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Review Article

National eCommerce Policy: What India's new (Draft) eCommerce Policy outlines for Online Retailers and its Regulatory aspects

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Abstract

The India Draft National eCommerce Policy is a high-level policy document proposed by India's Department for Promotion of Industry and Internal Trade in February 2019. It sketches out a series of policy recommendations that range from useful consumer protections to non-constructive protectionist industry regimes that would likely backfire and hurt businesses, entrepreneurs and consumers alike. The best of these recommendations would institute stricter consumer protections against annoying, unsolicited phone calls and emails. But the worst of them would make data transfers difficult, impose onerous liability on third party platforms, and institute data localization that would reduce business and consumer choices.

Within India, the draft policy boosts the government's schemes/ programmes, such as Digital India, Skill India, Make in India and Startup India, which rely on eCommerce and its components. For instance, it has introduced norms for consumer protection, recognized the importance of data, its protection and storage, granted infrastructure status to data centers and server farms, integrated different systems to track imports and introduced anti-counterfeiting and anti-piracy measures.

It is also in sync with the recently updated industrial policy which reflects the underlying brick-and-mortar economy. However, the stakeholders, including industry, its associations and the independent policy community, point out that in the government's enthusiasm to address all these many aspects of eCommerce, the Draft Policy has become ambiguous, raising questions about whether it is intended to be an internet policy or a specific eCommerce policy. (1)

The National eCommerce Policy is aimed to address concerns which go beyond the sale and purchase of products by electronic means. For example, environmentally sustainable growth by outlining regulatory aspects on Swachh Bharat Abhiyan, suitable policy will be devised to promote "reduce, reuse and recycle" practices by stakeholders. In the era of Industrial Revolution 4.0, economic development is based on data which is generated, stored, transmitted or processed in large volumes. The increasing importance of data warrants treating it at par with other resources on which a country would have sovereign right. The Policy recognizes the importance of data while enabling the domestic industry to benefit from the advantages and opportunities created by electronic commerce. (2)

Keywords: Policy, eCommerce, Market places, Consumer Protection, Foreign Direct Investment (FDI), Telecom Regulatory Authority of India (TRAI), Environmentally Sustainable Growth.

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1. Introduction

The eCommerce industry has been booming over the years and has facilitated the integration of markets across the world. It allows producers as well as buyers to access markets easily who were hitherto separated by time and distance. In India, it brings in a lot of Foreign Direct Investment (FDI) as the market-based model for eCommerce entities is allowed 100% FDI.

India is a significant part of the global digital revolution. This revolution, among other things, has provided businesses as well as consumers, access to a large variety of products at competitive prices. India has exceeded expectations about the growth of mobile telephone usage and more specifically mobile data usage. In just three years since 2014, monthly data usage

in the country has increased fifteen times, as smartphones and mobile internet became cheaper and faster. At the end of 2014, the average monthly data consumption was only 0.26GB per person, which increased to over 4GB at the end of 2017 (Source: TRAI). Greater internet usage means generation of more data and therefore, greater requirement to prioritize privacy, consumer protection and regulate flow of data for leveraging it to benefit the domestic economy. (2)

Setting Up of Ecommerce Task Force

The ecommerce task force, which was set up in April 2018, has since been deliberating on formulating an ecommerce policy, based on inputs received from various stakeholders.

The task force formed nine subgroups to deal with 14 core issues including competition, regulation, data privacy, taxation, and a host of technical subjects such as localization of servers and technology transfer.

2. Definition and Usage of the term 'eCommerce'

The Draft Policy uses a dated definition of 'eCommerce' which extends to buying, selling, marketing and distribution of goods and services through the electronic network. It is similar to a 1998 WTO definition of eCommerce. This is out of sync with newer statutes in India like the FDI Policy, 2017, Central Goods and Services Act, 2017 and the Ministry of Electronics and Information Technology ("MeitY"), whose industries are part of the eCommerce supply chain.

The definition used in the Draft Policy is too broad, including industries and entities that need not fall under the eCommerce umbrella.

On 31 August 2018 (effective 1 January 2019) China's legislators enacted the PRC eCommerce Law, which specifically excludes financial products or services and use of information networks, such as news, programmes, publications and cultural products from the ambit of eCommerce. This restricts the scope of application of the stringent law to a limited number of stakeholders.

