

Concept Paper for Digital Enterprise and Services Hub (DESH)/

Proposal for a zero-friction regulatory
environment for digital businesses

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Executive Summary

- The Indian business and regulatory environment is frequently criticized for not being investor-friendly and failing to facilitate ease of doing business. Indian laws tend to provide high degrees of discretion to administrative bodies, impose onerous compliance obligations, require frequent paper-based submissions and mandate interaction with a multiplicity of regulatory authorities.
- These characteristics have led to an exodus of businesses, particularly digital businesses, from India. Indian start-ups are increasingly choosing to shift their headquarters to jurisdictions like Singapore or the United States, seeking a more facilitative regulatory environment and simplified tax and investment rules. The globalized nature of digital business and the ease of coordinating across markets means that multinational companies are seeking friendly jurisdictions to incorporate in. This creates competition amongst nation-states for attracting corporate charters, to facilitate capital flows, employment generation and expansion of the tax base.
- As a result of India's legacy challenges in administering its laws, the regulatory environment in India is not globally competitive and fetters domestic industry through increased compliance burdens. This paper develops a proposal for legal reform which addresses these objectives. The paper proposes the establishment of a digital-first regulatory environment, called the Digital Enterprise and Service Hub (DESH), which makes it possible to operate a business in India entirely through digital means.
- DESH is a techno-legal framework and may be thought of as a 'digital Delaware' – a set of systems, procedures and technologies for the incorporation and governance of companies. Given the globalized nature of digital business and the extant adoption of digital solutions by such businesses, DESH is proposed to be implemented as a pilot specifically for digital business.
- The DESH framework is a legislative package with several elements that are designed to achieve the concept of zero-friction regulation. This paper proposes that the processes of regulation, at all stages, are capable of being conducted digitally. To this end, it proposes the development of the DESH Compliance System – a layered stack of technologies to reduce compliance costs and automate regulatory processes.
- Under the DESH framework, a company can incorporate as a DESH Company or transfer its existing operations to the DESH framework, without requiring physical presence. The notional location of the DESH framework will serve as the 'legal home' of the company.
- A DESH Company will be governed specifically by the norms of the DESH framework. This includes a liberalized corporate governance regime and simplified investment and tax regulations. The interactions between a DESH Company and other regulatory bodies or government departments will be intermediated by the DESH Compliance System and the DESH Administrator. In doing so, a 'regulatory moat' will be created around DESH Companies – insulating them from regulatory friction and harassment, streamlining administrative interactions, and creating a facilitative business environment.
- The DESH framework is constituted of measures that can keep mature, successful global businesses in India and ease capital and employee flows. The overall objective is to make India an attractive jurisdiction for innovative businesses, incentivize founders to not relocate to foreign jurisdictions and make India a leader in the global digital economy and develop a thriving innovation ecosystem. Through the DESH framework, India can attain a position of global leadership in the digital economy and become the home for modern, innovative, and global businesses.

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I. Need for reform

Introduction

Any business must comply with applicable legal and regulatory requirements. The process of compliance requires businesses to spend time, money, and effort in understanding regulatory requirements, and in preparing and submitting information to the government. These 'compliance costs' have significant economic ramifications and affect a firm's decision to do business in a particular jurisdiction.

In India, the regulatory system is often characterized by high transaction and compliance costs. The process of regulation is characterized by a complex patchwork of laws, onerous paperwork requirements, corruption, and the existence of bureaucratic red tape.¹ The World Bank Ease of Doing Business rankings ranked India poorly relative to other economies of similar sizes. For instance, in 2020, while India's overall rank was 62, it ranked especially poorly on some key indicators such as the ease of starting a business (ranked 136), paying taxes (ranked 115) and enforcing contracts (ranked 163).² Many of these issues are a legacy of India's form of administrative and political system. High transaction and compliance costs affect the investor-friendliness of Indian companies. This contributes to weaker levels of foreign investment and capital flows within the Indian economy.³

India has witnessed a start-up revolution and the emergence of several successful technology-focused businesses. However, many Indian start-ups have relocated headquarters to foreign jurisdictions. These include Mauritius, Singapore, and Delaware in the United States.⁴ The effect of this is a loss of revenue, capital formation and reduction in the tax base for India, all of which have a knock-on effect on economic growth and development. The reasons behind start-ups headquartering in other jurisdictions are multifold: the applicable corporate governance rules, tax policy, investment regulations, the quality of dispute resolution and compliance costs. The decentering of the global firm has also led to an unbundling between the 'legal home', 'financial home' and 'managerial home' of a company.⁵ Multinational companies are making choices to locate their 'legal homes' in investor-friendly jurisdictions, while carrying on business in global markets.⁶ This is especially pertinent for technology-focused businesses – such as online platforms, digital service providers and R&D organizations.

In this context, by continuing to operate a regulatory apparatus which imposes high compliance costs and creates regulatory uncertainty, India is simply giving away a portion of its growth because of the reflexive need for control built into its laws. This situation presents an opportunity for legal reform. This concept paper explores the contours of this reform with two primary goals: developing legal solutions to simplify doing business in India, and making India an attractive jurisdiction for global companies to incorporate in.

This paper proposes a radical reimagining of the process of regulatory compliance using technology. It proposes the development of a Digital Enterprise and Services Hub ('DESH') – a legal framework designed to reduce compliance costs, automate compliances, and streamline administrative interactions. DESH is a collection of systems, procedures, administrative mechanisms, and legal rules which together create a paperless, presence-less, and frictionless regulatory environment.

¹ Neelanjana Sharma, 'Discussion Paper: Impact of unnecessary compliances on Ease of Doing Business in India', CUTS International, available at < <https://cuts-ccier.org/pdf/dp-on-impact-of-unnecessary-compliances-ease-of-doing-digital-business-in-india.pdf> > (June, 2022)

² Ease of Doing Business rankings, The World Bank, available at < <https://data.worldbank.org/indicator/IC.BUS.EASE.XQ?locations=IN> > (2020)

³ Neelanjana Sharma, 'Discussion Paper: Impact of unnecessary compliances on Ease of Doing Business in India', CUTS International, available at < <https://cuts-ccier.org/pdf/dp-on-impact-of-unnecessary-compliances-ease-of-doing-digital-business-in-india.pdf> > (June, 2022)

⁴ Chethan Thathoo, 'Amid exodus of Indian startups, FM Sitharaman says ready to discuss issues', Inc42, available at < <https://inc42.com/buzz/amid-exodus-of-indian-startups-fm-sitharaman-says-ready-to-address-issues/> > (October, 2022)

⁵ Mihir A Desai, 'The decentering of the Global Firm', Working Paper 09-054, Harvard Business School, available at < https://www.hbs.edu/ris/Publication%20Files/09-054_13c86f6a-2dae-4e5d-9a2e-16867c2f1639.pdf > (September, 2008)

⁶ Mihir A Desai, 'The decentering of the Global Firm', Working Paper 09-054, Harvard Business School, available at < https://www.hbs.edu/ris/Publication%20Files/09-054_13c86f6a-2dae-4e5d-9a2e-16867c2f1639.pdf > (September, 2008)

The Indian regulatory and business environment

The Indian regulatory and business environment requires reforms to improve the situation on certain key parameters. Indexes like the Ease of Doing Business rankings by the World Bank frequently rank India low on various parameters critical to the ease of doing business.⁷ Laws governing doing business in India suffer from the legacy of 'license raj', which was characterized by delayed government approvals, bureaucratic red-tape, corruption and rent-seeking.⁸ Further, because of the lack of coordination between regulators, businesses in India are required to comply with a patchwork of laws across sectors and subject areas, as well as across the Union and State governments.⁹ The need for control is built reflexively into the administrative mechanisms for these laws, leading to high degrees of discretion and weak institutional checks and balances. The existence of specialized dispute resolution fora, such as commercial courts, has also proved ineffective at providing quick, speedy dispute resolution.¹⁰ Cumulatively, this creates an environment that is difficult for businesses to navigate.

The Indian regulatory and business environment is criticized for creating a weak investment climate, due to the unpredictability of legal protections and taxation policies, and frequent delays in dispute resolution. As a result, the availability of external finance to firms incorporated in India is limited, which hampers the growth of Indian firms. In the case of deep tech start-ups with long growth phases, the business model often relies on absorbing losses for a period of time before network effects are accumulated by the firm, at which point they become profitable.¹¹ This requires investors to lock capital within a firm for a period of time without immediate returns, therefore, leading investors to prioritize predictability and safety of capital.¹² Consequently, legal protections and financial incentives for investors, as well as effective dispute resolution assume greater importance. These objectives must be facilitated by a legal framework which is specifically designed to achieve the goal of simplifying the regulatory and business environment in India.

