WHITE PAPER ON REGULATING E-COMMERCE IN INDIA: NEED FOR A PRINCIPLES-BASED APPROACH[1]

February 2019

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POLICY BRIEF
TECHNOLOGY & SOCIETY (TECHSOC) INITIATIVE

BACKGROUND

From a market size of USD 3.8 billion in 2009, India's online sector has grown exponentially to currently stand at USD 38 billion.[2] This could further grow to nearly 150 billion USD over the next 5-7 years.[3] This growth will primarily be fuelled by rapid mobile internet penetration, the explosion of data available at the hands of e-commerce players to innovate and service customers, greater disposable income, especially in tier 2 and 3 cities, and the availability of a young workforce that can support the massive expansion projected in this area. The rising penetration of internet-enabled devices is expected to change consumption behaviour from offline to online. At the same time, a significant population is switching to smart phones. The number of smart phone users in India are expected to reach over 500 million, up from 330 million users in 2017.[4] Enhanced user interaction because of these developments would help platforms track consumer preferences and consumption patterns better.

The global context within which this growth is happening is also very relevant. Many nations have initiated conversations to formulate policies for cross border governance of e-commerce at the WTO. Over the last year, a grouping of the developed nations (United States + European Union + Japan + Korea + Singapore) with the support of Latin American nations Argentina, Chile, Colombia, Costa Rica, Uruguay, as well as Kenya, Mexico, Nigeria, Pakistan and Sri Lanka has emerged, named the Friends of E-Commerce for Development. They have pledged to work towards new electronic commerce trade rules that promote open and predictable regulations. India is still in the process of developing its position on the various sub-themes within the broad rubric of e-commerce policy.

It is in this background that the Centre for Policy Research decided to organise a closed-door roundtable discussion on 4th September, 2018 at the CPR Conference Room. Representatives from multinational tech companies, industry bodies, government, research institutions, and law firms were present at this discussion, geared to seek views on the possible regulatory approaches towards some of the key themes that require informed deliberation and policy resolution.

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THEMES AND VIEWS AT THE ROUNDTABLE

Discussions at the roundtable were structured around the following themes:

1. Regulation of e-commerce:

Many attendees were of the belief that increasing regulation, by way of FDI Regulations or a separate stand-alone law would be counter-productive to the sector. E-commerce is a horizontal business model, cutting across several types of businesses. As a result, e-commerce businesses face multiple regulations. On the one hand, there are horizontal regulations impacting all forms of online (and offline commerce), such as competition law, consumer protection regulation, digital payments regulation by the RBI among others. In addition, specific verticals (or sectoral regulators) govern specific aspects of e-commerce. Cab aggregator platforms are heavily regulated by state transport authorities.[5] The government not only regulates the entry to market (by way of licensing) but also regulates fares, the behaviour of service providers, and geographies in which they can ply their trade. Similarly, other sectoral regulators are increasingly legislating on e-commerce platforms for their area of business. The Insurance Regulatory Development Authority **(IRDA)**[6], regulates insurance e-commerce entities, and increasingly the Medical Council of India has sought to regulate the operation of e-pharmacies in India. Therefore, there is a risk of licence raj returning in the online commerce domain. Many traditional regulators are of the view that e-commerce entities in their sector cannot operate without a licence to conduct business (like those given to the brick and mortar players in their industry). This seems at odds with the core business model of e-commerce businesses in India, who by regulatory design are permitted to only act as a marketplace for existing brick and mortar businesses. The other major risk for online business that stood highlighted was relating to unequal regulation of online and offline commerce. Often online businesses are levied additional regulatory obligations either to limit their market growth, or to share on the burden of regulation to these platforms.

2. Governing data:

Most participants agreed that data would become an extremely important commodity driving all innovation going ahead. As a result, there is a need to review how businesses collect, control and process data. Moreover, there is a need to revisit the relationship between the generator of the data and the processing entity. However, there were extremely divergent views on the way forward. These divergences were primarily around three different themes, all relating to data: localization, protection, and sharing.

