

TOWARDS FINANCIAL INCLUSION THROUGH DIGITAL FINANCIAL SERVICES: EXAMINING THE IMPACT OF THE ‘NOTICE AND CONSENT’ PRIVACY MECHANISM

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As smartphone ownership and Internet penetration in the Philippines are among the highest in the world, the Philippines is well-positioned to leverage on digital financial services as a means of alleviating poverty. However, with the increasingly active implementation of the Philippine Data Privacy Act (‘DPA’), such potential may not be realised. The privacy regulator, the National Privacy Commission, has consistently set ‘notice and consent’ as the dominant mechanism for data processing in the delivery of digital financial services, directly replicating the European General Data Protection (‘GDPR’) standard.

Such replication not only disrupts the delivery and development of digital financial services in developing countries, but also inherently conflicts with the use of Big Data for innovation. Financial inclusion may be better achieved through a test-and-learn, industry-based approach supervised by the central bank. Further, regulation must be designed in proportion to the consumer risks digital financial services pose.

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I. INTRODUCTION

Technological advancements have enabled disadvantaged and low-income segments in developing countries to access basic financial services.¹ Digital payment platforms, e-money, and mobile-enabled solutions are some of the digital financial services that deliver low-cost basic financial services in ways that traditional banks have been unable to.² However, with the processing of personal data at the core of these technologies—from assessing credit-worthiness to determining insurance risks—privacy concerns inevitably arise.³ Whilst increased ownership of mobile devices presents an opportunity to elevate access to digital financial services,⁴ the recent implementation of the Philippine Data Privacy Act (DPA),⁵ which was influenced by the provisions of the *Data Protection Directive* and interpreted according to the provisions of the EU General Data Protection Regulation (GDPR), makes an examination of the privacy implications of digital financial services imperative. The task requires a delicate balance of priorities; done right, the delivery of such services can potentially increase the GDP of developing countries by as much as US\$3.7 trillion by 2025, and generate as many as 95 million jobs, fostering economic growth and creating millions of jobs in the process.⁶

The Philippines is a prime example of a developing country that can benefit from financial inclusion, which is defined by the World Bank as access to affordable financial products and services, delivered in a sustainable and efficient manner.⁷ The Bangko Sentral ng Pilipinas (the Philippine central bank, or ‘BSP’) reports that a large segment of the Filipino adult population remains excluded from

¹ See generally *Advancing Financial Inclusion Metrics*, WORLD ECONOMIC FORUM (Jan. 2018), http://www3.weforum.org/docs/WEF_White_Paper_Advancing_Financial_Inclusion_Metrics.pdf [https://perma.cc/69TQ-65JM].

² See generally *Digital Financial Services*, AFI, <https://www.afi-global.org/policy-areas/digital-financial-services> (last visited Nov. 2, 2018) [https://perma.cc/A35P-8QK7].

³ See generally Satoshi Kambayashi, *Big Data, Financial Services and Privacy*, THE ECONOMIST (Feb. 9, 2017), <https://www.economist.com/finance-and-economics/2017/02/09/big-data-financial-services-and-privacy> [https://perma.cc/2SWG-KSPP].

⁴ DAVID LEE KUO CHUEN & ROBERT H. DENG, *Handbook of Blockchain, Digital Finance, and Inclusion: Chinatech, Mobile Security, and Distributed Ledger*, 456 (Vol. 2, 2018).

⁵ Timothy Lyman and Kate Lauer, *What Is Digital Financial Inclusion and Why Does It Matter?*, CGAP (Mar. 10, 2015), <http://www.cgap.org/blog/what-digital-financial-inclusion-and-why-does-it-matter>.

⁶ *Digital Finance Is Key to Increasing Financial Inclusion in Asia Pacific*, AFI (Nov. 10, 2017), <https://www.afi-global.org/news/2017/11/digital-finance-key-increasing-financial-inclusion-asia-pacific> [https://perma.cc/646P-NJ4K].

⁷ *Digital Financial Inclusion*, WORLD BANK, <http://www.worldbank.org/en/topic/financialinclusion/publication/digital-financial-inclusion> (last visited Sep. 28, 2019) [https://perma.cc/GD4A-JJ2K].

the formal financial system, with only 22.6% having a formal financial account,⁸ and an even fewer 11.5% having a bank account—somehow lower than the recorded 14.1% in 2015.⁹ Only 18% of Filipino adults have insurance, citing lack of funds, lack of need, and high cost as the major reasons for not having one.¹⁰ Unsurprisingly, those without formal financial accounts or insurance belong to the poorest sectors of society.¹¹

Despite these figures, there is room for optimism: The Philippines is at the cusp of digital transformation in financial services. With the potential to expand access to basic financial services and serve as a great tool for financial inclusion,¹² digital financial services can reach millions of poor Filipinos.¹³ Two powerful tools that are essential in the delivery of digital financial services are at their disposal: mobile phones and access to the Internet, with 59% of the Filipinos owning a smartphone and Internet penetration of 55.5%, among the highest in the world.¹⁴ Mobile phones supplement the gap in financial services that traditional banks are unable to address, by giving the poor access to innovative and mobile-based payments, savings, credit, and insurance.

Such a possibility, however, may be tempered by the active implementation of the DPA. The National Privacy Commission (‘NPC’), the privacy regulator, has consistently adopted the strict European Union (‘EU’) standards of privacy, specifically the ‘notice and consent’ system expressed in the GDPR. As various financial technology (‘fintech’) services offered in the Philippines, from payment and lending to online wealth management and crowdfunding, are well-positioned to lead to financial inclusion, the DPA presents significant roadblocks that may irreversibly impact the delivery.¹⁵ This paper argues that the DPA, particularly its ‘notice and consent’ regime, security measures, and stiff penalties, has a direct

⁸ Art Fuentes, *The State of Financial Inclusion (or Exclusion) in PH*, ABS-CBN NEWS (Aug. 3, 2018), <https://news.abs-cbn.com/focus/multimedia/infographic/08/03/18/the-state-of-financial-inclusion-or-exclusion-in-ph> [<https://perma.cc/JCB6-6XJS>].

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See Jane K. Winn & Louis de Koker, *Introduction to Mobile Money in Developing Countries: Financial Inclusion and Integrity Conference Special Issue*, 8 WASH. J. L. TECH. & ARTS 155, 156 (2013).

¹³ Bangko Sentral ng Pilipinas, *Financial Inclusion in the Philippines* (2018), http://www.bsp.gov.ph/downloads/Publications/2018/FIP_1Sem2018.pdf [<https://perma.cc/AMU3-HE3K>].

¹⁴ Bangko Sentral ng Pilipinas, *Report on the State of Financial Inclusion in the Philippines* (2017), <http://www.bsp.gov.ph/downloads/Publications/2016/Financial%20Inclusion.pdf> [<https://perma.cc/SC3Q-ZT5K>].

¹⁵ Fabian Szijarto, *Digital Banking Overview in the Philippines* 9, FINASTRA (2017).

impact on the delivery of digital financial services for financial inclusion.¹⁶ This paper explores the extent by which the DPA's framing of consent disrupts business models, stifles the use of big data, and leads to unfair competition.¹⁷

Part II briefly discusses the development of privacy law in the Philippines, from consistently drawing from U.S. jurisprudence to an abrupt pivot to the EU-based approach. This provides the context for the critique that follows in Part III: a discussion of how the DPA disrupts the democratized digital financial services as they are delivered, at present, prevents the use of Big Data and imposes barriers to entry. This Part breaks down the effectiveness of the 'notice and consent' system. Instead of asserting a privacy regime that may not be fit for purpose, Part IV closes with a proposal to ensure that digital financial inclusion is achieved, with the supervision of the BSP and with adequate privacy protections that are more appropriate in the context of developing countries. To be clear, this paper does not propose the wholesale disregard of privacy regulation, as there are perfectly valid reasons for requiring them. Rather, this paper suggests a bottom-up approach to privacy that addresses both financial inclusion and privacy regulation.

II. THE DEVELOPMENT OF PRIVACY LAW IN THE PHILIPPINES

This section provides a brief overview of the development of privacy law in the Philippines from an approach that consistently drew from the U.S. legal system to a sudden pivot towards the EU approach with the passage of the DPA. It then compares the similarities between the DPA and the GDPR. Highlighting this sudden shift is important, considering that early digital financial services in the Philippines, such as Smart Money and GCash, were offered at a time when the strict privacy requirements of the DPA were not yet in effect. If both financial products were invented today, justifying them to the NPC would have been an insurmountable challenge.

A. The Internal Tension of Privacy Law in the Philippines

The diverging approaches to privacy law are influenced by a democratic society's collective choice about the roles that the market, citizens, and government

¹⁶ See generally AVI GOLDFARB & CATHERINE TUCKER, *Privacy and Innovation*, 12 INNOVATION POL'Y AND THE ECON. 65, 67 (Vol. 12, 2012).

¹⁷ Douglas Randall & Jennifer Chein, 8 *Key Approaches to Accelerate Financial Inclusion*, PRIVATE SECTOR DEVELOPMENT BLOG (Feb. 2, 2017), <http://blogs.worldbank.org/psd/8-key-approaches-accelerate-financial-inclusion> [<https://perma.cc/JQ7R-T8CD>].

play.¹⁸ Liberal, market-based norms define the privacy regime in the U.S.¹⁹, compared to socially-protective, rights-based privacy norms in the EU.²⁰ The EU model expresses privacy and data protection as rights that may be asserted against illegal data collection practices of firms.²¹ The EU frames data privacy as anchored in human rights, imposing on the government the obligation to ensure equal bargaining terms between corporations and individuals; privacy protection thus applies regardless of the purpose of processing.²²

Unlike the EU, the U.S. takes a liberal, sector-based approach to privacy.²³ Specifically, U.S. privacy law is couched as a right to personal autonomy, with constitutional protections against state interference, and sector-specific privacy legislation adopted on an *ad hoc* basis, based on *laissez-faire* economics.²⁴ Indeed, the U.S. and EU approaches have been moving further apart from each other, following international decisions by the EU on information privacy and blockage of data transfers to third party nations, culminating with the passage of GDPR.²⁵

Prior to the enactment of the GDPR-like DPA, Philippine privacy law was largely inspired by the U.S. conceptualization of privacy. Section 2 of the Bill of Rights under the Philippine Constitution provides for the right against unreasonable searches and seizures, while Section 3 emphasizes the right to privacy of communication and correspondence—rights that may be invoked against the state.²⁶

Pre-DPA privacy jurisprudence in the Philippines drew heavily from U.S. decisions, starting with the Philippine Supreme Court case of *Morfe v. Mutuc*, which dealt with the constitutionality of the requirement for public officers to disclose their assets and liabilities, on the grounds that it violates due process.²⁷ In

¹⁸ Joel R. Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 STAN. L. REV. 1315, 1370 (2000).

