ANNEXURE

USISPF RESPONSE TO THE DRAFT NATIONAL e-COMMERCE POLICY, 2019

Members of the U.S.-India Strategic Partnership Forum welcome the opportunity to participate in a collaborative process to inform the Government of India's e-Commerce policy. It is our hope that the Department for Promotion of Industry and Internal Trade's (DPIIT) February 23rd draft is the beginning of a thorough public review process that will culminate in a forward-looking policy that positions India as a world leader in the digital economy.

We offer the following guiding principles as the cornerstone of an effective national policy that will attract investment, provide an environment that supports innovation and competition, and offers customers unheralded levels of choice, convenience and service:

- The e-Commerce policy should promote India's leadership role in the global digital economy, attracting investment and jobs that make India the premier destination from which to run regional/global operations, launch new services and develop new technology.
- A goal of the e-Commerce policy should be to create interoperability with global frameworks, particularly in the foundational areas of data protection and cross border data flows.
- The e-Commerce policy should recognize existing domestic regulatory laws and governmental jurisdictions to ensure coherence between the offline and online worlds and to avoid overlap and jurisdictional confusion. Any policies or rules created specifically for an e-Commerce environment should be minimal and narrowly tailored to address an articulated and evidence-based market failure or consumer harm.
- The e-Commerce policy should align with the principle of national treatment and not have differentiated regulatory regimes for foreign-invested and domestic companies, including regulations for e-Commerce marketplaces.
- The final version of the e-Commerce Policy should narrowly define the scope of "e-Commerce" and should ensure that the definition is in alignment with existing streams of regulation. Presently, the policy is broad in scope and impacts any service provider or entity that deals with data – and specifically mentions examples such as cloud services and email – when these services are clearly outside the remit of an e-Commerce policy.
- The e-Commerce policy should support the open, interoperable, secure and reliable global Internet and avoid placing artificial restraints on websites, applications, and platforms.

The sections below highlight our substantive submission on key proposals outlined in the draft policy. We would be more than willing to take you through these in detail. We are grateful to the DPIIT for the opportunity to share our views on the draft policy, and are optimistic that our inputs shall be given due consideration.

I. Data

1. Data Ownership – Individuals should be empowered to control the collection and use of their data

Respecting individual autonomy means that individuals should be able to control and share their personal information as they wish. The Supreme Court has recognized that data protection is related to the protection of an individual's autonomy. The judgement in ***K.S. Puttaswamy*** vs. ***Union of India***[1] (***Puttaswamy***) established

[1] (2017) 10 SCC 1.

privacy as a fundamental right. One section of the majority judgement deals specifically with informational privacy and consent. In this section, the Hon'ble Supreme Court stated:

> "*177..*
>
> *Apart from safeguarding privacy,* ***data protection regimes seek to protect*** *the* ***autonomy of the individual****. This is evident from the emphasis in the European data protection regime on the* ***centrality of consent****. Related to the issue of consent is the* ***requirement of transparency which requires a disclosure by the data recipient of information pertaining to data transfer and use****."*

The Supreme Court necessitates disclosures regarding terms of data transfer and use by the data recipient as the pre-condition to data transfer. The intention of the Hon'ble Supreme Court is to provide safeguards for the process of data exchange between individuals and online services, not the prohibition of such interactions. The Draft Policy, however, undermines individul consent with regard to sharing of their own data with companies, including companies outside of India. This proposition directly contradicts the Supreme Court's position in *Puttaswamy* and undermines individuals' autonomy and agency.

In continuation of the line of reasoning in Puttaswamy, the Justice Srikrishna Committee Report, that led to the drafting of the Data Protection Bill, 2018, has introduced the concept of Data Fiduciaries. The Report stated that individuals share their data with other entities in a trust-based relationship that is essential "*to fulfil the expectations of the data principal in a manner that furthers the common public good of a free and fair digital economy*". Thus, the Srikrishna Committee viewed corporations who receive and use data of individuals as trusted entities who further the public good of a digital economy.

The Draft Policy also runs contrary to the existing position of law under the Information Technology Act, 2000 ("IT Act") and the framework which the Government is seeking to implement through the PDP Bill, which specifically allows for the transfer of an individual's personal data outside India subject to meeting certain conditions, including obtaining the consent of the data principal for such cross-border data transfer.

Under globally recognized privacy frameworks, such as the European Union's General Data Protection Regulations (GDPR) and the APEC privacy principles, consent is the primary criterion used for processing sensitive personal data. In order to support the growth of India's digtal economy and its role in the global digital economy, DPIIT should seek to ensure interoperability with similar global frameworks.

2. <u>Anonymization is a privacy-protective measure that should be encouraged</u>

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.*"

The key reason why data pertaining to individuals is sought to be protected when in the hands of third parties, is that such data if disclosed without consent or authorization can violate the privacy of the individual, or lead to decisions being made about the individual that are discriminatory or detrimental.

Once data is anonymized, such risks diminish. Anonymized and/ or aggregated data allows companies and governments to gather valuable insights. For example, it enables tracking suspicious activities and assessing social or public health trends for public research purposes. Often, various kinds of data – as an example, health data - is used in anonymized form for training machine learning algorithms, which in turn leads to exceptional advances in medical sciences benefitting a larger community of individuals than those who contributed such data.

Bearing this in mind, the draft 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's

GDPR also exempts anonymized data, as does the California Consumer Privacy Act. Even the U.S. Health Insurance Portability and Accountability Act, 1996, which is a federal law that *inter alia* covers treatment of medical data in the United States, allows data that has been de-identified as per a certain standard, to be disclosed without limitation.

