MANUAL, Rule II, § 17.
[16] BJMP COMPREHENSIVE OPERATIONS MANUAL, Rule II, § 18.

their incarceration, set out for them in national and international human rights instruments. These rights include the right to be treated in a humane manner, the right to be protected from cruel, inhumane, degrading treatment and punishment, including sexual violence and other forms of torture, the right to fair and humane treatment which enables the maintenance of self-respect, and the right to a prison program which enhances their social and intellectual abilities.

When the courts of law find the accused guilty of a felony, a sentence is imposed upon him or her based on the prescribed penalty of the corresponding penal law. The current sentence-based classification system for the admission to penal institutions refers to the Revise Penal Code or Special Penal Laws in determining the proportionality of the length of the period of detention to the crime for which offenders are convicted.

The Revised Penal Code

The RPC is the Philippines' principal criminal code defining felonies and their corresponding penalties. A distinct aspect of the RPC is its appreciation of *aggravating*, *exempting*, and *mitigating* circumstances that affect the gradation of penalties into *minimum*, *medium*, and *maximum* periods particularly of imprisonment. The percentage of crimes punishable by each degree of imprisonment against the total number of felonies punishable by imprisonment is summarized in *Table 1*.

Table 1. Applicable Penalties as a Percentage of the Total Number of Felonies under the RPC

Penalty	**Percentage of Felonies against Total Number of Felonies Punishable by Imprisonment,** (%)
Reclusion perpetua	*6.13*
Reclusion temporal	*9.20*
Prision mayor	*17.18*
Prision correccional	*38.95*
Arresto mayor	*29.45*
Arresto menor	*7.06*

It can be derived from *Table 1* that prison sentence of at least 36% (from *arresto mayor* and *arresto menor*) of all felonies shall be served in jails for short-term sentences of less than three years, while at least 32% (from *reclusion perpetua* to *prision mayor*) are those sentenced for a longer term and must stay in penitentiaries. The figures shall further adjust depending on the applicable minimum, medium, or maximum periods, as determined by the application of the Indeterminate Sentence Law[17], imposed on crimes punishable by *prision correccional*. As of September 2022, the BJMP has reported that of the 131,311 total number of PDLs, 90% are detainees and 7% are sentenced to three years and below, while only 3% are insular prisoners.[18]

The Philippine Statistics Authority has reported theft as the leading crime at 32.88% of the total reported crimes since 2020, followed by physical injuries and robbery at 28.82% and 14.59%, respectively.[19] The numbers justify these crimes' inclusion in the Philippine National Police's (PNP) seven focus crimes of murder, homicide, physical injury, rape, robbery, carnapping, and theft, which constitute "index crimes" defined as crimes that are serious in nature and occur with sufficient frequency and regularity. The periods for the sentences of these index crimes, with their corresponding penalties in proportion to the total reported crimes in 2020, are summarized in *Table 2.*

Table 2. Seven Focus Crimes of the Philippine National Police

Index Crime	**Range of Penalties**	**As a percentage of the Total Reported Crimes in 2020[20]** (%)
Murder	*Reclusion temporal* to *reclusion perpetua*	15.55

[17] The Indeterminate Sentence Law (Act 4225, as amended by Rep. Act. 4203) finds application in prison sentences for offenses punished by the REV. PEN. CODE, except those under § 2 thereof.

[18] *BJMP Actual Jail Population Data,* Bureau of Jail Management and Penology, Sept. 13, 2022.

[19] 2021 Philippines in Figures, Philippine Statistics Authority (2021).

[20] *Id.*

Homicide	*Reclusion temporal*	3.78
Rape	*Prision mayor* to *reclusion perpetua*	5.57
Carnapping[21]	*Reclusion perpetua*	6.81
Robbery	*Pricion correccional* (max) to *reclusion perpetua*	14.59
Physical Injuries	*Serious – Arresto mayor* to *prision mayor* *Less serious – Arresto mayor* to *prision correccional* *Slight – Arresto menor*	28.82
Theft	*Arresto menor* to *Prision mayor*	32.88

Special Penal Laws

In measuring crime volume, crimes are classified into index and non-index categories. Non-index crimes, in contrast with index crimes, are those with no marked regularity and seldom find report in police files. Non-index crimes include the violation of special penal laws and all other crimes under the RPC that are not categorized as index crimes. The imposition of imprisonment as a penalty for non-index crimes from special laws is similarly provided by their statutes.

An analysis of special penal laws shows that the imposed periods for imprisonment are directly proportional to the perceived "gravity" of the offenses regardless of the moral implications of these *mala prohibitum* crimes. This underscores the sentence-based classification system of crimes, wherein the nature of the crime dictates the weight of the penalty of imprisonment.

Revisions of Laws

The legislature has not been amiss in recognizing the antiquated provisions of the RPC and the unsystematic proliferation of special penal laws that amplifies the difficulty in determining the appropriate laws to use in the punishment of

[21] Rep. Act No. 10883 (2016). Anti-Carnapping Law.

particular criminal conduct. Since the proposal[22] of the Criminal Code of the Philippines in 2013, it has guided legislators in making considerable strides towards updating existing penal laws, introducing reforms to address problems in the justice system, and rationalizing the compilation and simplification of penal laws. Several legislative revisions have been subsequently brought in Congress attempting to update existing penal laws to reduce or abolish periods of imprisonment and to implement systemic improvements in the corrections system in consideration of criminal due process, international best practices, and human rights.

Conforming to the direction of prison decongestion through the reduction of the incidence of imprisonment, these legislations have proposed some interesting policy changes, ranging from the abolishment of the penalty of imprisonment in libel cases[23] and improvements to the law on Good Conduct Time Allowance[24] to institutionalizing prison reform.[25]

In *Guinto et al., v. Department of Justice* and *Inmates of New Bilibid Prison, et al. v. Department of Justice*,[26] the Supreme Court En Banc ruled that the Department of Justice (DOJ) exceeded its authority in promulgating the 2019 Implementing Rules and Regulations (IRR) for Rep. Act No. 10592, also known as the New Good Conduct Time Allowance (GCTA) Law. The En Banc found that the 2019 IRR went beyond the scope of Rep. Act No. 10592 by excluding persons convicted of heinous crimes from earning GCTA credits, despite the law not explicitly excluding them. RA No. 10592, amending Article 97 of the RPC, extended GCTA benefits to "any convicted prisoner" in any penal institution or local jail, without any specific exclusion based on the nature of the crime. Therefore, the Court concluded that the DOJ's 2019 IRR

[22] H. No. 2300, 16th Cong. (2013). Philippine Code of Crimes.

