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Discussion Paper

Impact of Regulatory Uncertainty on Ease of Doing Digital Business in India

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Overview

The government has taken several steps to foster a digital-first economy, including promoting the ease of doing business for digital businesses. However, the persisting regulatory uncertainty has adversely impacted the Ease of Doing Digital Business (EoDDB). The objective of the Discussion Paper is to emphasise the need of regulatory certainty by highlighting how regulatory uncertainty has impacted businesses in India in different sectors.

Regulating the digital economy becomes tougher due to its cross-cutting nature which causes regulatory overlaps. Further, the difficulty gets intensified due to lack of set regulatory procedures. The paper highlights the several reasons which cause regulatory uncertainty for digital businesses including lack of regulatory framework, excessive delay in enactment of regulations, arbitrary approach of regulators, sub-optimal or ambiguous design, incorrect interpretation and failure in effective and efficient implementation. The paper analyses of how regulatory uncertainty caused due to these factors affects the digital business from different sectors such as e-commerce, online gaming, ed-tech and fintech.

Regulatory uncertainty impacts both businesses and consumers and the government must take steps to curb it. For this, the paper argues for formulation of a principles-based regulatory framework, inspiration for which can be taken from the United Kingdom Government's Digital Charter. Further, the paper makes a case for adoption of a Whole of Government (WoG) approach and institutionalisation of set regulatory procedures. Furthermore, effective engagement with the Parliament to establish accountability of regulatory actions has been suggested. Creation of a mechanism for informal guidance is also recommended.

Introduction

In a market economy, regulation is considered a key government intervention for correcting imperfections and anomalies in the market. It involves laying down instructions about what business entities can or cannot do. In India, since the late 1990s, the government has set up independent regulatory agencies which have developed different approaches to regulate the economy and achieve their regulatory goals.[1]

Today, the Indian economy is rapidly changing as traditional business models are being transformed for digital adoption and new business models are being introduced. The digital economy has provided newer digital services to consumers which have only grown due to network effects.[2] While digital firms have provided numerous new innovative digital products and services to consumers, their growth has posed several challenges. For instance, consumers risk privacy invasion and are exposed to information disorder on social media platforms. Further, issues such as the rights of gig workers working for digital businesses and effective taxation of digital businesses which operate across borders are also present.

Thus, the government has been grappling with the challenge of regulating the new and rapidly expanding industries while safeguarding against potential risks. There is an increasing recognition of digital businesses being seen as entities requiring specialised regulatory/policy interventions, and the government has taken steps for the same.

However, in several cases, the approach to regulation of the digital economy followed by the government has led to regulatory uncertainties. Regulatory uncertainty is defined as a condition of perceived inability of a business to predict the future state of the regulatory environment.[3]

Regulation is done by using different instruments, including making legislations and policies, framing subordinate legislation including regulations, guidelines, notifications, orders, and judicial decisions etc. These various actions are taken by the different arms of the state including the executive - central and state governments, the legislative – the parliament and state assemblies, the judiciary and quasi-judicial bodies, and the regulatory agencies.

When there is arbitrariness, ambiguity, inconsistency, instability and frequent changes in these different instruments used by the different arms of the state, it may lead to regulatory uncertainty. Such uncertainty may be because of multiple reasons including:

- lack of legal and regulatory framework and instruments,
- excessive delay in the enactment of proposed laws and regulations,
- arbitrary approach of issuing regulations,
- sub-optimal or ambiguous design of regulatory framework and instruments,
- incorrect interpretation of the regulatory instrument,
- failure in effective and efficient implementation of the regulatory instrument.

While the Ministry of Electronics and Information Technology (MeitY) has articulated a vision of the digital economy which states that regulatory policies should be supportive,[4] given its dynamic and ever-changing nature, regulatory uncertainty has only intensified with the government's arbitrary, ambiguous, inconsistent and unstable actions. It is essential to take a look at the reasons for this which are highlighted below:

Cross-cutting Nature of the Digital Economy and Regulatory Overlaps

Regulatory overlaps can occur when multiple regulatory agencies try to achieve similar goals, engage in similar activities and regulate similar entities.[5] Regulatory overlaps cause uncertainty, delays and poor enforcement.[6] This is because the different regulatory agencies may bring in conflicting sets of regulations and are often not able to resolve differences amicably in a time bound manner.[7] This causes delays which becomes a cause of regulatory uncertainty.

Various government ministries and regulators work to regulate the digital economy. Akin to traditional businesses, digital businesses are regulated under sectoral regulations, and are subject to the competition and consumer protection regimes. However, in addition to these, digital businesses are also subject to the India's cyber law, the Information Technology Act, 2000 (IT Act) and will also be subject to the proposed data protection law and other such legislations which may be enacted. Thus, the regulatory overlaps have become even more complicated in the digital economy because of its cross-cutting nature and involvement of data.

