

Comments on proposed amendments to the Consumer Protection (E-Commerce) Rules, 2020

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About the Centre for Internet & Society

The Centre for Internet and Society (CIS) is a non-profit organisation that undertakes interdisciplinary research on internet and digital technologies from policy and academic perspectives. The areas of focus include digital accessibility for persons with disabilities, access to knowledge, intellectual property rights, openness (including open data, free and open source software, open standards, open access, open educational resources, and open video), internet governance, telecommunication reform, digital privacy, and cyber-security. The academic research at CIS seeks to understand the reconfiguration of social processes and structures through the internet and digital media technologies, and vice versa.

We are thankful to the Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution for conceptualising these amendments with the intention of protecting consumer choice and user rights, and also grateful for this opportunity to provide commentary. Our comments and suggestions offer both considerations as the rules are further clarified and implemented along with suggestions for amendments to further strengthen the scope and achieve the objectives of the proposed amendments

Introduction

E-commerce players have attracted regulatory ire for several unfair practices that harm Indian consumers, including for their predatory pricing practice, flouting of Indian laws and forum shopping.¹ The Competition Commission of India (CCI) has made attempts to regulate the e-commerce giants but there has been a constant tug-of-war between the two.² To better regulate the e-commerce space with the purpose of protecting the consumer, commerce and preventing unfair trade practices, the Consumer Protection (E-commerce) Rules, 2020 were brought about. However, since their inception, they have been continuously objected to by the various trade associations, consumer bodies and other representatives for not being stern enough on the e-commerce entities. These objections along with the continuous conflict of the e-commerce entities with the Competition Commission of India (CCI), Department for Promotion of Industry and Internal Trade (DPIIT) and other regulatory bodies created a requirement for the proposed amendments.

The amendments have proposed several rules which will protect the consumer with a restriction on misleading advertisements and appointment of grievance officers based in India. However, in the path to create a greater level playing field between the large e-commerce entities, small e-commerce entities and the physical stores; the proposed rules have created several hurdles in the operations of e-commerce, reducing the ease of business and increasing the costs of operations; which will eventually pass on to the consumers.

In this response, we at CIS, examine the proposed rules with the view to strengthen them further, and aid their synchronisation with the Consumer Protection Act, 2019 and other regulatory bodies. Finally, we make recommendations on the impact of these rules and their alternatives to align with the aim of consumer protection while encouraging the growing e-commerce sector.

Definitions and Registration

1. Amended Rule 4 - Requirement for registration and definition of E-commerce Entity

Since the definition of “e-commerce entity” is very wide. A plain reading of the amendment suggests that this includes logistics providers, although illustrative examples of the same may bring further clarity to the provision. It should be ensured that the mandatory registration with the DPIIT is a simple and easy process and does not cause any harassment to entities requiring physical visits to the office of the DPIIT in New Delhi. It is often observed that even though the registration mechanism may

¹ Reuters, "Piyush Goyal: 'Arrogant' US e-commerce giants flout Indian laws," June 28, 2021, <https://indianexpress.com/article/india/piyush-goyal-arrogant-us-e-commerce-giants-flout-in-dian-laws-7378995/>

² <https://www.medianama.com/2021/06/223-missing-piece-cci-big-tech/>

be completely online, in case of grievances or special situations citizens are required to visit the government office in person to explain their special circumstances to the officers concerned. The registration with DPIIT under this rule is a move away from providing a single window clearance system that the government seeks to implement to increase ease of business in India.

Recommendation: It is therefore suggested that a single window system of registration should be created which must also provide for a robust online grievance redressal mechanism which completely removes the requirement of in person visits to the office of the DPIIT.

Compliance

As a general observation, compliance obligations should be differentiated based on the size of the entity and the volume of transactions rather than adopting a ‘one size fits all’ approach which may harm smaller businesses, especially those that are just starting up.³ Before these rules come into force, further consultations with small and medium-sized business enterprises would be vital in ensuring that the regulation is in line with their needs and does not hamper their growth. Excessive compliance requirements may end up playing into the hands of the largest players as they would have larger financial coffers and institutional mechanisms to comply with these obligations.

