# IAMAI submission on Draft national e-Commerce Policy

The Internet and Mobile Association of India [IAMAI], on behalf of its members, would like to thank DPIIT for initiating a consultation on the Draft National e-Commerce Policy.

Our submission is divided into two sections. Section one discusses thematic issues as identified in the Draft Policy. Section two gives a substantive point-wise response to some of the suggestions made in the Draft Policy.

## Section 1

### 1.1 Definitional Challenges

**1.1.1 Definition of e-commerce:** The draft e-commerce Policy uses a much wider definition of e-commerce[1]. The document, in terms of 'context', refers to guidelines/regulation of different services including e-tailing/online marketplaces for services, search engines, digital advertising and many such services.

**Issues for Consideration**

e-Commerce has been narrowly defined in the existing FDI Policies. The FDI regulations are restricted to trade in goods, while allowing unrestricted FDI in digital services. Within trade in goods, a distinction is made between B2B (wholesale Cash and Carry) and B2C. B2C in turn is divided into Multi Brand Retail Trade (MBRT) and Single Brand Retail Trade (SBRT).

The provision of allowing only online marketplaces and not inventory based e-commerce was aimed at MBRT[2]. This draft policy, by using a wider definition, imposes the narrow FDI condition for MBRT on the entire digital universe.

Consequently, various digital services, which up to now had 100% FDI allowed under the automatic route, seem to be brought under the same FDI restrictions as applicable to marketplace model of product ecommerce. This risk derailing the entire digital sector that has developed over the last 15 years based on legitimate investments.

**IAMAI Submission**

- **IAMAI requests that since the issue of ecommerce is directly connected with FDI historically, the definition of ecommerce that we follow is aligned with our regulations and policies.**
- **IAMAI requests that services like Video on demand, digital advertising, etc be explicitly kept out of the FDI restrictions and the ambit of this draft be restricted to product e-commerce as usually understood.**

[1] The terms "*'e-commerce', 'electronic-commerce' and the 'digital economy' are used interchangeably, as the context requires*" (Page 9).
[2] following Press Note 3 (2016) and clarifications of Press Note 2 (2018)

**1.1.2 Concept of Capital Dumping:** The Draft policy refers to Capital Dumping as a problem[3] and suggests measures to restrict Capital Dumping[4] while it discusses Strategies for FDI.

**Issues for Consideration**

The Consolidated FDI policy has been amended periodically to make our economy more open and investor friendly. FDI is a major driving force of the Indian economy and the digital services sector is one of the prime sectors attracting Foreign Investment into the economy.

All FDI compliant with the existing FDI policy must be presumed to be legal. Any official prejudice or negative connotation such as 'capital dumping' is contradicting one's own policies, as well as detrimental to attracting more FDI.

A locally funded e-commerce venture is also capable of creating disruption in the market and stifling competition. Therefore, the issue of fair competition cannot be seen through the narrow lens of foreign capital and its usage, but has to come under the ambit of Competition Laws of the country.

**IAMAI Submission**

- **IAMAI suggests that such terms as capital dumping should not find its place in official documents to describe FDI or investments made according to laws of the land.**

**1.1.3 Cash burning**: page 24 of the Draft Policy states "*selling at loss and 'cash burning' and capital burning had anti competitive consequences*".

The above quoted section of the Draft is in direct contradiction to the observation made on page 19 where the document notes "*With the advent of online e-commerce in India, consumers have benefitted from increased competition in the market by way of getting access to greater variety of products at competitive prices*." (emphasis added)

**Issue for Consideration**

e-commerce allows greater efficiencies for sellers in terms of:

- e-tailing lower capital expenditures in maintaining multiple retail outlets, staff requirements, licensing, rents etc.
- Since some platforms provide warehousing and logistics services, small scale sellers save considerably on operational expenses.

[3] "*However, this era was also witness to large scale capital dumping, by enterprises with deep pockets, to finance sustained selling at losses*", (Page 13)
[4] "*A situation of capital dumping is to be strongly discouraged*" (Page 19)

- e-commerce platforms with pan India outreach allows greater economies of scale for both onboarded sellers and the platform operators.

All these factors allow sellers to offer goods at much lower prices online than offline. This is direct consumer benefit arising from adoption of digital technology, and cannot be termed as anticompetitive practices. This has been validated by the CCI on multiple occasions.

The Income Tax Appellate Tribunal of Bangalore (Bangalore Tribunal) ruled against the Tax Department's contention that sale of retail goods at a loss/ discount was capital in nature and deduction could not be claimed in respect of the same. The Bangalore Tribunal rejected the Tax Department's contentions that predatory pricing policies helped the tax payer create intangible assets and, therefore, expenses incurred towards building such intangible assets should be disallowed as revenue expenses.

This ruling potentially absolves allegations of unfair business practises through price discounts levied on online marketplaces by several offline retail entities and is a response to allegations of 'price manipulations' by online marketplaces.

**IAMAI Submission**

- **IAMAI requests avoiding subjective opinions in the Draft e-commerce policy and requests the policy to be based on established understanding of such matters.**
- **The interpretation of discounting by CCI and the Tax Appellate Tribunal of Bangalore are to be read us benchmarks unless these understanding are legally amended by due processes.**

**1.1.4 Definition of Indian and MNC businesses**: The Draft makes a distinction between foreign businesses who have the first mover's advantage, and posit emerging 'Indian' businesses in contrast to highlight the challenges of network effect affecting access to data.

**Issues for Consideration**

Sectors like Banking, Insurance, telecom has existing restrictions on equity holding by foreign investors. This in turn allows a distinction to be made between foreign and Indian companies. The digital sector does not have any such restrictions, nor is it advisable.

Under the present Government of India policies, Indian tech start-ups are attracting global interests that also translates in the form of foreign investments. The sector is heavily reliant on VCs and angel funders who route FDI in the Indian tech sector as indigenous Indian investor network is not matured enough to meet the demand of the Indian tech start-up sector.