Apart from the government ministries and departments such as MeitY, Department of Consumer Affairs, Department for Promotion of Industry and Internal Trade (DPIIT), regulators such as the Telecom Regulatory Authority of India (TRAI), the Competition Commission of India (CCI), the Reserve Bank of India (RBI), and the Central Consumer Protection Authority (CCPA) regulate the digital economy.[8] There is another proposed horizontal regulator for data protection, the Data Protection Authority (DPA). Debates about having an e-commerce regulator[9] and a social-media regulator[10] are also on-going. Further, India also has agencies for cyber security such as Indian Computer Emergency Response Team (CERT-In) and National Critical Information Infrastructure Protection Centre (NCIIPC).

The lack of clarity among regulators about their jurisdiction, which stems from a lack of clarity about their objectives causes regulatory uncertainty and delays.[11] In the past, this has led to regulators reaching constitutional courts. A famous case is the CCI vs Bharti Airtel Limited where the Supreme Court laid out the jurisdictions in which sectoral and horizontal regulators can operate.[12] However, conflicts may also arise between two horizontal regulators such as the CCI and the CCPA which may cause regulatory uncertainty. Conflicts between state agencies undermine the credibility and capacity of the state to regulate effectively. To prevent this, the Joint Parliamentary Committee's (JPC) Report on the Personal Data Protection Bill, 2019 (PDP Bill, 2019) mandates the DPA to consult with other regulators and authorities in case of concurrent jurisdiction which is a welcome step.

Lack of Set Regulatory Procedures across Regulators and their Arbitrary Approach

When different regulators do not have common set of regulatory procedures and standards for circulating consultation papers, inviting public comments, issuing regulations and evaluating the conduct of digital businesses, it results in them being flexible and adopting arbitrary approach of regulations where they may bring in ad-hoc regulations.[13]

Doctrine of Arbitrary State Action states that any arbitrary state action is against the principles of natural justice and is violative of Article 14 of the Constitution of India.[14] In the Cellular Operators Association v TRAI case, the Supreme Court held that TRAI's action of mandating one-rupee credits to subscribers for each call drop was manifestly arbitrary and violated the Article 14 and Article 19(1)(g).[15]

Impact of Regulatory Uncertainty on the Ease of Doing Digital Business

The government has recognised that 'a thriving digital economy needs a creative balance between regulation, compliance and innovation' and the 'ease of operation for digital businesses should drastically improve' which would require 'adopting supportive policies and regulations.'[16] The regulatory landscape is an important criterion for businesses to make investments.

In this context, a vast body of literature proves that the lack of regulatory certainty adversely impacts businesses' investment decisions. Uncertainty in proposed laws also hampers investment decisions.[17] Further, policy uncertainty can also affect the level of investment a firm makes. This is because the uncertainty associated with regulatory and policy changes adversely impacts a business's profitability.[18] Due to the irreversibility of investment decisions, businesses may also not invest as they would want to be wary of investing in activities that may lead to them losing their money.[19] Further, empirical research shows that policy and regulatory uncertainty temporarily reduces the output in the economy and employment levels and, thus, has an overall negative impact on the economy of any country.[20]

An example of this is the international e-commerce giant, Shopee's exit from the Indian market which, exited within six months of starting its operation citing 'global market uncertainties'. However, reports stated that the exit was influenced by the Indian government's banning of the Free Fire which is owned by Singapore-based Sea Group, the parent company of Shopee.[21] The arbitrary action of banning the app resulted in massive loss in market capitalisation for the Sea group.[22]

Thus, regulatory uncertainty is undesirable and an impediment to the development of the digital economy because it makes it difficult for digital businesses to make decisions. As digital markets are increasingly becoming powerful drivers of social and economic growth, the impact of digital regulation needs assessment.[23]

Regulation of the digital economy must be done to achieve greater public good. Today, governments across the world are adopting newer ways to regulate digital businesses and going forward, the regulatory pressure will only increase.[24]

In this context, it is also essential that a regulatory landscape that instils trust in businesses and in turn allows for better investment flows, business landscape, competitiveness and thus, increases the Ease of Doing Digital Business (EoDDB) is created.

Regulatory Uncertainty in Specific Sectors

To effectively create policy and regulatory certainty, it is important to understand and highlight how regulatory uncertainty persists in different sectors and impacts EoDDB. This section illustrates the existing regulatory uncertainties in a few specific sectors highlighting how digital businesses are impacted because of uncertainties.

1. Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021

Internet in India is currently governed under the IT Act and its rules which are brought from time to time to regulate the different aspects of the digital economy like cybersecurity, social media companies etc. The Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 (IT Rules 2021) were released in February 2021 under the sub-section (3) of Section 69A, sub-section (2) of Section 79.[25]

The rules require social media intermediaries, as defined under the rules to follow certain mandates. Due to sub-optimal and ambiguous drafting, the rules have created more confusion rather than providing clarity for the industry. For instance, the rules state that "social media intermediary means an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services." The definition is broad enough to cover business messaging platforms like Microsoft Teams and Slack, SaaS companies like Freshworks and Zoho etc which are not social media services.[26]

The IT Rules have also created ambiguity on what constitutes a messaging service. The rules state that any SSMI "proving services primarily in the nature of messaging" will have to identify the first originator of the information. As it was unclear how "primarily in the nature of messaging" will be defined for intermediaries as they may also provide different other services on their platform,[27] MeitY came up with a set of Frequently Asked Questions (FAQs) to bring clarity and explain nuances of due diligence in November, 2021.[28] Until then, digital companies struggled to ascertain if they would have to follow the provisions under the rules or not.

The FAQs stated that "online interaction" should be the primary or sole purpose while also detailing what qualifies as the primary purpose. While this has brought certainty for some digital business such as payment gateways and ed-tech platforms, uncertainty still exists.[29] It is unclear if rules are applicable on Apple iMessage or not because the service is exclusively offered to Apple users.[30]

Further, the rules require SSMIs primarily having messaging services to report the first originator of the information. While the government has claimed that for this purpose, the rules do not need digital businesses to break end-to-end encryption which messaging platforms provide, digital businesses have stated that it would be impossible for them to do so. It remains unclear how compliance will be ensured without breaking encryption, thus causing uncertainty. This has resulted in one of the messaging services, WhatsApp filing a petition in the Delhi High Court (HC) and stating that it will infringe "the fundamental right to privacy and free speech of citizens."[31]

Furthermore, the rules require digital media publishers to adhere to a Code of Ethics be subject to self-regulation with an oversight mechanism of the central government. Stating that regulatory provisions hamper free speech and appear to be aimed at "controlling the media by the government", the Madras HC and the Bombay HC have put a stay. It remains unclear whether the provisions applicable on the digital media publishers would apply on a print newspaper which also has an online edition as print newspapers are already regulated under Press Council of India norms.

2. Digital Taxation and Equalisation Levy

As digital businesses easily transcend borders, governments have introduced a digital services tax on foreign-based digital firms. India introduced Equalisation Levy (E.L.) 1.0 in 2016 putting a tax of six percent on digital advertisement services. This led to double taxation of digital businesses in India, complicating the taxation framework.[32]

E.L. 2.0 was introduced through in 2020 mandating foreign 'e-commerce operator' having 'online sale of goods' or 'online provision of service' to pay a two percent E.L on the gross revenue received from the provision of 'e-commerce supply or service' to Indian residents or non-resident companies with a permanent establishment in India. This introduction increased the complexity and uncertainty for businesses as what constitutes online sale of goods and online provision of service was left unclear which is an issue of sub-optimal drafting of regulations.

These were later clarified in the budget of 2021, when the scope of the E.L. was substantially increased. Until the Finance Bill 2021 was passed, the industry was in a state of uncertainty about the taxation. However, even now, the provisions of the are worded widely and vaguely such that they are open to interpretation to even cover the sale of physical goods as services.[33]

E.L. became a contentious issue for India after the US termed it discriminatory, unfairly targeting the American tech companies. It proposed a 25 percent retaliatory tariff on Indian products in May 2021.[34] However, negotiations began in June 2021 for a uniform international taxation system for digital businesses under the OECD and G20 and the US suspended the retaliatory tariff for six months.[35] In October 2021, 136 countries joined the framework. This is expected to add certainty and stability to the international tax system. However, until this tax deal comes into effect, India intends to continue imposing its 2-6 percent E.L.

In December 2021, India's Finance Minister, Nirmala Sitharaman stated that there should be a 'level of predictability' in tax rates for both direct and indirect taxes.[36] However, the uncertainty has led to major US digital companies deciding to not create deferred tax assets in their accounting statement until they get more clarity on the digital taxation.[37]

3. Regulation of Crypto-assets/ Virtual Digital Assets

The government has adopted an inconsistent approach in regulating cryptocurrencies which has created uncertainty for both, industry players and consumers. The inconsistent and arbitrary approach stems from a lack of a regulatory framework.

In 2013, the RBI had issued a circular warning the public against cryptocurrencies. In February 2017, the RBI again issued a circular and in late 2017, the Finance Ministry and the RBI clarified that the cryptocurrencies are not legal tender.[38] Two Public Interest Litigations were filed in the Supreme Court, one seeking a complete ban and another seeking regulation of cryptocurrencies.