Jurisdictional competition in global corporate law

With advances in technology enabling firms to coordinate across different markets and operate at a global scale, the concept of the multinational firm with a particular national identity and a fixed corporate headquarters in one country is becoming obsolete.¹³ The structuring of businesses has changed as a result: Multinational firms followed a model of global self-replication during the 1960s-80s to avoid tariffs and high transportation costs, setting up subsidiaries of the company in different markets where it operated.¹⁴ With the increase in offshoring of business functions, there has been a fragmentation in the structure of the firm. Today, firms choose to establish different business functions in different jurisdictions, depending on the comparative advantage offered by them. As a broad overview, this decision can be understood today as a decision of selecting the three 'homes' of a firm: its financial home, its legal home and its home for managerial talent.¹⁵ This degree of choice further enhances the importance of jurisdictional and regulatory competition in the market for corporate law. For instance, with the case of a firm like Genpact, in the early 2000s, it was the wholly owned outsourcing operation of General Electric. By 2007, the firm was named Genpact and eventually listed on the New York Stock Exchange (financial home),

⁷ Ease of Doing Business rankings, The World Bank, available at < <https://data.worldbank.org/indicator/IC.BUS.EASE.XQ?locations=IN>> (2020)

⁸ Philippe Aghion et al, 'The unequal effects of liberalization: Evidence from dismantling the license raj in India', Development Economics Discussion Paper Series 45 (December, 2005)

⁹ Neelanjana Sharma, 'Discussion Paper: Impact of unnecessary compliances on Ease of Doing Business in India', CUTS International, available at < <https://cuts-ccier.org/pdf/dp-on-impact-of-unnecessary-compliances-ease-of-doing-digital-business-in-india.pdf>> (June, 2022)

¹⁰ Ameen Jauhar and Vaidehi Misra, 'Commercial Courts Act, 2015: An Empirical Impact Evaluation', Vidhi Centre for Legal Policy, available at < <https://vidhilegalpolicy.in/research/commercial-courts-act-2015-an-empirical-impact-evaluation/>> (July, 2019)

¹¹ Junic Kim, 'Platform business and network strategy', STI Policy Review 5(1), 57 (2014)

¹² David McIntyre and Asda Chintakananda, 'Market entry in the presence of network effects: a real options perspective', Journal of Management, 40(6), 1535 (2014)

¹³ Mihir A Desai, 'The decentering of the Global Firm', Working Paper 09-054, Harvard Business School, available at < https://www.hbs.edu/ris/Publication%20Files/09-054_13c86f6a-2dae-4e5d-9a2e-16867c2f1639.pdf> (September, 2008)

¹⁴ Mihir A Desai, 'The decentering of the Global Firm', Working Paper 09-054, Harvard Business School, available at < https://www.hbs.edu/ris/Publication%20Files/09-054_13c86f6a-2dae-4e5d-9a2e-16867c2f1639.pdf> (September, 2008)

¹⁵ Mihir A Desai, 'The decentering of the Global Firm', Working Paper 09-054, Harvard Business School, available at < https://www.hbs.edu/ris/Publication%20Files/09-054_13c86f6a-2dae-4e5d-9a2e-16867c2f1639.pdf> (September, 2008)

while the legal home of the firm is in Bermuda (legal home) and its managerial talent sits primarily in India (home for managerial talent).¹⁶

This situation gives birth to the trend of competition between jurisdictions to attract corporate charters.¹⁷ This can lead to a 'race to the top' or 'race to the bottom' – depending on the regulatory approach adopted and the existence of certain conditions.¹⁸ DESH is proposed as a mechanism to participate in the 'race to the top' and develop a best-in-class regulatory framework for digital businesses.

Barriers to entry, regulatory friction, and compliance burdens

The existence of barriers to entry and transaction costs, in the form of procedures, official time and official cost, have a cascading effect on economic growth. In the Indian regulatory framework, these procedures and the costs associated with them are not competitive relative to global practices.¹⁹ Heavier regulation of entry is associated with higher corruption and larger unofficial economies, but does not necessarily lead to a better quality of public or private goods.²⁰ In some instances, barriers on entry may be well-intended, to secure the quality of market participants and provide 'registered companies' with a type of official approval, which makes them reputable enough to engage in transactions with the general public and other businesses.²¹ However, the procedures in relation to regulation of entry create opportunities for rent-seeking and may be economically inefficient.

The existence of compliance and transaction costs can be evaluated using the rubric of 'regulatory friction'. Regulatory friction refers to the existence of a multiplicity of regulations and authorities, and the existence of conflict or differing standards across them.²² The term can also be construed in a broader sense, where regulatory friction refers to the costs associated with demonstrating compliance with applicable laws. In the United States, for instance, the Paperwork Reduction Act, 1995 requires every regulation to be assessed with regard to the 'burden' associated with it.²³ This burden is defined as the requirement of identifying legal and regulatory obligations, filling forms, and submitting regulatory reports.²⁴ The existence of high paperwork burdens, conflicting rules, multiplicity of authorities and duplicated submissions are sources of 'regulatory friction' or 'regulatory burden' in the Indian legal framework. These are aspects that can be radically simplified using technology. A systematic approach towards the reduction of 'regulatory burden' has the potential to provide the Indian legal framework with a comparative advantage on these aspects.²⁵

¹⁶ Mihir A Desai, 'The decentering of the Global Firm', Working Paper 09-054, Harvard Business School, available at < https://www.hbs.edu/ris/Publication%20Files/09-054_13c86f6a-2dae-4e5d-9a2e-16867c2f1639.pdf> (September, 2008)

¹⁷ Ofer Eldar and Lorenzo Magnolfi, 'Regulatory competition and the market for corporate law', *American Economic Journal: Microeconomics*, 12(2), 60 (2020)

¹⁸ Lucian Arye Bebchuk and Alma Cohen, 'Firms decision where to incorporate', *The Journal of Law and Economics*, 46(2), 383 (2003)

¹⁹ Neelanjana Sharma, 'Discussion Paper: Impact of unnecessary compliances on Ease of Doing Business in India', CUTS International, available at < <https://cuts-ccier.org/pdf/dp-on-impact-of-unnecessary-compliances-ease-of-doing-digital-business-in-india.pdf>> (June, 2022)

²⁰ Simeon Djankov et al, 'The regulation of entry', *The Quarterly Journal of Economics*, 117(1), 1 (2002)

²¹ SRI International, 'International practices and experiences in business startup procedures' (1999)

²² Deirdre Ahern, 'Regulatory lag and regulatory friction as fintech disenablers: Calibrating an EU Policy Response to the adaptive regulatory sandbox in Member States', *European Business Organization Law Review*, 22, 395 (2021)

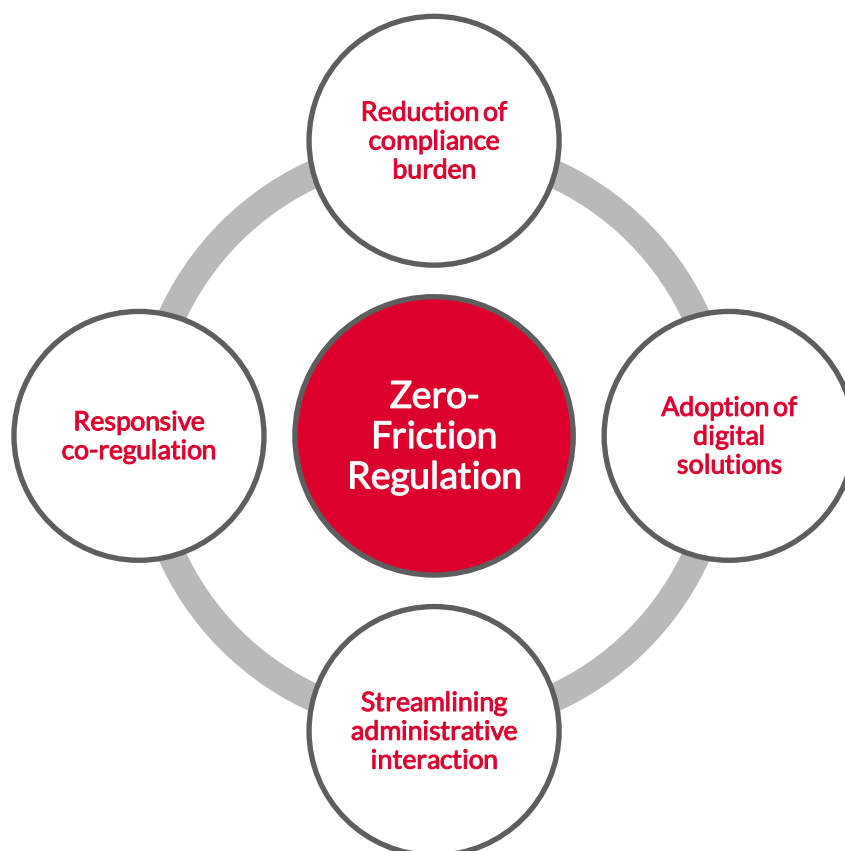
²³ Paperwork Reduction Act of 1995 (44 USC 3501) (United States of America)

²⁴ Andrew L Levy, 'The Paperwork Reduction Act of 1980: Unnecessary burdens and unrealized efficiency', *Journal of Law and Communication*, 14, 99 (1994)

²⁵ Stuart Shapiro, 'The case for reinventing the paperwork reduction act', available at SSRN 3351953 (2019)

II. Developing a zero-friction regulatory approach

Considering the need for reform established in the previous section, this part of the paper develops an approach for legal reform which can achieve the objectives previously outlined. This approach is based on four pillars:



Zero-friction regulation

The previous section outlined the importance of a business and regulatory environment which facilitates economic growth. This is a comprehensive exercise and requires assessing various factors. This paper focuses on one aspect of regulatory reforms – **the elimination of transaction and compliance costs associated with regulation.**

The concept of eliminating transaction costs in regulatory reporting is referred to in this paper as the idea of ‘zero-friction regulation’. To develop this rubric, it is useful to view regulatory requirements as comprising of a few different types of regulatory actions.²⁶ This includes measures to understand compliance, undertake compliance and demonstrate compliance.²⁷

- At the level of **understanding compliance**, this includes the burden associated with reading and analyzing regulations to understand the obligations of a company. Most businesses rely on specialized professionals for assistance with this aspect of regulatory compliance, adding to external service costs.

