28 March 2019

To
Shri Suresh Prabhu
Minister of Commerce and Industry
Department for Promotion of Industry and Internal Trade, Government of India

Cc:
Shri Ramesh Abhishek
Secretary (IPP)
Department for Promotion of Industry and Internal Trade, Government of India

Subject: Industry Submission and Recommendations on the Draft E-Commerce Policy (Amended and Supplemented to the submission sent on 9 March 2019)

Dear Sir,

On behalf of the Asia Internet Coalition (AIC) and its members, I am writing to express our sincere gratitude to the Department for Promotion of Industry and Internal Trade (**DPIIT**) for the opportunity to submit comments on the Draft National E-Commerce Policy, 2019 ("***Draft Policy"***). AIC is an industry association comprised of leading Internet and technology companies in the Asia Pacific region with an objective to promote the understanding and resolution of Internet and ICT policy issues. Our current members are AirBnB, Amazon, Apple, Expedia Group, Facebook, Google, LinkedIn, LINE, Rakuten, Twitter and Yahoo (Oath), and Booking.com.

We commend DPIIT on formulating the Draft Policy for public consultation, with an aim to stimulate the national digital economy and export promotion through e-commerce. It also addresses broad areas of the e-commerce ecosystem such as data, infrastructure development, e-commerce marketplaces, and regulatory framework. Such industry level efforts and direction are critical, particularly at a time when cross-border trade has taken a centre stage in India's export promotion strategy. We believe that this is a timely initiative as e-commerce is a rapidly booming business around the globe.

The Indian e-commerce market with a potential to reach US$200 billion by 2026, is largely attributed to increasing Internet and smartphone penetration. E-commerce is India's fastest growing channel for promoting both cross-border trade and transactions – connecting buyers and sellers across all major markets. While the Draft Policy makes some progress on protecting home-grown small businesses, the proposals about data ownership and stricter quality norms may make it harder for such businesses to grow. Furthermore, the underlying measures may have an impact on the global players, due to which India might lose the momentum and potential in the e-commerce sector.

As responsible stakeholders in this policy formulation process, we appreciate the ability to participate in this public consultation and submit our views. As such, please find appended to this letter detailed comments and recommendations, which we would like to respectfully request DPIIT to consider when reviewing the Draft Policy.

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact our Secretariat Mr. Sarthak Luthra at Secretariat@aicasia.org or at +65 8739 1490. Importantly, we would also be happy to offer our inputs and insights on industry best practices, directly through meetings and discussions and help shape the dialogue for the advancement of e-commerce sector in India.

Sincerely,

Jeff Paine
Managing Director
Asia Internet Coalition (AIC)

Enclosure

DETAILED COMMENTS AND RECOMMENDATIONS ON THE NATIONAL E-COMMERCE POLICY

A. DATA AND OWNERSHIP – ADVOCATING A CONSENT BASED APPROACH

i. Individuals should be empowered to control the collection and use of their data

Respecting individual autonomy means that individuals should be able to control and share their personal information as they wish. The Supreme Court has recognized that data protection is related to the protection of an individual's autonomy. The judgement in ***K.S. Puttaswamy*** vs. ***Union of India***[1] (***Puttaswamy***) established privacy as a fundamental right. One section of the majority judgement deals specifically to informational privacy. In this section, the Hon'ble Supreme Court has stated as follows:

> "*177..*
>
> *Apart from safeguarding privacy,* ***data protection regimes seek to protect*** *the* ***autonomy of the individual****. This is evident from the emphasis in the European data protection regime on the* ***centrality of consent****. Related to the issue of consent is the* ***requirement of transparency which requires a disclosure by the data recipient of information pertaining to data transfer and use****.*"
>
> (emphasis provided)

One aspect of individual autonomy is to have free access to the market and be able to enter into contracts and agreements with various service providers. It is through the exercise of this freedom that individuals are able to engage within the digital economy and provide data about themselves on various online platforms of their choice. Further, consent is a critical concept within the contractual framework of the country, which forms the backbone of all commercial transactions. By undermining consensual transfer of data, the Draft Policy attempts to invalidate all online contracts, and seeks to bring trade and commerce in the country crashing to a halt.

All users of the digital economy are required at the time of signing up on any platform or online service, and at appropriate other times, to consent to the terms and conditions of the service. The Supreme Court necessitates disclosures regarding terms of data transfer and use by the data recipient as the pre-condition to data transfer. The conclusion, then, is that the intention of the Hon'ble Supreme Court was to provide safeguards for the process of data exchange between individuals and social media platforms, not the prohibition of such interactions. The suggestions of the Draft Policy are in direct contradiction to and contravention of the rulings of the Supreme Court.