Subsequently, in November 2017, the government constituted an expert committee to draft legislation on cryptocurrencies which did not suggest a ban.[39] At the same time, the RBI issued a circular restricting all banks from allowing transactions, which effectively led to a ban on cryptocurrencies in India.

The RBI arbitrarily banned cryptocurrencies in April, 2018 without any public consultation. The move led to cryptocurrency prices falling, frozen crypto exchanges and withdrawals being completely stopped.[40] The measures affected businesses and consumers who had invested in cryptocurrencies as their money froze and they became concerned about the steps the government would take for regulating the industry.

Further, the expert committee released a new version, 'Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019', suggesting a complete ban. In March 2020, the Supreme Court overturned the RBI directive which prohibited trading in cryptocurrencies, indicating it to be disproportionate.[41]

In February 2021, Nirmala Sitharaman, the Minister of Finance reiterated in the Parliament that the government wished to ban cryptocurrencies. However, in March 2021, she publicly stated that the government wants to foster innovation in the crypto space. Later in the year, the Standing Committee on Finance met crypto industry representatives and suggested that cryptocurrencies should be regulated and not banned. Subsequently, 'The Cryptocurrency and Regulation of Official Digital Currency Bill, 2021' (Crypto Bill 2021) was listed to be tabled in the parliament in the winter session 2021. However, it was not introduced.[42]

The Finance Ministry in the Union Budget 2022 termed cryptocurrencies as virtual digital assets and put a 30 percent tax on income from them and a one percent additional tax deduction at source (TDS). Despite taxation put in place, the ministry has issued a clarification that this move does not make crypto assets legal or illegal in India.[43] Further, throughout this time, the stance of the RBI has been to ban cryptocurrencies in India as they may be a threat to the macroeconomic stability of the country, while it is itself working on its own fiat digital currency.[44]

Such regulatory uncertainty has escalated the difficulty in leveraging the potential of such digital technologies. When regulatory uncertainty increases, businesses often relocate to more favourable jurisdictions, and may take human talent with them.[45] For instance, a crypto based start-up, Polygon's co-founder highlighted that the digital businesses are affected by regulatory uncertainty in India. It is unfeasible for them to expose their teams to local risks, including their business being shut down. This results in brain drain where Indian talent chooses to move out of India.[46]

Due to the regulatory uncertainty in the sector, reportedly, companies have to restructure their strategies. In November, 2021, with the listing of the Crypto Bill, 2021, many crypto exchanges suspended ads for a couple of weeks and restarted when the government clarified that the bill would seek to not ban but regulate crypto-assets.[47] The crypto exchanges took a conservative approach and stopped advertising because they wanted to minimise their risks.[48]

As per a recent report, the Finance Ministry is working on a consultation paper to deal with the issue of crypto assets and it will release the paper for public consultation in six months.[49] The industry body, Blockchain and Crypto Assets Council also wants to have more consultations with the government.[50]. Further, this is in concurrence with the G20 countries' effort to form a global consensus on the issues of regulatory arbitrage in the evolving digital developments including crypto-assets.[51] Reports suggest that the government will only frame the law after having a global consensus.[52] This has reduced the regulatory uncertainty for the sector.

4. Regulation of the E-Commerce Sector

As per the Allocation of Business Rules released in 2018, the e-commerce industry is to be regulated by the DPIIT, Ministry of Commerce and Industry. The Department of Consumer Affairs had released rules for protection of consumers in the e-commerce space. Moreover, the legal recognition of e-commerce is under the Ministry of Electronics and Information Technology (MeitY).[53] All these bodies define e-commerce differently[54] which creates regulatory uncertainty.

The Consumer Protection (E-commerce) Rules 2020[55] (E-commerce Rules 2020) and the proposed draft Consumer Protection (E-commerce) (Amendment) Rules 2021 (E-Commerce Amendment Rules 2021) were brought to prevent unfair trade practices in e-commerce and protect the interests and rights of consumers.[56] However, the proposed amendment rules were riddled with sub-optimal drafting. For instance, they introduced 'flash sale' which is contemplated as something which offers 'high discounts', 'significantly reduced prices' or other such promotions for a specific time period. However, there is ambiguity and uncertainty surrounding the phrase 'flash sale' as terms such as 'significantly reduced prices', 'high discounts', interception of 'ordinary course of business', have not been defined by the proposed amendment leaving the definition open to several subjective interpretations.[57] Even after the clarification in the press release in June, 2021, that third-party sellers' flash sales are not banned, the ambiguity in the definition is creating confusion.[58]