[23] H. No. 1835, 18th Congress (2019). An Act to Abolish the Penalty of Imprisonment in Libel Cases, Amending for the Purpose Articles 355, 357.

[24] Rep. Act No. 10592 (2013). New Good Conduct Time Allowance (GCTA) Law.

[25] S. No. 180, 18th Congress (2019). Prison Reform Act of 2019.

[26] Guinto v. Department of Justice, G.R. Nos. 249027 & 249155, Apr. 3, 2024.

improperly expanded the law's scope and invalidated the provisions that excluded recidivists, habitual delinquents, escapees, and persons deprived of liberty convicted of heinous crimes from availing of the benefits provided under Rep. Act No. 10592.

HB 1835, An Act to abolish the penalty of imprisonment in libel cases, amending for the purpose Articles 355, 357, and 360 of the RPC,[27] appreciates the purpose of penalizing criminal conduct parallel to understanding the deeper issues that imprisonment produces on public interest and general welfare, particularly to members of the media. The bill seeks to abolish imprisonment as a penalty to allow members of the media to follow their mandates without hesitation or doubts on the freedom of speech and of expression. Under Articles 355, 357, and 360 of the RPC, libel is penalized with imprisonment ranging from *arresto mayor* to *prision correccional*, and a fine ranging from P200 to P6,000. In abolishing imprisonment, a higher fine ranging from P5,000 to P30,000 shall allow the law to accomplish the purpose of penalizing libel and deterring prospective violators.

Corollary to the implementation of RA 10592, or the GCTA Law, granting PDLs allowance for good conduct and special time allowances resulting in the reduction of their incarceration, several House and Senate Bills were introduced to define good conduct and institute additional measures for its implementation[28], to educate inmates and give them the opportunity to develop their skills and strengthen their moral values while in detention[29], and to grant time credits toward the service of sentence as an incentive to inmates who make satisfactory progress in their education[30].

[27] *Id.,* H. No. 1835.

[28] S. No. 974, 18th Congress (2019). An Act Defining Good Conduct, Instituting Additional Measures for the Implementation of Good Conduct Time Allowance.

[29] H. No. 1614, 18th Congress (2019). An Act Granting Good Conduct Time Allowance to Prisoners Who Participate in Literacy, Skills, and Values Development Programs in Penal Institutions.

[30] H. No. 1746, 18th Congress (2019). An Act Granting Good Conduct Time Allowance to Prisoners Who Participate in Literacy, Skills, and Values Development Programs in Penal Institutions.

In 2019, SB 180, Prison Reform Act of 2019,[31] was introduced to institutionalize prison reform through the creation of information systems, training programs, and intervention offices. Guided by international standards, human rights principles, and the goal of resolving prison overcrowding, the bill proposed judicial, facility, and organization reforms. Judicial reforms[32] aim to adopt appropriate measures for the protection of the PDLs' right to speedy trial and for the decongestion of detention and correctional facilities through a system of automatic release. Facility reforms[33] comprise of infrastructure plans and an Offender Tracking Information system for improved compliance with standards of prison planning. Organization reforms[34] consist of educating and restructuring of personnel in the BJMP and BuCor in whose hands the rehabilitation of PDLs depend upon. Most prominent in this bill is the introduction of a new system of classification that shall substitute the present sentence-based classification through the consideration of not only the imposable penalties but other criminogenic factors that affect the rehabilitation of PDLs.

THE PROBLEM: FACILITATING PRISON DECONGESTION

In 2022, the Philippines' 484 operational detention facilities (7 national prisons, 477 jails) contained 181,437 PDLs (50,126 in BuCor prisons[35], 131,311 in BJMP jails[36]), which translates to an incarceration rate of 157 per 100,000 citizens in the national population of 115.56 million. With an official capacity of 46,001 (12,251 in prisons, 33,750 in jails), actual occupancy level is at 394% (409% in prisons, 389% in jails). The figures clearly manifest the reality of the deplorable and deteriorating living conditions of PDLs in the Philippine incarceration system.

[31] Id., Prison Reform Act of 2019.
[32] §§ 8-9, Prison Reform Act of 2019.
[33] *Id.,* §§ 11-13.
[34] *Id.,* §§ 15-21.
[35] BuCor prisons had a population of 51,747 PDLs in 2023. *PDL Statistics 1990-2024*, BUREAU OF CORRECTIONS: DATA AND STATISTICS (2024).
[36] BJMP Actual Jail Population Data, *supra* note 17.

A deeper examination of the numbers would reveal that severe overcrowding is a multilayered problem with several grave consequences. Prison overcrowding leads to illness and high death tolls[37], to inmates' self-managed organizational structures[38] (e.g., brotherhoods, gangs, ethnic affiliations), and to corruption[39] in the form of payoffs, kickbacks, favoritism, graft, and bribes by those in control of the prisons' political and administrative systems. Efforts to separately address these consequences, without a systemic approach of integrating other prison processes and functions, would only result in a more dysfunctional corrections system.

Prison-level solutions, such as the BJMP and BuCor infrastructure projects and a Department of Justice (DOJ) jail decongestion program, all failed to resolve the steady inflow of inmates, which is the underlying cause of the alarming congestion rate of jails and penal institutions. Despite the 29 infrastructure projects[40] of the BJMP and the Build and Design of Regional Prison Facility Project[41] of the BuCor, their delayed completion and prolonged suspension only hampered the agencies from providing functional and responsive jail facilities. The DOJ's jail decongestion program launched in 1993[42], with the BJMP's OPLAN Decongestion Program, sought to facilitate the early release of inmates through recognizance, probation, parole, and executive clemency schemes and by providing legal services to afford prisoners with a fair and speedy trial. Close to 12,000 inmates benefited from the program that year and, while it continues to

[37] Jessie Yeung, *More than 5,000 inmates die at this prison every year*, CNN, *available at* https://edition.cnn.com/2019/10/04/asia/philippines-inmate-deaths-intl-hnk-scli/index.html (last accessed Nov. 3, 2021).

