



Comments for NITI Aayog on Discussion Draft of Data Empowerment and Protection Architecture, 2020

Background

Consumer Unity and Trust Society (CUTS) expresses its gratitude to the NITI Aayog, for inviting comments and suggestions on The Draft Data Empowerment and Protection Architecture, 2020 (draft architecture).

About CUTS

In its 37 years of existence, CUTS has come a long way from being a grassroots consumer-centric organisation based in Jaipur, to opening overseas Resource Centres in Vietnam,¹ Africa,² Switzerland,³ and most recently in the United States of America⁴. It continues to remain an independent, nonpartisan, and non-profit economic policy think tank, while opening various programme centres, namely: Centre for International Trade, Economics & Environment (CITEE)⁵; Centre for Consumer Action, Research & Training (CART)⁶; Centre for Human Development (CHD)⁷; and Centre for Competition, Investment & Economic Regulation (CCIER)⁸. It has been working towards enhancing the regulatory environment through evidence-backed policy and governance-related interventions across various sectors and national boundaries. Further details about CUTS, are available [here](#).

Having conducted various studies and events, pertaining to e-commerce (such as: Internationalisation of Micro and Small Enterprises through e-commerce and e-commerce in the Context of Trade, Competition and Consumer Protection in India)⁹, as well as on Data Protection (such as: Consumer Impact Assessment of Data Localisation,¹⁰ and Understanding the Impact of Data Localization on Digital Trade)¹¹, Data Sharing,¹² and Encryption¹³, CUTS has observed a few critical issues in the draft architecture. These have been discussed in subsequent sections, along with a few recommendations to address them.

¹ <http://cuts-hrc.org/en/>

² <http://www.cuts-international.org/ARC/>

³ <http://www.cuts-geneva.org/>

⁴ <http://www.cuts-wdc.org/>

⁵ <https://cuts-citee.org/>

⁶ <https://cuts-cart.org/>

⁷ <https://cuts-chd.org/>

⁸ <https://cuts-ccier.org/>

⁹ <https://cuts-ccier.org/e-commerce/>

¹⁰ **Objective:** Assessing the impact of restriction of cross-border data flows on consumers, among other stakeholders, on parameters, such as quality of service, innovation, data privacy, data security etc. **Expected Outcome:** presenting an evidence-based impact of data localisation, to the government and other stakeholders. <https://cuts-ccier.org/consumer-impact-assessment-oncross-border-data-flow/>

¹¹ **Objective:** Understand and analyse the importance of digital exports for India's GDP and economy, along with the possible impact of data localisation barriers on Indian exports of digital goods and services. **Expected Outcome:** build detailed and holistic understanding of the economic implications of existing and/or proposed data localisation barriers on India's digital exports, while producing evidence to study alternatives to data localisation measures which are prohibitors to free data flows, in order to help policy makers in India and around the world to take an informed and appropriate and on data localisation. <https://cuts-ccier.org/pdf/projectbrief-dtdl.pdf>

¹² <https://cuts-ccier.org/npd/>

¹³ <https://cuts-ccier.org/understanding-consumers-perspective-on-encryption/>

Submission

CUTS would like to congratulate NITI Aayog on taking an important step towards making India a trillion-dollar digital economy. The strategic foresight on having an architecture on data empowerment of consumers is a progressive step in which India can lead by example. The architecture shows the potential for a policy transfer for emerging economies around the world. While the policy goes into detail on several aspects, such as: the need for India to have an evolvable regulatory, institutional, and, a technological framework for data sharing, CUTS submission brings forth a few lacunas in the policy, which have been highlighted in the subsequent section.

I: Broad Submissions

The draft architecture seems to be based on some broad principles that expressly or implicitly appear throughout the document. Key concerns about such principles are laid out below:

1. Trade-off between prevention of harm and individual empowerment – Despite highlighting the importance of prevention of harm for digital users, the draft seems to indicate that a trade-off exists between harm prevention and consumer empowerment. It points out that models in other countries focus on the former which India can't afford to follow. The draft goes on to suggest that increased risk to data privacy is worth taking for experience the benefits of data sharing model suggested by the draft. It does not consider experience in other jurisdictions like over-indebtedness, blacklisting of borrowers and coercive recovering practices, which are been experienced in other jurisdictions as a result of excessive reliance on cash flow and alternate credit data-based lending.

Recommendations: There is need to clarify upfront that both these objectives are not mutually exclusive and can be achieved in tandem. Given that India is becoming data rich before being economically wealthy, and limited awareness and capacity exists among individuals, there is a need to acknowledge that the risk of privacy violation and harm may be much more in India when compared with other countries. Thus, any plan to enable data sharing needs to be approached with caution. Any instance of harm or privacy violation may push individuals (and others in their area of influence) away from digital economy. Thus, the draft needs to put as much emphasis on building trust among individuals as it has put in leveraging the value of their data.

