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White Paper

Analysing India's draft E-Commerce policy

*Perspectives from the viewpoints of
International Trade & Competition Law*

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INTRODUCTION

Data is the new oil. Catchy and pithy, the metaphor conveys the point with a bold claim – data is important, so important that it's comparable to the lifeblood of economic progress and stability in the world, comparable to a resource over which wars have been fought as recently as this century. But that is where the metaphor's effectiveness reaches its limit from a regulatory perspective. Data is important, but it is not the new oil, because it's nowhere near as simple to regulate. There are complexities and elements of individual rights that make data (and e-commerce) an infinitely more daunting resource to legislate on.

With commercial reliance on technology growing rapidly, the long-anticipated transition of global trade to online platforms has commenced, perhaps earlier than expected. This early arrival has left regulators playing catch-up, outpaced by burgeoning evolutions in tech applications and data consumption¹.

Concerns over moral, legal and business implications of evolving tech have led to considerable debate and discussion. Stakeholders, and perhaps most of all legislative bodies, find themselves having to deal with a bevy of multi-layered and complex questions. Whether it's balancing competing interests on data or finding a sustainable position on multilateral negotiations, regulators across the world find their hands full and overflowing.

The new Draft National e-commerce Policy ("**Draft Policy**") etches out how pervasive and impactful e-commerce is expected to be. Further buttressing this position is the fact that not all economies are created the same, and therefore, a straitjacket set of rules may not be ideal for all comers.

Indeed, there are reasonable arguments behind India's stated intent on e-commerce. At the same time, the fulfilment of any legislative objective must be accompanied by a clarity of scope and the deployment of practical mechanisms to accomplish the stated goals.

This white paper attempts to address the Draft Policy directly on these issues, starting with what constitutes "e-commerce", what is the scope of "data" and more specifically what constitutes "sensitive data" under the purview of the policy's stated intent. Our analysis then juxtapositions the Draft Policy with key regulatory aspects (both local and international), including data privacy, competition law and international regulation of data. Finally, the paper has identified a few red flags within the Draft Policy for which suggestions have been put forth.

From the perspective of global trade, the importance of e-commerce to the future of the Indian economy cannot be overstated. To this end, the white paper seeks to examine the Draft Policy from the perspective of World Trade Organization ("**WTO**"). More specifically, how essential fair-trade principles enshrined under

¹ Indeed, the Draft Policy itself recognizes that since 2014, "monthly data usage in the country has increased fifteen times", page 9 of the Draft National e-Commerce Policy

the aegis of the WTO could impact the same. Another section will also assess how other jurisdictions have balanced competing interests on e-commerce in their respective laws, wherever pertinent.

The Draft Policy also recognizes the dangers of anti-competitive conduct and the necessity to encourage and protect fair competition. While the Draft Policy refrains from setting out any specific policy objective and goals, it does make a reference to the role of the Competition Commission of India (“**CCI**”) and the Competition Act, 2002 (“**Act**”) and draws from certain principles of the anti-trust law. These issues are highlighted in detail in the section on the interface of the Draft Policy with the Competition Act.

CLARITY OF SCOPE: IDENTIFYING WHICH E-COMMERCE TRANSACTIONS AND DATA ARE SOUGHT TO BE COVERED

Before proceeding with a substantive analysis, it is imperative to distil what the subject matter is. In order to regulate e-commerce, one must necessarily set the boundaries for what e-commerce is. Similar clarity in scope would also be necessitated for the definition of "data" that this policy seeks to regulate, particularly "sensitive data".

"E-COMMERCE" DEFINED : A COMPARISON OF DEFINITIONS FROM THE INDIAN AND WTO STANDPOINT

The Draft Policy rightly observes² that globally, the definitions of "e-commerce" have been varied, if overlapping. Further, the policy clarifies that "e-commerce", "electronic commerce" and "digital economy" are interchangeably used. With these caveats, the Draft Policy defines e-commerce in the following manner:

"e-Commerce includes buying, selling, marketing or distribution of (i) goods, including digital products and (ii) services; through electronic network. Delivery of goods, including digital products, and services may be online or through traditional mode of physical delivery. Similarly, payments against such goods and services may be made online or through traditional banking channels i.e. cheques, demand drafts or through cash."

In and of itself, the definition is sufficiently specific. Indeed, the above definition is largely comparable to the one adopted by the WTO,³ which reads as follows:

"electronic commerce" is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means. Digital trade includes the use of the internet to search, purchase, sell, and deliver a good or service across borders and includes how internet access and cross-border data flows enable digital trade."

However, in the WTO Work Programme on Electronic Commerce "electronic commerce" is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means. A commercial transaction can be divided into three main stages: the advertising and searching stage, the ordering and payment stage and the delivery stage. Any or all of these may be carried out electronically and may therefore be covered by the concept of "electronic commerce".

As may be seen above, the definition being contemplated by the WTO appears to be wider in scope, according an explicit inclusion to cross-border data flows, though the Draft Policy's definition also implicitly covers data. Another parameter where the WTO's definition is wider than the Draft Policy's is the use of the word "production ... through electronic means", which appears in the WTO definition. One parameter where the WTO's policy is more specific could perhaps be the focus on transactions, purchases and

² Page 9 of the Draft National Ecommerce policy, February 23, 2019

³ https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm

deliveries “across borders”. It is important to bear in mind that both definitions are heavily inclusive and illustrative, whereby nothing is explicitly excluded from either.

Similar overlaps and variances are observed with the definitions provided by other global bodies governing trade such as UNCTAD or even local statutes such as the India's EXIM Policy.

ELP Comment: *Suffice to say, the stated definition in the Draft Policy does not prima facie seek to regulate transactions or data that are beyond the scope of what other organizations have already identified, the extent of regulation notwithstanding.*

Having said that, further analysis of the identified strategies (particularly on data) indicates a need a scope for greater clarity on some issues, particularly on the type of information the Draft Policy seeks to regulate.

DATA FOR E-COMMERCE

As stated above, data being the new oil in the Indian context is to a certain extent exaggerated and misguided, as oil has been a barometer of all Industrial and Financial performance in India. It is important to understand that there is no contextual relationship between oil and data other than an underlying thread of being crucial to economic growth. Oil is a natural resource in the hand of few countries, prices are regulated based on demand and supply and depletes on usage. Data on the other hand increases exponentially, value is unknown unless there is economic value when used with combination of data and technologies. It is not static and has potential with further mining to be used for social and economic use both domestically and globally. Lastly, data carries concerns of individual rights that oil regulation wouldn't necessarily need to deal with.

Like other economies, India's intent and objective is to harvest data domestically for good use both socially and commercially. India has therefore proposed restrictions in the short term until such time it needs to mutually agree to market access bilaterally or multilaterally.

In doing so, there must be a well planned and executed roadmap to create value and the power of data for intended use in emerging technologies across all varied spectrum of goods, services and technology.

“Data” as defined as follows in the Draft Policy:⁴

“In the context of e-commerce, data is any type of information converted into a binary digital form that is efficient to store, process and transfer across different devices, platforms, servers and borders.”

The divergence between the definition of “e-commerce” and “data” is readily apparent. While e-commerce explicitly pertains to commercial activities such as “buying, selling or distribution”, no such distinction is made for data. In other words, even non-commercial data – which, it may be presumed, would not be generated in e-commerce transactions – is sought to be regulated by the Draft Policy.

⁴ Page 11 of the Draft National Ecommerce policy, February 23, 2019

A supplementary definition in the Draft Policy seems to confirm the above understanding:⁵

“Data can either be standalone individual data such as the financial details of clients available with banking institutions or be at the level of community such as data created by recording and storing information about movement of vehicles at an intersection or data generated by climatic conditions. Data can be used for analytical, statistical, business and security purposes.”

ELP Comment: *The Draft Policy briefly makes the case that seemingly non-commercial data has commercial implications. However, greater clarity is necessary in determining exactly what kind of data is sought to be regulated. In trying to be comprehensive, the Draft Policy must not be overly broad, and where there is scope for such an error, a specific clarification is necessary. For example, it is unclear whether information about movement of vehicles (an example specifically given in the Draft Policy) is directly or even tangentially related to e-commerce transactions. If not, it's worth considering whether the Draft Policy should aim for greater specificity with the type of data it is trying to regulate.*

Also, since “sensitive data” is presently undefined under the Draft Policy (more on that in the following section), it isn't clear how the restrictions envisaged can be reconciled with the right to privacy, and a rational correlation with the commercial aspect of “e-commerce” needs to be established. This is especially relevant since the primary strategy identified by the Draft Policy is the creation of a “legal and technological framework” to restrict cross-border data flow from IoT devices in public places and data collected from e-commerce platforms, social media, search engines etc. Indubitably, that is a wide net to cast, and a policy governing e-commerce would typically be expected to regulate data that can be objectively linked to e-commerce transactions.