It has been recommended that the DPIIT should consider creating a unified definition of eCommerce and a separate definition for the digital economy in India in line with international norms as these subjects are not constrained by territorial borders. This will help in streamlining regulations in this sector across countries as well as on multilateral platforms. (1) Policy focuses on data localization, improved privacy safeguards and measures to combat the sale of counterfeit products.

This policy document further splits into sub-topics viz. Data, Infrastructure Development, eCommerce Marketplaces, Regulatory Issues, stimulating domestic digital economy, export promotion through eCommerce majorly focusing on the strategies in each.

- **Data** - The draft bars retailers in the country from allowing data access to foreign businesses even with the consent of the user. Currently, data gathered by eCommerce companies in the country is stored on

the private cloud storage capacities outside India for financial reasons. Due to this, companies like Amazon and Flipkart will have to undergo major restructuring processes. Also, the draft has proposed that the Data gathered by these companies must be shared with smaller players in the eCommerce field, particularly the start-ups. This is intended to provide a level playing field to all players, big or small. The reasoning behind these changes is that Data is a national asset, and everybody should have access to it. (2, 3)

- **Ecommerce Marketplaces and Consumer Protection** - eCommerce marketplaces are digital platforms, i.e. online platforms on which goods (physical or digital) or services, are sold. An eCommerce marketplace is expected to provide all-round benefits in comparison to its physical counterpart, by increase in access and economies of scale in operation. With the advent of online eCommerce in India, consumers have benefitted from increased competition in the market by way of getting access to greater variety of products at competitive prices. Another benefit in this field has been the development in logistics (delivery partners), which has provided employment to a significant number of people. (2, 3)
- **Anti-Piracy and Anti-Counterfeiting** - The eCommerce industry is plagued with this problem. To tackle this, the draft policy has proposed certain changes to be complied with. It suggests that e-tailers must publicly share all relevant details of the sellers listed on their portals. Online retailers must display phone numbers and email addresses for consumer grievances and offer a primary solution to each problem within a week. Online retailers also have to seek authorization from trademark owners before enlisting the products. (2, 3)
- **Authentic Ratings and Reviews** - The draft policy talks about transparency and non-discrimination in publishing of ratings and reviews. All ratings and reviews for verified purchases must be published as registered by the consumer, except those found to be promotional, abusive or inappropriate in a community setting. Marketplaces are required to devise mechanisms to prevent fraudulent reviews and ratings by the sellers and their affiliates. (2)
- **Consumer Oriented Customer Service** - The policy laid down outlines the publication/display of phone number and email address for consumer grievances is mandatory for all ecommerce sites and applications where purchase and sale of products is taking place. A system of acknowledgment of consumer complaints to be put in place as well as clear cut timelines for their disposal. These timelines are to be displayed prominently on the website/ application. A first resolution to all consumer complaints must be provided within 1 week. (2)
- **Prevention of Sale of Prohibited Items** - The policy sketches how websites or applications where purchase-sale of products take place, must display

list of products which are prohibited, as prescribed by DGFT or any other competent authority, on their site. Sellers must provide an undertaking to the platform/site/application that they are not engaged in transacting in such products on the platform and the same must be made accessible to consumers. In case it is found that products being sold are prohibited, or a complaint to that effect is received, the platform shall immediately remove the listing or other reference to the product. The time limit for this shall not exceed 24 hours. Such sellers shall also be blacklisted from the platform and the relevant authorities notified. The liability of the platform in case used for sale of prohibited goods shall be determined as per provisions of law. (2)

- **Unauthorized eCommerce Websites** - The new draft policy comes down heavily on unauthorized eCommerce websites, especially Chinese firms such as Shein, Romwe and Club Factory. These firms have been found to be misusing the “Gifting” route to avoid customs duty and GST. To curb this, the draft policy mandates that all eCommerce websites channel their shipments from other countries through the customs route. It has also made it mandatory for the eCommerce website to have a registered business entity in the country as the firms through which all sales is transacted. (2, 3)

3. Regulatory aspects

The India Draft National eCommerce Policy proposes a mixed bag of strict regulatory and protectionist policies related to data governance and privacy – largely premised on the rationale that “India’s data should be used for the country’s development. Indian citizens and companies should get the economic benefits from the monetization of data.”

These recommendations accompany others, regarding tax, infrastructure development, and customs and export policy. The Policy paints in broad brush strokes. It is therefore difficult to gauge in a precise way its likely legal and economic impacts. But certain concerns do stand out, alongside some worthy recommendations.

