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**SUBMISSION
TO THE
DEPARTMENT OF COMMUNICATIONS
AND DIGITAL TECHNOLOGIES
ON THE
NATIONAL DATA AND CLOUD POLICY**

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Contents

<i>Executive summary</i>	1
<i>Free Market Foundation and Rule of Law Project</i>	2
1. Chief concerns of the draft National Data and Cloud Policy	2
2. Economic concerns	4
3. Recommendations	6
4. Conclusion.....	7

Executive summary

The Free Market Foundation notes with serious concern the proposed National Data and Cloud Policy. In a post-COVID-19 world, those countries with the clearest to understand, rule of law-based regulatory frameworks will witness the greatest progress in terms of digitalisation and the eventual realisation of the Fourth Industrial Revolution (4IR). Unfortunately, as evidenced by the proposals contained in the Policy, the risk is that South Africa could well head in the opposite direction.

The proposed National Data and Cloud Policy (hereafter referred to as ‘the Policy’) will, if adopted, effectively nationalise data created in South Africa into the hands of the state. If it proceeds, this Policy will ensure that all data generated in South Africa becomes “co-owned” by the state – with negative privacy, rule of law, and economic freedom concerns. Given the unequal relationship of coercion between the state and legal subjects, to the extent that the Policy is enforceable, even so-called co-ownership in practice will mean total ownership by the state of the respective data.

In its current form the Policy will deter both local and foreign investment and growth in the information and communications technology (ICT) sector and, because this sector is becoming increasingly important for businesses (of all sizes) in all economic sectors, such a policy will also deter investment in other sectors of the economy.

The global norm is not for governments to be at the centre of cloud services, as this Policy would require. Cloud services, and the data produced, used through and saved through them, can be protected without the need for the state to have a copy of a particular data set saved in a central state-built and administered location.

According to Boston-based data consultancy Xalam, the Policy is:

“one of the most dispiriting statements of intent on cloud services we have seen in emerging markets in some time. If its core tenets were translated into formal regulation, South Africa’s proposed cloud policy would considerably dampen the outlook for an otherwise thriving cloud market, with a materially adverse impact on Africa’s broader cloud services opportunity.”¹

For South Africa to realise the 4IR in a meaningful sense and encourage growth in sectors such as e-commerce especially, this Policy must either be returned to the drawing board or abandoned completely.

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¹ [Critics of SA government’s proposed digital grab idea express deep concerns](#), *Daily Maverick*, 3 May 2021.

Free Market Foundation and Rule of Law Project

The Free Market Foundation (FMF)² is an independent public benefit organisation founded in 1975 to promote and foster an open society, the Rule of Law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations, and sponsorships.

Most of the work of the FMF is devoted to promoting economic freedom as the empirically best policy for bringing about economic growth, wealth creation, employment, poverty reduction, and greater human welfare.

The FMF's Rule of Law Project³ is dedicated to promoting a climate of appreciation throughout South Africa, among the public and government, for the Rule of Law; continually improving the quality of South African law; identifying problematic provisions in existing and proposed laws, and, where feasible, advocating rectification.

1. Chief concerns of the draft National Data and Cloud Policy

Of the policy interventions recommended in the Policy, the one that is most concerning from a rule of law perspective, and which will generate the most uncertainty for cloud, e-commerce, and general business investors, is **10.4.4** which states:

To ensure ownership and control: ... All data generated from South African natural resources shall be co-owned by government and the private sector participant/s whose private funds were used to generate such, and a copy of such data shall be stored in the HPCDPC [High-Performance Computing and Data Processing Centre].⁴

This particular intervention contains serious, negative implications for the data privacy of South African businesses and citizens. The right to privacy is protected in terms of the common law and section 14 of the Constitution of South Africa, 1996; the Policy will dilute and undermine this right. In South Africa, the right to privacy may be limited in terms of section 36(1) of the Constitution and, to justify the idea that the government should be co-owner of the data of citizens, will be exceedingly difficult.

The Policy adds that:

to ensure ownership and control: data generated in South Africa shall be the property of South Africa, regardless of where the technology company is domiciled. Government shall act as a trustee for all government data generated within the borders of South Africa.

At this point in time, it is unclear what "co-ownership" could mean legally. The concept of "co-ownership" implies access rights – is this the case in the context of this Policy? Such uncertainty and vague language will dissuade the potential growth of cloud services. The Policy holds that all data

² www.freemarketfoundation.com.

³ www.ruleoflaw.org.za.

⁴ pp.30-31

classified or identified as ‘critical Information Infrastructure’ should be processed and stored in South Africa, but the definition thereof is left unfilled. Will this judgment call become the purview of a particular government department, board, or minister?