“SENSITIVE DATA”

The Draft Policy also identifies specific strategies pertaining to a category of data known as “sensitive data”. The term has not been defined in the Draft Policy, though similar (but narrower) terms have been defined in the Personal Data Protection Bill, 2018 (“PDP”).

“Section 3(29): “Personal data” means data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, or any combination of such features, or any combination of such features with any other information;

Section 3(35): “Sensitive Personal Data” means personal data revealing, related to, or constituting, as may be applicable— (i) passwords; (ii) financial data; (iii) health data; (iv) official identifier; (v) sex life; (vi) sexual orientation; (vii) biometric data; (viii) genetic data; (ix) transgender status; (x) intersex status; (xi) caste or tribe;”

⁵ *ibid*

ELP Comment: *As is evident, the PDP has given a narrow and specific definition to “personal data” and “sensitive personal data”. It is not clear if the term “sensitive data” as used in the Draft Policy is meant to be read in the same light – though it can be reasonably presumed that simultaneous legislations on these issues will be harmonized. It can also be deduced that perhaps the scope of “sensitive data” is wider than that of “sensitive personal data”, since it would also inherently include sensitive non-personal data.*

There is no doubt that substantial data used for, and arising out of, e-Commerce transactions would contain data that could be defined as sensitive from the perspective of privacy and national security. In view of this, the Draft Policy seeks to place certain restrictions on the transfer and use of such sensitive data.⁶

ELP Comment: *It might be argued that some of these restrictions are excessive – for example, transfer of certain sensitive data to third parties is prohibited, even with the customer's consent⁷. Needless to say, this might potentially conflict with the right to privacy recognized by the Indian Supreme Court.⁸*

At the same time, it is feasible that some categories of data (for various reasons including security) are so sensitive that their dissemination must be restricted and strictly controlled. Unfortunately, the absence of a concrete definition of “sensitive data” prevents the Draft Policy from justifying such a position. It is therefore even more important to specifically identify what “sensitive data” means in the context of the Draft Policy.

In the US, the definition of “sensitive personal data” varies widely by sector and statute. Generally, personal health data, financial data, credit worthiness data, student data, biometric data, personal information collected online from children under 13, and information that can be used to carry out identity theft or fraud are considered sensitive.⁹

Under Recital 51 of the EU GDPR law, an allusion to Sensitive Personal Data has been made as under:

“Personal data which are, by their nature, particularly sensitive in relation to fundamental rights and freedoms merit specific protection as the context of their processing could create significant risks to the fundamental rights and freedoms. Those personal data should include personal data revealing racial or ethnic origin, whereby the use of the term ‘racial origin’ in this Regulation does not imply an acceptance by the Union of theories which attempt to determine the existence of separate human races.”

The above extract identifies any data and processing that could have implications on the fundamental rights of an individual as sensitive.

⁶ Section 1.2; Page 16 of the Draft National Ecommerce policy, February 23, 2019

⁷ Section 1.2(b); Page 16 of the Draft National Ecommerce policy, February 23, 2019

⁸ WRIT PETITION (CIVIL) NO 494 OF 2012; Judgement passed August 24, 2017 in the Hon'ble Supreme Court of India.

⁹ <https://www.dlapiperdataprotection.com/index.html?t=definitions&c=US>

Although these definitions seem to apply only to an individual, it is beneficial to juxtapose the relevant data sets identified for a collective.

There seems to be no overarching homogeneity in the definitions of sensitive data, and it is imperative to strictly define and cast a wide but effective net to identify data that could be deemed sensitive. Further, as can be seen above, there is also an express need for a demarcation between *Personal* sensitive data and *Sensitive data*. Data can be sensitive for both the individual and a commercial entity depending on the nature of the said data and its potential to be commodified. Another way to view this would be that the primary difference between personal sensitive data and sensitive data would lie in the anonymization of collected data and the commercial application of the same – though this may be seen as a limiting categorization by some.

ELP Comment: *If data which can be considered as sensitive has any commercial or commodity value or use, it must be categorised under the Draft Policy and not under the definitions under PDP.*

AGENCY

The Draft Policy mentions the possibility of a 'data authority' to regulate the sharing of community data to serve larger public interest.

ELP Comment: *It would be beneficial to consider widening the scope of this authority beyond just dissemination of collected data but also to the collection, processing and standardization of the data in order to ensure security and remove the possibility of mismanagement. Most crucially, collation and insightful assessment of data would allow the Government of India ("**Government**") to make informed decisions on policy and strategy.*

The authority may consider the collection and collation of data with the intent to add value to the data collected to benefit not only the operative status quo of e-commerce but also add value to the potential of the digital economy. The data could potentially be processed qualitatively based on sectoral relevance, technology tracking, consumption tracking, supply chain tracking among myriad other avenues.

The potential of the data is far reaching beyond e-commerce. The same can be instrumental in achieving the data localisation and dissemination controls that the Government is intent upon as well as being a source of a national employment and jobs database.

*The authority may be able to process and compartmentalize the data to enable Small and Medium sized Enterprises ("**SMEs**") and Micro Small and Medium Enterprises ("**MSMEs**") to be more export oriented as well as give them more market access via information management.*

The value (qualitatively & monetarily) of the collected and processed data would also have to be adjudged by the said authority and for the same, relevant scientific and technological as well as regulatory and business expertise can be sought.

THE DRAFT POLICY FROM THE PERSPECTIVE OF KEY WTO PRINCIPLES

Introduction

The WTO is the world's largest, (and on many issues, the only) multilateral body for trade related negotiations. Its sluggishness on negotiations notwithstanding, the WTO has been a bulwark for fair trade and the principles that entail this high objective. It was therefore inevitable that concerns over e-commerce would eventually spill over to the multilateral forum. Indeed, several member countries have made proposals on the subject, and continue to push for negotiations.

India's position at the WTO on e-commerce has been reticent. Compared to the strong proposal put forth by the developed West and other interested Member countries of the WTO, India has seemed reluctant to make commitments on multiple fronts relating to e-commerce. Even before the Draft Policy was released, it was clear that India sought to balance its fair-trade obligations with an evening of the playing field – to not just be a resource for the new oil, but also to use it as fuel to power domestic growth.

As observed above, there is growing pressure at the WTO to address e-commerce and to agree upon common minimum thresholds of fair trade in this arena. For example, the **Friends of E-Commerce** is one such group of WTO members pushing for negotiations at the WTO on e-commerce. Additionally, many members of the WTO have also put forth their suggestions in the form of non-papers to take the discussion forward.

India has been hesitant to enter into negotiations on e-commerce at the WTO. In this background, the Draft Policy is being seen as a potential tool for India to defend its position with when such negotiations do come up. Regardless of whether India finally accedes to the Friends of E-Commerce, it is important to assess the Draft Policy under the lens of the core principles and disciplines canvassed by the WTO.

PRINCIPLES OF NON-DISCRIMINATION – MOST FAVOURED NATION AND NATIONAL TREATMENT

Under the aegis of the WTO, member nations have committed to avoid discriminating between their trading partners except in some specific exceptional instances. For example, granting a particular nation a lower customs duty rate for one of their products imposes an obligation on the granting nation to offer the same duty reduction to all other WTO members. This is known as most-favoured-nation ("**MFN**") treatment. It is the first article of the General Agreement on Tariffs and Trade ("**GATT**") and holds a place of priority in trade of goods. MFN is also a priority in the General Agreement on Trade in Services (GATS) (Article 2) and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("**TRIPS**") (Article 4), although in each agreement the principle is incorporated specific to the ambit and function of the agreement in question.