2. **Amended Rule 5(5)(a)** – The Chief Compliance Officer has the responsibility to ensure compliance with the Act and rules made thereunder. This responsibility to ensure compliance with the Act and rules has already been cast on the “nodal person of contact or an alternate senior designated functionary who is resident of India” under Rule 5(1). It is not clear whether the person referred to in Rule 5(1) can be the same as the one referred to in Rule 5(5)(a).

Recommendation: This confusion needs to be addressed and the responsibility for compliance should be given to a single person.

³ “The Draft E-Commerce Rules Could Disrupt 6.3 Crore MSMEs Across India” <http://www.businessworld.in/article/The-Draft-E-Commerce-Rules-Could-Disrupt-6-3-Crore-MSMEs-Across-India/21-07-2021-397417/>,” RSS affiliate suggests changes to ecommerce rules,” <https://economictimes.indiatimes.com/news/india/rss-affiliate-suggests-changes-in-consumer-protection-e-commerce-rules/articleshow/84613325.cms>

3. **Amended Rule 5(5)(a)** – The clause imposes a liability on the Chief Compliance Officer in case of proceedings relating to third party information, data or communication link hosted by the e-commerce entity. The only safe harbour for the Chief Compliance Officer is if CCO ensures that the e-commerce entity has observed due diligence while discharging its duties under the Act and rules. However there may be situations where the CCO may not be the final decision maker with respect to such third party information or links even if the CCO has raised the issue with the management. The safe harbour should therefore refer to due diligence by the CCO and not the e-commerce entity itself, i.e. as long as the CCO has discharged her duties with due diligence she should not be liable, instead the person who was the ultimate decision maker in the given situation, should be made liable in such situations.

Recommendation: This rule should be amended to hold the ultimate decision maker liable.

4. **Amended Rule 5(5)(a)** – Since the Chief Compliance Officer is required to be an Indian citizen resident in India and also has to be a senior employee or managerial personnel (and not just any employee as in the case of “nodal contact person” or “Resident Grievance Officer”), this would mean that any ecommerce entity offering services in India would have to ensure that they have at least one senior employee located in India. This might be too onerous a requirement for smaller ecommerce entities and niche players not located in India.

Recommendation: For entities that do not have an office in India, any employee (and not just a senior employee) should be allowed to be the Chief Compliance Officer. Alternatively an allowance may be made whereby certain persons or entities may be appointed as Chief Compliance Officers for more than one ecommerce company.

5. **Amended Rule 5(5)(c)** - This rule specifies that the responsibilities of the “Resident Grievance Officer” shall be those that are referred to in Rule 3(2). This appears to be an error of reference, since Rule 3(2) is merely a rule of interpretation in the definition section and does not refer to any functions to be performed by the e-commerce entity. Further, the Rule refers to the term grievance officer in certain places, which needs to be replaced by the term “Resident Grievance Officer”.

Recommendation: To make corrections as needed

Data Protection and Surveillance

6. **Amended Rule 14(e) and (f)** - While these amendments are a welcome step in the direction of consumer data protection, in the absence of an overarching data protection legislation, these provisions do not offer enough protection of consumer interests insofar as their personal data is concerned. We appreciate that the Data Protection Bill may be introduced in Parliament at any point of time, however there is no guarantee regarding when the said Bill would be passed. Till the passage of such a Bill, these E-commerce Rules might offer the best chance for consumers to protect their data insofar as e-commerce entities are concerned. These provisions could be made operational only till such date as the Personal Data Protection Bill is passed to avoid a conflict of laws in the future.

Recommendation: The data protection provisions need to be much more robust and provide for compliance with privacy principles such as collection limitation, purpose limitation, consent, disclosure, etc. in order to better protect the interests of consumers.

7. **Amended Rule 5(18) and 5(5)(b)** – The Consumer Protection (E-Commerce) Rules, 2020 have been made under section 101(1)(zg) of the Consumer Protection Act, 2019. This section refers to the powers of the Central Government to take measures for the “purposes of preventing unfair trade practices in e-commerce, direct selling and also to protect the interest and rights of consumers”. Thus, neither the specific sections of the Act under which these Rules are framed nor any other provisions of the Consumer Protection Act, 2019 provide for an obligation to assist or provide information to law enforcement agencies, especially for purposes such as verification of identity, or for the prevention, detection, investigation, or prosecution, of offences, which are not related to the interests of consumers. This provision therefore appears to be *ultra vires* the parent legislation. Similar rules in the Information Technology (Intermediary Guidelines And Digital Media Ethics Code) Rules, 2021 could be justified by reference to section 69 of the Information Technology Act, 2000 (the parent legislation in that case), however since there are no such corresponding provisions in the Consumer Protection Act, 2019, such a requirement in the delegated legislation cannot be legally justified.