A few discussants believed that localization of certain data was necessary to prevent agglomeration of data in the hands of a few players. And that it would ensure that the government would be able to access this information for developing fresh data sets and sharing with local players. In response, other participants countered that even if the data were to be stored locally, it would be the property of the entity processing the data – and as a result unable to be shared with third parties, government or otherwise (unless under a lawful request). As a result, the costs of localization would outweigh any benefit. It would only add a compliance burden for global and domestic companies alike – and not result in any public policy benefits. Any issues relating to data monopolies are therefore best left to ex post adjudication or controls, falling within the jurisdiction of the Competition Commission of India.

Participants also disagreed over the regulatory structure to protect e-commerce data. Importantly, the discussions were happening with the recently released draft data protection bill in the background. The proposals contained therein therefore figured in the debates to a considerable extent. Some participants felt that a super-regulatory structure with too many rights vested with individuals would cause difficulties for smaller players especially to comply with the regulatory requirements. Therefore, a light-touch regulatory structure built on principle of self-regulation or at best co-regulation would be a better approach to data governance than excessive compliance requirements and penalties. Others disagreed with this stance broadly agreeing with the direction taken in the draft bill and stating that a weak enforcement regime was the bane of the present system of data protection. They felt that tightening the same, as sought to be done in the bill, would result in more responsible use of personal data by various e-commerce players in a big data age.

On the issue of data sharing, participants mostly agreed upon the fact that a clear model for such sharing and access can only emerge with clarity on the issue of data ownership. This was however absent in the Justice Srikrishna Committee's[7] proposed framework for data protection, as it claimed to adopt a rights-based as opposed to property-based approach to this issue. While this may have been good in principle, participants felt that an innovation-centric view of data will have to take a call on who owns the data as initial entitlements to experiment with such data would depend on this choice of ownership.

3. Competition law effects:

Many dimensions to this debate came up during the roundtable. The first was the issue of competition between online and brick-and-mortar players, one that has found reflection in the FDI policies of the past and continues to resonate with policy makers. The second is the issue of competition between foreign and domestic players, one that has manifested in the lobbying efforts of unicorns incorporated in India or with Indian founders / promoters. The third is the issue of competition between bigger companies and entrants or smaller players, with the primary issue here being the question of data access and data

sharing. The fourth is the issue of consolidation in the sector, exemplified by the recent Walmart-Flipkart merger, resulting in concentration of economic and data power with time.

On the first theme, participants disagreed over the real impact of practises like deep discounting on the brick-and-mortar stores, with some of them opining that technology neutrality rather than e-commerce focused outlook is required to curb anti-competitive practises. In other words, even the bigger brick-and-mortar retailers are used to deep discounting, particularly during festive season. Therefore, there is no evident harm caused to corner stores that uniquely emanates from the e-commerce players. Even if some portion of the harm arose from the e-commerce model, there is no data at all on the extent and degree of such harm. These participants also stressed that the aim of competition law should be to concern itself with consumer welfare and not to micro-manage or shape the market economy in undesirable ways based on limited information.

On the second and third themes, even some of the participants from the Indian start-up landscape observed that the real problem was not capital dumping but that the capital could be more gainfully deployed by players outside India (with no local entities present in India) while several regulatory and tax obligations constrained similar free play for Indian entities. Therefore, the focus should be on creating a level playing field, more broadly construed, than to place operational barriers on the sector itself. Many discussants therefore believed that support structures needed for local start-ups, if any, should be towards reducing their regulatory burden. In addition, the government should look to providing them with access to finance and other benefits (such as mentorship, training, access to markets, or logistical/ infrastructural support) that may help them grow their local or international businesses. They felt that discriminatory treatment between local and foreign companies would be against the principles of a free market economy, and against the policy objective of accepting greater FDI in India. Moreover, increasingly it is difficult to identify local versus foreign businesses, as most of these entities have a similar profile of foreign investors as their principal backers. However, some of the participants also stressed the need for a more active push for Indian start-ups so that the massive success witnessed by Chinese companies in the digital economy could be emulated by Indian players too. In this regard, they emphasised the possibility of data localization as a policy tool to lessen the impact of the current competitive advantages owned by foreign players. Similar views were expressed on the possibility of mandatory data sharing imposed on bigger entities so that the smaller ones could enjoy access to data to innovate and compete better.