National Treatment is another core principal under the WTO wherein all goods, whether locally sourced or imported into the country, have to be afforded the same treatment within the nation. This means that

there cannot be differential taxation, standards, intellectual property regulations applicable to the imported products once the products enter the local market.¹⁰

ELP Comment: *Considering the prime position these non-discriminatory principles take in the jurisprudence of the WTO, it becomes paramount to ascertain that these principles are incorporated in the national policy to ensure WTO compliance.*

The principles of non-discrimination were initially discussed in the context of e-commerce at the Council for Trade in Services in 1999. Members considered the MFN treatment obligation provided under Article II of the GATS and the national treatment obligation provided under Article XVII of the GATS to be applicable to the supply of services through electronic means. On the issue of like products, Members noted that the main question to be addressed in this regard is whether electronically delivered services and those delivered by other methods should be considered "like services". Some Members suggested that within the limits of individual sectors and modes of supply, it should be possible to agree that likeness would not depend on whether a service was delivered electronically or otherwise.

Further discussions on these principles, when applied to e-commerce, did not resurface until the discussions on e-commerce were revived at the 10th WTO Ministerial Conference in Nairobi ('MC10'). The United States submitted a non-paper in 2016 suggesting that the non-discrimination principles should be secured for e-commerce. In particular, the United States stated that principles of non-discrimination should apply to digital products and would contribute to the stability of the digital economy. The relevant extract from the United States' non-paper is reproduced below:

"2.2. SECURING BASIC NON-DISCRIMINATION PRINCIPLES: Fundamental non-discrimination principles are at the core of the global trading system for goods and services. Rules that make clear that the principles of national treatment and MFN apply to digital products can contribute directly to stability in the digital economy."

In this behalf, the Draft Policy does not appear to explicitly take a discriminatory stance as far as the MFN principle is concerned. However, the same cannot be said for national treatment. The Draft Policy makes explicit its intention to even the playing field by encouraging domestic players to engage with the digital economy in various capacities – be it research and development, capacity building, e-commerce platforms, data analytics and the like.¹¹

¹⁰ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm

¹¹ Page 14-15 of the Draft National Ecommerce policy, February 23, 2019

ELP Comment: *As and when the above stated objectives are shaped into law, it can be foreseen that they will be in the form of incentives and financial contributions, potentially contingent on domestic content. In order to boost the domestic infrastructure and capacities, there would necessarily need to be stimulants provided by the government to fast track growth. If these stimulants are classifiable as violative of core WTO principles – an example would be a subsidy contingent on domestic content – some these policies would be subject to challenge at the WTO even without a specific negotiation on e-commerce. India should therefore be careful to ensure that any stimulants deployed to encourage growth of local capabilities are in line with India's obligations under the WTO (including subsidies). The core principles to be followed would be to avoid disadvantaging overseas e-platforms / suppliers / companies / subsidiaries in comparison to local companies.*

DOMESTIC REGULATIONS – NON-TARIFF BARRIERS

In the context of services and by extension e-commerce, domestic regulations amounting to non-tariff barriers are contemplated under Article VI of the GATS. Article VI requires that in sectors where specific commitments are undertaken, each Member should ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. It also requires that each Member create judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. All of these provisions apply to regulations or standards affecting the electronic supply of services.

In the context of goods, technical regulations, standards and conformity assessment procedures are covered under the TBT Agreement.

ELP Comment: *The question of standards is likely to be particularly important, since one of the basic characteristics of the Internet itself is the use of common frameworks and standards for interconnectivity and interoperability in order to maintain "universal" communication. To that degree, there is a need to ensure that technical standards do not constitute unnecessary barriers to trade in services.¹²*

IMPLICATIONS FOR INTELLECTUAL PROPERTY

Paragraph 4.1 of the Work Programme provides that the Council for TRIPS shall examine and report on the intellectual property issues arising in connection with electronic commerce. The issues to be examined include:

- Protection and enforcement of copyright and related rights;
- Protection and enforcement of trademarks;

¹² Council for Trade in Services, THE WORK PROGRAMME ON ELECTRONIC COMMERCE, Note by the Secretariat, S/C/W/68, 16 November 1998.

- New technologies and access to technology.¹³

Post MC10, the discussion on e-commerce related issues under TRIPS was revived by Brazil and Russia. Communication received from Russia identified gaps under the TRIPS in the context of e-commerce.¹⁴ The relevant text from Russia's communication is reproduced below:

"E-commerce – trade in objects of intellectual property. In this case, gaps in WTO regulation can be caused by the following circumstances.

Cross-border nature of e-commerce often contradicts with traditional principle of exhaustion of intellectual property rights. This situation ultimately leads to questions about the choice of applicable law and jurisdiction in e-transactions.

Also, the fast distribution of digital content creates additional opportunities for the right holder, but at the same time, it leads to the lack of technical protection of such content and significantly reduces the income of the right holder."

Brazil, in its non-paper¹⁵, identified copyright concerns which must be addressed. The relevant portion of Brazil's non-paper is reproduced below:

"4.6. Trade-related aspects of Intellectual Property Rights: The protection of copyright and authors' rights, in conformity with the Berne Convention for the Protection of Literary and Artistic Works and the TRIPS Agreement, must be addressed in light of new technologies provided by the digital environment such as streaming and cloud uploading."

ELP Comment: *In this behalf, it is important to note that the Draft Policy does outline measures to protect intellectual properties and rights arising thereof. Strong anti-piracy and anti-counterfeiting strategies have been contemplated in the Draft Policy, placing an obligation on e-commerce platforms to take strict measures to protect the rights of Trade Market owners. Further, other websites (such as streaming platforms) are stipulated to ensure copyright violations are strictly dealt with. While the burden is placed on e-commerce platforms for protection of their intellectual property, it must be ensured that the procedure to be followed is streamlined and not overly burdensome.*

GATS - IMPLICATIONS FOR TRADE IN SERVICES

The GATS essentially extend the multilateral trading systems and principles to identified service sectors. Article I:2 of the GATS identifies four modes of services which can also extend to cover e-commerce:

¹³ Council for Trade-Related Aspects of Intellectual Property Rights THE WORK PROGRAMME ON ELECTRONIC COMMERCE Background Note by the Secretariat, IP/C/W/128, 10 February 1999.

¹⁴ WAYS TO MOVE FORWARD Communication from the Russian Federation, JOB/GC/131, 14 July 2017.

¹⁵ NON-PAPER FROM BRAZIL, JOB/GC/98, 20 July 2016.

Mode 1: Services supplied 'from the territory of one Member into the territory of any other member' Cross-Border Trade.

Mode 2: Services supplied 'in the territory of one member to the service consumer of any other member' Consumption Abroad.

Mode 3: Services supplied 'by a service supplier of one member, through commercial presence, in the territory of any other member' Commercial Presence.

Mode 4: Services supplied 'by a service supplier of one member, through the presence of natural persons of a member in the territory of any other member' Presence of Natural Persons.

ELP Comment: *EU and Canada among other countries have taken the position that e-commerce would be covered under Mode 1.16 Categorization of e-commerce under Modes 1, 2 or a Mode 5 specially carved out for this purpose would alter the implications for each Member depending on their commitments under the GATS. Once countries take a position on which mode would best categorize e-commerce, they can negotiate upon their commitments under the GATS. Given that one of the Draft Policy's perceived objectives is to be a basis for negotiation at the WTO, Indian objectives should accordingly be clearly identified at the outset in anticipation of the ongoing debate.*

ALIGNING POLICY OBJECTIVES WITH WTO OBLIGATIONS

In view of the key principles of the WTO identified above, it is worth revisiting some of the Draft Policy's objectives – identified at page 16 as follows:

"1.1 A legal and technological framework to be created that can provide the basis for imposing restrictions on cross-border data flow from the following specified sources:

- a) Data collected by IoT devices installed in public space; and*
- b) Data generated by users in India by various sources, including ecommerce platforms, social media, search engines etc.*

The legal and technological framework would also provide basis for sharing the data collected by IoT devices under (a) above with domestic entities for use in research and development for public policy purposes.

1.2 A business entity that collects or processes any sensitive data in India and stores it abroad, shall be required to adhere to the following conditions:

- a) All such data stored abroad shall not be made available to other business entities outside India, for any purpose, even with the customer consent;*

¹⁶ TRADE POLICY, THE WTO, AND THE DIGITAL ECONOMY Communication from Canada, Chile, Colombia, Côte d'Ivoire, the European Union, the Republic of Korea, Mexico, Paraguay and Singapore, JOB/GC/97/Rev.1, 22 July 2016

- b) All such data stored abroad shall not be made available to a third party, for any purpose, even if the customer consents to it;
- c) All such data stored abroad shall not be made available to a foreign government, without the prior permission of Indian authorities;
- d) A request from Indian authorities to have access to all such data stored abroad, shall be complied with immediately;
- e) Any violation of the conditions mentioned above shall face the prescribed consequences (to be formulated by the Government)."