3. The Draft Policy does not differetiate between different types of data

The Draft Policy does not define "data". Since it speaks of data exclusively in the context of data generated by Indian users in the digital economy, the Draft Policy creates a distinction between data collected and processed digitally, and data that exists offline. If the real public policy objective is to safeguard personal data, then data held in the offline, phycial world should be treated the same as data held online.

Moreover, the idea that data has inherent value on its own is flawed. Companies, researchers and academics look to collect data that can be used to generate useful insights to further develop the products and services that they offer. This "useful data" is a subset of data that is generated from users. Economic value is ascribed to data only once it is made accessible for the purpose of analysis.

4. Data should not be treated as 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 is not only incorrect in the law, but also reflects internal inconsistency in the Draft Policy.

"*Collective property of the group*", known in the law as *res communis*, or community property, is a natural resource that a community inherits or has used traditionally, or which comes into the possession of a community.[2] This is not the nature of data. The Supreme Court in *Puttaswamy* has characterised data as information created by an individual through their own actions. To that extent, data is not in the nature of property at all. Unlike natural resources, data is not exhaustible, limited or exclusively available and hence the economic principle underlying their regulations are distinctly different. Given the Indian jurisprudence and evolving data governance framework, the government should refrain from applying the principle of equitable access to data like natural resources.

Further, in previous portions of the same section of the Draft Policy, an argument has been made to rest ownership of data with the individual. If the argument of individual ownership were to be accepted as reasonable, which it is not, the position on data thereafter becoming a national asset loses its validity since a resource can belong either to an individual or to a community, and not to both.

Even if it were accepted for the sake of argument that data does in fact qualify as a community resource, there is no restriction on a corporation gaining access to such resource, so long as due process has been established and followed.

Acquisition of a national asset takes place through contracts with the government, rather than with the community. If data is to be classified as a national asset, obtaining the consent of the individual to access their data will no longer be necessary. The Draft Policy is, to that extent, advocating non-consensual transfer of data,

[2] As discussed by the Supreme Court in *Orissa Mining Corporation Ltd. Vs Ministry of Environment & Forest and Others*, (2013) 6 SCC 476.

which is inconsistent with the judicial classification of data as an aspect of informational privacy, which is a fundamental right.

Further, the Draft Policy states that "*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. The same way that non-Indians do not have access to the national resources on the same footing as Indians, non-Indians do not have equal rights to access Indian data. However, access to it can be negotiated, in national Interest*." This language seems to suggest that the data of the community is held by the government in trust. This position reflects a lack of understanding of the public trust doctrine itself.

The Draft Policy thus erroneously applies the doctrine of public trust to data. The Supreme Court in its judgement in M.C. Mehta v. Kamal Nath[3] stated that "the State is the trustee of all natural resources which are by nature meant for public use and enjoyment. The public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership." Therefore, in order for the state to hold a resource in trust on behalf of citizens, it has to be a natural resource, whose primary purpose must be to be used and enjoyed by the public. Data is not a resource as contemplated under the Draft Policy.

In *Puttaswamy*, the Supreme Court made it clear that the State may interfere in the informational privacy of an individual only when there is a procedure duly established by law, there is a legitimate State interest in collecting an individual's data, and the measures adopted by the legislature are proportionate to the objects sought to be fulfilled by law. Thus, it is only in exceptional circumstances that the State may exercise any manner of controlling rights over the data of individuals, and not as a matter of routine. Natural resources, on the other hand, are continuously held by the government in trust.[4] Thus, the State's legal and legitimate access to data is very different from the State's control over natural resources.

Further, the public trust doctrine envisages the State holding natural resources in trust for the free and fair enjoyment of the public at large. Personal data, being private and specific to individuals, cannot be used by the public at large. Each party who seeks to use an individual's data, must obtain a consensual transfer of the data from the individual to themselves. This is also the manner in which corporations gain access to data. Should the position of the Draft Policy be accepted, and data become subject to the public doctrine trust, the consent of individuals will no longer be necessary for data transfers.

Moreover, under the public trust doctrine, there can be no private ownership of data. This invalidates the previous position of the Draft Policy regarding individual ownership of data, and exposes further internal inconsistencies in the document.

Lastly, the Draft Policy cites certain instances from around the world that illustrate the idea of "community control" - namely, the Maori Data Sovereignty Network in New Zealand, the European Commission's The Decentralized Citizen-owned Data Ecosystems ("DECODE") project, and the OCAP standards for data sovereignty for indigenous people in Canada which are trademarked and used by the First Nations Information Governance Centre ("FNIGC"). However, these instances are unique in themselves and are restricted to extremely small communities and geographical locations, unlike the Draft Policy's proposed framework which would govern the data of all citizens across India. These instances are also entirely voluntary projects which do not compel persons to share their data with the community. In fact, DECODE states that its main aim is to respond "to people's concerns about a loss of control over their personal information on the internet" and provides them with tools

[3] M.C.Mehta v. Kamal Nath, (1997)1 SCC 388
[4] As held by the Supreme Court in *M.C. Mehta* v. *Kamal Nath*, 1997 (1) SCC 388.

to control whether they keep their personal information private or share it for public good. In contrast, the Draft Policy attempts to implement the community control principles which mandate sharing of individual data and state control of data. The Draft Policy has not considered that the models cited by it are not scalable at a national level, especially in relation to a large and diverse country like India.

5. **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).

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.

The Draft Policy reflects 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.

6. **Proprietary rights of companies should be recognised**

The e-Commerce Policy appears to consider it a "basic premise" that "companies do not own the data, which they have processed and monetized." This flows from the assumption that rights over data rests with the government – rather than with individuals who can legally permit companies to use and monetize data.

