

**29 March 2019**

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

**Sub: ISOC Delhi's submission to DPIIT on National eCommerce Policy.**

Dear Sir,

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

Internet Society India Delhi Chapter (ISOC Delhi) is a chapter of the Internet Society, and one of six Internet Society Chapters in India. The Internet Society is a global not-for profit organization that supports and promotes the development of the Internet as a global technical infrastructure, a resource to enrich people's lives, and a force for good in society.

Please find enclosed our comments on the Draft Policy.

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

With Regards,

Amrita Choudhury  
President  
Internet Society India –Delhi Chapter  
+91 9899682701

## **COMMENTS TO THE DRAFT NATIONAL ECOMMERCE POLICY**

### **SUBMITTED BY: INTERNET SOCIETY INDIA DELHI CHAPTER**

Internet Society Delhi Chapter (**ISOC Delhi**) expresses its gratitude to the Department for Promotion of Industry and Internal Trade (**DPIIT**) for conducting a public consultation on the Draft National E-Commerce Policy, 2019 (**Draft Policy**) to address broad issues of the e-commerce ecosystem such as data, infrastructure development, e-commerce marketplaces, regulatory issues, stimulating the domestic digital economy and export promotion through e-commerce.

We welcome the Draft Policy as an important step towards regulation of e-commerce in the country and thank the DPIIT for providing us the opportunity to present our comments and suggestions on various aspects of the Draft Policy. Since the Draft Policy will have far-reaching impact across sectors and digital platforms, we would request the government to undertake extensive consultations with all stakeholders before coming up with a final e-commerce policy.

Please find below our comments and suggestions on some aspects of the Draft Policy.

#### **1. Individuals should be empowered to control the collection and use of their data as they wish.**

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

This proposition contradicts the Supreme Court's position in *P. K.S. Puttaswamy vs. Union of India*<sup>1</sup> (*Puttaswamy*) by trying to restrict individuals' autonomy over their personal information and their ability to take advantage of opportunities in the global digital economy.

Secondly, such a proposition can stifle the digital economy and reduce its benefits for India.

We would submit that the **Draft Policy should remove such contradictory statements.**

#### **2. Anonymization is a privacy-protective measure that should be encouraged.**

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

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<sup>1</sup> (2017) 10 SCC 1.

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

Bearing this in mind, the Personal Data Protection Bill, 2018 (PDP Bill) takes anonymous data out of the purview of data protection obligations. This is the norm in data protection laws across jurisdictions. The EU General Data Protection Regulation also exempts anonymized data.

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

### 3. Data is not a national asset held in public trust

The Draft Policy states that “Data about a group of individuals and derivatives from it is thus the collective property of the group. Thus, the data that is generated in India belongs to Indians as do the derivatives there from.” The Draft Policy also refers to data as a “national asset”. This language, written in context of anonymized data, seems to suggest that for a certain aggregation of individuals, their data belongs to the community. This position seems contrary to the law, and also reflects internal inconsistency in the draft of the Draft Policy.

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.

Personal data cannot be termed as a community resource or national asset since decisions regarding use of the data cannot be taken by the state, but only by individuals who generate data them and this is the position supported by Indian law. **The Draft Policy should adhere and acknowledge that personal data cannot be termed as national asset or community resource.**

### 4. India does not have sovereign right to Indian data

The Draft Policy states that “India and its citizens have a sovereign right to their data. This right cannot be extended to non-Indians”. This assertion

confuses the nature of rights held by States (that is, sovereign rights) and those held by citizens (that is, private rights).

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

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

#### **5. Forced disclosure of source code will hamper Indian economy**

The Draft Policy suggests 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.

Forced disclosure of source code, overregulation of AI could also run contrary to India’s WTO commitments. Also, some of these provisions could lead to violation of intellectual property rights of businesses and expropriation claims under investment law. Overall, it would reduce India’s attractiveness as a business destination. **The Draft Policy should remove provisions of forced disclosure of source codes and over regulation of AI.**

#### **6. Cross Border Data Flow is essential for a digital economy**

The Draft Policy imposes restrictions on cross border data flows. It states that: “...by not imposing restrictions on cross-border data flow, India would itself be shutting the doors for creation of high-value digital products in the country.”

