



Representing the ecosystem of Internet -Bharat Model

29 March, 2019

The Department for Promotion of Industry and Internal Trade,  
Government of India

**Sub: CCAOI's submission on National eCommerce Policy.**

Dear Sir,

At the outset, we wish to thank the Department for Promotion of Industry and Internal Trade (DPIIT) for giving us the opportunity to submit our comments on the [National eCommerce Policy](#) (draft policy).

CCAIOI, represents the different stakeholders of the internet ecosystem in India – internet service providers, content providers, intermediaries, including cybercafes, and consumers, aims to promote internet to the common masses in India. For achieving this, CCAIOI voices the challenges of these entrepreneurs and grievances of consumers on their behalf.

Emergence of India as a world-class IT outsourcing business centre and the growth of digital trade and eCommerce in this country can be attributed to the light touch regulation which was adopted in the country so far. For the digital economy to grow further, we believe that any eCommerce policy should be so formulated that it should bring together and nurture interests of all stakeholders so that the digital economy and the internet ecosystem grows uniformly across India.

Please find enclosed our specific comments related to the draft policy, along with a synopsis of a multistakeholder discussion which we organised to gather the views of different stakeholders on the draft policy.

Thanking you and looking forward for favorable consideration of our suggestions in the interest of growth of internet economy in the country.

Yours very truly,  
For CCAOI

Amrita Choudhury  
Director

## CCAOI: Comments on the proposed National eCommerce Policy

We thank the Department for Promotion of Industry and Internal Trade (DPIIT) for giving us the opportunity to submit our comments on the National eCommerce Policy draft (draft policy)

As the representative of the different stakeholders of the internet ecosystem in India – internet service providers, content providers, cybercafe, small digital entrepreneurs and consumers, we welcome the draft policy as an important step towards regulation of eCommerce in the country. Please find below our comments and suggestions on various aspects of the Draft Policy.

S. No.	Chapter	Issues in the draft Policy	CCAOI Recommendations / Suggestions	Rationale
1	I: Data	<p><b>Ownership of Data</b></p> <ul style="list-style-type: none"> <li>- The Policy acknowledges the importance of data as an asset and identifies the means to protect data generated in India.</li> <li>- Companies do not own the data, which they have processed and monetized.</li> <li>- The data of a country is best thought of as a collective resource, a national asset. The analogy of a mine of natural resource or spectrum works here.</li> <li>- Even after data is anonymized,</li> </ul>	<p>We recommend:</p> <ul style="list-style-type: none"> <li>- Rephrasing these provisions in order to remove references to data as a national asset or community resource.</li> <li>- Clarifying that companies have rights over lawfully acquired data – including, inter alia, commercial and IP rights over processed data / processes of data analysis.</li> </ul>	<ul style="list-style-type: none"> <li>- The position that companies should not be able to freely use the data that is acquired with consent of individual, or collected or processed using their own methods and devices, could be a major impediment to e-commerce businesses and go against the stated objectives of the draft policy of facilitating e-commerce.</li> <li>- Data privacy is a facet of individual autonomy as recognised in K.S. Puttaswamy vs. Union of India case. Therefore, the right to allow use of data rests with the individual and not with the state.</li> <li>- Personal data cannot be termed as a community resource or national asset since decisions regarding use of use of the data cannot be taken by the state, but</li> </ul>

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		the interests of the individual cannot be completely separated from it.		only by individuals who generate data them and this is the position supported by Indian law. <ul style="list-style-type: none"> <li>- The public trust doctrine envisages the State holding natural resources in trust for the free and fair enjoyment of the public at large. However, personal data, being private and specific to individuals, cannot be characterised in a similar manner.</li> <li>- Anonymisation of data takes it out of the purview of most data protection legislations across the world, as the data cannot be linked to the individual and no longer poses privacy risks. It is incorrect to state that anonymization does not separate individuals' ownership over their data.</li> </ul>

