





# REGULATING BIG TECH: A BALANCING ACT

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## 1. Introduction

Through the ravages of the COVID-19 pandemic are some bright spots and some beneficiaries. One such spot is Big Tech and the global digital marketplace. From governments to institutions to consumers, all have turned to digital platforms to conduct business, work from home, seek COVID-related help, and fulfil their everyday needs – from schooling, to retail, payments and telemedicine. Big Tech's profits have soared – a 105% increase over the last year.

However, the omnipresence of these tech platforms raises crucial questions on their dominance, data protection and privacy, and the specific role of intermediaries. Understanding this, developing and developed countries alike are focussing on digital governance in order to determine fundamental ground rules and principles on the operation and expansion of digital businesses and platforms. In the last few years, the European Union has taken the lead in framing rules on digital governance that promote innovation as well as a level playing field. In addition to the flagship General Data Protection Regulation (GDPR), which has been like a model law for several nations, there is the Payments Service Directive, the revised e-commerce directive and the Digital Services Act, amongst others.

India is behind the EU on digital rules, but it is leading the way on fintech. The cornerstone of India's fintech revolution is the India Stack - a set of application programming interfaces (APIs), that are publicly available, thereby promoting open-source information for the provision of digital services for public use. With India ahead of the fintech game on the technology, regulatory and consumer fronts, it will be looked at as a leader in the global fintech order.

With several countries in the process of determining domestic technology laws and rules, it is imperative for multilateral bodies to run parallel with global rules. Groups such as the G20 must work on establishing the global rules on digital governance and arrive at an international consensus. The aim should be to strike the right balance between innovation and regulation.

This report analyses key aspects of the digital revolution – from fintech, digital public goods and intermediaries, to global data rules and issues of anti-trust. It makes pointed recommendations on creating digital equity, uniformity of global digital regulations along with digital empowerment of policy makers. None of this is possible without the combined and sustained efforts of all stakeholders from governments to corporates, academia and civil society organisations.

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1 Big Tech's surging growth stuns Wall Street: <https://www.ft.com/content/42c5f1d6-36e5-4117-b30e-635c85c6a55c>

# MAKING DIGITALIZATION A PUBLIC GOOD

*by* Manjeet Kripalani

On 27th April, the President of the UN General Assembly convened a one-day High-Level Thematic Debate on Digital Cooperation and Connectivity, bringing together the international community to commit to a common digital future for all and leave no one offline – especially in the context of the COVID-19 pandemic.



In the midst of the cruel second wave of the pandemic, rays of hope are still visible, offered by technology and digital solutions.

The pandemic has made two things clear: Digitalisation will power the developing world out of an economic crisis and the digitalisation of the Medium, Small and Micro (MSME) sector<sup>2</sup> is a necessary ingredient for it.

This is good news for the world for multiple reasons. The pandemic has accelerated economic reforms in many developing countries<sup>3</sup>; social distancing has accelerated the adoption of digitalisation by governments, companies, consumers, educational institutions and NGOs<sup>4 5 6</sup>; the decreasing cost of technology and production<sup>7</sup> makes it accessible and possible; and platforms are the new institutions – now easier to build and participate in.

At the cusp of this new era, how can we ensure equity and a level playing field in digitalisation? There are some challenges to consider, as this process is still fundamentally different in developed and developing countries.

First, there's a difference between "access" and "usage" of technology. The issue facing the developed world is "usage", that is, consumer privacy, security, data protection, productivity. The developing world needs "access" - digital availability, affordability and usage of infrastructure.

Second, there's a "hard" and "soft" infrastructure gap - "Hard" includes devices, electricity, telecom, servers, data centres, while "soft" includes digital platforms, content, legal and policy measures across value-chains. The developing world lacks both.

The world is also tied down to three approaches: proprietary digital platforms owned by a few private players, a government mandated system and a broad regulation for consumers disconnected from their needs<sup>8 9</sup>. A universalist approach is necessary to reconcile these worlds. One way is by making digitalisation a 'public good' – available, affordable, accessible, auditable, scalable, with privacy embedded in its design. The UN Secretary General laid this out in his substantive Road Map for Digital Cooperation.<sup>10</sup>

A ready and demonstrated model of digital public goods is available in India, in the form of IndiaStack - a set of open, modular, interoperable protocols, building blocks that allow "governments, businesses,

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<sup>2</sup> Liu, Clark Ke. 2020. "Policy Brief: The Role of Micro-Small and Medium Enterprises in Achieving SDGs." [https://sdgs.un.org/sites/default/files/2020-07/Policy\\_Brief\\_MSMEs\\_and\\_SDGs.pdf](https://sdgs.un.org/sites/default/files/2020-07/Policy_Brief_MSMEs_and_SDGs.pdf)

<sup>3</sup> Sharma, Ruchir. 2021. "Fresh Sanctions May Barely Dent Fortress Russia." *Www.ft.com*. 2021. <https://www.ft.com/content/8ba328f7-f002-439e-a19b-c0839b649dde>.

<sup>4</sup> UNCTAD. 2021. "How COVID-19 Triggered the Digital and E-Commerce Turning Point | UNCTAD." *Unctad.org*. March 15, 2021. <https://unctad.org/news/how-covid-19-triggered-digital-and-e-commerce-turning-point>. • <sup>5</sup> FIS. 2021. "Global Selector | Worldpay from FIS." *FIS Global*. 2021. <https://offers.worldpayglobal.com/rs/850-JOA-856/images/1149143%20GPR%20DIGITAL%20ALL%20PAGES%20SINGLES%20RGB%20FNL9.pdf> • <sup>6</sup> World Bank. 2020. "GovTech: Putting People First." <https://www.worldbank.org/en/topic/governance/brief/govtech-putting-people-first>

<sup>7</sup> Agrawal, Ajay, Joshua Gans, and Avi Goldfarb. "Prediction machines: the simple economics of artificial intelligence." *Harvard Business Press*, 2018.

<sup>8</sup> Medhora, Rohinton. 2019. "New Norms for Globalisation's Digital Challenges." 2019. <https://www.gatewayhouse.in/globalisations-digital-challenges/> • <sup>9</sup> Medhora, Rohinton P, and Taylor Owen. 2020. "A Post-COVID-19 Digital Bretton Woods." *Centre for International Governance Innovation*, April 19, 2020. <https://www.cigionline.org/articles/post-covid-19-digital-bretton-woods>

<sup>10</sup> <https://undocs.org/A/74/821> pg. 6

startups and developers to utilise a unique digital infrastructure to solve India's hard problems."<sup>11</sup> It can be compared to the public highways which governments finance and build – on which private and public vehicles can drive, commerce can thrive and people can prosper.

The base of this is a biometric identity, connected to bank accounts through which citizens receive services and subsidies, from pensions to remittances, licences to food rations. The identity stores the digital records –but consent of sharing data lies with the individual. It has been tested during the pandemic across India's vast, diverse population, and at continental scale – with food rations for migrant workers,<sup>12</sup> vaccines taken and digital certificates provided.<sup>13 14</sup>

Efforts are also underway globally, to adopt all or part of this model. The Philippines,<sup>15</sup> Morocco, Ethiopia, are working with MOSIP, or the Modular Open-Source Identity Platform, a not-for-profit foundation offering the open-source code.<sup>16 17</sup> The UN High Level Panel for Digital Cooperation endorsed MOSIP in its June 2020 report.<sup>18</sup>

Once the pandemic ends, the focus will be on getting people back to work, and this is where digital public goods are critical, especially to revive the MSMEs. In developing countries, they are plagued by low digitalisation and poor access to low-cost and easily available credit. In the absence of data, the costs of reaching these MSMEs, underwriting, monitoring and repayment risks of small-sized loans, make it difficult for lenders to provide credit.

India is democratizing credit flows to MSMEs while simultaneously driving digitalisation within them – this is Microfinance 4.0! Building blocks such as the Open Credit Enablement Network (OCEN) bring together private participants like app-based companies, credit-scoring, mutual funds, insurance, telcos, which can innovate across the entire lending value chain.

We cannot forget to consider sustainability. Massive digitalisation requires mountains of silicon chips, magnets and batteries, which need rare earths and lithium, all difficult to mine. Data centres are responsible for 1% of global energy consumption.<sup>19</sup> Chip-making is water-intensive, and the chemicals are polluting. The need of the hour is yes, more digitalization, but also innovation for a smart, non-polluting chip.

Till that comes, the hope is for democratic digitalization to create new tiger economies, across continents – in the Indo-Pacific, Africa, South America, the Caribbean. It's more possible now than ever before.