Institutional challenges like Angel Tax in recent times have forced many Indian tech start-ups to register abroad, who then go on to raise funds abroad and service Indian markets[5]. These

[5] https://economictimes.indiatimes.com/small-biz/startups/why-indian-startups-are-looking-abroad/articleshow/59407899.cms?from=mdr

businesses then officially have the status of a 'foreign' company, even though they may be serving only Indian customers and are run by Indian entrepreneurs.

Given the organic relationship between Indian tech companies and foreign investors holding equities in such businesses, it is virtually impossible to make any distinction in such business in terms of 'Indian' and "Non-Indian' businesses. A business with an Indian founder, registered abroad, with heavy equity investment by VC and funding by international agencies stretches the imagination of its 'Indian' identity.

**IAMAI Submission**

- **IAMAI suggests that a narrow definition of Indian and MNC companies may be avoided in making a policy for the digital sector which is solely reliant on foreign investment and has been the "golden goose" of the economy since the last 7 years.**
- **IAMAI also submits that a strict application of this false distinction may backfire on some of the India start-ups.**

### 1.2 Conceptualizing Data

The draft policy seems to take the new adage "data is the new oil" too literally and proceeds to make policy based on a literal interpretation of a very loose analogy[6]. It infers that Indian Data is to be treated as a 'national asset', argues for data localization to restrict access to Indian data' and undermines individual's rights over one's data in favour of community ownership which serves as a euphemism for State ownership[7].

**Issues for Consideration**

While certain members like Rediff.com differ with us, it is our collective understanding that data cannot be treated as oil or 'a mine of natural resource or spectrum' on the following grounds:

a) Non Exclusive: the first fundamental difference between data and any other such resource is the fact that access to data is non-exclusive. 'Sharing' 1 litre of oil makes the original owner poorer by 1 litre and makes the recipient richer by 1 litre. In contrast, 'sharing' 1 TB of data only makes the recipient richer by 1TB of data without making the original owner any poorer. Data is easily replicable and same personal data can be shared across different recipients, which makes access to data non-exclusive.

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[6] "*It is almost a cliché today that data is the new oil. Unlike in the case of oil, data flows freely across borders. It can be stored or processed abroad and the processor can appropriate all the value. Therefore, India's data should be used for the country's development Indian citizens and companies should get the economic benefits from the monetization of data*". (page 16)

[7] "*The data of a country, therefore, is best thought of a collective resource, a national asset, that the government holds in trust, but rights to which can be permitted. The analogy of a mine of natural resource or spectrum works here*". (Page 14, emphasis added)

b) Non-Exhaustive: the biggest difference between data and any other natural resource like oil is the fact that while using 1 litre of oil makes the world poorer by a litre, using 1 TB of data only generates more TB of data in the form of data products, services and solutions.

c) Intangible: Data is intangible unlike oil, and is not geo-specific unlike spectrum. Any allusion of mandating data localization to retain 'physical' control over it is a false illusion that has no practical validation.

d) Value of data: data has no intrinsic value of its own; the value from data arises from its processing. Physical location of data or its access has no bearing on realization of value from data; realization only depends on the ability to process data meaningfully to provide services for users. It is the service provided by using the data that creates the 'value' of data which can then be monetized, provided the value of the service attracts enough users for the service.

**IAMAI Submission**

- **The notion of treating data as a natural/national asset akin to oil/coal/spectrum is flawed. Any regulatory premise developed on this assumption risks erroneous policy objectives and strategies.**
- **IAMAI requests that on the issue of ownership, collection, sharing and cross border transfer of data, the principles laid down in the Report by the expert committee Chaired by Justice [Retd.] BN Srikrishna and the subsequent Draft Personal Data Protection Bill be followed in principle.**

### 1.3 Concerns of violation of fundamental rights

The draft e-commerce Policy starts by recognizing that individuals own their own data[8]. However, the draft then posits individual's data as a national asset[9], suggests State to have ownership over it[10] and the right to adjudicate this data for commercial benefits[11].

**Issues for Consideration**

Data is not a natural resource but it emanates from individuals. Privacy, or control over one's personal data is a fundamental right well established especially after the *Puttuswamy* judgment by Supreme Court. Following this judgment, MeiTY was mandated to establish the Sri Krishna Committee that came up with the Draft Personal Data Protection (PDP) Bill 2018.

[8] "*An Individual owns the right to his data. Therefore, if at all the data of an individual is used, it must be with his/ her express consent. This consent has to be express,in a form understandable and regarding the uses to which it shall be put*." Data: To whom it belongs' (Page 14)
[9] "*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*." (Page 14-15)
[10] "*The data of a country, therefore, is best thought of a collective resource, a national asset, that the government holds in trust, but rights to which can be permitted.*" (Page 14)
[11] "*the e-commerce policy is about how best to exploit this national resource, for maximizing growth and for delivering greatest benefits to all sections of society*" (Page 15)

The Draft Bill recognizes individuals as the owner of their own data and even the State only acts as a fiduciary of the data[12]. Therefore, all suggestions in this Draft Policy that undermine customer consent[13] are gross violation of Fundamental Rights of Indians.

We would like to highlight that the Supreme Court on its judgment on Aadhar, specifically struck down Section 57 of the Act that allowed usage of personal biometric data stored in the Aadhar database for verification by private entities[14]. The Supreme Court categorically stated that Aadhar, which is the largest repository of personal data held by a State entity, can only be used by the state for its own service delivery and cannot be even limitedly shared with private entities. In this context, the proposed provisions of this Draft Policy may be deemed Unconstitutional.

**IAMAI Submission**

- **The Draft personal Data Protection Bill by Sri Krishna Committee has focused all discussions on data, data privacy and data localization in the recent times. The Bill is the cynosure of Data Regulation discussions in India currently. We request the authorities to await the passing of the draft Bill before starting a parallel discourse in contradiction with the provisions of the draft Bill.**
- **The Draft Personal Data Protection Bill, once passed, can serve as the benchmark for other/sectoral data regulation provisions in the country.**

**1.4 Level playing field between extant and emerging businesses**

The draft rightly recognizes the need to promote emerging Indian digital businesses and the challenges such businesses often face from bigger businesses already entrenched in the sector.