It is worth noting that in several parts of the e-Commerce Policy, there are references to disclosure of source code and algorithms for AI, data sharing with start ups and firms, and mandatory technology transfer provisions. All of these provisions, read with the acknowledgement that companies cannot exercise rights over datasets they have created, would create a regulatory regime where proprietary rights of companies are not respected. Constitutional rights to hold property and carry on business are enshrined under Articles 31 and 19 of the Indian Constitution respectively.

Corporations often use derivatives of data to provide services to customers, including improving user interfaces and the quality of service. These datasets are proprietary and forms a part of the intellectual property of the entity. Requiring the entities to share data with domestic entities for research and development purposes, disclose proprietary technology, share source code etc. would be violative of the entity's intellectual property, as well as give rise to potential expropriation claims.

Further, data has no value when it is at rest – it is only commercially useful when it is innovatively processed and monetized – and this should be incentivized by ensuring adequate protection to property rights.

7. **Cross Border Data Flows (sec 1.1, 1.2, 1.3, 1.4)**

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.*" This language suggests that the Draft Policy underestimates India's ability to compete in the global digital economy and wishes to close the borders of the Indian digital economy, which today accounts for 15-16% of India's GDP.[5] Such an approach would also serve to fundamentally undermine one of the apparent goals of

[5] Singh, Shelley. "India's way to $1 trillion digital economy". *The Economic Times*. 01 April, 2018. Available at https://economictimes.indiatimes.com/news/economy/indicators/indias-way-to-1-trillion-digital-economy/articleshow/63561270.cms?from=mdr (last seen on 01 March 2019).

the Draft Policy, which is to encourage the development of innovative indigenous Indian companies. Cross-border flow of data is a reality as well as necessity in the connected global digital ecosystem and supply chain, and placing undue restrictions could severely impact the ease of doing business in India and impede India's opportunity to achieve a global leadership position.

The strategies outlined are particularly concerning. The policy assumes that there are many benefits derived from placing restrictions on cross border flow of data for the Indian economy. In some instances, it contradicts the draft PDP Bill, creating conflicting and unnecessary regulatory confusion. We offer the following points for re-consideration of this section: When a company applies its intellectual property through processing an individual's data, creating unique datasets, copyright law protects rights in that dataset.

- There seems to be an assumption that restricting cross border flow of data would help in the growth of the digital economy in India. This is an extrmeley flawed viewpoint, as mere restrictions on cross border data flow coupled with localization would not help in the growth of the digital economy – it is a light touch regulatory framework which encourages and eases data sharing that would help in the creation of a vibrant digital economy.
- The R&D derived from Indian users is used to create actual value for Indian users and the economy in the form of new goods and services and may also result in improved quality of service of existing products. In this regard, India should make the best use of its inherent advantage as a data rich country which attracts R&D efforts by several leading multinationals in India.
- India was the leading outsourcing destination across the world, accounting for approximately 55% market share of the US $185-190 billion global services outsourcing business in 2017-18 . As India's exports alone will show, domestic enterprises rely heavily on the free transfer of data across borders.
- The Draft Policy states that: "*Conditions are required to be adhered to by business entities which have access to sensitive data of Indian users stored abroad. Sharing of such data with third party entities, even with customer consent, is barred under the Policy*." This stance of the Draft Policy impedes user autonomy by undermining the consent of individuals with regard to cross border data flows (refer to discussions in Section I). It should be kept in view that the Supreme Court in *Puttaswamy* recognised that "*an individual may have control over the dissemination of material that is personal to him*."
- It is not entirely clear what the scope of localisation envisaged by the Draft Policy would be – in terms of the kind of data that is sought to be localised, the sectoral applicability if any, the potential overlaps with the regulatory regime in the PDP Bill. Restrictions on data flow sought to be imposed by the Draft Policy not only reduce the scope of data transfer under the present law, but also do not align with the PDP Bill. This risks the creation of parallel frameworks for the transfer of similar types of data, and conflicting legal regimes which may lead to low enforcement and a potentially unstable business environment.
- The restrictions on data flow have been proposed with regard to "sensitive" data – without defining what kind of data qualifies as sensitive in the context of the Draft Policy. Notably, the Draft Policy does not refer to the SPDI Rules and the definition of "sensitive personal data and information" contained therein. Thus, the scope of data sought to be protected by the Draft Policy is unclear. Similarly, there is no definition of "community data" even though there are specific requirements sought be enforced in respect of such data.

8. <u>Negative impact on the Indian market and consumers</u>

Applying the proposed restrictions to the cross-border transfer of a broad category of data will significantly impact most entities that use data, which encompasses virtually every organization that operates in a country in addition to India. The cross-border restriction combined with the requirement to have a registered business entity in India as the importer on record, or as the entity through which all sales in India are transacted, will

mean that new international services cannot be made available in India, significantly limiting consumer choice for India's digital users.

Further, it will lead to customer service becoming more difficult for these business entities, since cross-border data flow is a crucial element in how these processes are being carried out in the industry. As industry will need to invest in additional resources to comply with the cross-border data transfer restrictions, it can lead to a drop in the quality of service provided, increase prices and limit the pool of services available to customers in India.

9. <u>Impact on domestic enterprises</u>

In India, a large number of local enterprises including MSMEs and start-ups use services that necessarily involve cross-border data flow. Large and small companies alike make use of cross-border data flow to deliver their services at cost-effective rates to customers in India. There are certain services, such as cloud computing, that can only be provided by entities that operate on large economies of scale at a global level, with data centers distributed across many countries. It is only because these entities are able to operate on such a scale that the price points for provision of these services are competitive and affordable. Therefore, it is necessary for these providers to continue to be able to function as they currently do to ensure that local businesses are not left having to procure the same services at increased rates, acting as an entry barrier for new enterprises.

