

**13 August 2020**

To the  
Senator Sherwin Gatchalian  
Republic of the Philippines

The Representative, Weslie Gatchalian  
Republic of the Philippines

**Subject: Asia Internet Coalition (AIC) Industry Submission on House Bill 6122 and Senate Bill 1591 the Internet Transactions Bills in the Philippines**

On behalf of the [Asia Internet Coalition \(AIC\)](#) and its members, we would like to submit our comments on the [House Bill No. 6122: An Act Protecting Consumers and Merchants Engaged in Internet Transactions, Creating For This Purpose the E-Commerce Bureau and Appropriating Funds](#) and [Senate Bill No. 1591: An Act Protecting Consumers and Merchants Engaged in Internet Transactions, Creating For This Purpose the E-Commerce Bureau and Appropriating Funds](#). 'House Bill 6122' or the 'Internet Transactions Act', seeks to further boost the e-commerce in the country. HB 6122 seeks to establish an eCommerce Bureau that will, among others, focus on promoting the development of e-commerce in the country by building trust between sellers and consumers, stronger online consumer protection, safer e-payment gateways, easier online business registration, and formulating other policies and programs to increase the number of online merchants and consumers.

AIC is an industry association comprised of leading internet and technology companies in the Asia Pacific region with a mission to promote the understanding and resolution of Internet and ICT policy issues in the Asia region. Our members are Google, Facebook, Amazon, Apple, SAP, LinkedIn, Booking.com, Airbnb, Cloudflare, Expedia Group, Grab, LINE, Rakuten, Twitter and Yahoo (Verizon Media). We have worked closely with the governments around the region in relation to the development of ICT policies and in doing so, we have witnessed first-hand the potential for adoption of digital technology and innovation.

As responsible stakeholders, we appreciate the ability to participate in this discussion and the opportunity to provide inputs into the policy-making process in the Philippines. As such, please find appended to this letter detailed comments and recommendations, which we would like to respectfully request the Government of the Philippines to consider, which could be a useful feedback for future consultations.

**Importantly, we would also like to request for a virtual meeting with you and your team to further offer our inputs and go through the submission on industry best practices.**

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact me directly at [Secretariat@aicasia.org](mailto:Secretariat@aicasia.org) or +65 8739 1490.

Thank you for your time and consideration and we look forward to hearing from you.

Sincerely,



**Jeff Paine**  
**Managing Director**  
**Asia Internet Coalition (AIC)**

*Cc.:*

*Secretary Ramon Lopez*  
*Department of Trade and Industry (DTI)*  
*Republic of the Philippines*

## **Detailed Comments on House Bill 6122 and Senate Bill 1591 the Internet Transactions Bills in the Philippines**

### **A. INTRODUCTION**

While e-commerce in the Philippines continues its growth momentum, the sector's performance pales significantly to e-commerce expansion enjoyed by regional counterparts. Despite market conditions seemingly ripe for the industry's growth, the Philippines after all has the second largest internet user base in Southeast Asia according to a 2018 Temasek/Google report, the Philippine internet economy comprises only about 1.6 percent of GDP. This is certainly lower when ranged beside the 2.8-percent average tracked in Southeast Asia, and far lower still than the US rate of 6.5 percent.

The Philippine government attributes the relatively slow pace of the country's e-commerce market to a lack of regulations. While there is already an existing electronic commerce law, the government believes that the 20-year-old policy is no longer in keeping with the industry's growth. This has impelled the creation of the Internet Transactions Bill, filed in Congress by Rep. Weslie Gatchalian. The bill has already been matched with a senate version, which was filed by Gatchalian's brother, Sen. Sherwin Gatchalian.

It is clear that the proposed bills seek to address the challenges that typically attend online transactions, including those related to information disclosure, misleading commercial practices, dispute resolution, and redress. There is no question that these risks should be mitigated to enhance consumer trust and protection. However, policies on e-commerce should also be carefully tailored to respond to such challenges, without inadvertently hindering the growth of the digital economy, or stifling innovation in new solutions and technology.

Certain provisions of HB6122 and SB1591 introduce key details and definitions that supplement and clarify existing e-commerce law. While some of these provisions are welcome improvements to the existing legal framework and are helpful in improving trust between online merchants and sellers, it is respectfully submitted that there are other provisions that could unintentionally impair the growth of the Philippine e-commerce market - a result that is the exact opposite of the bill's larger goal.