[12] Section 2(1) (b) of the Draft PDP Bill categorically states that the Act applies to "*processing of personal data by the State, any Indian company, any Indian citizen or any person or body of persons incorporated or created under Indian law*" (emphasis added) where the bill recognizes processing under Section 3 (32) as "***"Processing"****in relation to personal data, means an operation or set of operations performed on personal data, and may include operations such as collection, recording,organisation, structuring, storage, adaptation, alteration, retrieval, use, alignment or combination, indexing, disclosure by transmission, dissemination or otherwise making available, restriction, erasure or destruction*".

[13] Section 1.2 on page 16 "*a) All such data stored abroad shall not be made available to other business entities outside India, for any purpose, even with the customer consent; b) All such data stored abroad shall not be made available to a third party, for any purpose, even if the customer consents to it*;" (emphasis added)

[14] "*the impact of the aforesaid features would be to enable commercial exploitation of an individual biometric and demographic information by the private entities. Thus, this part of the provision which enables body corporate and individuals also to seek authentication, that too on the basis of a contract between the individual and such body corporate or person, would impinge upon the right to privacy of such individuals. This part of the section, thus, is declared unconstitutional*" (emphasis added)

A key concern expressed is that organizations grow in size due to network effects and access to large amounts of data. They may reach levels after where effective competition cannot be re-established.

**Issues for Consideration**

Digital Service providers compete in a dynamic environment where market players can be quickly replaced given low entry barriers. The first movers in the digital economy in the service categories like e-mail, e-commerce and even social media have either disappeared or lost their dominant position. On the other hand, some home-grown companies have replicated global business models and captured a large share of the market in short span of time, proving that second movers succeed in India.

Since data is non-exclusive and non-exhaustive, access to data by extant businesses does not restrict access to data by new businesses. Customers can share same data with big and small businesses simultaneously. Consumers benefit from competition and its resultant innovation. Any monopoly, whether foreign or Indian is harmful, and policies must provide for robust measures to check such monopolies.

The abuse of monopolistic power by big businesses does not rise from monopoly over data, but from restricting market access to smaller businesses, predatory acquisitions, etc. All such acts can be suitable dealt with under the Competition Act 2002, which needs to be strengthened to deal with digital businesses. We would like to highlight that some of the cited examples of 'punishing' big digital businesses (in Europe for instance) for unlawful practices are all based on provisions of regulating anti-competitive practices, and not on the basis of data regulatory provisions. In the case of India as well, any such level playing field enforcement need to come from such provisions.

We would also like to highlight that level playing field for digital start-ups in India is not only required vis-à-vis big digital businesses, but more often than not vis-à-vis offline businesses.

- The provision of TCS under GST for example creates unlevel playing field for e-commerce companies vis-à-vis offline businesses, and smaller e-commerce businesses face a bigger challenge of compliance than their bigger counterparts, which further worsens the situation for them.
- The issue of Angel tax has over the last 2 years been the single largest challenge for Indian start-ups leading to drying up of critical funding and businesses going out of India.
- Equalisation levy, which was introduced to originally tax big MNCs was actually introduced as a withholding tax for Indian businesses, with the burden of compliance and punitive measures for non-compliance being passed on to the Indian businesses.

**IAMAI Submission**

- **IAMAI is acutely aware of the challenges faced by Indian tech start-ups and is actively engaged in evangelizing the cause of the emerging Indian tech sector. IAMAI**

**welcomes the proposal of treating Indian start-ups as 'infant industry' and would like to extend all support to DPIIT in such an endeavour.**

- **IAMAI requests DPIIT to initiate a deeper discussion on promoting Indian tech start-ups and identify the various challenges the sector is facing. However, any meaningful discussion on this issue has to be based on objective understanding of the real challenges being faced by Indian digital start-ups and cannot be on the basis of unsubstantiated perceptions.**

### 1.5 Infrastructure Development

Chapter II of the Draft Policy talks of developing the physical infrastructure for digital services.

**Issues for Consideration**

IAMAI would like welcomes the suggestion for better data storage infrastructure in India. IAMAI earlier had conducted a study to promote location of Data Centres in India under the Make in India initiative, and would only reiterate its call for incentivizing datacenter location in India instead of a mandate.

While some member like Rediff.com support data localization, it is absolutely necessary to focus on infrastructure development. In fact infrastructure is a priori to localization according our earlier report. It is also a welcome idea to mandate budgetary allocation for building data centres. Such allocation should be made available to all businesses operating in India through and open and transparent manner.

However, in our view such allocation should necessarily be based on an objective and public report based on the returns on such investments.

However, IAMAI would also like to highlight that the draft Policy is overtly optimistic about the economic benefits of such data centres[15] and employment generation arising from data localisation[16]. In our limited understanding, based on our earlier report, data-centres are highly capital and technology intensive with very little employment generation. The claim of job generation from data localization too is presently unfounded with no objective analysis of the impact of data localization.

**IAMAI Submission**

- **Budgetary incentivisation for data infrastructure is a must and should be justified by a proper report in the return on investments on such allocation.**

[15] "*Location of the computing facilities like data centres and server farms within the country will not only give a fillip to computing in India but will also lead to local job creation*." (Page 18)
[16] "*In the future, economic activity is likely to follow data. It is hence vital that we retain control of data to ensure job creation within India*" (Page 18)

- **IAMAI also suggests that incentivizing data centres to locate in India is a better option that mandating it by law.**

### 1.6 Objective of a national policy

Comments on the Section titled THE VISION.

**Issues for Consideration**

Over the years, e-commerce has witnessed multiple regulators stepping in to regulate. This is turn gave rise of to multiple regulatory bottlenecks for the sector.

In this regard, IAMAI and its members welcome suggestions of a central authority that will supercede even state regulations, as it offer a holistic framework for e-commerce to flourish in India.

However, in its attempt to undertake a developmental agenda, the Draft Policy seeks to set the State as a collector and arbitrator of data, which it falsely recognizes as a national asset. Any State policy should be impartial towards all businesses operating legitimately to provide a level playing field in the country. Some of the unfounded and unverified biases identified in the policy leads to ideas of State arbitrated access to data that harks back to a form of License Raj, which has its own baggage of pitfalls and market asymmetry.