***This speech was delivered at the High-Level Thematic Debate on Digital Cooperation and Connectivity, organised by UN Office of the Secretary General's Special Envoy on Technology, United Nations General Assembly, New York, on 27 April, 2021.***

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<sup>11</sup> IndiaStack. n.d. "About – IndiaStack." IndiaStack.org. <https://www.indiastack.org/about/>

<sup>12</sup> Umang. n.d. "Department of Food and Public Distribution." UMANG. Accessed May 26, 2021. <https://web.umang.gov.in/landing/department/department-of-food-and-public-distributionfpd.html>

<sup>13</sup> Gelb, Alan, and Anit Mukherjee. 2021. "CGD Note a COVID Vaccine Certificate Building on Lessons from Digital ID for the Digital Yellow Card." <https://www.cgdev.org/sites/default/files/Covid-vaccine-certificatNotePDF.pdf> • <sup>14</sup> *ibid*

<sup>15</sup> Schellhase, John. 2019. "Framing the Issues: Expanding Digital Financial Inclusion in the Philippines." Milken Institute.

<sup>16</sup> MOSIP. n.d. "Open Source Platform - National Foundational Id - MOSIP." [www.mosip.io](http://www.mosip.io). <https://www.mosip.io/> • <sup>17</sup> "Digital Public Goods Alliance." n.d. [Digitalpublicgoods.net](https://digitalpublicgoods.net/). <https://digitalpublicgoods.net/>

<sup>18</sup> UN Secretary General's High Level Panel. 2019. "The Age of Digital Interdependence."

<sup>19</sup> Harvard John A. Paulson School of Engineering and Applied Sciences. "Environmental impact of computation and the future of green computing." ScienceDaily. [www.sciencedaily.com/releases/2021/03/210302185414.htm](http://www.sciencedaily.com/releases/2021/03/210302185414.htm)

# BIG FINTECH IS HERE

*by* Ambika Khanna

The future is likely to see 'Big FinTech' replace 'Big Tech'. But this time around, India can be part of the story from the ground up. India has been ahead of the fintech game on the technology, regulatory and consumer fronts.

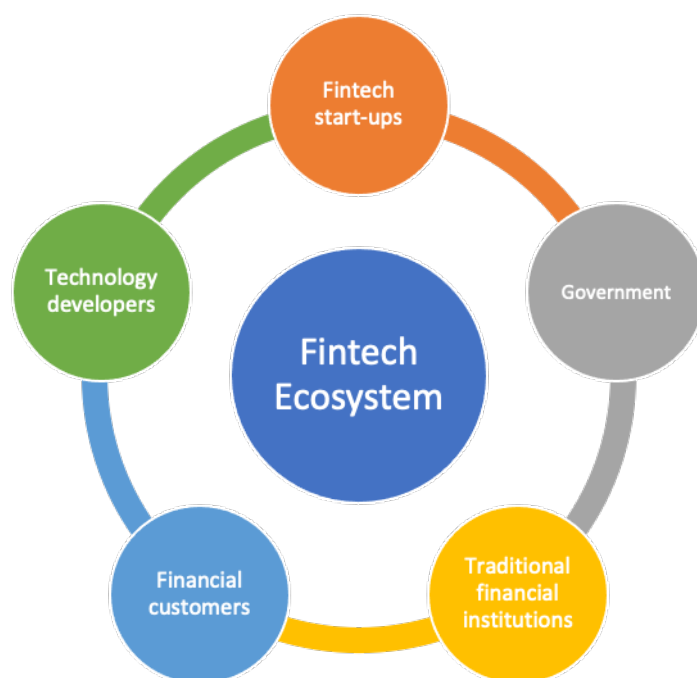


The disruptive innovation that is the fintech revolution was primarily sparked by the move from cash to cashless economies, e-Commerce, e-trading services, bitcoins and more recently, accelerated by COVID-19. Investor sentiment in the fintech sector is at its peak. Globally, fintech funding in 2020 is estimated to have reached \$105 billion.<sup>20</sup> India saw \$1.46 billion worth of fintech investments in the first half of 2020 itself, a 60% jump compared to \$919 million for the same period in 2019.<sup>21</sup>

What is fintech? It refers to the use of technology for the provision of financial services. While digital payments are at its forefront, it also includes paperless lending, digital currencies, peer-to-peer lending, securities trading and insurance. While there is no uniform definition of fintech, the Financial Stability Board, the international body that promotes financial stability, defines fintech as “technologically enabled innovation in financial services that could result in new business models, applications, processes or products with an associated material effect on financial markets and institutions and the provision of financial services”.<sup>22</sup>

The following graphic outlines the stakeholders that define the fintech ecosystem:

Figure 1



Source: 'Fintech in India: Opportunities and Challenges', Dr. C. Vijai, SAARJ Journal on Banking and Insurance Research, January 2019

<sup>20</sup> KPMG. "VC investment in fintech more than doubles in second half of 2020 – expected to remain strong into 2021." Press Release. 23 February 2021. <https://home.kpmg/xx/en/home/media/press-releases/2021/02/vc-investment-in-fintech-more-than-doubles-in-second-half-of-2020.html>

<sup>21</sup> Mankotia, Atharv. 2021. "BFSI – Fintech & Financial Services." [www.investindia.gov.in](http://www.investindia.gov.in). 2021. <https://www.investindia.gov.in/sector/bfsi-fintech-financial-services>

<sup>22</sup> FSB. 2017. "FinTech." [www.fsb.org](http://www.fsb.org). May 12, 2017. <https://www.fsb.org/work-of-the-fsb/financial-innovation-and-structural-change/fintech/>

Given its relevance across sectors and borders, primarily led by the potential of scale, it has attracted interest not only from the private equity and venture capital investor but also banks, Big Tech companies, public sector companies and governments across the world. India's RuPay, indigenously created by the National Payments Corporation of India, holds 60% market share of the total cards issued in India<sup>23</sup> and 30% by value.<sup>24</sup> PayPal, a U.S. digital payments company, has a valuation of over \$300 billion.<sup>25</sup> China's Ant Financial, which owns Alipay, was valued at over \$315 billion at the time of its prospective IPO in 2020.<sup>26</sup>

The Big Tech companies have the potential to become even bigger, as they can leverage Big Data to power their way through to the fintech pinnacle and attain market/sectoral leadership. Google, in addition to Google Pay, has already started developing physical and virtual debit cards, similar to the Apple Card. In fact, it also has its own investment arm, Google Ventures, which provides seed capital to tech start-ups including those into lending services, payment, banking and cryptocurrencies.

The future is likely to see 'Big Fintech' replace 'Big Tech'. But this time around, India can be part of the story from the ground up. India has been ahead of the fintech game on the technology, regulatory and consumer fronts.

India is the first country to introduce a digital infrastructure tool called the 'India Stack'. The cornerstone of the fintech revolution, India Stack is a set of application programming interfaces (APIs), that are publicly available thereby promoting open-source information for the provision of digital services. It has reaped massive and widespread benefits not only for the consumer and the government, but also industry, particularly telecom and banking, which have extensively leveraged the UPI and e-KYC APIs. Learning from the India Stack model, International Institute of Information Technology, Bangalore (IIIT-B), a world-renowned technology university, anchored the creation of MOSIP, an open-source digital identity platform.<sup>27</sup> Currently, MOSIP is being used by Morocco, Ethiopia, Sri Lanka and Philippines to develop their digital identity ecosystems.<sup>28</sup>

In the last few months, three homegrown fintech companies have achieved unicorn status – Cred, a credit card rewards and payments company; Groww, a personal finance start-up; and, Digit Insurance, an insurance tech start-up.<sup>29</sup> These add significant strength to the existing fintech unicorn club of Paytm, Pine Labs, PhonePe, RazorPay, Policy Bazaar and BillDesk, and reaffirm the faith of stakeholders in this sector. On the industry front, companies such as Piramal, Tech Mahindra and Wipro are showing increased interest too – the former is in talks to acquire Payments Technology Services, a fintech start-up, as it aims to establish its name in the banking and financial services.<sup>30</sup>

**23** Reserve Bank of India. n.d. "Reserve Bank of India - Publications." Rbi.org.in. <https://rbi.org.in/scripts/PublicationsView.aspx?id=20315> • **24** Subramanian, Shobhana, and Shritama Bose. 2021. "'RuPay's Market Share by Volumes Is 34%.'" *The Financial Express*. March 23, 2021. <https://www.financialexpress.com/industry/banking-finance/rupays-market-share-by-volumes-is-34/2218027/> • **25** Bary, Emily. 2021. "PayPal Valued at over \$300 Billion for the First Time." *MarketWatch*. 2021. <https://www.marketwatch.com/story/paypal-valued-at-over-300-billion-for-the-first-time-11612463466>