[38] Raymund Narag, *Freedom and Death Inside the Jail: A Look into the Condition of the Quezon City Jail*, ed. Rod P. Fajardo III, Supreme Court of the Philippines and United Nations Development Program (2005).

[39] Gary Hill, *Effective Training for the Prevention of Misconduct and Corruption in Detention and Corrections*. Asia And Far East Institute For The Prevention Of Crime And The Treatment Of Offenders (2016).

[40] *Annual Audit Reports*, Bureau of Jail Management and Penology, COMMISSION ON AUDIT (2021).

[41] *Annual Audit Reports*, Bureau Of Corrections, COMMISSION ON AUDIT (2021).

[42] Mildred Alvor, *The Philippine Corrections System: Current Situation and Issues*, US DEPARTMENT OF JUSTICE (2005).

this day, the yearly rate at which prison occupancy is reduced by the early release from incarceration remains much lower than the inflow of prisoners in prison and detention facilities.

Evidently, prison-level solutions are bound to fail without acknowledging that the primary cause of the overcrowding problem is the continuous inflow of inmates. Therefore, the prerequisite to effective prison decongestion is to succeed in eliminating the causes of imprisonment. A new system of classification based on criminogenic factors can replace the current sentence-based classification for admission while maintaining correction and reformation as the purpose of punishment. The current classification system is applied merely for the physical segregation of convicts inside penal institutions according to their criminal record or derogatory character, the gravity of their offences that require longer and more secure imprisonment, and the class of rehabilitative treatment that they require; this classification does not determine for which crimes imprisonment is the appropriate penalty.

It must be noted that 63.9%[43] of Philippine incarcerations are pre-trial or remand detentions. As in other countries, Filipino offenders may serve time that outweighs their crimes as a result of the lengthy pre-trial process that can only be addressed by the strengthening of the judicial system. The scope of this study will be limited to reforming the sentencing policy that will dictate the proportionality of the crime convicted to the penalty of imprisonment to be imposed.

SENTENCING

Criminal due process under the Constitution

The Due Process Clause requires the state to afford certain procedures before depriving individuals of their interests in life,

[43] *Philippines, World Prison Brief, Institute for Crime & Justice Policy Research*, Birbeck University of London (2021).

liberty, or property.[44] Unlike property interests that have their source in the Civil Code, liberty is perceived to have the Constitution as its only source. Deprivations of certain basic liberties, such as the freedom to travel, the freedom from incarceration, or the freedom to not be subjected to physical violence or forced medical treatment trigger the Constitutional requirement of affording due process. A guarantee of basic fairness, the due process clause serves the basic goals of producing accurate trial results that prevent the wrongful deprivation of interests and of ensuring that the government treats people fairly by giving them the opportunity to be heard.

Anybody who stands charged with or suspected of transgressing the law may invariably invoke his or her right to due process as it is firmly enshrined in the Constitution. The framers deemed it necessary to reiterate the clause more specifically in criminal cases in Section 14, Article III, or the Criminal Due Process Clause:[45]

> (1) No person shall be held to answer for a criminal offense without due process of law.
>
> (2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable.

[44] No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." CONST. art. III, § 1.

[45] CONST. art. III, § 14.

In Justice Jardeleza's dissenting opinion in *De Lima v. Guerrero (2017)*[46], citing *Romualdez v. Sandiganbayan (2002)*[47]: "Criminal due process requires that the accused must be proceeded against under the orderly processes of law. In all criminal cases, the judge should follow the step-by-step procedure required by the Rules. The reason for this is to assure that the State makes no mistake in taking the life or liberty except that of the guilty." This clarifies that the Criminal Due Process Clause of the Bill of Rights refers to procedural due process and it simply requires that the procedure established by law, or the rules are followed.

The Court, in *Vera v. People*[48], interpreted procedural due process to include: 1) that the accused is convicted only on the basis of evidence that is not tainted with falsity; 2) that the sentence imposed be in accordance with a valid law; and 3) that it is imposed by a court of competent jurisdiction. Thus, in the penal or correctional process of the judicial system, the sentencing of imprisonment as punishment must be laid down by competent courts based on the methods prescribed by law only after substantial consideration of the facts and evidence presented at trial. In the current system, both processes of conviction and sentencing are dependent on the application of law to specific case facts to allow legal rules to make empirical sense when applied by the courts.

Separating Sentencing from Conviction

All defendants before courts of first instance who are convicted of an indictable offense experience the court's decision-making procedure. Both decision-making processes of trial for conviction and sentencing are largely affected by evidentiary information that may be provided by the prosecutor, the investigators, the law enforcement officers, and professional experts; however, the sentencing process, unlike a trial, is not regulated by rules for exclusion of evidence or specific definitions

[46] De Lima vs. Guerrero, G.R. No. 229781, Oct. 10, 2017.
[47] Romualdez vs. Sandiganbayan, G.R. Nos. 143618-41, Jul. 30, 2002.
[48] Vera v. People, G.R. No. L-31218, Feb. 18, 1970.

of mitigating or aggravating circumstances.[49] Sentencing involves determining the appropriate punishment or penalty based on the severity of the offense, the defendant's level of culpability, and the offender's background or personal circumstances that may influence the sentencing decision.

The connection between the "in-court" part of sentencing and the serving of the sentence by the prisoner must be viewed as a continuous process that must conform with notions of procedural due process such that the elements and safeguards of pre-conviction due process should be present until the post-conviction stage of sentencing.[50] An important theoretical insight is the recognition that while "the essence of due process is after all the right to be heard before one is deprived of his right to liberty[51]", there arise from the Criminal Due Process Clause equally significant expectations of fairness in the process of sentencing.

The concept of fairness in sentencing decisions springs from the major purposes usually attributed to the sentencing process, which are just punishment, retribution, rehabilitation, deterrence, incapacitation, and community protection. Sentencing principles of parsimony, proportionality, parity, and totality form the basis of fair sentencing decisions. The lack of attention to the idea that procedural fairness must extend to the imposition and service of penalties perhaps creates the most important barrier to achieving the purposes of sentencing. Rote obedience to the written law on the imposable penalty for a corresponding offense may be deemed contrary to the principles that sentencing must be no more severe than is necessary to meet its purpose and that the overall punishment must be proportionate to the gravity of the offending behavior. Sentencing should not separate the crime from the behavior, the offense from the offender.

