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To,
Goonjan Kumar,
Assistant Director,
Department for Promotion of Industry and Internal Trade,
Government of India

Subject: Comments in response to the Draft National E-Commerce Policy

Dear Sir,

Medianama (www.medianama.com) is a premier publication for reporting and analysis on the technology sector in India, active for the past twelve years. We believe in the ideal of an open Internet and a fair and competitive market. We have consistently engaged in and encouraged national conversations about the development of technology policy in India.

We believe that the ideal of a fair, competitive market online can be achieved by implementing what the founder of the World Wide Web, Tim Berners-Lee says: "All of the Internet, for all of the people, all of the time". In light of our position, the following are our issue-wise submissions with respect to the key subjects we have identified arising in various provisions across the draft Policy.

Data Localisation

We request the DPIIT to withdraw the requirements under the Policy for data localisation. We request the DPIIT to reframe the provisions to allow the free flow of information across borders.

The mandate of the Policy for localising data is fundamentally opposed to a free and open Internet, the basis of India's successes in the e-commerce market. Locking data within Indian borders will lead to non-Indian providers of goods and services facing barriers to operate within India and will be forced to close operations in the country.

Further, this requirement hinders the operations of Indian companies who avail of the services of cloud service providers outside India. As pointed out in the MediaNama discussion on e-commerce, companies use cloud services based on the location of the primary customer base. If an Indian company wants to target consumers in a different country, they will be required to make use of data centers outside India and closer to the customers being targeted. This will require frequent, fast, and uninterrupted transfer of large quantities of data in and out of India, which will be prohibited as per the mandate of the draft Policy.

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The requirement of localisation will stifle creative businesses within India that are looking to provide services across and globe and expand the user base. Contrary to the stated objective of the Policy, where it is said that the aim is to develop business opportunities in India and provide a fillip to Indian companies, this measure will disadvantage Indian companies in providing services to both within India as well as across the globe. It will also cut off the Indian market from access to state of the art online services.

Localisation will also drive up expenses borne by Indian companies in storing their data on servers located within the country. Cheap data centers outside India, in locations such as USA and Singapore, are currently the preferred choice of storage for many Indian companies. This will be disrupted by the Policy and companies will have to look for options within India, where there will be intensive investment into the technology, land, and resources necessary to set up and maintain data centers.

Many companies also haven't architected their platforms to segregate users by geography, and the reworking of their systems for the demands of a single country is also a disproportionate ask.

Furthermore, this division of users and services available to them based on location, goes against the fundamental principle of an open Internet – one that is available to everyone across the globe, at all times. Valuable services such as online encyclopedias, academic journals, and community discussions are kept alive on the basis of this facility, and cannot be traded in return for a marginal increase in control over user data.

Data Sharing as a counter to the Network Effect

We request the DPIIT to remove from the draft Policy all coercive measures of data sharing mandated on select companies. The government should instead look at ways of empowering consumers to switch service providers for online applications and services. Data Portability is one such measure.

The Policy takes up data sharing as a measure to counter the challenge posed to Indian companies by the network effect of international companies with access to large datasets. While we agree that access to data is a crucial factor in the market power of companies in the current context of the market, the measures of compulsory data sharing imposed on companies by law cannot be a regulatory response to this situation. The measure is neither in favour of consumers nor the companies.

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Companies maintaining datasets cannot provide access to this data to other entities for a number of reasons. Firstly, the terms on which companies collect this data ensures that they are not at liberty to share with third parties, with certain exceptions specified within the terms of usage of the company's service. Secondly, companies in possession of metadata and analytics derived from user data and usage of the applications have a vested IP right in these datasets. Companies would put themselves at an explicit competitive disadvantage if these derived datasets are shared.

While gaming of the market and anti-competitive practices must be prevented, forcing companies to share datasets would deprive them of legitimate means to improve service and remain competitive in the market. Competitiveness is an important part of ensuring the overall welfare of the market, including Indian startups as well as consumers, and cannot be compromised in an effort to provide a platform for innovation.