In broad strokes, HB6122 and SB1591 introduce a new policy framework that (i) intends to regulate non-resident online enterprises, (ii) creates obligations and undertakings for platform providers with respect to the conduct of merchants and retail service providers, (iii) shifts the burden of policing online merchants to platform providers, and (iv) requires substantial changes in the business model, product design and function to enable compliance with requirements of HB6122.

HB6122 and SB1591 should aim not only to improve consumer protection, but also to unlock the vast potential of Philippine e-Commerce. Both bills rightly acknowledge that the sector's growth remains sluggish in contrast to its regional neighbors. However, this is a challenge that could in fact worsen if any regulation proposed will fundamentally undercut the open,

rapidly evolving nature of the internet. Whatever regulatory framework is crafted, it should instead account for the sheer diversity of business models that contribute to the overall growth of e-commerce, the exponential speed of innovation in e-commerce solutions, and the industry's present and potential benefits to the Philippine socio-economic landscape.

## **B. KEY AREAS OF CONCERN**

Below are features in HB6122 and SB1591 we find most concerning, considering their immediate and long-term potential to stymie the progress of Philippine e-commerce.

### **1. A one-size-fits-all approach to 'Online eCommerce Platforms' may be difficult to operationally implement.**

What is often broadly termed as e-Commerce actually encompasses a wide variety of roles and business models. Some platforms allow anyone to advertise items they want to sell, some are more like virtual shopping centers or retail stores, while others are a mix of both. Sellers can include major businesses, individuals who want to have a side business, or simply people who have an excess item for sale, replacing the function that newspaper classified sections once held with instant access to a wide pool of potential buyers.

HB6122 and SB1591 define an Online eCommerce Platform as “a natural or juridical person that solicits the purchase of digital products through digital platforms and marketplaces whose business is to connect online buyers and online sellers facilitating sales of products, goods or services through the internet with the presence and use of monetary transaction.” There is some uncertainty on what is considered “whose business is to connect online buyers and online sellers.” That is, whether the definition applies to both 1.) full-fledged e-Commerce platforms with payment and/or logistics systems formally in place and 2.) networking platforms whose primary business is social networking or post-listing, where e-commerce activities are limited to nothing more than facilitating communications between merchant and consumer, and where payment and shipping transactions are conducted off-platform.

This becomes more relevant because HB6122 and SB1591 applies a uniform set of norms and obligations to all 'Online eCommerce Platforms,' despite the fact that the e-commerce space is home to diverse business models which cannot be considered equal. Enforcing a one-size-fits-all regulatory framework will not be responsive to the dynamic and highly changeable landscape that defines e-commerce in the Philippines and elsewhere.

Such an overly broad framework will also be difficult to enforce, due once more to the diversity of business models in the e-commerce sector. If a one-size-fits-all regulatory regime is imposed on e-commerce, it will subsequently force the adoption of a uniform business model rigidly compliant to a single framework. This can pose significant constraints to innovation in the sector, as well as prevent the entry of other valuable e-commerce platforms whose business models cannot meet the proposed regulations.

## 2. Added Bureaucracy in Onboarding Merchants

Obligating all “Online eCommerce Platforms” to require merchants to, among others, submit registration documents from the appropriate regulatory authority before onboarding has the unintended consequence of discouraging some very small-scale entrepreneurs from accessing the marketplace.

MSMEs out of necessity build their business from the ground up, often by briefly trialing small amounts of products before formally registering their businesses. Added bureaucracy automatically increases costs for a microenterprise at its infancy, and lengthens the time to comply with these requirements. These factors combined can have the unfortunate effect of discouraging MSMEs-- especially aspiring entrepreneurs in the lower to lower-middle classes--from exploring new opportunities to begin or grow their business.

Furthermore, requiring online platforms that have designed their user models around ease of use to create new processes to collect and verify huge amounts of information legally, and without compromising users’ safety and privacy, would be a huge administrative burden. It should be noted that these same platforms have operated successfully around the world without collecting information on every individual who posts an item for sale.

The Philippines should thus prioritize a regulatory environment that allows companies to respond to changing conditions and ensures the growing e- Commerce market is fully open to MSMEs and consumers. This is particularly important in view of the effect of COVID-19 on the domestic economy, and a potential recession that will not resolve itself anytime soon. According to a study by the Harvard T.H. Chan School of Public Health, “on and off periods of social distancing will be needed through 2022” in order to manage the COVID-19 pandemic.