Further, regulatory uncertainty increases if different government bodies, having overlapping jurisdictions, work without much collaboration. For instance, reports highlight that there was a significant difference in opinion within the government for regulation and consumer protection in the e-commerce space which resulted in inconsistent and frequent changes in regulations which causes regulatory uncertainty.[59] Some of the provisions in the proposed E-commerce Amendment Rules 2021 like abuse of dominance overlap with provisions of Competition Law 2002, which has created ambiguity and thus regulatory uncertainty.[60] Various government departments including the Ministry of Finance, DPIIT, Ministry of Corporate Affairs, MeitY, and NITI Aayog had expressed their concerns about the potential of the proposed rules to hurt ease of doing business, creating policy uncertainty, regulatory overlaps, similar compliances for e-commerce entities under different rules/laws, etc., which are largely targeted at e-commerce entities.[61]

Further, the Foreign Direct Investment (FDI) policy in e-commerce categorises e-commerce into marketplace-based e-commerce entities and inventory-based e-commerce entities. The proposed E-Commerce Rules Amendment 2021 restrict related parties of a marketplace-based e-commerce entity to be enlisted as sellers. However, the rules have not been notified yet. The uncertainty caused due to this has impacted business and investment decisions in the e-commerce space.[62] For instance, Tata delayed the launch of its super app since September 2021 because it was unclear if the app was classified as marketplace-based e-commerce or inventory-based e-commerce. In case of being classified as an e-marketplace, associated brands of Tata would not be able to sell products on the platform.[63] Further, plans for super app by the Adani Enterprises has also been impacted.[64]

Further, the DPIIT has been working on the National E-Commerce Policy and released a draft version in 2019. In early 2020, media reports referred to a newer version of the National E-Commerce Policy which suggested creation of a new e-commerce regulator.[65] Since then, there have been no developments in this regard. Reports have highlighted that the government wishes to release the National E-Commerce Policy and the new e-commerce rules for consumer protection together, in order to reduce the scope of misunderstanding and thus limit ambiguity.[66] While this approach can reduce regulatory uncertainty as conflicting set of regulations will not be issued, a significant delay in releasing the same would mean that businesses will hold on to their investments negatively impacting consumer choice.

5. Regulation of Online Gaming Sector

There are different types of online games such as fantasy sports, poker, rummy, etc. Online games may be categorised as 'games of skill' which are games where a player plays against other players and applies a strategy and 'games of chance' which games where a player plays against 'the house' and a strategy won't help the player. Here, betting and gambling are characterised as games of chance.[67]

Different petitions have been filed in different HCs seeking ban online gaming and fantasy sports. Responding to these petitions, the Punjab and Haryana HC in 2017, the Bombay HC in 2019 and the Rajasthan HC in 2021 have held that fantasy sports is a game of skill.[68] The Rajasthan HC also held that online gaming is a legitimate business activity under Article 19(1)(g) of the Constitution.[69] In August, 2021, the Supreme Court, stating that the fantasy sports have an element of skill that predominantly affects their outcome, upheld Rajasthan HC's judgement.[70]

While the above-mentioned judgements were in response to petitions filed for banning online gaming, laws were not made in these states. As betting and gambling are under state list of the 7th schedule of the Constitution of India, state governments can enact laws to ban games of chance. The regulatory landscape for the online gaming industry in India has been uncertain because there is an inconsistent interpretation of the terms 'game of skill' and 'game of chance' which has led to differential regulations by different state governments.[71] Many states have effectively banned online gaming stating such games to be games of chance.

Telangana was the first state to ban online gaming in 2017, followed by Andhra Pradesh in 2020. Governments of Tamil Nadu, Kerala and Karnataka have also taken steps to ban online gaming. This has created uncertainty for businesses to invest and expand, as they fear that many states may follow suit, and existing business investments may be threatened.[72]

However, the gaming industry through various petitions has been seeking clarity on the distinction between the game of chance and game of skill. Different petitions have been filed, challenging the laws brought to ban games of chance and gambling. The petitions, filed in different HCs, principally have stated that treating a game of skill under the game of chance category is arbitrary. For instance, Kerala government sought to ban online rummy through an amendment in the Kerala Gaming Act, 1960. The Kerala HC however held struck down the law stating that the law was unconstitutional and in violation of the fundamental rights to trade and commerce under Article 19(1)(g) and the right to equality under Article 14 of the Constitution of India.[73]

The Karnataka State Assembly had passed the Karnataka Police (Amendment) Act, 2021 prescribing a ban on online gaming which was struck down by the Karnataka HC. The Karnataka Government has moved to the Supreme Court against this.[74] Similarly, the Tamil Nadu State Assembly had passed the Tamil Nadu Gaming and Police Laws (Amendment) Act of 2021 which was struck down by the Madras HC. The HC stated the government can make a new law to regulate the industry. Now, the Tamil Nadu Government has stated that it will go to the Supreme Court against the Madras HC's order.[75] On the other hand, governments of Rajasthan, Maharashtra and Telangana have stated that they wish to regulate the industry[76] which is a positive stance.

