

Response to Draft National e-Commerce Policy

Dr. V. Sridhar

Professor

International Institute of Information Technology Bangalore (IIIT-B)

vsridhar@iiitb.ac.in

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Comments on Chapter IV - Regulatory Issues

Prelude

It shall be noted that of all the different types of e-commerce models noted in the MeitY definitions (B2B, B2C, C2C, C2B), the C2C model is the one that is of utmost importance for regulatory oversight, as this normally does not have a physical counterpart. In all the other cases, the extant regulation to some extent provide insights and basic principles, while C2C e-commerce handled by aggregators/ market places/ Intermediaries are the ones that have evolved thanks to digitization and require attention by regulators and policy makers. In other words, B2C models are inventory-led and are much similar to retail stores and the like; B2B is not concerned about retail customers and hence is not of prime concerns for regulators and policy makers; C2B e-commerce is often very limited in scope and scale. Hence the focus should be on e-commerce of goods and services in the C2C market place model.

A: Inter-disciplinary nature of e-commerce

1. Recognition of the inter-departmental nature of e-commerce and the setting up of Standing Group of Secretaries on e-commerce (SGoS) is a welcome step. This is expected to incorporate multiple viewpoints in to policy making. The extant regulation and laws including IT Act 2008 and Rules, IT Act draft Intermediary Amendment (Rules) 2018 issued by MeitY, The Competition Act 2002, Consumer Protection Act, National IPR Policy 2016, National Data Sharing Policy 2012, Personal Data Protection Bill 2018, Unsolicited Commercial Communication Regulation 2018 and OTT consultation paper 2018 published by TRAI - cover issues of consumer privacy and consent, data protection, data localization, consumer grievance redressal, IPR and copyright protection of digital goods. Hence there is no need for e-commerce policy to address all these above mentioned issues. Minor amendments to these rules that are specific to e-commerce shall be discussed, reviewed and incorporated by the SGoS. It is pertinent that DPIIT is made as a nodal government agency to address these inter-departmental and inter-disciplinary nature of e-commerce.

B: Data Lens

1. As pointed out Network Effect (including both same side and cross side network effects – please refer to Eisenmann (2006) for details) is an important characteristic of digital market platforms. This effect is more pronounced in Customer to Customer (C2C) markets than in any other form. The network effect results in monopolization of the market place. However, as pointed out in Eisenamnn (2012) platforms tend to get commoditized. Hence in order to survive, firms engage in pricing and other strategies to become monopolies over time. However, the regulators and policy makers should go beyond thinking that “monopolies are inherently bad”. Only abuse of

monopoly power should be checked and regulated as clearly pointed out in Competition Act 2002. Hence as mentioned in clause 4.7, presence of network effect that prevents the second-movers to enter the market, through TRUE is not really an economic problem that regulation should try to address unless abuse is noticed. Hence instead of including any ex-ante regulation, ex-post regulation to detect and address abuse of monopoly power as pointed out in Competition Act should be prescribed.

2. Further, e-commerce platforms provide personalized services using data gathered from their stakeholders. While personalized services benefit customers in most cases, they often do not know that they are trading their personal data and use patterns to derive such benefits. Hence as long as e-commerce firms stick to basic privacy guidelines including informed customer consent, purpose and collection limitations, fair and reasonable pricing as indicated in Draft Customer Data Protection Bill 2018, there should not be onerous regulatory burden on the firms.
3. Issue raised in 4.6, needs more elaboration. Typically platforms have “single homing” and “multi homing” sides (refer to Sridhar (2016) for details). The platforms act as monopolies for the single homing side as the other multi homing side indicates competition in the market place. Hence the monetization model of the platform results in charging (or super charging) the single homing side to subsidize the multi-homing side. This aspect is of concern to the regulator as it might be discriminatory and burdensome for the single homing side (also referred to as Water Bed Effect as propounded in Economides & Tag (2012)). Small sellers in e-commerce platforms normally single home and hence their grievance regarding exclusive contracts, labour laws in case of services, platform charges need to be addressed by the regulator. However, the regulator should normally allow market forces to address concerns on the multi homing side. As specified in clause 4.6, the regulator can put some ceiling for advertising charges (e.g. as a percentage of seller’s revenue) or requesting advertising charges to be made transparent if there are no alternatives for the users to home in to any other platforms.
4. In clause 4.7, the mergers and acquisitions of platforms increase network effect and hence value for customers as well. Vertical or horizontal integration per se is not harmful in the platform business, except if there is any abuse. The regulators should clearly indicate the penalty for misuse as an ex-ante regulatory measure. For example much like EU GDPR wherein any violation results in a penalty of 2-4% of global revenue of the firm, heavy penalties will deter abuse of monopoly power.