Over the longer term, the Philippines should consider not just the pandemic, but also the heightened risk the archipelago faces from natural disasters. Under the realities of the COVID-19 pandemic and the country’s vulnerability to natural calamities, access to e-Commerce will continue to be an existential issue for many businesses and a key to overall economic resilience.

Instead of focusing on licensing requirements (e.g. requiring proof of registration before sellers are able to access the Online eCommerce Platforms), a possible policy approach to consumer protection is to focus on standards of conduct of participants similar to the approach in JAO 01- 08 of the Electronic Commerce Act of 2000. Section 7 (Code of Conduct) of HB6122 and SB1591 already provides certain principles of conduct that must be observed by “all businesses engaged in eCommerce”. However, Section 7 does not allocate the standards of conduct between Online eCommerce Platforms and Online Merchants. The list of principles in Section 7 include specific undertakings, many of which appear to be more appropriate for merchants and not the online platforms and service providers themselves.

### **3. Requiring Online eCommerce Platforms to Regulate Commercial Communication and Online Merchants' Compliance with Business Registrations**

Certain provisions within HB6122 and SB1591 appear to shift the burden of overseeing Online Merchant's compliance with e-Commerce regulations onto Online eCommerce Platforms. Both bills impose obligations on the Online eCommerce Platform to actively police and regulate commercial communications.

Section 11(A) of HB6122 requires the Online eCommerce Platforms to ensure that any commercial communication shall “(i) be clearly identifiable as a commercial communication; (ii) clearly identify the person on whose behalf the commercial communication is made; (iii) clearly identify any promotional offer including any discount, premium, or gift, and ensure that any conditions which must be met to qualify for it are easily accessible, and presented clearly unambiguously; and (iv) clearly identify any promotional competition or game and ensure that any conditions for participation are easily accessible and presented clearly and unambiguously.”

While e-commerce platforms are key enablers of entrepreneurship, trade, and innovation, and offer access to market, they are not engaged in the same business as the merchants or business users and may not be fully acquainted with or have actual access to the contents of the commercial communication. Therefore, this transparency obligation to ensure that the content of commercial communication is clear, accurate, and unambiguous should be the responsibility of the online merchants.

This is consistent with the current legal framework as represented in the Electronic Consumer Act of 2000. Under JAO 01-08, the obligation to provide accurate, clear, and easily accessible information relating to the product and the transaction falls on the sellers and retailers engaged directly in the online transaction. This by itself is sufficient regulation that does not unnecessarily burden e-commerce platforms themselves, for whom such communications are either difficult or impossible to monitor.

Section 11(E) of HB6122 and SB1591 require e-Commerce Platforms to keep lists of every seller on the platform and make them responsible for reporting unregistered sellers to the government. Furthermore, Section 8, par. 3 of HB6122 and SB1591 also provides that a person who facilitates the sale of a digital product or service by one who is not authorized is deemed primarily liable for any obligation, damage, or fine that may arise from the transaction or from the digital product.

By the nature of their function, however, e-commerce platforms enable or facilitate the sale of digital products. This means that these platforms will have to underwrite compliance of Online Merchant with the registration requirements. This would be difficult to implement as Online e-Commerce Platforms will have to track and identify merchants that are either 1.) directly engaged in the business of selling digital products are required to register, and 2.) persons who are merely involved in Consumer-to-Consumer Transactions (i.e., one-off or occasional low-value transactions that are not made in the ordinary course of business--as is often the case for budding entrepreneurs in the lower- middle to lower classes).

A more efficient and MSME-friendly way to drive businesses to register without stifling growth would be by creating a voluntary registration process that a business could undergo once established, in order to give consumers more confidence in purchasing from these merchants. Another possible approach on monitoring compliance would be to equip the eCommerce Bureau with the resources and the technical expertise to exercise its powers effectively.

#### **4. Extraordinary Diligence and Vicarious Liability of Online eCommerce Platforms**

Section 17(A) under HB6122 and SB1591 imply that Online eCommerce Platforms are required to adhere to a higher standard of diligence: extraordinary diligence. In the context of common carriers, the standard for such extraordinary diligence means that “a common carrier is bound to carry the passengers safely as far as human care and foresight can provide, using the utmost diligence of very cautious persons with a due regard for all the circumstances.”