In continuation of the line of reasoning in Puttaswamy, the Justice Srikrishna Committee Report, that led to the drafting of the Data Protection Bill, 2018, has introduced the concept of Data Fiduciaries. The Report stated that individuals share their data with other entities in a trust-based relationship that is essential "*to fulfil the expectations of the data principal in a manner that furthers the common public good of a free and fair digital economy*". Thus, the Srikrishna Committee viewed corporations who receive and use data of individuals as trusted entities who further the public good of a digital economy.

[1] (2017) 10 SCC 1.

The Draft Policy of the DPIIT, however, suggests that individuals cannot consent to sharing data with companies, including companies outside of India.

This proposition directly contradicts the Supreme Court's position in Puttaswamy and undermines individuals' autonomy and agency.

In addition, this policy position also severely curtails the functioning of the digital economy. The digital economy today accounts for 15-16% of India's GDP.[2] The DPIIT is attempting to not just surpass the law laid down by the Supreme Court, but to cripple India's digital economy by making it difficult for individuals to take advantage of the global digital economy.

Recommendations:

- It is submitted that the Draft Policy is in contradiction of the position taken by the Supreme Court to the extent that it tries to restrict individuals' autonomy over their personal information and their ability to take advantage of opportunities in the global digital economy.
- It is further submitted that the Draft Policy will stifle the digital economy and reduce its benefits for India.
- It is further submitted that should the Data Protection Bill be adopted into law, the position taken in the Draft Policy will be contradictory to a legislation, which recognizes that individuals should be empowered to share their personal information, in appropriate and privacy-protective ways, to enable products and services that benefit them.

ii. Anonymization is a privacy-protective measure that should be encouraged

The Draft Policy states that: "*Even after data is anonymized, the interests of the individual cannot be completely separated from it. Data about a particular group will always have something of value for them.*"

This is a misconceived notion betraying a lack of understanding of how data links to personal identity, the manner in which data protection frameworks operate, and what such frameworks seek to safeguard. The key reason why data pertaining to individuals is sought to be protected when in the hands of third parties, is that such data if disclosed without consent can violate the privacy of the individual or lead to decisions being made about the individual that are discriminatory or detrimental.

Once data is anonymized, such risks diminish. Anonymized, aggregated data allows companies and governments to gather valuable insights. For example, it enables tracking suspicious activities and assessing social or public health trends for public research purposes. Often, data that would be otherwise sensitive (such as health data) is used in anonymized form for training machine learning algorithms, which in turn leads to exceptional advances in medical sciences benefitting an even larger community of individuals than those who contributed such data.

Bearing this in mind, the Personal Data Protection Bill, 2018 (***PDP Bill***) takes anonymous data out of the purview of data protection obligations. This is the norm in data protection laws across jurisdictions. The EU General Data Protection Regulation also exempts anonymized data, as does the California Consumer Privacy Act. Even the Health Insurance Portability and Accountability Act, 1996, which is a

[2] Singh, Shelley. "India's way to $1 trillion digital economy". *The Economic Times*. 01 April, 2018. Available at https://economictimes.indiatimes.com/news/economy/indicators/indias-way-to-1-trillion-digital-economy/articleshow/63561270.cms?from=mdr (last seen on 01 March 2019).

federal law that *inter alia* covers treatment of medical data in the United States, allows data that has been de-identified as per a certain standard, to be disclosed without limitation.

Recommendations:

- It is submitted that the reason why all laws separate individual interest from anonymized data is linked to the utility of such data. The Draft Amendment should also adhere to global wisdom in this regard and not seek to impose restrictions on the use, disclosure and transfer of anonymized data in community interest.

iii. Data is not a national asset held in public trust

The Draft Policy states that "*Data about a group of individuals and derivatives from it is thus the collective property of the group. Thus, the data that is generated in India belongs to Indians as do the derivatives there from.*" The Draft Policy also refers to data as a "*national asset*". This language, written in context of anonymized data, seems to suggest that for a certain aggregation of individuals, their data belongs to the community. This position is not only incorrect in the law, but also reflects internal inconsistency in the draft of the Draft Policy.

"*Collective property of the group*", known in the law as *res communis*, or community property, is a natural resource that a community inherits or has used traditionally, or which comes into the possession of a community.[3] This is not the nature of data. The Supreme Court in Puttaswamy has characterised data as information created by an individual through their own actions. To that extent, data is not in the nature of property at all.

Further, in previous portions of the same section of the Draft Policy, an argument has been made to rest ownership of data with the individual. If the argument of individual ownership were to be accepted as reasonable, which it is not, the position on data thereafter becoming a national asset loses its validity since a resource can belong either to an individual or to a community, and not to both. It is the very basic difference between private gardens and community pastureland. The Draft Policy fails to comprehend the nature of community resources in its attempt to make a catch-all provision to restrict access to data by corporations.

Further, even if it were accepted for the sake of argument that data does in fact qualify as a community resource, there is no restriction on a corporation gaining access to such resource, so long as due process has been established and followed.