Cross-border flow of data is a reality as well as necessity in the connected global ICT ecosystem and supply chain, and placing undue restrictions in this regard could severely impact the ease of doing business in India.

It is therefore **submitted that by seeking to restrict cross-border flow of data, the Draft Policy is restricting India’s ability to participate in the global digital economy.**

Further, by seeking to restrict cross-border flow of data, the Draft Policy is harming the growth prospects of the Indian digital economy by limiting India's access to global technology, collaborations, and economies of scale. India has been the biggest beneficiary of cross border data flows, as seen in the emergence of a world-class IT outsourcing business with annual exports exceeding USD 135 billion. The MEITY estimates that IT-ITES exports out of India has grown exponentially due to disruptive technologies such as analytics, cloud services, artificial intelligence, embedded systems, etc., all of which rely on the international flow of information in order to grow. Localisation, on the other hand, limits access to technology on which service economies like India depend. Barriers to data flows often increase the costs associated with developing new services, and may also prevent companies from transferring data for daily activities, resulting in them having to pay for duplicate services.

Also, there is **no evidence based approach justifying the position that restrictions on cross border data flows enhance protection of data**. In fact, data localization may actually impair a service provider's ability to transfer their data assets into the repositories where they can be best protected. Moreover, having the data in multiple locations unlikely to be disrupted by a singular incident is a good practice from the perspective of data security, disaster recovery and business continuity.

## 7. IPR and Piracy should be addressed by existing regulations

The Draft Policy seeks to regulate intellectual property rights and piracy issues on e-commerce platforms and appears to envisage proactive monitoring and removal of content when such content is pirated or IP-infringing.

Firstly this is in **conflict with the existing Intermediary Liability regime**. While most e-commerce platforms do take on additional roles in order to safeguard consumer interest, nevertheless an intermediary cannot legally be held liable for any third party information made available or hosted by it, as long as certain 'safe harbour' conditions are fulfilled – which includes removing or disabling content when having notice of the same through appropriate legal channels. The position of law in India as spelled out through various court decisions. In *Shreya Singhal vs. Union of India*<sup>2</sup> the law upheld that an intermediary cannot be required to proactively monitor its platform for unlawful content, and its responsibility is limited to actioning content when notified by court orders or authorized government agencies.

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<sup>2</sup>(2013) 12 SCC 73.

Further **eCommerce Platform is Ill-Equipped to Assess IP Issues**. In the case of Kent RO Systems Ltd. & Anr. Vs. Amit Kotak & Ors, <sup>3</sup>the Delhi High Court had held that the issue of whether an intellectual property right has been infringed by a user on an intermediary platform is not to be determined by the platforms themselves, as per the IT Act. This case also arose in the context of an e-commerce platform being requested to remove IP-infringing content. The court was clear on the fact that such a platform is simply not equipped to determine what essentially a question of law is. This indicates that the Draft Policy should refrain from imposing such requirements on intermediaries against the law.

#### **8. Incorporation as a Trade Barrier is restrictive for business**

The Draft Policy requires all e-commerce platform service providers to incorporate in India as a precondition to providing services in India. This is not only **enormously trade restrictive, it would also deprive consumers of the flexibility** that has been offered to them through the development of various innovative e-commerce platforms that provide technology services on a cross border basis while connecting consumers and goods/service providers locally. DPIIT should refrain from suggesting such restrictive changes in the e-commerce space.

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

#### **9. No Network Effect in the Digital Market**

The Draft Policy states that there should be regulation to address the "network effect" created by the big players in the market. It concludes that "*data effect and the network effect are the reasons why selling at a loss has emerged as 'sustainable' for enterprises.*" Such a blanket determination should not be made without any evidence as has been done in the Draft Policy.

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

**The Draft Policy should not seek to regulate online markets on the basis of network effects, which simply do not operate in the same way in the digital economy.**

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<sup>3</sup>CS (COMM) 1655/2016.

**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.**

**Conclusion:**

To conclude, ISOC Delhi would recommended that the Draft Policy be amended and align itself with existing principles of law, in matters related to the nature and ownership of data, marketcompetition, consumer protection, cross-border data transfer, privacy, and e-commerce generally.

The Draft Policy should promote creating an environment and facilitate growth 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.

The Draft Policy should respect the autonomy of individuals and business over their data 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.