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	I: Data	<p><b>Restrictions on Data Transfer or Localisation</b></p> <ul style="list-style-type: none"> <li>- 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.</li> <li>- Location of data centres within the country will not only give a fillip to computing in India but will also lead to local job creation.</li> <li>- A legal and technological framework to be created that can provide the basis for imposing restrictions on cross-border data flow from specified sources such as IoT devices and data generated by users on search engines, e-commerce platforms etc.</li> <li>- A business entity that collects or processes any sensitive data in India and stores it abroad, shall be required to adhere to specified conditions.</li> <li>- A time-bound provision 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.</li> </ul>	<p>We recommend that the draft policy should remove these provisions. The draft policy should refrain from taking a position on data transfer related issues as the Personal Data Protection Bill, 2018 is already under consultation for this purpose. Alternatively, we recommend rephrasing these provisions in order to establish a clear consent based framework for transfer of personal data, and defining:</p> <ul style="list-style-type: none"> <li>- What constitutes sensitive data (preferably in line with existing law in order to avoid overlapping &amp; contradictory definitions)</li> <li>- Consent requirements for transfer of such data</li> <li>- The scope of localisation for which the three year time period is envisaged (presently no details are mentioned).</li> </ul>	<ul style="list-style-type: none"> <li>- An unjustified restriction on data transfer in the Draft Policy impedes user autonomy by undermining the consent of individuals with regard to handling of their data.</li> <li>- 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.</li> <li>- The Draft Policy in restricting data flows from India has failed to take note that India has been the biggest beneficiary of cross border data flows, and has emerged as a world-class IT outsourcing business with annual exports exceeding USD 135 billion.</li> <li>- The European Centre for International Political Economy estimates that if India were to implement economy-wide data localisation requirements, India would lose more than U.S. \$15 billion in GDP annually. In this context, it is specifically concerning that the Draft Policy envisages localisation requirements to be introduced.</li> </ul>

S. No.	Chapter	Issues in the draft Policy	CCA O I Recommendations / Suggestions	Rationale
2	Scope and Objectives  I: Data  II: Infrastructure Development	<b>Digital Protectionism</b>  - India and its citizens have a sovereign right to their data. This right cannot be extended to non-Indians. - Suitable framework will be developed for sharing of community data that serves larger public interest (subject to addressing privacy-related issues) with start-ups and firms. - AI developers may be subject to technology transfer / source code disclosures. - During trade negotiations, India will retain policy space to seek disclosure of source code for facilitating transfer of technology and development of applications for local needs as well as for security. - Policy space to grant preferential treatment of digital	We recommend removing these provisions entirely and considering a policy approach encouraging and supporting the development of research and computing capacity in India.	<ul style="list-style-type: none"> <li>- This approach to digital protectionism undermines the gains to the Indian economy from the development of e-commerce. Recently, Oxford’s Online Labour Index (OLI)<sup>1</sup> worker supplement revealed that the largest overall supplier of online labour is India. The benefits to India’s workforce due to free and flourishing cross border digital trade cannot be overstated.</li> <li>- India is home to several global R&amp;D efforts due to the availability of large volumes of data and a light touch regulatory framework. Any policy intervention that has a negative impact on this, could adversely affect the development of research / computing capacity in India, which contradicts the objectives of the Draft Policy.</li> <li>- Forced disclosure of source code, overregulation of AI, and preferential treatment of digital products originating in India could also run contrary to India’s WTO commitments. Similar efforts undertaken by other countries could have a severe ripple effect on the global digital economy as a whole.</li> <li>- Some of these provisions could lead to violation of intellectual property rights of businesses and</li> </ul>

<sup>1</sup> <http://ilabour.oii.ox.ac.uk/online-labour-index/>

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		products created within India is sought to be retained. - Domestic alternatives to foreign-based clouds and email facilities will be promoted. Ways of promoting this could include budgetary support.		expropriation claims under investment law. Overall, it would reduce India's attractiveness as a business destination and go against the government's stated commitment to improve 'ease of doing business in India'. - Domestic development in cloud and email based services is already underway and there is no evidence offered by the draft policy that the domestic industry requires intervention in light of genuine trade or competition issues. - The government should, instead, create an enabling regulatory framework attracting developers and businesses to India.
3	IV:Regulatory Issues	<b>Competition Issues</b> - The presence of 'network effects' means that in the era of data, the larger the firm, the greater the access to potential sources of data and greater the likelihood of its success. - Because of the significant first mover advantage, once a certain scale is reached, it becomes virtually impossible for a 'second mover' to, on its own, make an entry in the market. - A situation of capital dumping is	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.  The reference to regulation of advertising charges	- The network effect as it operates outside of the digital world is fundamentally different from the operation of networked services online. A digital networked service does not monopolise the market, due to low entry barriers and possibility of multi-homing. - 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. - The Draft Policy incorrectly states that first mover advantage and network effect makes a business impossible to disrupt. Several times in the history of the internet, innovative competitors have emerged

