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28th March, 2019

Subject: Recommendation on Draft National e-commerce Policy: India's Data for India's Development

Ref.: Public Consultation on Draft e-commerce Policy published on MeitY website

Sir,

With reference to the "Draft e-Commerce Policy: Data for India's Development" published for public consultations on 23rd February, 2019 (the Draft Policy), we would like to submit that some of the proposed provisions may need to be reassessed given the varying nature of business of e-Commerce companies. Given data has gained economic importance, it is prudent that its regulation is looked into with careful legal and practical considerations. It has been observed that data has been regulated broadly and the proposed policy should acknowledge legal ramifications that arise due to such regulations.

We have elaborated on the changes and the significance of them on high growth internet companies and in lieu of the same we propose to recommend the following:

1. **Data**

No.	Section	Issues / Challenges	Comments and/ or Recommendations	Rationale
1.	Section titled '*Data: to whom does it belong*' and Clause 1.1 and Clause 1.4	- The regulation of: community data i.e. data procured from IoT devices and platforms like e-commerce and social media; and aggregated and anonymized data; on par with personal or sensitive personal data, and the holding of the same as a	'Community data' or 'anonymized data' has no person or individual associated with it. There is a need for the Policy to distinguish between an individual's right over his/her personal data versus processed or anonymized data. If the anonymized data is not capable of identifying an individual and is	Regulation of 'community data' would result in denying the proprietary rights held by the company that derived, collated, analyzed and applied the data across markets to yield certain usable results. Analytical data derived from a data set may not use any personal information that may be relevant for identifying an individual. Further, if the purpose of the

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		national asset held by the government in trust. - Sharing of 'community data' for larger public interest with startups and firms. - Transactional data belonging to individuals which is conflicting the laws that mandate companies to store data	simply analytical, this data shouldn't belong to an individual. Additionally, transactional data also should not belong to an individual alone. Even if a customer wants to delete his/her data, the e-commerce platform must be allowed to store transactional data from a regulatory compliance standpoint. The Policy should consider making this exception.	analytical data is to provide a better user experience, then it should belong to the e-commerce platform alone. Additionally, laws in India mandate storage of transactional data by e-commerce companies. Therefore, even in scenarios where an individual may demand deletion of an account with transactional information, the e-commerce companies would still need to retain transactional data. Such data should also not belong to an individual.
2.	Clause 1.2	Data collected in India and stored abroad cannot be made available to anyone outside India, even with the consent of the data principal to whom it pertains.	• The data subject's consent should be paramount, allowing them to make informed decisions about the transfer of his/her data. • Transfer of data between group and affiliate companies should be permitted. • Transfer of data to third-party service providers and vendors should be permitted.	• The J. Srikrishna Committee Report, the Supreme Court decision on privacy, and the Draft Personal Data Protection Bill 2018 embody the necessary principles for treatment of data, including principles in relation to consent, accountability and management of personal data. • It would be operationally impossible for companies to be restricted from transferring data to its group/ affiliate companies or to entities that carry out certain processing activities on behalf of the company that collected it.

2. Infrastructure Development

No.	Section and Clause	Issues / Challenges	Comments and/ or Recommendations	Rationale
1.	Clause 2.2, 2.3 and 2.4.	• Mandating data localization for all data collected from Indian residents and developing infrastructure for the same. • Inclusion of 'data centres' in the Harmonized Master List of Infrastructure to promote the industry.	• Requesting subsidies and tax benefits for domestic companies that develop alternative cloud storage systems. • Ancillary infrastructure such as power supply, real estate and construction, and cooling systems would need to be encouraged as well.	We support suggestions in this Chapter that aim to develop domestic infrastructure to support India's growing reliance on data. However, without adequate support and incentives to local companies, including under the current GST and income tax schemes, it would be difficult for the sector to swiftly grow to meet the sunset period of 3 years. Further, important ancillary infrastructure needs to be developed concurrently on a large scale.

3. E-commerce marketplaces

No.	Section and Clause	Issues / Challenges	Comments and/ or Recommendations	Rationale
1.	(A) *Strategies - FDI*	Stressing the requirements under PN2, specifically that marketplaces should not hold or control inventory.	Requesting a clarification under PN2 that it is not applicable to '**services**'.	The FDI policy aims to regulate retail trading and not the services industry, the latter of which under the 100% automatic route.