Acquisition of a national asset takes place through contracts with the government, rather than with the community. If data is to be classified as a national asset, obtaining the consent of the individual to access their data will no longer be necessary. The Draft Policy is, to that extent, advocating non-consensual transfer of data, which is inconsistent with the judicial classification of data as an aspect of informational privacy, which is a fundamental right.

Further, the Draft Policy states that "*Data can, therefore, best be likened to a societal 'commons'. National data of various forms is a national resource that should be equitably accessed by all Indians. The same way that non-Indians do not have access to the national resources on the same footing as Indians, non-Indians do not have equal rights to access Indian data. However, access to it can be*

[3] As discussed by the Supreme Court in *Orissa Mining Corporation Ltd.* vs. *Ministry of Environment & Forest and Others*, (2013) 6 SCC 476.

negotiated, in national Interest." This language seems to suggest that the data of the community is held by the government in trust. This position reflects a lack of understanding of the public trust doctrine itself.

In *Puttaswamy*, the Supreme Court made it abundantly clear that the State may interfere in the informational privacy of an individual only when there is a procedure duly established by law, there is a legitimate State interest in collecting an individual's data, and the measures adopted by the legislature are proportionate to the objects sought to be fulfilled by law. Thus, it is only in exceptional circumstances that the State may collect the data of individuals, and not as a matter of routine. Natural resources, on the other hand, are continuously held by the government in trust.[4] Thus, the State's legal and legitimate access to data is very different from the State's control over natural resources.

Further, the public trust doctrine envisages the State holding natural resources in trust for the free and fair enjoyment of the public at large. Personal data, being private and specific to individuals, cannot be used by the public at large. Each party who seeks to use an individual's data, must obtain a consensual transfer of the data from the individual to themselves. This is also the manner in which corporations gain access to data. Should the position of the Draft Policy be accepted, and data become subject to the public doctrine trust, the consent of individuals will no longer be necessary for data transfers.

Moreover, under the public trust doctrine, there can be no private ownership of data. This invalidates the previous position of the Draft Policy regarding individual ownership of data, and exposes further internal inconsistencies in the document.

Recommendations:

- The Draft Policy is misclassifying data as a national asset, which is not the nature of data at all.
- By misclassifying data as a community resource, the Draft Policy is interfering with the process of consensual transfer of data from individuals to corporations and creating a route for corporations to gather data directly from the government.
- The Draft Policy contradicts the law laid down by the Supreme Court by trying to give the State unimpeded access to the data of individuals even in cases where no legitimate State interest exists.
- The Draft Policy deprives individuals of all agency and autonomy over their private data by indicating that the State holds data in public trust.

iv. India does not have sovereign right to Indian data

The Draft Policy states that "*India and its citizens have a sovereign right to their data. This right cannot be extended to non-Indians*". This assertion confuses the nature of rights held by States (that is, sovereign rights) and those held by citizens (that is, private rights).

[4] As held by the Supreme Court in *M.C. Mehta* v. *Kamal Nath*, 1997 (1) SCC 388.

To begin with, sovereign rights are extended over power and ability to act, not over citizens, resources or data. Thus, the State cannot, by the very nature of the right, have sovereign rights over data.

Further, the Draft Policy reflects internal confusion regarding the ownership of data. Assuming that the term "sovereign right" was used to mean State ownership of data, the position of both India and its citizens owning their data is a misnomer. The State and its citizens can only have mutually exclusive ownership over the same thing, and if an individual owns their private data, the State cannot have ownership over it. This is the essential difference between public and private goods. To that extent, the Draft Policy has taken no clear stand on who they believe has ownership of data, the State or its citizens.

Recommendations:

- The Draft Policy is drawing out an impossible scenario of both the State and its citizens having ownership of data, thereby creating an absurdity in the law which can be held to be unconstitutional and cannot be allowed to exist.

B. DEFENSE OF CROSS BORDER DATA FLOWS

The Draft Policy imposes restrictions on cross border data flows. It states that: "*…by not imposing restrictions on cross-border data flow, India would itself be shutting the doors for creation of high-value digital products in the country.*" This language suggests that the Draft Policy severely underestimates India's ability to compete in a free and fair global digital economy and wishes to close the borders of the Indian digital economy. Cross-border flow of data is a reality as well as necessity in the connected global ICT ecosystem and supply chain and placing undue restrictions in this regard could severely impact the ease of doing business in India.

The Draft Policy also appears to envisage a movement towards data localisation. It states that: "*A time-frame would be put in place for the transition to data storage within the country. A period of three years would be given to allow industry to adjust to the data storage requirement*."