Intellectual property (IP) rights in South Africa are meant to protect the IP of legal entities, especially as IP can carry significant commercial value and is thus vulnerable for exploitation by outside parties. If all data – in this case data pertaining to new patents and inventions – as well as forms of fiction and non-fiction writing, are ‘co-owned’ by the government, IP rights will become seriously diluted and rendered tenuous.

There are also serious privacy concerns contained in the Policy. Government can improve its own accountability and data protection by ensuring its processes, procedures, and cloud services are up to standard; this does not entail that it should therefore have copies of – and fundamentally, potentially access to – any and all data that is generated in the Republic.

There is the potential that this Policy will run into and overlap with the Protection of Personal Information Act 4 of 2013 (POPIA). For example, there are currently no data localisation (storage) requirements in South Africa. The processing of personal data and information should be protected in line with POPIA, the Promotion of Access to Information Act 2 of 2000, and according to international best practice – such as the General Data Protection Regulation in the European Union.

Amongst other aspects, POPIA aims to:

to promote the protection of personal information processed by public and private bodies.

Can the aims and intentions of the Policy be reconciled with POPIA? Or will one override the other? It must be acknowledged that citizens of all countries are increasingly concerned regarding the possible accessing of their personal data by governments, and POPIA was such an attempt to prevent overtures by an overreaching state. Recommending that all data generated in the country – especially data tied to matters such as personal health status and information – needs to sit with the government, does not satisfy the bar that one needs to justify for such a massive intrusion into personal data.

At no point in the Policy is ‘data’ defined. Does data encompass WhatsApp messages and SMSs? The Excel spreadsheets generated by a corner laundromat could fall under ‘data.’ The terabytes and terabytes of data generated as people play video games, could conceivably constitute ‘data.’ Does ‘data’ include the video and sound files created by South African film- and TV series-houses? Any proposed policy or legislation must be as clearly defined as possible – therefore, not have anything as potentially massive as all data created in a country as undefined – and, when it has serious privacy concerns as this Policy does, narrowly define the contexts and situations to which its proposed interventions will apply. The Policy also confuses ‘data’ with ‘data infrastructure,’ and further with ‘data producers.’

2. Economic concerns

South Africa's growth rate has hovered at 1-2% on average for the last few years. There are no objective reasons to presume this will increase without the necessary pro-growth structural reforms. On the expanded definition the unemployment rate is over 42%, which means more than 11 million citizens are out of work. The solution to this mounting crisis is not more onerous legislation and growth-inhibiting policies – as is the case with this Policy.

Through calling for the building and maintaining of a High-Performance Computing and Data Processing Centre, at which copies of all data generated in the country will be stored, the Policy adds unnecessary and burdensome costs onto businesses and customers, both in terms of having to pay towards the Centre – it will certainly require more tax revenue to be paid by the private sector – and having to pay to provide the Centre with said copies of data. It makes little practical sense to have this duplication of data. The overtaxed private sector has nothing more to give – further burdens will likely entail disinvestment.

The South African government and legislature should be looking at eliminating those laws and regulations that inhibit economic activity, instead of conceiving avenues to dissuade possible investment and job creation. The world of data and cloud services is one of the fastest-growing industries in the world today: “The global cloud computing market size is expected to grow from USD 371.4 billion in 2020 to USD 832.1 billion by 2025, at a Compound Annual Growth Rate (CAGR) of 17.5% during the forecast period.”⁵ South African cloud companies, investors – and connected industries – will not be able to take advantage of this growth were this Policy, or any of its ill-considered proposals, to be implemented.

According to Aluwani Thenga, Executive Head: Merchant Services Growth at Rand Merchant Bank and First National Bank, “The value of e-commerce transactions in South Africa is expected to surge 150% to R225bn by 2025.”⁶ The COVID-19 lockdown has changed consumer behaviour and habits, and by ensuring ease-of-operation and less onerous regulation and interference the government can encourage yet more growth in this sector. Even with the potential subsiding of COVID-19 consumer spending habits will have changed, and will remain so changed into the future. Many businesses have begun to realise and tap into the worth that e-commerce and online tools can provide for them. “RMB estimates there are now currently about 5 000 businesses online in South Africa with a turnover of R100k or more.”

The e-commerce market in South Africa is worth approximately US\$3 billion, second only to Nigeria on the African continent.⁷ According to Quartz Africa, “South African shoppers spent an average of \$109 on online purchases on consumer goods—the most among African countries.”⁸ In terms of the number of people using e-commerce, there are currently more than 20 million users in South Africa.