C: Law and Order

1. Section 4.11. is covered in IT Intermediary (Amendment) rules 2018.
2. Digital platforms can be local clusters (e.g. taxi aggregators) or global clusters (e.g. AirBnB) (refer to Zhu & Iansiti (2019) for details). It is difficult not impossible for global clustered e-commerce firms to adhere to Permanent Establishment requirements or local representatives in each country they operate. Even those that have local presence, provide communication to the users only through call centres and chats. Hence we need to invent new models to make these e-commerce firms adhere to local law and order regulations. For example, it is practically not

possible for a small hospitality and tourism platform that provides services in Kuala Lumpur, Malaysia to establish PE in India, though it might attract travelers from India to avail their services.

D: Small enterprises and start-ups

1. As discussed earlier, it is preferable that we frame rules for breaking or lessening the single homing nature as exhibited by certain platforms. For examples, exclusive contracts, IP related binding contracts should be discouraged through regulatory guidelines so that the participants in the market place have options. This will also reduce the barrier to entry of new e-commerce firms and enable competition and multi homing.

E: Taxation Issues

1. Requirements of determining PE on the basis of “significant economic presence” is an apt condition as described in 2018 budget. Equalization Levy’ on 12 digital services which include online advertisement and other related services as indicated in the Finance Act, 2016 is the first attempt to address the e-commerce tax issues. This levy (aka Google Tax) levied at 6 percent on the revenue earned by providing services in India shall be applicable to all e-commerce services (including advertising) as well. The moratorium on the Customs duty on electronic transactions needs a relook and established fairly and equitably.

F: Consumer Protection

1. Consumer protection for e-commerce services are being put in place in different sectors. For example, the Cab Aggregator rules and regulations by the Department of Transport in many States have put ceiling on surge pricing; mandated emergency calling services and digital metering along with other rules to enable safety of consumers. Food Safety and Standards Authority of India (FSSAI) has mandated that online Food aggregators and distributors to source only from FSSAI certified restaurants to maintain quality of foods. Since these are industry specific, the regulations and rules be incorporated in the extant regulation in part or full by the individual sector regulator/ government departments.
2. Clause 4.17 is already addressed in the Unsolicited Commercial Communication Regulation issued by TRAI from time to time.

G: Payment related issues

1. Online Payment related issues shall be addressed in the draft Payment and Settlement Systems Bill 2018.

H: Tracking the digital economy

1. Clause 4.20 shall be as per data protection guidelines applicable to the State in terms of informed customer consent, fair and reasonable processing, purpose and collection limitation, and proportionate.

I: Exemption from content liability

1. The draft IT Intermediary Guidelines (Amendment) rules along with consultation process on Over The Top (OTT) regulation should address the content liability issue of the intermediaries.

J: Environmentally sustainable growth

1. The rules and regulation issued by the National Green Tribunal shall be adhered to.

Other issues to be addressed in the policy

1. Sharing economy that aims to improve the efficiencies of under/un utilized services are being promoted by C2C e-commerce platforms (e.g. AirBnB, Task Rabbit, Amazon Mechanical Turk, Freelancer.com, WeWork, Faircent) across industries such as hospitality, finance, digital services transform the way in which goods and services are used. The users of these platforms, due to lack of brand and product identities, depend on “trust worthiness” and “due diligence” of the platforms to engage in commercial transactions. There should be benchmark rules across sectors (i.e. horizontal rules) on certain mandated features that enable safety, security, quality and privacy that are derived from the previously mentioned extant regulations. While innovations in sharing economy has immense benefits to the economy, regulations also needs to be agile and innovative to address consumer issues (for details refer to Ranchordás (2015))
2. E-commerce in goods and services have reduced information asymmetry, provides disintermediation, reduces search costs, increases network effects and hence associated benefits to the users of the associated platforms. These services have profound impact in emerging economies that have inefficiencies and poor associated infrastructure (Sridhar, 2016). Since these platforms evolve thanks to technology that regulation is often trying to catch up. Hence it is better for the regulators to extend some mandatory rules as ex-ante and adopt a soft touch regulatory process and encourage self and co-regulation. The enforcement of regulation with heavy penalty on mandatory issues is an approach that will deter deviations. It is important for the policy makers to make sure that regulatory arbitrage should not be extended to the e-commerce market platforms when it causes social and public harm and hence only in carefully chosen select cases.

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