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[49] Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation*, LONDON: ROUTLEDGE & KEGAN PAUL. (1981).

[50] Ralph Henham, Due Process, Procedural Justice and Sentencing Policy, INTERNATIONAL OF THE SOCIOLOGY OF LAW (1995).

[51] Justice Caguioa, *dissenting*, De Lima v. Guerrero, G.R. No. 229781, Oct. 10, 2017.

Offender Characteristics

To fulfill the demands of fairness and equality in trial, courts are deliberately blind to the status, social identity, the personal and social characteristics of the accused. Only the alleged action is considered and matched with an applicable law to adjudge a conviction. Similarly, sentencing policy in the Philippines is dominated by juridification, defined by Blichner as a process through which law regulates an increasing number of different activities and where conflicts are solved by or with reference to law.[52] The resulting dichotomy between legal rules and discretion triggers the debate on how and why sentencing should consider the characteristics of the offender.

Scholars argue that because criminal cases are composed of the discrete factors of the offense and the offender, sentencing must be approached with the two-phase process of first considering the alleged offense and only then, if such offense is proved, follows considering the personal qualities of the offender.[53] In the first phase, the alleged offense is considered divorced from the offender and uncontaminated by information about the individual. The necessity to abide by the sentencing purposes of punishment, deterrence, and incapacitation warrants the objective reliance on legal rules in determining the seriousness of the penalty required by the seriousness of the corresponding crime.

The second phase where the personal qualities of the offender are considered is demanded by the rehabilitative model followed by the Philippine corrections system. The rehabilitation of offenders is foremost the objective of sentencing in the retribution, correction, and reformation of PDLs. This model presupposes that an offender has a "social sickness"[54] that can be

[52] Lars Blichner and Anders Molander, *What is Juridification?,* Arena Center for European Studies, University of Oslo (2005).

[53] Stewart Field, *State, Citizen and Character in French Criminal Process.* JOURNAL OF LAW AND SOCIETY (2006).

[54] Megan Kurlycheck and John Kramer, *The Transformation of Sentencing in the 21st Century,* IN: HANDBOOK OF SENTENCING POLICIES AND PRACTICES IN THE 21st

diagnosed by the judicial system for the prescription of the proper treatment to "cure" or rehabilitate the him or her into a functional and productive citizen. Diagnoses are made from the offender's personal conditions and from surrounding social circumstances that affect his or her behavior, all of which become a function of the seriousness of the required "treatment" or punishment. Ascertaining what must be treated, the methods of rehabilitation, and how long it should be carried out is contingent on the characteristics of the offender rather than the applicable penal laws.

Justifying Imprisonment by Seriousness

For decades, policymakers and legal academics in the Philippines and foreign jurisdictions have presumed that the way to reduce incidence of imprisonment is to promote and increase the availability of 'prison alternatives.' Community sentences, intervention, and diversion programs continue to be the direct alternatives to prison advocated by policy officials and penal reformers despite the warnings of Cohen[55] and more contemporary scholars like McMahon[56] and Kantorowicz[57] about the dangers of 'net-widening[58]'. The general thrust of these policies on the use of prison alternatives has been to discourage judges from passing prison sentences in less serious cases by requiring imprisonment only after determination that prison alternatives are neither appropriate nor feasible for serving the sentence imposed.

Tata observed four ironies[59] to these community sanctions that lead to the conclusion that their alternative use does not in

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CENTURY, Vol. 4, The American Society of Criminology's Division on Corrections & Sentencing (2020).

[55] Stanley Cohen, *Visions of Social Control.* CAMBRIDGE: POLITY PRESS (1985).

[56] Maeve McMahon, '*Net-Widening': Vagaries in the Use of a Concept*, THE BRITISH JOURNAL OF CRIMINOLOGY, Vol. 30.2, Oxford University Press (1990).

[57] Elena Kantorowicz, *The "Net-Widening" Problem and its Solutions: The Road to a Cheaper Sanctioning System*, 2013, *available at* SSRN: https://ssrn.com/abstract=2387493.

[58] Definition: The problem of expanding the penal control over individuals through different new programmes other than imprisonment.

[59] Cyrus Tata, N*ew Directions for Research and Policy, In: Sentencing: A Social Process.* PALGRAVE SOCIO-LEGAL STUDIES (2019).

fact reverse but fuel the rise in the use of imprisonment. One of these ironies is the resort to imprisonment of the convicted offenders only when they are deemed to have failed to comply with the conditions of their community order and not because their convicted offense warrants such imprisonment. Another irony is the idea of imprisonment as the 'last resort' leaving all community sanctions as alternatives to the central idea of prison. Because no conditions, other than compliance with penal provisions, must be proved to resort to prison, imprisonment as a sentence remains as the default when alternative means of sentencing have been exhausted.

Prison does continue to be used not because the seriousness of the offense demands it, but because it is the only option left when nothing else seems to work. McNeill[60] and Morris[61] suggest that sentences of imprisonment should only be imposed if the seriousness of the offense demands it and not because prison alternatives or community sanctions do not seem feasible nor sufficient.

To avoid the idea of prison as the last resort, two clear principles should be expressed. First is that imprisonment should be used parsimoniously and only when warranted and justified by the seriousness of the offense. The second is that as a general rule, the offender's personal and social *needs* should be excluded as grounds for recommending and passing a custodial sentence. This does not preclude the rehabilitation in prison of those who committed serious offenses, but the suffering that punishment produces must be limited to no more than is required by the seriousness of the offense and the seriousness of the offender's probable impact on the free community should his or her deterrence and incapacitation not be accomplished by the sentence.

[60] Fergus McNeill, *Pervasive Punishment: Making Sense of Mass Supervision*. Bingley: Emerald Publishing (2019).

[61] Norval Morris, *The Future of Imprisonment*. Chicago: University of Chicago Press (1974).

The meaning of seriousness is flexible and should relate to both the gravity of the offense and the dangerousness of the offender on the community. Arguing for parsimony and proportionality of imprisonment, sentencing should be recognized as a communicative and symbolic performance[62] of judicial decision-making rather than a mechanical and remote exercise of juridification. Sentencing decision-making should be guided by the recognition that it is processual, interpretive, and performative of expected roles on fairness in post-sentence criminal due process.