Experts have opined that since online gaming is free flowing and transcends state boundaries, a central driven national framework will bring in regulatory certainty and clarity which will inspire businesses to grow and innovate.[77] There have been some developments at the union level. While online gaming has been considered outside the ambit of the central government, in July 2018, the 276th Law Commission had suggested that the central government may bring in a legislation for regulating online games under the entry 31 of List 1 of 7th Schedule of the Constitution of India since online games are offered over digital platforms.

Following this, the Sports (Online Gaming and Prevention of Fraud) Bill, 2018 ("Sports Bill") was introduced as a private member bill in Lok Sabha in December, 2018 by the Lok Sabha MP Shashi Tharoor. The bill aimed to prevent and penalise frauds and also regulate online sports betting activities.[78] NITI Aayog also came up with 'Guiding Principles for the Uniform National-Level Regulation of Online Fantasy Sports Platforms in India' in December 2020.[79]

Lately, a uniform approach towards regulation is under consideration by the central government.[80] In the winter session of 2021 of the Parliament, the Lok Sabha Member of Parliament, Sushil Kumar Modi raised his voice stating the need of regulating the online gaming industry.[81] However, these developments have not led to a national policy or legislation which can create parity across the country for the regulation of the gaming industry.

The inconsistent interpretation of the terms 'game of skill' and 'game of chance' create ambiguity and uncertainty about the future and status of online gaming. Experts have opined that this leads to a decrease in the investment as there is a sense of uncertainty. [82] The industry has seeking clarity on several provisions of such legislation.[83] Further, currently, the industry largely remains self-regulated and has formed several associations such as the All-India Gaming Federation, The Online Rummy Federation, and the Federation of Indian Fantasy Sports.[84] However, there also have been calls for setting up a single self-regulatory body which can provide certainty to foreign investors and thus help drive innovation, employment and taxes.[85]

6. Regulation in the Ed-Tech Sector

There has been an increasing call for regulation of the ed-tech sector in India. The Lok Sabha Member of Parliament, Karti Chidambaram raised the issue of ed-tech platforms engaging in predatory marketing practices in the winter session in 2021 in the Parliament.[86] Subsequently, the Ministry of Education released an advisory to citizens in December, 2021 detailing out the dos and don'ts for students and their guardians and also stated that ed-tech companies are e-commerce entities and need to comply with the Consumer Protection (E-Commerce) Rules, 2020.[87]

The Education Minister announced that a policy to regulate ed-tech companies was in works in January, 2022.[88] Following this, before stricter norms being put in place by the government, ed-tech companies formed the India EdTech Consortium and prepared a code of conduct for self-regulation which was shared with the officials from the Ministry of Education.[89] The ministry has decided to closely track the code of conduct enforcement by the ed-tech companies.[90] Even after the industry opting for self-regulation and the ministry recognising it, there is no clarity if the ministry is still working on a policy for regulation. This further causes regulatory uncertainty for the ed-tech industry.

7. Regulation for Fintech Industry

Given the growth of fin-tech sector, the RBI has set up a dedicated fintech department in order to identify challenges and opportunities in the sector and facilitate innovation.[91] However, given the regulatory approach of the RBI in the past, digital businesses have faced uncertainty about compliance to regulatory norms.[92] For instance, recently, the RBI had mandated processing of e-mandate on cards for recurring transactions and card on file tokenisation through different circulars. These circulars were issued without conducting inclusive stakeholder consultation and thus resulted in uncertainty about the role different kinds of business entities would have to play for compliance. This resulted in lack of industry's readiness to adhere to the directives, ultimately resulted in consumers facing inconvenience.[93]Such unintended adverse consequences could have been avoided by following an inclusive stakeholder consultation.

Further, in the digital lending sector, digital businesses have been uncertain of the regulatory stance of the regulator and focused on existing customers as opposed to increase their customer acquisition.[94] While RBI's Report of the Working Group on 'Digital Lending including Lending through Online Platforms and Mobile Apps' has been released,[95] regulations are yet to be issued. Now, the National Payment Council of India (NPCI) has sought RBI's permission to enable credit through Unified Payment Interface (UPI). However, there exists a need for regulatory clarity for Merchant Discount Rate (MDR) for credit-based UPI transactions.[96]

The RBI had also mandated interoperability for all full-Know Your Customer prepaid payment instruments (PPI) including prepaid payment wallets.[97] However, fintech firms remained uncertain about the level of compliance required and the MDR they could charge, and hence missed the deadline. [98]

Regulatory uncertainty also exists with respect to data localisation and cross border data flows norms mandated by the RBI. However, the expanse of the topic demands a separate paper and thus, will be covered in detail in an upcoming paper on cross border data flows in this discussion paper series.