⁵ [Cloud Computing Industry to Grow from \\$371.4 Billion in 2020 to \\$832.1 Billion by 2025, at a CAGR of 17.5%](#), Research and Markets, 21 August 2020.

⁶ [E-commerce to be worth R225bn in SA in 5 years as expectations change](#)

⁷ [X-raying The Call That Crushed South African eCommerce During Lockdown](#), WEETracker, 15 May 2020.

⁸ [Online spending in Africa shows just how much work e-commerce companies still have to do](#), Quartz Africa, 10 February 2020.

Finally, on spending using e-commerce platforms, by the end of 2021, the average per South African spend is expected to be nearly \$190.

The potentially explosive growth in this area will be most beneficial for informal, small-, and medium-sized businesses. While larger corporates have the manpower and financial muscle to adequately handle additional regulatory and administrative requirements imposed on them, this Policy will add unnecessary operational burdens on the shoulders of smaller businesses and make their growth yet more uncertain and difficult.

The provision of cloud services and data protection must – to ensure that the best, and cheaper, options are available – be open to market forces, competition, and innovation. The growth of South African and international cloud services companies, and the starting of new ones, will be seriously inhibited if this Policy were to be implemented. For those companies that decide it is worth their investment to still operate in South Africa, only the largest will have the necessary human resources and capital to contend with onerous regulation – a government that wants robust competition in all economic spheres should not contribute to potential monopolies through imposing policies such as this one under current analysis.

The Policy will, if adopted, also apply to foreign multinational companies investing in digital infrastructure. To convince them to store copies of the data they generate and house in a government centre may well be a bridge too far, and if they are dissuaded from investing and building in South Africa the loss of their own infrastructure means fewer potential jobs for South African citizens. This country's own ICT sector will lose out on international exposure and expertise, as foreign companies look to invest in locales where their data will be more secure from government overreach. The Policy correctly highlights the growing society-wide need to store and access data, as well as the concomitant need to process said growing amount of data using cloud computing software. The best path forward in this regard is to encourage private sector investment, dynamism, and the lowering of associated costs – rather than implementing policies and interventions that make such investment more difficult.

The Africa Continental Free Trade Area (AfCFTA) is potentially one of the greatest agreements to be signed into action by African governments. The agreement initially requires members to remove tariffs from 90% of goods; the United Nations Economic Commission for Africa estimates that the agreement will boost intra-African trade by 52 percent by 2022.⁹ With such a level of removal of tariffs, and the steady removal of non-tariff trade barriers (NTBs), the agreement can encourage a substantially improved flow of goods, services, and intellectual capital and problem-solving over borders right across the continent. However, this Policy is precisely the kind of NTB that emerging market economies should not be considering or implementing, and it will undermine the potential good that could be achieved through the AfCFTA.

In the 2019 edition of the *Trade Barrier Index*,¹⁰ South Africa was ranked at 42nd (out of 89 countries); 1st in the sub-Saharan Africa region. Following South Africa, in descending order in the region: Ghana (52nd overall), Nigeria (57th), Senegal (60th), Cameroon (66th), Côte D'Ivoire (70th) Mali (75th). The data and tools used to compose the Index indicate that, “‘High-income economies’ have fewer trade

⁹ [African Continental Free Trade Area: What you need to know](#), Al Jazeera, 20 March 2018.

¹⁰ [International Trade Barrier Index](#)

restrictions, whereas those countries that score poorer, generally are marked by “high tariff scores, weak facilitation of property rights, membership in few trade agreements, and market entry restrictions on foreign businesses.”

The Index places great emphasis – in the context of innovation, economic growth, and job creation – on robust property rights, of both the fixed and intellectual variety. If South Africa were to implement this Policy the country would experience a decline on the Index; this will be seriously detrimental both for innovation within our borders, and have a ripple-effect through the wider region.

The Policy will also affect the security of IP rights for patents, products, and services that are conceived and implemented in South Africa. This adds to the detrimental impact on potential innovation in the country, with the downstream effect that South Africans are forced to either import new products and innovations from other countries, or to remain with what is the *status quo* – in areas such as medical care, innovation and progress are vital both to combat new diseases and viruses and to lower the costs of medical equipment by innovating better, cheaper versions thereof.

Unfortunately, the Policy appears to aim in the same direction as South Africa’s competition authorities in general, as there is an assumption that a department or the government is best placed to decide what constitutes ‘market dominance’ and ‘anti-competitive behaviour.’ The Policy proposes the reviewing of existing competition legislation in order to address ‘dominance’ in the market within the data and cloud environment. Government interventions into markets tend to distort supply and demand and impose onerous requirements; this will be the case were this Policy to come into force, with the subsequent detrimental results for South African companies in the data and cloud services spheres, and they will fall behind international counterparts in terms of technological advances and service offerings.