ADJUDICATING CULPABILITY AND SERIOUSNESS

Risk Assessments; Testing Criminogenic Risk Factors

The philosophy of the "social sickness" model of offenders is that individuals do not act with full rationality and choice, but they instead suffer from an illness—that ranges from mental conditions to substance addiction, or from negative social circumstances such as poverty, prior exposure to violence, or childhood trauma, that places them at risk for criminal behaviors. These diagnoses typically constitute the criminogenic risk factors that pre-sentence investigations often rely on for risk, needs, and responsivity assessments[63] in preparation for prosecution.

In foreign jurisdictions[64] like in some American states, an "evidence-based" risk assessment approach in decision-making has been adopted in some stages of their criminal justice system, including sentencing, corrections, and pre-trial detention. A predominant characteristic of this type of sentencing decision-making is the use of "risk assessment instruments" (RAIs) that operate on statistical algorithms in predicting the likelihood that an offender will commit crimes in the future. As statistical formulas are generally thought to be more accurate and less susceptible to bias, the use of RAIs in criminal justice is expanding

[62] David Garland, *Punishment and Modern Society*, Oxford: Clarendon Press (1990).

[63] D.A. Andrews et al., *Classification for effective rehabilitation: Rediscovering psychology*. Criminal Justice and Behavior (1990).

[64] Cecelia Klingele, *The Promises and Perils of Evidence-based Corrections,* 91 NOTRE L.REV. 537, 566–67 (2015).

rapidly across several states in aid of decision-making. Magistrates, correctional officials, and judges use actuarial RAIs in determining offenders' "criminogenic factors" when imposing sentence[65], setting of bail, selecting probation conditions, and deciding parole.[66]

RAIs[67] may be an actuarial tool, a structured methodology for professional judgment, or a simple interview checklist that does not involve any quantification of the evaluator's findings. Regardless of their form, an evaluation of three widely used RAIs—Oxford Risk of Recidivism Tool (OxRec), Violence Risk Appraisal Guide (VRAG), and Historical-Clinical-Risk Management-20 (HCR-20), will give insight to the range of risk factors they consider in sentencing decision-making.

The Oxford Risk of Recidivism Tool (OxRec)[68] relies on many statistically weighted "risk factors" that include environmental variables that other instruments do not consider. This risk factors considered in this RAI are: male sex; unemployed before prison; young age; non-immigrant status; previous prison sentence of short duration; violent index crime; previous violent crime; never married; fewer years of education; low disposable income; alcohol use disorder; drug use disorder; any mental disorder; any severe mental disorder; and "high neighborhood deprivation" determined using rates or measures of welfare recipiency, migration status, divorce, educational levels, residential mobility, crime and disposable income within the individual's neighborhood.

Used extensively in the United States and Canada, the Violence Risk Appraisal Guide (VRAG)[69] relies only on 12 risk

[65] Pamela Casey et al., *Using Offender Risk and Needs Assessment Information and Sentencing*, National Center for State Courts (2011).

[66] Pamela Casey et al., *supra*.

[67] T. Douglas et al., *Risk assessment tools in criminal justice and forensic psychiatry: the need for better data*, European Psychiatry (2016).

[68] Seena Fazel et al., *Prediction of violent offending upon release from prison: Deviation and external validation of a scalable tool,* 3 THE LANCET: PSYCHIATRY 535 (2016).

[69] Grant T. Harris, *Prospective replication of the violence risk appraisal guide in predicting violent recidivism among forensic patients*, 6 L. & HUM. BEHAV. 377 (2002).

factors that include the individual's score on the Psychopathy Checklist[70]; elementary school misconduct; diagnosis of personality disorders correlated with risk; age at index offense; presence of parents in home before age sixteen; performance on conditional release; non-violent offenses; marital status; victim injury; victim gender; and history of alcohol problems.

The Historical-Clinical-Risk Management-20 (HCR-20)[71] consists of 20 risk factors categorized as historical, clinical, and risk management-related. The ten historical factors are previous violence; age at first violent incident; relationship instability; employment problems; substance use problems; major mental illness; psychopathy; early maladjustment; personality disorder; and prior supervision failure. The five clinical factors are lack of insight; negative attitudes; active symptoms of major mental illness; impulsivity; and unresponsiveness to treatment. The five risk management factors are the unfeasibility of plans; exposure to destabilizers; lack of personal support; noncompliance with remediation attempts; and stress.

Regarding risk as a legitimate criminogenic factor for pre-trial detention and sentencing, as affirmed by the courts and legislatures in many countries, would justify the use of RAIs as instruments in deciding whether a convicted offender should be incarcerated, released on conditions, or incarcerated with an enhanced sentence, provided that such use is guided by the principles of fitness, validity, and fairness in post-sentence criminal due process. Notwithstanding the number and dissimilarity of the factors used by each RAI, what is important is grasping the goal of producing the best estimate of an offender's dangerousness from the combination of relevant risk factors that capture the relationship of these factors to the seriousness of offense and its corresponding penalty of imprisonment.

[70] Definition: a measure of psychopathy that takes into account criminal history.

[71] Kevin Douglas and Christopher Webster, T*he HCR-20 Violence Risk Assessment Scheme: Concurrent Validity in a Sample of Incarcerated Offenders*, 26 CRIM. JUST. & BEHAV. 3 (1999).

Behavioral Autonomy as the Determining Criminogenic Factor for Prison Detention

Criminal sanctions are imposed on blameworthy antisocial behavior because intentional (*dolo*) or grossly negligent (*culpa*) acts or omissions are neither justified nor excused. The appreciation of the circumstances surrounding criminal liability is premised on the principle of "blaming and punishing"[72]—that a person must be punished when he or she commits criminal acts with a blameworthy state of mind. The punishable nature of felonies[73] under the RPC translates to a strong preference for imposing criminal liability only if there is proof of awareness that one is committing the conduct or the intent to cause the result of such conduct. This principle, however, is unrepresentative of the fact that the effect on criminal of liability of an individual's behavior can be driven by justification and a relative culpability.