The default standard of diligence is “proper diligence of a good father of a family” or ordinary diligence. HB6122 will have the effect of increasing the duty of care required for Online eCommerce Platforms. Extraordinary diligence is a standard which is that of the highest possible degree of diligence, using the utmost diligence of a very cautious persons, with due regard for all circumstances, and is usually required of a common carrier (a public utility) or other business imbued with public interest, such as banks. In practice, this test is very subjective. To impose the same on e-commerce platforms is not in keeping with existing international regulatory standards. In other jurisdictions, e-Commerce Platforms are subject to a duty of care as a “diligent operator” and not extraordinary diligence.

There is also some uncertainty on the meaning of the phrase “should have known” in Section 17(C) of HB6122 which could trigger solidary liability. This, coupled with an extraordinarily high standard of due diligence, will lower the threshold to claim liability against e-Commerce Platforms. This will penalize e-Commerce Platforms for acts committed by Online Merchants, and for which the latter is more appropriately accountable.

The administrative responsibilities in ensuring that HB6122 is complied with by online merchants are mainly shifted to Online eCommerce Platform under Sections 17(D)-(F) of HB6122. Requiring Online eCommerce Platforms that have designed their user models around ease of use to create new processes to collect and verify huge amounts of information, and without compromising users’ safety and privacy, would be an onerous regulatory burden that will once more threaten the potential for innovation and growth in the e-commerce economy.

#### **5. Regulating cross-border transactions**

Section 8 of HB6122 provides that “[a] non-resident of the Philippines who engages in eCommerce by marketing goods or services that are accessible in the Philippines may not evade legal liability in the Philippines owing to the fact of non-residency, and shall be subject to the same obligations and liabilities arising from any transaction as those who are authorized to engage in eCommerce in the Philippines.” A proposal to require non-residents to adhere to the same regulations as residents would be difficult, if not impossible, to implement unilaterally.

JAO 01-08 under the existing Electronic Commerce Act offers a more cooperative solution to cross-border issues because it engages participation of foreign government agencies. Under the JAO 01-08, any consumer located in the Philippines aggrieved by any consumer transaction through electronic means with a retailer, seller, distributor, or manufacturer from another country may file his complaint in the Philippine trade/consular office/embassy therein or directly in the foreign government agency or regulator of the country where the retailer, seller, distributor, or manufacturer is located with the assistance of the Philippine government agency concerned.

Another solution would be to broaden the capacity of consumer protection enforcement authorities and other relevant authorities, as appropriate, to cooperate and coordinate their investigations and enforcement activities, through notification, information sharing, investigative assistance, and joint actions with foreign government agencies. Section 5(G) of HB6122 and SB1591 empowers the eCommerce Bureau to represent the Philippines in international negotiations to promote cross-border eCommerce transactions. This is a good initiative.

The eCommerce Bureau should also be capacitated to develop and enter into agreements or other arrangements for the mutual recognition and enforcement of judgments resulting from disputes between consumers and businesses and enforcement actions taken to combat fraudulent, misleading or unfair commercial conduct.

## **6. Regulatory reach of the DTI is broad**

The bill creates an eCommerce Bureau meant to implement the proposed law, but what the bill really does is empower the DTI to the extent that it appears to gain authority over actions beyond the scope of trade. There appears to be a wider-than-ordinary, sweeping grant of regulatory jurisdiction.

Under Section 10 of HB6122, it is proposed that DTI shall exercise primary regulatory jurisdiction over any website, webpage, social media account, or other similar platform that markets digital products that are accessible in the Philippines.

Without any amendment or clarification, the risk to covered entities is simply not understanding what processes or measures the DTI could pursue and implement. Actors could possibly face a “superbody” that can try to suspend, curtail or shut down aspects of operations without due regard to or compliance with safeguards that may apply under the procedures of other relevant agencies.

For example, if a food product is sold on a platform and the DTI believes there is some lack of transparency with respect to the safety of that good, theoretically, based on the text of the bill, it can move against the platform even if the appropriate agency that needs to review the product is the Food and Drug Administration. Online Merchants and Online eCommerce Platforms could face investigations or actions in more than one venue.