ELP Comment: We have already discussed how there is ample room for further clarity on the scope of "sensitive data" and "data" in general. Beyond that, it must be borne in mind that members of the WTO are looking to negotiate on these issues and secure commitments to free trade from other members. India would be well-served by framing its policy mechanisms in the context of not just its existing WTO obligations, but also those being promulgated by some of its co-signatories at the WTO – some of which have been introduced in this section.

REVENUE IMPLICATIONS FOR DEVELOPING COUNTRIES

Under the Work Programme on Electronic Commerce, the Committee on Trade and Development was given the task to examine and report on the development implications of electronic commerce, taking into account the economic, financial and development needs of developing countries.¹⁷ The Communication made available after the 11th WTO Ministerial Conference in Nairobi ('MC11'), reaffirmed the commitment of the WTO regarding the need to reinvigorate and review the progress under the Work Programme as per the member nations' recommendations and also extended the moratorium on customs duties on electronic transmissions.

ELP Comment: Development implications of e-commerce include revenue implications. Conventional customs duties would be difficult to apply to electronically delivered products. This may create an incentive to bypass taxed routes and move away from conventional trade towards electronic commerce leading not only to economic distortions, but also to losses in government revenue. However, it is not impossible to tax electronic transmissions, and different methods of doing so are being studied by governments. In this connection, seven principles of tax treatment – equity, simplicity, certainty, effectiveness, avoidance of economic distortions, flexibility in the face of technological development, and fairness in the division of tax revenue among countries – have been enunciated by the OECD.¹⁸

¹⁷ Committee on Trade and Development DEVELOPMENT IMPLICATIONS OF ELECTRONIC COMMERCE Note by the Secretariat, WT/COMTD/W/51, 23 November 1998.

¹⁸ Ibid, OECD Observer, No.206, 1997, quoted in WTO, Special Studies 2, page 40.

The African Group has taken a strong position on the development issues,¹⁹ expressing particular concern regarding the digital divide. The relevant extract from the African Group's communication is reproduced below:

"1.3. ... While the world is getting more connected, international bandwidth is unequally distributed and that most developing and least developed countries continue to lag far behind. According to the ITU, more than half of the world's population is not using the Internet, notably 75% of people in Africa.

1.4. The world is confronted with the reality of a deep, persistent and widening digital divide. If this is not addressed, it will drive further technology, income and infrastructural divides. The Panel Discussion also highlighted the extremely high market concentration levels existing in the current global e-commerce space - evident both in terms of how e-commerce trade is distributed across the global economy, and in terms of the number of firms that dominate this space, notably in terms of market capitalization.

1.5. Developing countries need to look beyond the possible benefits of digital solutions, and to start assessing the impact that the lack of digital and technological capabilities would have in cementing and widening the technology divide."

ELP Comment: *India in a joint communication with South Africa sought to re-examine the issue of moratorium from a development perspective.²⁰ It was noted that it would mostly be developing countries, which would suffer loss in customs revenue, if the temporary moratorium on electronic transmissions is made permanent.²¹ However, given that this is not an issue for developed countries, policy space for negotiations must be retained. Moreover, by taking a strict stand on moratorium, the Government should not deprive the domestic market of e-commerce and entailing advantages thereto. A middle ground has to be achieved between zero duty and protection of nascent industries in digital trade.*

PUBLIC POLICY AND NATIONAL SECURITY EXCEPTIONS UNDER THE GATS

Article XIV of the GATS sets out, in paragraphs (a) to (e), specific grounds for justification for measures which are otherwise inconsistent with provisions of the GATS. If e-commerce is brought into the purview of the WTO through the negotiations at play, it is likely that, along with the main non-discrimination principles that are being borrowed for e-commerce, the accompanying exceptions will also feature. These grounds of exceptions or justification relate, *inter alia*, to:

- The protection of public morals
- The maintenance of public order
- The protection of human, animal or plant life or health

¹⁹ WORK PROGRAMME ON ELECTRONIC COMMERCE, REPORT OF PANEL DISCUSSION ON "DIGITAL INDUSTRIAL POLICY AND DEVELOPMENT" Communication from the African Group, JOB/GC/133, 21 July 2017.

²⁰ WORK PROGRAMME ON ELECTRONIC COMMERCE MORATORIUM ON CUSTOMS DUTIES ON ELECTRONIC TRANSMISSIONS: NEED FOR A RE-THINK, Communication from India and South Africa, WT/GC/W/747 13 July 2018.

²¹ Rising Product Digitalisation and Losing Trade Competitiveness, UNCTAD.

- The prevention of deceptive and fraudulent practices
- The protection of the privacy of individuals
- The equitable or effective imposition or collection of direct taxes.

It's worth bearing in mind that the grounds for justification set out in paragraphs (d) and (e) of Article XIV of the GATS only justify inconsistency with the national treatment obligation (Article XVII) or the MFN treatment obligation (Article II) respectively. With regard to measures relating to direct taxation, Article XIV(d) of the GATS allows Members to adopt or enforce measures which are inconsistent with the national treatment obligation of Article XVII. Article XIV(e) of the GATS allows a Member to adopt or enforce measures which are inconsistent with the MFN treatment obligation of Article II.

To be provisionally justified under the exceptions listed in paragraphs (a), (b) and (c) of Article XIV, a measure must be necessary to achieve the policy objective pursued. No such requirement of necessity exists under paragraphs (d) and (e). Once it has been established that the measure at issue meets the requirements of one of the particular exceptions of paragraphs (a) to (e), it must be examined whether the measure meets the requirements of the chapeau of Article XIV. The chapeau of Article XIV requires that the application of the measure at issue does not constitute:

- either 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail';
- or 'a disguised restriction on trade in services'.

Other than the exceptions provided under Article XIV of the GATS, Article XIV bis of the GATS allows Members to adopt and enforce measures, in the interest of national or international security, otherwise inconsistent with GATS obligations. The communication EU, Canada among other countries suggests that disciplines ensuring cross-border data flows and localization may be subject to public policy exceptions. However, there is no clarity on whether the exceptions under GATS would be sufficient to address such concerns.

THE DRAFT POLICY : INTERFACE WITH THE COMPETITION ACT

Introduction

The Draft Policy, unlike the precursor Draft National Policy Framework on Electronic Commerce in India, ("**Draft Policy Framework**")²² which identified the specific goal of "*addressing anti-competitive practices effectively in India*" and provided some policy options for it, does not directly deal with anti-competitive practices in the e-commerce sector.

However, the admitted purpose of the Draft Policy is to provide "*a possible policy framework that will enable the country to benefit from rapid digitalization of the domestic, as well as global economy*"²³ and as such, the Draft Policy recognises the dangers of anti-competitive conduct²⁴ and the necessity to ensure fair competition. To this end, while the Draft Policy refrains from setting out any specific policy objective and goals, it does make a reference to the role of the Competition Commission of India ("**CCI**") and the "The Competition Act, 2002 ("**Competition Act**") and also draws from certain principles of the anti-trust law. In particular, the Draft Policy makes the following points which may have some relevance from the perspective of competition law:

- **Data leading to dominance:** The Draft Policy at various points refers to the relevance of 'data' in what it describes as a 'digital economy'²⁵ and goes on to suggest that a company which "*has access to maximum information about the market, is in a position to dominate it.*"²⁶ The Policy also places reliance on the "*network effects*" in the sector, to support the conclusion of data leading to dominance.²⁷
- **Access to data:** The Draft Policy also brings to the fore, without providing any details of the framework to be adopted, the 'need' to provide access to data in a bid to create a level playing fields for all participants.²⁸ While, recognising that the data pertaining to an individual may not belong to the collecting company, the Draft Policy does seem to indicate that access to data may be provided through regulations, especially to MSMEs and start-up firms.

