Synopsis of the CCAOI-ISOC Delhi webinar on Draft National E-Commerce Policy

Background

The Department for Promotion of Industry and Internal Trade, Government of India (DPIIT) has released a draft of the National eCommerce Policy (draft policy) and has invited public comments on the draft policy by 29 March 2019.

The CCAOI with the support of the Internet Society India Delhi Chapter (ISOC DEL) organised a webinar to discuss the draft policy on 18 March. The objective of the discussion was to inform various stakeholders of the provisions of the Draft Policy and to highlight issues of concern.

The session was moderated by Amrita Choudhury and Subhashish Panigrahi and was attended by over 45 participants from different stakeholder communities across the country. The speakers participating in the session were Devika Aggarwal from NASSCOM; Ankit Anand from Reliance Jio; Nikhil Pahwa from Medianama; Parminder Singh from IT for Change and Dr. Mahesh Uppal from ComFirst (India) Private Limited.

Smitha Krishna Prasad of the Centre for Communication Governance at National Law University, Delhi provided an overview of the draft policy paper, which was followed by the speakers sharing their perspectives on the draft policy. The discussion concluded with an interactive session wherein the speakers answered questions put to them.

Highlights of the discussion

The key issues discussed in the webinar and the comments shared by the participants have been elucidated below:

1. Shortcomings of the Draft Policy

While most speakers welcomed the draft policy as an important step towards regulation of e-commerce in India, the following shortcomings were highlighted as a cause of concern:

- Many terms used in the draft policy have not been defined. For instance, Aggarwal pointed out that it is unclear whether the meaning of ‘sensitive data’ has to be understood in light of the definition provided in the Personal Data Protection Bill, 2018 or the Information Technology (Sensitive and Personal Data and Information Reasonable Security Practices and Measures) Rules, 2011 (SPDI Rules). The lack of clearly defined terms led Pahwa to regard the draft policy as ‘misleading’.

- It was suggested by Uppal that the draft policy should not be concerned with technical measures to be undertaken by businesses, but with the advisable approach towards e-commerce. It must be a simple document with clearly stated objectives and recommendations.

- The fact that complex restrictions are being proposed for e-commerce by the draft policy, which are distinct and absent from offline commerce, was criticised as being biased against e-commerce and...
creating an artificial distinction between online and offline commercial activities. Pahwa highlighted this while discussing the rights of trademark owners.

2. Ownership and Categorisation of Data:

The Draft Policy has introduced three distinct categories of data, namely, (a) personal; (b) community and (c) national data. The following concerns were raised in relation to this classification:

- The term ‘community data’ is not defined under the draft policy and there is no consensus on the meaning of this term. Most speakers including Anand and Pahwa agreed that there is a need to define the different categories of data and to explain the rationale for distinguishing between them.

- The need to adopt safeguards when categorising any data as ‘community data’ was discussed. Pahwa pointed out any personal user information should not be covered under the ambit of community data.

- It was highlighted by Uppal that the draft policy must ensure ownership and control of data by the user.

- An alternate view was raised by Singh who spoke of the need to recognise the intrinsic value in data as a national resource and to utilise it fully in order to be able to create an AI driven e-commerce infrastructure in India like that of China and the U.S.

3. Data Sharing and Data Localisation:

The Draft Policy envisages restrictions on cross border transfers and disclosures of various categories of data.

- The restrictions placed on cross-border data flows in the draft policy were attacked by Aggarwal for lacking any rationale and by Uppal for absence of evidence by way of use cases demonstrating benefits to the economy or favourable geo-political ramifications.

- Another objection raised to data localisation by Aggarwal was that such a requirement would have a stifling effect on businesses and would amount to micro-management of businesses. Uppal suggested that rather than mandating businesses to comply with restrictions on cross-border data sharing, incentives should be created by the draft policy for businesses to adhere to data localisation.

- While mandatory sharing of data was criticised by Uppal, Pahwa suggested the need for non-coercive alternatives such as data portability.

- The draft policy was also criticised by Aggarwal for undermining user-consent by prohibiting cross-border sharing of data even with user consent.

4. IPR and Conflicting Regulatory Frameworks:

- Many illustrations were cited to argue that the provisions of the draft policy are in conflict with existing laws. For instance, it was emphasised by Aggarwal that the draft policy must be streamlined with the provisions of the Information Technology Act, 2005 and the rules thereunder and the Personal Data Protection Bill, 2018.
The provisions relating to intellectual property were argued by Pahwa to give rights to trademark owners to control the sales of the products sold on e-commerce platforms, which they do not enjoy in offline commerce.

In addition, the e-commerce platforms will have to monitor content to look out for intellectual property violations, which would be in conflict with the exemptions granted to intermediaries under the Information Technology (Intermediaries Guidelines) Rules, 2011. Uppal, Pahwa and Anand flagged this issue.

5. Other Themes:

In addition to the themes elaborated upon above, the speakers also shared their thoughts on the following areas of the draft policy:

- Certain stakeholders suggested that issues concerning data should not be dealt with by the draft policy and the provisions in relation to the same should be removed.
- Disclosure of source codes was regarded as problematic by Aggarwal, who suggested the adoption of a lesser intrusive measure like a system of algorithmic auditing.
- Aggarwal suggested that consumer welfare should be the focus of the draft policy rather than restriction of data flows. However, Uppal argued that there is no evidence to prove that the assumption that consumer rights are not protected in the course of e-commerce activities and hence there is no need for more stringent consumer protection obligations on e-commerce platforms.
- Network effects of businesses was regarded by Pahwa as an area beyond the purview of the Draft Policy that should instead be dealt with by the Competition Commission of India (CCI).

Overall Takeaways:

- There are several ambiguities in the draft policy that need to be addressed so as to provide clarity to businesses and users engaging in e-commerce activities.
- The draft policy in its present form, contains provisions in conflict with prevailing laws in India and needs to be streamlined with all applicable statutes.
- Although the policy is an unenforceable document, several of the issues highlighted in it fall under the domain of existing regulatory frameworks and agencies. These regulators could bring into effect the recommendations of the draft policy by issuing appropriate directions. Therefore, the implementation process needs to be clarified.
- The draft policy must not become a complex document dealing with the intricacies of the conduct of e-commerce operations in India, but should suggest the favourable approaches to e-commerce and provide incentives to businesses to comply with the suggested approaches.

Recording: The recording of the webinar is available [here](link)