¹⁹ *Id.* at 1318.

²⁰ *Id.*

²¹ JASMINE MCNEALY & ANGELYN FLOWERS, *Privacy in a Digital Networked World* 203 (Sherali Zeadally & Mohamad Badra eds., 2015).

²² Christopher Kuner, *An International Legal Framework for Data Protection: Issues and Prospects*, 25 COMP. L. & SEC. REV. 307, 1347 (2009).

²³ See Reidenberg, *supra* note 19, at 1342-50 (There is no omnibus privacy law in the U.S. e.g. privacy regulations applicable to the health sector differ from the finance sector).

²⁴ See *id.*

²⁵ See Paul M. Schwartz, *The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures*, 126 HARV. L. REV. 1966, 1966-67 (2013) (discussing growing differences between the EU and U.S. privacy laws).

²⁶ CONST. (1987), art. III, §§ 2-3 (Phil.).

²⁷ *Morfe v. Mutuc*, G.R. No. L-20387, 130 Phil. Rep. 415 (S.C., Jan. 31, 1968) (Phil.).

its ruling, the Philippine Supreme Court quoted U.S. Justice Brandeis, who characterized the right to be let alone as the “most comprehensive of rights and the right most valued by civilized men.”²⁸ This is how the idea of various zones of privacy created from certain fundamental rights was imported to the Philippine legal system.²⁹ In another Philippine Supreme Court case, *Ople v. Torres*, the Court recognized the right to privacy as a fundamental right guaranteed under the Philippine Constitution.³⁰ In striking down the measure involved, the Court admonished that a national identification system is where “[t]he end of privacy begins.”³¹ Pre-DPA privacy was traditionally asserted as a check and balance against the state.³² Thus, prior to the DPA, the Philippines had consistently leaned towards the U.S. approach to privacy law.

With the passage of the DPA, the Philippines finds itself in a unique, if not confusing, position: the constitutional right to privacy is rooted in the *laissez-faire* U.S. concept of privacy, whilst the DPA, with provisions analogous to the GDPR, leans towards the opposing EU model. The DPA appears oblivious to this conflict and offers no solution, leaving many questions unanswered. For one, what is now the role of the government in upholding the right to privacy, when this right was traditionally asserted against it? The right to privacy has historically been asserted against government abuses and questionable government measures,³³ which is more consistent with the U.S. approach. With the DPA, the government, through the NPC, is now expected to be the vanguard of privacy.³⁴

As an omnibus privacy law, the DPA stands as an outlier that does not conform to the historical development of privacy law in the Philippines. Its inconsistency clashes with many digital financial services that have been around even before the DPA, and prevents innovation that involves the processing of personal data, as will be argued in this paper. With this inconsistency, justifying the pedestal on which the DPA appears to be placed above financial inclusion is difficult. There is a need to re-examine the DPA’s various provisions and its bases, the Data Protection Directive, and GDPR, to understand how it is a regrettable

²⁸ *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928)).

²⁹ *Id.* at n. 63 (discussing how the U.S. concept of zones of privacy stemming from the U.S. Bill of Rights is analogous to extending those same protections under the Philippine Constitution).

³⁰ See *Ople v. Torres*, G.R. No. 127685, 354 Phil. Rep. 948 (S.C., July 23, 1998)(Phil.) (“the right to privacy was not engraved in our Constitution for flattery”).

³¹ See *Ople v. Torres*, G.R. No. 127685, 354 Phil. Rep. 948 (S.C., July 23, 1998)(Phil.).

³² See *Morfe v. Mutuc*, G.R. No. L-20387, 130 Phil. Rep. 415 (S.C., Jan. 31, 1968)(Phil.).

³³ See, e.g., *id.*

³⁴ V. Pitogo, *National Gov. Agency’s Compl. on Data Privacy Act of 2012: A Case Study*, Phys.: Conf. Ser. 1201 012021 (2019) (summarizing history of privacy laws in the Philippines).

obstacle to digital financial inclusion.³⁵ This is discussed in the following subsection.

B. DPA’s Replication of the EU Approach

DPA was passed supposedly because of the lack of a data protection law hindered the development of the business processing outsourcing (‘BPO’) industry.³⁶ The DPA mirrored several provisions of the Data Protection Directive. Then, the GDPR replaced the Data Protection Directive with twice as many provisions. One of the reasons for updating the Data Protection Directive with the more exhaustive GDPR is a supposed need to institute more rigid protective measures in light of emerging technologies, such as cloud computing, Big Data, and the Internet of Things (“IoT”).³⁷ A specific concern is how consent requirements under the Data Protection Directive have been used by companies on a take-it-or-leave-it basis, where customers must consent to the service or be blocked from using it altogether.³⁸

With the enactment of the GDPR, the NPC has actively sought to show that it aligns with the DPA’s provisions. As noted by a previous Deputy Commissioner of the NPC, compliance with the DPA would equate to 90% compliance with the GDPR.³⁹ In its newsletter, the NPC set out the similarities between the two:

	GDPR	DPA
Consent	Consent must be freely given, specific, informed, and unambiguous indication of the data subject’s agreement to the processing. This is indicated	Consent must be freely given, specific, informed indication of will that the data subject agrees to the processing of personal data. This is evidenced by

³⁵ See Lyman & Lauer, *supra* note 6 (defining digital financial inclusion as, “digital access to and use of formal financial services by excluded and underserved populations”).

³⁶ GRAHAM GREENLEAF, *Asian Data Privacy Laws: Trade & Human Rights Perspectives* 342 (2014).

³⁷ *Id.*

³⁸ *Id.*

³⁹ Damian Mapa, *Mapping the Philippine Data Privacy Act and GDPR: A White Paper from the EITSC*, EUROPEAN INNOVATION, TECH., AND SCI. CTR. FOUND. 1 (2018), <https://eitsc.com/wp-content/uploads/2018/05/Mapping-the-DPA-and-GDPR.pdf>.

	through a statement of clear affirmative action. ⁴⁰	written, electronic or recorded means. ⁴¹
Criteria for Lawful Processing	Consent, necessary for the fulfillment of a contractual arrangement, compliance with a legal obligation, protection of vital interests, public of the processor, public interest/exercise of official authority, <i>or</i> legitimate interest. ⁴²	For the processing of personal information: consent, necessary for the fulfillment of a contractual arrangement, compliance with a legal obligation of the processor, protection of vital interests, public interest/exercise of public authority, <i>or</i> legitimate interest. ⁴³
Security Measures	Controllers must implement appropriate technical and organizational measures to demonstrate GDPR compliance, and build in privacy by default and design. ⁴⁴ They must also undertake compulsory data protection impact assessments, ⁴⁵ and appoint data protection officers. ⁴⁶	Controllers and processors ⁴⁷ must implement organizational, physical and technical security measures. ⁴⁸ Privacy impact assessments must be undertaken for programs or processes that involve the personal data. ⁴⁹ A data protection officer must also be appointed. ⁵⁰

⁴⁰ COUNCIL OF THE EUROPEAN UNION, REGULATION 2016/679 OF THE EUROPEAN PARLIAMENT AND THE COUNCIL OF 27 AUGUST 2016: GENERAL DATA PROTECTION REGULATION [hereinafter GDPR]; GDPR art. 4(11).

⁴¹ CONGRESS OF THE PHIL., REPUBLIC OF PHIL. REP. ACT NO. 10173: DATA PRIVACY ACT OF 2012 [hereinafter DPA]; DPA § 3(b).

⁴² GDPR Recital 39-52, art. 6.

⁴³ See DPA § 12.

⁴⁴ GDPR art. 5(2), 24, 25.

⁴⁵ *Id.* art. 35.

⁴⁶ *Id.* art. 37.

⁴⁷ DPA § 3(i) (referring a processor as "any natural or juridical person qualified to act as such under this Act to whom a personal information controller may outsource the processing of personal data pertaining to a data subject").

⁴⁸ *Id.* § 20.

⁴⁹ *Id.*

⁵⁰ DPA § 21(b).

Sanctions and Penalties	Administrative fines of up to 20 million euros or 4% of annual worldwide turnover. ⁵¹	Fine of up to PhP 2,000,000 and imprisonment of up to seven years. ⁵²
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The GDPR and the DPA share many other similarities, but the above provisions are singled out, specifically because they are relevant in analyzing the impact of the DPA on the delivery of digital financial services. In fact, the DPA is more punitive, with the potential of imprisonment of up to seven years.⁵³

The NPC is empowered by the DPA to issue advisory opinions based on inquiries by the public.⁵⁴ The NPC has used this power to further align itself with GDPR. There are a number of NPC opinions that directly affect the delivery of digital financial services. To start with, the NPC expressly stated that the DPA applies to companies in the financial sector that are engaged in processing personal data.⁵⁵ The regulator has also expressly qualified certain standard practices in the financial services industry as falling within the scope of the DPA, such as mobile phone data shared for credit scoring,⁵⁶ anonymized statistical data,⁵⁷ and data shared between entities.⁵⁸

Perhaps one of the more significant interpretations of the DPA involved consent: the NPC has certain terms that set opt-in consent as the baseline standard when processing is based on consent, ruling out the possibility of using implied,

⁵¹ GDPR art. 83.

⁵² DPA §§ 25-37.

⁵³ *Id.* § 28.

⁵⁴ *Id.* § 7.

⁵⁵ PRIVACY POLICY OFFICE, REPUBLIC OF PHIL. NAT'L PRIVACY COMM'N, ADVISORY OP. NO. 2017-23 (June 21, 2017), https://www.privacy.gov.ph/wp-content/files/attachments/advopn/NPC_AdvisoryOpinionNo._2017-023.pdf.

⁵⁶ PRIVACY POLICY OFFICE, REPUBLIC OF PHIL. NAT'L PRIVACY COMM'N, ADVISORY OP. NO. 2017-31 (June 28, 2017) (holding that while the DPA does not apply to truly anonymous information, it must prevent the possibility of identification of the data subject. As discussed in the next section, technological advancements puts effective anonymisation solutions at a permanent state of uncertainty), https://www.privacy.gov.ph/wp-content/files/attachments/advopn/NPC_AdvisoryOpinionNo._2017-031.pdf.

⁵⁷ PRIVACY POLICY OFFICE, REPUBLIC OF PHIL. NAT'L PRIVACY COMM'N, ADVISORY OP. NO. 2017-27 (June 23, 2017), https://www.privacy.gov.ph/wp-content/files/attachments/advopn/NPC_AdvisoryOpinionNo._2017-027.pdf.