On the fourth, some of the participants stressed the need for better ex ante checks before approving mergers in the digital economy space. Standard distinctions between vertical and horizontal integration or based on the market shares of the merging entities, may not hold good in evaluating post-merger impact in the context of the digital economy as network effects and data advantages may not be sufficiently captured by these tests. But others highlighted the perils of crystal gazing that any ex ante approach would entail to some extent and therefore contended that the focus instead should be on ex post measures to address anti-competitive harms and consumer grievances.

4. Trade and e-commerce:

The discussants appreciated the importance of a local debate on e-commerce, given India's discussions in multilateral forums on measures to protect the domestic industry. In addition to the discussions at the WTO, several of the focal points of the discussions at the Regional Comprehensive Economic Partnership **(RCEP)**[8] have now found their way into the discussion draft to build the national e-commerce policy of India. This not only includes data localization, but also supporting measures such as source code sharing, security concerns around cross border data flows, and the taxation of electronically transmitted products. The participants agreed on the need for policy space to regulate the local economy. However, there were divergent views on the path to regulation. In addition, a few participants were also of the belief that restrictive policies recommended by the WTO may be violative of our multi-lateral commitments towards free and open trade under the GATS and other treaties.

PROVISIONAL VIEWS

1. Regulatory Principles:

In the absence of an overarching law or policy on all aspects of e-commerce at present, the Indian approach has been to largely regulate the sector using the FDI Policy. This cannot go on for very long because of the new sectoral concerns when matters are viewed more holistically. At the same time, many of these concerns are best addressed through the market churn in this sector rather than through state intervention. Therefore, a **four-step process** is required when developing a national e-commerce policy. The **first step** is to identify the critical sectors where a policy is required in the first place, rather than bring everything into the fold of e-commerce. The definition of e-commerce must therefore be narrow and confined to those areas where:

a) concerns go beyond what markets can realistically address, or
b) there are significant regulatory fragments at present due to federal structure or for other reasons resulting in lack of certainty and clarity, and there is no other national sectoral policy that can address such fragmentation.

The role of policy as a market-maker must not be lost at any point in time. Another facet of this step therefore is to also ensure inter-ministerial coordination where required considering the nature of the sector, the subject matter in question etc. A recent example of a similar recognition of coordination efforts is present in the draft personal data protection bill recommended by the Justice Srikrishna Committee, which envisages a mechanism for inter-regulatory coordination between the newly proposed Data Protection Authority and other regulatory agencies on matters of common interest or potential overlap.

Once sectors and conduct within the purview of e-commerce are identified, the **second step** should be to also prioritise the concerns that regulation needs to address on an immediate basis rather than project into the future with little data to substantiate such interventions. As e-commerce platforms exist as a marketplace for current brick and mortar businesses, a light touch framework for entry conditions of the underlying business can assist in job creation for the country.

Administrators must also identify areas where a regulatory approach may fail to solve an underlying social problem. Not all concerns can be addressed through regulation, and a regulatory approach that takes this line of approach is more likely to fail than succeed. Moreover, it is only when filtering the concerns that the state will have a clearer picture of how many of these concerns are unique to technology-powered models and how many, concerns to be addressed through technology agnostic regulations. A common set of principles recognising the nature of e-commerce platforms as intermediaries needs to be set out by the policy. This would act as a guiding document for regulators looking to develop governance of online businesses in their sectors.

The **third step** is to usher in the possibility of co-regulation as far as possible. The regulator's jurisdiction should arise only upon the inability of these codes to address core concerns in a desirable manner. For this to happen in an effective manner, regulations should be principles-based rather than stipulating with a high level of micro-detail the various compliances and operational procedures / technologies that industry players must adhere to when doing business. Setting out heavy licensing obligations would only limit the market. High regulatory barriers often favour large incumbents and prevent the entry of startups in the sector. A soft touch regulatory approach can on the other hand help in the proliferation of local digital businesses that are best suited to tackle the unique business and consumer environment in our country. We would recommend that any such regulation on a platform must be principles-based and not prescriptive in nature. This would allow the platform to innovate while meeting broader policy goals, rather than be locked to certain processes or technologies to achieve outcomes decided in advance.