²² The Draft Policy Framework of July 2018 was made available on the public domain at: <https://www.medianama.com/wp-content/uploads/Draft-National-E-commerce-Policy.pdf>

²³ Para 3 of the Draft National Ecommerce policy, February 23, 2019

²⁴ Page 10 of the Draft National Ecommerce policy, February 23, 2019

²⁵ Pages 6, 11 to 17, 26 (para 4.6 to 4.9) of the Draft National Ecommerce policy, February 23, 2019

²⁶ Page 13 of the Draft National Ecommerce policy, February 23, 2019

²⁷ Pages 6, 13, 24 to 27 of the Draft National Ecommerce policy, February 23, 2019

²⁸ Page 12 of the Draft National Ecommerce policy, February 23, 2019

- **Regulation of price of advertisement:** As a solution to address the importance of data and the limited access to it, the Draft Policy also suggests regulating the prices of advertisements.²⁹
- **Leveraging of data:** Linked to the relevance of data, the Draft Policy discusses the possibility of companies accessing data to leverage the same to indulge in, “selling at a loss and capital burning” as well as through product development.³⁰

ELP Comment: *This absence in the Draft Policy of specific recommendations in relation to anti-competitive practices in the e-commerce sector is perhaps a result of the setting up of the Competition Law Review Committee in September 2018 which is mandated to, inter alia, “review the Competition Act/ Rules/ Regulations, in view of changing business environment and bring necessary changes.”³¹ This forbearance in the Policy is laudable.*

Some interesting issues that emerge from the observations made in the Draft Policy are discussed in this section of the white paper, and we hope the same are taken into consideration for formulation of any further policy document.

ISSUES PERTAINING TO DATA LEADING TO DOMINANCE

ELP Comment: *As mentioned above, the Draft Policy proceeds on an understanding that the relevance of data in the recent times, implies a position of dominance for companies which have access to such data. This approach presents the dangers of theoretical concepts being applied without conducting suitable market assessment and disregarding the peculiarities of a certain sectors, especially in the innovation technology space. In brief, mere access to a large pool of data, by itself cannot, and should not be seen as an indication of dominance.³² Any regulatory inference based merely on “access” to data may amount to distortion of the factual and economic realities in the sector.*

A few issues that should be considered in this regard by policy makers are:

- **Mere access to data is not bad:** While access data is an increasingly relevant factor for a large number of sectors now, it would be inappropriate to suggest that the relevance of data is new. Data has long been essential for business planning and strategy. Technology has certainly enabled

²⁹ Para 4.6 of the Draft National Ecommerce policy, February 23, 2019

³⁰ Page 12 of the Draft National Ecommerce policy, February 23, 2019

³¹ Government constitutes Competition Law Review Committee to review the Competition Act, September 30, 2018, Press Information bureau, Government of India, Ministry of Corporate Affairs, available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=183835>

³² See generally, Daniel Sokol and R.E. Comerford, “Antitrust and Regulating Big Data”, 23 George Mason Law Review 1129, 1135 (2016), available here. Also see Anja Lambrecht and C. E Tucker, “Can Big Data Protect a Firm from Competition?” (2015) (“big data is not inimitable or rare, that substitutes exist, and that by itself big data is unlikely to be valuable”), available [here](#); Andres V. Lerner, The Role of “Big Data” in Online Platform Competition available [here](#).

easy access to the same while also enabling easier aggregation of data. However, data has always been relevant for businesses across sectors.

Pertinently, mere “access” to data should not have any implications under the competition regime. Furthermore, mere access to and use of data cannot automatically imply dominance. Dominance, as an economic and legal concept, is dependent on a range of factors and no single factor can be determinative of dominance.³³

Moreover, as we will discuss below, it is an established economic principle (adopted by the competition regime) that size alone is not bad. In fact, for a market, large companies with economies of scale often translate to better services and cheaper products for consumers. The size of an enterprise by and of itself, cannot be seen to be a problem and should not be seen to be concern for operation of competitive forces in a market. Only where the size of an enterprise leads to some anti-competitive effects on the market, for both, the competitors and consumers (measured as loss of consumer welfare or harm to economic efficiency), should regulatory scrutiny of any nature come into play.

The principle that the size of an enterprise is in itself not bad has been accepted under competition law, where application of principles of competition law cannot be based merely on large size.³⁴ An adverse effect on competition is necessary for redressal under the Act and merely being dominant may not be the sole basis of regulatory interference, more so, in e-commerce sector, which represents an increasingly important channel of distribution of products and services.³⁵

- **Network effects and data as entry barriers are not a ‘gospel truth’:** A large part of the conclusions in the Policy are also derived from the theory of ‘network effects.’ However, the application of the principle of ‘network effects’ requires some caution and while it is an economic principle of great value it does not represent the gospel truth across the sector. There is literature³⁶ and evidence³⁷ to suggest that data of itself has not deterred entry into the market.

³³ Determination of whether a dominant position exists has to be made on the basis of the factors enumerated under Section 19(4) of the Competition Act which include market share of the enterprise, position and strength of competitors, dependence of consumers and entry barriers, amongst others. *Belaire Owner Association v. DLF Limited*, Case No. 19/2011at para 12.43 (“The evaluation of this “strength” is to be done not merely on the basis of the market share of the enterprise in the relevant market but on the basis of a host of stipulated factors such as size and importance of competitors, economic power of the enterprise, entry barriers etc. as mentioned in Section 19 (4) of the Act. This wide spectrum of factors provided in the section indicates that the Commission is required to take a very holistic and pragmatic approach while inquiring whether an enterprise enjoys a dominant position before arriving at a conclusion based upon such inquiry.”)

³⁴ See generally, Masimilliano Vatiere, “Power in the market: on the Dominant position,” available here referring to the decision of the European Court of Justice in *Hoffman La-Roche v. Commission of European Communities*, [1979] ECR 461. See also, *Meru Travels Solutions Private Limited v. ANI Technologies Private Limited*, Case No. 25 to 28 of 2017 available here. (“Dominance in itself is not bad, its abuse is. The Competition Act, 2002 made a paradigm shift from ‘monopoly being per-se bad’ to ‘abuse of dominant position’ being bad in law.”).

³⁵ See, *Mr. Ashish Ahuja v. Snapdeal.com through Mr. Kunal Bahl, CEO & Ors.*, Case No, 17 of 2014, available here where the CCI recognises that online and offline are two distinct ways of distribution.

³⁶ D.S. Evans and Richard Schmalensee, “Network Effects: March to The Evidence, Not to The Slogans”, *CPI Antitrust Chronicle* (September 2017), available here; Marina Lao, “Erring on the Side of Antitrust Enforcement When in Doubt in Data-Driven

Similarly, network effects do not hold true for the entire e-commerce sector, which comprises of various markets. Data, in fact, it has been argued, has such economic characteristics that it cannot foreclose the market.³⁸ The market is, in fact, characterised by constant innovation and disruption which belies the applicability of network effects as existing for the entire e-commerce sector.

- **Regulating extent of enforcement:** The e-commerce sector (and the technological market in general) is characterised by disruptive innovations requiring the anti-trust regulators to adopt a very cautious approach.³⁹ Over regulation can often lead to freezing of innovation, which would be antithetical to the goal of promoting competition and innovation through regulation. An e-commerce policy should adequately account for the negative effects that over regulation can have on innovation and innovators. Notably, the CCI, considering the disruptive nature of the sector, has adopted a very balanced approach on e-commerce and hi-tech sectors, so far.⁴⁰
- **Motivated complaints requiring clarity in policy:** The emergence of the e-commerce sector has been linked with reduction in costs for enterprises and prices of consumables for the consumers, with easy and increased availability of a variety of products and services. It represents a departure from, and a challenge to, the earlier known business and traditional marketplace. Complaints of anti-competitive conduct against such new players (especially with disruptive capabilities) from the existing market participants are likely. However, at the same time, there may *prima facie*, be significant benefits for the consumers such as, low prices and greater choice due to existence of these new innovative players. Any competition enforcement or policy initiative in e-commerce sector should ideally require a balanced approach in terms of the nature and timing of regulatory interference.⁴¹

Mergers”, in Douglas H. Ginsburg, *An Antitrust Professor on the Bench - Liber Americorum - Vol. I* (Institute of Competition Law, 2018), (“a large online platform’s competitive edge arguably comes from its engineers’ sophisticated know-how and analytical tools, and not its possession of big data itself”); Daniel Sokol and R.E. Comerford, “Antitrust and Regulating Big Data”, 23 *George Mason Law Review* 1129, 1135 (2016)

³⁷ Evidence of the limited applicability of network effects can be found in Evans and Schmalensee’s article. Additionally, replacement by Facebook of MySpace and Orkut reveals that a new entrant without data can also enter into the market. Google’s failure to enter into social networking through Google+, a product which they recently discontinued also reveals that a allegedly dominant entity which access to data cannot necessarily leverage it to enter other markets.