Several prediction methodologies are used in foreign jurisdictions in measuring the dangerousness of an offender's behavioral autonomy[74] to culpability. Slobogin[75] uses the term "dangerousness," or violence proneness, as the collective term for the risk, magnitude, imminence, frequency, and extent to which the offender's behavioral autonomy represents a danger to society. The term finds application in criminal and civil contexts of violence, insanity, extreme mental distress, and necessity. Predictions of dangerousness are valid based on variable criteria that center on the probability of post-sentence anti-social conduct.

Psychological predictions of dangerousness operate as a function of probabilities of recidivism and of causing self-harm or injury to others. For instance, under an RAI called the

[72] G.P. Fletcher, *Rethinking Criminal Law*. Boston: Little, Brown (1978).

[73] REV. PEN. CODE, art. 3.

[74] Definition: One's ability to make decisions and follow through with actions.

[75] Christopher Slobogin, *Proving The Unprovable: The Role of Law, Science, and Speculation in Adjudication Culpability And Dangerousness*, Oxford University Press (2007).

Classification of Violence Risk (COVR) [76], risk flow charts (or risk classification trees) are used to first analyze whether a person demonstrates low or high psychopathy. If a person demonstrates low psychopathic tendencies, whether he or she has been arrested a few or many times will be determined to decide whether there is a need to further examine recent violence or ascertain individual substance abuses. If the person instead demonstrates strong psychopathy, he or she is first evaluated for serious abuse as a child and further inquiry into substance abuse occurs. At each step of this classification tree, every answer is scored with a particular recidivism probability.

In other actuarial RAIs such as the VRAG, risk predictions on recidivism are raised or lowered based on considerations that relate to offending. For instance, an offender who has done well in treatment or rehabilitation or has personal circumstances such as close proximity to getting married, might receive lower risk predictions than another offender who has made express threats or has exhibited behavior that he or she will be joining a gang if released.[77]

These psychological predictions of dangerousness all relate to the probabilities of recidivism and future harm based on the offender's mental capacity to make subtle differentiations between premeditation and recklessness. Where one's mental state lies in the spectrum of right or wrong determines his or her entitlement to "insanity" as a defense. If courts can require, as they do now, the presentation of clinical testimony on the mental condition of the offender to establish an excuse for wrongful conduct, with greater reason should said testimony be used in deciding whether and how much to punish and rehabilitate an individual.

Insanity, an exempting circumstance under the RPC, has always been related to insane persons being excused from criminal

[76] Henry Steadman et al., *A Classification Tree Approach to the Development of Actuarial Violence Risk Assessment Tools,* 24 LAW & HUMAN BEHAVIOR 83 (2000).

[77] Vernon Quinsey et al., *Violent Offenders: Appraising and Managing Risk*, 171 (1st ed. 1998).

liability not because they did nothing wrong, but because they are deemed morally blameless for their conduct. While situated among the exempting circumstances,[78] insanity has been linked with the justifying and mitigating conditions of necessity, duress, self-defense, provocation, and mistake. To exempt from criminal liability, insanity is typically defined as a mental disease or defect that causes either a substantial inability to appreciate the wrongfulness of conduct or a substantial inability to conform conduct to the requirements of the law.

Insanity exists when a severe mental or emotional disturbance causes the person to believe that his or her conduct was necessary to avoid a harm and when such harm sought to be avoided is, to a reasonable person, at least as great as that caused by the defendant's conduct. Finkel[79] proposed a relative culpability schema for insanity wherein the *mens rea* associated with the alleged crime is not separated from the offender by mere presence of insanity at the commission of the wrongful conduct. For instance, people who are cognitively or volitionally impaired by mental disease but who intentionally commit a crime would not be exempted from liability by evidence of said mental disease. This schema necessitates the creation of a process for considering decisions about committing the act, the mental disability at the moment of the act, the degree of culpability for bringing about the mental disorder, and the *mens rea* in determining whether insanity can exempt the offender from liability. Unique to this schema is Finkel's proposal that when the offender is responsible for bringing about the mental disorder[80], the *mens rea* cannot be separated from the commission of the crime and insanity ceases to be a defense for the accused.

[78] REV. PEN. CODE, art. 1.

[79] Norman Finkel, *Insanity on Trial*. NEW YORK: PLENUM. (1988).

[80] *Supra.* Finkel enumerated possible acts of the offender for bringing about his or her own mental disorder: (1) refusing to seek therapy when it was strongly suggested; (2) refusing to take medication; (3) refusing to keep out-patient therapy appointments; (4) ignoring urgings to get help; (5) choosing to drink some more before the fatal act; (6) drinking to calm down, and then drinking some more; and (7) taking some pills that were not prescribed.

With respect to the rehabilitation purpose of sentencing, if the offender is found to be dangerous based on the assessments of his or her mental state (i.e. insanity, mental and emotional stress, and reasonable fear of harm), the judicial system should always be permitted to evaluate culpability assessments on behavioral autonomy to prescribe the appropriate treatment commensurate to the post-sentence dangerousness of the offender.

High-Risk Convictions

As it occurs in most actuarial RAIs, risk factors are associated with precise probabilities of dangerousness creating the label of "high-risk" that not only conveys the potential for recidivism but is squarely suggestive of bad character, a history of bad decision-making, and the likelihood of exhibiting violent behavior. Faced with high probabilities of dangerousness, a judge might decide on a high-risk conviction leading him to enforce a sentence enhancement based on the conclusion that the offender is not so impaired in his ability to reason so as to require leniency. The judge is guided by the calculated probabilities of recidivism and violent behavior that quantify in more concrete terms how dangerousness will be lowered if particular factors are not present or particular protective factors are present[81]. Risk probabilities allow sentencing decision-makers to classify offenders to belong to a group that is likely to reoffend or is likely to cause harm at a particular rate.

What type of evidence may the system use to prove dangerousness? Depending on the criminal justice system's goals of punishment, prevention or protection, sentencing is implemented through sanctions based on culpability of past acts, the prevention of future violence designed to deter or control the dangerousness of offenders, and the assurance of autonomous decision-making. Most reviews[82] of high-risk offenders lead to the

[81] Gary Melton et al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, 2nd Ed., Guilford Press (1997).