On the other hand, the Policy proposes several steps that seem likely to curtail innovation or business development, particularly if they lead to overly aggressive or protectionist regulation. In particular,

- It recommends data localization requirements that would make it difficult for Indian businesses to work with international data and services platforms;
- It recommends that India restrict data transfers out of India from eCommerce platforms, social media, and search engines, thus limiting how Indian consumers and businesses can work with those platforms;
- It even suggests price controls – which can limit choices and reduce competition and innovation;
- It recommends that the Indian authorities be granted access to commercial source code and

algorithms, which could inhibit intellectual property development and innovation; and

- More broadly, it suggests that online platforms should be liable for user-generated content (and thus safe harbors for internet intermediaries be diluted) - a threat to free speech and open communication.

At the same time, the Policy proposes that Indian authorities have wide latitude to demand information held overseas – a potential concern for civil liberties, and an invitation for international disputes.

Policy singles out biggest factor in eCommerce is data, stating that it is essential that regulators examine transactions with reference to the access to data that they entail. With further touch base on AI, big data, deep learning and cutting-edge technology are going to take center stage in time to come. It is imperative that regulators and law makers must create dedicated ‘technology wings’ within the organization set-ups.

It clearly outlines the data aspects associated with advertising on social media and search engines, privacy, taxation issues, consumer protection, payment related issues, exemption from content liability and environmentally sustainable growth.

The Policy is an early-stage document and will be subjected to scrutiny from the wide range of groups with something at stake. These include Indian entrepreneurs, investors, and vendors with international clients and businesses with international vendors. Consumers, too, may see their choices dwindle if the Policy is implemented aggressively. It is anticipated that moderating voices will prevail to help draft a document that protects consumers without enforcing protectionist data regimes. (4)

4. Impact and implementation of the draft policy

The Draft Policy can be an important legislation as it affects a wide swathe of stakeholders of the new and old economies, including fintech, MSMEs, start-ups, payment systems, content providers, sellers, advertisers, logistics personnel etc., both domestic and foreign. As it stands, its impact can be both negative or positive, as discussed broadly below.

Every eCommerce entity has to be a registered business in India. This will ensure better governance (including taxation) by Indian authorities. However, this is likely to be a barrier to market entry and innovation, thus inhibiting foreign direct investment. A few instances of eCommerce entities that were – or are not – registered in India include, Ali Express, ASOS and Shein.

The Standing Group of Secretaries on eCommerce (“SGoS”) is the stipulated supervisory body, but there are no provisions on its formation, constitution and functioning. This clarity is critical as the SGoS will be in charge of implementing the legislation across multiple departments to implement the eCommerce regulations.

The Draft Policy provides for capacity building by the creation of technology centers in government and

regulatory circles. This capacity needs to be extended to the state and the judiciary. For now, the Draft Policy is only a direction; it is not an enforceable document. This must change for it to be able to meet its objectives. (1)

5. Conclusion

India is not part of the WTO negotiations on eCommerce, currently under way. (5) The negotiations are dominated by developed nations, and, as has been for the past half-decade, the concerns and interests of developing countries are not taken seriously or incorporated. India now has a large market with large foreign investments in eCommerce: Alibaba Group has invested approximately \$1.8 billion in eCommerce companies in India; Walmart invested \$16 billion in Flipkart recently. This, along with a new, dedicated eCommerce policy, puts India in the advantageous position of being a key global influencer. But the Draft Policy – India is one of the few countries to have one – must be well drafted and well implemented. With this, India can spearhead the global eCommerce debate and be a model for the eCommerce policies of other developing countries, especially those which are not part of the ongoing WTO negotiations. India has taken a decision not to join the WTO's multilateral group on trade rules in e-commerce. Earlier this year, 77 WTO member countries came together to negotiate trade rules in e-commerce. Although India is not a part of this group, it is negotiating an e-commerce chapter in Regional Comprehensive Economic Partnership (RCEP) agreement. Among the 16 RCEP member countries, 11 (including China) are a part of multilateral group. The deadline for the e-commerce chapter will permit the completion of the RCEP deal “not later” than November 2019. (6) For consumers, strong anti-counterfeiting and anti-piracy measures are a big relief.

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Conflict of Interest

The content and views in article are author independent opinion and in no way related to Reckitt Benckiser's or Grofer's views and policies. The author declares that there is no conflict of interest regarding the publication of this article.

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