**IAMAI Submission**

- **IAMAI suggests that the free fostering environment that has allowed the emergence of the Indian tech start-up scenario be not disturbed by the national e-commerce Policy.**
- **Market imperfections, if any, need to be properly scrutinized and dealt under existing provisions for same. If needed, those provisions maybe strengthened to deal with the new emerging realities.**
- **However, existing market restrictions, if any, cannot be made an excuse for arbitration of data by the State.**

A detailed itemized submission on the suggestions of the Draft Policy follows in Section 2 of our submission.

**Section 2**

## I. DATA

| Provision | Issues for Consideration | Recommendation |
|---|---|---|
| **1.1** A legal and technological framework to be created that can provide the basis for imposing restrictions on cross-border data flow from the following specified sources:<br>a) Data collected by IoT devices installed in public space; and<br>b) Data generated by users in India by various sources, including e-commerce platforms, social media, search engines etc.<br>The legal and technological framework would also provide basis for sharing the data collected by IoT devices under (a) above with domestic entities for use in research and development for public policy purposes. | A blanket ban on cross border flow of data as prescribed is based on a flawed understanding of Data as national resource (as discussed in Section I).<br>1.1 b) refers to personal data that is currently under the purview of the Draft Personal Data Protection Bill. The PDP creates different categories of personal data and stratified permission for cross border flow of such categories of data.<br><br>Limiting the ability to share data with third party restricts the ability of smaller players to achieve feature parity with incumbents. A small marketplace would prefer to offset its recommendation or similar data based intelligence to a third party until it achieves affordability for home grown solutions by scaling. Similarly, marketplaces would need to share data with 3PL and third party cloud service providers to avoid building their own fleet. | Regulation of flow of Data comes under the ambit of Data protection regulations formulated by MeiTY. The issue of regulating cross border flow of data should be limited to the draft PDP. |
| **1.2** A business entity that collects or processes any sensitive data in India and stores it abroad, shall be required to adhere to the following conditions:<br>a) All such data stored abroad shall not be made available to other business entities outside India, for any purpose, even with the customer consent;<br>b) All such data stored abroad shall not be made available to a third party, for any purpose, even if the customer consents to it;<br>c) All such data stored abroad shall not be made available to a foreign government, without the prior permission of Indian authorities;<br>d) A request from Indian authorities to have access to all such data stored abroad, shall be complied with immediately;<br>e) Any violation of the conditions mentioned above shall face the | The provisions suggest a Custodian role of the State over individual data. This formulation is flawed, dangerous, and in contradiction to the understanding of personal data and its ownership as espoused by the Supreme Court in its judgment, the draft PDP Bill, and global regulatory frameworks.<br><br>The Right to Privacy Judgement clearly states that personal data protection flows from an individual's right to informational privacy. Treating individual's data as public property contradicts the understanding of Puttaswamy.<br><br>The Draft PDP Bill has outlined a consent based-governance framework for regulating personal data, including sensitive personal data through explicit consent based- framework. By | Clarity on definition, principles and treatment of Sensitive personal Data is evolving in Indian law and is not settled. With the proposed framework for restrictions on the cross-border data in this Policy, it needs specific discussions and detailed consultations, in alignment with evolving law, for possible evaluation of these clauses and its implications for concerted views/feedback.<br><br>The provisions in this section contradict existing global norms and interpretations by the Indian judiciary. Restrictions on data products violate IPR of businesses.<br>In light of these factors, these provisions should be avoided. |

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| prescribed consequences (to be formulated by the Government). | restricting fiduciaries to share data with third party, even with customer's consent, the policy undermines provisions of Chapter VII of the Draft PDP Bill that outlines restrictions on cross-border transfer of personal data.<br><br>Under globally recognized regulatory frameworks such as the GDPR and the APEC privacy principles, it has been recognized that explicit consent is the primary criterion invoked for the processing of sensitive personal data of individuals i.e. consumers' data. This is in line with globally accepted best practices such as the GDPR and APEC frameworks, which place individuals' consent as the primary criterion for the processing of data. Any mandate that negates customer consent [1.2 a) & b)] are in direct violation of all global norms of data or privacy regulations. and violates the Fundamental rights of individuals as interpreted by the Supreme Court of India.<br><br>Processed data/data products/ anonymized data are recognized to be Intellectual properties of businesses that process them. They have been kept outside the ambit of GDPR in Europe and also the draft PDP bill of India. Any restriction/regulation of data products held by businesses violated IPR of such businesses.<br><br>Restricting cross border flow of data is a form of artificial entry barriers for international businesses and may qualify as Non Tariff Barrier (NTB) to trade in services sector. This can trigger retaliatory provisions from other countries that risks jeopardizing the lucrative BPO sector in India. | |
| **1.4** 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. The larger public interest or public good is an evolving concept. The implementation of this shall | The policy has introduced the term "Community Data" without defining its scope. Since data can be privileged, confidential, propriety et al. for the sake of clarity, the policy must clearly define this term and the contours of this "suitable framework" for the sharing of | Any framework to enable the sharing of *anonymised community data* in whatever shape and form must be deliberated under an appropriate legislative framework and not under sectoral policy, taking into consideration the rights that fiduciaries have under the |

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| be undertaken by a 'data authority' to be established for this purpose. | this community data that will serve larger public interest.<br><br>Establishing a Data Protection Authority (DPA) is already proposed in the draft PDP, along with the structure and remit of such a DPA. As per the remits of the PDP, the remit of the DPA is limited to personal data, and no forms of data product in the form of metadata, anonymized data or collective like "community data" comes under its purview.<br>To suggest new roles of the DPA would result in suggesting amendments to the PDP; suggesting a Data Authority over and above the DPA is regulatory overreach. | Indian Intellectual Property Law, and the Constitution, as applicable, in respect of that processed or derived data. |