²⁶ ‘OECD Framework for Regulatory Policy Evaluation’, OECD, available at < https://www.oecd-ilibrary.org/governance/oecd-framework-for-regulatory-policy-evaluation_9789264214453-en > (2014)

²⁷ Johan Van Solms, ‘Integrating regulatory technology into the digital transformation of a bank Treasury’, *Journal of Banking Regulation* 22, 152 (2021)

- The second stage of **undertaking compliance** involves filing forms, documents, applications, or reports with regulators/administrative bodies, or applying for approvals, licenses, or clearances. Regulations may require firms to pay certain benefits (for *eg*, employee benefits) or undertake certain types of audits, disclose information, or take other substantive steps.
- Finally, regulatory compliance requires the **demonstration of compliance**. Like the previous stage, this is often undertaken through filing forms, documents, or reports with regulators/administrative bodies, or undertaking audits, self-certifications or third-party certifications. At this stage, regulators/administrative bodies are also vested with the powers of inspection to evaluate whether the compliance has been undertaken.

The premise of this paper is that at all three stages, the use of technology can eliminate the associated burden with compliance. The resistance to adopting digitization in regulatory processes is a legacy issue because of the traditional understanding of regulatory and administrative procedure, which relied on paper-based procedures and a command-and-control outlook to regulation.²⁸ The solutions proposed in this paper depart from this traditional understanding as a fundamental starting point. Given the contemporary state of technology, it should be possible for the procedure in all three stages to be undertaken purely digitally, in a presence-less, paperless, and frictionless manner.

The ultimate objective of DESH is **to make it possible to run a business in India and demonstrate compliance with Indian laws entirely through digital means**, with no reversions to paper-based processes or traditional regulation. This paper aims to develop solutions to streamline procedural requirements using technology without diluting substantive protections under the law. This approach is built on the following four pillars:

I. Reduction of regulatory burden

Regulatory burden, as a phrase, is used to denote the costs associated with understanding, undertaking and demonstrating regulatory compliance.²⁹ The OECD Regulatory Compliance Cost Assessment Guide develops a taxonomy of regulatory costs – which includes compliance costs, implementation costs, external service costs, overhead and equipment costs, financial costs, indirect costs, opportunity costs and macroeconomic costs.³⁰ The regulatory burden on a firm in any sector can be measured using tools such as Regulatory Impact Assessments and Regulatory Burden Measurement Frameworks.³¹ For instance, the Australian Government’s Office of Best Practice Regulation has developed a Regulatory Burden Measurement Framework which is used to estimate the regulatory costs applicable to businesses.³² A similar exercise forms a core component of the proposed approach in this memo.

II. Adoption of digital solutions

The burden associated with regulation can also be eliminated, or substantially minimized, through the adoption of digital solutions. While e-governance measures have been attempted to be integrated in the Indian regulatory framework – particularly in the case of single window portals set up by different agencies/State governments, and the online portals operated by the Ministry of Corporate Affairs for administering the Companies Act, 2013 – these measures have been partially adopted and have not been integrated *inter se*, leading to several inefficiencies.³³ Therefore, even though there is a degree of digitization of governance, this has not been

²⁸ Darren Sinclair, ‘Self regulation versus command and control? Beyond false dichotomies’, *Law and Policy*, 19(4), 529 (1997)

²⁹ OECD Regulatory Compliance Cost Assessment Guidance, OECD, available at < https://www.oecd-ilibrary.org/governance/oecd-regulatory-compliance-cost-assessment-guidance_9789264209657-en> (2014)

³⁰ OECD Regulatory Compliance Cost Assessment Guidance, OECD, available at < https://www.oecd-ilibrary.org/governance/oecd-regulatory-compliance-cost-assessment-guidance_9789264209657-en> (2014)

³¹ OECD Overviews of Regulatory Reform, OECD, available at < https://www.oecd-ilibrary.org/governance/regulatory-impact-analysis_9789264067110-en> (2009)

³² ‘Regulatory Burden Measurement Framework’, Office of Impact Analysis, Department of the Prime Minister and the Cabinet, Australian Government (2022)

³³ Ravi Dutta Mishra and Dilasha Seth, ‘Centre to allow reverse integration on national single-window portal’, *Livemint*, available at < <https://www.livemint.com/news/india/centre-to-allow-reverse-integration-on-national-single-window-portal-11662464090397.html>> (September, 2022)

undertaken in a manner that truly realizes the transformative potential of technology. This memo recommends a digital-first approach to regulation, where any reversion to paper-based measures or offline measures is generally prohibited and permitted only in exceptional circumstances. The use of 'regtech' measures, adopted as a foundational principle, can radically simplify the process of regulatory compliance.³⁴

III. Streamlining administrative interactions

A major source of regulatory friction in India is the existence of multiple administrative bodies/authorities at different levels of government, and consequently, the existence of parallel frameworks which may be conflicting. Even in the absence of conflicting laws, the existence of multiple authorities requires an Indian firm to interact with several government departments individually to undertake the process of regulatory compliance. This approach seriously undermines the principle of 'whole of government' regulation, that has been frequently asserted by the Indian Government as a core tenet of its regulatory philosophy.³⁵ The interaction with multiple regulatory authorities also increases the opportunities for rent-seeking behavior by officials, and significantly increases the cost of compliance for firms. In addition to developing a whole of government approach, it is proposed in this framework to develop an administrative mechanism comprising of a 'principal coordinating agency', who may act as a single point of contact for all firms within the framework and would be responsible for harmonizing and coordinating regulatory requirements. A similar exercise for the purpose of financial sector regulation has been undertaken in the framework governing the International Financial Services Centre Authority set up under the IFSCA Act, 2017.³⁶

IV. Responsive co-regulation

The traditional approach to regulation imbibes a 'command and control' model.³⁷ In this approach, regulations are created by the government and set out obligations for businesses to comply with. While there may be some degree of involvement by market participants in the form of stakeholder consultations, the traditional approach relies on the government's role of 'setting the rules of the game' and the policy formulation process, consequently, happens within the government without the involvement of market participants. In the case of highly technical regulations or rapidly evolving sectors, the traditional approach necessarily requires significant capacity on part of the government to be able to effectively create efficient regulations. In India, this degree of state capacity is often lacking.³⁸

A co-regulatory approach, as discussed by the OECD Practical Guidance on Agile Regulatory Governance to Harness Innovation, is proposed in this paper.³⁹ We suggest three significant ways in which a co-regulatory approach can be adopted: (i) operationalizing efficiency reviews, where the regulator is obligated to conduct an annual efficiency audit of its practices and procedures and meet designated targets for reducing regulatory burdens; (ii) enabling requests for improvement, where a regulated entity can approach the regulator with a request for changes to the applicable substantive provisions and must be provided with a hearing and reasoned order; and (iii) requiring mandatory consultations and empirical analysis before taking any measure which increases the regulatory burden or reduces any benefit provided to regulated entities. Through these three measures, the traditional approach of 'control and command' regulation can give way to a more flexible, innovative approach of 'responsive co-regulation'.

