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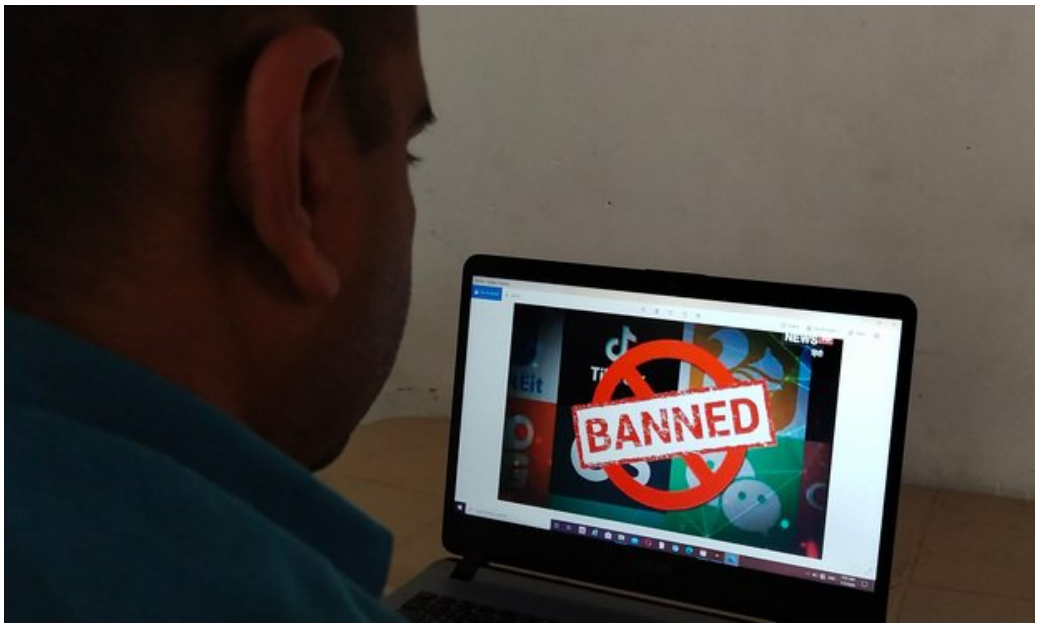
India Bans Chinese Owned Apps, Now What?

The app ban is part of an wider effort by the Indian government to curtail Chinese involvement in the country's businesses.

By **Rabindra Jhunjhunwala and Atul Pandey** | October 28, 2020



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The Indian government has gradually taken various steps to curb and restrict business transactions with entities based out of China. In addition to banning close to 180 apps, India has also restricted Chinese involvement in public procurement and foreign investments. But questions have now been raised, both on the efficacy of such moves, as well as their legality.

The impact of such moves has been felt across industries, particularly considering the substantial investments already made by Chinese firms in India, and the reliance of various Indian companies (prominently start-ups) on Chinese funding. Accordingly, a legal challenge to such curbs introduced by the government cannot potentially be ruled out, particularly given that the proportionality test may not be met i.e. the real impact of such steps taken by the Indian government is grossly disproportionate to the stated intent of the government behind introduction of these steps.

Background to the banning of apps and their impact

In July, the Indian Ministry of Electronics and Information Technology ('**MEITY'**) had taken the unprecedented action of banning 59 apps by invoking Section 69A of the Information Technology Act, 2000 ('**IT Act**') read with the relevant provisions of Information Technology (Procedure and Safeguards for Blocking of Access of Information by Public) Rules 2009 ('**IT Rules**'). According to a statement, MEITY justified the ban citing that the apps in question were engaging in activities *"prejudicial to sovereignty and integrity of India, defence of India, security of state and public order,*" and they were "*stealing and surreptitiously transmitting users' data in an unauthorized manner to servers which have locations outside India.*"

As per the author's discussions with government sources, one of the major concerns of the government in banning the apps stems from two Chinese legislations:

1. The Counter-Espionage Law 2014 which requires that "*when the state security organ investigates and understands the situation of espionage and collects relevant evidence, the relevant organizations and individuals shall provide it truthfully and may not refuse."*

2. National Intelligence Law, 2017, Article 7 of which required that "*Any organization or citizen shall support, assist and cooperate with the state intelligence work in accordance with the law, and keep the secrets of the national intelligence work known to the public*."

Given that both these legislations provide for vaguely drafted provisions (both "intelligence work" and "counter-espionage work" are not clearly defined under these laws), they have given rise to concerns that the Chinese government may requisition data from Chinese companies on loosely worded grounds and such Chinese companies may be compelled to share user data and other confidential data with the government.

