



National **E-COMMERCE** Policy- An Analysis

The authors aim at understanding the background and the need for the Policy, analyse some of the major changes to be introduced by it, and discuss the impact of the same on issues relating to data, consumer protection, foreign investment and competition among the e-commerce players.

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The Draft National E-Commerce Policy released on 23 February 2019 by the Department for the Promotion of Industry and Internal Trade (DPIIT) is a welcome step to regulate and give a further boost to the rapidly growing Indian digital economy. The B2C e-commerce sector in India was worth US\$38.5 billion in 2017 and is estimated to rise to US\$ 200 billion in 2026. The Policy is much needed for creating a facilitative regulatory environment, protecting interest of the consumers, stimulating the growth of micro, small and medium enterprises (MSMEs), ensuring healthy competition amongst the e-commerce players and giving an impetus to government schemes such as Digital India, Start-up India etc. Such a Policy has become even more pertinent during these Covid times, which has seen a transformation in this sector. There is news that DPIIT will be coming up with the second draft of the Policy soon during 2020. Adoption of such a Policy will make India one of the few countries in the world to move towards advanced legislation on e-commerce, and at par with U.S. and China.

Background and Need for the Policy

In 2014, India's average monthly data usage was just 0.26 GB per user, which increased to more than 4 GB by the end of 2017. Greater internet use means more data generation, and thus greater the need to prioritize data privacy, consumer security, and control data flow to ensure it contributes to the growth of the domestic economy. E-commerce has also given rise to a technology driven economy, new business models and new service sectors that need to be regulated. Data is the new enabler of the economy and is the digital capital which is at par with financial capital. India, with its largest population in the world, is a treasure trove of commercially useful data. In such a situation it is important to regulate access to data in order to ensure that companies can derive maximum value from data. A data-driven economy also requires a Policy to tackle various issues such as law and order, revenue-based erosion, anti-competitive behaviour etc. Thus, in order to facilitate the E-commerce sector, which has growing from the past six years, the Policy was released to address six core areas –

- i) Data
- ii) Infrastructure development



- iii) E-commerce market places
- iv) Regulatory issues
- v) Stimulating domestic digital economy, and
- vi) Export promotion through e-commerce.

Regulation of the Data

The Policy recognises the importance of data in: being a competitive advantage for certain businesses through targeted advertising and product development; generating new streams of revenue and innovative solutions, and ensuring growth of artificial intelligence. The Policy also recognises the importance of 'network effects', which means the greater access to data, the greater the likelihood of success of companies. However, data is owned by an individual and cannot be exploited without his/her express consent. Even anonymised data is the collective property of the group of individuals from which it has been derived. The Policy understands the data of the country as a national asset that the government holds in trust on behalf of its citizens, and thus is not in favour of cross-border flow of Indian data.

The Policy suggests that a legal framework be created to:

- i) Restrict cross-border flow of data collected by Internet of Things (IoT) devices installed in public spaces and data generated by users of e-commerce platforms in India; and
- ii) For sharing data collected by IoT devices in public spaces with domestic entities for the purpose of research and development.

Certain categories of data has also been exempted from these cross-border data flow restrictions, such as: data not collected in India; B2B data shared by a foreign entity with an Indian entity under a commercial contract; software and cloud computing services involving technology-related data flows; data of MNCs, which is internal to the company.

The Policy also lays down regulations for business entities storing and processing Indian sensitive data abroad. It mentions that all such data will not be available to other business entities outside India, and third parties, even with the consent of the customer.

Further, all such data will not be available to any foreign government without prior permission of Indian authorities, and request of Indian authorities to have access to such data abroad will be adhered to. The Policy suggests establishing a data authority and creating a suitable framework for sharing community data for public interest.

Even though the Policy's object is to regulate monetisation of data, it does not clearly define 'data', 'individual data', 'anonymized data', 'community data' etc.; or prescribe the penalties for violating the Policy. Restricting cross-border flow of data may restrict foreign investments into India and may also hinder the growth of domestic companies; thus, regulating such cross-border data flow through consent may be a better option.