The **final step** is to focus on effective enforcement of the limited number of areas where state intervention through policy would exist because of adherence to the first three steps. This is the only way to ensure respect for policies as enforceable documents rather than mere exhortations. Complex and heavy regulations would either deter the entry of entrepreneurs in the market or result in non-compliance by smaller players. Conversely, it would significantly add to the cost of doing business for large local and global e-commerce companies. In fact, it may incentivise companies to provide access to their platforms offshore. This would allow businesses to evade complex regulatory obligations on local entities, and yet benefit from cross border data flows to provide access to markets for Indian citizens. One such example, that was raised in our discussions was the scope of the press notes governing e-commerce. The intent of the FDI policy for e-commerce specifically was to prevent on-line multi-brand retail. However, the text of the policy impacts digital products and services, which often may not be permissible to be provided in a marketplace model. Clarity and streamlining of these provisions could help focus the policy and its application.

2. Data Governance:

The issue of localization has assumed political connotation without a clear assessment of the trade-offs and benefits. One may argue that on a principled basis, the idea for localisation is antithetical to the idea of an open internet. This is particularly so because the Indian IT industry has been, and continues to be, a beneficiary of unhindered cross-border data flows for years. Even digital trust is not necessarily built through localization. On the other hand, researchers claim that localisation would benefit in creating a local economy for data infrastructure. Moreover, the proximity of servers to Indian citizens may help in improving access to citizens.

However, as no hard data has been made available, or perhaps even factored in when proposing localization, it is difficult to conclude either way. Moreover, if e-commerce is defined widely to cover the whole gamut of operations, it is difficult to see why all kinds of personal data must be stored in India.

Even the draft data protection bill does not take such an extreme view of matters, only insisting upon a mirroring requirement. Finally, the point that China has been able to build a vibrant digital economy riding on the strength of a walled internet is not the same as asserting that data was in Chinese servers. There are many steps between data storage/ residence and final innovation that consumers benefit from, including a talented workforce, investments in R&D, and acute sensitivity to the human-machine interaction in a digital economy setting. At present, it would suffice to observe that this is an area where one must tread with extreme caution.

A pragmatic approach is needed when it comes to the balancing of individual rights against the innovative possibilities offered using personal data. E-commerce is poised to be a big part of India's growth story, therefore demanding extreme scrutiny before taking a technology-sceptic view of matters. Before coming up with a super-regulatory structure, a few matters need deep consideration: i) the kinds of harms and interests implicated in the case of e-commerce data; ii) the sensitivity of the data in question; iii) the inability, if any, of industry actors to deploy solutions sufficiently respectful of privacy interests; iv) the negatives of an excessive compliance structure including advance permissions before data innovation, extensive data audits etc.; v) the need for sufficient exceptions when data is stored or processed in an anonymised format or for R&D purposes; vi) the regulatory and enforcement capacity before insisting on wide-ranging new rights such as the right to be forgotten / de-indexed; and vii) the need for an effective grievance redressal mechanism to tackle data breaches.

There is a need to move beyond the rhetoric and identify the policy goals that the government wishes to achieve, in terms of law enforcement, data sharing, and local economy support. Any policy choice must suggest the path of least coercion to achieve its goal.

3. Competition:

Both ex ante and ex post approaches to competition in the digital economy come with their distinct set of tradeoffs. While an ex ante approach can provide higher certainty to industry players as well as opportunity for the state to shape the structure of the economy and behaviour of market players well in advance, they come with significant monitoring and enforcement costs as well as possible drawbacks for innovation and evolutionary growth. All said and done, it is important to bear in mind that the freedom of entrepreneurs to innovate and to be the best and the biggest is not per se unworthy of recognition. At the same time, there is always the fear that monopolisation extends too far, perhaps a big drawback with an ex post approach that otherwise lends itself to great flexibility. Striking a via media between these approaches is desirable but the details of such balance are critical in ensuring that it imbibes the best of both worlds while discarding the worst.