Also, the government action on banning the apps (mostly with Chinese beneficial ownership) has to be seen in the light of the recent curbs introduced by the Indian government in late April 2020 on foreign direct investment (FDI) from entities beneficially owned by companies located in countries sharing a land border with India (including China). It should come as no surprise that the move of the government was clearly to curb investments from China (since no other country sharing a land border with India has any considerable investments in Indian companies).

Accordingly, any FDI (irrespective of the sector) from entities being beneficially owned by entities in China are subject to a fairly long pre-scrutiny process. The Indian government has also not come out with any clarifications on the ambit of "beneficial ownership" on account of which, several cases wherein foreign investors although not located in China, but having minority equity stake from Chinese investors or having Chinese funds as their limited partners are also caught in the net of pre-scrutiny under the new investment laws.

Practically, various Chinese entities who were willing to explore the Indian market (particularly in the automobile and heavy industries sector) have put their India entry plans in cold storage till the regulations are eased. One must also bear in mind the fact that any foreign investment application process also involves a comprehensive security clearance by the Ministry of Home Affairs. The rules for such security clearance being extremely opaque, any rejection by the MHA on security clearance grounds has very little scope for a judicial review since courts will be extremely reluctant to intervene on matters which may be ostensibly claimed to be of "national interest."

While sources recently indicate that the government is looking to fast track proposals involving minor investments from China and Hong Kong, the efficacy of such a move will only be evident after the government approved investment applications which have been pending in excess of five months on account of the pre-scrutiny process.

Given that the government has banned extremely popular apps like Tiktok, Clubfactory, PUBG, Shein, etc, the impact affects a large portion of the population of a particular demographic, particularly the youth of the country. Besides, by clamping down on investments from investors which be treated to be "beneficially owned" by entities in China, the government has effectively curbed down on investments from a large pool of investors based out of Hong Kong, thereby cutting down on a primary source of investments for several Indian start-ups. Fears of further apps being banned in case the government believes that they are Chinese owned or are transmitting their data to the Chinese government also cannot be ruled out.

Responses of the banned apps and the possible way forward

Section 69A of the IT Act, the law under which the government undertook the app ban, was previously challenged in the Supreme Court of India of its constitutionality. In 2015, the Supreme Court upheld the constitutionality of Section 69A of the IT Act and the IT Rules, highlighting that *"reasons have to be recorded in writing in such blocking order so that they may be assailed in a writ petition under Article 226 of the Constitution of India.*" Additionally, the IT Rules provide for constituting a committee to examines the necessity of blocking and to provide necessary hearing to affected parties.

According to Rule 9 of the IT Rules which permits the government, with written recorded reasons, to issue an "interim ban" in emergencies before giving any opportunity of hearing to the offending party, MEITY had individually written to each of the apps banned in July 2020, duly mentioning the reasons for which the apps had been banned (particularly highlighting the insufficient data protection measures and the surreptitious transmission of user data). Besides, MEITY also circulated a detailed questionnaire to each of the banned apps, seeking their response to various queries raised by MEITY, particularly focusing on the structure of these companies (including their ultimate beneficial owner), as well as their data privacy and data localization measures (including the location of their data centers).

While questions had been raised on compliance with Section 69A of the IT Act and the IT Rules initially when the MEITY had issued the press notification informing of the banned apps in July 2020, the government has stuck to the same process while banning the additional set of 118 apps in September 2020, supposedly since they are confident that the process followed by them for banning the apps is compliant with the process set out under the IT Act.

Any challenge to the banned apps from a procedural perspective may not see much success in a court of law. Rather, any potential challenge to the banned apps before the High Court under Article 226 of the Constitution of India should focus on substantive grounds, particularly that the app in question does not pose any threat to national security and has in no manner, be prejudicial to sovereignty and integrity of India, defense of India, the security of the state and public order.

However, while a writ petition by an Indian company owning any of the banned apps (e.g. Clubfactory) may still be maintainable, a writ petition by any of the foreign companies owning any of the banned apps may not have any standing insofar as a writ petition is concerned, considering that the Supreme Court has, in previous cases *(Indo-China Steam Navigation Co. Ltd. vs. Jasjit Singh, Additional Collector of Customs)* held that foreign company cannot claim benefits under Article 19 (1)(g) of the Indian constitution, although other options, including a breach of Article 14 (equality before law), may be explored.

Additionally, given that the government has also invoked the protection of national security in banning the apps, courts may be reluctant to intervene, unless there are strong grounds of doing so, particularly that the ban is a disproportionate action, considering that the allegations are mostly unproven and there were better ways to achieve the goals of the government in preventing "*surreptitiously transmitting users' data in an unauthorized manner to servers which have locations outside India."* Additionally, it may be pertinent for the Indian companies having Chinese funding, and whose apps have been banned, to highlight the employment opportunities that have been affected in light of the sudden app ban.

With increasing geopolitical tensions, any clear plan of action in respect of the banned apps looks difficult as of now.

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