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		Capital Dumping	A locally backed and funded e-commerce venture is also capable of creating disruption in the market and stifling competition it faces from say an MSME or start-ups. Therefore, to ensure and maintain a level playing field the Policy needs to extend itself to ensure a framework that will provide the security to MSMEs and start-ups even from locally funded e-commerce ventures.	To promote a level playing field for start-ups and MSMEs.
2.	(B) *Other strategies relating to e-commerce marketplaces*	All e-commerce and social media sites/apps available for download in India <u>must have a registered business entity in India</u> as the importer on record or as the entity through which all sales in India are transacted.	We request that "*as the importer on record or as the entity through which all sales in India are transacted*" be replaced with "*through which the e-commerce and social media platform is operated*".	Since the intent appears to be to ensure that companies- Indian or foreign- are brought under the ambit of domestic regulation (particularly taxation, company compliances, labour laws and data protection regulations), the language in the Draft Policy should clarify that it is aimed at all foreign e-commerce and social media companies and platforms.
3.	(B) – Customs-related points under *Other strategies relating to e-commerce marketplaces* (C) – *Anti-Counterfeiting Measures* (D) – *Anti-Piracy Measures*	The obligations under this Chapter, seem to apply to all e-commerce players, including service facilitation players.	We request a clarification that the policy points relating to customs, anti-counterfeiting, anti-piracy, authentic ratings/reviews, and sale of prohibited items, are intended for 'retail products' sold over e-commerce marketplaces and not 'services'. The Policy must extend the provision to other internet platforms like search engines, social-media websites and meta-search engines must be explored (like TripAdvisor).	Since the majority of the points under this Chapter aim to ensure product liability and consumer safety in relation to the sale of retail products, it would be appropriate to confirm the same so that similar requirements are not imposed on the services facilitation sector. Similar to measures for controlling counterfeit or pass-off goods in the e-commerce platforms, there is necessity of measures to control passing off of service providers in the Internet Platforms.

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	(E) – *Authentic Ratings and Reviews* (G) – *Prevention of Sale of Prohibited Items*		All Internet Platforms such as (a) search engines (like Google, Yahoo), (b) social media websites (like Facebook, Instagram), (c) meta-search websites (like TripAdvisor, iXigo) should allow the registration of certain brands as TM owners. The above platforms are referred as Internet Platforms for the purpose of this submission. The Internet Platforms shouldn't allow any offline or online businesses to bid on, or derive traffic from, the trademarks of other Online or Offline businesses as that will tantamount to infringing on trademarks.	The impact of some of the policies of Internet Platforms is multi-fold as follows: (1) Business have to spend extraordinary amount of money to bid on certain key words in search engines. As already acknowledged by the Policy, such charges of search engines have become a huge cost centre for businesses; (2) Some search engines also allow business to bid on the tradename of their competitors. This will abet trademark infringement by various businesses, and also will force genuine trademark owners to protect their marks from infringement by spending money on the bidding programmes of such search engines; (3) Lastly there have been multiple cases where customers have been misled from such Internet Platforms, especially search engines, to dubious websites based on these fake search results, where the customers have ended up getting cheated and losing money.
4.	(F) Sub-Section 3.25 *Consumer Oriented Customer Service*	A first resolution to all consumer complaints must be provided within 1 week.	We request that this period be extended to 1 month. We would also request a clarifying language explaining what constitutes first resolution means since it would differ from sector to sector based on the business line the companies operate within.	Some cases would require coordination with multiple stakeholders that form the platform ecosystem. Therefore, we believe that the timeline should be reasonably extended.

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				Also, this obligation is on the e-commerce platforms, which are varying in nature, we would request there is clarity provided on what first resolution would entail.

4. Regulatory Issues

No.	Section and Clause	Issues / Challenges	Comments and/ or Recommendations	Rationale
1.	(A) Sub-Section 4.2	The Standing Group of Secretaries on e-Commerce (**SGoS**) shall give recommendations to address policy changes.	We request that while the SGoS may operate on a recommendatory basis with experts in the area, it should not function as an independent regulator for e-commerce or social media platforms.	Sectors in which e-commerce entities and social media platforms currently operate are well-governed by specialized bodies and agencies (such as the MeitY, DPIIT, Regional and State Transport Authorities, the FSSAI, the RBI, Central Drug Standards Control Organization, etc. Another regulator specific to e-commerce businesses and social media platforms may prove to be burden for companies from an operational, business and compliance perspective. It may create confusion with regards to enforcement and overlap in the scope of regulators.

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2.	(B) Sub-Sections 4.6 to 4.8	• 'Data effect' and 'network effect' to be considered in all cases when analyzing mergers and acquisitions. • Advertising charges in e-commerce must be regulated, especially for small enterprises and start-ups.	We recommend that the Draft Policy specify that the Competition Commission of India (**CCI**) assess such issues independently and on a case-to-case basis. That said, this is a critical issue for the social media industry and no significant steps have been taken so far to prevent such practices which have an adverse effect on competition and growth of domestic tech companies in the social media space..	Principles such as the 'data effect' and 'network effect' are evolving economic principles around which jurisprudence is still developing at an international level, and we recommend that the CCI develop such jurisprudence over time as well. All instances of 'network effect' do not result in anti-competitiveness, and it is imperative for the CCI to assess this based on the impact that an incumbent has in the relevant market. However, this may not be essentially true as in the case of social media companies wherein disruptive practices have been a major deterrent to competition which has led to a sizeable market share being captured by dominant companies. CCI must be more actively analysing mergers and acquisitions as the foreign companies are capable of killing potential competition by using big data to their advantage. They enter into strategic mergers and acquisitions and let the entities under their umbrella leverage their vast distribution networks, infrastructure and extensive user reach to enable them to acquire and retain users without having the need to make huge investments. In the absence of such strategic advantages, policy equalization

