

ERGO

Analysing developments impacting business

E-COMMERCE: FAIR PLAY CODE PROPOSED

19 March 2021

In March 2019, Department for Promotion of Industry and Internal Trade (DPIIT) had invited comments from stakeholders and the public on a draft e-commerce policy (2019 Draft Policy). Among other items, the 2019 Draft Policy proposed that measures should be taken to regulate cross-border data flow, establish a level playing field for domestic and foreign e-commerce players, boost sale of domestic products through e-commerce, and generally regulate e-commerce in India.

Several aspects of the 2019 Draft Policy were opposed by industry participants, including on the obligation on data localisation and the proposal to institute an independent e-commerce regulator. The 2019 Draft Policy did not gain much traction.

In the first week of July 2020, Indian media reported that DPIIT has been working on a revised draft e-commerce policy and that the revised draft policy will be placed in public domain inviting public comments. Since then, the government has enacted the Consumer Protection (E-Commerce) Rules, 2020 (E-Commerce Rules), which addressed few of the policy initiatives under the 2019 Draft Policy (see [here](#) for our Ergo on E-Commerce Rules).

Fast forward to March 2021, while the DPIIT is yet to formally release the final draft of the revised e-commerce policy, we have received an undated draft of the proposed e-commerce policy which media reports indicate was discussed in an inter-ministerial meeting on 13 March 2021 (2021 Draft Policy). It is unclear if DPIIT will formally release the 2021 Draft Policy for public or industry consultation. **A draft policy generally reveals the Government's thoughts on the subject matter and helps the industry set expectations.**

The 2021 Draft Policy covers all models of e-commerce i.e., inventory, marketplace and hybrid model across all forms of entities, natural and legal with foreign and domestic investments. It broadly covers: (a) handling of data; (b) free and informed choice; (c) fair competition; (d) prevention of counterfeit and piracy; and (e) monitoring.

Definition of 'e-commerce' and 'e-commerce operators'.

- The definition of "E-commerce" is broad under the 2021 Draft Policy and intends to cover business of sale, marketing, and distribution of goods or provision of services through internet or other information networks.
- Entities that are engaged in the operational activities of selling goods or providing services through internet and other information network, including e-commerce

platform operators or operators providing service via their self-built website or other web service are defined as 'e-commerce operators'.

- Interestingly, the 2021 Draft Policy seeks to differentiate e-commerce operators on parameters of turnover, market size, active users, registered sellers, sale of merchandise value, etc, and prescribe additional compliances on significant e-commerce operators. This should also be seen in the hindsight of the market study on e-commerce in India conducted by the Competition Commission of India last year.

Conduct of e-commerce.

- E-commerce operators may be required to ensure that their algorithms are not biased and are not partial towards any seller on the platform. It is also proposed that any information collected through the platform should not be used to obtain market advantage against sellers operating on the e-commerce platform. Even though the intent is altruistic, the code-base and the algorithm that powers e-commerce platforms are material intellectual property, which the platform owners may not share. While an argument could be made that the government may rely on historic consumer-facing data to build its case against an e-commerce operator, it would be interesting to see how the government will legislate and enforce this.
- Government plans to also bring in mechanisms to ensure that actions which are prohibited for the entity operating the marketplace, will also apply to their associates and related parties. While the terms 'associates' and 'related parties' are not defined, the Government may seek to amend the scope of the term 'Group Company' under the Foreign Exchange Management (Non-debt. Instruments) Rules, 2019.
- The Government plans to put in place assessment procedure to verify that goods and services sold on e-commerce platforms meet the standards and technical regulations that are prescribed by other sectoral regulators. To this end, it is also proposed that e-commerce operators should be required to register with an authority. This is possibly an intended push to have an all-encompassing e-commerce regulator in India, which has been mooted in the past.

Handling of data

The regulations on data protection are awaited. The 2021 Draft Policy incorporates aspects from the report submitted by the committee of experts on non-personal data governance framework which was constituted by the Ministry of Electronics & Information Technology. For instance, the 2021 Draft Policy proposes to allow data sharing with the government to aid in national security, economic security, and law enforcement and with other industry participants to aid in innovation and fair competition.

Competition

The 2021 Draft Policy emphasises that the Government will attempt to curb any monopolistic tendencies and seeks of the e-commerce operators to bring out clear and transparent policies on discount offerings and participation by vendors in various schemes.

Prevention of counterfeit and piracy.

- In line with the E-Commerce Rules, the 2021 Draft Policy proposes that the e-commerce operators must develop safeguards to ensure the genuineness of the product and the sellers. It is also proposed that if the seller fails to establish genuineness of the products within a reasonable time frame, the e-commerce platform may be required to delist the seller. The Government intends to make both the seller and the e-commerce operator jointly liable for sale of counterfeit products.

- Intermediaries may be required to put in place measures to prevent online dissemination of pirated content. The 2021 Draft Policy however clarifies that a body of industry stakeholders and certain trusted parties may create and identify 'rogue e-commerce entities' that predominantly host pirated content. Once a platform is identified as such, intermediaries, including internet service providers and search engines, may be required to disable access to the identified platform, and advertisers and advertising agencies may be required to refrain from hosting advertisements on such platforms.

Other aspects.

- Government intends to facilitate more inclusive growth and provide necessary impetus to Micro, Small & Medium Enterprises (MSME) for exporting their goods. The government intends to achieve this by reducing administrative and compliance requirements and costs for these focus groups.
- The 2021 Draft Policy proposes that the e-commerce-based exports shall be streamlined by building synergies between relevant Government departments.

Conclusion.

The overarching principle of the 2021 Draft Policy seems to be fair play, and it brings forth ideas that address existing imbalances in the e-commerce space. We are likely to see the Government taking measures to achieve a level playing field with more diversity amongst the market participants.

The proposal for a sector regulator for e-commerce is an interesting one and has been mooted several times earlier. The Indian constitution read with the Government of India (Allocation of Business) Rules, 1961 could however limit the scope of the sector regulator to only have limited nodal functions to coordinate with other Government departments on e-commerce related matters and arrive at decisions. The implementation of a sector regulator may however help address broader compliance concerns in the industry provided that the Government enables an effective framework that safeguards the interests of the consumers without unreasonably straining the market players. The ongoing investigation by the Competition Commission of India (CCI) into practices of certain e-commerce players and the judicial review of CCI's powers in this regard could also shape the e-commerce sector regulator's purview.

Some aspects mentioned in the 2021 Draft Policy have been addressed under the E-Commerce Rules which were enforced last year and have been reiterated with the intent to likely build Government processes and streamline implementation. Some other proposals are likely to see light under the data protection framework that is under discussions. Lastly, the 2021 Draft Policy does not strangely refer to any proposals to ease the working conditions of 'gig workers' which received media attention lately. But, with the labour codes proposed to be legislated soon, this issue is likely to be addressed at a different forum.

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