**26** Wu, Julie Zhu, Kane. 2021. "Exclusive: Investors Value China's Ant Group at over \$200 Billion after IPO Halt - Sources." *Reuters*, March 16, 2021. <https://www.reuters.com/article/us-china-ant-group-investors-exclusive-idUSKBN2B80JS>

**27** MOSIP. n.d. "Open Source Platform - National Foundational Id - MOSIP." <https://www.mosip.io/about.php>

**28** Kripalani. Manjeet. "Making Digitalization a Public Good." Gateway House, 29 April 2021. <https://www.gatewayhouse.in/making-digitalization-a-public-good/> • **29** IBSintelligence. 2021. "3 Indian FinTechs That Reached Unicorn Valuation in 2021." 2021. <https://ibsintelligence.com/3-indian-fintechs-that-reached-unicorn-valuation-in-2021/#:~:text=Groww%3A%20On%20April%20%20Bengaluru,Neeraj%20Singh%2C%20and%20Ishan%20Bansal>

**30** BW Disrupt. 2021. "Tech Mahindra to Acquire Fintech Startup Payments Technology Services for 9M." *BW Disrupt*. 2021. <http://bwdisrupt.businessworld.in/article/Tech-Mahindra-To-Acquire-Fintech-Startup-Payments-Technology-Services-For-9M-/13-01-2021-364923/>

Technology and associated regulations in this sector that often target benefits to the under-served communities is one of the prime boosters of fintech growth in India. The creation of the RuPay and UPI system (built on the Immediate Payment Service or IMPS infrastructure), the real time payments system developed by the National Payments Corporation of India, is one example. UPI itself has seen over 200 crore monthly transactions since October 2020.<sup>31</sup> In fact the IMPS platform has been a huge success that has exploited blockchain technology. Countries such as UAE, Malaysia and Singapore have recognised this. India and Singapore entered into a formal MoU in 2018 to strengthen cooperation in financial innovation and India is implementing UPI-based QR Codes at airport terminals along with Singapore's Network for Electronic Transfers.<sup>32</sup>

On regulation, the primary fintech regulator, the Reserve Bank of India (RBI), is leading from the front. As far back as July 2016, it created a Working Group on Fintech and Digital Banking to understand the sector and assess its implications on markets. More recently in January 2021, the RBI established a Working Group on Digital Lending.<sup>33</sup>

The RBI was one of the first in the world, along with Australia, U.K. and Singapore, to introduce regulatory sandboxes, a controlled testing environment, in 2019 in digital and contactless payment, and has already launched the second cohort of regulatory sandboxes in December 2020.<sup>34</sup> Government schemes and programs such as the Jan Dhan Yojana, Digital India and Start-up India have been major contributors too. Policies such as 100% FDI in the fintech sector has allowed foreign investments to flow in.

State level governance is not far behind. Maharashtra introduced its Fintech Policy 2018<sup>35</sup> which envisaged Mumbai to be a global fintech hub, provided for a corpus fund of Rs. 250 crores or \$34 million, in addition to a separate fund for fintech accelerators/ incubators. Such progressive policies have the potential to make India a key stakeholder in the global fintech world.

Apart from India, Europe is moving ahead. The European Commission (EU), in 2015, revised the Payment Services Directive which promoted an integrated electronic payments market in the EU, competition and innovation, consumer protection, and provided greater transparency and protection of consumer data.<sup>36</sup> Japan and Australia have instituted similar regulatory frameworks.

Surprisingly, the U.S. is the slow runner on regulation and consumer adoption. The Federal Reserve Bank only now plans to introduce a real-time payment system, similar to the UPI, in 2023 called 'FedNow'.<sup>37</sup>

What makes fintech so attractive?

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**31** NETS. "NETS Ties Up with India's National Payments Corporation of India to Facilitate Cross-Border Usage & Acceptance." Press Release. 13 November 2017. <https://www.nets.com.sg/newsroom/nets-ties-up-with-indias-national-payments-corporation-of-india-to-facilitate-cross-border-usage-and-acceptance/> • **32** Reserve Bank of India. "Reserve Bank constitutes a Working Group on digital lending including lending through online platforms and mobile apps." Press Release. 13 January 2021. [https://www.rbi.org.in/Scripts/BS\\_PressReleaseDisplay.aspx?prid=50961](https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=50961) • **33** Reserve Bank of India. n.d. "Reserve Bank of India - Publications." <https://rbi.org.in/scripts/PublicationsView.aspx?id=20315> • **34** Directorate of Information Technology, Government of Maharashtra. "Setting up of Global Fintech Hub and implementation of Fintech policy." DIT-2018/C.R-17/D-1/39. 2018. [https://fintech.maharashtra.gov.in/documents/GR\\_FintechPolicy.pdf](https://fintech.maharashtra.gov.in/documents/GR_FintechPolicy.pdf) • **35** "Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC" Official Journal of the European Union L 337/35. 2015. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015L2366> • **36** "Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC" Official Journal of the European Union L 337/35. 2015. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015L2366> • **37** Federal Reserve Board. n.d. "The Fed - Frequently Asked Questions." Board of Governors of the Federal Reserve System. [https://www.federalreserve.gov/paymentsystems/fednow\\_faq.htm](https://www.federalreserve.gov/paymentsystems/fednow_faq.htm)

- Sustainable technology: Blockchain (decentralised distributed ledger) which lies at the heart of fintech, provides a permanent record of data along with a high level of security, leading to transaction processing efficiency, reduced costs and transparency.
- Financial inclusion and access to capital: A classic example of India Stack's enablement is that of RuPay, which targeted India's masses, those who did not have access to financial capital. RuPay, which issues debit and credit cards, soon found success as it allowed every person to access payment cards due its affordability, and was highly accessible due to its linkage with Jan Dhan accounts. Mastercard too has introduced a fintech accelerator program - Fintech Express, aimed at financial inclusion in the MSME sector in Southeast Asia. China's Union Pay was similarly launched to provide digital financial services to the lower income groups.
- Minimal technology development: Fintech players do not necessarily need to develop new technology, which can be both capital and time intensive. Players in the fintech market can leverage existing networks and technology such as that of telecom, open-source APIs and data networks. Companies can thus piggy-back on existing technology to provide financial services. In 2007, Kenya launched M-PESA mobile banking, a digital cash transfer service, which leveraged the existing telecom network to provide its services.

So, what is required to sustain the global fintech boom?

### 1. Regulatory catalysts:

- At both the global and domestic level, it is necessary to have legislation on data protection and privacy, cybersecurity and AI, all of which are aligned towards creating a robust fintech ecosystem;
- Staggered compliance requirements: In order to balance innovation and regulation, policies should incorporate the varying compliance standards for companies subject to revenue-based thresholds. This will ensure that the MSMEs and smaller companies are not bogged down by excessive regulation and control.

**2. Virtual Fintech Parks:** Taking from the concept of physical parks such as the SEZs in India, countries can locally introduce virtual fintech parks with the supporting digital tax and other fiscal incentives.

### 3. Collaborations:

- Country-to-country: Sharing of best practices and capacity building measures: Mature fintech markets can assist under developed fintech markets by encouraging government-to-government as well as private sector partnerships such as that being done by India with MOSIP as well as India Stack. In addition, countries should share the challenges faced in adopting such best practices, and share insights from monitoring and evaluation activities on a regular basis. This will allow governments to be better prepared for effective policy and technology implementation at the domestic level.
- Domestic: Policy makers, regulators should hold regular discussions with the private sector and civil society members in order to foster innovation and address the challenges faced by industry.

There is no better time than now for fintech stakeholders to leverage the opportunities unleashed by the COVID-19 pandemic, from booming e-commerce to adoption of digital payments across demographics and geographies.

And, it is India's IMPS and UPI models that can lead the global fintech order.

# CREATING AN INDIAN DIGITAL SERVICE

*by* Blaise Fernandes

India is now an integral part of the global digital supply chain, and is salient to global technology stakeholders. The country's innovation, regulation and legislation is working hard to keep up with this fast-moving new element. The gap is in domestic administrative technical capacity. A new all-India service cadre with technical expertise can streamline the technology policy work across ministries and play an important role in building India's digitisation dimensions.



India has witnessed a digital boom in the last decade. From digital infrastructure to adoption of new technologies to big data becoming central to industry, the Indian socio-economic fabric is redesigning itself with the digital thread in urban and rural areas alike. It is accompanied by the government's push through the 'Digital India' initiative, which is creating digital services as public goods. Internationally, India's software engineers are the creators, testers or supporters of software and its services. With 752 million<sup>38</sup> internet subscribers, India is second only to China,<sup>39</sup> and is poised to be the third largest consumer market in the world, after China and the U.S.

In short, India is an integral part of the global digital supply chain, and is salient to global technology stakeholders.