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		to be strongly discouraged.	should be removed.	<p>rapidly and displaced established firms, examples being Slack, Facebook, Snapchat, and Tinder.</p> <ul style="list-style-type: none"> <li>- The issue of capital dumping is severely misplaced in the context of the Draft Policy. There are already regulatory regimes such as the domestic competition law statute as well as international frameworks such as the WTO Agreement on Anti-dumping, to deal with legitimate issues of dumping. Merely having access to sources of capital and using them to innovate on service delivery does not constitute dumping under any legal definition.</li> <li>- The issue of regulation of advertising charges should be left to market forces, as the Draft Policy has offered no defensible reason to interfere on this issue.</li> </ul>
4	III: E-Commerce Marketplaces IV: Regulatory Issues	<b>Legal Reforms: Marketplaces</b> <ul style="list-style-type: none"> <li>- Anti-Counterfeiting Measures / Anti-piracy measures / Regulation for Authentic Ratings and Reviews / Consumer Oriented Customer Service</li> <li>- Prevention of Sale of Prohibited Items</li> <li>- The current practice of not imposing custom duties on electronic transmissions must be reviewed in the light of the</li> </ul>	We recommend that: <ul style="list-style-type: none"> <li>- Counterfeiting / piracy / ratings etc. are already being controlled by e-commerce platforms and such efforts should be encouraged, any reference to micro-level regulation could be unduly restrictive and should be removed.</li> <li>- Sale of prohibited items</li> </ul>	<ul style="list-style-type: none"> <li>- The Draft Policy will lead to confusion in governance of the digital economy by creating regulatory overlaps – RBI already regulates payment systems that the Draft Policy seeks to regulate, TRAI regulates unsolicited commercial messages, Intermediary Guidelines regulate takedown orders for prohibited items, etc.</li> <li>- The moratorium on customs duties on digital transmissions should continue, as agreed by all countries at the WTO. This is a major fillip to global trade. The issue of additive manufacturing and corresponding confusion in this regard is both misplaced and premature.</li> </ul>

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		changing digital economy and the increased role that additive manufacturing is expected to take.	should be left to be regulated by the Intermediary Guidelines and takedown notices there under, in addition to internal company policy  - The practice of not imposing customs duties on digital transmissions should be continued.	

To conclude, it is recommended that the draft policy should,

1. 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 evidence based approach, and not creates an unstable regulatory regime on the basis of mere assumptions.
2. 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.
3. 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.





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As the draft policy will have far reaching impact across sectors and can impact several digital platforms, we would request that the government undertake extensive consultations with stakeholders – eCommerce platforms (not only the big players but also the small ones) sought to be regulated and the other stakeholders including user communities and civil societies in this discussion. We recommend an approach similar to that undertaken for the PDP Bill, which includes consultations both before and after formulation of the draft be adopted for this draft policy too.

## Annexure

### Synopsis of the CCAOI-ISOC Delhi webinar on Draft National eCommerce Policy

#### Background

The Department for Promotion of Industry and Internal Trade, Government of India (DPIIT) has released a draft of the [National eCommerce Policy](#) (draft policy) and has invited public comments on the draft policy by 29 March 2019.

The [CCAOI](#) with the support of the Internet Society India Delhi Chapter (ISOC DEL) organised a webinar to discuss the draft policy on 18 March. The objective of the discussion was to inform various stakeholders of the provisions of the Draft Policy and to highlight issues of concern.

The session was moderated by Amrita Choudhury and Subhashish Panigrahi and was attended by over 45 participants from different stakeholder communities across the country. The speakers participating in the session were Devika Aggarwal from NASSCOM; Ankit Anand from Reliance Jio; Nikhil Pahwa from Medianama; Parminder Singh from IT for Change and Dr. Mahesh Uppal from ComFirst (India) Private Limited.

Smitha Krishna Prasad of the Centre for Communication Governance at National Law University, Delhi provided an overview of the draft policy paper, which was followed by the speakers sharing their perspectives on the draft policy. The discussion concluded with an interactive session wherein the speakers answered questions put to them.

#### Highlights of the discussion

The key issues discussed in the webinar and the comments shared by the participants have been elucidated below:

##### 1. Shortcomings of the Draft Policy

While most speakers welcomed the draft policy as an important step towards regulation of e-commerce in India, the following shortcomings were highlighted as a cause of concern:

- Many terms used in the draft policy have not been defined. For instance, Aggarwal pointed out that it is unclear whether the meaning of ‘sensitive data’ has to be understood in light of the definition provided in the Personal Data Protection Bill, 2018 or the Information Technology (Sensitive and Personal Data and Information Reasonable Security Practices and Measures) Rules, 2011 (SPDI Rules). The lack of clearly defined terms led Pahwa to regard the draft policy as ‘misleading’.
- It was suggested by Uppal that the draft policy should not be concerned with technical measures to be undertaken by businesses, but with the advisable approach towards e-commerce. It must be a simple document with clearly stated objectives and recommendations.
- The fact that complex restrictions are being proposed for e-commerce by the draft policy, which are distinct and absent from offline commerce, was criticised as being biased against e-commerce and creating an artificial distinction between online and offline commercial activities. Pahwa highlighted this while discussing the rights of trademark owners.