⁵⁸ PRIVACY POLICY OFFICE, REPUBLIC OF PHIL. NAT'L PRIVACY COMM'N, ADVISORY OP. NO. 2017-13 (Mar. 6, 2017), https://www.privacy.gov.ph/wp-content/files/attachments/advopn/NPC_AdvisoryOpinionNo._2017-013.pdf.

passive, or opt-out consent.⁵⁹ In interpreting the requirement of consent, the NPC has on at least two occasions *in toto* adopted the GDPR interpretation that consent must be a freely given, specific, informed and unambiguous—clearly indicating the data subject’s acceptance of the processing by the controller; silence, pre-ticked boxes, or inactivity do not meet this criterion.⁶⁰ While controllers theoretically need not limit themselves to consent, as there are other criteria for processing personal data that may be relied upon, the NPC considers consent as the most reliable if not unassailable criterion. Responding to a question on whether an entity providing credit scores based on mobile phone data is covered by the DPA, the NPC unsurprisingly answered in the affirmative, then went one step further by stating that the processing activity requires consent.⁶¹ Consent is likewise the criterion for data sharing, even among affiliates.⁶² Based on these opinions, the NPC has exerted an active effort to set ‘notice and consent’ as the ideal standard for processing.

The above opinions, which frame consent as the ideal standard for data processing, come at a time when several studies have critiqued overreliance on ‘notice and consent’ as a standard for data processing,⁶³ and this, in particular, is examined more closely in the next section. Moreover, by expressly citing the GDPR, the NPC has shown its proclivity for transplanting the GDPR into the Philippine context as shown in Part III below. This policy direction has far-reaching implications on the delivery of digital financial services geared towards financial inclusion.

III. THE IMPACT OF REPLICATED GDPR STANDARDS ON THE DELIVERY OF DIGITAL FINANCIAL SERVICES FOR FINANCIAL INCLUSION

⁵⁹ PRIVACY POLICY OFFICE, REPUBLIC OF PHIL. NAT’L PRIVACY COMM’N, ADVISORY OP. NO. 2017-23 (June 21, 2017), https://www.privacy.gov.ph/wp-content/files/attachments/advopn/NPC_AdvisoryOpinionNo._2017-023.pdf.

⁶⁰ PRIVACY POLICY OFFICE, REPUBLIC OF PHIL. NAT’L PRIVACY COMM’N, ADVISORY OP. NO. 2017-53 (Sep. 11, 2017), https://www.privacy.gov.ph/wp-content/files/attachments/advopn/NPC_AdvisoryOpinionNo._2017-053.pdf; PRIVACY POLICY OFFICE, REPUBLIC OF PHIL. NAT’L PRIVACY COMM’N, ADVISORY OP. NO. 2017-42 (Aug. 14, 2017), https://www.privacy.gov.ph/wp-content/files/attachments/advopn/NPC_AdvisoryOpinionNo._2017-042.pdf.

⁶¹ PRIVACY POLICY OFFICE, REPUBLIC OF PHIL. NAT’L PRIVACY COMM’N, ADVISORY OP. NO. 2017-31 (June 28, 2017), https://www.privacy.gov.ph/wp-content/files/attachments/advopn/NPC_AdvisoryOpinionNo._2017-031.pdf.

⁶² PRIVACY POLICY OFFICE, REPUBLIC OF PHIL. NAT’L PRIVACY COMM’N, IMPLEMENTING RULES AND REGULATIONS OF REPUBLIC ACT No. 10173 § 20 (Aug. 24, 2016).

⁶³ Eugenia Politou, Efthimios Alepis & Constantinos Patsakis, *Forgetting Personal Data and Revoking Consent under the GDPR: Challenges and Proposed Solutions*, 4 J. CYBERSECURITY 20, 5 (2018).

Having discussed the transplantation of the EU-based privacy regime, this Part discusses how the current privacy regime, specifically the system of ‘notice and consent’ drawn from the Data Protection Directive and interpreted in accordance with the GDPR, may negatively impact the delivery of digital financial services and may impede the common goal of financial inclusion. Innovations in digital financial services have been making strides towards financial inclusion by enabling the poor to make financial transactions, empowering them to have formal saving channels, and increasing their ability to partake in profit-enhancing activities. With the DPA, such financial services may violate the ‘notice and consent’ system in place, among other provisions.⁶⁴

This Part is divided as follows: first, it maps the link between digital financial inclusion and innovation in fintech. Second, it discusses the problems that scholars have identified with the ‘notice and consent’ system transplanted from the EU. The third subsection more thoroughly illustrates possible DPA violations inherent in the current business model of digital financial services in the Philippines. Such services primarily rely on branchless banking, which was legal in the pre-DPA privacy era. The fourth sub-section analyzes how the DPA’s ‘notice and consent’ system prevents the use of Big Data, which is integral for the innovation of financial processes. The fifth sub-section discusses how the DPA discourages competition and, as a corollary, encourages monopolies.

Innovation in digital financial services usually takes the form of fintech products—services that offer credit, provide financial advice, manage assets, and facilitate mobile money transactions.⁶⁵ A key concept that ties the discussions below together, and is important to remember, is how innovation has helped reduce poverty through inexpensive and efficient financial services—enabling the poor to make mobile payments, gain access to savings, and increase their ability to partake in profit-enhancing activities—all of which seem simple but provide a crucial financial lifeline to the unbanked.⁶⁶

A. *The Dilemma of Financial Exclusion*

While providing access to financial services may seem like a straightforward process, developing countries like the Philippines have struggled

⁶⁴ Sylviane Guillaumont Jeanneney & Kangni Kpodar, *Financial Development and Poverty Reduction: Can There Be a Benefit Without a Cost?*, INTERNATIONAL MONETARY FUND (Mar. 1, 2008).

⁶⁵ Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech* (2018) 65 UCLA L. REV. 23, 239.

⁶⁶ Jeanneney and Kpodar, *supra* note 65, at 19.

with financial inclusion for decades. The population of the Philippines is 101 million people,⁶⁷ of which 53% live in rural areas⁶⁸ and 21.6% live below the national poverty level. Among the Filipinos who are employed, only 8.3% have the purchasing power of \$.190 daily.⁶⁹ The underserved segment is primarily comprised of two groups in poverty: the unbanked who do not have any relationship with financial institutions and the underbanked who have a basic but insufficient relationship with financial institutions.⁷⁰ Reaching this segment of the population has been a Sisyphean task for banks. These groups are not only financially illiterate, but many live in remote areas where bank branches are financially unsustainable. They do not have enough money to avoid transacting through the formal banking system that would result in higher transaction costs than those paid by an average person. Even worse, they have no credit history that can help determine their creditworthiness for lower interest rates.⁷¹ The list of challenges goes on and accurately illustrates the effect of lacking access to basic necessities like a bank account.⁷²

The solution to reaching the underserved segment lies in innovation: first by breaking down the complex causes of financial exclusion to their elemental components, finding inventive solutions for each identified problem, and then testing each solution in the market for efficacy.⁷³ In this regard, mobile phones have proven to be a powerful means to deliver financial services to achieve financial inclusion.⁷⁴ With 59% of the population owning a smartphone and 55.5% using the

⁶⁷ Bangko Sentral ng Pilipinas, *Financial Inclusion Initiatives 2017*, ALLIANCE FOR FINANCIAL INCLUSION (2017), https://www.afi-global.org/sites/default/files/inline-files/bsp-microfinance_2017.pdf [<https://perma.cc/G45C-ENXW>] (last visited Oct. 15, 2018).

⁶⁸ *Rural Population (% of Total Population)*, WORLD BANK DATA (2018), <https://data.worldbank.org/indicator/SP.RUR.TOTL.ZS>.

⁶⁹ *Poverty in the Philippines*, Asian Development Bank (June 5, 2018), <https://www.adb.org/countries/philippines/poverty>.

⁷⁰ Nizan Geslevich Packin & Yafit Lev-Aretz, *Big Data and Social Netbanks: Are You Ready to Replace Your Bank*, 53 HOUSTON L. REV. 1211, 1242 (2015).

⁷¹ Gautam Ivatury, *Using Technology to Build Inclusive Financial Systems*, New Partnerships for Innovation in Microfinance (Feb. 3, 2009), http://link.springer.com/10.1007/978-3-540-76641-4_9.

⁷² See Glob. P'ship for Fin. Inclusion, *Global Standard-Setting Bodies and Financial Inclusion for the Poor: Toward Proportionate Standards and Guidance*, 8 (Oct. 2011), <http://www.gpfi.org/sites/gpfi/files/documents/White-Paper-Global-Standard-Setting-Bodies-Oct-2011.pdf> [<https://perma.cc/C53Y-XYHU>].

⁷³ See generally Daniel Mwirigi Amanja, *United Nations Conference on Trade and Development, Financial Inclusion, Regulation and Stability: Kenyan Experience and Perspective*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (May 11-15, 2015), https://unctad.org/meetings/en/Presentation/c1mem3_2015_p09_Mwiribi_en.pdf.

⁷⁴ See Eleanor Lumsden, *The Future Is Mobile: Financial Inclusion and Technological Innovation in the Emerging World*, 23 STANFORD J.L. BUS. & FIN. 1, 17 (2018).

Internet,⁷⁵ the Philippines could use smartphones and the Internet as a viable, effective, and inexpensive means for delivering financial services to the poor.⁷⁶ As key components driving the digital financial inclusion,⁷⁷ the evidence that mobile phones can improve access to financial services is by no means anecdotal. When governments cannot invest in the complex banking infrastructure and banks deem such investment as financially unsound, digital financial service has emerged as a viable alternative to include the underserved population into the financial system in countries that have high mobile phone penetration.⁷⁸ Considering the advantages of digital financial services concerns about how policy decisions (in this case, the DPA) can affect the trajectory of fintech are well-founded.⁷⁹

Financial inclusion measures access to four types of financial services: credit, savings (including current accounts), payments, and insurance.⁸⁰ There are many examples of fintech bridging the gap towards financial inclusion. How the DPA affects innovation in these four types of financial services is discussed in the subsequent sections.

B. DPA's Problematic Framing of Consent

This section analyzes the 'notice and consent' standard of processing under the DPA, imported from the EU-based approach. As discussed in Part II, the 'notice and consent' system under the DPA, as interpreted by the NPC, copies the language and interpretation of the GDPR.

Copying the EU-based privacy approach may be incompatible with innovation⁸¹, as reflected in the so-called "European Paradox"—the contrast between the EU's reputable academic position vis-à-vis its relative weakness in

⁷⁵ Bangko Sentral ng Pilipinas, *supra* note 14.

⁷⁶ See Ross Buckley et al., *Financial Innovation in East Asia*, 37 SEATTLE U.L. REV. 307, 346-347 (2014).