Does the country have the requisite capacity to benefit from this coalescence? There is some being built, of course. On the regulatory front, the National Cyber Security Policy of 2013 is being updated and revamped as the National Cyber Security Strategy. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 are being operationalised to regulate electronic transactions and cybercrime.<sup>40</sup> Important measures are pending, like the Personal Data Protection Bill, which is fundamental to digital governance in India.

The 11th Second Administrative Reforms Report of 2008 highlighted the importance of e-governance and the consequent need for capacity-building at every level of government. Currently, new recruits to the Civil Services do receive training in information technology and e-governance. And as of now, the Indian Telecommunication Service is the primary cadre from which officers are assigned to work on different aspects of technology policy and digital issues.

But this is not enough. Digital now extends beyond telecom. And the Civil Services coursework does not offer an enhanced understanding of how technology works, its domestic and international ecosystem, and the implications of emerging technologies – all of which can enable them to identify loopholes/risks to make and implement better policy.

India needs an exclusive and new all-India service cadre – an Indian Digital Service (IDS), part of the civil service and recruited primarily by the Union Public Service Commission, to serve as the backbone of the Indian government's multiple digital and other emerging technology initiatives.<sup>41</sup>

This service will:

1. Reinforce the existing institutions to deal with challenges arising out of the digital world, from data protection to white labelling to cryptocurrency, use of the dark net, e-commerce abuse etc.;
2. Create a roadmap for e-governance, data protection, a level playing field in e-commerce for producers especially the Ministry of Micro, Small and Medium Enterprises sector, and consumers, cryptocurrency, Intellectual Property protection, cybersecurity etc.;
3. Use India's attractive digital ecosystem to drive the global digital narrative.

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<sup>38</sup> [https://www.trai.gov.in/sites/default/files/QPIR\\_21012021\\_0.pdf](https://www.trai.gov.in/sites/default/files/QPIR_21012021_0.pdf)

<sup>39</sup> <https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/digital-india-technology-to-transform-a-connected-nation>

<sup>40</sup> <https://www.gatewayhouse.in/changing-status-quo-social-media-india/>

<sup>41</sup> These include India Stack and the digitisation of government services such as GSTN (Goods and Services Tax Network), National Logistics Platform, AgriMarket App, e-NAM (National Agriculture Market), MyGov, DigiLocker, GeM (Government e-Marketplace) and UMANG (Unified Mobile Application for New-Age Governance).

The last time a new services cadre was created was in 2018, when the government restructured some of the existing services to create Indian Enterprise Development Services for the Ministry of Micro, Small and Medium Enterprises.<sup>42</sup> Typically, it takes years for such a cadre to be established. With galloping digitisation, India can't wait for a new cadre to reach full maturity or for the Constitutional amendment needed for the creation of an all-India service.

Therefore, the government can immediately begin filling the ranks of the IDS through lateral hiring, by bringing in domain expertise from the private sector. Several ministries already do this, including the Ministry of Commerce & Industry, Ministry of Finance and Ministry of Health and Family Welfare.<sup>43</sup> Past lateral entries that have served the Indian Government well are former President K. R. Narayanan who was inducted into the Indian Foreign Service in 1949, former Prime Minister Manmohan Singh, Montek Singh Ahluwalia and Amber Dubey (former KPMG, currently at Ministry of Civil Aviation as Joint Secretary).

The establishment of the IDS cadre will streamline the technology policy work currently being carried out across ministries such as the Department of Telecommunications, the Ministry of Electronics and Information Technology, the Ministry of Commerce and Industry and the Ministry of External Affairs. The placement of the officers in these different ministries will provide the requisite knowledge and expertise.

In addition to policy-making at the central level, the IDS officers can play an important role at the state level in strengthening digitisation and building capacity.

The IDS will bring in the requisite institutional strength and skill-set for digital technology policy-making. This has the potential to propel not only India's digital transformation, but also its digital economy through able preparation and administration, effective dispute resolution and a futuristic outlook.

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<sup>42</sup> <http://www.dcmsme.gov.in/employ-corner/IEDS/MSME-Notification.pdf>

<sup>43</sup> <https://pib.gov.in/PressReleasePage.aspx?PRID=1695534>

# BIG, BIGGER TECH: TRUST & ANTI-TRUST

*by* Ambika Khanna

Big Tech wields considerable influence over commerce, speech, media, and politics. Mergers and acquisitions have been key to their burgeoning growth. Now it is clear that their power is buttressed by anti-competitive and predatory practices. Governments across the world are moving to redress this through regulation, but the task is complex.



The combined market capitalisation of the five Big Tech companies Facebook, Amazon, Apple, Microsoft and Google (FAAMG) in September 2020 was over \$6 trillion,<sup>44</sup> more than double the GDP of India.

This staggering data point raises a fundamental question: what makes the big tech companies 'big'? Three things: first, continuous investments across domains and sectors from e-commerce, digital payments to AI and autonomous vehicles; second, zero financial cost to users of the platform (excluding the cost of data, an evolving concept for users); three, network effects i.e., a phenomenon where every new user adds value to the big tech platform.

There's nothing reprehensible about being big and established. But it is the 'how' of their dazzling growth that has red-flagged concerns about Big Tech. The world over, FAAMG companies have come under increased scrutiny for reasons ranging from monopolistic behaviour to data privacy to content moderation to advertising policies. In India, the most recent case against Big Tech was due to the amended (now suspended) WhatsApp privacy policy which allowed the platform to share metadata with its parent company, Facebook.<sup>45</sup> Australia introduced a media bargaining code<sup>46</sup> in December 2020 to curb anti-competitive practices by Big Tech by mandating a payment structure between the platform and news outlets. In the U.S., where there is a long history of anti-trust cases against tech and other giants, the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law concluded after an investigation in October 2020, that the Big Tech companies have been indulging in anti-competitive practices by abusing their status as gatekeepers of the internet.<sup>47</sup>

Mergers and acquisitions by Big Tech across sectors have been key to their burgeoning growth. In the COVID-19-hit year of 2020 itself, Salesforce acquired six companies,<sup>48</sup> Facebook acquired over seven companies including Kustomer, a customer service start-up, for \$1 billion,<sup>49</sup> and Apple focussed its 2020 acquisitions on AI technology companies.

The graph below provides a pictorial representation of the reach of the big tech companies, that indicates their power and ability to influence society, economy and even politics.

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<sup>44</sup> Jones, Chuck. 2020. "The FAAMG Stocks Drive the Markets." *Forbes*. 2020. <https://www.forbes.com/sites/chuckjones/2020/09/26/the-faamg-stocks-drive-the-markets/?sh=2c5eba495439>

<sup>45</sup> Whatsapp. 2021. "Privacy Policy." *WhatsApp.com*. January 4, 2021. <https://www.whatsapp.com/legal/updates/privacy-policy/?lang=en>

<sup>46</sup> Australia. House of Representatives. 2021. "Treasury Laws Amendment (New Media and Digital Platforms Mandatory Bargaining Code) Bill 2021." [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r6652](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6652)