³⁸ Daniel Sokol and R.E. Comerford, “Antitrust and Regulating Big Data”, 23 *George Mason Law Review* 1129, 1135 (2016) (“As suggested below, both theory and actual cases support a finding that the characteristics of data are such that larger online firms cannot foreclose rivals from replicating the benefits of Big Data they enjoy, and that Big Data in the hands of large firms does not necessarily pose a significant antitrust risk.”)

³⁹ See generally, Alexandre De Stree, Pierre Larouche, *Disruptive Innovation and Competition Law Enforcement*, OECD, October 20, 2015, available here.

⁴⁰ See, for instance, *C. Shanmugam & Other Vs. Reliance Jio Infocomm Limited & Ors.*, Case No. 68/2016, available here where the CCI refused to interfere into the pricing structure of Reliance Jio noting that it was not dominant in the market; *Fast Track Call Cab Pvt. Ltd. v. ANI Technologies Pvt. Ltd.* Case 06/2014 available here where the CCI found that owing to intense competition between Ola and Uber none had a dominant position and allegation of discounting could not be looked into; *Matrimony.com Limited Vs. Google LLC & Others*, Case No. 7 of 2012, available here where the CCI noted the caution with which a regulatory authority should approach antitrust issues in technology sector.

⁴¹ The CCI and the Appellate Authority (the National Company Law Appellate Tribunal/NCLAT) have experienced this with respect to e-commerce marketplaces as well as taxi aggregators like Ola and Uber. In 2014, an individual filed a complaint

ELP Comment: *Given the above, the Draft Policy should adopt a more cautionary view of data's relevance to a dominance assessment. De facto attribution of dominance or its abuse on account of access to data may be antithetical to the well-established principles of law and economics and may also harm consumer welfare. As discussed, the Policy should acknowledge these issues and address important concerns that arise out of it.*

ISSUES PERTAINING TO ACCESS TO DATA

The Draft Policy also suggests that access to data may be provided to MSMEs and start-ups. The Draft Policy does draw reference to the aim of providing access to data, however the principles guiding the same are not discussed in detail.

For such provision of access, the Draft Policy itself recognises that ownership of data may pose a concern. Further, the policy note also seeks to place some restrictions on sharing of data between organizations, which may present some principle friction with the proposal of providing access to data. However, apart from such principle contradictions, the access to data aimed at providing a level playing field raises some pertinent issues under competition law as well.

Competition law seeks to maximise consumer welfare as well as economic efficiency by maintaining competition in the market. The law and economics behind competition law is based on a nuanced understanding of opportunities for business. Legitimate means and methods of achieving greater power in the market are not frowned upon and in fact, are in the interests of consumer welfare and economic efficiency.⁴² The Policy itself recognises the benefits that the proliferating e-commerce market has had on consumers.⁴³

ELP Comment: *Limited discussion on the how the government plans to deal with the issue of access to data, makes it important to touch upon issues that are likely to arise. For instance, mandatory obligations on certain entities who have access to certain data sets to provide access to that data (on certain terms and conditions) to MSMEs and start-ups. Such blanket obligations or obligations that do not account for important business considerations underlying relevant data in certain markets is likely to reduce the economic efficiencies in the market by reducing incentive and innovation.*

Notably, compulsory provision of resources is guided by strict criterion and in most cases requires that denial of the resource would harm consumer welfare (by denying access to a consumer to a product, as in case of a drug) or economic efficiency (by denying entry to a new entrant).

against various e-commerce platforms which was dismissed by the CCI. (Mohit Manglani v. Flipkart & Ors., Case 80/2014, available here). Similarly, the merger approval granted by the CCI to Wal-mart and Flipkart has been challenged by the Confederation of All India Traders before the NCLAT. The NCLAT however is yet to issue notice Order here. During 2014 to now, over 5 cases have been closed by the CCI against Ola and Uber, all of which have been filed by Meru. 4 out of the 5 cases have been closed without any investigation.

⁴² See generally, Areeda, Hovenkamp and Turner, "Antitrust Law: An Analysis of Antitrust Principles and Their Application" Aspen Law and Business (2010) and Stephen Martin, "The Goals of Antitrust and Competition Policy," available here

⁴³ Pages 3 and 24 of the Draft National Ecommerce policy, February 23, 2019

Under competition law, an obligation to share or provide access to a resource can only be placed on a dominant entity and only where, the underlying resource would have to be characterised as an essential facility.⁴⁴ Such a characterization of “essential facility” proceeds from an assessment of evidence and represents a rather high standard of “*indispensability*” as opposed to “*convenience*” or “*preference*”.⁴⁵ The application of such a doctrine is however seen as exceptional. Furthermore, there is an evident divide on the necessity of such doctrine, with the Competition Appellate Tribunal in India even referring to it as being “*beyond comprehension*”.⁴⁶

Similar provisions of compulsory licensing also exist under the Indian Patents Act, 1970 (“**Patents Act**”), however, the statutory provisions provide detailed guidance situations in which license can be granted. There are certain pre-requisite conditions, given under Sections 84-92 of the Patents Act, which need to be fulfilled if a compulsory license is to be granted in favour of someone. The conditions place a high burden of proof and the exceptional nature of the provision is evident from the few instances in which a compulsory license has been granted in India.⁴⁷

ELP Comment: *With the foregoing in mind, any suggestion or provision to regulate access to data must keep in mind that data may not, in all cases, be essential enough to create a mandatory obligation to provide access. Moreover, not all data sets have characteristics of an intellectual property and any compulsory regime requiring provision of data would grant it such status which would be antithetical to its economic characteristics. Without a detailed assessment, a policy that does not take into account the requirements of incumbents as well as those of the aspirants with regard to access of data, may harm the interests of competition rather than encourage it.*

⁴⁴ Typically, such “essential facilities” are found where a dominant company has an infrastructure monopoly (e.g., a gas pipeline, port, or telecommunications infrastructure) that represents the only means for competitors to bring products or services to market. Courts and authorities are generally very cautious in imposing such “positive” duties to supply, because they interfere with companies’ property rights and may in fact distort competition. See generally, Case C-7/97 Brönner [1998] ECR I-7791, Opinion of Advocate General Jacobs, paras. 56-57; “[T]he Sherman Act does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.” *Trinko*, 540 U.S. at 410-11 (explaining that the Supreme Court has “never recognized” an “essential facilities doctrine”)

⁴⁵ This becomes evident from a large number of decision in the European Union and United States e.g., Case T-374/94 *European Night Services* [1998] ECR II-3141, paras. 208-209; Case C-7/97 Brönner [1998] ECR I-7791, para. 41; Case T-201/04 *Microsoft* [2004] ECR II-2977, para. 322; Case C-418/01 *IMS Health* [2004] ECR I-5039, para. 38; Case C-241-2/91 *Magill* [1995] ECR I-743; *Hecht v Pro-Football Inc* (1977) 570 F.2d. at 992-93

⁴⁶ The COMPAT in *Indian Trade Promotion Organisation v. CCI and others*, Appeal No. 36 of 2014 (COMPAT).has, while discussing the doctrine of “essential facilities” as developed by the courts in European Union, stated that, “(I)t is beyond comprehension of any reasonable person as to how a person/entity can be compelled to part with, permanently or temporarily, his/its own assets for the benefit of others, which may, at times detrimental to his/its own interest.” The doctrine however finds mention in *See, Arshiya Rail Infrastructure Ltd. v. Ministry of Railways (MoR) through the Chairman, Railway Board and another*, Cases Nos. 64 of 2010, 02/2011 and 12/2011 (CCI), though it hasn’t been applied in India

⁴⁷ India has so far issued only one compulsory license for the drug Nexavar in 2012.

ISSUES SURROUNDING LEVERAGING OF DATA

The Draft Policy at multiple places refers to leveraging of data by companies for product development as well as selling at lower costs. In this regard, the Policy highlights that companies with access to data through their presence in one market, can benefit from a competitive edge in a market for other services and products. This suggests that the Draft Policy acknowledges that not only can data be utilized in one market but can be used by entities to create synergies in other markets. The Draft Policy does not very clearly spell out the concern arising from leveraging.

