National Law School of India
NLSI Review

THE 10TH NLSIR SYMPOSIUM ON REGULATING E-COMMERCE IN INDIA

The E-commerce sector in India has seen tremendous growth in recent years. However, the legal environment has imposed one of the biggest challenges to the growth of the sector, with the development of law seldom keeping pace with business innovation. The 10th NLSIR Symposium on regulating E-commerce in India puts these issues in the spotlight with four sessions discussing various aspects such as foreign investment, taxation and liability.

SESSION I: BUSINESS MODELS AND REGULATION OF FOREIGN INVESTMENT

A key feature of the Indian E-commerce sector has been foreign investment as Private Equity (PE) and Venture Capital (VC). In the context of both Business to Business (B2B) and Business to Consumer (B2C) E-commerce, these investments have been pivotal in driving innovation in logistics, data analytics, developing technological expertise and funding discounts.

While B2B facilitates transactions between businesses, B2C facilitates transactions between a business and the final consumer. In the Indian context the latter is further subdivided into marketplace E-commerce, where the entity only facilitates transactions between buyers and sellers without owning any inventory, and inventory-led E-commerce where the entity owns the inventory it sells to the final consumer. The choice of model depends on the incentive structure created by laws such as the Indian Foreign Direct Investment (FDI) policy. Since FDI is prohibited for B2C, E-commerce entities have been functioning as a marketplace (which receives investment) thus acting as an intermediary between the retailer and consumer.

Taking cognizance of these developments, the Department of Industrial Policy and Promotion (DIPP), in March 2016 released certain guidelines for FDI in E-commerce. While the presence of the marketplace model was legally recognised for the first time, the press note left a number of issues unresolved.

"E-commerce" now includes "digital products" and "services", but no definition of these terms has been provided, thus creating uncertainty. It is unclear whether such terms should be even included within the ambit of the rules. Moreover, since the term "E-commerce" only apples to companies, it is unclear whether the press note would be applicable to other entities. The distinction between market-place model and inventory model lies at the heart of these

new FDI rules. However, it does not contain any bright-line rule to distinguish the two models from a compliance point of view, casting doubt on the validity of a wide-range of business models. Further, the question of where "services" fall under this distinction remains open.

The new rules also prohibit E-commerce entities from *directly or indirectly* influencing the selling price, and require them to maintain a *level playing field*. Once again, the new rules lack any bright-line test to determine *direct or indirect influence* or *level playing field*, thus creating uncertainty. Finally, the new rules cap total sales originating from a single supplier to 25% but lack any details on how this percentage will be calculated.

SESSION II: INDIRECT TAXATION: CHALLENGES AND CONCERNS

Taxation issues have posed one of the most significant hurdles to the growth and regulation of E-commerce in India. Taxation problems plague the sector mainly because the existing tax laws remain inept to handle the variety of business models that different E-commerce entities adopt. There is great ambiguity both in terms of which laws are to be made applicable to the sector and the manner in which compliance can be enforced. This session seeks to throw light on the manner in which taxes are levied on E-commerce players under the existing regime and also the changes that the pending GST Bill will bring to the system.

The various business models that exist within the E-commerce sector make it difficult to have broad tax rules for the sector in general since characterising E-commerce players by using the traditional roles in the supply chain is often fraught with inaccuracies. Besides this, the E-commerce players find it difficult to categorise their offerings as goods or services, especially in case of digital downloads like e-books and music. However, this problem might be rendered redundant if the GST were to be introduced. Another major issue being faced is that of determining the jurisdiction for VAT due to the virtual nature of the transaction and the absence of information regarding the physical presence of goods and services. Levy of entry tax in case of movement of E-commerce goods has also been a contentious issue in the recent past.

While the GST Bill has been lauded for acknowledging the uniqueness of the sector and attempting to introduce some form of taxation scheme for it, the Bill does not address all of the existing problems and gives rise to some new problems. The system of tax collection at the source, which the Bill introduces, has been questioned on merits as well as the ground of

practicability in the face of high compliance costs. Further, the definition of E-commerce operators only includes the marketplace model and hence puts them at a disadvantage without any justification when compared against other business models. The Bill might also disadvantage small sellers as tax collection at source would eat into their working capital. It also does not answer the question of whether discounts are to be included in the cost of transaction, and also what happens to the tax that has already been paid in case of cancellation or return. The session seeks to analyse whether the "one size fits all" approach adopted by the Bill is suited for a sector as dynamic and diverse as E-commerce and whether the unified scheme proposed by the Bill addresses all the concerns of taxation in E-commerce.

SESSION III: INTERPLAY BETWEEN E-COMMERCE AND COMPETITION LAW

Given the recent emergence of E-commerce, the position of law on multiple issues is unsettled from the standpoint of competition law and policy. The view of the Competition Commission of India (CCI), beginning with its order in *SanDisk*, has been that that the E-commerce sector by itself does not constitute a relevant market, and is a part of the larger retail market. However, this holding is at odds with the determination of relevant market in comparative jurisdictions, making the issue of whether E-commerce constitutes a relevant market a highly contested one.

Issues regarding the exclusivity of agreements, examined in the case of *Mangavi* v. *Flipkart*, also pose a relevant question regarding the anti-competitive nature of such exclusive distribution agreements, and the possible adverse effects on competition. This case also raised the issue of whether the discounts offered by such companies could qualify as predatory pricing, and thus be deemed anti-competitive under the Act. A related question that has recently been entertained by the CCI is whether directions by manufacturers to maintain a minimum price in the face of frequent discounts offered by online retailers violates the provision against resale price maintenance under the Competition Act.

Another issue the session will consider is whether the increasing trend of mergers between online retailers warrants the attention of regulators. As of now, regulations limiting concerns about merger controls to asset base might grant immunity to previous mergers, but the prospective merger of larger companies merits a deeper examination. Further, the manner in which the above mentioned principles of competition law have been adapted to the E-

commerce industry by comparative jurisdictions will shed greater light on some of the abovementioned issues in this session.

SESSION IV: LIABILITY REGIMES: ENSURING COMPLIANCE

The ability to transact in commercial goods and services electronically has led to the development of a wide range of models for online retail. Online marketplaces such as Amazon or Flipkart, that have been acting as intermediaries between retailers and end-consumers, serve as platforms on which the products and services of multiple retailers can be accessed by consumers.

In situations where the online content infringes intellectual property rights or consumer protection standards, it becomes necessary to determine the liability of intermediaries hosting such content. Presently, the liability of online intermediaries is governed primarily by the Information Technology Act, 2000 and the Intermediaries Rules, 2011. Intermediaries are generally exempt of liability where they act as mere conduits of information. However, the existing regime raises the question of the degree to which intermediaries are expected to conduct background assessments, or 'due diligence' of content before hosting it. A related issue is whether intermediaries should be held liable merely for having a 'reasonable ground of belief' of the presence of unlawful content. In light of India's a 'notice-and-takedown' regime, there is still no clarity on the extent to which intermediaries can 'self-censor' content.

Further, while the inventory based model of E-commerce companies can be made liable for the goods and services provided by them, the liability of market-based models of such companies under the Consumer Protection Act, 1986 is uncharted. Another concern raised about such E-commerce companies the manner in which they use data gathered from their users' preferences. Unlike jurisdictions such as the European Union, which has a dedicated framework for data protection and privacy, India faces the need for a clear data protection and privacy policy in this regard. Moreover, marketplaces have also faced liability issues under the Legal Metrology Act. Therefore, this session aims to discuss the possible areas of regulation that the E-commerce companies ought to face and the compliances they should take into account as aggregators of, and intermediaries in, the sale of products and services.