Recommendation: This proposed amendment should be deleted.

Flash sales

8. **Amended Rule 5(16)**- The proposed rule imposes an absolute ban on flash sales. Flash sales are defined in the amended Rule 3(e) as sales which fraudulently intercept the ordinary course of business using technological means favouring a particular group of sellers. In an attempt to clarify the ambiguity created by this rule, the press release, dated 21 June 2021, stated that conventional flash sales are not banned but only the specific flash sales or back-to-back sales which limit customer choice, increase prices and prevent a level playing field are restricted.⁴ This clarification appears to permit certain flash sales but fails to define conventional flash sales creating space for judicial interference and litigation.

Fraudulent flash sales can be misutilized to create an artificial shortage of goods, leading to retail arbitrage and shopping frenzy. However, by not defining and distinguishing properly between conventional flash sales and fraudulent flash sales, the rules create regulatory uncertainty towards all flash sales. This uncertainty could act as a barrier in usage of conventional flash sales by e-commerce entities to promote and market goods. Further, by limiting the definition of flash sales to only those that fraudulently intercept ordinary course of business using technological means, the rules will ensure that any law drafted in future is unable to borrow the definition of flash sales from the e-commerce rules, adding the regulatory burden of defining flash sales independently and leading to misinterpretation.

Recommendation: Conventional flash sales should be defined. Clear distinction must be made between conventional flash sales and fraudulent flash sales. The definition should not be limited to interception of business “using technological means”, which limits the scope of the fraudulent flash sales. Further parameters must be provided for when a flash sale will be considered a fraudulent flash sale.

⁴ Press Information Bureau, Government of India, Ministry of Consumer Affairs, Food & Public Distribution, 21 June 2021, *Proposed Amendments to the Consumer Protection (E-commerce) Rules, 2020* [PRESS RELEASE] <<https://www.pib.gov.in/PressReleseDetail.aspx?PRID=1729201>>.

Unfair trade practices

9. **Amended Rule 5(14)(d) and 6(6)(b)** - The proposed Rule 5(4)(d) appears to prevent e-commerce entities from selling goods or services using the same brand name as the marketplace entity. Similarly Rule 6(6)(b) prevents related parties of marketplace entities from being listed as sellers on the platform. There is no such restriction on brick and mortar retail stores selling goods which are associated with its own brand and a number of major retailers such as Big Bazaar, Chroma, etc. sell items of their own brands in their retail stores along with those of others. This Rule would prevent such retailers from offering their retail services through an online platform.

Recommendation: Instead of a blanket ban, there should be restrictions on the activities of associated entities (such as promotions, data sharing, provisions restricting discrimination against goods being sold by others) so that they do not have an unfair advantage over other sellers purely by virtue of being associated with the entity running the marketplace platform.

Jurisdictional issues with respect to competition law

10. **Amended Rule 5(17)** - As mentioned above, the Consumer Protection (E-Commerce) Rules, 2020 have been made under section 101(1)(zg) of the Consumer Protection Act, 2019. This section refers to the powers of the Central Government to take measures for the “purposes of preventing unfair trade practices in e-commerce, direct selling and also to protect the interest and rights of consumers”. Although this section is broad enough to cover issues of market domination under headings such as “unfair trade practices”, or “interest and rights of consumers”, importing concepts of “abuse of dominant position” which are specifically provided for in detail under the Competition Act, 2002 appears to be a case of legislative overreach and may lead to forum shopping by the e-commerce entities.

Adjudicating upon a dominant position and what constitutes its abuse is strictly a Competition Act and CCI matter. The e-commerce rules itself acknowledge the domain to Competition Act in this issue by referring to the Competition Act in describing ‘abuse of dominant position’. This rule brings the issue of ‘abuse of dominant power’

under the fora of the Consumer Protection Authority or the Consumer Disputes Redressal Commissions. Overlapping jurisdiction of this nature could introduce regulatory delays into the dispute resolution process and can be a source of tension for the parties and regulatory authorities. A potential argument for this provision may lie in an interpretation of this rule that allows the rules to apply ex ante whereas the CCI would act against dominant positions ex post. However, this does not negate the potential problems with overlapping jurisdictions and as such should be avoided by legal regimes.