Recommendations and the Way Forward

Regulation of an industry is typically a combination of executive, legislative and judicial actions of the three branches of the government. Thus, bringing in regulatory certainty is a difficult task. However, good regulation is a step towards building a safer internet world. The developmental pace of digital technologies challenges regulation making.[99] The need for optimum regulations persists and steps should be taken to work on the reasons which lead to regulatory uncertainty. This section illustrates a few recommendations for this purpose.

1. Formulate a principles-based Regulatory Framework

As the digital economy is dynamic, there is a requirement of change in regulations from time to time.[100] Thus, the government should first design guiding principles and adopt a principle-based regulatory framework. The design of legislations and regulations should be done based on the guiding principles with an aim to achieve the intended policy goals.

The government has articulated its vision for the growth of the digital economy which recognises the need for supportive policies and regulations. Further, the Minister for MeitY, Ashwini Vaishnaw and the Minister of State for MeitY, Rajeev Chandrashekhar have also articulated their vision for the regulation of the digital economy in various public platforms.[101] However, the government has not worked with different stakeholders to create an official regulatory framework. This formulation, when done with due public consultation, can result in development of a better umbrella framework and other countries such as the UK has followed this.

The United Kingdom (UK) formulated a Digital Charter[102] in 2018 by bringing together the government, the industry and the civil society. The Charter has specified three different work programmes on (i) making online space safe, (ii) making work technology for society as a whole and (iii) to promote fair and efficient digital markets. It further details out what the UK government had done for each of these work programmes and what it needs to do more while also setting out guiding principles and goals to be achieved.

In India, the RBI framed a Payment Systems Vision 2019-21 with public consultation which was a step in positive direction.[103] However, the digital economy covers aspects much more than just the payment sectors and therefore needs an overarching framework. Hence, the government should do due public consultation and create an official principles-based regulatory framework.

2. Adopt a Whole of Government (WoG) Approach

Even after having a principles-based regulatory framework, regulatory enforcement is a challenge.[104] Regulation is adversely impacted when there is regulatory overlap and there is a need to minimise these overlaps.[105] To effectively tackle this, dialogue between the different government departments and agencies is important and must. Hence, a WoG approach must be adopted so that these departments and agencies work jointly to resolve issues of regulation.

Further, as big digital businesses transcend sectoral boundaries, regulators need capacity building. Therefore, adopting a WoG approach will also enable the government to bring in its expertise from different departments before making regulations and enforcing them. Further, different regulators have been set up at different instances for achieving different kinds of results, collaborating on different issues becomes difficult. Therefore, new regulatory collaboration methods should be designed so that in cases of regulatory overlaps, regulation is not compromised due to turf wars.

To facilitate this process, guidelines for adopting a WoG approach and regulatory collaboration must be made by the government. A Policy Convergence Unit may be formed and can be housed in NITI Aayog.[106] However, while adopting this approach, the independence of regulators must be respected and not interfered with.

3. Institutionalise Set Regulatory Procedures

The lack of set regulatory procedures and standards leads to regulators following arbitrary approach of regulation. This causes regulatory uncertainty. There is a need to institutionalise regulatory procedures followed by different regulators. This should include mandating the regulators to conduct due public consultation, justifying the reasons the issued regulation in writing and following regulatory impact assessment, among others.

Adopting transparency in regulation making can cut arbitrary regulations.[107] For this purpose, regulators should indulge in public consultation with stakeholders like industry associations, businesses and consumers and be responsive to comments received by the public. This practice can lead to lower levels of regulatory uncertainty.[108] The degree to which this is followed also indicates how well the rule of law is observed.[109] Studies show that when regulatory agencies take time to change the regulatory landscape, regulatory uncertainty is reduced and there are more opportunities for investments and innovation.[110]

In the Cellular Operators Association v TRAI case,[111] the Supreme Court referenced the Airports Economic Regulatory Authority of India Act, 2008 which requires the authority under the act to perform public consultation and maintain transparency. The court found a lack of transparency in the consultation process carried out by TRAI. Without making 'upholding transparency' in the regulatory process a general requirement, the court expressed its desire for the Parliament to step in and enact legislation similar to the Administrative Procedure Act, 1946 (AP Act) of the US.[112]

In this context, the absence of legislation that sets out procedures and standards for regulation on the lines of the AP Act in the United States is an impediment to effective regulation.[113] Under the AP Act, regulators are required to mandatorily give a general notice of any rulemaking in the federal register, conduct public consultation and provide standards for judicial review.[114] The AP Act is successfully checks arbitrary actions in regulation making and thus helps create regulatory certainty.[115] In India, though there exists a Pre-Legislative Consultation Policy, it is not followed in spirit.[116] Further, efforts to bring a law for this purpose like the Regulatory Reform Bill in 2013[117] and the Pre-Legislative Consultation Bill in 2021[118] have not been able to materialise.