³⁴ Johan Van Solms, 'Integrating regulatory technology into the digital transformation of a bank Treasury', *Journal of Banking Regulation* 22, 152 (2021)

³⁵ 'Adopt a whole-of-government approach with governance focus on all regions, PM Modi tells new IAS Officers', *Economic Times* (October, 2022)

³⁶ The International Financial Service Centre Authority Act, 2019

³⁷ Darren Sinclair, 'Self regulation versus command and control? Beyond false dichotomies', *Law and Policy*, 19(4), 529 (1997)

³⁸ Devesh Kapur and Madhav Khosla, 'Regulation in India: Design, Capacity, Performance', 8 (2019)

³⁹ OECD Practical Guidance on Agile Regulatory Governance to Harness Innovation, OECD, available at < <https://legalinstruments.oecd.org/public/doc/669/9110a3d9-3bab-48ca-9f1f-4ab6f2201ad9.pdf> > (2021)

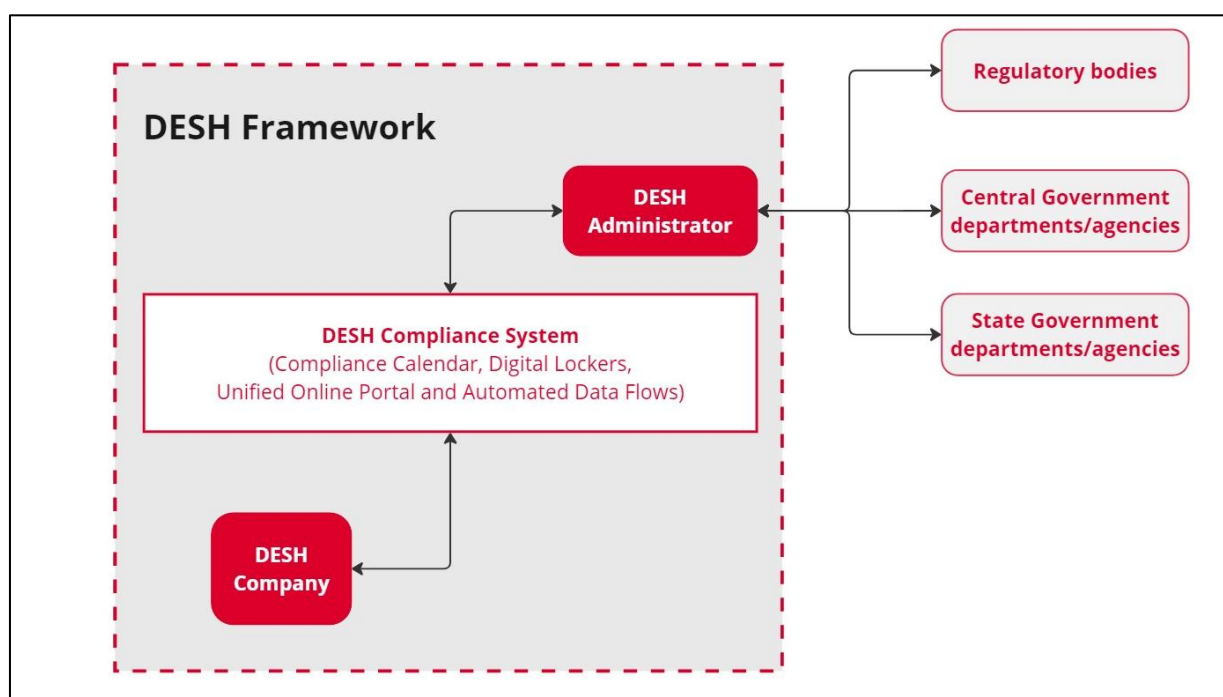
III. The DESH framework

What is DESH?

The DESH framework is a collection of systems, procedures, administrative mechanisms, and legal rules which together create a frictionless regulatory environment for digital businesses. It may be thought of as a 'digital Delaware', where companies can incorporate and benefit from streamlined regulatory processes.

- DESH may be conceptualized as a 'legal home' for a firm. A firm may be incorporated under the DESH framework, or an already incorporated firm may transfer into DESH. The notional location of DESH will be treated as the Registered Office/Headquarters of the firm for legal purposes.
- A DESH Company will be a specialized form of legal entity, modelled on the private limited company framework under the Companies Act, 2013, and will have to comply with streamlined rules related to corporate governance and investment regulations.
- DESH will provide the digital infrastructure necessary for frictionless and paperless regulation (such as the compliance calendar, digital lockers, online portal, and automated data flows). There will be ensuing disclosure obligations on firms to enable the operation of this framework.
- DESH will be administered by a specialized body with dedicated capacity and functional autonomy ('**DESH Administrator**'), who shall be required to act under a co-regulatory approach. A DESH Company will interact with any government agency through this body, which will also act as the principal coordinating agency for interactions with other government agencies and departments.

The elements of DESH are set out in the subsequent section. Cumulatively, these elements create a legal regime which allows for globally competitive rules and enables India to obtain a leadership position in the global jurisdictional race. The schematic illustratively sets out the design of the Hub. The grey-bounded area within the dotted red lines represents the legal boundaries of the DESH framework, with: (1) All interactions between the DESH Company and the DESH Administrator intermediated by the DESH Compliance System; (2) All interactions between DESH Companies and regulatory bodies are intermediated through the DESH Administrator.



The creation of legal frameworks to provide specialized business environments is not without precedent. For instance, free trade zones and special economic zones have traditionally been developed to provide a streamlined regulatory framework for certain types of manufacturing and trade activity. In India, the Special Economic Zones Act, 2005 creates a legislative framework which grants certain exemptions and relaxations, as well as streamlined administrative mechanisms, for any business unit within the special economic zone.⁴⁰ Similarly, the IFSCA Act, 2017 provides streamlined administrative mechanisms for financial sector regulation.⁴¹

Existing methods to create these types of legislative frameworks have been anchored in a demarcated territorial area. However, with the advent of digital tools and their adoption in business operations, there is no need for an exemptions-based framework to be anchored to a physical parcel of land. Modern businesses can operate across physical locations and territorial boundaries – and similarly, ensuring oversight over these businesses does not necessarily require physical inspection of such businesses.

The DESH framework, in principle, can be applicable to any firm. However, given the fact that this is a regulatory experiment, it may be prudent to undertake a limited pilot before expanding DESH into a general-purpose framework for every type of company. Consequently, this paper recommends that an initial pilot of DESH be developed first. This pilot may be limited to technology companies, particularly those engaged in the provision of digital services, software development and other automated digital services. Given the high likelihood of technology adoption already existing within these firms, this may be a suitably limited pilot to evaluate the robustness and efficacy of the concept of DESH.

Elements of the DESH framework

I. Guiding principles

DESH, in addition to the concepts described previously, will be guided by a set of principles that will cut across subject matters. These principles serve as overarching objectives that can be applied to a variety of specific instances. They also provide a core of objectives and tools that can be utilized by both firms and the regulator in operationalizing and administering this framework. Some of the guiding principles that may be specifically articulated are:

1. Principle of Digital Correspondence:

This principle requires that any correspondence with a DESH Company should be through electronic means only. Where a DESH company is required under law to submit a document physically, this requirement may be fulfilled by submitting this information electronically to the digital infrastructure provided by the Hub. The principle also requires that any correspondence from a government agency to a DESH Company should be in electronic form.

2. Principle of Compliance Reduction and Automation:

This principle places a duty on the DESH Administrator to continuously seek to reduce or automate compliances for companies. It requires that a company may communicate with multiple government agencies/departments using a unified portal, and that any document already submitted by a company to any agency/department shall not be required to be resubmitted to another agency/department. This principle also undergirds the concept of Efficiency Reviews, which are outlined later in this paper.

3. Principle of Self-certification and Third-party Auditing:

This principle requires that provisions of laws where self-certification or third-party auditing may be suitable should be made subject to those mechanisms. This principle places the DESH Administrator

⁴⁰ See The Special Economic Zones Act, 2005

⁴¹ See The International Financial Services Centre Authority Act, 2017

under the duty to, on a recurring basis, identify these provisions and continue to incrementally make improvements to the framework.

4. Principle of Assigned Responsibility:

This principle requires that the assignment of legal responsibility for different functions of a firm should be aligned to the boundaries of the firm. It enables a DESH Company to assign responsibility for ensuring or conveying compliance with certain laws to an empaneled professional, subject to the company fulfilling its obligation of providing such professional with complete and accurate information. As previously discussed, companies often rely on certain types of professionals – lawyers, accountants, auditors – to generate regulatory reports. These professionals are outside the boundary of the firm, however, the legal responsibility for their functions falls on the firm, leading to potential principal-agent problems in these arrangements.⁴² The assignment of legal responsibility should hew closely to the actual performance of functions, and this principle may present a solution to the principal-agent problem in such relationships.

5. Principle of Responsive Co-regulation:

This principle of responsive co-regulation requires a shift away from a focus on command-and-control model of bureaucratic rulemaking, to a focus on shared missions and systems. There are two mechanisms for co-regulation that are recommended as part of this framework and are discussed subsequently: Efficiency reviews and Rule change filings.

II. DESH Companies

DESH companies are proposed as a new form of legal entity, which can be set up by incorporating a DESH Company or transferring an existing private limited company under the Companies Act, 2013 to DESH. While this is proposed as a new specialized legal entity, it is largely modelled on the framework for private companies limited by shares under the Companies Act, 2013.

However, there are a few reasons for the development of a new form of legal entity: *First*, it enables a bespoke framework to be developed for digital businesses. This allows specific, targeted measures to be undertaken for this form of legal entity, without having to undertake it for all companies; *Second*, the pace of incremental change in the corporate governance framework is particularly slow. This is for legitimate reasons such as the breadth of entities being governed by the framework, which necessitates an incremental approach accounting for the different ways in which any reform might play out for different types of companies. For instance, while the Company Law Reform Committee report also makes various suggestions for use of technology to streamline processes, these are incremental and pragmatic changes.⁴³ However, this leads to the creation of a gap between regulatory practice and market behavior, which evolves much more rapidly with the introduction of new technologies. This is evidenced most clearly in the requirements for physical paperwork and meetings under the Companies Act, 2013.⁴⁴ Creating a separate legal form enables more radical experimentation with regulatory processes and corporate governance rules; *Third*, it clearly signals that these companies are to be governed and treated in accordance with the specific set of principles under DESH. This signaling is particularly important given that DESH Companies, for certain matters, will inevitably interact with other government agencies/departments. Even where the DESH Administrator intermediates this interaction, the classification of such companies will signal the distinction very clearly throughout the legal framework and will also enable the development of a specialized jurisprudence surrounding this class of companies.