⁷⁷ Kate Lauer & Timothy Lyman, *Digital Financial Inclusion: Implications for Customers, Regulators, Supervisors, and Standard-Setting Bodies 2* (Feb. 2015), <http://www.cgap.org/sites/default/files/researches/documents/Brief-Digital-Financial-Inclusion-Feb-2015.pdf> [<https://perma.cc/HW88-UR2A>].

⁷⁸ Lumsden, *supra* note 75, at 16.

⁷⁹ Paul B. McGuire & John D. Conroy, *Fostering Financial Innovation for the Poor: The Policy and Regulatory Environment*, THE FOUNDATION FOR DEVELOPMENT COOPERATION 7 (2015).

⁸⁰ Center for Financial Inclusion, Toolkits and Guides: *Financial Inclusion Glossary*, FINANCIAL INCLUSION 101 (Oct. 2, 2018), <https://www.centerforfinancialinclusion.org/financial-inclusion-glossary> [<https://perma.cc/9JZY-BCCW>].

⁸¹ See generally Rhys Bollen, *A Discussion of Best Practice in the Regulation of Payment Services*, J. INT'L BANKING L. & REG. 370 (2010).

innovation.⁸² The Internet market illustrates the phenomenon: not only has the EU failed to become a leader in this field, but it also has not been noticeable.⁸³ This was not always the case as EU-based companies had the first-mover advantage in information and communication technologies. However, the EU privacy regime became increasingly strict and U.S.-based Internet juggernauts like Google, Facebook, Amazon, and Twitter took over the market.⁸⁴ In the data-driven market as the Internet, the EU-based model, which emphasized ‘notice and consent’ from its inception, may have failed to take into account that “regulation could preclude economic and societal benefits.”⁸⁵ While factors other than privacy also led to this contrast, the United-States-based privacy approach facilitates the flow of information necessary to fuel the information economy of the Internet. The U.S. model is consistent with the idea that as long as consumer protection mechanisms and security concerns are in place, personal data is a useful tool that can promote innovation.⁸⁶ In fact, the pre-DPA privacy law in the Philippines followed the U.S. model, allowing the invention of mobile money systems and e-money in an environment relatively unencumbered by regulation.⁸⁷

Upon the implementation of the DPA, consent became the preferred standard of processing and the dominant mechanism in some parts of the modern world.⁸⁸ This approach, as required by the GDPR and replicated by the NPC, intuitively makes sense, as it empowers individuals to exercise their privacy rights.⁸⁹ However, the ‘notice and consent’ system is replete with assumptions and anachronisms at the expense of financial inclusion in the long run.⁹⁰ The

⁸² Giovanni Dosi et al., *Science-Technology-Industry Links and the "European Paradox": Some Notes on the Dynamics of Scientific and Technological Research in Europe*, BUREAU D'ECONOMIE THÉORIQUE ET APPLIQUÉE 14 (2015).

⁸³ Tal Z. Zarsky, *The Privacy-Innovation Conundrum*, 19 LEWIS & CLARK L. REV. 115, 155 (2015).

⁸⁴ *Id.* at 158.

⁸⁵ Jess Hemerly, *Public Policy Considerations for Data-Driven Innovation*, 46 COMPUTER 25, 25 (2013).

⁸⁶ See Kabir Kumar & Kim Muhota, *Can Digital Footprints Lead to Greater Financial Inclusion?*, CGAP (July 2012).

⁸⁷ Sophia Hasnain et al., *Mobile Money in the Philippines: Market Conditions Drive Innovation with Smart Money and GCash*, GSMA: MOBILE FOR DEVELOPMENT (June 23, 2016), <https://www.gsma.com/mobilefordevelopment/programme/mobile-money/mobile-money-philippines-market-conditions-drive-innovation-smart-money-gcash-philippines-becoming-mobile-money-innovation-hub> [<https://perma.cc/FE5R-EQUN>].

⁸⁸ Fred H. Cate & Viktor Mayer-Schönberger, *Notice and Consent in a World of Big Data*, 3 INT'L DATA PRIVACY L. 67, 67 (2013).

⁸⁹ *Id.*

⁹⁰ Ira S. Rubinstein, *Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes*, 6 I/S, J.L. & POL'Y FOR INFO. SOC'Y 355, 406 (2011).

requirement of consent assumes that consumers read written privacy policies in the first place and therefore, can give meaningful consent.⁹¹ The truth could not be further removed from this assumption—the forms contain too much legalese;⁹² they are too time-consuming to read; resistance to giving consent is futile;⁹³ or, electronic contracts just do not have the same compelling force as paper contracts.⁹⁴ The reality is that consumers simply do not pay attention when consenting to privacy policies.⁹⁵ While the DPA makes an extensive enumeration of the rights of a data subject, as well as the risks of privacy violations, consumers simply do not have the expertise and information to sift through a privacy policy and make an informed choice.⁹⁶ This is the so-called transparency paradox: even the most sophisticated users would be confounded by the impact of information practices relating to their personal data.⁹⁷ Thus, the ‘notice and consent’ system forces individuals to make a binary choice—based on a complex number of factors they do not even realize or are not aware of, to begin with—regarding their privacy.⁹⁸

The reality of a consumer’s modern commercial life is that to avail of a service, there is no choice but to tick the consent box—and all other alternative services impose the same condition.⁹⁹ Privacy has certainly not been identified as a reason to refuse service. Moreover, the transparency paradox has found its way to the Philippines, as the active implementation of the DPA has resulted in the ubiquity of privacy policies that need to be expressly agreed to before a service is provided.¹⁰⁰ At best, the barrage of these tick boxes is an unwelcome interruption

⁹¹ *Id.* at 406-07.

⁹² Omri Ben-Shahar, *The Myth of the ‘Opportunity to Read’ in Contract Law*, 5 EUR. REV. CONT. L.

1, 2 (2009).

⁹³ See Rubinstein, *supra* note 91, at 406.

⁹⁴ See Christopher G. Bradley, *FinTech’s Double Edges*, 93 CHICAGO-KENT L. REV. 61, 72 (2018).

⁹⁵ See Rubinstein, *supra* note 91, at 407.

⁹⁶ See Robert H. Sloan & Richard Warner, *Beyond Notice and Choice: Privacy, Norms, and Consent*, 14 J. HIGH TECH. L. 370, 407 (2014).

⁹⁷ See Solon Barocas & Helen Nissenbaum, *Big Data’s End Run Around Procedural Privacy Protections*, 57 COMM. ACM 31, 32 (2014).

⁹⁸ See Cate & Mayer-Schönberger, *supra* note 89, at 68.

⁹⁹ See Bert-Jaap Koops, *The Trouble with European Data Protection Law*, 4 INT’L. DATA PRIVACY L. 250, 251-252 (2014).

¹⁰⁰ See *id.* at 252.

to a consumer's online life.¹⁰¹ At worst, it is a grim reminder that resistance is futile, and the consumer really has no choice but to agree.¹⁰²

A perspective to consider is that the consumer intuitively welcomes information sharing in certain cases or for a certain price.¹⁰³ Indeed, if privacy is so important to one's dignity, then people would not be giving away tidbits of their personal lives on social media or discarding it away to participate in promotional advertisements.¹⁰⁴ Also, while people value privacy, they are actually willing to disclose sensitive information about themselves for just a small price, like a chance to win in a raffle contest.¹⁰⁵ That Filipinos are on top when it comes to social media usage for the third year in a row—spending almost four hours a day on average—speaks to this notion.¹⁰⁶ Moreover, consumers may want to have their data profiled, so they can receive targeted information about the services they may be of interest.¹⁰⁷

The question of how the extensively criticized 'notice and consent' system impacts innovation, especially in financial services, is therefore important to consider. The attempt to frame consent as a matter of individual choice is a barrier to necessary research that could lead to innovation.¹⁰⁸ 'Notice and consent' systems impede data flows,¹⁰⁹ resulting in a restrictive environment that prevents the processing of personal data to experiment with innovative financial solutions. Experimentation would entail reverting to the individual multiple times to obtain their consent—a task too costly to undertake, and is therefore unlikely to be allowed by firms.¹¹⁰ The DPA's 'notice and consent' system has been interpreted by the

¹⁰¹ See generally Larry Downes, *GDPR and the End of the Internet's Grand Bargain*, HARV. BUS. REV. (Apr. 9, 2018), <https://hbr.org/2018/04/gdpr-and-the-end-of-the-internets-grand-bargain> [<https://perma.cc/FX89-8RPY>].

¹⁰² See Koops, *supra* note 100, at 252.

¹⁰³ See Brent D. Mittelstadt & Luciano Floridi, *The Ethics of Big Data: Current and Foreseeable Issues in Biomedical Contexts*, 22 SCI. & ENGINEERING ETHICS 303, 315 (2016).

¹⁰⁴ See Anita L. Allen, *Protecting One's Own Privacy in a Big Data Economy*, 130 HARV. L. REV. F. 71, 72 (2016).

¹⁰⁵ See Alessandro Acquisti & Ralph Gross, *Imagined Communities: Awareness, Information Sharing, and Privacy on the Facebook* 36-58, 37 LNCS 4258 (2006).

¹⁰⁶ Kyle Chua, *PH Top in Social Media Usage for 3 Straight Years – Report*, RAPPLER (Feb. 15, 2018, 2:50 PM) [<https://perma.cc/V6P7-79X5>].

¹⁰⁷ See Alessandro Acquisti, *The Economics of Personal Data and the Economics of Privacy: 30 Years after the OECD Privacy Guidelines* 6, OECD (Dec. 1, 2010) [<https://perma.cc/UH2Y-WHB9>].

¹⁰⁸ See Mittelstadt & Floridi, *supra* note 104, at 312.

¹⁰⁹ See generally Koops, *supra* note 100, at 255.

¹¹⁰ See Cate & Mayer-Schönberger, *supra* note 89, at 68.