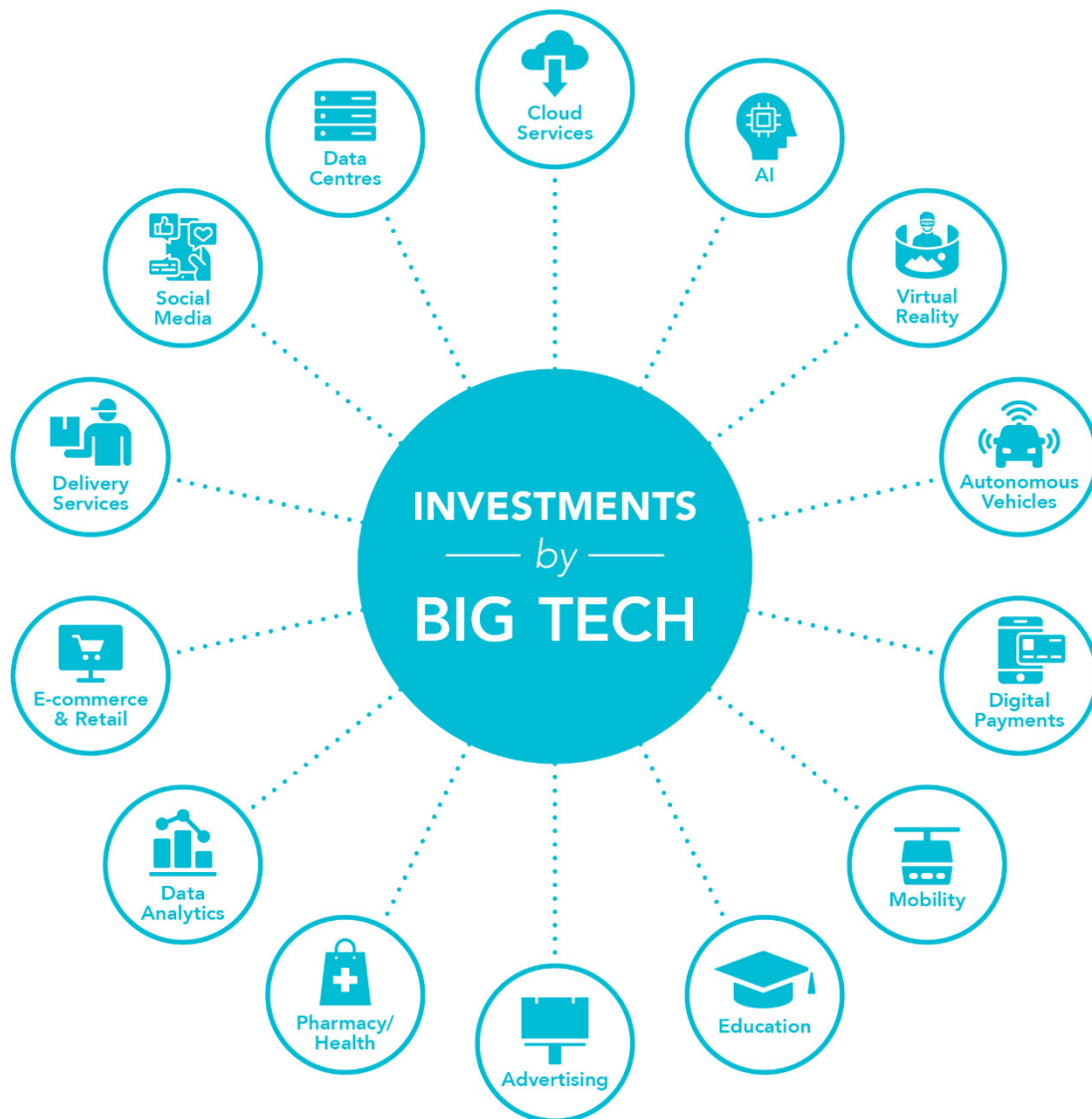
<sup>47</sup> House Committee on the Judiciary. "Judiciary Antitrust Subcommittee Investigation Reveals Digital Economy Highly Concentrated, Impacted By Monopoly Power." Press Release. 6 October 2020. <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3429>

<sup>48</sup> HIC Global Solutions. 2020. "Salesforce All Acquisitions 2020: An Year for Salesforce." *HIC Global Solutions*. December 23, 2020. <https://hicglobalsolutions.com/blog/list-of-salesforces-acquisitions-in-2020-an-year-for-salesforce/>

<sup>49</sup> Levy, Dan, and Matt Idema. 2020. "Kustomer to Join Facebook." *About Facebook*. November 30, 2020. <https://about.fb.com/news/2020/11/kustomer-to-join-facebook/>

The graph below provides a pictorial representation of the reach of the big tech companies, that indicates their power and ability to influence society, economy and even politics.

Figure 2: Investments by BigTech



In the last few years, governments around the world have questioned some of these investments alleging that their objective is to neutralise competition, leading to monopolisation and stifling of innovation. In December 2020, the U.S. Federal Trade Commission along with 48 U.S. States filed a case against Facebook alleging monopolisation and killing of competition by making large acquisitions including that of Instagram in 2012 for \$1 billion and Whatsapp in 2014 for \$19 billion.<sup>50</sup>

<sup>50</sup> Federal Trade Commission. "FTC Sues Facebook for Illegal Monopolization." Press Release. 9 December 2020. <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>

The U.S. Department of Justice filed a lawsuit against Google in October 2020, alleging monopolistic practices in search advertising and anti-competitive practices by entering contracts with smartphone makers requiring they make Google their default search engine.<sup>51</sup>

Europe has moved heavily against Google in the recent past. The European Commission, in 2019, imposed a penalty of over \$1 billion (approximately 1.3% of its annual turnover in 2018) on Google for abusing its dominant position in online advertising.<sup>52</sup> Google was found guilty of including anti-competitive clauses in contracts with its vendors, restricting them from hosting rivals' content. In the past, Google has been subjected to similar fines by the European Commission, to the tune of over \$6 billion, for abusing its dominance.

Amazon has been accused, in the U.S., of using the data of third-party sellers for furthering its own retail business on the platform<sup>53</sup>- a formal lawsuit is expected soon. The company has faced similar claims of misuse of third-party data, harming the smaller players, for its own benefit in Canada and the EU, in 2020.<sup>54</sup> The European Commission has even started a separate investigation to assess if Amazon gives preferential treatment to its own products.<sup>55</sup>

China is playing catch up too with its homegrown BAT (Baidu, Alibaba and Tencent). In December 2020, China's anti-trust regulator alleged that Alibaba, the country's largest e-commerce company, violated the anti-monopoly law by entering into contracts that demanded exclusivity from vendors.<sup>56</sup> More recently, in March 2021, Tencent was fined \$ 76,000 for not being transparent about its acquisitions.

While in the US, it is the Department of Justice, Federal Trade Commission and the states that are leading the anti-trust cases, and the European Commission in Europe, in India it is the Competition Commission of India (CCI). As the primary anti-trust watchdog, Competition Commission of India, in January 2020, launched an investigation into Amazon and Flipkart for abusing their dominant positions and carrying out acquisitions (such as the Walmart-Flipkart deal) with the aim to stifle competition and for using predatory pricing tactics. The companies have managed to obtain a stay on the CCI investigation from the Karnataka High Court.<sup>57</sup> In October 2020, CCI started a probe against Google for pre-installation of G-pay on Android phones and for forcing exclusivity for in-app purchases.<sup>58</sup> In another case in 2018, CCI imposed a penalty

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<sup>51</sup> Department of Justice, United States Government. "Justice Department Sues Monopolist Google For Violating Antitrust Laws." 20 October 2020. <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>

<sup>52</sup> European Commission. "Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising." Press Release. 20 March 2019. [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_1770](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770)

<sup>53</sup> McLaughlin, David. 2021. "With Democrats Running Antitrust, Amazon and Apple Aren't Safe." Bloomberg.com, January 22, 2021. <https://www.bloomberg.com/news/articles/2021-01-22/amazon-amzn-apple-aapl-could-be-next-for-antitrust-lawsuits>

<sup>54</sup> Palmer, Annie. 2020. "Amazon Faces Antitrust Probe in Canada." CNBC. August 14, 2020. <https://www.cnbc.com/2020/08/14/amazon-faces-antitrust-probe-in-canada.html>

<sup>55</sup> European Commission. "Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon." Press Release. 17 July 2019 [https://ec.europa.eu/commission/presscorner/detail/pl/ip\\_19\\_4291](https://ec.europa.eu/commission/presscorner/detail/pl/ip_19_4291)

<sup>56</sup> Liao, Rita. 2020. "China's E-Commerce Titan Alibaba Hit with Antitrust Probe." TechCrunch. 2020. <https://techcrunch.com/2020/12/23/alibaba-antitrust-probe/>

<sup>57</sup> The Hindu Businessline. 2020. "Amazon, Flipkart Probe: SC Declines to Entertain CCI Plea to Remove Karnataka High Court Stay." 2020. <https://www.thehindubusinessline.com/news/amazon-flipkart-probe-sc-declines-to-entertain-cci-plea-to-remove-karnataka-high-court-stay/article32946397.ece#>

<sup>58</sup> <https://www.cci.gov.in/sites/default/files/07-of-2020.pdf>

of \$20 million on Google for abusing its dominant market position and for bias in search activities on the internet.<sup>59</sup>

In India, the primary legislation dealing with anti-trust is the Competition Act, 2002. The purpose of this law is to protect the industry and consumers from monopolistic behaviour that leads to abuse of dominance, predatory pricing or denying market access to rival or smaller players. In addition, the law also mandates 'merger control' which means that a merger transaction will require the prior approval of CCI if the deal crosses stipulated financial thresholds.<sup>60</sup> But, to cater to the all-pervasive tech sector, the Act needs updating as several transactions escape its scrutiny.

The Indian government is trying to update its regulation to deal with fast-moving Big Tech. In order to control unfettered investments in India, and to curb monopolisation in the e-commerce sector in particular, the Department for Promotion of Industry and Internal Trade introduced amendments to the Foreign Direct Investment Policy in 2018. This imposed embargoes on product exclusivity and prohibited inventory-based models for foreign e-commerce players.<sup>61</sup> Of course Flipkart and Amazon protested - but they did have to change their business models to align with the new regulations. In spite of such policy measures, companies continue to hold dominant market positions.