The legal entity of a DESH Company will have a similar fundamental structure to private companies limited by shares – governed by a Board of Directors, who are subject to fiduciary responsibilities in the interest of the company and are appointed and removed by the shareholders of the company. However, provisions in relation to certain aspects of corporate governance can take a divergent approach from the general approach under the

⁴² Wuqing Wu and Suning An, 'Double-Principal Agent: False accounting information, Supervision cost and Corporate performance', *Journal of Systems Science and Information*, 2(4) (2014)

⁴³ Report of the Company Law Committee, Ministry of Corporate Affairs (March 2022)

⁴⁴ See ICSI Guidance Notes, available at < https://www.icsi.edu/guidance_notes/>

Companies Act, 2013. For instance, on matters such as the form of charter documents, the terms related to charter documents, appointment of directors, procedures related to meetings, filing requirements, terms related to employee stock options, and mergers and amalgamations, the DESH Company may have a more liberalized and flexible regime. This is an illustrative list of the areas where corporate governance may be simplified, streamlined, or deregulated without compromising on core safeguards like the protection of investors and prevention of fraud. The creation of a specialized form of legal entity will enable this experimentation and help identify the next generation of corporate law reforms in India.

III. DESH Compliance System

A core element of the DESH framework is the digital regulatory infrastructure deployed in the Hub. The DESH Compliance System is the backbone of the Hub. In this memo, we propose four elements that can constitute the DESH Compliance System. There may be additional components and elements that can be added to this infrastructure over time.

- **Compliance Calendar:**

The Compliance Calendar is a personalized calendar, generated for every DESH company, which outlines their upcoming regulatory and compliance obligations. The operation of the calendar requires a categorization of companies in the Hub based on criteria relevant to identifying the ensuing regulatory obligations. For instance, any DESH Company which is providing e-commerce services will have obligations from the Consumer Protection (E-Commerce) Rules, 2020 and the Information Technology (Intermediary Guidelines and Digital Media Code of Ethics) Rules, 2021, along with other applicable sectoral regulations, listed on its compliance calendar. The development of this construct will require developing a regulatory taxonomy, a system for the categorization of companies within that taxonomy, identification of legal obligations, and deployment of an algorithmic system which can generate a personalized compliance calendar based on the relevant attributes of a company.

- **Digital Lockers:**

Digital Lockers are facilities for the storage and transmission of documents.⁴⁵ The use of digital lockers has the potential to eliminate the duplicated submission of documents, ensure a comprehensive record of the companies' regulatory reports, and reduce the costs associated with document processing and management. The DESH company can be required, legally, to maintain certain documentation within the digital locker. Further, any documentation uploaded in the digital locker and required by any government agency/department for the purpose of legal and regulatory compliance can be shared with them through the locker itself, subject to the consent of the company.

- **Unified online portal:**

The Unified Online Portal can facilitate communication with government departments/agencies and submission of regulatory reports. A single, electronic interface can be designed to minimize the costs associated with multiple regulatory submissions, paper-based submissions and to streamline the process of undertaking or demonstrating compliance. Existing single window portals have been set up for narrow sectoral purposes – for instance, several states have attempted to develop single-window clearance mechanisms for business approvals; similarly, for customs administration and tax administration, the ICEGATE and GST portals respectively have been established to provide electronic interfaces. However, these existing portals are developed and operated in silos. Consequently, India is experiencing the paradox of a multiplicity of single window portals. While unification of such efforts is important as a broader goal, DESH can be the first instance of such an exercise. A mechanism involving API calls being made to other portals/interfaces can enable this form of interoperability between multiple single window clearance mechanisms and usher in the development of a truly effective and unified online portal.

- **Automated Data Flows:**

The final element of the DESH Compliance System is the facility for regulatory reporting through Automated Data Flows (ADF). The intent with this element is to automate significant parts of compliance, which consist of largely

⁴⁵ Warren B Chik, 'The future of digital lockers', Research Collection School of Law Singapore Management University (2012)

mechanical data extraction and reporting. With the advent of advanced capabilities in understanding and structuring text, an ADF framework for the preparation of regulatory reports based on the documentation stored in a DESH Company's digital locker can be developed to generate the first draft of regulatory reports. This facility, given the probability of inaccuracies in automated reporting, may be made voluntary and implemented in a phased manner. Mechanisms for ADF have already been implemented by the private sector for creating regulatory reports in fields like insurance, finance, and corporate governance.⁴⁶ The development of an ADF framework will require the development of a standard format, data structure and metadata framework for the storage of documentation in the digital locker. With the existence of standardized data formats, methods for extraction of relevant information and conversion of information into regulatory reports can be developed.

IV. Streamlined corporate governance rules

The existing framework for governance of companies under the Companies Act, 2013 provides the primary legislative and regulatory apparatus for the operation of companies in India. The Companies Act, 2013, is modelled on the erstwhile Companies Act, 1956, which in turn, was transplanted from British corporate governance statutes.⁴⁷ The resulting corporate governance framework, while robust, continues to afford a central role to regulatory authorities in its implementation and administration. The Registrar of Companies under the Companies Act, 2013 exercises various powers – both ministerial and discretionary – in relation to companies. The Companies Act also sets out the way several obligations are to be performed by a company. While there have been efforts at simplification and streamlining of these obligations, there continues to be a significant and onerous burden on companies in the process of demonstrating compliance with the Companies Act, 2013.

Existing reform measures – such as the recommendations proposed in the Company Law Review Committee's recommendations – are promising.⁴⁸ However, given the breadth of the companies that these will apply to, they are necessarily incremental in nature. Consequently, while such reforms are essential, a parallel framework, targeted for a specific subset of companies, may be able to move far beyond the existing imagination of corporate governance reforms in India. DESH can be this framework.

There are certain areas of corporate governance where procedural requirements can be simplified without compromising on the degree of protection provided to investors or minority shareholders. In these instances, the effective use of technology can continue to ensure transparency and accountability, mitigating the possibilities for corporate fraud or misuse of the streamlined framework.

To identify the elements of corporate governance that may require streamlining, it is instructive to look at the Delaware model of corporate governance. Delaware has historically been considered an attractive jurisdiction due to its shareholder-friendly legal framework, as well as the efficacy and efficiency of its dispute resolution mechanism.⁴⁹ With regards to the corporate governance rules, the Delaware rules stand out in certain aspects. For instance, the flexibility provided to the directors of the company in managing its affairs under Delaware law far exceeds the flexibility provided under other frameworks. In terms of substantive rules, provisions which allow the Board of Directors to hold its meetings with alternate members, provide a simplified procedure for business entities to change their form or expedited procedures for incorporation and filing certificates of corrections are some of the types of provisions which are routinely identified as enhancing Delaware's attractiveness for investors and shareholders.⁵⁰ This flexibility is evident in relation to the rules applicable to charter documents, meetings of the company, mergers and amalgamations and the liability of directors. These areas may be of particular concern when investigating how corporate governance rules can be streamlined effectively. The

⁴⁶ 'Approach Paper on Automated Data Flow from Banks to Reserve Bank of India', Reserve Bank of India (2010); See 'Transformation of the Banking Industry with Automated Data Flow', D2K Technologies, available at < <https://www.d2ktechnologies.com/post/transformation-of-the-banking-industry-with-automated-data-flow>> (February, 2022)

⁴⁷ Umakanth Varottil, 'The evolution of corporate law in post-colonial India: From transplant to autochthony', *American University International Law Review*, 31, 253 (2016)

⁴⁸ Report of the Company Law Committee, Ministry of Corporate Affairs (March 2022)

⁴⁹ Faith Stevelman, 'Regulatory competition, choice of forum and Delaware's stake in corporate law', *Delaware Journal of Corporate Law*, 34 (2009)

⁵⁰ Lewis Black Jr, 'Why corporations choose Delaware', Delaware Department of State (2007)

flexibility afforded under the Delaware framework leads to it being referred to as a contractarian-model of corporate law – which creates a broad enabling statute and permits and facilitates company-specific procedures to be developed.⁵¹ To provide safeguards against the managerial abuse of this flexibility, the Delaware statute provides several methods for shareholders to exercise control over the managers of a company.⁵² By contrast, the model of corporate governance under Indian law is significantly prescriptive and does not provide the same degree of flexibility in the internal affairs of a company. For instance, on the issue of meetings of the company, the Companies Act 2013 in India makes specific prescriptions for granular matters such as the manner of providing notice, explanatory statement to be annexed to notice, quorum for meetings, the chairman of the meetings, proxies, restrictions on voting rights and voting methods. These matters, under a contractarian approach, would largely be left to the internal affairs of the company with some basic safeguards in place to ensure the interests of shareholders.

