

Doing Business in India? Keep an Eye on This....

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The draft National E-Commerce Policy (“**Draft Policy**”) released by the Government of India on February 23, 2019 for stakeholder comments, has left the e-commerce sector in jitters. For global market players, the protectionist construct of the Draft Policy seems to suggest a shift of India’s focus from ‘Ease of Doing Business in India’ to ‘Make in India’. If the Draft Policy is implemented in its present form, it may have a serious impact demanding drastic change in internal strategies, policies and cost allocations for foreign companies having e-commercial presence in India. The Draft Policy is open for stakeholder comments up to March 9, 2019.

The Draft Policy focuses on: (i) restriction on cross-border flow of data; (ii) local presence and taxability of foreign entities having significant economic presence in India; (iii) creating a robust digital infrastructure for e-commerce, from online custom clearance to online resolution of consumer complaints; (iv) promoting exports from India with a boost to start-ups and small firms; and (v) regulatory changes to augment economic growth in e-commerce.

The key highlights of the Draft Policy are as follows:

1. Local Control over Data: The Draft Policy identifies data as an asset and provides that Indian citizens and companies should get economic benefits against monetization of India’s data. The Draft Policy has suggested the following measures in this regard:

(i) To create a legal and technological framework for cross-border flow of data as well as domestic data flow for public policy, for (a) data collected by public-installed ‘Internet of Things’ (IOT) devices; and (b) data of users generated over e-commerce and social media platforms.

(ii) It prohibits disclosure of sensitive data stored by business entities outside India, with any other business entity or third party despite consumer consent. The non-compliance of these obligations may lead to consequences to be prescribed by the Government.

(iii) It has exempted certain types of cross-border data flow from restrictions: (a) data not collected in India; (ii) B2B data transfers outside India under a commercial contract; (c) software and cloud computing services which have no personal or community impact; and (d) multinational corporations moving internal data which is not collected from social media, e-commerce platforms or search engines, etc.

(iv) The Draft Policy also suggests community sharing of data with start-ups for larger public interest, with the help of a ‘Data Authority,’ which is to be established.

2. Digital Infrastructure: The Draft Policy aims at making India data-storage ready by providing infrastructure guidelines for local data centers, server farms, etc. and shift to a digital regime for services including government services. The Draft Policy has provided for a sunset period of three years to the industry to adjust to the data storage requirements and infrastructure set-up. It also

suggests creating domestic alternatives to foreign cloud based and email services. However, there is no blanket or express ban on overseas data storage, other than as discussed above.

3. Foreign Investment (FDI) in E-Commerce Sector: The Draft Policy is in line with the present FDI which permits FDI only in market place models and not inventory-based models.

4. Mandatory Registration in India: Amongst other strict anti-counterfeit and anti-piracy measures suggested by the Draft Policy, it requires e-commerce sites/apps available for download in India, to be registered in India as the importer on record or as the entity through which all sales in India are transacted. A local representative is also required to be appointed by entities.

5. Other Suggested Regulatory Changes: Other regulatory changes suggested by the Draft Policy include: (i) reduction in advertising charges in e-commerce for start-ups and small enterprises; (ii) Government may reserve its right for disclosure of source code and algorithms especially in AI technology platforms; (iii) special status to be afforded to start-ups and small enterprises vis-à-vis data access; (iv) suggested amendment to the Indian Income Tax Act to include 'significant economic presence' as a means to determine permanent establishment in India and allocation of profits of multinationals; (v) levying customs duties on electronic transmissions; (vi) addressing digital payment and other financial issues including privacy of information, inherent in e-commerce sector; (vii) increased responsibility and liability of e-commerce and social media platform as to genuineness of information posted on their sites; and (viii) establishment of e- consumer courts to address grievances/ disputes online.

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