[82] Lawrence MacAulay, *High-Risk Offenders: A Handbook for Criminal Justice Professionals*, Solicitor General Canada (2001).

conclusion that they are not a homogeneous group. Their high-risk classification may be grounded on profound mental health problems that cloud their judgment and render them unfit to participate in the justice process; others are of such perceived risk that entitle them for indeterminate detention; some can have the assessed risk managed in the community after a period of incarceration and treatment, while others may stimulate fear in the community even after the service of their entire sentence.

How are high-risk convictions sentenced? In foreign jurisdictions that incarcerate proportionately far fewer people, incarceration is used less frequently and for shorter periods of time. In Germany[83], where crimes are divided into two categories of minor (*Vergehen*) and more serious (*Verbrechen*) crimes, the criminal system relies greatly on non-custodial sanctions and diversions for Vergehen crimes. Non-dangerous offenders are shifted from prison to more effective and less expensive alternatives to incarceration. As their system is organized around the central principles of resocialization and rehabilitation, the primary conditions for confinement for treatment and disciplinary actions are less punitive and more goal-oriented that results in a mere 6%[84] of all convicted offenders being sentenced to prison. Their policymakers believe that being tough on crime is not the only or best way to achieve public safety.

In Canada, a National Flagging System for High-Risk Offenders[85] was created as a result of the examination of dangerousness policies adopted in the United States, the United Kingdom, and Australia. The Flagging System introduced community notification protocols, and sex offender and child abuse registries, in following the trend towards tighter responses and more severe penalties for high-risk violent offenders. When an

[83] Richard Frase, *Sentencing In Germany And The United States: Comparing Äpfel With Apples*, Max Planck Institute for Foreign and International Criminal Law (2001).

[84] Frieder Dünkel, *The Sentencing System, Probation and Re-entry of Prisoners in Germany, European-American Prison Project Conference at Waldeck Prison* (2013).

[85] James Bonta and Annie Yessine, *The National Flagging System: Identifying and Responding to High-Risk, Violent Offenders, Public Safety and Emergency Preparedness*, Canada (2005).

offender is flagged as high-risk violent, the system is alerted of risk factors concerning the offender that would assist in the determination of whether the present conviction should warrant a Dangerous Offender Application. The DO Application was designed "to carefully define a very small group of offenders whose personal characteristics and particular circumstances militate strenuously in favor of preventative incarceration.[86]"

The primary role of determining high-risk convictions is to reduce reliance on incarceration as the default criminal sanction and to expand sentencing from institutional to more community-based sanctions, keeping most offenders out of prison. Community-based sanctions, such as probation, community service, diversion and intervention programs, already exist in the Philippines, albeit applied to a narrower group of offenders. Policy reforms must recognize the detrimental impact of lengthy incarceration on PDLs and the criminal justice system and acknowledge that there are other methods that can be used to manage and respond to the retribution and rehabilitation mandate of corrections.

POLICY REFORM: A HYBRID REGIME OF PRISON AND POST-SENTENCE CONFINEMENT

The current criminal justice system rests on the utilitarian theory that people are more likely to comply with a legal regime that is perceived to be morally credible. A morally credible criminal justice system is one that tracks and balances views on how deserving a crime and its offender are of punishment, deterrence, and incapacitation. By the fact that most crimes are committed by a small percentage of people and even a smaller percentage of offenders are convicted of principal, afflictive, and higher correctional penalties, focus can be placed on the incarceration of high-risk convictions and perhaps also on allowing leniency towards the non-high-risks by giving relatively short sentences or community-based sanctions.

[86] R. v. Johnson, 2003 SCC 46 (CanLII), (2003) 2 SCR 357.

The legislation of a sentencing policy that adjusts the penalty system entails the transformation of the current sentence-based classification of crimes to an individual prevention system as a way of approaching the mass incarceration problem in the Philippines. To reduce the reliance on incarceration as the first response to punishment, the disciplinary structure must adapt to enhanced incarceration conditions that target the treatment of offenders of special populations—those that are assessed to be dangerous, high-risk, and in most need of behavioral rehabilitation. An adjusted penalty system shall assess the defendant's behavioral autonomy to divert low-risk offenders to community interventions, limit the use of imprisonment as a penalty for high-risk convictions, and adopt preventive post-sentence confinement as the primary rehabilitation and treatment measure for dangerous offenders.

Just as the Due Process Clause provides that "[n]o person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws[87]", the Convention for the Protection of Human Rights and Fundamental Freedoms[88] provides under Article 5 Section 1 the international standards for the possible justifications for the deprivation of an individual's liberty:[89]

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> a. the lawful detention of a person after conviction by a competent court;

[87] CONST. art. III, § 1.

[88] Note: The original signatories to the ECHR were representatives of the member states of the Council of Europe. Since then, many other countries have signed and ratified the ECHR as members of the Council of Europe. The Philippines is a signatory to the International Covenant on Civil and Political Rights (ICCPR), which is one of the key international agreements that promotes and protects civil and political rights, like the ECHR.

[89] *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, CETS No. 5, 213 UNTS 221.

b. the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition

Preventive imprisonment in the Philippines is a non-punitive measure imposed upon persons who cannot afford bail or are charged of non-bailable crimes before they are convicted. In foreign jurisdictions like the Germany and the United States, preventive imprisonment extends to the continued detention of convicted offenders who show high levels of either or both mental illness or dangerousness to justify their continued detention. In Germany, a person who has completed their sentence and is considered to be particularly dangerous can be subjected to post-sentence preventive detention[90]. The United States has long been

[90] German Criminal Code, § 66 in the version published on Nov. 13, 1998 (Federal Law Gazette I, p. 3322), as last *amended* by Article 2 of the Act of June 19, 2019 (Federal Law Gazette I, p. 844).

using preventive detention in the form of civil commitment of mentally ill offenders as a means of protecting the public[91]. Arguments on post-sentence confinement center significantly on the deprivation of substantive or procedural due process of offenders, which shall be the main constitutional consideration for the adoption of post-sentence confinement as an additional rehabilitative and preventive measure in the sentencing system of the Philippines.