## II. INFRASTRUCTURE DEVELOPMENT

| Provision | Issues for Consideration | Recommendation |
|---|---|---|
| **2.2** Steps will be taken to develop capacity for data storage in India. An assessment needs to be done regarding how data-storage-ready the available infrastructure in the country is. Creation of infrastructure for storage would take some time. 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.<br>Certainty about the intent and direction of government policy is important to maximize private investment in this sector. | Mandating data localization without first taking a stock of the present infrastructure of data storage or an assessment of requirements for capacity building risks the growth of digital economy in India.<br><br>Suggesting a time frame (three years) is arbitrary without any present assessment of the present capacity.<br><br>While the involvement of private parties for developing data storage capacity is the right way forward, the policy needs to clarify the rights the State plans to exercise over such facilities in its ambition to control the data stored in such facilities. | A proper assessment of the requirements for data-storage infrastructure to meet the growing need of data for India first needs to be undertaken before any policy directives are decided upon.<br><br>Prescriptive suggestions like definite time periods are best avoided before a comprehensive understanding is evolved.<br><br>Such an initiative would require a widespread stakeholder's consultation. This process itself will be long drawn effort that deserves a separate policy document. Treating it under the e-commerce policy fails to do justice to the cause. |
| **2.3** The Harmonized Master List of Infrastructure -sectors grants 'infrastructure status' to certain categories of sectors, goods and services to guide the various agencies responsible for supporting infrastructure in various ways, including financing their development. This enables regulation of the listed infrastructure in a more streamlined manner. Benefits of such regulation have led to India having one of the largest roadways and railway networks in the world. Data centres, server farms, towers and tower stations, equipment, optical wires, signal transceivers, antennae etc. will be accorded 'infrastructure status' Physical infrastructure for setting up of data centers (power supply, connectivity etc.) will be established by the relevant implementing agencies, while financing agencies may identify these as infrastructure that they may intend to support. This would facilitate achieving last mile connectivity across urban and rural India, including hilly areas, as aimed under the Digital India initiative. | The initiative for treating data centres as infrastructure is a welcome initiative.<br><br>The National Digital Communication Policy (NDCP) 2018 as released by the Department of Telecommunication is the vision document for developing the digital infrastructure of India. The NDCP is the logical extension of the national Telecom Policy, the various iterations of which has established the foundation of the digital sector in India. Developing data centres is best covered under the NDCP and not a national policy of e-commerce. | Budgetary incentivisation for data infrastructure is a must and should be justified by a proper report in the return on investments on such allocation.<br><br>Matters pertaining to developing digital infrastructure is linked to the overall telecom infrastructure in the country. Initiatives for promoting Data Centres should be aligned with the NDCP 2018 for seamless integration and implementation. |

Internet And Mobile Association Of India

**III e-COMMERCE MARKETPLACES**
**The Online marketplace for Goods and Services**

| Provision | Issues for Consideration | Recommendation |
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| 3.1 All product shipments from other countries to India must be channelized through the customs route.<br>3.2 An integrated system that connects Customs, RBI and India Post to be developed to better track imports.<br>3.3 Any non-compliant e-commerce app/website will not be given access to operate in India. Necessary mechanisms may be put in place by MeitY and the other concerned government departments.<br><br>**3.6** In view of the misuse of the 'gifting' route, as an interim measure, all such parcels shall be banned, with the exception of life-saving drugs. India Post must conduct due diligence on "from and to" shipping entities and addresses and set thresholds in the shipment booking system to eliminate misuse of the Foreign Trade (Development & Regulation) Act, 1992. | There are already multiple laws in India which regulate and govern the import channel.<br>When a product is being sold to an Indian consumer using legitimate import routes, wherein all procedures and documentation of import has been complied with, the products follow applicable laws, an appropriate import duty has been paid.<br>The Finance act' 2017 requires all dutiable products imported for personal use by post, air *and courier* to be classified under HS Code 98 (Chapter) only.<br>Mandating appointment of a local importer on record will mean that customers currently having the option to purchase selection from offshore sellers/websites for their end-use could not continue to do so, which shall greatly impact the convenience of Indian customers and may restrict them from utilizing a legitimate channel of Import. | Any provision pertaining to import of items via e-commerce platforms need to make a distinction between B2B and B2C transactions.<br><br>These provisions must also clarify the distinction between import of Goods and services, as by definition, accessing international website contents maybe interpreted as 'import' given the definition of e-commerce here covers both goods and services.<br><br>Online marketplaces are not the seller or buyer on the platforms. In many cases, the actual logistics too is outsourced to third party facilitators. The provision needs to keep these different business models in mind before ascertaining an 'Importer' in case of cross border transaction of Goods. |
| **3.5** All e-Commerce sites/apps available to Indian consumers (displaying prices in INR) must have MRPs on all packaged products, physical products and invoices. Department of Consumer Affairs would evaluate violations and decide corrective actions for such sites/apps. | Online marketplaces buy definition are just technology platforms and they themselves are not directly involved in the act of wholesaling or retailing goods. It is the Manufacturer, seller, distributor, etc. who are required to ensure that the packaged commodities are compliant with the Legal Metrology Act and Rules thereunder. | Online marketplaces can at best provide technological tools for replication of product information on their platforms.<br><br>As intermediaries, online marketplaces cannot be held liable for information pertaining to MRP or other details of products listed by third party sellers on their platforms. |
| **3.7** Consumer/Business Payments from Indian banks and payment gateways to unauthorized and unregistered (GST non-compliant) sites/apps shall be barred. | Practically, the small exporter and domestic sellers may be using online PG or Banks for only part of their overall sales and there is no way for PG/Banks to ascertain status of MSME tax compliance.<br><br>Such a provision will essentially mean that all MSMEs with income less that the GST mandated threshold cannot access digital payment mechanisms. This runs contrary to the Government's endeavours to promote cash-less economy. | We recommend this provision should be dropped.<br><br>Alternatives to be explored:<br>PG/banks in their contracts can take self-declaration that suppliers are GST compliant<br>Incentivise and extend MIES/SIES schemes small sellers which will require them to register for GST. |