The problems with this approach are explained below:

- **Lack of Cost-Benefit Analysis:** The Draft Policy in restricting data flows from India on account of holding data in "trust" has failed to note that India has been the biggest beneficiary of cross border data flows, as seen in the emergence of a world-class IT outsourcing business with annual exports exceeding USD 135 billion. The MEITY estimates that IT-ITES exports out of India has grown exponentially due to disruptive technologies such as analytics, cloud services, artificial intelligence, embedded systems, etc., all of which rely on the international flow of information in order to grow. Localisation, on the other hand, limits access to technology on which service economies like India depend. Barriers to data flows often increase the costs associated with developing new services, and may also prevent companies from transferring data for daily activities, resulting in them having to pay for duplicate services.

  The Draft Policy further states that "*In light of the increasing importance of data protection and privacy, the National Draft Policy ("Policy") aims to regulate cross-border data flow*." Yet, there is no evidence-based approach justifying the position that restrictions on cross border data flows enhances protection of data. In fact, data localization may actually impair a service provider's ability to transfer their data assets into the repositories where they can be best

protected. Moreover, having the data in multiple locations unlikely to be disrupted by a singular incident is a good practice from the perspective of data security, disaster recovery and business continuity.

- **Undermining user autonomy:** The Draft Policy states that: "*Conditions are required to be adhered to by business entities which have access to sensitive data of Indian users stored abroad. Sharing of such data with third party entities, even with customer consent, is barred under the Policy*." This stance of the Draft Policy impedes user autonomy by undermining the consent of individuals with regard to cross border data flows (refer to discussions in Section I). It should be kept in view that the Supreme Court in *Puttaswamy* recognised that "*an individual may have control over the dissemination of material that is personal to him*."

- **Unclear scope:** It is not entirely clear what the scope of localisation envisaged by the Draft Policy would be – in terms of the kind of data that is sought to be localised, the sectoral applicability if any, the potential overlaps with the regulatory regime in the PDP Bill. Restrictions on data flow sought to be imposed by the Draft Policy not only reduce the scope of data transfer under the present law, but also do not align with the PDP Bill. This risks the creation of parallel frameworks for the transfer of similar varieties of data, and conflicting legal regimes which may lead to low enforcement and a potentially unstable business environment.

- **No Definition of Sensitive Data:** The restrictions on data flow have been enacted with regard to "sensitive" data – without defining what kind of data qualifies as sensitive in the context of the Draft Policy. Notably, the Draft Policy does not refer to the SPDI Rules and the definition of "sensitive personal data and information" contained therein. Thus, the scope of data sought to be protected by the Draft Policy is unclear.

Recommendations:

- It is submitted that by seeking to restrict cross-border flow of data, the Draft Policy is restricting India's ability to participate in the global digital economy.
- It is further submitted that by seeking to restrict cross-border flow of data, the Draft Policy is harming the growth prospects of the Indian digital economy by limiting India's access to global technology, collaborations, and economies of scale.

C. IPR AND PIRACY

The Draft Policy seeks to regulate intellectual property rights and piracy issues on e-commerce platforms and appears to envisage proactive monitoring and removal of content when such content is pirated or IP-infringing. There are several problematic aspects of this requirement, as highlighted below:

i. Conflict with Intermediary Liability Regime

Under Indian law, an e-commerce platform is an intermediary, and intermediaries as globally understood and as defined in the Information Technology Act, 2000 (***IT Act***) are neutral channels for conveying information. While most e-commerce platforms do take on additional roles in order to safeguard consumer interest, nevertheless an intermediary cannot legally be held liable for any third-party information made available or hosted by it, as long as certain 'safe harbour' conditions are fulfilled – which includes removing or disabling content when having notice of the same through appropriate legal channels.

The position of law in India as spelled out through various court decisions, is perfectly clear on the point that intermediaries should not be made to assess the legality of content. In ***Shreya Singhal*** vs. ***Union of India***[5] various provisions of the IT Act and rules thereunder were read down to uphold the position of law that an intermediary cannot be required to proactively monitor its platform for unlawful content, and its responsibility is limited to actioning content when notified by court orders or authorized government agencies.

ii. E-Commerce Platform is Ill-Equipped to Assess IP Issues

In the case of ***Kent RO Systems Ltd. & Anr.*** vs. ***Amit Kotak & Ors***,[6] the Delhi High Court had held that the issue of whether an intellectual property right has been infringed by a user on an intermediary platform is not to be determined by the platforms themselves, as per the IT Act. This case also arose in the context of an e-commerce platform being requested to remove IP-infringing content. The court was clear on the fact that such a platform is simply not equipped to determine what is essentially a question of law. This indicates that the Draft Policy should refrain from imposing such requirements on intermediaries against the law.