NPC so rigidly (in that it can only be opt-in)¹¹¹ and at the same time so broadly (in that it can apply to all situations that remotely have a data processing component)¹¹² that what should be a peripheral concern turns into a major red flag for financial innovation.¹¹³ With its power to prosecute for imprisonment and sanction standard financial services industry practices through its opinions,¹¹⁴ the NPC is generating false positives: characterizing present and future business models as in breach of the ‘notice and consent’ system, when, as discussed in this subsection, this standard is problematic in the first place. Moreover, certain industry practices, which were in place pre-DPA, are normatively acceptable, at least in the Philippines.¹¹⁵

A study commissioned by the NPC showed that 94% of Filipino adults want to understand how their personal data is used in transactions and that 85% believe that the rights of data subjects are important.¹¹⁶ This should not give the privacy regulator the blanket authority to impose ‘notice and consent’ as the ideal standard for processing. Instead, it should provide the impetus for the NPC to conduct information awareness campaigns. A more reasoned approach, which is discussed in more detail in Part IV below, is for the NPC to adopt an innovation-friendly stance, protecting core privacy values and recognizing its role in the delivery of digital financial services.¹¹⁷ For a country that is only beginning to understand privacy regulation, this seems more plausible than the current activist stand of the NPC in its bid to set “higher bars for compliance standards in the Asia-Pacific region.”¹¹⁸

¹¹¹ See generally PRIVACY POLICY OFFICE, REPUBLIC OF PHIL. NAT’L PRIVACY COMM’N, ADVISORY OP. NO. 2017-42, at 1 (Aug. 14, 2017) (stating that the DPA requires subject companies to obtain “freely given, specific, informed indication of will, whereby the data subject agrees to the collection and processing”); see also Disini & Disini Law Office, *Differences Between and Legal Effects of Opt-in vs. Opt-out under Philippine Privacy Law*, ELEGAL (Jan. 31, 2019), <https://elegal.ph/differences-between-and-legal-effects-of-opt-in-vs-opt-out-under-philippine-data-privacy-law/> [<https://perma.cc/Z25N-LLAA>].

¹¹² PRIVACY POLICY OFFICE, REPUBLIC OF PHIL. NAT’L PRIVACY COMM’N, ADVISORY OP. NO. 2017-23, at 2 (June 21, 2017) (explaining that the DPA applies to all “processing of personal data by any natural and juridical person in the government or private sector”).

¹¹³ See generally Zarsky, *supra* note 84, at 150 (arguing that the EU’s “over-extensive” privacy laws stall innovation).

¹¹⁴ See *supra* Part II(B).

¹¹⁵ See Zarsky, *supra* note 84, at 150.

¹¹⁶ *NPC Survey: Filipinos Value Data Privacy*, REPUBLIC OF PHIL. NAT’L PRIVACY COMM’N (AUG. 30, 2017, 2:05 PM), <https://www.privacy.gov.ph/2017/08/npc-survey-filipinos-value-data-privacy/>.

¹¹⁷ See *infra* Part IV.

¹¹⁸ *PH Privacy Commission Gets International Accreditation*, REPUBLIC OF PHIL. NAT’L PRIVACY COMM’N (Oct. 21, 2016, 1:36 AM), <https://www.privacy.gov.ph/2016/10/ph-privacy-commission-gets-international-accreditation/> [<https://perma.cc/K7LF-MJ7N>].

C. *DPA Disrupting Current Business Models*

The story of digital financial inclusion in developing countries commonly begins with mobile payments.¹¹⁹ In no other area has fintech played a greater role in promoting financial inclusion than in the area of mobile payments.¹²⁰ The ‘fuel’ of mobile payments systems is mobile money—electronic money that allows users to store, send, and receive money in a mobile phone-based account.¹²¹

If a mobile phone is a powerful tool for the underserved to gain access to financial services, retail agents serve as the infrastructure for facilitating this access.¹²² Filling the gap left by the lack of brick-and-mortar banks, retail agents serve as the communication points for customers to use their mobile phones to store e-money, to make money transfers, and to withdraw cash from their mobile-based account.¹²³ This is known as branchless banking, the reliance on non-bank outlets such as retail stores, grocery shops, lottery outlets, gas stations, and fertilizer stores, instead of brick-and-mortar banks, to provide financial services.¹²⁴ Under this model, the agent (who is often the cashier of the store) performs the traditional banking role by settling transactions with the customer.¹²⁵ Through these low-cost delivery channels, underserved people can reliably access financial services, increasing financial inclusion,¹²⁶ with little delay,¹²⁷ and minimal transaction costs.¹²⁸ Kenya’s M-Pesa, widely considered one of the most successful case

¹¹⁹ International Money Fund, *FinTech: The Experience So Far* (June 17, 2019).

¹²⁰ See generally Ignacio Mass and Dan Radcliff, *Mobile Payments Go Viral M-PESA in Kenya, in Yes Africa Can: Success Stories from a Dynamic Continent* 353, 357 (Punam Chuhan-Pole & Manka Angwafo eds., 2011) (“the M-PESA experience suggests that there may be a third approach—focusing first on building the payment “rails” on which a broader set of financial services can ride”).

¹²¹ Vivienne A Lawack, *Mobile Money, Financial Inclusion and Financial Integrity: The South African Case Mobile Money Symposium*, 8 WASH. J.L. TECH. & ARTS 317, 319 (2013).

¹²² WORLD BANK, *supra* note 8.

¹²³ Randall & Chein, *supra* note 18.

¹²⁴ Lauer & Lyman, *supra* note 78.

¹²⁵ Gautam Ivatury et al., *Use of Agents in Branchless Banking for the Poor*, CONSULTATIVE GRP. TO ASSIST THE POOR (Oct. 2006), <http://www.cgap.org/research/publication/use-agents-branchless-banking-poor> [<https://perma.cc/JZ4T-QBE V>].

¹²⁶ Amanja, *supra* note 74, at 13.

¹²⁷ Bradley, *supra* note 95, at 76.

¹²⁸ Asli Demirgüç-Kunt et al., *Financial Inclusion and Inclusive Growth: A Review of Recent Empirical Evidence*, 15 WORLD BANK (2017).

studies for mobile payments, has a ratio of 48.46 active agents per 10,000 adults¹²⁹ and over 12 million users since its 2007 launch.¹³⁰

The Philippines is the pioneer in mobile payments, with the launch of Smart Money in 2001¹³¹ and GCash in 2004.¹³² Operated by the two telecommunications ('telco') operators in the Philippines, their services allow subscribers to facilitate money remittances, pay bills, and avail of products and services via SMS. In the Philippines, these services are commonplace in *sari-sari* stores: small neighborhood retail shops that sell basic commodities such as instant noodles, canned food, and candy chips.¹³³ These stores serve as access points for senders to transact, deposit and withdraw money with their mobile accounts.¹³⁴ Mobile money may even be used to pay for *sari-sari* store goods.¹³⁵ As a country with over 7,500 islands, bank branches present in only 50% of these islands, and 36% of municipalities without a bank branch, the value that branchless banking brings is significant.¹³⁶

A vibrant mobile payments market is just an entry point for providing other financial services crucial to financial inclusion: savings, credit, and insurance.¹³⁷ Aside from enabling money transfers digitally, mobile payments serve as a reliable way of saving cash, albeit without earning interest.¹³⁸ As for credit, mobile payment systems serve as viable channels for making loan payments.¹³⁹ A subscriber's data history can also serve as a way of building data history that potential lenders can use to assess credit risk.¹⁴⁰ Mobile microfinance, which allows smartphone users to

¹²⁹ David S. Evans & Alexis Pirchio, *An Empirical Examination of Why Mobile Money Schemes Ignite in Some Developing Countries but Flounder in Most*, 723 COASE-SANDOR WORKING PAPER SERIES IN LAW AND ECON. No. 723 (2015).

¹³⁰ Megan Plyer et al., COMMUNITY LEVEL ECONOMIC EFFECTS OF M-PESA IN KENYA: INITIAL FINDINGS 4, Financial Services Assessment (U. of Md. 2010).

¹³¹ GSM ASS'N, MOBILE MONEY IN THE PHILIPPINES: THE MARKET, THE MODELS AND REGULATION 16 (2014).

¹³² *Id.* at 15.

¹³³ *What's a Sari-Sari Store: PH's Small Neighborhood Retail Shop* PHILIPPINE PRIMER, (July 30, 2016), <http://primer.com.ph/tips-guides/2016/07/30/expat-guide-sari-sari-stores/> [<https://perma.cc/T3E2-EBY9>].

¹³⁴ *Digital Payments at Sari-Sari Store*, PRESSREADER: BUSINESS WORLD (Jan. 31, 2018), <https://www.pressreader.com/philippines/business-world/20180131/282411284755049>.

¹³⁵ GSM ASS'N, *supra* note 132, at 6.

¹³⁶ Hasnain et al, *supra* at note 88.

¹³⁷ CHUEN & DENG, *supra* note 5, at 392.

¹³⁸ William Smith, Lucy Scott & Andrew Shepherd, *Financial Inclusion Policy Guide* 11, CHRONIC POVERTY ADVISORY NETWORK (Policy Guide No. 6, 2015).

¹³⁹ GSM ASS'N, *supra* note 132, at 12.

¹⁴⁰ Asli Demirgüç-Kunt et al., *The Global Findex Database 2017: Measuring Financial Inclusion and the Fintech Revolution* 9, WORLD BANK (2018),

borrow money after an evaluation of their mobile phone data (from their call usage to their bill payments),¹⁴¹ promises better accountability, lower transaction costs, flexibility, and transparency.¹⁴² With mobile microfinance, the underserved are given the opportunity to engage in entrepreneurial activity.¹⁴³ Several credit-related initiatives have already been introduced in the Philippines: Lenddo for non-conventional credit scoring, GoodKredit for disbursing short-term consumer loans, Loansolutions.ph as a P2P lending marketplace,¹⁴⁴ and Lendr as a loans management platform.¹⁴⁵ Lastly, for insurance, mobile payment systems can serve as a channel for providing insurance. This is possible through partnerships between telco operators that serve as customer-facing distribution channels and commercial insurers who remain risk carriers. Together, they enter into outsourcing arrangements, where practically all but underwriting risks are outsourced to the telco operators.¹⁴⁶ The last metric of financial inclusion, insurance, is particularly important for the poor, who face major risks, yet are unfortunately the least likely to buy insurance products.¹⁴⁷ For example, weather risk is a major problem farmers face, and index-based weather insurance, with payouts triggered upon certain weather measurements, allows them to take on risks with their farming choices that result in better yield.¹⁴⁸

Quite unsurprisingly, data processing is involved in facilitating mobile payment systems, and delivering savings, credit, and insurance to the underserved. Mobile payment systems work because consumers only need to comply with rudimentary identification requirements when going to a *sari-sari* store. The DPA turns this approach on its head by requiring consent to be in written form, evidenced through electronic or recorded means.¹⁴⁹ If the DPA were applied as intended, opt-

https://globalindex.worldbank.org/sites/globalindex/files/2018-04/2017%20index%20full%20report_0.pdf.

¹⁴¹ Susan Adams, *How Tala Mobile Is Using Phone Data To Revolutionize Microfinance*, FORBES (Aug. 29, 2016), <https://www.forbes.com/sites/forbestreptalks/2016/08/29/how-tala-mobile-is-using-phone-data-to-revolutionize-microfinance/>.