Under the Companies Act, 2013, it is recommended that a contractarian-approach can be considered in relation to certain provisions that may be construed as ‘low-risk’ provisions. This approach, of segmenting applicable rules by risk and developing flexibility for the low-risk provisions, will enable reforms to be identified that enhance the competitiveness of India’s corporate law from a global perspective of jurisdictional competition. Certain areas where these provisions can be identified are in relation to the charter documents of a company, the provisions related to holding meetings of the shareholders and meetings of the Board of a company, matters in relation to mergers and amalgamations, and provisions requiring the maintenance of certain kinds of records. In these areas, permitting company-specific procedures is likely to have a significant effect on the ease of running a company, without diluting safeguards for key concerns like protection of minority shareholders. This exercise, however, requires a comprehensive review of the Companies Act 2013 using a risk-based framework as suggested above.

V. Simplified investment and tax rules

In the inter-state competition for corporate charters, recent trends show that a substantive simplification of corporate governance rules may present a significant advantage, but it is not the sole or most important factor which determines the decisions of companies to incorporate in a particular jurisdiction.⁵³ Recent scholarship has focused on the role of tax arbitrage, and the crucial role that tax policy plays in the incorporation decision of a firm.⁵⁴ This is also evidenced in the emergence of a set of competitors to Delaware over the previous decade – which includes many jurisdictions which impose very low rates of income tax, and in some cases, may be classified as a ‘tax haven’.⁵⁵ These jurisdictions have emerged as an attractive option – particularly for large Chinese companies – as opposed to incorporating in Delaware.⁵⁶

While it is true that a lower rate of tax may play a critical role in determining a company’s choice of jurisdiction, the trade-offs with reducing taxes also need to be carefully examined, from a fiscal and empirical lens. The reduction of tax revenue can have significant impacts on the government’s financial position, and consequently, should be the remit of substantive tax policy. At the same time, there are various procedural requirements under investment and tax regulations that can be significantly simplified without compromising on the substantive regulations in these fields. Some illustrative areas where these reforms can be explored are set out below:

Angel Tax

As per Section 56(2)(viib) of the Income Tax Act, 1961, any premium received by a company from a resident which exceeds the Fair Market Value of the share is liable to tax in the hands of the company.⁵⁷ This has commonly been referred to as the ‘angel tax’ requirement. Several start-ups have argued that this provision may deter foreign

⁵¹ Lewis Black Jr, ‘Why corporations choose Delaware’, Delaware Department of State (2007)

⁵² Lewis Black Jr, ‘Why corporations choose Delaware’, Delaware Department of State (2007)

⁵³ Dale Murphy, ‘The structure of regulatory competition: Corporations and public policies in a global economy’, 11 (2006)

⁵⁴ Martin Gelter, ‘The structure of regulatory competition in European corporate law’, *Journal of Corporate Law Studies*, 247 (2005)

⁵⁵ William J Moon, ‘Delaware’s new competition’, *Northwestern University Law Review*, 1403 (2020)

⁵⁶ William J Moon, ‘Delaware’s new competition’, *Northwestern University Law Review*, 1403 (2020)

⁵⁷ Section 56(2), Income Tax Act, 1961

investors from investing in India and lead start-ups to consider restructuring their holdings overseas.⁵⁸ As such, measures like this directly undermine India's competitiveness in relation to attracting corporate charters. The only tax-efficient option for companies in India is to procure investments at the exact FMV of the share.⁵⁹ This has the effect of reducing capital flows, investments, and valuations of the Indian start-up industry.⁶⁰ Given the business models frequently found in the start-up ecosystem which rely on sustaining losses for a period to build up network effects, this tax framework is particularly pernicious for such companies. In this context, the harmonization of the angel tax regime with global best practices must be considered given its impact on the startup ecosystem. DESH can provide the regulatory environment for this harmonization.

Employee Stock Option Plans

In India, employee stock options are taxed twice – once at the point of exercise, where they are treated as 'perquisites' and taxed as part of the salary of an employee under Section 17(2) of the Income Tax Act, 1961,⁶¹ and second, at the point of sale, where any profit from sale of employee stock options is subject to capital gains tax under Section 45 of the Income Tax Act, 1961.⁶² The taxation regime for ESOPs and their accounting treatment has the effect of diminishing the attractiveness and utility of ESOPs for Indian companies. This particularly leads to increasing reliance on using cash for compensation, which further constrains the ability of startups and private companies from using ESOPs effectively to grow in their early stages.⁶³

In contrast, in the United Kingdom, there is no tax on exercise of Company Stock Option Plans ('CSOPs') if the shares are held by employees for a period of 3 years.⁶⁴ At the time of sale, CSOPs are subject to capital gains tax on the difference between the exercise price and the selling price. Similar tax-advantaged plans for stock options have been introduced for start-up employees in jurisdictions like Sweden.⁶⁵ The harmonisation of the ESOP regime for companies in the DESH with global best practices, like the United Kingdom or Sweden, will enable firms to effectively use their shares as compensation. This practice is likely to provide a significant boost to the start-up ecosystem within the DESH framework.

GST registrations

The provisions for registration under the Central Goods and Services Tax Act, 2017 require a company to obtain separate GST registrations for its branches/offices in different states.⁶⁶ While this requirement in itself may be necessary for the purposes of the GST law, which may require every branch or office to be separately identified and enumerated, it does not necessarily require the making of multiple applications. This procedure can be streamlined to enable a single, nationwide GST registration through a single application, while continuing to identify different branches or offices for the purpose of administering GST laws. Given that DESH Companies are notionally located in the Hub, a single, nationwide registration procedure would streamline compliance costs and procedures for such firms.

⁵⁸ 'How amendments in Angel Tax will impact companies', Ernst and Young, available at < https://www.ey.com/en_in/tax/india-tax-insights/how-amendments-in-angel-tax-will-impact-companies> (March, 2023)

⁵⁹ 'How amendments in Angel Tax will impact companies', Ernst and Young, available at < https://www.ey.com/en_in/tax/india-tax-insights/how-amendments-in-angel-tax-will-impact-companies> (March, 2023)

⁶⁰ 'How amendments in Angel Tax will impact companies', Ernst and Young, available at < https://www.ey.com/en_in/tax/india-tax-insights/how-amendments-in-angel-tax-will-impact-companies> (March, 2023)

⁶¹ Section 17(2), Income Tax Act, 1961

⁶² Section 45, Income Tax Act, 1961

⁶³ Mihir Dalal ,LiveMint,'The Pitfalls of ESOP Lifelines at Startups' available at <<https://www.livemint.com/industry/retail/the-pitfalls-of-esop-lifelines-at-startups-11592322029892.html>> < >

⁶⁴ Pinsent Masons, 'Tax-advantaged Company Share Option Plans' available at <<https://www.pinsentmasons.com/out-law/guides/hmrc-approved-company-share-option-plans-csop>> (November, 2022),

⁶⁵ Baker McKenzie, '2022 updates to Sweden's tax treatment of stock options for start-up employees and board members – qualified employee stock option', available at <<https://www.bakermckenzie.com/en/newsroom/2022/01/2022-updates-sweden-tax-treatment>> (January, 2022)

⁶⁶ Section 25, Central Goods and Services Tax Act, 2017

VI. Dispute resolution

The speed and efficacy of dispute resolution mechanisms is a key factor that determines the jurisdictional choice question for firms.⁶⁷ In this light, dispute resolution mechanisms assume special importance in the conceptualization of the DESH framework. Advances in dispute resolution mechanisms have come to place significant importance on alternative dispute resolution methods, such as mediation, conciliation, and arbitration. Additionally, the use of Online Dispute Resolution (ODR) mechanisms has the potential to radically streamline the process, reduce associated costs and provide effective dispute resolution.⁶⁸

At the same time, in cases of significant commercial value, special mechanisms such as Commercial Courts have, in general, been unable to deliver on the promise of effective dispute resolution.⁶⁹ Importantly, for some matters under the Companies Act, adjudicatory powers are specifically provided to the National Company Law Tribunal. Therefore, a one-size-fits-all dispute resolution mechanism for the purpose of the DESH framework may not be identifiable.

A combination of the measures mentioned here, implemented through a special framework and periodically reviewed for efficiency, may be able to create a better dispute resolution framework for firms in the Hub. While the problems with judicial reforms are much broader than the scope of this paper, the creation of a streamlined mechanism for the resolution of disputes has the potential to achieve positive outcomes.

These measures include: the establishment of an international arbitration center, which is built on the same lines as the Singapore International Arbitration Centre (such as the Delhi International Arbitration Centre, for instance); time-bound mediation and conciliation processes as envisaged under the Mediation Bill, 2022,⁷⁰ and the establishment of special benches for matters legally required to be heard by the NCLT. Cumulatively, these measures create a framework for dispute resolution that enables access to quicker and more effective dispute resolution.

VII. The DESH Administrator

The DESH framework will be administered by a specialized body, hereinafter referred to as the DESH Administrator. The Administrator will be responsible for the establishment, maintenance and operation of the systems and processes which constitute DESH. To this end, it is important that the regulatory body for the DESH framework should have functional and operational autonomy, the capacity to undertake the functions required of it, and transparency and accountability mechanisms to ensure that it functions as envisaged.