Even in the absence of legal requirements, there are some platforms that presently allow such claims to be addressed internally. For example, Facebook has a globally scaled notice-and-takedown program through which rights holders may report instances of intellectual property infringement for review; upon receipt of a complete and facially valid claim of infringement, Facebook promptly removes the reported content, typically within a day or less, and in many cases within a matter of hours or even minutes. Facebook also has developed a variety of tools that go above and beyond notice-and-takedown,and enforces strict policies to disable the accounts of repeat or blatant infringers where appropriate. Amazon also has recently announced that it will give certain companies the power to directly remove suspected counterfeits from the website as part of a new initiative aimed at curbing the sale of fake goods.

Recommendations:

- It is submitted that the Draft Policy disregards steps taken by companies internally to address these issues and seeks to impose onerous obligations externally, which is not recommended, and which falls afoul of globally accepted principles of intermediary liability.[7]

D. CONSUMER PROTECTION

The Draft Policy seeks to address issues of consumer protection by increasing the legal liabilities on e-commerce platforms, and in the process prescribes extremely specific requirements for such platforms to adhere to. For instance, the Draft Policy requires all e-commerce sites / apps available for download in India to have a registered business entity in India; seeks to institute an e-commerce specific consumer protection framework; regulates the packaging of goods, types of reviews that can be put up on platforms, unsolicited commercial communication, specific regulation of payment processes "*inherent to e-commerce*" etc. The approach of the Draft Policy is misguided inasmuch as it

[5] (2013) 12 SCC 73.

[6] CS (COMM) 1655/2016.

[7] This concept is enshrined in the U.S. Digital Millennium Copyright Act section 512(m): "Nothing in this section shall be construed to condition the applicability of [the safe harbors] on . . . a service provider monitoring its service or affirmatively seeking facts indicating infringing activity..."
European Union Ecommerce Directive says in Article 15: "Member States shall not impose a general obligation on providers . . . to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity."

disregards the commercial considerations underpinning online transactions, and also displays a striking disregard of existing regulatory frameworks governing various aspects of e-commerce that it seeks to address.

i. <u>The Draft Policy Ignores that Platforms are Already Innovating in Consumer Protection</u>

The Draft Policy emphasises responsibility and liability of digital economy platforms to ensure genuineness of any information posted on their websites. It also refers to platform control of fraudulent reviews by sellers and affiliates. However, these issues are already dealt with by platforms under competitive pressures to provide a reliable experience to users. As consumer engagement has risen and been impacted by fake reviews etc. various platforms and intermediaries have risen to this challenge through innovations and development of best practices in a competitive market. This has taken place, *inter alia,* through attractive refund policies, special guaranties to ensure genuineness of products, and increasingly secure payment mechanisms. Many platforms identify "certified buyers" in order to ensure the authenticity of reviews, some use blogs, videos and testimonials, and several platforms offer free trials. All of these are aspects that the Draft Policy fails to account for, and an assessment that there needs to be a regulatory intervention in this regard – that too at the minute level of regulating ratings and reviews – is not rooted in any evidence of consumer protection practices being presently inadequate.

ii. <u>The Draft Policy Will Negatively Impact Peer to Peer Markets</u>

Further, the Draft Policy will negatively impact Peer to Peer Markets (***PPMs***), whose growth in the last few years has led to further innovations in ensuring consumer trust. The idea of a smoothly functioning PPM is to offer the convenience of an informal, local, exchange economy while also offering consumer protection and connectivity at a scale which is unprecedented in such informal economies. The continued success of such platforms depend crucially on their ability to retain consumer trust – leading to major innovation by various PPM platforms in this regard.

The incredibly intrusive and onerous obligations imposed by the Draft Policy which have a one-size-fits-all attitude by seeking to regulate prices, ratings, reviews etc. could seriously undermine the development of this economy.

iii. <u>The Challenge of Regulatory Harmony</u>

(a) <u>Duplicative Legal Frameworks</u>: The regulatory framework in India presently addresses several of the concerns raised in the Draft Policy. Online sale of goods and services are regulated to a certain extent through the Consumer Protection Act, 1986, and to an even larger extent by the proposed Consumer Protection Bill, 2018 which has introduced provisions dealing with e-commerce. The Draft Policy ignores the significant strides made in this regard.

Further, the Draft Policy seeks to subsume several separate regulatory regimes:

- Labelling and packaging under the Legal Metrology Act, 2009
- Unsolicited commercial communications under Telecom Commercial Communications Customer Preference Regulations
- Removal of prohibited items from sale under Information Technology (Intermediaries Guidelines) Rules, 2011 (***Intermediary Guidelines***)
- Payment security and other similar issues are addressed by the RBI under various laws and regulations.

While the Draft Policy makes several recommendations that are so broad in their sweep that they could potentially subsume the regulatory authority of the many legal regimes described above, it does not specify how it seeks to achieve this integration. The merits of having one unifying law dealing with all of these aspects have not been examined in any detail. The clear problems with regard to harmonisation of so many different frameworks are not also addressed.