Post-Sentence Confinement must not be punitive

Post-sentence confinement must not be punitive in nature but shall be in the form of involuntary civil commitment that treats those individuals who are mentally ill and protects the society from those who are dangerous. While evidence from criminal conduct may be used to narrow the class of offenders subject to post-sentence confinement, such connections to criminal conduct shall not make it a punishment. The length of the confinement shall not link to any punitive purpose but only to the criminal justice system's interest in treatment and public safety, in accordance with Article 5 Section of 1 of the Convention on the lawful detention of persons of unsound mind[92] and "when it is reasonably considered necessary to prevent his committing an offense.[93]"

Post-Sentence Confinement must be connected to a criminal conviction

Sentences of high-risk convictions shall consist of two parts: the punitive imprisonment prescribed by the RPC and the subsequent placement in post-sentence confinement. An order of

[91] Adam Klein and Benjamin Wittes, *Preventive Detention in American Theory and Practice,* HARVARD SECURITY JOURNAL, Vol. 2, (2011).

[92] Art. 5, §1, Convention, supra. No one shall be deprived of his liberty saved in [the following cases of...] (e) the lawful detention of persons… of unsound mind, alcoholics or drug addicts or vagrants;

[93] Art. 5, § 1, Convention, supra. No one shall be deprived of his liberty saved in [the following cases...] (c) ..when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

post-sentence confinement, to be justified by Article 5 Section 1[94] of the Convention, shall always be a preventive measure that is dependent on and ordered together with the court's finding of guilt in a criminal offense. A finding of future dangerousness shall not be sufficient as a ground for post-sentence confinement absent a valid conviction of guilt, but a cautious approach is warranted in performing substantive analysis and assessment of an individual's behavioral autonomy to determine whether he or she may be subject to the added form of deprivation of liberty that is post-sentence confinement.

Post-Sentence Confinement must provide treatment, not lengthen incarceration

Section 22, Article III prohibits the enactment of ex post facto law,[95] which under our legal system is one which: aggravates a crime, or makes it greater than it was, when committed; or changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed[96]. This constitutional prohibition prevents legislation of additional punishment that is harsher for the accused, which warrants that the purpose of post-sentence confinement should not be to extend incarceration of high-risk offenders who already have been sentenced, but to provide *bona fide* treatment for persons assessed to be dangerous. Treatment and rehabilitation shall not be used as a pretext for what could really be a continuing punishment beyond the period prescribed by the penal laws.

Post-Sentence Confinement must be legislated subject to the Strict Scrutiny Test

At the core of the Bill of Rights is every person's freedom from unwarranted and unjustified confinement by the State—a liberty protected by the Due Process Clause. As one of the most

[94] Art.5, §1, Convention, supra. No one shall be deprived of his liberty saved in [the following cases of...] (a) the lawful detention of a person after conviction by a competent court;

[95] CONST. art. III, § 22.

[96] Black, Constitutional Law, 595.

common and most feared instruments of state oppression, incarceration must be acknowledged as the principal restraint to the Constitution's basic definition of liberty.

The Supreme Court in *White Light v. City of Manila*[97] explained that liberty, as the most primordial of rights "as guaranteed by the Constitution was defined by Justice Malcolm to include "the right to exist and the right to be free from arbitrary restraint or servitude."" The loss of liberty produced by involuntary civil commitment is comparable, in theory and in conditions of execution, to the loss of freedom from incarceration. Both imprisonment and post-sentence confinement will have significant stigmatizing consequences and unjustified intrusions on personal security, which necessitates a substantive evaluation of the quality and amount of governmental interest that could justify the regulation of liberty. It will thus be unjust to apply only a rational basis or reasonableness test only because the State's interest of rehabilitation and incapacitation is both legitimate and compelling. The strict scrutiny test is the appropriate standard for review in cases of deprivations of liberty.

CONCLUSION

Correctional deprivations of liberty are severe infringements on freedom that require persuasive and constitutional justifications for reform. Several major themes for facilitating prison decongestion explored in this paper can be summarized.

First, effective prison decongestion requires eliminating as much of the causes of imprisonment and recognizing that the primary cause is the continuous inflow of inmates. Within the principles of proportionality and parsimony, reformed sentencing policies should relinquish the idea of prison as 'the last resort' for punitive sanctions and instead adopt a disciplinary structure that expands the menu of sanctions to reduce reliance on incarceration

[97] White Light v. City of Manila, G.R. No. 122846, Jan. 20, 2009.

as the 'best option' for punishment and enlarge the use of community-based sanctions and post-sentence confinement.

Second, all forms of commitment must be legal and constitutional. Post-sentence confinement, as an additional form of commitment, should be permitted only on clear and convincing evidence that the convicted offender has been assessed as a high-risk and dangerous individual who is likely to cause serious harm to others unless subjected to a prescribed post-sentence treatment. Rehabilitative commitment should be specifically limited in time and resolutory upon showing that no dangerous subsequent behavior shall occur.

Third, there is a fundamental need to reform sentencing research and policy. Enveloping policy within the principles of procedural fairness and equality, the elements and safeguards of pre-conviction due process should be present until the post-conviction stage of sentencing. Policies on post-sentence confinement must not be punitive, must be connected to a criminal conviction, must provide treatment and not lengthen incarceration, and must be legislated subject to strict scrutiny.

Changing the direction of incarceration

Policymakers can take a cue from the overwhelming evidence of the negative impacts of incarceration on individuals and the community to seek less crime and greater safety through concrete and feasible strategies that reduce reliance on incarceration and improve confinement conditions. Sentencing policies must recognize the detrimental impact of prolonged segregation on an individual and seek more humane ways to manage offender behavior and punishment.

To safely lower incarceration rates and the population exposed to the negative consequences of the criminal system, prosecutorial discretion can extend diversion options to high-risk individuals and those with more serious offenses. The key to safely expanding diversion programs to prevent offenders from being incarcerated solely for the purpose of punitive

segregation is the availability of high-quality community interventions complemented with validated risk assessment tools. Attention must also be paid to normalizing prison conditions to mitigate the deleterious effects of incarceration on PDLs. Normalization—where prison conditions and the treatment of PDLs resemble life in the community, shall involve treating high-risk offenders as a special population with targeted treatment, education, and social or vocational training.

Reformed sentencing policy, while aimed at keeping most offenders out of prison, must answer whether the system is making the best use of prison alternatives available and explore whether these options can be safely expanded to support a shift from institutional to community corrections and rehabilitative post-sentence confinement.

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