Under Competition Act, leveraging is a concern only where the entity is found to be dominant. The requirement of dominance is as such the first filter. Further, a plain reading of Section 4(2)(e) would suggest that an entity which uses its **dominance** in one market *to enter into* another market or protect the original market would be viewed as abusing its dominant position. However, such a reading would lead to irrational conclusions. This would imply that once an entity is dominant in one market, it can never enter into a new market if it chooses to use its dominance in other market. It is important for the enterprises to be able to capitalize its existing resources in the most efficient way. Any policy recommendation to the effect that imposes unreasonable restrictions on seamless flow and use of data by an entity in making an entry into other markets would only be against efficiency and economic development.

In this context the CCI has observed that, *"to establish a case for leveraging under the Act, there should be a conduct on the part of the dominant enterprise/group to demonstrate the use of dominant position to enter into or protect another relevant market."*⁴⁸ Conduct in this regard has been understood by the CCI as *"abuse regarding pricing or pressurizing the consumers to buy its other product"* while selling the product in which the enterprise is found to be dominant.⁴⁹ Therefore, there has to be some unfair conduct on part of the dominant entity to enter into a new market⁵⁰.

ELP Comment: *The same understanding ought to be reflected from the Draft Policy as well, which should not recommend scrutiny of every attempt by a company to enter from one market to the other, but only those entries or business strategies that are anti-competitive. A nuanced and calibrated approach to this end should be evident from the Policy to avoid uncertainty for businesses, which may have a chilling impact on competition as well as innovation.*

ISSUES PERTAINING TO REGULATION OF PRICE OF ADVERTISEMENTS

As a mechanism to address the issues arising out of the necessity and importance of data, the Draft Policy also recommends regulation of advertisement prices. We have in our comments highlighted the dangers of adoption of an absolute theory with respect to importance of data. However, irrespective of the concerns

⁴⁸ XYZ v. REC Power Distribution Company Ltd., Case No. 30/2014 at para 6.8

⁴⁹ M/s Saint Gobain Glass India Limited v. M/s Gujarat Gas Company Limited, CCI Order dated April 23, 2015 in Case No. 20/2013 at para 61.

⁵⁰ The CCI, in HNG Float Glass v Saint Gobain, while dealing with the issue of leveraging noted that conduct of the opposite party was found not to attract the provisions of section 4(2) as this was noted to be one of the sales strategies for selling products. No abuse regarding pricing or pressurizing the consumers to buy its other product while selling architecture glasses was found to be imposed by the opposite party in the market. CCI Order dated October 24, 2013 in Case No. 51 of 2011.

raised above, regulation of price of advertisements raises issues of its own which should be duly considered.

Regulation of pricing by any regulatory authority has to be accompanied by sound economic assessment of the cost structures. The policy of price regulation should also be guided by relevant theoretical underpinnings which lay down the reasons and needs of such economic regulation with sufficient clarity or in other words, the motivation for such regulation should be self-evident. The effects of such regulation should also be assessed in greater detail.⁵¹

Competition law has adopted a very cautious approach towards regulation of or damping of prices. This flows from a recognition that markets itself are capable of addressing such distortions and conduct.⁵² While there may be disagreements on the self-correcting mechanism of the market⁵³ undoubtedly, regulation of price without a compelling reason is likely to distort legitimate competitive forces in the market.

ELP Comment: *Given the guidance that competition law offers on this aspect and the general caution that should be exercised while implementing an economic regulation, it is advisable that the suggestion of regulating prices of advertisement is analysed and assessed in more detail. Absent sufficient assessment of all relevant factors, any regulation may have a pronounced adverse effect, destroying and distorting the two-sided nature that e-commerce businesses follow.*

MULTIPLICITY OF REGULATORS AND NEED FOR A SEPARATE REGULATOR

The Draft Policy also recognises that e-commerce has an inter-disciplinary nature and to that extent suggests that the Standing Group of Secretaries on e-Commerce can be used as the main mechanism to tackle inter-departmental issues and make policy recommendations.⁵⁴

Some such broad issues that may be important to consider in that regard –

- Identification of the broad goals for particular sectors (which purpose this Policy to a large extent achieves);
- Prescribing some form of 'core issue' test for each area of regulatory overlap. Such a test would be in line with judicial precedent. For instance, addressing competition concerns in the e-commerce sector should be left to the domain of the CCI, however, law should provide

⁵¹ The seminal work of Paul L Joskow and Nancy L Rose on "Effects on Economic Regulation" (1989) available here is instructive about the theoretical underpinnings of economic regulation.

⁵² See generally, Jörg Philipp Terhechte, "Excessive prices and goals of competition policy: An enforcement perspective", Hamburg University School of Law, available here

⁵³ A. Ezrachi/D. Gilo, "Are Excessive Prices Really Self-Correcting?," 5 Journal of Competition Law & Economics (2009), p. 249 available here

⁵⁴ Pages 10 and 25 of the Draft National Ecommerce policy, February 23, 2019

for co-operation between the CCI and the sectoral regulator to ensure that the CCI benefits from the sectoral regulators knowledge.⁵⁵

- The Standing Group should be guided by the goal of increasing seamless co-operation between regulators including, the CCI and any sector specific regulator that may be established, with the aim of maximising consumer welfare and reducing transaction costs.⁵⁶

In this background we recall that, sector-specific regulators often raise concerns of turf wars with the competition regulator, requiring creation of a nuanced policy objective and goals for establishing constructive relationship between competition and sectoral regulators. The tension between the CCI and the Telecom Regulatory Authority (“**TRAI**”)⁵⁷ as well as the various challenges to the CCI’s⁵⁸ jurisdiction indicate the kind of the issues that can arise due to innocuous and often, laudatory statutory provisions which lead to overlapping duties.⁵⁹

⁵⁵ The Competition Act 2002 includes provisions (Section 21 and 21A) which allow the competition authority and a sectoral regulator to seek an opinion from each other on issues.

⁵⁶ Inter-American Development Bank and OECD, *Creating Constructive Relationships Between Competition Policy and Sectoral Regulators: Comments of the United States*, available [here](#); Dr. Gamze Aşçıoğlu Öz, *The Role of Competition Authorities and Sectoral Regulators: Regional Experiences*, UNCTAD, available [here](#)

⁵⁷ The interface between CCI and TRAI has witnessed statements made by the Chairperson of both authorities (See, Kiran Rathee, *Business Standard*, CCI tells TRAI to consult it on predatory pricing, market dominance, July 28, 2017, available [here](#); Tanya Thomas, *Business Line*, Turf wars rage between CCI and TRAI over telecom tariff, July 27, 2018, available [here](#)) as well as a decision on the CCI’s jurisdiction by the Bombay High Court (*Vodafone India Limited v. CCI & Ors.*, W.P. (C) 8594/2017, operative part available [here](#)), which finally culminated before the Supreme Court in *CCI v. Bharti Airtel and Ors.*, SLP (C) No. 35574/2017 available [here](#) where the Supreme Court held that while both regulators were ‘special’ CCI had follow on jurisdiction.

Similarly, the order that had changed the definition of ‘significant market power’ (SMP) to identify predatory pricing, issued by TRAI was struck down by its appellate authority – the TDSAT. See *TDSAT junks Trai's predatory pricing order* (*Economic Times*, December 14, 2018). TRAI has now approached the Supreme Court against the decision of the TDSAT. See, *TRAI moves SC against TDSAT order on predatory pricing* (*Business Today*, January 2, 2019)

⁵⁸ See generally, *Ericsson v. CCI & Ors.* L.P.A. No. 246/2016 (pending before the Division Bench of Delhi High Court on jurisdiction of the CCI on issues relating to Patents Act); *Anand Prakash Agarwal v Dakshin Haryana Bijli Vitran Nigam Limited*, Appeal No. 33 of 2016, decided by the Competition Appellate Tribunal addressing the issue of overlap between electricity regulator and the CCI; *Institute of Chartered Accountants of India v. CCI & Anr.*, W.P. No. 2815/2015 (pending before the Delhi High Court on the CCI’s jurisdiction to look into alleged anti-competitive conduct by ICAI)

⁵⁹ See generally, Rahul Singh, *The Teeter Totter of Regulation and Competition: Balancing the Indian Competition Commission with Sectoral Regulators*, 8 *Wash. U. Global Stud. L. Rev.* 71 (2009), available [here](#), for instances of legislations with overlapping provisions with those of the Competition Act, 2002.