An Alternative Approach: Data Portability

An alternate approach of empowering consumers needs to be developed. The Medianama discussion included a suggestion from a panelist on **Data Portability**. Data Portability is the concept where a user is able to remove their data from a particular service and transfer it to a different, competing service.

If data portability is operationalised, consumers will no longer be restricted to a single service. Services may then compete with each other on the features and functions made available to users and ease of access and usage. These would be efficient metrics for market players to compete.

This will benefit Indian entities because the nature of data network effect means that customers currently using the services of a particular company will stick to the same service. This is the data network effect discussed in the draft Policy.

With Data Portability in place, customers will be able to shift to a different service much easier than in the current scenario where one must go through the entire process of onboarding on a service once again. Standardisation of user details used by online services can help enable users to switch services easily, and this would include switching to more efficient services provided by Indian startups.

This measure will increase the competitiveness of the market as a result of increased migration of customers across services.

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Community Data

We request that the DPIIT clearly define the term ‘community data’ and details of various issues relevant to it, such as the mode and extent of data aggregation. We request that the DPIIT ensure that users’ rights over their data are not encroached in any such reframed policy.

The Policy makes reference to community data in the context of data collected from publicly installed IoT systems. The Policy also takes a clear position that access to data can be negotiated by the government in the national interest. The policy remains unclear as to how this will be done.

At various points in the document, the policy states that data of citizens of a country is a ‘national asset’, a ‘collective resource’, and a ‘societal commons’. These terms are not explained by the policy. That data is in fact in the nature of these terms is not explained by the policy, but the document continues to make assertions that the government has a right to access and make use of the nation’s collective mass of user data in order to further the ‘national interest’. Once again, the nature and scope of the national interests for which data can be used as a ‘collective resource’ has not been defined.

The user data of Indian citizens has been compared to being a ‘natural resource’. The policy then raises the question of how best to exploit this resource, without adequate reasoning behind this ideological approach. Several objections can be raised with the approach of the policy.

User data does not exist as a single collective unit. Users provide different sets of personal data to various entities scattered across the digital ecosystem. These various companies exercise control over the datasets collected by them, leaving them with various kinds of data regarding different groups of users. The companies are under a fiduciary duty to protect these datasets. Further, any derivative data remains the IP of the company creating such datasets. In order to use the data from this system, the policy will need to establish a rational basis for doing so.

Given these challenges, questions remain as to what data will come under the bracket of ‘community data’. What datasets will be accessed by the government, or shared in order to “negotiate, in the national interest”? These are crucial policy decisions that any policy deliberating on community data will need to tackle.

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A policy seeking to create a framework for community data will need to exhibit a more robust understanding of the concept. It will need to deal with the intricacies of how user data collected by private companies is meant to be leveraged for the collective benefit of the community.

Takedown of Content and IPR Regime

We request that the function of determination of infringement of IP rights not be delegated to online platforms. We request that all provisions requiring intermediaries to independently determine rights and liabilities be redrafted to accord the function to a judicial or quasi-judicial authority.

The policy chooses to place the burden of regulating online content largely on the intermediary – in this case, the e-commerce entity in question. The regulatory burden on online platforms (of all sizes) in the policy is disproportionately large compared to the rest of the e-commerce value chain.

Requirements imposed by the policy includes notice to TM owners in case of counterfeit goods within twelve hours, followed by an independent verification process and removal of the listing. This creates a situation where platforms, under stress of resources and time to allocate to this function, will take a risk-averse strategy of removing content and listings from their applications in order to minimise liability. This in turn creates a chilling effect on the participation of users on these platforms.

The anti-piracy measures also take a similar approach, where a mere notice alleging that one's copyright has been violated is sufficient to require the platform to remove the content in question. While we appreciate that dissemination of pirated material online, and large scale infringement of copyright is an important issue, the procedure described by the policy leaves itself open to abuse and prone to erroneous determinations, without any corrective oversight mechanism.