2. The focus on individual consent – The draft architecture has laid great emphasis on informed consent. While, at places, the draft mentions that consent alone cannot be the only backstop to prevent data misuse, it does not dive deep on what other mechanisms could be considered to prevent misuse. The draft has not considered the challenges individuals face in understanding privacy policies and providing informed consent. On the other hand, it has recommended consent for any granular piece of data shared, without considering the possibility of consent fatigue. It has also suggested standardising consent, without considering the diversity in knowledge, beliefs, attitudes and understanding regarding data among consumers.

Recommendations: The draft is long on vision but short on implementation. While nobody disputes relevance of informed consent, the draft could have dived deep on concepts like privacy labels, cool down periods, consent customisation, and time lags to showcase seriousness regarding innovations required in reforming consent architecture. It has just mentioned some of these in the passing. Surprisingly, the draft has recommended data sharing as default option, which goes against the principle of informed consent. Consequently, the draft should discuss mechanisms to provide informed consent and explicitly recommend default option as ‘no sharing’ to ensure real agency remains with consumers.

3. Awareness and capacity of consumers – While the draft presumes that individuals themselves are the best judges of the ‘right’ uses of their personal data, however, it disregards the limited level of awareness and capacity constraints faced by individuals in understanding implications of data collection and sharing. Similarly, while the draft states that individuals should have control over how their personal data is used and shared, it does not discuss challenges faced by consumers in this regard.

Recommendations: In order to truly empower consumers, there is a need to consider perspective of users during design and implementation of DEPA. It cannot be an afterthought, as being suggested by the draft, which recommends implementation of the architecture in form of ‘relay race’, with government taking the first step by designing a digital public good, the industry and market players then working to leverage the public platform, and lastly media and civil society playing a role to hold industry accountable and build awareness of the changes amongst the population. It will be too late if the media and civil society acts at last to generate awareness and collect public feedback. The architecture will be final by then, without any possibility of changes. Consequently, the framework must be considered as a ‘chain’ which is as strong as its weakest link, and all efforts need to be made since inception to build capacity and awareness of consumers, and take into account their perspectives while designing the architecture. It is more of a sack race than relay race.

4. Incentive alignment and addressing conflict of interest concerns – While the draft has mentioned that incentives of consent managers should be aligned to individuals, it has suggested that consent managers should charge data users. In such scenario, it would be difficult to ensure that consent managers would be in a position to uphold consumer welfare. Moreover, while the draft has mentioned that the consent managers will be data blind, it is not clear how they will be prevented from acting as data advisers and not merely act as data brokers. In addition, it has been pointed out that Sahamati, a collective of consent managers, will act as a quasi-regulatory and standard setting body for consent managers. This has the potential to result in serious conflict of interest concerns, as witnessed in the fintech space as well, with respect to the role of NPCI. Other conflict of interest concerns relate to the role of government, which will be the operator as well as regulator of digital public goods. There is a need to ensure that government or government affiliated entities are not preferred while acting as consent managers, information users or information providers.

Recommendations: The draft should be upfront about the concerns with respect to incentive misalignment and conflict of interest in the recommendations it has made. It must acknowledge that a sincere dialogue is required amongst stakeholders to address such concerns.

5. Fixing accountability and enabling grievance redress – While the draft has highlighted the need to fix accountability in data sharing ecosystem, it has not discussed mechanisms to enable timely grievance redress. Experience in other sectors suggests that in transactions wherein multiple parties are involved, it is difficult to fix accountability and resolve grievance of consumers. Given the conceptualisation of additional public and private organisations in operating digital public goods and providing new services to consumers, the draft has fallen short in predicting areas wherein fixing accountability could be challenging and grievance redress avenues that could be accorded to consumers.

Recommendations: The draft should comprehensively review the accountability and grievance redress challenges that may arise in the framework it is suggesting and design mechanisms to fix accountability and ensure timely resolution of complaints for consumers. Experience of civil society organisations working with consumers for getting their grievances redressed could come handy in this regard.

II: Specific Submissions

Reference	Issues	Remarks
<u>Chapter 1 – Context: The Emerging Data Revolution and Financial Inclusion</u>		
Page 24. Para 3	Data anonymisation	The draft architecture talks about publicly available datasets which are made of personal and derived data that is anonymised. Several studies suggest that data anonymisation does not offer unerring protection to individual privacy. ¹⁴ It is therefore recommended that publicly available datasets must be made of only non-identifiable and derived data. ¹⁵
Page 24. Para 4	Personal Data Protection Bill	The draft mentions that the issues related to data protection and privacy have been addressed by the Personal Data Protection Bill. Several stakeholders have raised concerns about the restrictive provisions of the Bill. CUTS also has highlighted similar concerns and have provided inputs to the Joint Parliamentary Committee. ¹⁶
Page 24. Para 5	Privacy and Security in Empowerment Context	The draft goes on to mention that the data governance framework will ensure secure data protection, by granting users control over data through a safe and seamless protocol to share data across institutions, leading to individual empowerment and