Since the metes and bounds of the regulatory jurisdiction of the DTI are not fully defined, it could be subject to legal challenge for possible undue delegation of legislative powers. A similar provision in the Cybercrime Prevention Act of 2012 (R.A. 10175) (Cybercrime Act)



was struck down by the Philippine Supreme Court for violating the constitutional guarantees to freedom of expression and against unreasonable searches and seizures. According to the Supreme Court, for an executive officer to seize content alleged to be unprotected without any judicial warrant, it is not enough for him to be of the opinion that such content violates some law, for to do so would make him judge, jury, and executioner all rolled into one. The provision also disregards any judicial intervention. Under the proposed bill, the DTI is given a power which is similar to that of the DOJ in the invalidated provision of the Cybercrime Act.

## **C. GENERAL RECOMMENDATIONS**

Recognizing both the laudable and concerning provisions under HB6122 and SB1591, we respectfully submit our policy recommendations, which we believe will 1.) contribute to a regulatory framework that can effectively aid the government's efforts to further stimulate the Philippine e-commerce industry, 2.) strengthen trust among online merchants, platforms, and consumers, 3.) encourage greater entry and participation of MSMEs in the Philippine digital economy, and 4.) help realize the potential of the e-commerce sector to contribute substantially to the growth of the Philippine economy as a whole.

### **1. Ease and widen access to e-Commerce Online Platforms, instead of imposing additional barriers to onboarding**

E-commerce helps businesses survive crises, expand their consumer base, and tap new opportunities for growth. Regulations should be progressive enough to permit both businesses and ordinary citizens to gain access to present and future e-commerce technology, and thus contribute meaningfully to the economy.

It is therefore imperative that any e-commerce regulatory framework be flexible enough to respond appropriately to changing conditions, especially in a market as vulnerable to natural (e.g., meteorological/geological) and social disturbances as the Philippines. Under the realities of the COVID-19 pandemic, ease-of-access to e-Commerce is an existential issue for many businesses, and will be essential to the development of the country's economic resilience to future shocks.

### **2. Avoid regulatory ambiguity**

Covered entities should be clearly defined to prevent ambiguities in regulatory scope and enforcement. HB6122 and SB1591 must consider the industry realities on the ground, especially the fact that full-fledged e-Commerce Platforms have different user models from participative networked platforms that are principally engaged in social networking, but offer ancillary services that support e-Commerce. The same is true for other internet intermediaries.

To illustrate, full-fledged e-Commerce Platforms may have more control in onboarding sellers than other non-conventional online platforms, because the former are engaged principally in the business of e-Commerce. Regulatory uncertainty can reduce the incentive

to invest, and investor hesitation may in turn constrain the ability to scale business appropriately.

**3. Incorporate the compliance monitoring of online merchants into the e-Commerce Bureau's mandate, instead of shifting this obligation to monitor onto e-Commerce Online Platforms**

Appropriate allocation of responsibility for consumer protection among relevant e-commerce actors will be key to promoting consumer welfare and enhancing consumer trust. The wisdom behind establishing a singular office dedicated to e-Commerce regulation is to ensure consistent and coordinated implementation. Passing on the administrative burden of monitoring compliance to e-Commerce platforms may disincentivize online platforms from doing business in the country, which could consequently impede the development of e-Commerce, contrary to the purpose of HB6122 and SB1591.

**4. Adopt international best practices**

Over regulation in the form of 1.) higher required standards of care and 2.) increased liability of e-Commerce Online Platforms; puts the Philippines out of step with global regulatory norms and standards that have allowed e-Commerce Platforms to flourish in many markets. Imposing overly rigid and onerous regulations in the Philippines--where e-commerce is still in its relative infancy--may actually prevent the progress that the bill intends to stimulate in the sector.

**5. Apply a pragmatic approach to cross-border issues**

Requiring non-residents to adhere to the same regulations as residents would be difficult or near-impossible to implement and enforce. Philippine Congress--as well as government agencies that contributed in shaping the bill--should consider a more collaborative approach with foreign government agencies. The eCommerce Bureau may be empowered to facilitate communication, co-operation, and, where appropriate, the development and enforcement of joint initiatives at the international level among governments and stakeholders. Relevant government agencies may also be mandated to assist residents commence or file complaints with foreign counterpart enforcement agencies.

*End of submission*