(b) Potential for Regulatory Overlaps: The problem of regulatory harmony requires special examination and emphasis in the Indian context, where TRAI and CCI have been in conflict in the past on the issue of overlapping jurisdiction. The RBI is presently resisting the creation of a separate payment regulator as it foresees a possibility of regulatory harmony in the payments space being disrupted. Similar problems could potentially be raised in the area of e-commerce, especially if new frameworks seek to replace old ones without any clear distinction in their scope.

(c) Existing Regulators Already Address E-Commerce Issues: The RBI has adequate powers under law to address specific payment related concerns that arise on account of the proliferation of e-commerce. To provide examples, in 2015 the RBI introduced the Online Payment Gateway Service Providers (***OPGSP***) schemes to ease the processing of export and import related payments – the stated objective being "*to facilitate e-commerce*." Likewise, in its Statement on Developmental and Regulatory Policies, issued in February 2019, the RBI has indicated that it will place a discussion paper in the public domain for consultation on Payment Gateway Service Providers and Payment Aggregators. This is possibly spurred by their ubiquity in the payments space, especially on e-commerce platforms.

iv. Incorporation as a Trade Barrier and restrictions on business model

The Draft Policy requires all e-commerce platform service providers to incorporate in India as a precondition to providing services in India. This is not only enormously trade restrictive, it would also deprive consumers of the flexibility that has been offered to them through the development of various innovative e-commerce platforms that provide technology services on a cross border basis while connecting consumers and goods/service providers locally. For global players, the idea of incorporation in every country of operation exposes them to a plethora of regulatory issues and tax incidences, which would serve as an enormous disincentive against doing business in India. The recently proposed amendments to the Intermediary Guidelines have already suggested a threshold-based incorporation requirement for all intermediaries, which would include e-commerce platforms, and it has received comments from several stakeholders pointing out the pitfalls of such an approach. This indicates that the DPIIT should refrain from suggesting even more restrictive changes in the e-commerce space.

In addition to requiring all e-commerce platform service providers to incorporate in India as a precondition to providing services in India, the Draft Policy further requires that such registered business entity must be the importer on record or the entity through which all sales in India are transacted. At the outset, every entity should have the right to structure their business affairs in a commercially feasible manner (as long as the same are compliant with all laws) and the above additional requirement seeks to undermine this fundamental right of entities. We are of the view that this additional requirement, if actually implemented, will be draconian in nature and will drastically increase the cost of doing business in India, thereby having a significant impact on cross-border activity in India. It is pertinent to note that the Indian Income tax Act already contains robust provisions to ensure that a foreign entity will be liable to pay taxes in India if certain conditions are fulfilled. Accordingly, there is no further need for introduction of a policy which dictates entities on how to undertake their business operations in India as the same goes against the very basic fundamental principles of business.

Further, foreign companies doing business in India (which have a place of business in India, and conduct business activities within India) are subject to the FDI Policy on E-Commerce. There should not be additional requirements placed through the Draft Policy that could undermine India's FDI norms and commitments.

Recommendations:

- It is submitted that the Draft Policy does not recognise the innovative potential of an open market in devising ways and means of safeguarding consumer interest. Thus, it may impede the growth of many consumer protection innovations, which has been possible due to a relatively light touch regulatory framework.
- The benefits offered to consumers through PPMs substituting the informal economy will be undermined by the micro-level regulatory burdens imposed by the Draft Policy.
- The Draft Policy will lead to confusion in governance of the digital economy by creating regulatory overlaps.
- Mandatory incorporation requirements are unnecessarily trade restrictive and would have the impact of depriving consumers of access to global technologies.
- Mandatory requirement for the registered business entity in India to be the importer on record or the entity through which all sales in India are transacted is unnecessary as the same will increase cost of doing business in India, thereby impacting the cross-border investment flows.

E. COMPETITION

The Draft Policy suggests changes to the competition law regime, notwithstanding the fact that competition law issues in the country are already being reviewed by the Competition Law Review Committee constituted by the Union Finance Ministry. The Draft Policy states that there should be regulation to address the "network effect" created by the big players in the market. It concludes that "*data effect and the network effect are the reasons why selling at a loss has emerged as 'sustainable' for enterprises*." Such a blanket determination should not be made without any evidence as has been done in the Draft Policy.

The assumption of there being a network effect in the digital market is entirely flawed and any regulation that flows from the assumption, including the assumption of there being a need to regulate advertising charges, would be similarly misplaced.

i. No Network Effect in the Digital Market

The network effect as it operates outside of the digital world, is fundamentally different from the operation of networked services online. The Cato Institute, while calling the concept of network effects in the online world a "bogeyman"[8] explains the traditional concept of network effect as follows:

> *"In some cases a service is more valuable if more customers are using it because customers want to interact with each other. Then, if a firm moved fast and got some customers, those customers would attract more customers, which would attract even more. Explosive growth would ensue and result in a single firm owning the market forever. The winner takes all."*

[8] *Debunking The 'Network Effects' Bogeyman*, David S. Evans And Richard Schmalensee (2017-18), The Cato Institute, https://object.cato.org/sites/cato.org/files/serials/files/regulation/2017/12/regulation-v40n4-1.pdf

This concept, as the Cato Institute points out, does not hold water in the digital space where even within concentrated markets, there is frequent entry of new service providers which impact the operations as well as market share of incumbent platforms. Thus, a digital networked service does not monopolise the market. This has been a consistent trend across the history of the digital world.