¹⁴ [There's No Such Thing as Anonymous Data \(hbr.org\)](https://www.hbr.org/2016/07/there-s-no-such-thing-as-anonymous-data)

¹⁵ [Anonymous Data v. Personal Data - False Debate: An EU Perspective on Anonymization, Pseudonymization and Personal Data 34 Wisconsin International Law Journal 2016-2017 \(heinonline.org\)](https://www.heinonline.org/doi/10.1017/S0022278X16000000)

¹⁶ [Personal Data Protection Bill 2019 | C-CIER \(cuts-ccier.org\)](https://www.cuts-ccier.org/2019/01/personal-data-protection-bill-2019/)

Reference	Issues	Remarks
		well-being. However, the draft doesn't mention how it plans on achieving that goal and how data sharing across institutions will contribute to individual well-being.
Page 25. Para 3	Opening API based data sharing	The draft mentions the potential benefits of opening up the API based data sharing for new fintech entities. While the draft holds itself as a champion of security and individual empowerment, without necessary empowerment and protection of individuals, this step is likely to take away the power and security of the individual and give them to corporations. As a consumer welfare organisation, we recommend that this step must be re-evaluated with robust checks and balances to protect consumer rights. ¹⁷
Page 26. Para 2	Data governance approach	The draft repeatedly mentions that India's current data governance approach is not scalable for the future growth of the economy. Nowhere does the draft explain the flaws with the current data governance regime. The draft also fails to justify why only the proposed solution can be used and is the best possible approach.
<i>Chapter 2 - Global Approaches to Data Protection & Sharing</i>		
Page 29. Para 3	Different data sharing approaches	The draft recognises the merits of data sharing models which are adopted by the EU, UK, and Australia, along with understanding the flaws from the approaches in the US and China. However, it does not provide enough support to its contention that such approaches may be not ideal for a country like India, or if India could learn from experiences of approaches in other countries. ¹⁸¹⁹
<i>Chapter 3 - Introducing India's Data Empowerment and Protection Architecture</i>		
Page 30. Para 3	Accountability	It's commendable that the draft recognises the importance of accountability as one of the guiding principles of DEPA. However, it is important to specify the

¹⁷ [USERS' PERSPECTIVES ON DIGITAL PAYMENTS \(cuts-ccier.org\)](https://www.cuts-ccier.org/users-perspectives-on-digital-payments)

¹⁸ [Data governance: Towards a policy framework \(competition.org.za\)](https://www.competition.org.za/data-governance-towards-a-policy-framework)

¹⁹ [India's Personal Data Protection Act, 2018: Comparison with the General Data Protection Regulation and the California Consumer Privacy Act of 2018 by Lothar Determann, Chetan Gupta :: SSRN](https://www.ssrn.com/document/4111111/)

Reference	Issues	Remarks
		accountability and penal provisions associated with the draft. The draft must consider avoiding the allocation of ambiguous responsibilities.
Page 36. Para 2	Privacy elective model	The draft introduces different business models for consent managers. Only one of the described models has a focus on data privacy and security. The draft must ensure that privacy and security must be made the utmost priority and held standards, rather than being a premium option.
<u>Chapter 4 - DEPA for the Financial Sector: The Account Aggregator Model</u>		
Page 45. Para 2	Start-ups as Loan Service Providers	The draft talks about using APIs to make start-ups as Loan Service Providers. The move is also likely to give excessive powers to relatively new businesses with no experience of dealing with consumer financial data. CUTS recommends that regulatory sandbox with strong oversight be conducted and following the results a robust regulation with checks and balances must be put in place before widespread adoption of this recommendation.
Page 46. Para 3	Robo advisory	The draft mentions that digital advice firms will be able to provide financial advice based on the user data after receiving consent. The draft does not mention the way how such firms will be processing the data. It's also important for the algorithms or "robos" providing such services to be scrutinised and regulated, as several studies have shown biases and flaws in such systems. ²⁰
<u>Issues missing in the draft architecture</u>		
Opting out		The option for individuals to opt-out of being a part of the proposed system/ opting out of sharing data to everyone must also be considered. The default option should be no-sharing, instead of 'sharing being happening by default' as suggested in the draft, to enable individuals exercise their option of informed and express consent upfront.
Role of DPA		The role of DPA within the DEPA must be explained.

²⁰ [Reducing bias in AI-based financial services \(brookings.edu\)](https://www.brookings.edu/research/reducing-bias-in-ai-based-financial-services/)

Conclusion

CUTS' looks forward to NITI Aayog accepting the suggestions given above, and to assist NITI Aayog in its endeavours of empowering consumers and individuals. For any clarifications/further details, please feel free to contact Amol Kulkarni (amk@cuts.org) and/or Setu Bandh Upadhyay (sbu@cuts.org).