Indian MSMEs should not be precluded from using high-quality globally available resources that MSMEs in other countries use, as they will lose their competitive edge in the global market.

II. Infrastructure Development

The Draft Policy envisages a movement towards data localisation. It states that: "*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*."

It is not entirely clear what the scope of localisation envisaged by the Draft Policy would be – in terms of the kind of data that is sought to be localised, the sectoral applicability if any, or the potential overlaps with the regulatory regime in the draft PDP Bill. Nor is there any quantifiable evidence making the case that a data localization policy is justified. Restrictions on data flow sought to be imposed by the Draft Policy not only reduce the scope of data transfer under the present law, but also do not align with the proposed PDP Bill. This risks the creation of parallel frameworks for the transfer of similar data, and conflicting legal regimes which may lead to low enforcement and a potentially unstable business environment.

1. Infrastructure Status (Para 2.3)

The e-Commerce Policy states that data centres, server farms etc, will be granted infrastructure status in the Harmonized Master List of Infrastructure. While this is a welcome move in order to develop capacity in India, any benefits arising out of this should be applicable in a non-discriminatory manner (to both domestic and multinational service providers).

III. e-Commerce Marketplaces

The Draft Policy conflates the role, purpose and function of online services, interchangeably mixing e-Commerce platforms, websites and applications. Generally applicable policies, such as consumer protection requirements, should be applied on a non-discriminatory basis agnostic as to country of origin, and equally applicable across customer-facing services. This Draft Policy, meant to create a uniform policy approach for e-Commerce in the nation, continues to recommend extra restrictions on foreign invested marketplaces that do not apply to

domestic e-Commerce marketplaces. In addition, , the Draft Policy's one-size-fits all approach with regard to regulating technologies may not be applicable to all services with varying customer types, product offers and business models. For example, vendor transparency requirements may not be appropriate for a business-to-business e-Commerce platform. Careful consideration for the applicability of the proposed provisions will need to be evaluated depending on the service, which the Draft Policy currently does not do.

1. Importer on Record Provison and MRPs (sec. 3.4, 3.5)

The Draft Policy requires all e-Commerce platform service providers, including websites and applications, to have a registered business entity in India as a precondition to providing services in India. This is not only trade restrictive, it also deprives consumers of the flexibility and choice offered by innovative e-Commerce platforms that provide technology services on a cross border basis while connecting consumers and goods/service providers locally.

As per clause 3.4 of the Draft Policy, "all e-Commerce sites/apps available for download in India to have a registered business entity in India as the importer on record or as the entity through which all sales in India are transacted." The stated purpose behind this requirement is to ensure compliance with extant laws and regulations. It is submitted that any good Policy should be practically workable in order to be effective: however, such a requirement, as is being proposed, would not only fail to serve any practicable purpose as far as law enforcement is concerned, but would also be unfeasible from a practical point of view.

Conflating "e-Commerce" sites/apps which make available physical products listed by third party sellers with sites/apps/ app stores which make available digital products/services overlooks the distinction between these two species of services and will irreparably harm India growing an innovation culture. India has become one of the world's fastest-growing markets for mobile apps, which are available for download from various platforms including app stores. The growth of the mobile app ecosystem has contributed a rapidly growing mobile development ecosystem in India which serves the world. These sites/apps are developed and owned by entities/ individuals all over the globe. It would be virtually impossible to ensure and impracticable to expect that each such entity/individual, many of them small start-ups, to register a business entity in India or for the Government to effectively police compliance with this proposed requirement.

For global players, including SMEs, the requirement is a disincentive to serving India users and doing business in India. The recently proposed changes to the Intermediary Guidelines include a threshold-based incorporation requirement for all intermediaries, which would include e-Commerce platforms, a proposal under consideration by another Ministry, and for which we, and other stakeholders, oppose.

We also find this proposal unnecessary because when a product is sold to an Indian consumer using legitimate import routes, all procedures and documentation of import have already been complied withand appropriate import duty has been paid. The need for an additional requirement of having a local importer on record is duplicative and unnecessary given the current process. Further, 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. 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.

It is not common practice to always document the MRP (or "list price") on an invoice. In some transactions, the negotiated price between a company and its distributor is documented in their master purchase agreements.

2. **Authentic Ratings and Reviews (sec. 3.21, 2.22)**

Issues related to fraudulent reviews by sellers and affiliates are already dealt with by platforms under competitive pressures to provide a reliable experience to users. As consumer engagement has risen and been impacted by fake reviews, etc., various platforms have addressed this challenge through innovations and development of best practices in a competitive market. This has taken place, *inter alia,* through attractive refund policies, special guaranties to ensure genuineness of products, and increasingly secure payment mechanisms. Many platforms identify "certified buyers" in order to ensure the authenticity of reviews, some use blogs, videos and testimonials, and several platforms offer free trials. All of these voluntary mechanisms are unaccounted for in the Draft Policy. Instead, it seeks to impose highly specific requirements that may be inappropriate in light of the differences in service supply and user interface across platforms. It is also likely that specifying minute details at this level may hamper the growth of the peer-to-peer market in India which seeks to replicate the convenience of the informal economy in India through various innovations.