In a hybrid model of competition regulation, the **first step** is in realising that not all sectors in the digital economy are equally critical. While, no doubt, it would be great to have three rather than one fashion portal in the interests of competition, it is not the same as a world with only one e-health or e-mobility platform. The **second step** is to stick to the foundational idea of competition law—consumer welfare – and move to other protective values only in exceptional cases. This has huge practical implications. For instance, a natural monopoly does not become per se undesirable, provided other regulatory interventions such as fare caps or easily accessible grievance redressal mechanisms against exclusion from the platform are in place. Moreover, ex post adjudicatory exercises would mostly suffice in addressing cases of abuse of dominant position rather than ex ante restrictions on what market players can and cannot do. Finally, questions of ownership of data are equally significant because consumer welfare is directly tied to this resolution. If platforms are mere trustees of consumer-owned data, their zone of influence though high may not be worrisome simply because consumers can choose to switch. This aspect of switching takes us to the **third step**, which is to develop a model for innovation in the digital economy that accounts for the reality that data being in the hands of a few players may not have immediate consequences for consumer welfare but could over time curb innovation and thereby affect consumer choices. Here, ex ante interventions may be useful but then again, they should not be oriented in the direction of stopping the bigger players from expanding their footprint. Instead, such interventions need to take the direction of incentives and disincentives thrust upon these players that nudge them to share data with smaller players. For example, recently we note that Uber has started the UberMovement platform, granting access to its traffic data to companies and governments to design policy and technology solutions for cities. These interventions should also explore the possibility of data exchanges and other market-based solutions with compulsory licensing so that smaller players can easily access such data for a fee.

CONCLUDING THOUGHTS

The growth of e-commerce signifies a massive disruption in the way Indians consume goods and services. Any such disruption is bound to come with severe impact on the status quo, including the industry structure and organisation, workforce incentives, competitive motivations of market players, and interaction between the State and industry. Faced with this, the temptation runs high to over-regulate and to attempt micro-managing the market behaviour of e-commerce players. Our preliminary research indicates that regulators and policy makers must hold back on this temptation and adopt a more principles-based approach to the problem. This entails a granular rather than blanket response, identification and differential treatment of critical and less critical sectors and concerns, and sufficient opportunity for the market to correct itself through voluntary codes and co-regulatory models. In short, the focus must be on stipulating a broad set of principles that govern behaviour in the playing field rather than strictures on specific ways in which market players can do their business.

ENDNOTES

1 These are views based on preliminary research undertaken jointly by Ananth Padmanabhan, Fellow, Centre for Policy Research, and Arjun Sinha, Partner, Cantor Associates, and to be read as serving the starting point for more substantive research engagement on critical themes associated with regulating e-commerce.

2 https://www.thehindu.com/business/E-commerce-industry-to-cross-38-billion-this-year-Assocham/article13977121.ece

3 PWC, Propelling India towards global leadership in e-commerce, at: https://www.pwc.in/assets/pdfs/publications/2018/propelling-india-towards-global-leadership-in-e-commerce/executive-summary.pdf.

4 https://www.financialexpress.com/industry/technology/giant-leap-india-to-have-over-500-million-smartphone-users-by-2022/1358972/

5 Most major markets such as Karnataka, Maharashtra, Delhi, UP and Haryana have state specific cab aggregator rules.

6 Guidelines on insurance e-commerce, IRDA/INT/GDL/ECM/055/03/2017 at: https://www.irdai.gov.in/ADMINCMS/cms/frmGeneral_Layout.aspx?page=PageNo3089&flag=1.

7 A Free and Fair Digital Economy, Protecting Privacy Empowering Indians at: http://meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf.

8 http://www.asiantradecentre.org/talkingtrade//rcep-facilitating-trade-for-e-commerce.

The Technology and Society Initiative ("TechSoc") undertakes policy research on emerging technologies, with special focus on regulatory frameworks for the digital economy and other technology transitions that carry increasing significance in India's development narrative.

Technology transitions have been a defining feature of the 21st century. Recent technology-powered advances – artificial intelligence and deep learning ecosystems, drones, the app economy, blockchain and crypto-currencies, and quantum computing, to name a few – have transformed interactions between states and citizens, as well as between private entities and individuals.

On the regulatory front, governments worldwide face the unenviable task of directing innovation by optimally balancing risks and rewards. When deployed for governance, technology also raises concerns around inequitable access to new solutions, exclusionary possibilities arising from unsuitable architecture, and unreasonable restrictions on individual rights such as privacy and personal liberty. The rise of the data economy and the aspirations of industry players to build network effects and scale rapidly has led to unprecedented consequences for both economic ordering and individual rights.

TechSoc critically examines the various tensions highlighted above, particularly focusing on technology innovations, norm and market-based responses to the same, and a robust, yet responsible, framework for start-ups, incumbents, and innovators of all hues to build, fail, learn, and grow in India.