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| | The GST Act itself had provisions for computing taxes in case of transactions involving non-registered entities, with the Place of Provision of Service section clarifying the incidence of tax for such transactions.<br><br>Such a provision would also bar any Indian customer availing services abroad from India as foreign service/goods providers are not mandated to register under Indian tax regime.<br><br>Legitimate trade should not be hampered with excessive burden placed MSME's or platforms which may hamper ease of doing business especially small exporters who are predominant users of Payment gateways. | |
| **3.9** Seller details should be made available on marketplace website for all products. This shall includethe full name of the seller(the name of the legal entity), address and contact details including email and phone number. | e-commerce marketplaces invest heavily in developing seller base and ecosystem around such sellers. It requires capital investment and labour resources to develop the database around sellers / potential sellers. Displaying complete details of sellers on website shall tantamount to giving away the competitive advantage to the competition.<br><br>The requirement to provide name and contact details of sellers is currently mandated under Press Note 02 of 2018. The draft Policy expands the details required to be furnished to specifically include email and phone details of sellers on website. It is important to note that Press Note 02 of 2018 permits e-commerce entities to provide support services to sellers (including customer support services), and accordingly, most e-commerce entities provide basic contact details of the sellers and facilitate redressal of grievances through their own platforms. | Displaying of complete seller details on marketplace website/app takes away the competitive advantage derived by marketplace and should not be made mandatory.<br><br>Communication between seller and buyer maybe routed via the platforms for convenience of all parties. |

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| | Consumer Redressal mechanism by ecommerce handles complaints efficiently and diligently and supports customers in resolving issues as facilitation services.<br>Customers may bypass the robust mechanism and sellers may receive direct queries and complaints of various kinds without them having requisite information or infrastructure to respond to such queries including services performed by ecommerce /other entities under contract.<br>Keeping track of all complaints being sent to different sellers would not be possible for ecommerce and that would be counterproductive for Consumer interest.<br>Rights of sellers' privacy as per contracts also needs to be valued as they may also start receiving various promotional/ marketing calls and messages. | |
| **3.10** Sellers must provide an undertaking to the platform about genuineness of products they are selling and the same must be made accessible to consumers.<br><br>**3.15** The platform shall enter into an agreement with each of the sellers on its platform, under which it shall obtain guarantee of authenticity and genuineness of the products sold by the seller, and also provide for consequences of violation of the same. It shall also seek a guarantee from the sellers that the product has not been impaired in any manner and that all warranties and guarantees of the brand owner are applicable and shall be honoured accordingly. Products of any sellers who are unable to provide such a guarantee shall not be listed on the platform. | e-commerce marketplace clearly lists out in their terms and conditions that the goods sold by the seller should be genuine and not counterfeit. An additional undertaking in this regard may not serve any purpose.<br><br>Sale of Products requiring mandatory compliances by various authorities like BIS, FSSAI, Food and drugs, Weight & Measurement certificate etc are covered in ecommerce contracts with sellers.<br><br>This needs detailed evaluation by Sellers on the guarantees/ warrantees they can provide to ecommerce with caveats. Various scenarios can be constructed where it may fail like if brand ceases to exist than seller will have limited or no recourse for getting guarantee/warrantee honoured. | The issue of genuineness is subjective without clear definition of what constitutes genuineness. Platforms already have various mechanisms that onboarded sellers have to comply before they can onboard. These processes are strengthened by the platforms themselves over time for the interest of their reputations and need no further regulation under the e-commerce policy.<br><br>Further, there should be clear exception for parallel imports wherein the seller warranties/ guarantees are applicable as opposed to brand owners' warranties. |
| **3.11** Trade mark (TM) owners shall be given the option to register themselves with e-commerce platforms. Whenever a trade-marked product is uploaded for sale on the platform, the platform shall | Clauses in the Policy relating to counterfeiting, while being well intentioned, are onerous and impracticable because: | The provisions, though well-intended, are impractical and cannot be implemented. |

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| notify the respective TM owner. This facility shall be put in place by platforms and made available for interested TM owners.<br><br>**3.12** In case TM owners so desire, e-commerce platforms shall not list/ offer for sale,any of the owners' products without prior concurrence. However, in case TM owners choose to opt for this, they would have to undertake to respond to platforms within a certain time limit.<br><br>**3.13** In case of specified high value (luxury) goods, cosmetics or goods having impact on public health, marketplaces will be required to seek TM owner's authorization (that is, authorized/distributor/reseller agreement) before listing the product.<br><br>**3.14** In case a complaint is received about a product being fake/counterfeit, the same shall be conveyed within 12 hours to the owner of the TM. If the owner of a TM informs the platform about the product being sold on its platform to be counterfeit, it shall notify the seller and if the seller is unable to provide evidence that the product is genuine, it shall take down its listing and notify the TM owner of the same, as per the provisions of law; | The sheer volume of goods sold on a marketplace through several lakh sellers makes proactive takedowns and registration with copyright owners onerous.<br>There are approximately 35 lakh product offers uploaded per week on marketplaces and at times, there are variances in description and title of the product that make it an impossible task. As Trade Mark owner includes the term licensee, the issue of sub-licenses and validity(non-perpetual) arises.<br><br>It must be noted that marketplaces do not own inventory therefore are not in a position to exert control over the goods. The title rests squarely with the seller. As intermediaries, online marketplaces are not supposed to engage in pro-active monitoring. Section 79(3)(b) of the Act mandates that an intermediary must remove third-party information from its portal, as and when it receives 'actual knowledge' that such third-party information is in violation of any law.<br><br>E-commerce marketplaces are already providing access to brand owners with respect to infringement and sale of counterfeit products wherein brand owners can report the sale of any counterfeit products to the marketplace and under existing law, marketplaces are liable to acknowledge the issue within 36 hours.<br><br>Although, exclusive contracts between ecommerce and sellers have been barred in Press Note 2, this provision opens up option to Trade Mark Owner/ licensee to drive/manage exclusivity, leaving limited options with sellers or marketplace. TM owner or licensee can register with numerous/ relevant ecommerce and restrict them for sale of certain brands leading to artificial push for sale on select ecommerce platform/ favoritism. This will create imbalance | India has a National IPR Policy, a vision document, that encompasses and brings all IPRs under a single platform. The Policy views IPRs holistically all forms of intellectual property (IP), concerned statutes and agencies. Hence, any IP protection measures outlined in the Draft National E-commerce Policy must rather come under the purview of the National IPR Policy along with its proposed institutional mechanism.<br><br>The risk of market distortions only makes this provision risk resulting in anti-competitive practices.<br>Therefore, the provision is best not imposed. Existing mechanisms of combating counterfeit need to be strengthened in consultation with online marketplaces and TM owners. |