3. Anti-Counterfeiting Measures

Counterfeit products in the Indian market are a serious problem. A 2012-13 FICCI study estimated the losses incurred by sellers due to counterfeiting at INR 72,969 crores. The loss to the exchequer due to losses in collection of direct and indirect taxes at amounted to INR 26,190 crores.[6]

However, in some instances a one-size-fits-all requirement may not be appropriate for some of the proposals in this section. For example, section 3.9, which requires seller details, may be appropriate for consumer-facing services, but not appropriate for business services where seller details may jeopardize distribution arrangements or expose proprietary information. Forum Members support the 2016 OECD Recommendations for Consumer Protection in e-Commerce, which address business-to-consumer sales platforms only.[7]

Policy proposals related to trade mark management and verification of authenticity (3.11, 3.12, 3.13, 3.14, 3.15) may be impractical given the volume of goods sold on a marketplace with several lakh sellers. Further, India already has a National IPR Policy, a vision document, that encompasses and brings all IPRs under a single platform. The Policy views IPRs holistically and seeks to exploit synergies between 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.

The responsibility of monitoring a marketplace for counterfeits and trade mark violations should rest with the trade mark owners, as it does in offline retail, and relevant action can be taken under the Trademark Act, 1999 as well as takedown notices under the Information Technology (Intermediaries Guidelines) Rules, 2011 (***Intermediary Guidelines)***. . Marketplaces should be encouraged to provide tools to monitor on a proactive and voluntary basis and to work closely with TM owners to address the tracing and swift takedowns of unlawful listings. Tools such as a dashboard, which allow TM owners to monitor and notify listings that may be in violation, could be developed and deployed.

The Draft Policy prescribes an expansive definition of "owner of trademark" to include licensees, thus applying to cases of exclusive as well as non-exclusive licensees. Therefore, there is an indirect verification obligation that is being placed on the platform in relation to proprietary rights in such cases, which can prove to be onerous

[6] Report by FICCI on *Socio-Economic Impact of Counterfeiting, Smuggling and Tax Evasion in Seven Key Industry Sectors* - http://ficci.in/spdocument/20190/Executive-Summary-invisible-enemy-aug-8-2013.pdf

[7] https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf

and placing such obligations on platforms to review, manage or verify a licensing relationship may create issues in the case of a licensing dispute.

Besides, the term "trade-marked" product is rather superfluous since a proprietor of a "trademark" may claim proprietary rights even in an unregistered trade mark. In any event, trade mark infringement claims are private disputes and subject to several statutory defences. Allowing trademark owners to block sales by any third party will also have the effect of restraining legitimate distribution of goods by resellers, as well as distribution of second-hand goods, which is a lawful activity beneficial to Indian consumers (who might obtain legitimate goods at better prices) and Indian small businesses (which may have invested heavily in developing a business selling legitimate, second-hand goods).

It should be noted that under Indian law, an e-Commerce platform is an intermediary, and intermediaries as defined in the Information Technology Act, 2000 (***IT Act***) and Intermediary Guidelines are neutral channels for conveying information. While most e-Commerce platforms do take on additional roles in order to safeguard their customers' interests, 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, is clear on the point that intermediaries should not be made to assess the legality of content. In ***Shreya Singhal*** vs. ***Union of India***[8] various provisions of the IT Act and rules thereunder were read down to uphold the position of law 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.

Furthermore, in the case of ***Kent RO Systems Ltd. & Anr.*** vs. ***Amit Kotak & Ors***,[9] 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 is essentially a question of law. This indicates that the Draft Policy should refrain from imposing such requirements on intermediaries against the law.

4. Anti-Piracy Measures

USISPF Members at all levels of the digital ecosystem support intellectual property rights and enforcement. India stands to gain by protecting the creative economy with robust anti-piracy provisions as described under this section. Effective remedies for counterfeiting and piracy should be coupled with limited and appropriately conditioned liability safe harbors for intermediaries. We recommend further engagement to ensure these specific aspects of the draft are practical and implementable. Additionally, the proposal to create a body of industry stakeholders to identify 'rogue websites' that host predominantly infringing content and place them on an 'Infringing Websites list' is welcome. We support these measures towards site blocking jurisprudence which has emerged in India in recent years. However the implementation process needs to be adequately defined so as to ensure that it does not lead to restrictions on free speech by blocking of lawful content.

5. The Draft Policy Ignores that Platforms are Already Innovating in Consumer Protection

The Draft Policy emphasises responsibility and liability of digital economy platforms to ensure genuineness of any information posted on their websites. It also refers to platform control of fraudulent reviews by sellers and

[8] (2013) 12 SCC 73.
[9] CS (COMM) 1655/2016.

affiliates. However, these issues are already dealt with by platforms under competitive pressures to provide a reliable experience to users. As consumer engagement has risen and been impacted by fake reviews etc. various platforms and intermediaries have risen to this challenge through innovations and development of best practices in a competitive market. This has taken place, *inter alia,* through community guidelines, attractive refund policies, special guaranties to ensure genuineness of products, and increasingly secure payment mechanisms. Many platforms identify "certified buyers" in order to ensure the authenticity of reviews, some use blogs, videos and testimonials, and several platforms offer free trials. All of these are aspects that the Draft Policy fails to account for, and an assessment that there needs to be a regulatory intervention in this regard – that too at the minute level of regulating ratings and reviews – is not rooted in any evidence of consumer protection practices being presently inadequate.

6. The Draft Policy Will Negatively Impact Peer to Peer Markets

Further, the Draft Policy will negatively impact Peer to Peer Markets (***PPMs***), whose growth in the last few years has led to further innovations in ensuring consumer trust. The idea of a smoothly functioning PPM is to offer the convenience of an informal, local, exchange economy while also offering consumer protection and connectivity at a scale which is unprecedented in such informal economies. The continued success of such platforms depend crucially on their ability to retain consumer trust – leading to major innovation by various PPM platforms in this regard.