¹⁴² Abd Elrahman Elzahi Saaid Ali, *Beyond Traditional Microfinance: Financial Inclusion for Unbanked Kenyans* 4 INT'L J. SOC. SCI. STUDIES 8, 74 (2016).

¹⁴³ Asli Demirgüç-Kunt et al., *supra* note 141, at 15.

¹⁴⁴ Tom Noda, *P2P Lending Platforms in Philippines Rising*, FINTECH SINGAPORE (May 11, 2018), <http://fintechnews.sg/19702/lending/p2p-lending-in-philippines-rising/>.

¹⁴⁵ Via Villafuerte, *About Lendr*, LENDR, <http://www.lendr.com.ph/about-lendr/> (last visited Oct. 18, 2018).

¹⁴⁶ G20 Global Partnership for Financial Inclusion, *Digital Financial Inclusion: Emerging Policy Approaches* 14, WORLD BANK (2017).

¹⁴⁷ Bradley, *supra* note 95, at 76.

¹⁴⁸ Smith, Scott & Shepherd, *supra* note 139, at 35.

¹⁴⁹ PRIVACY POLICY OFFICE, REPUBLIC OF PHIL. NAT'L PRIVACY COMM'N, ADVISORY OP. NO. 2107-53 (Sep. 11, 2017).

in consent would apply to every transaction. Quite simply, the DPA attempts to fix a system that is not broken and that has worked for the poor in far-flung and poverty-stricken areas in developing countries for several years now. Not only would the DPA's new requirement be impractical, but it would also unnecessarily complicate an otherwise straightforward and painless transaction between the retail agent and the subscriber. The consequences are grave, as violations may lead to hefty penalties and even imprisonment. The problem that the DPA tries to address by embedding a 'notice and consent' mechanism in such a transaction is not clear: in the Philippines, there has so far been no identified risks or reported privacy violations arising from mobile payments transactions of this kind.

Moreover, the cost of complying with the GDPR is estimated to be US\$50,000 for small businesses with less than nine employees.¹⁵⁰ Considering the similarities between the GDPR and the DPA, this is money that *sari-sari* stores simply do not have. For a simple store selling basic commodities with little more than a few hundred dollars of gross earnings in a month, the requirements the DPA impose are not only burdensome but also risky considering the penalties under the DPA.

Another characteristic of the financial services industry is the use of data as a currency for providing customized benefits and personalized products.¹⁵¹ The value of processing personal data in delivering such financial services to the poor is apparent. By using Big Data and artificial intelligence, financial providers can arrive at superior and more reliable data to assess the actual credit-worthiness of an individual,¹⁵² reducing information asymmetry that has made it hard for traditional lenders to provide similar services to the underserved.¹⁵³ Investors, lenders, and financial institutions use these technologies, generating relevant datasets after being fed vast amounts of raw data, to provide credit at a lower cost and in a more accessible manner.¹⁵⁴ The free flow of information is necessary to assess credit risk, to deliver mobile microfinance, and to establish insurance partnerships. Partnerships that allow service providers to share datasets among themselves, to

¹⁵⁰ Sean Wise, *Tim Cook Wants an American Version of GDPR. Here's What It Could Cost Your Business*, INC.COM (Oct. 25, 2018), <https://www.inc.com/sean-wise/tim-cook-wants-an-american-version-of-gdpr-heres-what-it-could-cost-your-business.html>.

¹⁵¹ *Financial Providers: Transforming Distribution Models for the Evolving Consumer*, ACCENTURE (2017), <https://www.accenture.com/au-en/insight-financial-services-distribution-marketing-consumer-study> (last visited Nov. 4, 2018).

¹⁵² Ali, *supra* note 143, at 84–5.

¹⁵³ Eugenia Macchiavello, *Peer-to-Peer Lending and the Democratization of Credit Markets: Another Financial Innovation Puzzling Regulators*, 21 COLUMBIA J. OF EUROPEAN L. 521, 526 (2014).

¹⁵⁴ Bradley, *supra* note 95, at 74.

come up with fresh insights, are integral to financial inclusion.¹⁵⁵ Many datasets necessary for delivering digital financial services involve linking various datasets to find new insights.¹⁵⁶ The ‘notice and consent’ system would require renewed consent every time information systems are activated to deliver digital financial services—an impractical and costly requirement that will significantly drive up their costs and result in unreasonable delay.¹⁵⁷

D. DPA Stopping Big Data in its Tracks

Referring to the use of increasingly sophisticated algorithms to aggregate and classify otherwise unobservable patterns, trends, and behaviors of individuals or consumer segments,¹⁵⁸ Big Data can arrive at highly complex datasets filtered from various sources, including a person’s cookies, social networking activities, online transactions, mobile phone usage, and email exchanges.¹⁵⁹ Big Data is made more powerful by modern devices, such as wearables and smart appliances, that actively process personal data and communicate them to a service provider—the so-called IoT.

Interoperability, a characteristic of big data that entails the sharing of datasets of personal information among service providers,¹⁶⁰ is a key element in extending digital financial services to the poor.¹⁶¹ Such datasets may be obtained from data on a user’s mobile device, call and text history, use of value-added services, Internet usage, and financial transaction data.¹⁶² With this resource businesses can create a more accurate profile of their consumers, allowing them to identify consumer needs and deliver more relevant financial products and services¹⁶³ with better pricing options.¹⁶⁴ Moreover, partnerships among providers are more easily formed as common needs and goals are identified.¹⁶⁵ Big Data likewise allows firms to engage in targeted marketing, the use of processed data to deliver advertisements that match consumers’ needs and interests.¹⁶⁶ Recommender

¹⁵⁵ Lumsden, *supra* note 75, at 43.

¹⁵⁶ Hemerly, *supra* note 85, at 28.

¹⁵⁷ Mittelstadt & Floridi, *supra* note 104, at 312.

¹⁵⁸ Allen, *supra* note 104, at 71.

¹⁵⁹ Weber & Staiger, *supra* note 38, at 92.

¹⁶⁰ Urs Gasser & John Palfrey, *Fostering Innovation and Trade in the Global Information Society* 123 (Mira Burri & Thomas Cottier eds., 2012).

¹⁶¹ See WORLD BANK, *supra* note 147, at 24.

¹⁶² Kumar & Muhota, *supra* note 87, at 1.

¹⁶³ WORLD BANK & CGAP, *Data Protection and Privacy for Alternative Data* (2018).

¹⁶⁴ Packin & Lev-Aretz, *supra* note 70, at 1222.

¹⁶⁵ See generally WORLD BANK, *supra* note 147, at 34.

¹⁶⁶ GOLDFARB & TUCKER, *supra* note 17, at 68.

systems, which offer custom recommendations based on previous purchasing decisions, are another by-product.¹⁶⁷ All these result in lower operating costs for the service provider that may lead to low-cost services for the underserved¹⁶⁸ and more useful information for consumers tailored to their interests.¹⁶⁹

This is the modern world we live in. Current data collection practices are a complex ecosystem of various players—from profilers and advertising agencies to advertisement purchasers and websites that post advertisements. These players simultaneously retain, analyze, and distribute personal data in various, unpredictable ways. A single processor simply cannot predict or describe in sufficient detail how specific data is being utilized.¹⁷⁰ In the context of Big Data, the value of personal data is not immediately apparent at the point of collection.¹⁷¹ Insights that may lead to innovation are realized only after datasets are combined, tested, or used in the market, in an open environment.¹⁷² Calling this interlocking system abusive is an oversimplification, as it has enabled commercialism and financial inclusion,¹⁷³ leading to many innovations in the digital economy.¹⁷⁴

Big Data is a game-changer for financial inclusion. Several mobile financial applications are underpinned by interoperable identity management systems.¹⁷⁵ An example is M-Pesa. From its use as a mobile payments system, M-Pesa utilized its massive datasets of personal data, partnered with financial institutions, and expanded into offering accessible and cost-efficient savings and credit for the poor.¹⁷⁶ Big Data also makes possible the creation of niche financial products that would otherwise be too risky to put out in the market,¹⁷⁷ like providing emergency funds where other fund sources are unavailable.¹⁷⁸ To democratize access to

¹⁶⁷ *Id.* at 71.

¹⁶⁸ Adam Thierer, *The Internet of Things and Wearable Technology: Addressing Privacy and Security Concerns without Derailing Innovation*, 21 RICHMOND J. OF L. & TECH. 1, 73 (2014).

¹⁶⁹ Acquisti, *supra* note 106, at 50.

¹⁷⁰ See generally Robert H. Sloan & Richard Warner, *Beyond Notice and Choice: Privacy, Norms, and Consent*, 14 J. HIGH TECH. L. 370, 391 (2014).

¹⁷¹ See Cate & Mayer-Schönberger, *supra* note 89, at 67.

¹⁷² Jess Hemerly, *Public Policy Considerations for Data-Driven Innovation*, 46 Computer 25, 25 (2013).

¹⁷³ Zarsky, *supra* note 84, at 118.

¹⁷⁴ Adam Thierer, *The Internet of Things and Wearable Technology: Addressing Privacy and Security Concerns without Derailing Innovation*, 21 RICHMOND J. OF L. & TECH. 1, 72 (2014).

¹⁷⁵ Urs Gasser, *Recoding Privacy Law: Reflections on the Future Relationship Among Law, Technology, and Privacy*, 130 HARV. L. REV. 1, 3 (2016).

¹⁷⁶ See Amanja, *supra* note 74, at 63.

¹⁷⁷ See Acquisti, *supra* note 106, at 42.

¹⁷⁸ CHUEN & DENG, *supra* note 5.

credit,¹⁷⁹ a person's transaction history, mobile wallet use, and subscriber tenure can be used to assess creditworthiness, especially for people who have no credit history with a bank.¹⁸⁰ Known as algorithmic lending 2.0, firms are increasingly turning to expanded volumes of data and machine learning to analyze data, then feeding the results into credit-scoring algorithms, to arrive at a more accurate risk profile of a person.¹⁸¹ The same footprints can also be used to offer them insurance products with custom features and modified payment schemes.¹⁸²

The realities of Big Data are incompatible with the 'notice and consent' system of the DPA, as the use of personal data cannot be readily ascertained and only becomes apparent after novel connections among datasets are made, in an environment of open creativity.¹⁸³ This is the same environment in which algorithmic lending is deemed permissible. Thus, obtaining informed consent at the time of collection (where it is usually given) is simply antithetical to the open-ended nature of Big Data.¹⁸⁴ Where the DPA errs is in its assumption that data controllers process tidbits of personal data at a time, when the reality of Big Data is that multiple processors, and combined datasets from various sources, are involved at any given point in time.¹⁸⁵ The DPA discounts the fact that processors cannot, in principle, obtain informed consent because Big Data assumes that raw data is in itself meaningless and purposeless until combined with other datasets, analyzed for its significance, and then used to come up with creatively designed digital financial services.¹⁸⁶ In this complex ecosystem, there is no clear processor, and the datasets are not located in a single repository at any given time.¹⁸⁷ Privacy harms, when they do happen, are an effect of aggregation of personal data over time by various entities, and pinning the blame on a single entity is erroneous.¹⁸⁸ The IoT involves an overlap of interconnected devices and systems collecting and processing personal data in a continuous loop, therefore, applying the DPA means that consent would have to be obtained ceaselessly as well.