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				framework, growing domestic social media companies struggle to acquire users organically and are unable to withstand competition against their foreign counterparts with deep pockets. The Policy rightly encapsulates that it has become virtually impossible for the 'second mover', on its own to, make an entry in this ecosystem in the presence of dominant companies that enjoy the "first mover" advantage.
3.	(B) Sub-Section 4.10	Government to reserve its right to seek disclosure of source code and algorithms.	We request that this requirement be removed from the Draft Policy.	As mentioned above, the risk of disclosure of proprietary information of the company is high in such a case. Further, under the Draft Personal Data Protection Bill 2018, the government may request not just personal data, but also the methods of processing or logic in automated processing, which would address the user protection concerns highlighted in this Sub-Section. Disclosure of source codes and algorithms are unique to a business protected by IP laws and therefore confidentiality needs to be maintained. Source codes or algorithms if leaked could have far reaching effects on e-commerce companies and social media platforms.
4.	(B) Sub-section 4.16	Electronic grievance redressal mechanism	Electronic grievance redressal mechanism should consider the existence of miscreants who misuse	To avoid multiplicity of grievance redressal.

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			such processes; there should be a mechanism in the online format to penalize such customers. Also, once a complaint is lodged in the one such online platform, the same complaint cannot be filed in another other court or forum.	
5.	Pg. 24 (open paras)	Tax Collection at Source (TCS) under GST: TCS provisions have created an uneven playing field between the e- commerce and brick- n-mortar operators for both goods and services. This has also put an unwarranted compliance burden on e-commerce operators and thereby increased the cost of compliance for both e-commerce operators as well as the suppliers using its platform.	TCS provision should be removed in its entirety. E-commerce operators can provide periodic information to the authorities with respect to all the transaction concluded through its platform.	This is to ensure a level playing field between E- commerce platforms and brick-n-mortar operators, and for the ease of doing e-commerce business in India.
4.	(E) *Taxation Issues*	Taxation should be on the basis of 'significant economic presence' i.e., this should constitute 'permanent establishment' under tax laws.	We encourage and support taxation be on the basis of significant economic presence. This must constitute of a requirement for a permanent establishment. For instance; Foreign Online Travel Agents (OTA) who have no physical	• Similar to the requirement to have a business entity in India (as discussed above), this policy point will ensure that companies do not avoid income tax obligations in India. • Payments arising from India for transaction related to goods or services or property carried by non-

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			presence in India, however, rendering "reservation of accommodation and/or transportation services" through an online platform to Indian travellers, hotels, airlines, etc. for a fee/commission have been avoiding taxes in India on such incomes. It is pertinent to note that an Indian traveller can book a domestic hotel or flight on the online portal of such foreign OTA, still no taxes are payable in India on such incomes. Foreign OTAs can choose a tax heaven to render such services in India and enjoy unwarranted pricing advantage over the domestic travel agents.	resident should be considered for threshold instead of 'Revenue'; • Payment threshold should not be more than INR 20 lacs for the financial year, similar to the threshold set under GST law to exclude small traders from tax liability; • Term 'User' should be defined to include both B2B and B2C users in India or anyone who has or will make a payment to foreign operator towards transactions related to goods or services or both.

5. Stimulating Domestic Digital Economy

No.	Clause	Issues / Challenges	Comments and/ or Recommendations	Rationale
1.	*Section V*	Certain recent circulars of RBI (Statement on Developmental and Regulatory Policies issued on 6th June, 2018) have mandated all authorized dealers to collect PAN for all remittances under LRS, even for permissible current account transactions below USD 25,000.	RBI should clarify that the requirements of collecting PAN for LRS remittances, international travel should be applicable only for direct remittances from individuals through LRS. However, if the OTAs are required to collect PAN, then such requirement should be applicable for all domestic	To provide a level playing field to all travel platforms providing services in India.

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		This ruling has indirectly burdened the domestic OTAs to collect PAN from individual travelers booking any international holiday package or travel. However, the overseas OTAs who needn't remit any money from India to overseas suppliers are not affected by this circular of RBI and hence those OTAs aren't asking the PAN of the travelers. This disparity has put the domestic OTAs to disadvantage causing loss of revenue and transactions to them.	and international OTAs.	
2.	New clause requested	There are no policy points relating to the further growth and development of the existing CKYCR.	That the Draft Policy address that CKYCR: (i) be effectively implemented and that its widespread use across the technology industry is encouraged, specifically in the financial and payments sector; (ii) infrastructure be made simpler, easily accessible, and hassle-free for swift adoption.	Given the nature of technology and e-commerce businesses, a centralised repository for quick and reliable KYC completion would be beneficial for the government's 'Digital India' initiative. CKYCR will also promote inter-usability of KYC records across financial sectors, which will be useful given that data across all regulators such as the RBI, SEBI, IRDA, PFRDA, etc. will be unified. The ability to identify and penalise fraudulent transactions and enforce the current regulations would be easier using the CKYCR.