The onerous obligations imposed by the Draft Policy which have a one-size-fits-all attitude by seeking to regulate prices, ratings, reviews etc. could undermine the development of this economy.

IV. Regulatory Issues

1. The Challenge of Regulatory Harmony

(a) Duplicative Legal Frameworks

The existing regulatory framework in India presently addresses several of the concerns raised in the Draft Policy. Online sale of goods and services are regulated to a certain extent through the Consumer Protection Act, 1986, and to an even larger extent by the proposed Consumer Protection Bill, 2018 which has introduced provisions dealing with commerce generally, including e-Commerce. The Draft Policy ignores and often conflicts with these significant policies and proposals.

Further, the Draft Policy seeks to subsume several separate regulatory regimes:

- Labelling and packaging under the Legal Metrology Act, 2009
- Unsolicited commercial communications under Telecom Commercial Communications Customer Preference Regulations
- Removal of prohibited items from sale under Information Technology (Intermediaries Guidelines) Rules, 2011 (***Intermediary Guidelines***)
- Payment security and other similar issues are addressed by the RBI under various laws and regulations.

While the Draft Policy makes several recommendations that are so broad they could potentially subsume the regulatory authority of the many legal regimes described above, it does not specify how it seeks to achieve integration and ensure that online regulations align with offline regulations.

This uncertainty is exacerbated by the broad scope of the Draft Policy which has created confusion as it conflicts with definitions of e-Commerce and e-Commerce entities the Government currently uses. Because of the regulatory overlap and rapidly changing nature of the digital landscape, any proposed change in definition would need to be explored by the Government through a thorough public consultation review and examination of current law. For instance, the draft policy's definition of e-Commerce is inconsistent with the existing definition of e-Commerce in Chapter 5.2.15.2.2 of the Consolidated FDI Policy of India ("FDI Policy"). By including "marketing or distribution", the policy's scope has expanded beyond online retailing to cover the entire digital economy, including sectors such as BPOs, ISPs, content ecosystem, search engines, as well as the larger Indian IT Industry. Such an expansive scope could result in the application of India's restrictive FDI policy on e-Commerce to the entire digital sector. To avoid the legal anomalies that may be created by such a broad definition of e-Commerce, it is recommended that the term should be narrowly defined.

(b) Potential for Jurisdictional Overlap

The problem of regulatory harmony requires special examination and emphasis in the Indian context, where TRAI and CCI have been in conflict in the past on the issue of overlapping jurisdiction. Existing regulators already address e-Commerce issues. For example, in 2015 the RBI introduced the Online Payment Gateway Service Providers (***OPGSP***) schemes to ease the processing of export and import related payments – the stated objective being "*to facilitate e-Commerce*." The RBI is presently resisting the creation of a separate payment regulator as it foresees a possibility of regulatory harmony in the payments space being disrupted. Similar problems could potentially be raised in the area of e-Commerce, especially if new frameworks seek to replace old ones without any clear distinction in their scope. The RBI has adequate powers under law to address specific payment related concerns that arise on account of the proliferation of e-Commerce.

2. Competition

The Draft Policy suggests changes to the competition law regime, notwithstanding the fact that competition law issues in the country are already being reviewed by the Competition Law Review Committee constituted by the Union Finance Ministry. 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*."

The broad assumption of there being a network effect in the digital market is 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 as would the need for the government to have unjustified access to source code and algorithms, which have their own intellectual property protections. 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 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.

We oppose technology transfer as a condition of market access, which includes any requirement to disclose algorithms and source code.

(a) No Network Effect in the Digital Market

The network effect as it operates outside of the digital world, is fundamentally different from the operation of networked services online. The Cato Institute, while calling the concept of network effects in the online world a "bogeyman"[10] explains the traditional concept of network effect as follows:

> *"In some cases a service is more valuable if more customers are using it because customers want to interact with each other. Then, if a firm moved fast and got some customers, those customers would attract more customers, which would attract even more. Explosive growth would ensue and result in a single firm owning the market forever. The winner takes all."*

This concept, as the Cato Institute points out, does not hold water in the digital space where even within concentrated markets, there is frequent entry of new service providers which impact the operations as well as market share of incumbent platforms. Thus, a digital networked service does not monopolise the market. This has been a consistent trend across the history of the digital world.

The emergence of such a "winner takes all" markets require the convergence of several factors as pointed out by the MIT Centre for Digital Business,[11] such as:

- *High Multi-Homing Costs* – This refers to costs incurred by network users due to platform affiliation and subsequently a high cost of accessing multiple platforms. High multi-homing costs often cause stickiness in the context of a single platform. However, this is never the case with e-Commerce platforms where multi-homing costs are low or nil.

- *Positive and Strong Cross-Side / Same Side Network Effects* – In a market with negligible multi-homing costs, cross side network effects can be replicated. For instance, the same doctors can be listed on both Practo and Lybrate, and the same Andriod phones are available on both Amazon and Flipkart.

- *No Preference for Inimitable Differentiated Functionality* – In cases where there is no preference for differentiated functionality – network effects may be stronger, although in conjugation with multi homing costs. In the online marketspace, it is the small inimitable differences that set platforms apart and lead to users choosing different platforms based on convenience.

Therefore, it is clear that a "winner takes all" situation cannot emerge in the digital services space which does not suffer from network effects in the same way that conventional markets do. Low entry barriers and multi-homing result in a rapidly changing marketplace, as evidenced by innovative competitors emerging rapidly and displacing established firms.