¹⁷⁹ Matthew Adam Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data FinTech's Promises and Perils* 93 CHICAGO-KENT L. REV. 3, 19 (2018).

¹⁸⁰ Asli Demirgüç-Kunt et al., *supra* note 129, at 10.

¹⁸¹ Bruckner, *supra* note 180, at 15.

¹⁸² See Kabir Kumar & Kim Muhota, *Can Digital Footprints Lead to Greater Financial Inclusion?*, CGAP 3 (July 2012).

¹⁸³ See Mittelstadt & Floridi, *supra* note 104, at 315.

¹⁸⁴ See Cate & Mayer-Schönberger, *supra* note 89, at 68.

¹⁸⁵ See Koops, *supra* note 100.

¹⁸⁶ Jess Hemerly, *Public Policy Considerations for Data-Driven Innovation*, 46 COMP. 25 (2013).

¹⁸⁷ See Robert H. Sloan & Richard Warner, *Beyond Notice and Choice: Privacy, Norms, and Consent*, 14 J. HIGH TECH. L. 370, 395 (2014).

¹⁸⁸ See, Daniel Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 Harv. L. Rev. 1881 (2013).

E. DPA's Anticompetitive Effect

This sub-section discusses the link between privacy regulation and competition in financial services.¹⁸⁹ The recent enactment of the *Philippine Competition Act*¹⁹⁰ highlights the government policy to promote unencumbered market competition in the interest of consumers, encourage an entrepreneurial spirit, facilitate technology development, and enhance resource productivity.¹⁹¹

Companies engaged in data-intensive operations thrive because of economies of scale and network effects.¹⁹² In the Philippines, the most popular digital financial services are operated by duopolistic telco operators. While one may superficially conclude that the DPA decreases the tendencies of monopolization by curbing data-mining practices, the opposite rings true. The DPA actually encourages monopolies, to the exclusion of resource-strapped smaller players.¹⁹³

The DPA applies to the data processing activities of a processor, regardless of its size and scale. Both dominant financial service providers and startups have to comply with the DPA. This is a costly undertaking that requires organizations, among other things, to invest in IT systems, conduct audits, hire data protection specialists, seek extensive legal advice, amend and renegotiate contracts, and undertake technical and organizational measures.¹⁹⁴ Small Philippine startups already lack capital, meaning that any privacy-related costs, if by the company, will likely be passed on to the consumer.

This uniform treatment results in a disproportionate and unlevelled playing field. Established financial service providers are more capable of persuading consumers to give up consent, simply because they have more to offer than SMEs.¹⁹⁵ Consumers are likely to trust entrenched brands and continue using their services, instead of new entrants who have not proven their value.¹⁹⁶ This will allow dominant players to maintain their position in the market, as they continue to collect and process personal data with relatively few roadblocks. With access to their consumer data, established service providers can afford investing in behavioral

¹⁸⁹ GOLDFARB & TUCKER, *supra* note 17, at 83.

¹⁹⁰ *See generally*, PHILIPPINE COMPETITION ACT, Republic Act, No. 10667, 16th Congress (2015).

¹⁹¹ *Id.* at § 2.

¹⁹² GOLDFARB & TUCKER, *supra* note 17, at 83.

¹⁹³ *Id.*

¹⁹⁴ *See* Tara Seals, *GDPR: True Cost of Compliance Far Less Than Non-Compliance*, INFOSECURITY MAGAZINE, <https://www.infosecurity-magazine.com:443/news/gdpr-true-cost-of-compliance> (last visited Dec. 12, 2017).

¹⁹⁵ GOLDFARB & TUCKER, *supra* note 17, at 83

¹⁹⁶ *Id.* at 84.

targeting techniques that avoid the application of the DPA,¹⁹⁷ while SMEs do not have the same resources to invest in equally expensive techniques. SMEs can only rely on accessible personal data (that the DPA now prohibits) to provide innovative financial services. Because consumer data is not as easily accessible for SMEs, they cannot understand consumer behavior as well as the bigger players can,¹⁹⁸ resulting in additional barriers to entry and ineffective financial services. New Zealand is an illustrative example: its strict credit card reporting regime resulted in only a few banks being able to issue credit cards as the prohibitive costs and restrictive requirements prevented smaller firms from engaging in data-related activities as simple as running credit card checks on applicants.¹⁹⁹

To bring the example closer to the Philippines, the two leading mobile payment services providers, Smart Money and GCash, dominate the mobile payments market and are provided by the only two telco operators in the telecommunications industry.²⁰⁰ With only 1.3% of the Filipino population having an electronic money account²⁰¹ and although the Philippines pioneered the digital payments industry, the DPA will only further entrench these dominant players in the industry. They will not only have access to customer data, but also the resources needed to target consumers, invest in behavioral targeting techniques, and comply with the burdensome requirements of the DPA. Because the DPA imposes equally strict requirements on both dominant players and new entrants and exposes them to unreasonable risks, SMEs have to consider all these costs, aside from their main task of actually creating innovative financial services.

IV. A VIABLE PROPOSITION TO PRIVACY REGULATION OF FINANCIAL SERVICES

The Philippine central bank has declared financial inclusion as one of its goals, recognizing how sustainable, secure, and affordable financial services can be delivered in a digital finance ecosystem.²⁰² In its report, the BSP has identified

¹⁹⁷ Weber & Staiger, *supra* note 30 at 89.

¹⁹⁸ Acquisti, *supra* note 106, at 51.

¹⁹⁹ GOLDFARB & TUCKER, *supra* note 17, at 83.

²⁰⁰ Lorenzo Subido, *Mirroring Giant Telcos: Is a Duopoly Emerging in Digital Payments Too?*, <http://www.entrepreneur.com.ph/news-and-events/mirroring-giant-telcos-is-a-duopoly-emerging-in-digital-payments-too-a00200-20180713> (last visited Oct. 18, 2018).

²⁰¹ See, Bangko Sentral ng Pilipinas, *Latest BSP Survey Highlights Challenges and Opportunities for Digital Financial Inclusion* (2018), <http://www.bsp.gov.ph/publications/media.asp?id=4738> (last visited Oct. 18, 2018).

²⁰² Bangko Sentral ng Pilipinas, *supra* note 68, at 4.

three pillars to achieve this: (1) a retail payment system that allows even small-value transactions, (2) a network of affordable touchpoints for clients to be onboard users, and (3) convenient access to an account that will allow the poor to open and use digital financial services.²⁰³ As shown in Parts III(C) and (D), digital financial services can provide support for these three pillars. Also, a recent conference in the Philippines showcased the various local fintech initiatives that can potentially drive financial inclusion across the country.²⁰⁴ The central bank has thus far demonstrated the right attitude, with an understanding of how digital financial inclusion can lead to economic empowerment and poverty reduction.²⁰⁵ As argued in this paper, the NPC's consent framework may derail the possible gains in digital financial inclusion.

This Part discusses an approach that will support the trajectory of innovation for financial inclusion, without disregarding the importance of privacy. By framing privacy risks as a consumer protection issue, actual privacy problems relating to transparency and fair treatment are addressed.

A. Maintaining the Test-and-Learn, Industry-Based Approach to Financial Regulation

The ladder to the success of financial innovation that leads to financial inclusion is not prudential and proactive regulation, but a regulatory policy that enables service providers to engage in prudent behavior.²⁰⁶ Thus far, the ideal regulatory formula for digital financial inclusion is for regulators to maintain a healthy distance and to work closely with service providers, to develop custom-fit regulations consistent with international standards.²⁰⁷ Service providers must be given enough legroom to experiment and fine-tune their digital financial services—regulatory intervention should only be introduced as flagged issues start to materialize and risks (including privacy-related ones) become clear.²⁰⁸

The BSP has believed in this approach since the start. When telco operators in the Philippines started offering their mobile payment services, the BSP agreed to accord them the status of a remittance agent, instead of a deposit-taker, substantially

²⁰³ *Id.* at 5.

²⁰⁴ See generally *Fintech Innovations to Push Financial Inclusion across the Philippines*, PHILSTAR GLOBAL (2018), <https://www.philstar.com/business/technology/2018/10/17/1860819/fintech-innovations-push-financial-inclusion-across-philippines> (last visited Oct. 19, 2018).

²⁰⁵ Bangko Sentral ng Pilipinas, *supra* note 14, at 3.

²⁰⁶ Amanja, *supra* note 74, at 23.

²⁰⁷ Buckley et al., *supra* note 77, at 345.

²⁰⁸ Glob. P'ship for Fin. Inclusion, *supra* note 73, at 49.

lessening their need to comply with burdensome banking regulations.²⁰⁹ Later, the BSP issued its e-money regulation,²¹⁰ notable for ensuring that the playing field between banks and nonbanks are equal.²¹¹ Intending to promote financial inclusion, the regulation arose from the BSP's test-and-learn approach.²¹²

To complement this approach, the regulator should emphasize and foster multi-sectoral cooperation. Dominant players, telco operators, startups, investors, and retail agents must be given adequate representation and a forum to ensure that digital financial inclusion is achieved whilst addressing actual data privacy risks, and not imagined ones.²¹³ This will foster an environment that facilitates open dialogue on the best data processing practices for digital financial inclusion, instead of the tendency towards strict privacy rules, like DPA, that require controllers to comply with privacy rules on paper without truly understanding the essence of privacy protection.²¹⁴ Moreover, an open environment will force industry players, including the NPC, to reexamine the 'notice and consent' system.

Entities engaged in data processing themselves recognize that they are in the best position to standardize data protection practices and to balance privacy with the free flow of information necessary for innovation.²¹⁵ By giving the financial services market the responsibility of setting professional standards and ethical market conduct concerning privacy, the end product is a privacy framework that is fit for its purpose,²¹⁶ and does not rely on 'notice and consent' as a mere formality and a way of abrogating responsibility.²¹⁷ A culture of institutional accountability is thus created.²¹⁸ To be clear, the BSP's powers are not diminished; it merely gives the market the flexibility and accountability it needs to develop viable financial solutions.²¹⁹

²⁰⁹ Ivatury et al, *supra* note 125, at 12.