While it is true that the establishment of another regulatory body will increase the multiplicity of regulators, the DESH Administrator is envisaged as a principal coordinating agency for interactions between DESH Companies and other regulatory bodies.⁷¹ This means that where any government department/agency intends to communicate with or request information from a DESH Company, the DESH Administrator must either be intimated, or provide approval, for such interaction. In doing so, the DESH Administrator creates a regulatory moat between DESH Companies and other departments/agencies. This regulatory moat provides a degree of insulation to DESH Companies from regulatory friction and will enable the streamlining and simplification of regulatory multiplicity and duplication in the long run. Consequently, despite the creation of another regulatory body in the Indian framework, for the purpose of DESH Companies, the DESH Administrator streamlines administrative interactions by being the only regulatory body that they must interact with.

The DESH Administrator, given the technical nature of its functions, must develop appropriate capacity to effectively operate and maintain these systems. While this is a matter of institutional functioning, funding and

⁶⁷ Dale Murphy, 'The structure of regulatory competition: Corporations and public policies in a global economy', 11 (2006)

⁶⁸ Deepika Kinhal et al, 'ODR: The future of dispute resolution in India', Vidhi Centre for Legal Policy, available at < <https://vidhilegalpolicy.in/research/the-future-of-dispute-resolution-in-india/>> (July, 2020)

⁶⁹ Ameen Jauhar and Vaidehi Misra, 'Commercial Courts Act, 2015: An Empirical Impact Evaluation', Vidhi Centre for Legal Policy, available at < <https://vidhilegalpolicy.in/research/commercial-courts-act-2015-an-empirical-impact-evaluation/>> (July, 2019)

⁷⁰ Mediation Bill, 2022

⁷¹ Neil Gunningham and Darren Sinclair, 'Smart regulation', *Regulatory Theory*, 133 (2017)

priorities, Indian regulators have historically failed to develop in-house capabilities to effectively deploy technology-based solutions, leading to several implementational issues in the technology-based governance solutions deployed so far.⁷² To remedy this, it is key that the DESH Administrator should be assisted by a Technical Secretariat, which is specifically tasked with the operation and maintenance of the technical systems under DESH.

Finally, it is key that the DESH Administrator's functioning should not devolve into the typical behavior of Indian regulatory bodies.⁷³ Strong transparency and accountability mandates are key to this. The co-regulatory mechanisms identified in this paper (Efficiency Reviews, Rule Change Filings) will contribute to ensuring better regulatory practices. However, beyond these mechanisms, there must be a clearly identified mandate for the DESH Administrator's performance to meet certain specified standards. These standards can be identified as various metrics that the DESH Administrator's performance must be measured through – for instance, the number of friction parameters eliminated by the DESH Administrator, the year-on-year reduction of compliance burdens under the DESH framework, reduction in the number of instances that information was requisitioned from a DESH Company without any ensuing legal action, and a reduction in the number of official procedures that a DESH Company is required to undertake. These metrics may be encapsulated in a service-level agreement with the CEO of the DESH Administrator and be subject to annual reviews and evaluations.

VIII. Efficiency reviews

Efficiency Reviews are conceptualized as a co-regulatory mechanism under the DESH framework designed to ensure that the objectives of the DESH framework are being advanced. An Efficiency Review would involve the measurement and evaluation of friction parameters under the DESH framework on a periodic basis by the DESH Administrator, or by a professional empaneled by the DESH Administrator for this purpose. Broadly, the purpose of the review is to assess the extant levels of 'regulatory friction' for DESH Companies, and to measure the effectiveness of the DESH Administrator in reducing these levels.⁷⁴

The primary metric relevant to the Efficiency Reviews are the friction parameters. Friction parameters would have to be clearly identified during an Efficiency Review. Friction parameters, broadly, measure the actions which require time, effort or financial resources expended by a DESH Company in complying with the provisions of any law where more efficient means are available or can reasonably be made available.⁷⁵ For instance, this would include the number of signatures required, the quantum of duplicate submission of information, quantum of non-regular information required, forms, statements, reports required to be filed by a DESH Company which may reasonably be automated, and other such parameters. The methodology for the identification of friction parameters must be laid out in a publicly available document and may involve the development of an effort-to-value ratio for the evaluation of friction parameters and their desirability.

The DESH Administrator may be required to conduct the review through an established consulting or auditing firm, given their specific competence and capability to undertake reviews of this form. During the review, along with friction parameters, several other metrics can be measured to help generate a composite Regulatory Efficiency Score for the DESH framework. These include the following evaluations:

- (a) Evaluating existing statutory requirements applicable to DESH Companies through a risk-based methodology to identify their suitability for self-certification;
- (b) Evaluating existing friction parameters for DESH Companies
- (c) Undertaking cost-benefit analysis of regulations made by the DESH Administrator and an analysis of the change in circumstances since these regulations were framed;
- (d) Analyzing the efficacy of automated data flows;

⁷² Ravi Dutta Mishra and Dilasha Seth, 'Centre to allow reverse integration on national single-window portal', Livemint, available at <<https://www.livemint.com/news/india/centre-to-allow-reverse-integration-on-national-single-window-portal-11662464090397.html>> (September, 2022)

⁷³ Devesh Kapur and Madhav Khosla, 'Regulation in India: Design, Capacity, Performance), 8 (2019)

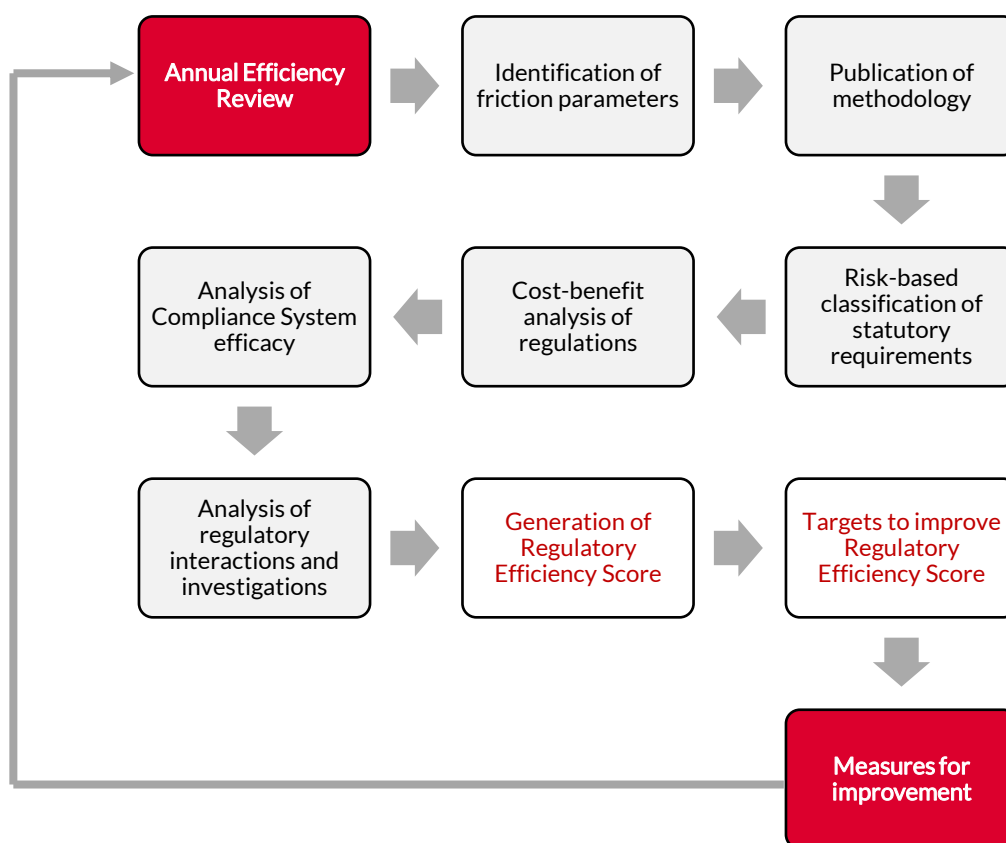
⁷⁴ OECD Practical Guidance on Agile Regulatory Governance to Harness Innovation, OECD, available at <<https://legalinstruments.oecd.org/public/doc/669/9110a3d9-3bab-48ca-9f1f-4ab6f2201ad9.pdf>> (2021)

⁷⁵ Andrew L Levy, 'The Paperwork Reduction Act of 1980: Unnecessary burdens and unrealized efficiency', Journal of Law and Communication, 14, 99 (1994)

- (e) Analyzing the comprehensiveness of the compliance calendar; and
- (f) Analyzing number of investigations, search and seizures in relation to DESH Companies and the percentage of investigations where a recovery was made and further proceedings were initiated.

Through an evaluation of these parameters, the Efficiency Review can lead to the generation of the Regulatory Efficiency Score. The DESH Administrator can then be made responsible for improvements in the Regulatory Efficiency Score and targets for such improvement, as well as the measures that will yield this improvement, can be identified.