While the intention behind importing a competition law concept such as “abuse of dominant position” in the consumer protection regulations may be understandable, such a step might be effective in jurisdictions which have a common regulatory authority for both competition law as well as consumer protection issues, such as Australia,⁵ Finland,⁶ Ireland,⁷ Netherlands,⁸ etc. However, in a country such as India which has completely separate regulatory mechanisms for competition and consumer law issues, such a provision may lead to logistical difficulties. The members of the consumer fora may not have the requisite experience to decide complex issues of competition law such as “abuse of dominant position” which comes with an entire jurisprudence behind the development of the concept, which may require expertise and experience in the field of competition law. As mentioned earlier, since the CCI already has the expertise as well as statutory force to handle such issues, there is no reason to saddle the consumer fora with such added responsibility. Further, having tribunals with overlapping jurisdictions may encourage companies to engage in ‘forum shopping’-where they approach different tribunals based on their conveniences in a manner that avoids the regulatory reach of both regimes.

Recommendation: This rule should be scrapped entirely, as keeping it will lead to forum shopping by the e-commerce giants and an unwarranted delay in dispute resolution.

Compliance with international trade law

11. **Amended Rule 5(7)(c)** - The proposed rule mandates that e-commerce entities must provide a ranking of imported goods. Such a directive with lack of any guidelines on

⁵ Australian Competition and Consumer Commission.

⁶ Competition and Consumer Authority.

⁷ Competition and Consumer Protection Commission.

⁸ Netherlands Authority for Consumers and Markets.

parameters on which the ranking must be based may lead to arbitrariness. The rule further mandates to ensure that such ranking does not discriminate against domestic goods and sellers. The burden of compliance with this condition may add operational costs for any e-commerce entity. The purpose of the e-commerce rules is to establish a level playing field between e-commerce entities and physical stores,⁹ availability of goods orderly ranked moves farther away from that purpose and gives the e-commerce entities the discretion to rank goods under the guise of being user friendly. Given the wide definition of e-commerce entities, this becomes particularly complicated if we are talking about content providers like Netflix who would likely need to show similarly placed Indian alternatives to all foreign films they show.¹⁰

Additional obligations on imported goods require some scrutiny with respect to India's obligations under the General Agreement on Trade and Tariffs, 1994 [and similarly General Agreement on Trade in Services (GATS) for services] to prevent litigation at the World Trade Organisation (WTO).¹¹ Article III prohibits members from discriminating against "like" imported products, and treating them less favourably than domestic products once they have entered the market.¹² As per the WTO Appellate Body in *Korea-Various Measures on Beef (2001)*, in order to violate the relevant GATT provision (Article III:4), three elements must be satisfied:

1. The domestic and imported products at issue are like products.
2. The measure at issue is a law, regulation affecting their internal sale, offering for sale, purchase, transportation, distribution or use. It is important to note here that as per *US-Section 337 Tarrif Act (1989)* and *Italy-Agricultural Machinery (1958)* this includes both substantive laws, regulations or requirements and procedural requirements which may alter the conditions of competition between the imported goods and the domestic market.

⁹ PTI, Business Standard, *New norms for e-commerce to create level-playing field, help MSMEs: Experts*, 27 December 2018

https://www.business-standard.com/article/companies/new-norms-for-e-commerce-to-create-level-playing-field-help-msmes-experts-118122700617_1.html

¹⁰ Rahul Jain and Shruti Ajit Murali, "Proposed amendments to the e-commerce rules-the good, the bad and the ugly," Medianama, July 6, 2021, <https://www.medianama.com/2021/07/223-e-commerce-rules-good-bad-ugly/>

¹¹ Relevant key provision is Article III:4 which reads "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

¹² Japan Alcoholic Beverages II (1996) pp. 109 relevant quote: "The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III is to ensure that internal measures "not applied to imported or domestic products so as to afford protection to domestic production. Towards this end, Article III obliges members of the WTO to provide equality of competitive conditions."