²¹⁰ *Id.*

²¹¹ See Tilman Ehrbeck, Mark Pickens & Michael Tarazi, *Financially Inclusive Ecosystems: The Roles of Government Today*, CGAP (Feb. 2012).

²¹² Buckley et al., *supra* note 77, at 349.

²¹³ Zhou Weihuan, Douglas Arner & Ross Buckley, *Regulation of Digital Financial Services in China: Last Mover Advantage*, 8 TSINGHUA CHINA L. REV. 25, 34 (2015).

²¹⁴ Koops, *supra* note 100, at 255.

²¹⁵ Cate & Mayer-Schönberger, *supra* note 89, at 71.

²¹⁶ Glob. P'ship for Fin. Inclusion, *supra* note 73, at 12.

²¹⁷ Cate & Mayer-Schönberger, *supra* note 89, at 68.

²¹⁸ Alliance for Financial Inclusion, *G20 Principles for Innovative Financial Inclusion*, <https://www.gpfi.org/sites/gpfi/files/documents/G20%20Principles%20for%20Innovative%20Financial%20Inclusion%20-%20AFI%20brochure.pdf> (last visited Sep. 5, 2018).

²¹⁹ Iris HY Chiu, *A Rational Regulatory Strategy for Governing Financial Innovation*, 8 EUR. J. OF RISK REG. 743, 745 (2017).

This proposed liberalized approach marks a return to form. As previously discussed in Part II(A) of this paper, the Philippines had consistently followed the market-based, sector-specific approach to privacy, until suddenly pivoting to the EU-based model. If the DPA was enacted because the lack of a data privacy law might hinder the growth of the outsourcing sector,²²⁰ perhaps the Philippine legislature should have enacted a BPO sector-specific privacy legislation instead, consistent with the US approach. Moreover, a market-based approach would give the market the leg room it needs to rectify recurring privacy-related problems. Identity theft, for example, can be minimized by biometric technologies such as facial recognition technology.²²¹ Privacy-Enhancing Technologies, such as encryption techniques and certain data analytic and management tools, were engineered by the private sector well before the GDPR—and are continuously improving, regardless of what the privacy law may require.²²² Better algorithms are being designed to prevent algorithmic discrimination.²²³ These just show that, even without strict privacy regulation, the industry is aware of the commercial importance of privacy.

B. Going Back to Basics by Generating Privacy Awareness

Whilst financial inclusion is important, this does not mean that privacy is not important for the underserved.²²⁴ Big Data can be used for price discrimination and identity theft.²²⁵ Digital financial services may be used to commit financial crimes, like money laundering and terrorist financing.²²⁶

The solution to privacy violations is not a ‘notice and consent’ regime. As discussed in this paper, it forces individuals to make a responsible choice,²²⁷ without achieving its purported goal of protecting information privacy.²²⁸ Instead, this paper advocates for a bottom-up approach. Before providing sweeping regulation that can affect how entire industries operate, it makes sense to generate

²²⁰ GREENLEAF, *supra* note 29, at 342.

²²¹ Bradley, *supra* note 95, at 72.

²²² Urs Gasser, *Recoding Privacy Law: Reflections on the Future Relationship Among Law, Technology, and Privacy*, 130 HARV. L. REV. 61, 65 (2016).

²²³ Bruckner, *supra* note 180, at 5.

²²⁴ David Medine, *Making the Case for Privacy for the Poor*, CGAP BLOG (Nov. 15, 2016), <http://www.cgap.org/blog/making-case-privacy-poor>.

²²⁵ Bradley, *supra* note 95, at 72.

²²⁶ See Ivatury et al, *supra* note 125, at 13.

²²⁷ See Cate & Mayer-Schönberger, *supra* note 89, at 68–69.

²²⁸ See *id.* at 67.

more public awareness about privacy issues and the benefits and risks of the processing of their personal data.²²⁹

While unappealing and rudimentary, the solution necessitates going back to basics—first, by increasing public awareness of privacy issues.²³⁰ General awareness campaigns must be conducted with a twofold purpose: to promote digital financial literacy and to uphold transparency concerning the relevance of data processing in the delivery of digital financial services.²³¹ Equipping Filipinos with digital financial literacy will not only give them access to crucial financial services, but it will also give them a concrete picture of how their personal data is used.²³² A campaign that highlights both digital financial services and the privacy concerns they pose will address the goals of financial inclusion, without dismissing the data privacy angle.²³³ The net result is financially literate Filipinos who have a meaningful understanding of how their Internet behavior and mobile phone usage, interacts with privacy.

Transparency in data processing practices, instead of ‘notice and consent’, must be the key focus in disseminating awareness. Transparency regarding the various processors in the information-sharing ecosystem and the lawful uses of personal data is a more reasonable obligation to impose on financial providers at this point, than the burdensome compliance costs of ‘notice and consent’.²³⁴ Only after genuinely providing the foundation for privacy awareness can a credible sector-specific privacy regulation that balances financial inclusion and privacy concerns be in place.

C. Reframing Privacy as a Consumer Protection Issue

While generating privacy awareness is important, the question of where privacy fits in the regulation of digital financial services remains unanswered. In this regard, this article proposes that privacy must be approached as a matter of consumer regulation.²³⁵ Regulation can be designed in proportion to the risks posed to a consumer of digital financial services.²³⁶ Applying regulations as proportionate

²²⁹ See GOLDFARB & TUCKER, *supra* note 17, at 85.

²³⁰ See Cate & Mayer-Schönberger, *supra* note 89, at 70.

²³¹ See Weber & Staiger, *supra* note 38, at 10.

²³² See Lumsden, *supra* note 75, at 41.

²³³ See Allen, *supra* note 104, at 78.

²³⁴ See generally WORLD BANK & CGAP *supra* note 147, at 7.

²³⁵ Hemerly, *supra* note 78, at 27.

²³⁶ See Glob. P'ship for Fin. Inclusion, *supra* note 73, at 12.

measures compared to the risks requires the private sector and regulators to collaborate and research to arrive at a common understanding of how digital financial services interact with consumers.²³⁷ This may require more experimentation and processing of personal data—which a ‘notice and consent’ regime does not endorse.

In framing privacy as a consumer protection issue, the question needs to be asked: to what extent should privacy violations be considered consumer protection violations?²³⁸ What consumers arguably need most in the delivery of financial services is transparency, fair treatment, and effective dispute resolution mechanisms—factors that privacy regulation purports to regulate, but in reality, are within the domain of consumer protection.²³⁹ For instance, data processing activities that result in racial profiling or discrimination based on one’s marital status or gender should be considered violations of consumer protection standards. Under this mindset, the likely solution is the mitigation of possible privacy harms to an individual,²⁴⁰ reserving the need for consent only in appropriate and limited occasions where consumers will actually pay attention to them.²⁴¹

Considering the dynamic and unpredictable nature of the digital economy, it makes more sense to require organizations to institute a relatively flexible framework of privacy principles emphasizing the responsible and transparent use of personal data rather than imposing a costly and rigid ‘notice and consent’ system that may impede innovation without achieving its purpose.²⁴² This is what Google suggests in the *Framework for Responsible Data Protection Regulation* the company released in September to guide the United States Congress.²⁴³ While Google’s self-interest is apparent, its recommendation complements the test-and-learn approach discussed above.

V. CONCLUSION

As the U.S. and the EU continue to disagree about their approaches to privacy, the NPC has put the Philippines in a precarious situation, innovation-wise, by taking a clear side and dictating absolutist outcomes. This brings to mind

²³⁷ See Gasser, *supra* note 223, at 69.

²³⁸ See Alliance for Financial Inclusion, *supra* note 219, at 3.

²³⁹ See *id.*

²⁴⁰ Mittlestadt & Floridi, *supra* note 104, at 315.

²⁴¹ Cate & Mayer-Schönberger, *supra* note 87, at 69.

²⁴² See *Framework for Responsible Data Protection Regulation*, GOOGLE (Sep. 2018) [<https://perma.cc/87YP-5YNA>].

²⁴³ See *id.*

one of the problems with the implementation of the Single Euro Payment Area ('SEPA'):

No cost-benefit study was undertaken before the SEPA project was launched but it appears that both regulators and banks grossly underestimated its costs. The problem of unexpectedly difficult and expensive technological problems was compounded by EU regulators' notion that a pan-European electronic fund transfer network constituted a public good, which made it easy for them to reject any obligation to ensure there was any way for the banks to defray the cost of creating it. Thus, the cost of modifying their legacy systems and business practices to accommodate the SEPA system fell squarely on the banks.²⁴⁴

A similar predicament exists in the Philippines in the sense that when the NPC interpreted the DPA by importing the GDPR's 'notice and consent' regime in the delivery of financial services, it did not appear to have considered the difficult and expensive technological problems such an interpretation would pose to the delivery of digital financial services. An important difference, however, is that the NPC does not—and can not—proscribe financial services providers from defraying the costs of privacy compliance by transferring them to the consumer, who will likely have to pay more for digital services in the end.

This paper has shown how the DPA, with its GDPR-like standard of 'notice and consent' not only disrupts the delivery of digital financial services in developing countries like the Philippines but also inherently conflicts with the use of Big Data for innovation that may lead to financial inclusion. It also has an anticompetitive effect by placing costly barriers to entry for SMEs that might compete with leading digital financial services providers.

To achieve digital financial inclusion, the increasing reliance of the NPC on 'notice and consent' as the gatekeeper of data privacy must be dismissed in favor of a test-and-learn, industry-based approach supervised by the BSP. This does not mean dismissing privacy concerns altogether, as digital financial inclusion and privacy regulation need not clash with each other. Rather, the industry must take the lead in developing standardized data practices that balance privacy protection and the free flows of information, ultimately creating a culture of accountability.

²⁴⁴ Jane Winn, *Transnational Governance of Innovation in Payment Services: A Case Study in the Single European Payment Area* 8, TRANSNATIONAL BUSINESS GOVERNANCE INTERACTIONS PROJECT (Working Paper No. 34).

Privacy awareness must be generated to supplement the need for digital financial literacy and transparency in data processing. Privacy concerns must then be approached as a consumer protection issue so that regulation can be designed in proportion to the consumer risks digital financial services pose.

With the high percentage of smartphone ownership and the suite of digital financial services offered in the market, digital financial inclusion in the Philippines is within reach. It cannot afford a setback in the form of a restrictive and ill-fitted ‘notice and consent’ system under DPA. As the NPC has the power to impose prohibitive penalties and even prosecute violations as crimes punishable by imprisonment, the ‘notice and consent’ system must be challenged now, and replaced with a more flexible and relevant privacy regulation that works towards, and not against, financial inclusion.