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| | and will hamper competitiveness of ecommerce.<br><br>Distinguishing or identifying specific high value (luxury) goods, cosmetics or goods having impact on public health only for ecommerce sale would be a challenging exercise (rules need to be set) for Government. It may lead to discrimination for ecommerce channel and will be unfair if only e-retail is covered while other retail (which is also digital) is not covered. This may end up being vague and may lead to over regulation. | |
| 3.16 Though post-sale, delivery of goods to the customers and customer satisfaction will be responsibility of the seller, there is a caveat to this. Since counterfeiting is a major concern, in case a customer makes a complaint to that effect, marketplaces would have liability to return the amount paid by the customer. In addition, the marketplaces shall cease to host the counterfeited product on their platform, thereby taking down every information related to the product. | Online marketplaces cannot pre-assess products for counterfeit check nor does have capability to assess counterfeit even on return (immediate verification of consumer claim of counterfeit) and has limitations.<br><br>Online marketplaces are intermediaries who pass on payments received from buyers to the sellers.<br>The present GST cycle of reporting requires all such transactions to be reported within a specified timeframe, which in turn means that platforms have to pass on the payments within stipulated time period.<br>In many cases, payments are facilitated by third party payment gateways/ applications/ netbanking and various other forms of digital payments, and the online marketplaces do not control the payment process at all.<br><br>Refund from marketplaces can only be made applicable in the event the seller has not been paid and money is lying with the marketplace. If the money has already been paid to the seller or the payment process has been facilitated by other payment service providers, the same should be refunded by the seller and not the marketplace. | The provision fails to take into consideration the operational models of online marketplaces, and the variations therein.<br>This provision is impractical on various counts and is not feasible. |
| 3.21 Transparency and Non-discrimination in publishing of ratings and reviews. All Reviews and Ratings for Verified purchases must be published as | We understand that the intent of 3.21 is not to mandate all ecommerce to compulsorily publish (all) reviews and ratings but only to bring transparency | To ensure there is no misunderstanding, suggest edits/revised first line: |

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| registered by the customers, except those found to be promotional, abusive or inappropriate in a community setting. | and non-discrimination in publishing of ratings and reviews of verified purchases. | "*All reviews and ratings, if published, must be published in a transparent and non-discriminatory manner*. All Reviews and Ratings for Verified purchases must be published as registered by the customers, except those found to be promotional, abusive or inappropriate in a community setting. |

## IV REGULATORY ISSUES

| Provision | Issues for Consideration | Recommendation |
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| **4.2.** Given the inter-disciplinary nature of e-commerce, the tackling of specific issues that emerge may be the subject matter of different statutes- the Information Technology Act and Rules, the Competition Act, the Consumer Protection Act etc. The Standing Group of Secretaries on ecommerce (SGoS) shall give recommendations to address policy challenges. The SGoS is an important avenue of ensuring that the policy keeps pace with the digital environment. It will continue to be important in administering the e-commerce policy. | The definition of e-commerce first needs to be addressed before the inter-disciplinary nature of e-commerce can be ascertained. | The formation of the Standing Group of Secretaries is a welcome move as it provides a single entity to monitor, enforce and enable the e-commerce sector. It is expected that such a body, if established, will also serve as the single point of contact for all digital services; and that digital service providers will not have to interact with multiple regulators in the near future.<br><br>The composition, mandate, and legislative extend of such a group needs to be defined by the legislature. |
| **4.6.** One area where this is manifested is the high rates charged for advertising by social media platforms and search engines. Traditional logic states that this should purely be a market driven activity. However, the presence of network implies that a few social media platforms and search engines virtually control access to potential consumers. This puts them in a position to charge monopoly prices also make it very expensive for new firms, small enterprises and start-ups to reach consumers. These firms do not have deep pockets. To reach the market (leave aside finding and maintaining their position there) they would have to allocate an excessively high proportion of their budget and working capital to advertising. Juxtapose this with the high rates of capital. Thus, high advertising charges become a barrier to entry. Advertising charges in e-commerce must be regulated, especially for small enterprises and start-ups. | Companies invest capital and resources in building innovative advertising tools that can target consumers on their platform on the basis of their past activities. The sophisticated targeting offered by digital advertising services (in contrast to conventional advertising platforms) offer higher VFM for advertisers for their advertising spend in terms of targeting, monitoring reach, and devising other marketing strategies. To control pricing of advertising tools would be an attempt to control the business models of digital advertising platforms.<br>Pricing controls take the incentive away from digital platforms to further improve their advertising platforms and offering the various tools they offer for the advertisers.<br>Small businesses are increasingly relying heavily on digital advertising to gain market access. Absence of innovation in marketing tools would be disastrous for small and medium businesses and new start-ups. | Pricing of Digital Advertising is best left to market dynamics. The segment is already a fiercely competitive sector with aggressive pricing, and digital advertising itself competes with advertising across different platforms and mediums. |
| **4.7.** The network effect must also be kept in mind whileanalyzing mergers and acquisitions. World over, the experience has been that e-commerce players like social media platforms have taken over potential competitors early. This | The erroneous understanding of network effects of first movers and entry barriers to newcomers (discussed in details under Section 1.4 of this submission) leads to a fragmented | The myopic view of first mover's monopoly and thereby M&A in the tech sector should be replaced by a more balanced view of the matter. |