Regulatory Impact Assessment (RIA) is an approach to ensure that suboptimal results are not achieved.[119] Different reform commissions including Financial Sector Legislative Reforms Commission, Damodaran Committee Report and the Tax Administration Reform Commission, among others have suggested adopting RIA.[120] However, the same has not been made mandatory for all regulators in India. In many jurisdictions, regulatory agencies are required to conduct RIA mandatorily.[121]

Light touch regulation can facilitate innovation, thus adopting light but tight regulations should be encouraged.[122] Sunset clauses may also be put in these regulations so that contextually irrelevant regulations end naturally without any requirement of repealing them. Further, to clear regulatory uncertainty and confusion, different regulators can also conduct public meetings periodically, say once in 3 months, to make their stance on regulatory aspects public, like the Monetary Policy Committee of the RBI.

Further, regulations may be first tested using regulatory sandboxes.[123]

Furthermore, regulators may also encourage the usage of technology for reducing regulatory uncertainty. This can include digital businesses using regulatory technology (regtech) to comply with regulations and regulators utilising supervisory technology (suptech) to meet regulatory objectives and ensure compliance by digital businesses.[124] When technological tools are used effectively for achieving these ends, it can result in an overall better regulatory system which minimises regulatory uncertainty. These tools range from digital platforms, machine learning, blockchain etc. In India, steps in this direction are already being taken by other regulators such as the Food Safety and Standards Authority of India (FSSAI) which has digitalised its licensing and registration functions, re-designed its portal as Food Safety Compliance System (FoSCoS) for intelligent decision making.[125]

4. Mechanism for Informal Guidance

Given the constant innovations in the space of digital economy, digital businesses have wish to seek clarity on regulatory aspects before taking a business decision. In this regard, regulators should allow digital businesses to approach them for seeking clarifications. This is already present in the fields like taxation where businesses can reach the Board for Advance Ruling[126] and securities market where Security and Exchange Board of India (SEBI) has the Informal Guidance Scheme.[127] Here, businesses receive the guidance about the consequences of a proposed decision. Adoption of this practice by regulators will aid in reducing regulatory uncertainty. While such guidance should not become precedence, it can still provide regulatory certainty to businesses about the thinking of the regulator.[128]

5. Effectively Engage the Parliament for Establishing Accountability

Regulators should be made accountable for not maintaining regulatory certainty. For this purpose, the parliament should be actively engaged for establishing their accountability. Even though laws have the provisions for parliamentary committees reviewing the work on regulatory agencies, in practice, this is found missing. The departmentally related standing committees only carry out macro level scrutiny.[129] An enhanced parliamentary review of actions of regulators by standing committees can help establish accountability and thus bring in regulatory certainty. In this regard, legal reforms should be carried out, mandating a dedicated standing committee to review delegated legislation. The Parliamentary Committee on Subordinate Legislation may be designated for this purpose.[130]

6. International Cooperation between Governments

There are several challenges for which governments across the world take steps to cooperate and learn from each other and further work jointly to effectively fight them. A good example of this is the finance and banking sector. Over the years, central banks of different countries have come together to form the Bank of International Settlements which has helped form regulations in the form of Basel norms for tackling world economic crises.[131]

As digital businesses often transcend territorial boundaries, they also pose regulatory challenges to governments across the world. Governments should come together to form *guiding principles* so that the digital economy is effectively regulated. The OECD led International Regulatory Co-operation helps governments with adding an international lens to rulemaking.[132] A similar body should be made focused towards the digital economy. Cooperation may also be done at regional or bilateral levels and other countries have taken a step in this direction. For instance, the

Association of Southeast Asian Nations (ASEAN) is working on a Digital Economy Framework Agreement, negotiations for which are said to be completed by 2025.[133] The US and EU have also worked on the transatlantic Data Privacy Flows.[134]

This step will drastically help the digital economy as regulatory uncertainty will reduce because of governments adopting similar guiding principles for regulation. However, this should not result a one-size-fits all approach as different countries are in different stages of the evolution of the digital economy. Rather than harmonisation of approaches, cooperation must lead to coherence.

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