An open Internet requires the free exchange of ideas, views and opinions, including through various forms of media that continue to evolve with the nature of services being developed. Over regulation of intermediaries will erode this important feature of the world wide web. The dangers posed by the proposed model of restrictions on platforms to police online content can lead to the creation of a system of privatised censorship, where the sharing of art, opinions and media on public platforms can be obstructed.

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On Regulation of FDI in Online Marketplaces

We believe, as stated in [our earlier submission to the DPIIT](#) (then DIPP), that 100% FDI should be allowed in e-commerce through the automatic route. The policy discusses FDI in marketplaces in the context of restricting the control exercised by online marketplaces over the listing and pricing of their inventory.

The objective of preventing marketplaces from influencing the listings and pricing on their services is an important one. The policy however tries to tackle this issue together with differential limits of FDI rules. The Policy fails to take a clear position on the issue, but the objective is one of preventing marketplaces with FDI from encroaching into an inventory based model and competing with Indian providers of similar goods and services.

An alternate method for helping Indian manufacturing could be to prescribe a minimum level requirement of procurement of goods that are either produced in India or have value addition within India. This can be made applicable to businesses procuring a gross sum of goods above a certain annual value (say, companies procuring goods worth over INR 500 crore in a year).

Greater competition in providing services to Indian consumers should be encouraged in order to increase the quality and innovation produced by Indian companies. Foreign investment will help in increasing this competitiveness, and serve to break local cartels and encourage companies to focus on convenience and affordability for customers.

Disclosure of Source Code

We request that the DPIIT withdraw the requirement for disclosure of complete source code. Disclosures to users on data collection and usage to be enforced. We request that disclosure requirements be limited to these functions.

Companies in the digital space gain a competitive advantage in the market through the services and user experience they provide, and these are inherently linked to the algorithm of their application.

Disclosure of complete source code would negate the competitive advantage and allow misuse if the algorithm is accessed by other entities. Without the ability to protect their source code, companies would no longer innovate on the services they provide to consumers, large parts of which are determined through what can be done with the code underlying the application. If

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companies no longer gain advantages from modifying code, the investment in such innovation will remain limited, resulting in lower quality services being offered to Indian consumers, bringing down the competitive level of the market.

We agree with the objective of consumer protection in relation to this measure. However, there is a need to look at alternate methods to achieve this. There are RegTech approaches available which may be used to test for bias in algorithms without requiring the sharing of source code. On a more general note, these issues of regulating code and use of data are better handled by a dedicated data protection authority. The issue is too wide in impact to be included in the remit of an e-commerce policy.

The requirement to disclose to users the data collected and its usage, for example is a positive step in the direction of transparency and fairness. We however believe that disclosure of complete source code renders the market less competitive, and is detrimental to the medium and long term interests of Indian companies and consumers.

Incorporation of Local Entity in India

We request that this provision either be removed from the policy, or be made applicable only above a large threshold of users.

We recommend that the DPIIT remove this requirement from the draft as it will be a disproportionately large regulatory burden on smaller companies looking to offer services in India. Regulations like these, while useful for abuse of dominance or violation of regulations by larger entities, are not useful when applied across the board in achieving a competitive market. The requirement of a local entity goes against the basic idea of the Internet being an international, global space.

On Regulation of Advertising Rates

We request that the DPIIT withdraw mention of regulation of advertising rates from the Policy.

The objective of the Policy behind regulation of advertising rates is to counter the benefits afforded to larger Internet companies by the data network effect. As mentioned earlier, better measures to counter against these entities would be ways of empowering the consumer with control over their data and allowing businesses to compete by offering better services.

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Regulation of advertising rates will not change the competitive advantage companies derive from a concentration of user data.

We thank the DPIIT for the opportunity to provide our comments on this important document and look forward to further engagement.