Globally, as the anti-trust movement against Big Tech gathers steam, it is time to find solid solutions. Breaking-up the Big Tech companies is not a sustainable long-term solution as this will merely open the door for a new set of dominant players – just as Blackberry and Yahoo were replaced by FAAMG. Governments must look at solutions that create a level playing field, a fair marketplace and promote consumer welfare as well as innovation in the industry.

One such solution is stricter control, in addition to the financial thresholds, by a nation's anti-trust watchdog prior to a merger or acquisition which will entail a detailed investigation including a comprehensive due diligence into a potential transaction by the regulator.

In India in particular, as the government seeks to promote the use and adoption of technology across sectors, it must first adopt a whole-of-government approach. This is important especially as the issues in the technology sector including data, privacy, investments and anti-trust are all inter-linked and impossible to segregate. The technology sector will benefit immensely if the policy makers across ministries align and expedite policy-making – from Ministry of Electronics and Information Technology on data protection (personal and non-personal data) and AI, to Ministry of Commerce and Industry on e-commerce and FDI, to Ministry of Home Affairs on national security concerns, to the Competition Commission of India on anti-trust and merger control. This inter-ministerial collaboration can reap immense socio-economic benefits for the Indian economy, resulting in policies that reflect the New India.

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<sup>59</sup> <https://www.cci.gov.in/sites/default/files/07%20%26%20%2030%20of%202012.pdf>

<sup>60</sup> Section 5 and 6 of the Competition Act, 2002.

<sup>61</sup> Department of Industrial Policy and Promotion, Ministry of Commerce & Industry. "Review of the Policy on Foreign Direct Investment in e-commerce." Press Note no. 2. 2018. [https://dipp.gov.in/sites/default/files/pn2\\_2018.pdf](https://dipp.gov.in/sites/default/files/pn2_2018.pdf)

# REGULATING BIG TECH INTERMEDIARIES

*by* Ambika Khanna

Social media platforms such as Twitter and Facebook have come under global scrutiny in recent months following their use to incite or misinform the public. For years, governments around the democratic world have not taken the responsibility to adequately regulate these platforms. Now that may be changing – and it won't be easy.



Since 8 January 2021, when Twitter banned former U.S. President Donald Trump,<sup>62</sup> the might of social media platforms has been on full display. Twitter was followed by Instagram, Facebook and Snapchat in suspending Trump's accounts, and Parler, the equivalent of Twitter but without the content restrictions, was chastised by its hosting servers including Amazon, Google and Apple for not self-regulating content.<sup>63</sup>

Social media platforms, often referred to as intermediaries, have become powerful purveyors of content – and their regulation. They have billions of users,<sup>64</sup> and multi-billion-dollar valuations, making them consumer and capital powerhouses.

Yet for years, governments around the democratic world have not taken the responsibility to adequately regulate these intermediaries. Now that may be changing – and it won't be easy.

Globally, social media companies are protected by the 'safe harbour provision'. This protects the intermediary, say Twitter or Google, from being penalized for harmful or unlawful content on its platform, if it is not created or modified by it, or if the platform did not have knowledge of such content posted by a user. The liability lies with the content creator/ user, an individual or entity. In recent years, the Indian judiciary has clarified ambiguous provisions<sup>65</sup> relating to the liability of intermediaries to take down unlawful content keeping in mind the fundamental right to freedom of expression of users.<sup>66</sup>

The U.S. offers similar protection to internet companies through Section 230 of the Communications Decency Act.<sup>67</sup> In Europe, the e-Commerce Directive 2000,<sup>68</sup> the foundational legislation on internet providers, provides protection to internet intermediaries if they act only as a conduit and do not have actual knowledge of unlawful content.

In India, the Ministry of Electronics and Information Technology proposed amendments to the Intermediary Guidelines in 2018 to include mandatory use of technology such as machine learning in content moderation and data disclosures to the government. In February 2021, the Ministry introduced these amendments in the form of new rules - Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

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<sup>62</sup> Twitter Inc. 2021. "Permanent Suspension of @realDonaldTrump." Blog.twitter.com. January 8, 2021. [https://blog.twitter.com/en\\_us/topics/company/2020/suspension.html](https://blog.twitter.com/en_us/topics/company/2020/suspension.html)

<sup>63</sup> Nicas, Jack, and Davey Alba. 2021. "Amazon, Apple and Google Cut off Parler, an App That Drew Trump Supporters." The New York Times, January 10, 2021, sec. Technology. <https://www.nytimes.com/2021/01/09/technology/apple-google-parler.html>

<sup>64</sup> As an example, Facebook has 2.7 billion monthly active users, Twitter has 152 million daily active users.

<sup>65</sup> Section 79 of the Information Technology Act read with the Intermediary Guidelines 2011.

<sup>66</sup> Shreya Singhal v Union of India; Google India v. Visakha Industries.

<sup>67</sup> <http://www.columbia.edu/~mr2651/ecommerce3/2nd/statutes/CommunicationsDecencyAct.pdf>

<sup>68</sup> "Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')" Official Journal L 178. 2000. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031>

<sup>69</sup> Section 79 of the Information Technology Act 2000 and the Intermediary Guidelines 2011 are the fundamental legislations for intermediary regulation. This law broadly outlines the obligations of intermediaries for due diligence including content takedown guidelines. But it lacks clarity and imposes limited obligations on intermediaries, allowing social media platforms to continue to be misused and misinform.

<sup>70</sup> Ministry of Electronics & Infrastructure Technology. "the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021" Notification G.S.R. 139(E). 25 February 2021. <https://www.meity.gov.in/content/notification-dated-25th-february-2021-gsr-139e-information-technology-intermediary>

Europe and Australia have been first off the mark in trying to effectively regulate intermediaries. In December 2020, Europe, building on its e-Commerce Directive, introduced a well-drafted and comprehensive Digital Services Act<sup>71</sup> for handling of online content, liability of intermediaries and diligencerequirementsandprotectionoffundamentalrights of individuals. Obligations of intermediaries include timely notification to law enforcement agencies in case of illegal content, content takedown obligations, transparency disclosures such as details of account suspensions and content removals, rules on digital advertising, appointment of compliance officers and conducting annual audits. These rules await adoption by the European Parliament and the Council of the European Union.

Australia incorporated stricter rules after the Christchurch terrorist attack, where the perpetrators posted videos of the attack on social media to glorify or incite violence. The Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act, 2019<sup>72</sup> mandates social media platforms to expeditiously remove violent content and imposes a large penalty in case of non-compliance – 10% of the annual turnover of the company.

Otherwise, country-specific and global rules on intermediary liability or content takedown regulations are largely absent, and social media companies have been self-regulating. In 2017, Facebook, Twitter, Microsoft and YouTube established the Global Internet Forum to Counter Terrorism (GIFCT), to share knowledge across platforms, setting standards and providing guidelines.<sup>73</sup> This is a good step but insufficient for general content regulation where the power of enforcement and redressal is required for affected users and in the public interest, given jurisdictional complexities and the vast scope of content.

While India has made some progress with the new Intermediary Rules, the Ministry of Electronics and Information Technology must consider following the guiding principles of Transparency, Accountability and Grievance Redressal or TAG. This assumes increasing importance in the current and post-COVID era with intermediaries becoming ever more central to daily communications and knowledge-sharing:

1. **Transparency:** Each social media intermediary to disclose, in a timely manner, the process followed in moderating content, technology applied, categorisation of content between lawful and unlawful, and taking down of content;
2. **Accountability:** Make the principle of 'duty of care' central – i.e., intermediaries be made responsible by imposing positive obligations on them to prevent users from harming others. Here, it is important to balance accountability with providing adequate immunity to intermediaries through clear safe harbour provisions;
3. **Grievance Redressal:** An independent judicial body should be assigned for grievance redressal and dispute resolution along with provisions for following the due process of law.

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<sup>71</sup> European Commission. 2020. "The Digital Services Act: ensuring a safe and accountable online environment." [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en)

<sup>72</sup> Parliament of Australia. 2019. "Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019." No. 38, 2019. <https://www.legislation.gov.au/Details/C2019A00038>

<sup>73</sup> Microsoft Corporate Blog. 2017. "Global Internet Forum to Counter Terrorism Has First Meeting Aug. 1." Microsoft on the Issues. July 31, 2017. <https://blogs.microsoft.com/on-the-issues/2017/07/31/global-internet-forum-counter-terrorism-first-meeting-aug-1/>

Globally, because internet giants have porous territorial boundaries, the G20 Digital Economy Taskforce can be the platform for developed and developing nations to share the challenges in their home countries. They can also share best practices to create global standards and guidelines for liability of social media intermediaries. Policy makers must draft these with adequate leeway given the on-going evolution of domestic digital laws and that what may be unlawful or illegal in one jurisdiction may not be so in another.