The emergence of such a "winner takes all" markets require the convergence of several factors as pointed out by the MIT Centre for Digital Business,[9] such as:

- *High Multi-Homing Costs* – This refers to costs incurred by network users due to platform affiliation and subsequently a high cost of accessing multiple platforms. High multi-homing costs often cause stickiness in the context of a single platform. However, this is never the case with e-commerce platforms where multi-homing costs are low or nil.
- *Positive and Strong Cross-Side / Same Side Network Effects* – In a market with negligible multi-homing costs, cross side network effects can be replicated. For instance, the same doctors can be listed on both Practo and Lybrate, and the same Andriod phones are available on both Amazon and Flipkart.
- *No Preference for Inimitable Differentiated Functionality* – In cases where there is no preference for differentiated functionality – network effects may be stronger, although in conjugation with multi homing costs. In the online marketspace, it is the small inimitable differences that set platforms apart and lead to users choosing different platforms based on convenience.

Therefore, it is clear that a "winner takes all" situation cannot emerge in the digital services space which does not suffer from network effects in the same way that conventional markets do. Low entry barriers and multi homing result in inherently unstable networks, as evidenced by innovative competitors emerging rapidly and displacing established firms, such as Slack, Facebook, Snapchat, and Tinder. Therefore, regulatory interventions based on this assumption may be severely misplaced.

ii. Pro-Competitive Aspects of the Digital Economy

(a) Dynamic competition is easier for online platforms than for traditional networked industries and studies have shown that network effects, which might otherwise act as a barrier to entry, encourage dynamic competition within the digital space in several important ways.[10]

(b) The Draft Policy states that: "*Greater access to data provides a greater digital capital to a corporation, granting it an advantage over its competitors.*" However, multi-homing results in users generating equivalent datasets on competing platforms. Therefore, mere access to data cannot be providing competitive edge to businesses. It is the processing of that data to generate unique insights, and offer more customized services, that results in one business being potentially favoured over another. The ability to generate more customer-satisfying products should not be seen as anti-competitive.

(c) In fast moving technology markets, market shares change regularly, and disruptors have the ability to introduce revolutionary products that change the market structure, and existing players can rapidly increase size to compete with the incumbent market leader. In light of this, such markets are extremely pro-competitive, dynamic and self-correcting. Regulation of large digital platforms on the basis of market power allegedly held by them, may be characterized by problems of quick obsolescence.

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[9] *Platform Networks – Core Concepts*, Thomas Eisenmann, Geoffrey Parker, Marshall Van Alstyne (2007), MIT Center for Digital Business, http://ebusiness.mit.edu/research/papers/232_VanAlstyne_NW_as_Platform.pdf

[10] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009438

Recommendations:

- It is submitted that the Draft Policy should not seek to regulate online markets on the basis of network effects, which simply do not operate in the same way in the digital economy.
- The Draft Policy should refrain from addressing competition issues and defer to the more specific and consultative processes presently underway through the review by the Competition Law Review Committee.

F. OVERREGULATING THE TAXATION REGIME

i. Overregulating Indirect Taxation

The Draft Policy states that "*The current practice of not imposing custom duties on electronic transmissions must be reviewed in the light of the changing digital economy and the increased role that additive manufacturing is expected to take. A 2017 UNCTAD report suggests that it would be mostly developing countries which would suffer loss in revenue if the temporary moratorium on custom duties on electronic transmissions is made permanent.*"

Electronic transmission of data for a consideration is covered within the scope of the Goods and Services Tax (***GST***) laws. Therefore, the argument forwarded in the draft policy that in case of non-removal of moratorium on customs duties on electronic transmissions would result in a loss of revenue, is entirely misplaced. Under the GST laws, electronic transmission made to a taxable online recipient for a consideration would be treated to be a supply and attract GST on a reverse charge basis.

Further, under the provisions of the Customs Act, 1962 (***Customs Act***), import of goods into India attracts the levy of customs duty at the applicable rates. Various courts have time and again clarified that the meaning and scope of term 'import' under the Customs laws is restricted to physical crossing of customs frontier and any electronic transfer does not qualify as imports for customs purposes. It is a settled position of law that no tax can be imposed without the authority of law.