(b) Pro-Competitive Aspects of the Digital Economy

i. Dynamic competition is easier for online platforms than for traditional networked industries and studies have shown that network effects, which might otherwise act as a barrier to entry, encourage dynamic competition within the digital space in several important ways.[12]

ii. The Draft Policy states that: "*Greater access to data provides a greater digital capital to a corporation, granting it an advantage over its competitors.*" However, multi-homing results in users generating equivalent datasets on competing platforms. Therefore, mere access to data cannot be providing competitive edge to businesses. It is the processing of that data to generate unique insights, and offer

[10] *Debunking The 'Network Effects' Bogeyman*, David S. Evans And Richard Schmalensee (2017-18), The Cato Institute, https://object.cato.org/sites/cato.org/files/serials/files/regulation/2017/12/regulation-v40n4-1.pdf
[11] *Platform Networks – Core Concepts*, Thomas Eisenmann, Geoffrey Parker, Marshall Van Alstyne (2007), MIT Center for Digital Business, http://ebusiness.mit.edu/research/papers/232_VanAlstyne_NW_as_Platform.pdf
[12] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009438

more customized services, that results in one business being potentially favoured over another. The ability to generate more customer-satisfying products should not be seen as anti-competitive.

iii. In fast moving technology markets, market shares change regularly, and disruptors have the ability to introduce revolutionary products that change the market structure, and existing players can rapidly innovate to increase size to compete with the incumbent market leader. In light of this, such markets are extremely pro-competitive, dynamic and self-correcting. Regulation of large digital platforms on the basis of market power allegedly held by them, may be characterized by problems of quick obsolescence.

3. Taxation Issues

(a) Over-regulating Indirect Taxation

The Draft Policy states that "*The current practice of not imposing custom duties on electronic transmissions must be reviewed in the light of the changing digital economy and the increased role that additive manufacturing is expected to take. A 2017 UNCTAD report suggests that it would be mostly developing countries which would suffer loss in revenue if the temporary moratorium on custom duties on electronic transmissions is made permanent.*"

Under the provisions of the Customs Act, 1962 (***Customs Act***), import of goods into India attracts the levy of customs duty at the applicable rates. Various courts have clarified that the meaning and scope of the term 'import' under the Customs laws is restricted to physical crossing of customs frontier and any electronic transfer does not qualify as imports for customs purposes. It is a settled position of law that no tax can be imposed without the authority of law.

Therefore, the recommendations provided in the Draft Policy that customs duties must be imposed on electronic transmissions would require amendments in the Customs Act as well as repudiation of the WTO moratorium. Unless such amendments are made, any electronic exchange not involving physical movement of goods along the customs frontiers cannot be taxed under the Customs Act. Additionally, given that the Customs Act specifically concerns itself with physical movement, the law would also need to provide for a framework for taxing such intangible electronic transmissions.

(b) Over-regulating Direct Taxes

The Draft Policy states *"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."*

By way of the Finance Act, 2018, India had amended the (Indian) Income-tax Act, 1961 ("**Tax Act**") to provide that a foreign enterprise would be subject to income tax in India in respect of its business profits if it has a significant economic presence in India. In other words, such foreign enterprise could be taxable in India if it participates in the Indian economy digitally (beyond the prescribed threshold) without having any physical presence in India. For such purpose, 'significant economic presence' has been defined to mean:

i. Any transaction (above the prescribed threshold) in respect of any goods, services or property carried out by the foreign enterprise in India including downloading of data or software in India; or

ii. Systematic and continuous soliciting of its business activities or engaging in interaction with prescribed number of users in India through digital means.

It is also important to note that amendments to the Tax Act, however are subject to the benefits available under the applicable double taxation avoidance agreements (***DTAA***s). 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.

Unless tax treaties are re-negotiated and amended, India should not unilaterally read in the concept of significant economic presence under its DTAAs. Accordingly, until the DTAAs are amended, the tax position under the DTAAs with respect to PE will remain unaltered by the significant economic presence test. Admittedly, the memorandum to Finance Act, 2018 has also noted such position, reproduced below.

"*The proposed amendment in the domestic law will enable India to negotiate for inclusion of the new nexus rule in the form of 'significant economic presence' in the Double Taxation Avoidance Agreements*. It may be clarified that the aforesaid conditions stated above are mutually exclusive. The threshold of "revenue" and the "users" in India will be decided after consultation with the stakeholders. *Further, it is also clarified that unless corresponding modifications to PE rules are made in the DTAAs, the cross border business profits will continue to be taxed as per the existing treaty rules*."

V. Stimulating the Domestic Digital Economy

1. Internet of Things (IoT) Devices (sec 5.1)

We encourage support for international standards to facilitate trade growth. We also note that the Department of Telecommunications and the Ministry of Electronics and IT have done work in this area for the past several years and we are concerned about regulatory coherence if another agency becomes involved in the issue.

2. Customs Clearance (sec. 5.3)

We are supportive of the specific customs trade facilitative measures identified, such as the customs electronic data interchange platform and minimizing customs procedures and documentation. We strongly believe that customs trade facilitation is a necessary focus for any successful e-Commerce policy. In addition to the proposals mentioned, India should also focus on reducing commodity restrictions for processing shipments in the express/courier mode, implementing a meaningful *de minimis* regime that raises duties and taxes to a commercially meaningful level to help SMEs acquire the necessary inputs for goods to be exported to global markets, and harmonizing data elements for imports and exports.