A global change in the status quo is urgently needed. This can only be effected with the active participation and deliberation of all stakeholders: tech companies, civil society, academia and governments. Together, they can create the necessary balance between controlling misinformation/unlawful content and protection of citizen rights including freedom of speech.

# A MODEL FOR GLOBAL DATA REGULATION

*by* Kartik Ashta

Individuals now generate copious amounts of personal data everyday – both online and offline. Devices and infrastructure extract data, which can be shared instantly across borders with diverse entities - without consent. It is imperative that countries come together to create regulations to protect individuals who are unable to control how their data is shared and processed. A model already exists in the Paris Climate Agreement



The Hiranandani Group's recent Rs. 8,500 crore deal to set up a data centre in West Bengal,<sup>74</sup> the notification of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021,<sup>75</sup> and the adoption of the News Media Bargaining Code in Australia,<sup>76</sup> which will require Google and Facebook to pay local media houses for news they source from them, all have brought the issue of Big Tech and big data regulation back into focus.

Platforms like Facebook and Twitter were initially the bastions of free speech and responsible for quick mobilisation, allowing people to organise. However, as they have grown, three areas of concern have emerged: security, privacy and anti-trust issues.

In terms of security, these platforms have been accused of being negatively used – for example to influence elections, as in the case of the Russian bots in the U.S. elections in 2017,<sup>77</sup> or aid in the targeting of vulnerable groups in India.<sup>78</sup> There are privacy concerns, for example online harassment like doxing (where an individual's sensitive, personal data is made public without their consent) and location-tracking. Anti-trust issues are also mounting. Companies from technologically-developed countries like the U.S. and China can adopt anti-competitive practices, rapidly acquire companies and penetrate developing markets at the cost of local players. For example, Free Basics,<sup>79</sup> Facebook's initiative aimed at bringing people online with access to a limited number of websites that also sought monopolistic control of data in Africa.<sup>80</sup>

These concerns are worldwide and require regulation at an international level. Efforts to create global data regulation have been sporadic and disjointed, with efforts spread domestically, regionally and multilaterally, as seen in the chart below:

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**74** Hiranandani Group to Invest Rs 8,500 Crore For Industrial-Data Centre Park In West Bengal, Press Trust of India, Bloomberg Quint, February 15, 2021, available at: <https://www.bloombergquint.com/business/hiranandani-group-to-invest-rs-8-500-cr-to-develop-industrial-data-centre-park-in-west-bengal>

**75** e Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, 25 February 2021, available at: [https://www.meity.gov.in/writereaddata/files/Intermediary\\_Guidelines\\_and\\_Digital\\_Media\\_Ethics\\_Code\\_Rules-2021.pdf](https://www.meity.gov.in/writereaddata/files/Intermediary_Guidelines_and_Digital_Media_Ethics_Code_Rules-2021.pdf)

**76** Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 Available at: [https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652\\_aspassed/toc\\_pdf/20177b01.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6652_aspassed/toc_pdf/20177b01.pdf;fileType=application%2Fpdf)

**77** Report on The Investigation Into Russian Interference In The 2016 Presidential Election, Special Counsel Robert S Mueller III, Vol. I, March 2019, available at: <https://www.justice.gov/storage/report.pdf>

**78** Violent Cow Protection in India, Human Rights Watch, February 18, 2019, available at: [https://www.hrw.org/report/2019/02/18/violent-cow-protection-india/vigilante-groups-attack-minorities#\\_ftn9](https://www.hrw.org/report/2019/02/18/violent-cow-protection-india/vigilante-groups-attack-minorities#_ftn9)

**79** <https://connectivity.fb.com/free-basics/>

**80** Daniel Coleman, Digital Colonialism: The 21st Century Scramble for Africa through the Extraction and Control of User Data and the Limitations of Data Protection Laws, 24 Michigan Journal of Race and Law, 417, (2019), available at: <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1294&context=mjrl>

Figure 3: Global Efforts to Regulate Data

Domestic Efforts to Regulate Data
a. India: Personal Data Protection Bill, 2019
b. United States of America: The Clarifying Lawful Overseas Use of Data (CLOUD) Act, 2018, California Consumer Privacy Act, 2018
c. United Kingdom: Online Harms White Paper, 2020, Data Protection Act 2018
d. Russia: Law of the Russian Federation on Personal Data, 2006
e. China: Draft Personal Data Protection Law, 2020
Bilateral and Regional Efforts to Regulate Data
a. The U.S.-UK Data Sharing Agreement, 2020
b. European Union: General Data Protection Regulation (GDPR), 2016
c. Council of Europe: Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1981
d. ASEAN: Framework on Personal Data Protection, 2016
e. African Union Convention on Cyber Security and Data Protection, 2014
Multilateral Efforts to Regulate Data
a. United Nations Guidelines for the Regulation of Computerised Data Files, 1990
b. G20: Osaka Track, 2019
c. Data Flow Clauses in Free Trade Agreements:
i. Regional Comprehensive and Economic Partnership (RCEP), 2020
ii. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), 2018
iii. The U.S.-Mexico-Canada Agreement (USMCA), 2018

Source: Gateway House research

Experts at the Centre for International Governance Innovation in Waterloo, Canada, point out that the technology structure of the world is divided into three blocs or silos<sup>81</sup> the “authoritarian” approach by countries like China which call for “internet sovereignty”,<sup>82</sup> the consumer/individual-centric approach by Europe called GDPR (General Data Protection Regulation), and the “commercial/open internet”<sup>83</sup> outlook of the U.S., which has allowed Big Tech companies to set the rules regarding data use.<sup>84</sup> (See table) The rest of the world, including countries like India, Canada, Japan, Australia, the African continent have not yet found a pole position – nor may they want to.

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<sup>81</sup> Kieran O’Hara and Wendy Hall, *Four Internets: The Geopolitics of Digital Governance*, Centre for International Governance Innovation, CIGI Papers No. 206 — December 2018, available at: <https://www.cigionline.org/sites/default/files/documents/Paper%20no.206web.pdf> • <sup>82</sup> *Id* • <sup>83</sup> *Id* • <sup>84</sup> *Id* • <sup>85</sup> *Id*

Table 1: Existing Global Data Blocs

COUNTRY	CONCERN	CURRENT STATUS
CHINA	National Security	Data regulation geared towards national security.
	Privacy	Very little or no privacy protection for individuals from government surveillance.
	Anti-Trust	Tech companies are now covered under the ambit of China's anti-trust regime.
EUROPEAN UNION	National Security	National Security not the primary concern, the GDPR is a pan-EU law that removes restrictions on data flow between EU countries but erects certain barriers to data flow outside the EU.
	Privacy	Privacy of persons is of paramount importance, with rules on how data is to be stored and for how long. Governments are not exempt from most GDPR requirements.
	Anti-Trust	Aims to curb anti-trust issues with special compliance requirements for the large players.
USA	National Security	National Security laws like the PATRIOT Act were used for mass data collection, however restrictions have been placed through the Safeguarding Americans' Private Records Act of 2020 and the USA Freedom Act.
	Privacy	No federal level privacy protection law.
	Anti-Trust	Unregulated data collection by players like Facebook and Google has given rise to allegations of anti-competitive practices by Big Tech companies.

Source: Gateway House research

As a result of these differing methods, international consensus on data regulation has been missing.<sup>86</sup> Data is being called the new electricity<sup>87</sup> and its centrality to modern existence needs an international treaty with binding rules for issues that transcend boundaries. Such a document will only be effective if countries which lead in the digital space are on board, and will address the critical issues of security, privacy, and anti-trust.

A model exists in the Paris Climate Agreement, continuing the principle of common but differentiated responsibilities, and in the International Covenant for Civil and Political Rights, which protects the right to privacy. With data, these principles mean creating a pathway toward a cooperative data framework that does not place onerous responsibilities on emerging nations, and protects democratic freedoms and privacy from state surveillance.

While drafting a data regulation treaty, the following principles from the Paris Climate Agreement can be emulated:

1. Capacity-building in areas like infrastructure development for local data centres and related skills, so countries that are still developing technologically can mitigate the undue influence of, and negotiate with, Big Tech players on an equal footing.
2. Collaborative financing mechanisms, like Development Impact Bonds and Social Impact Bonds to enable best practices on data storage.<sup>88</sup>
3. Establish a Transparency Framework, where countries provide information on steps taken to regulate and protect data.
4. Compensation for loss and damages for unauthorised use or leakage of data.

Getting to this point will be an arduous task. Most immediately, it can be addressed by the G20 which is already seized of the matter. Even there, the difference in outlooks on data and in technological development of member states has held up consensus as was the case with the Osaka Track,<sup>89</sup> which India, South Africa, Indonesia, and Egypt elected to stay out of.