Therefore, the recommendations provided in the draft Draft Policy that custom duties must be imposed on electronic transmissions would require amendments in the Customs Act. Unless such amendments are made, any electronic exchange not involving physical movement of goods along the customs frontiers cannot be taxed under Customs Act. Additionally, given that the Customs Act specifically concerns itself with physical movement, the law would also need to provide a robust framework for taxing such intangible electronic transmissions. Needless to add that given the intangible nature of these transmissions, chances of valuation disputes cannot be entirely ruled out. Such disputes which may culminate into litigations may be in the teeth of the 'ease of doing business' promise of the Government at the helm.

Recommendations:

- It is submitted that the Draft Policy seeks to overregulate the levy of customs duty and GST by failing to take into account existing provisions of the law and imposing new standards of indirect taxation that are not supported by the existing legal regime.

i.

ii.

ii. <u>Overregulating Direct Taxes</u>

The Draft Policy states "It has been globally accepted that there is a need to reconsider the traditional approach towards addressing the issues related to taxation. India has been quick to adjust to these changes. For instance, the concept of 'significant economic presence' was introduced in the 2018 Budget. It is important to move to the concept of 'significant economic presence' as the basis for determining 'permanent establishment' for the purpose of allocating profits of multinational enterprises between 'resident' and 'source' countries and expanding the scope of 'income deemed to accrue or arise in India' under Section 9(1)(i) of the Income-tax Act, 1961."

By way of Finance Act, 2018, India had amended the (Indian) Income-tax Act, 1961 ("**Tax Act**") to provide that a foreign enterprise would be subject to income tax in India in respect of its business profits if it has a significant economic presence in India. In other words, such foreign enterprise could be taxable in India if it participates in the Indian economy digitally (beyond the prescribed threshold) without having any physical presence in India. or such purpose, 'significant economic presence' has been defined to mean:

a) Any transaction (above the prescribed threshold) in respect of any goods, services or property carried out by the foreign enterprise in India including downloading of data or software in India; or

b) Systematic and continuous soliciting of its business activities or engaging in interaction with prescribed number of users in India through digital means.

Such amendments to the Tax Act, however are subject to the benefits available under the applicable double taxation avoidance agreements (***DTAA***s). Under India's DTAAs, India can only tax a foreign enterprise in respect of its business profits if such foreign enterprise has a permanent establishment (***PE***) in India. The definition of PE under the DTAA requires a physical presence/ nexus in India for the creation of a PE. The definition of PE does not capture the concept of significant economic presence.

Therefore, unless such tax treaties are re-negotiated and amended, India cannot unilaterally read in the concept of significant economic presence under its DTAAs. This would amount a violation of its treaty obligations. Accordingly, until the DTAAs are amended, the tax position under the DTAAs with respect to PE will remain unaltered by the significant economic presence test. Admittedly, the memorandum to Finance Act, 2018 has also noted such position, reproduced below.

"*<u>The proposed amendment in the domestic law will enable India to negotiate for inclusion of the new nexus rule in the form of 'significant economic presence' in the Double Taxation Avoidance Agreements</u>*. It may be clarified that the aforesaid conditions stated above are mutually exclusive. The threshold of "revenue" and the "users" in India will be decided after consultation with the stakeholders. *<u>Further, it is also clarified that unless corresponding modifications to PE rules are made in the DTAAs, the cross-border business profits will continue to be taxed as per the existing treaty rules</u>*."

Recommendations:

- It is submitted that the Draft Policy contradicts the DTAAs and shall cause India to violate its treaty obligations.
- It is further submitted that that the Draft Policy seeks to overregulate direct taxation by failing to take into account existing provisions of the law and imposing new standards of taxation that are not supported by the existing legal regime.

G. CONCLUSION

To conclude, it is recommended that the Draft Policy be amended to take the following into account:

The Draft Policy should align itself with existing principles of law, both as developed in parliament, and as laid down by the Supreme Court in matters related to the nature and ownership of data, market competition, consumer protection, cross-border data transfer, privacy, and e-commerce generally. Where the Draft Policy seeks to amend or overhaul existing positions of law, it is critical to follow an evidence-based approach, and not create an unstable regulatory regime on the basis of mere assumptions.

It should advocate for and facilitate a vantage point for India in the digital global economy, rather than seeking to impede India's participation in global e-commerce by closing off data transfers, international collaborations, access to a diverse range of e-commerce services, etc.

It should respect the autonomy of individuals and businesses and not seek to over-regulate and unnecessarily interfere in the free market by dictating how, when, where and with whom individuals can share their data, where and how businesses should compete, and in general prescribing micro-level changes that may be difficult to operationalise across all services.

Given the impact of this Draft Policy across sectors and its potentially stultifying impact on several digital platforms, we would like to request that the government undertake extensive consultations with stakeholders, particularly the e-commerce platforms sought to be regulated. We recommend an approach similar to those undertaken for the PDP Bill, which includes consultations both before and after formulation of the draft.

- ***End of Submission***