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| prevents the emergence of the threats to market position later on. As discussed elsewhere in this document, the presence of network effect implies that it is virtually impossible for 'second-movers' to enter the market. | understanding of mergers and acquisitions.<br><br>There is a distinction between predatory takeovers and willful acquisitions.<br><br>Sale is often the preferred route of exit for many finders, and some of the top global tech firms has had the founder exiting via sale. They may engage in founding new start-ups, continue working within the new merged entity, emerge as an Angel Investor, etc. Such examples are abound both internationally and domestically. | Any anti-competitive behaviour can be dealt with suitable anti-competitive laws and prevention of Monopolistic trade practices. |
| **4.10.** In continuation, it is also important for the Government to reserve its right to seek disclosure of source code and algorithms. There will be a greater reliance on AI in decision making in future where parts of the process will become 'AI-fied'. Decisions will need to be explained. There is a need to strike a balance between commercial interests and consumer protection issues, as well as issues of larger public concern, like preventing racial profiling and maintaining constitutionally mandated rights, such as the right to equality. | Each e-commerce marketplace has a unique manner of developing the algorithms and comprises the propriety and IP of the e-commerce marketplace. Such algorithms are woven and interlinked to a great extent technology aspect, user interface aspect, selling aspect and business development aspect as well.<br><br>Source code and algorithms are the intellectual properties of the owner or the developer and hence inherent to the owner's right to do business and pursue his/her profession. They are like the trade secrets to a digital business, as important as the underlying formula to any propriety ayurvedic preparations or a proprietary food article. They are constitutionally protected and disclosers of such codes and algorithms are expropriatory in nature, and hence must be subjected to the constitution and applicable laws of the land, including international treaties, where applicable | .Unlawful practices of businesses can be suitable dealt with under existing provision without resorting to accessing source code. It is also not clear how the Government would act on accessing such a code.<br><br>The provision extends the false understanding of State ownership over personal data to State ownership over IPR of businesses. Both these provisions are legally untenable and hence best avoided. |
| **4.11** With e-commerce and the digital economy becoming a part of daily life of more and more Indians, unique law and order challenges are also emerging. Privacy is an important aspect and all possible efforts must be made to ensure it. However, law and order in society is something that we cannot live without. The Government must stand up to the challenge. Access to data for purposes | The use of the words 'ensuring law and order' in the context of access to data is vague, and could have wide and overarching effect to allow collection of/access to data from participants of digital economy.<br><br>The issue of data collection for law enforcement agencies is suitably covered under the IT Act, and various other legal provisions. | Access to data by Law Enforcement Agencies is completely outside the ambit of an e-commerce policy.<br><br>We request DPIIT to restrict the national e-commerce policy within its remit of promoting trade and economic activities, and let issues of law and order be handled by relevant authorities. |

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| of maintaining and ensuring law and order cannot be over emphasized. | | |
| **4.14.** Integration of small enterprises and MSMEs in the digital sphere is important. In order to ease the process, of onboarding, for MSMEs and to provide them best practices, platforms,where they already exist, (like elala, Tribes India) will be strengthened. | While it is important to strengthen MSMEs and small enterprises there should be neutrality when it comes to promoting one marketplace over the other in the interest of maintaining a level playing field. | The policy to promote MSMEs should be impartial without the Policy cherry picking and specific platform over the other. |
| 4.E 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. | The issue of tax evasion by digital platforms is a globally recognised challenge. The Base Erosion and Profit Shifting (BEPS) that brings 125 countries under its umbrella is a global initiative that is best suited to help forge a global framework that will prevent such tax avoidances by errant businesses.<br><br>Such amendments to the Tax Act, however are subject to the benefits available under the applicable double taxation avoidance agreements (DTAAs). 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.<br><br>Foreign Online Travel Agents (OTA) who have no physical presence in India, however, rendering "reservation of accommodation and/or transportation services" through an online platform to Indian travellers, hotels, airlines, etc. for a fee/commission has been escaping taxes in India on such incomes.<br>This often creates unlevel playing field as Indian OTAs have to pay considerable taxes while the others do not. | All efforts by Indian Authorities to address the issue of tax evasion must be done within the ambit of global efforts to ensure:<br>a) a holistic tax mechanism that does not allow any loopholes for exploitation<br>b) unilateral initiatives by India may risk isolating India in the global sphere and derail the global effort.<br>c) The present Commitments under various international treaties to which India is a signatory must not be violated.<br><br>Payments arising from India should be considered for threshold and not 'Revenue'.<br><br>Provisions should cover both B2B and B2C transactions. |
| 4.15 The atypical nature of an e-commerce transaction necessitates a consumer protection framework specific to this sector. | Consumer Protection Framework should be applicable industry-wide. With wide use of technology and digital payments by retail, offline & online borders are diminishing, and consumer interests or businesses cannot be compartmentalized. | Consumer protection provisions should focus on consumer interests in transactions in a holistic manner.<br><br>The role of intermediaries and the different business models need to be |

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| | Any provision for consumer provision needs to be platform agnostic, given offline sellers onboard online marketplaces to sell online.<br>the Consumer Protection Bill, 2018 already addresses several consumer protection issues that are specific to the digital world - therefore, in the interest of avoiding regulatory overlap, this issue should be left to the broader consumer protection framework as sought to be amended. | understood before drafting any regulations for e-commerce. |
| **I – Exemption from content liability:**<br>Online platforms and social media have become important tools to enhance outreach, mobilize social welfare causes, promote trade, spread ideas and build business relationships. Internet penetration, coupled with user traffic, has brought these platforms and social media almost to every household in the country. With a growing importance of these entities, their social responsibilities also increases. Due to the fact that traders, merchants, individual users, organizations, associations are all dependent on them, the authenticity of content posted on their websites cannot be compromised. In this regard, it is important to emphasize on responsibility and liability of these platforms and social media to ensure genuineness of any information posted on their websites. | The It Act recognizes digital intermediaries, certain conditions to qualify as an intermediary, and thereby provides safe harbours for such platforms.<br><br>The Intermediary Liabilities and safe harbor provisions have its own set of rule notified under the IT Act.<br><br>As per numerous court judgments, intermediaries cannot be expected to proactively monitor/edit contents on their platform as it violates the conditions for being an intermediary.<br><br>These issues are being dealt in details in the new intermediary Rules being discussed by Meity.<br><br>Social media platforms are recognised as intermediaries. Stretching e-commerce regulations of social media stretches the definition of e-commerce.. | Issues of intermediary liabilities and safe harbor provisions are outside the ambit of a national e-commerce policy.<br><br>We request DPIIT to desist from regulating digital services outside the ambit of e-commerce, in lines of our submission on the issues with the definition of e-commerce in Section I of our submission. |

**Note: Our member Reliance Jio has divergences with this submission.**