ELP Comment: *The Draft Policy also, reveals forbearance with respect to a sector specific regulator. In this regard, it may be noted that with a potential dedicated e-commerce regulator such issues of overlap may arise.⁶⁰ While, the benefits of sectoral regulators are undisputable in certain cases, specifically for complex sectors, policy formulation needs to be conscious to the need of such a sector specific regulator and the necessity to minimise the friction between the competition (and other pre-existing regulators) and sectoral regulator.⁶¹ Such consciousness should involve appropriate analysis of a need for a specific sectoral regulator for e-commerce should be conducted on inter alia, a cost benefit analysis model. Furthermore, the possibility of jurisdictional overlaps should be minimised by clear drafting of the subsequent statutes or its accompanying policy, in this case, the statute establishing the e-commerce regulator.*

CONSOLIDATION IN THE SECTOR

The Policy also briefly refers to the practice of mergers and acquisitions leading to some concerns in the e-commerce sector. Specifically, the Policy notes that, *“World over, the experience has been that e-commerce players like social media platforms have taken over potential competitors early. This prevents the emergence of the threats to market position later on.”⁶²*

ELP Comment: *In this regard, we note that the Competition Act, already provides for mechanism of ex-ante regulation of mergers and acquisitions or combinations.⁶³ Notably, regulation of combinations is an ex-ante exercise which is carried out within the legal and economic parameters laid down under the Act, requiring the CCI to inquire into two counterfactual market scenarios i.e., with and without the combination, to assess whether the combination would harm competition. In such a forward-looking analysis, potential competition offered by the target may also be taken into account, addressing the concerns that the Draft Policy raises. It will be important that mergers & acquisitions by larger players of the growing competitors are examined as per the tested principles of competition law and due regard must also be given to the freedom of enterprise to do business to grow organically and efficiently in a manner that is in the best interests of the competition and the consumers.*

⁶⁰ A reading of the Draft E-commerce Policy suggests potential overlap with the DIPP, the CCI, the Consumer Protection Forums, the authorities empowered under the Information Technology Act, 2002 and potentially Data Protection Authority that may be created under any Privacy Protection law that is enacted

⁶¹ See, Alexandre de Streel, *The Relationship between Competition Law and Sector Specific Regulation: The case of electronic communications*, *Reflets et Perspectives*, XLVII, 2008/1, 53-70, available here which provides an illustration of the broad basis on which the responsibilities can be distinguished

⁶² Para 4.7 of the Draft National Ecommerce policy, February 23, 2019

⁶³ Presently mergers and acquisitions are subject to the requirement of a mandatory prior approval, only where (a) the target enterprise has assets of more than INR 3500 million (~ USD 52.25 million) and the turnover of more than INR 10,000 million (~ USD 149.28 million);⁶³ and subsequently (b) the combined asset and turnover of the parties (acquirer and the target) or the acquirer group and the target fall within one of the limits laid down in Section 5 of the Act. See, Ministry of Corporate Affairs, Notification, S.O. 988(E) dated March 27, 2018 (“de minimis exemption”) and Section 5 of the Competition Act.

Conclusion

The Draft Policy note also raises some relevant issues regarding increased use of Artificial Intelligence (“AI”) as well as creation of ‘technology hubs’ both of which present unique issues and opportunities for the CCI as well. However, the Draft Policy does not, and rightly so, deal with the competition aspects of these in detail. Given that the report of the Competition Law Review Committee is pending, such issues can be appropriately dealt with by that body and recommendations from the same can be included in a comprehensive policy document.

Our analysis also reveals that while e-commerce does have some unique characteristics, the assessment of the same cannot be conducted in a void. To adequately assess the impact, it is necessary to conduct a study which is thoroughly informed by the legal and economic considerations relevant to the sector. The CCI has also initiated a study in this regard. Such sectoral studies would help the regulatory authorities reduce the possibility of both, misplaced, over-zealous enforcement and under enforcement. In the absence of such sound studies the necessary infrastructure, to build a viable Policy document may be missing.

In summary, the e-commerce sector presents unique regulatory challenges, exacerbated by its disruptive, innovative nature. Any policy for the sector can have massive implications for competition in the sector and should necessarily account for the nascency of the sector. A cautionary approach must be adopted for any regulatory interference, especially to address antitrust issues, taking due care that innovation and competition is not harmed by over zealousness.

REGULATORY TOOLS USED IN OTHER JURISDICTIONS AND FIELDS

The Draft Policy has set out significant objectives for governance of e-commerce in India. While this paper has outlined potential areas of concern in the mechanisms proposed in the Draft Policy, there are also other useful mechanisms being deployed by various governments, not just in other jurisdictions but also in India. One prominent tool is the Regulatory Sandbox model.

REGULATORY SANDBOX MODELS

A regulatory sandbox is a framework set up by a financial sector regulator to allow small scale, live testing of innovations by private firms in a controlled environment (operating under a special exemption, allowance, or other limited, time-bound exception) under the regulator's supervision.⁶⁴ The Regulatory Sandbox creates a safe space where a FinTech and a limited number of real consumers can engage in an "on-market" trial. Some of the regulatory requirements can be amended to create a bespoke framework for the duration of the trial where the normal regulatory consequences do not apply.⁶⁵ Tech regulators across the world are contemplating regulatory sandbox models because of the ability to safely test new innovations without smothering tech proliferation and at the same time protecting consumers. This section provides a few examples of regulatory sandbox models being contemplated.

Regulatory Sandbox in Japan

The Regulatory Sandbox is a Japanese regulation strategy being implemented by the Ministry of Economy, Trade and Industry ("METI").

The Regulatory Sandbox, as stated by METI, is intended to "develop an environment in which businesses are able to conduct demonstration tests and pilot projects for new technologies and business models that are not envisaged under existing regulations with a limited number of participants and within the predetermined implementation periods. This environment will allow businesses to conduct demonstration tests and pilot projects quickly and collect data that may contribute to regulatory reforms".⁶⁶

While no specific boundaries have been identified for the Regulatory Sandbox, the intended focus is meant for four areas of particular interest:

- Internet of Things
- Artificial Intelligence

⁶⁴ Regulatory Sandboxes and Financial Inclusion, October 2017, a CGAP Working Paper by Ivo Jenik and Kate Lauer, available at <https://www.cgap.org/sites/default/files/Working-Paper-Regulatory-Sandboxes-Oct-2017.pdf>

⁶⁵ <https://industrysandbox.org/regulatory-sandboxes/>

⁶⁶ https://www.jetro.go.jp/ext_images/en/invest/incentive_programs/pdf/Detailed_overview.pdf

- Big Data
- Blockchain

Regulatory Sandbox Consultations in Europe

The European Commission (EC) plans to streamline policies and measures to encourage innovation in the financial, data and E-commerce services area and build capabilities for new FinTech services to be introduced in the European Union. To this end, it conducted a public consultation similar to the Indian government, laying out its objectives and proposed a framework that will allow for free and fair trade.

The objective was a framework that would ensure the below essentials for the FinTech sector:

- Inclusivity
- Financial Stability
- Security of consumers, businesses and investors

Goals and objectives were to be achieved via innovation hubs, academies and regulatory sandboxes which essentially operated as controlled test environments in which regulations can be temporarily modified.

There was much support for the creation of European-wide regulatory sandboxes to prevent national divergences and promote cross-border projects, operated by European Supervisory Authorities and the European Central Bank through guidelines and local initiatives.⁶⁷

Regulatory Sandbox in India

The Securities and Exchange Board of India ('SEBI') has also considered a regulatory sandbox for the Indian fintech diaspora. The Sandbox policy will allow companies to test products in a closed environment, a particular geography or among a set of users, before they are allowed roll out commercially meeting all regulations.

In light of the invalidation of cryptocurrencies and massive technology interventions in the financial sector, it has become important for the regulator to consider a holistic policy towards the same.⁶⁸

The Regulator has set up a committee to consider the concept of a regulatory sandbox in which the concepts of e-commerce and data management will also likely have major implications.

⁶⁷ <https://www.bbva.com/en/proposals-promote-innovation-fintech-sector-europe/>

⁶⁸ <https://economictimes.indiatimes.com/markets/stocks/news/sebi-plans-sandbox-policy-for-tech-cos/articleshow/67176693.cms>



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