3. The imported product must be accorded less favourable treatment than domestic products. The Appellate Body held in *US-FSC (Article 21.5-EC)* and *Thailand-Cigarettes (Philippines) (2011)* that this need not be based on the actual effects of the measure but potential effects suffice to constitute treatment less favourable. A scrutiny of the “design, structure and expected operation”¹³ of the measure may by itself reveal a violation. To constitute a violation, there must be a “genuine relationship” between the measure at hand and the adverse impact on the competitive opportunities for imported products.¹⁴

Bearing this in mind, while the transparency requirements on the origin of goods should not attract WTO scrutiny, two other aspects should be carefully enforced and developed. First, the obligation to provide domestic alternatives to all imported goods without providing imported alternatives to domestic goods would mean that domestic goods were receiving favourable treatment as per Article III. Further, the ambiguity in the obligation to rank goods could lead to a scenario where e-commerce entities are accused of giving competitive preferences to domestic goods, rather than merely levelling the playing field, which is the ostensible intention of this rule. Of course, in a hypothetical scenario where there is WTO litigation, India may be able to invoke the exceptions in Arts. XX and XI of the GATT and special and differential treatment for developing countries but all efforts should be made to prevent needless litigation in the first place.

Recommendation: A robust framework on ranking with transparent disclosure of parameters for the same would also go a long way towards addressing concerns with discrimination and national treatment under WTO law. Further, the obligation to provide domestic alternatives should be clarified and amended to ensure that it does not cause uncertainty and open India up to a national treatment challenge at the WTO.

Liabilities of Marketplace E-commerce entities

12. Amended rule 6(9) - Additional clarity on Fallback Liability

The amended rules provide for the provision of fallback liability on Marketplace E-commerce entities which are now liable when a seller on the marketplace fails to deliver purchased goods to the buyer. However at present it is unclear as to what extent such fallback liability applies to marketplace e-commerce entities.

¹³ Appellate Body Report, *Thailand-Cigarettes (Philippines)* (2011), para 134

¹⁴ Appellate Body Reports, *EC-Seal Products* (2014), para 5.10

Such liability ensures that consumers are adequately protected and can be adequately compensated in instances wherein it is difficult for them to hold the primary sellers accountable. It would also incentivize marketplaces to ensure that non delivery of goods is limited as much as possible, thereby reducing consumer harm.

While the rationale for such liability is understandable, since the ultimate aim of these rules and the parent legislation is safeguarding the interests of consumers. It is also not the first time such a concept of no fault liability has been introduced in Indian laws, it already exists under the Motor Vehicles Act, 1988, the Public Liability Insurance Act, 1991, the Employee's Compensation Act, 1923, etc. However, such a provision may force marketplaces to limit their activity on the basis of their ability to ensure delivery of every purchased good by sellers, specially in case of smaller marketplaces which may not have the financial might to withstand the costs associated with such fallback liability. Not only could this limit the economic growth of marketplaces but could result in a decrease in variety and consumer choice - leading to indirect consumer harm.

Therefore, while some form of fallback liability is essential, it is imperative that multiple ways of implementing it be examined. To do so, we look at alternate models of liability that could be possible in the e-commerce space.

Under the current conception of the e-commerce rules, the government has adopted a strict stance against marketplace entities wherein the mere fact that the goods was not delivered (even if it is due to the seller's fault) is sufficient to ensure that the marketplace is liable. However, it is important to note that such a strict approach¹⁵ is far from the only way to implement such fallback liability. Other methods of implementing liability include¹⁶:

1. Liability through negligence: Marketplace E-commerce entities can be considered liable if they have breached a duty of care by not undertaking measures to ensure that customers' purchases are delivered by the seller.
2. Liability as an exemption to safe harbour: Under such a model marketplace e-commerce entities can be provided with safe harbour status and any liability on them would require demonstrating that there has been some omission on their behalf. In this case such an omission could be a lack of policies vetting sellers on their platform prior to allowing them to list goods for sale.

Recommendation:

¹⁵ *Providers liability from the ecommerce directive to the future* (2017)[https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614179/IPOL_IDA\(2017\)614179_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/614179/IPOL_IDA(2017)614179_EN.pdf)

¹⁶ Ibid

Imposing liability on marketplaces serves to ensure that consumers are adequately protected is essential. However fallback liability as currently defined requires greater clarity in terms of providing exceptions for marketplace entities that have made all reasonable (or pre-defined) efforts to ensure delivery of goods by the seller.