## **2. Ownership and Categorisation of Data:**

The Draft Policy has introduced three distinct categories of data, namely, (a) personal; (b) community and (c) national data. The following concerns were raised in relation to this classification:

- The term ‘community data’ is not defined under the draft policy and there is no consensus on the meaning of this term. Most speakers including Anand and Pahwa agreed that there is a need to define the different categories of data and to explain the rationale for distinguishing between them.
- The need to adopt safeguards when categorising any data as ‘community data’ was discussed. Pahwa pointed out any personal user information should not be covered under the ambit of community data.
- It was highlighted by Uppal that the draft policy must ensure ownership and control of data by the user.
- An alternate view was raised by Singh who spoke of the need to recognise the intrinsic value in data as a national resource and to utilise it fully in order to be able to create an AI driven e-commerce infrastructure in India like that of China and the U.S.

## **3. Data Sharing and Data Localisation:**

The Draft Policy envisages restrictions on cross border transfers and disclosures of various categories of data.

- The restrictions placed on cross-border data flows in the draft policy were attacked by Aggarwal for lacking any rationale and by Uppal for absence of evidence by way of use cases demonstrating benefits to the economy or favourable geo-political ramifications.
- Another objection raised to data localisation by Aggarwal was that such a requirement would have a stifling effect on businesses and would amount to micro-management of businesses. Uppal suggested that rather than mandating businesses to comply with restrictions on cross-border data sharing, incentives should be created by the draft policy for businesses to adhere to data localisation.
- While mandatory sharing of data was criticised by Uppal, Pahwa suggested the need for non-coercive alternatives such as data portability.
- The draft policy was also criticised by Aggarwal for undermining user-consent by prohibiting cross-border sharing of data even with user consent.

#### 4. **IPR and Conflicting Regulatory Frameworks:**

- Many illustrations were cited to argue that the provisions of the draft policy are in conflict with existing laws. For instance, it was emphasised by Aggarwal that the draft policy must be streamlined with the provisions of the Information Technology Act, 2005 and the rules thereunder and the Personal Data Protection Bill, 2018.
- The provisions relating to intellectual property were argued by Pahwa to give rights to trademark owners to control the sales of the products sold on e-commerce platforms, which they do not enjoy in offline commerce.
- In addition, the e-commerce platforms will have to monitor content to look out for intellectual property violations, which would be in conflict with the exemptions granted to intermediaries under the Information Technology (Intermediaries Guidelines) Rules, 2011. Uppal, Pahwa and Anand flagged this issue.

#### 5. **Other Themes:**

In addition to the themes elaborated upon above, the speakers also shared their thoughts on the following areas of the draft policy:

- Certain stakeholders suggested that issues concerning data should not be dealt with by the draft policy and the provisions in relation to the same should be removed.

- Disclosure of source codes was regarded as problematic by Aggarwal, who suggested the adoption of a lesser intrusive measure like a system of algorithmic auditing.
- Aggarwal suggested that consumer welfare should be the focus of the draft policy rather than restriction of data flows. However, Uppal argued that there is no evidence to prove that the assumption that consumer rights are not protected in the course of e-commerce activities and hence there is no need for more stringent consumer protection obligations on e-commerce platforms.
- Network effects of businesses were regarded by Pahwa as an area beyond the purview of the Draft Policy that should instead be dealt with by the Competition Commission of India (CCI).

#### **Overall Takeaways:**

- There are several ambiguities in the draft policy that need to be addressed so as to provide clarity to businesses and users engaging in e-commerce activities.
- The draft policy in its present form contains provisions in conflict with prevailing laws in India and needs to be streamlined with all applicable statutes.
- Although the policy is an unenforceable document, several of the issues highlighted in it fall under the domain of existing regulatory frameworks and agencies. These regulators could bring into effect the recommendations of the draft policy by issuing appropriate directions. Therefore, the implementation process needs to be clarified.
- The draft policy must not become a complex document dealing with the intricacies of the conduct of e-commerce operations in India, but should suggest the favourable approaches to e-commerce and provide incentives to businesses to comply with the suggested approaches.

**Recording:** The recording of the webinar is available [here](#)