3. Recommendations

The FMF wishes to support the move contained in the Policy towards supporting local and foreign investment in data and cloud infrastructure and services through establishing a digital or ICT ‘Special Economic Zone.’

The Policy rightly points to the importance of data in the 21st century:

One of the greatest advantages of data is the value it generates after it is processed into information and knowledge. However, it is also well recognised that the capacity to use and transform data into information and knowledge lies in the hands of mega technological digital companies, which are highly operational in selected countries.¹¹

And we agree with this assessment of the current economic situation:

The South African economy is characterised by low economic growth, increasing levels of poverty, poor education, low skills and high levels of unemployment. The emergence of the COVID-19 pandemic has heightened the social and economic challenges that the country is facing. However, the advent of the Fourth Industrial Revolution (4IR) and its related

¹¹ p.4

technologies presents an opportunity to address the social and economic challenges characterising the South African economy.¹²

To better encourage and unlock greater data- and cloud services-expansion in the country, the FMF recommends that:

- Government should release broadband spectrum, to allow current players and new players in data provision to enter the mobile data market, increasing competition and lowering prices, enabling more South Africans to access e-commerce platforms;
- Explore a moratorium, in place until at least 2024, on tariffs on goods and services sold through e-commerce platforms;
- Provincial governments in South Africa to be encouraged to introduce tax incentives for e-commerce operations, and more digitally-focused businesses, to set up physical “bases” or warehouses in cities in those provinces; and
- South Africa should continue to support the moratorium on electronics customs duties at the World Trade Organisation.

4. Conclusion

Given the context of the damage caused by COVID-19 and subsequent government lockdowns, and especially in the context of an economy that had a pitiful 1 to 2% expected GDP growth rate before 2020, any possible policies or legislation that will make data- and e-commerce-related activity more difficult, make very little sense. In May 2020, Cas Coovadia, CEO of Business for South Africa, pointed out that e-commerce companies are connected with all manner of other businesses, including courier services.¹³

Legislation should be conceived of, and implemented in, the spirit of ensuring that the conducting of business activity – and in the case of data, people’s personal lives – is as free from onerous interference and obstruction as possible. In the sphere of personal data security and privacy, the Protection of Personal Information Act should be sufficient for what the Policy intends.

The Department of Telecommunications and Postal Services has, through its many delays in releasing more broadband spectrum, inhibited potentially transformative growth in data and cloud services for the last 20 years.¹⁴ To encourage increased investment in, and access to, data-related industries (indeed, which sector of the economy in 2021 is not somehow linked to data?) the department must release spectrum and further allow for the trading of spectrum between companies and investors.

The kind of command-and-control approach envisioned by this Policy will not generate the kind of growth, innovation and progress that the country needs to attain anything resembling the 4IR.

¹² p.3

¹³ [COVID-19: Cas Coovadia on why govt. should rethink its strategy on reopening the economy](#), *CNBCAfrica*, 12 May 2020.

¹⁴ [Media release: FMF launches Socio Economic Impact Assessment \(SEIA\); Government ICT policy is harming consumers](#), 13 April 2021.

If this Policy was confined only to the protection and security of data that is important for government administration and services, and collected by the government, then a stronger case could be made for a policy that seeks to update and upgrade the government's own processes and standards.

The Policy aims to classify all data as a 'national strategic asset,' but what constitutes such an asset is never clearly defined. If anything, the classification of some categories should proceed on a case-by-case basis, and the relevant justification for state intervention should be defined in every single case and context.

The whole cloud services sector has developed independently of the state – and has done very well in terms of catering to the needs of consumers. Ultimately, power must rest with consumers, and thus far they have decided to use it to support those businesses and services (regardless of size) that they feel best serve their needs. It is hubris and paternalistic to presume that the state has the knowledge to decide for consumers which companies (local or international) they should use for their data-related needs. The state can, by making the correct policy changes, enhance and ensure the continued digitisation of the economy.

This Policy is not the correct path on which to realise the goal of South Africans' taking advantage of increased data access and more cloud services. In a very real sense, the 4IR will be stillborn if unnecessary and burdensome legislation is imposed on the country's burgeoning e-commerce and data sectors. The Policy has negative privacy and economic growth-related concerns, and we therefore recommend that it be abandoned. The Interventions contained are not consistent with other statements that have emanated from government generally, and the Presidency in particular, regarding encouraging the speedy realisation of the 4IR, to the benefit of all South Africans.