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<sup>86</sup> Ambika Khanna, *Decoding Data Localisation*, Gateway House, 4 July 2019, <https://www.gatewayhouse.in/data-localisation/>

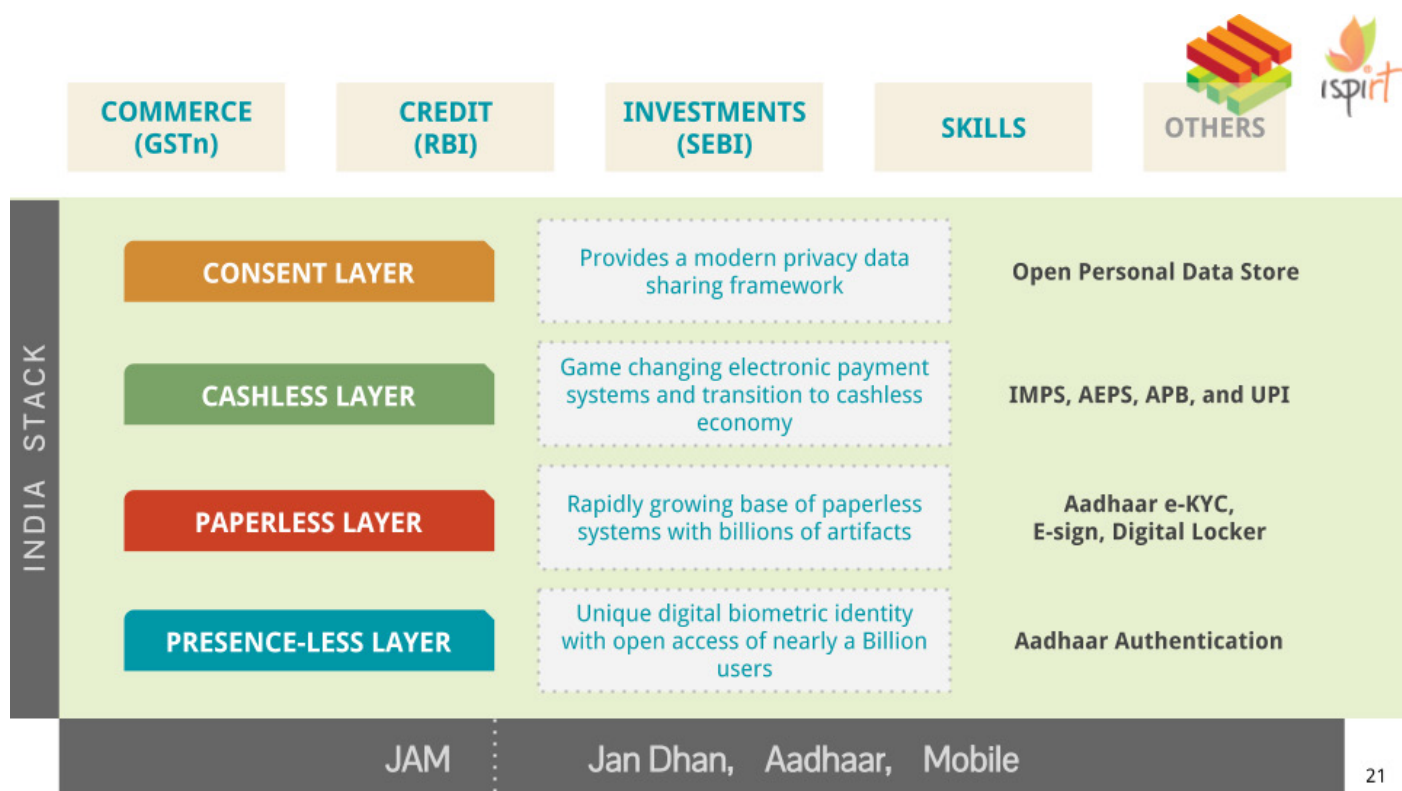
<sup>87</sup> Nandan Nilekani Interview with Shoma Chaudhury, <https://www.youtube.com/watch?v=9wGIL5ySVtk>

<sup>88</sup> Centre for Global Development, Rita Perakis, *First Development Impact Bond is Launched*, <https://www.cgdev.org/blog/first-development-impact-bond-launched>

On June 16, 2014 the UBS Optimus Foundation, Children's Investment Fund Foundation, Educate Girls and Instiglio announced the launch of a Development Impact Bond (DIB) pilot to improve educational outcomes in Rajasthan, India. This DIB was the first of its kind in the world, and has now become a standard form to fund development projects.

<sup>89</sup> Osaka Declaration on the Digital Economy, 28 June 2019, [https://www.mofa.go.jp/policy/economy/g20\\_summit/osaka19/pdf/special\\_event/en/special\\_event\\_01.pdf](https://www.mofa.go.jp/policy/economy/g20_summit/osaka19/pdf/special_event/en/special_event_01.pdf)

Table 2: An Alternate Model - India Stack



Source: India Stack

An alternate data protection framework is offered by India Stack.<sup>90</sup> The consent layer, which is the Data Empowerment and Protection Architecture,<sup>91</sup> seeks to give individual users control of their data; i.e. who has access to the data, for how long, and for what purpose. This is a ready way to bring developing countries on board. It helps to create an equal relationship between corporations, government, and individuals, and will thus be better able to address the three prongs of data: security, privacy and anti-trust.

<sup>90</sup> India Stack, available at: <https://www.indiastack.org/about/>

IndiaStack is a set of APIs that allows governments, businesses, startups and developers to utilise an unique digital Infrastructure to solve India's hard problems towards presence-less, paperless, and cashless service delivery. The Open API team at iSPIRT has been a pro-bono partner in the development, evolution, and evangelisation of these APIs and systems.

<sup>91</sup> India Stack, Data Empowerment and Protection Architecture, available at: <https://www.indiastack.org/depa/>

## About the Authors



**Ambika Khanna, Former Senior Researcher, International Law Studies Programme**

Ambika Khanna was earlier part of the corporate law practice (M&A and general corporate) at top-tier law firms, such as AZB & Partners, Bombay, and Dua Associates, Advocates & Solicitors, Delhi. She has also worked with Chase India, a public policy consultancy, and been an independent legal consultant when she advised startups and individuals on various aspects of corporate law, including investments and real estate matters. She has a B.A. LL.B. (Hons.) degree from Guru Gobind Singh Indraprastha University, Delhi. She also holds diplomas in corporate finance, securities law and cyber law from the Asian School of Cyber Laws. During her years at law school, she interned with top-tier law firms, such as Khaitan & Co., Amarchand Mangaldas, Economic Laws Practice, JSA, Trilegal, Dua Associates and Vaish Associates, Advocates.



**Blaise Fernandes, Board Member, Gateway House  
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Blaise Fernandes has spent over three decades of his career in the media and entertainment sector. The trust he is now associated with looks after the business interests of the recorded music industry. He is on the IPR Committee of the Federation of Indian Chambers of Commerce and Industry (FICCI) and Confederation of Indian Industry (CII) and CII's Monitoring and Evaluation Committee. He was CEO of Gateway House: Indian Council on Foreign Relations for four years, and prior to that Senior Vice President, Corporate Affairs, at Edelweiss Finance.



**Manjeet Kripalani, Executive Director and co-founder, Gateway House**

Manjeet Kripalani is the co-founder of Gateway House: Indian Council on Global Relations, and acts as the executive director of the institution. Prior to the founding of Gateway House, Kripalani was India Bureau chief of Businessweek magazine from 1996 to 2009. During her extensive career in journalism (Businessweek, Worth and Forbes magazines, New York), she has won several awards, including the Gerald Loeb Award, the George Polk Award, Overseas Press Club and Daniel Pearl Awards. Kripalani was the 2006-07 Edward R. Murrow Press Fellow at the Council on Foreign Relations, New York, which inspired her to found Gateway House. Her political career spans being the deputy press secretary to Steve Forbes during his first run in 1995-96 as Republican candidate for U.S. President in New Jersey, to being press secretary for the Lok Sabha campaign for independent candidate Meera Sanyal in 2008 and 2014 in Mumbai. Kripalani holds two bachelor's degrees from Bombay University (Bachelor of Law, Bachelor of Arts in English and History) and a master's degree in International Affairs from Columbia University, New York. She sits on the executive board of Gateway House and is a member of the Rotary Club of Bombay



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A lawyer by training, Kartik has a BA LL. B (Hons) from National Law University, Delhi and a Masters in International Law (LL.M) from the Fletcher School at Tufts University. Before joining Gateway House, he was part of the Protection Unit with the UNHCR - The United Nations Refugee Agency in Kosovo. He specialises in Refugee and Migration Law, International Humanitarian Law, Human Rights Law, and the Laws of the Sea.