The following diagram illustrates the way in which Efficiency Reviews create a framework for continuous evaluation and improvement of regulatory efficiency under the DESH framework:



The findings from the Efficiency Review must serve as action points for the DESH Administrator. Where the DESH Administrator is empowered to change regulations and take measures which have been identified during the review, there must be a time-bound requirement on the DESH Administrator to take those measures. In cases where the measures relate to another Central or State Government department or agency, there must be a legal requirement on the DESH Administrator to submit this recommendation to the relevant department/agency.

IX. Requests for improvement

Requests for improvement are conceptualized as a co-regulatory mechanism under the DESH framework designed to enable DESH Companies to participate in the development of regulations and to effectively intervene in the regulatory process as stakeholders. A request for improvement would enable an Indian-owned DESH Company to file an application to the DESH Administrator requesting the modification, alteration or repeal of any rule or regulation which may undermine the ease of doing business, hinder innovation, cause harm or limit opportunities for DESH Companies.

Requests for improvement provide a forum for regulated entities to propose alternative regulatory models, demonstrate inefficiencies in current regulatory practice and present evidence in relation to the same.⁷⁶ The request for improvement may relate to a particular rule or regulation, its interpretation, any operational practice, administrative process or technical system under the DESH framework.

The procedure for making requests for improvement, to be effective, must have strong mandates for accountability and transparency. This would include:

- Publishing every request for improvement submitted by any company and inviting suggestions on it;
- Implementing a public interface where any regulated entity may endorse, reject, or suggest changes to any request for improvement;
- Recording and publicly displaying any responses received by the DESH Administrator from regulated entities; and
- Passing a reasoned order, with quantitative evidence or empirical justification, to accept or reject the request for improvement.

The request for improvement procedure, in certain cases, may also enable any DESH Company which is not satisfied with the decision on its request for improvement, to seek an audience with the DESH Administrator, or other sufficiently senior officer responsible for the subject matter in relation to the request for improvement. These audiences or meetings may be publicly accessible, like subcommittee hearings in the United States Senate. Collectively, the rule change filing procedure can enable iterative and responsive rulemaking which necessarily involves the views of stakeholders and regulated entities.

X. Regulatory sandbox

In the digital landscape, technological advancements drive innovation and transform industries, while regulatory frameworks governing emerging technologies struggle to keep pace with this development. This creates an inefficiency for businesses which seek to deploy such innovation: the products and services that these businesses offer must be developed while complying with existing regulations and must also be agile to be compliant with any potential regulations that may be introduced in the future. To address this issue, the DESH framework may provide a regulatory sandbox to every DESH Company, offering a controlled environment where companies may experiment with new technologies, assess their viability and collaborate with regulatory bodies to shape appropriate regulations.⁷⁷

The regulatory sandbox will create an environment that nurtures innovation by allowing businesses to explore novel technologies and business models without facing immediate regulatory constraints. This approach encourages experimentation and fosters the development of cutting-edge solutions. The regulatory sandbox must also incorporate mechanisms to safeguard consumers, such as strict data protection regulations and regular evaluations of the impact on consumer welfare to enable controlled and responsible experimentation. Ultimately, the sandbox will serve as a platform for regulators to gain valuable insights into emerging technologies and their associated risks.⁷⁸

The proposed sandbox will be open to all DESH Companies. Inclusion in the sandbox will be automatic. DESH Companies will be granted temporary relief from specific regulatory requirements that may be identified, allowing them to test their innovative technologies and business models without the fear of immediate repercussions. This flexibility encourages experimentation and reduces barriers to entry for startups and small businesses. Further, by removing regulatory obstacles, the sandbox enables DESH Companies to accelerate their product development cycles and reduce time-to-market.⁷⁹ This advantage encourages rapid innovation and allows businesses to respond to market demands more effectively.

⁷⁶ Paul Verbruggen, 'Does co-regulation strengthen EU legitimacy?', *European Law Journal* 15, 425 (2009)

⁷⁷ Hillary J Allen, 'Regulatory sandboxes', *George Washington Law Review* 87, 579 (2019)

⁷⁸ Hillary J Allen, 'Regulatory sandboxes', *George Washington Law Review* 87, 579 (2019)

⁷⁹ Hellmann, Thomas F., Alexander Montag, and Nir Vulkan. 'The Impact of the Regulatory Sandbox on the FinTech Industry', available at SSRN 4187295 (2022).

IV. Implementation roadmap

➤ Development of technology blueprint for DESH Compliance System

The first step in the implementation of the DESH framework will be the development of a technology blueprint for the Compliance System discussed in the paper. The DESH framework, as a digital regulatory environment, is highly dependent on the technological systems underlying it. These systems must be efficient, functional and state-of-the-art, in order for the vision of DESH to be realized.

The Compliance System can be developed as a stack of technology modules, which are layered on top of each other. This stack of software can leverage existing technological infrastructures in India – for instance, the digital identity systems under Aadhaar can be used for the purpose of verifying and authenticating identities; similarly, the payments infrastructure and the account aggregator infrastructure can be used to aggregate financial data about companies, which can then be plugged into the Compliance System where necessary. Therefore, through leveraging the digital infrastructure already existent in India, the Compliance System can be developed as a layered stack of interoperable technologies. Particularly, the framework for Automated Data Flows is relatively novel and requires validation at a technical level before it can be deployed through a legislative framework. Previous exploration of this idea by the Reserve Bank of India has explored the fundamentals required to operationalize an ADF framework.⁸⁰ This work must be carried out to completion.

The technology blueprint is a key step in the conceptualization and implementation of the DESH framework. In some sense, it may be considered a necessary pre-condition before the DESH framework can be developed in a tangible manner.

➤ Development of inter-ministerial consensus

Once a technology blueprint for the DESH Compliance System and other modules of the DESH framework is developed, it is important to establish the appropriate regulatory and administrative framework for its operation. The development of this regulatory framework, necessarily, involves multiple existing regulators, agencies, departments, and ministries of the Central and State Governments. Particularly, the focus on the DESH Administrator acting as a ‘regulatory moat’ will require forging a consensus across different ministries on the way the DESH framework will operate.

To this end, an inter-ministerial task force can be constituted for the purpose of developing this consensus. The development of the DESH framework in isolation from other ministries/departments threatens not only its coming into existence, but also may undermine the final shape taken by the DESH framework. It is key that every ministry/agency whose powers, in some senses, may be affected by the DESH framework, should be a participant in this inter-ministerial task force.

➤ Locating the notional home of the DESH framework: GIFT City IFSC

The DESH framework will also require a notional location, which will serve, for legal purposes, as the registered office of DESH Companies. While the DESH framework is born-digital, and therefore, not required to be anchored to a physical location – a notional physical location may have to be identified for the purposes of tax laws and ensuring harmonization with other applicable regulations. The IFSC framework was envisaged as a carve-out of the overarching financial sector regulations in India, with a special regime for financial service regulations being developed for IFSC units. In principle, this idea hews closely with the idea of the DESH framework and the creation of a ‘regulatory moat’ around DESH Companies.

GIFT City IFSC, subsequently, may be considered as a suitable site for anchoring the DESH framework. The DESH framework would dovetail with the IFSC framework to create a business and financial services hub which can propel India to a position of global leadership in the race for attracting modern digital businesses.

⁸⁰ ‘Approach Paper on Automated Data Flow from Banks to Reserve Bank of India’, Reserve Bank of India (2010)

V. Conclusion and way forward

- This paper set out to develop a solution with two objectives in mind: simplifying doing business in India; and making India an attractive jurisdiction for global digital businesses to incorporate in.
- This paper has outlined a concept for a born-digital regulatory environment for businesses – the DESH framework – which is designed to achieve the two objectives. This framework is rooted in the ideas of zero-friction regulation – which encompasses the reduction of compliance burdens and associated costs, the adoption of digital solutions, streamlining of administrative interactions and a responsive co-regulatory approach.
- The DESH framework is a legislative package which implements a zero-friction regulatory approach. The DESH framework may be thought of as a ‘digital Delaware’ – a digital framework for company incorporation and corporate governance.
- There are several elements of the DESH framework which combine to create a ‘regulatory moat’ around DESH Companies, ensuring that they do not have to face a multiplicity of regulatory authorities, undertake onerous compliance processes and be subject to rent-seeking behavior from regulatory authorities. These elements are legal and technological, ensuring that digital solutions can be effectively used for running a company, and that the law facilitates this model of operations.
- The way forward requires sustained engagement across government ministries and departments in the development of the DESH framework. The first step towards this is the formulation of a technology blueprint for the DESH Compliance System. Pursuant to the development of a technology blueprint, an inter-ministerial task force may be constituted for the purpose of developing consensus on the way the DESH framework is to operate.
- DESH is a radical break from the traditional model of regulation of businesses in India. It is a born-digital framework, aligned to the realities of operating a business in India today. This 21st century understanding of regulation can help overcome several legacy challenges in India’s legal and regulatory frameworks. Particularly, considering the globalized nature of the digital economy, the DESH framework can help India truly participate in the global competition for attracting digital businesses.
- The ultimate vision behind the DESH framework is that India should become the home for digital businesses worldwide. The development of this framework has the potential to help India attain a position of global leadership in the digital economy and propel India’s domestic technology industry to greater heights.

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