3. Customs Validation (sec. 5.4)

e-Commerce exports can be promoted by Customs facilitating bulk clearance shipments (i.e. clearance off a consolidated document such as a manifest with minimal details) and simplified process for returns of e-Commerce shipments would enhance customer trust and facilitate economic growth.

4. Gifting (sec. 5.5)

Banning of parcels in the "gifting" route is not an effective response to misuse. We suggest an approach that leverages the modernization of data collection to improve risk management at the border. Furthermore, there should be no cap or thresholds on legitimate trade. Customs should implement a reasonable *de minimis* for all commodities with pre-arrival clearance off a manifest based on automated risk assessment to check gift mis-declarations. A *de minimis* threshold should be aligned with the government's cost of collecting such taxes and duties to enhance focus on high risk shipments.

5. Preference to local suppliers for the procurement of cloud and email services

The Draft Policy proposes promotion, including through budgetary support, of domestic alternatives to foreign-based cloud and email facilities. It does not provide any additional details with respect to such promotion.

We recommend instead that Indian innovation can be incentivized through measures such as collaborative R&D programs in the public-private-partnership model, setting up IP facilitation centres and incubators, providing training and recruitment assistance to MSMEs and grassroots innovators etc. Thus, the Government can ensure that Indian innovation and skills in the fields of cloud computing and email services becomes competitive in a global market for these services, which will also bring in more long-term benefits to the local economy.

VI. Export Promotion Through e-Commerce

We are encouraged that the draft policy recognizes the potential e-Commerce provides India's sellers, start-ups and SMEs. As the McKinsey Global Institute reported in 2016 "digitally powered startups can be 'born global,' connecting with international customers, suppliers, capital, and mentors from day one." [13]

1. Courier Mode (sec 6.2)

We support the proposal to increase the the existing limit for exports in the courier mode above INR 25,000 to INR 5,000,000. The export volumes for e-Commerce shipments are increasing since the increase of value to INR 5,000,000. We recommend that there should be no value limit for exports of e-Commerce shipments like for export through India Post to make Indian e-Commerce exports more attractive for MSMEs and even for high-value shipments through courier mode.

2. EDI Mode (sec 6.4)

We encourage the government to fast track the implementation of EDI at courier terminals to facilitate quicker and easier dispatch of export consignments.

3. India Post (sec 6.8)

We oppose any efforts to force private carriers into mandated relationships with India Post. Any such arrangements should be voluntary and negotiated among the parties on mutually agreed terms. India Post may want to consider offering a service similar to the ePacket shipping method offered by various countries. The ePacket service allows sellers to ship their goods worldwide at effective prices and provisions for end to end tracking.

4. Implementing Digital Single Window Systems (SWS)

Digital SWS can reduce the complexity and costs of administrative requirements associated with cross-border trade that disproportionately burden small businesses by providing, "a system that receives trade-related information and disseminates it all to relevant governmental authorities, thus systematically coordinating controls throughout trade processes."[i] Furthermore, making the digital SWS interoperable between countries,

[13] https://www.mckinsey.com/~/media/mckinsey/business%20functions/mckinsey%20digital/our%20insights/digital%20globalization%20the%20new%20era%20of%20global%20flows/mgi-digital-globalization-full-report.ashx, page 46

and harmonizing processes such as risk management, data exchange and electronic payment, will further reduce the barriers for MSMEs to join the global value chains. [14]

5. Further liberalisation of payment gateways mechanism (OPGSP) to boost MSME led exports

As outlined in the draft policy with RBI enabling regulations OPGSP's have played an important role in growing exports via e-Commerce while ensuring safety of exporters remittances. While a positive beginning has been made, we suggest further relaxations as under:

- Mercantile exports should be allowed via OPGSP's and simplification of documentation requested by banks and digitisation of these type of export flows.
- Value limit of $10000 per transaction to be increased to at least $25000per transaction under OPSGP for export related remittances
- RBI may consider providing limited activity AD II licenses (specialised AD II licenses) to OPGSP to undertake forex conversion of export related remittances. Currently, under FEMA all trade related remittances are permitted predominantly only via Authorised dealers banks.

These steps will further encourage new categories of exporters and new exports flows to benefit via e-Commerce. The suggestion of limited AD Bank to non-banks for specialised activity like OPGSP will reduce the barriers and bring in competition in foreign exchange charges which today are the domain of only banks for receiving international payments.

VII. Other Recommendations

1. Governance

The formation of the Standing Group of Secretaries is a welcome move as it provides a single entity to promote and monitor the e-Commerce sector. We also recommend that a group is formed under the Secretary or the Additional Secretary to interact with the industry on an ongoing basis. This sub-group should work closely with the DPIIT in a public and transparent manner to ensure the National e-Commerce Policy is able to adequately address the changing landscape of the economy, emergence of new technologies and evolving consumer trends. The constitution of the group, apart from the inter-ministerial representatives should include industry players, academia and other relevant experts. Creation of a participatory sub group, to tackle sectoral issues has been set up in other sectors as well.[15]

Given the impact of this Draft Policy across sectors and its potentially stultifying impact on several digital platforms, we request that the government undertake extensive consultations with stakeholders. We recommend an approach similar to those undertaken for the draft PDP Bill, which includes consultations before and after formulation of each draft.

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[14] [Study on Single Window Systems' International Interoperability: Key Issues for Its Implementation," Asia-Pacific Economic Cooperation, August 2018, https://www.apec.org/Publications/2018/08/Study-on-Single-Window-Systems-International-Interoperability].

[15] Note - These include the High Level Committee Constituted on Corporate Social Responsibility, SEZ policy review and Review of National Policy on Electronics with participation from the private sector including MNCs