Foreign Direct Investment

The Policy reinforces the provisions of the FDI policy and invites foreign investment only in the market place model and not the inventory model. The Policy also prohibits online market places from indulging in discriminatory behaviour against MSMEs and start-ups, for ensuring a level playing field. The Policy also provides that all foreign e-commerce sites/apps operating in India need to have a registered business entity in India, in order to ensure that they are compliant with the Indian laws and regulations.

However, the Policy does not address the issue of having uniform laws for online and offline market places in order to further boost the brick-and-mortar businesses. The Policy also does not address the discrepancies in the FDI policy with respect to multi-brand retail e-commerce platforms and multi-brand retail stores. While 100% FDI is allowed with respect to B2C e-commerce models under automatic route, FDI is allowed only up to 51% in multi-brand retail subject to Indian government approval. Thus, as most e-commerce platforms engage in multi-brand retail, it is unclear if these platforms will also be subject to the 51% restriction. Thus, in order promote foreign investment in e-commerce, these issues also need to be addressed.

In stead of restricting cross-border flow of data, regulating the same through consent may be a better option.



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Consumer Protection

In order to ensure consumer protection, the Policy directs all e-commerce sites/apps to compulsorily have MRPs on all packaged products, physical products and invoices. It also bars payments to all unauthorized and unregistered, GST non-compliant e-commerce sites/apps. The Policy also mandates e-commerce entities to make full disclosures of the purpose and use of the data collected from the consumers. The Policy also provides for various anti-counterfeiting measures, and holds e-commerce marketplaces liable to return the amount paid by the customer, in case of any complaints to that effect. Some of the anti-counterfeiting measures to be adopted by e-commerce entities include:

- i) Disclosing complete Seller details
- ii) Seller to provide a guarantee of authenticity and genuineness, and that all warranties and guarantees of the brand owners are applicable and shall be honoured
- iii) Provide for registration of the Trade Marks (TM) owners and not to list/offer for sale any product of such an owner without prior concurrence
- iv) Prior consent of TM owners would be required for listing luxury goods, cosmetics and goods having health implications
- v) In case of a complaint, if the seller is unable to prove genuineness of the product then product will be taken down.

In order to further the interests of the consumer, the Policy also addresses the challenge of piracy and encourages intermediaries to take steps to prevent online dissemination of pirated content, e-commerce platforms to expeditiously remove or disable access to alleged content, and internet service providers to remove or disable access to infringing websites. E-commerce platforms are also directed to ensure authenticity of ratings and reviews, mention contact details for

consumer grievances, the timeline for disposal of these grievances, provide first resolution to these complaints within one week, and develop an online grievance redressal system. We can see that some of the suggestions of the Policy have been incorporated in the Consumer Protection (E-Commerce) Rules, 2020, which came into effect in July 2020.

Challenges Relating to Competition

The Policy recognises how it is difficult for the second movers to enter the e-commerce sector, and how few e-commerce platforms and search engines dominate the market. The dominant players have deep pockets to be able to pay up the high advertising charges, which is a hindrance to the smaller players. Thus, Policy provides that the advertising charges in e-commerce must be regulated for creating a level playing field for small players. It also mentions that the anti-trust regime of our country should consider 'network effect' when analysing mergers and acquisitions. Policy also makes a very valuable suggestion to regulators and legislators of creating a 'technology wing' so that they are able to analyse such transactions properly and also draft laws for cutting-edge technology, Artificial Intelligence etc. These are some much-needed suggestions and will need to be effectively implemented.

Conclusion

Apart from the aforesaid point(s), the Policy also gives guidelines as to infrastructure development and promotion of exports. India is definitely moving in the right direction, and we await the second draft of the Policy. However, the government need to addresses the lacunae in the Policy and ensure that the Policy balances the interests of all the stakeholders.

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