REGULATING E-COMMERCE THROUGH CONSUMER AND COMPETITION LAW FRAMEWORK

Abstract

The faster growth of E-Commerce in India has been enabled by a facilitating policy support by Government of India in permitting 100% FDI under automatic route in the marketplace model of E-Commerce. The investments made by Government of India in rolling out fibre network is further likely to spur the entire E-Commerce ecosystem as more citizens will be connected to digital network. Presently, E-Commerce is governed by multiple sectoral regulations (RBI, FSSAI, IRDA, Motor Vehicles Act, Consumer Protection Act *etc.*) apart from competition regulation (CCI). The proposed Data Protection Bill is likely to add one more layer of regulation to E-Commerce. As the evolving E-Commerce has significantly contributed to consumer welfare, it is imperative that such burgeoning ecosystem of E-Commerce is not unduly constricted through multiple and overlapping regulations and sector specific compliance requirements, which may have an unintended effect not only on the growth of the sector but on the consumer interests itself. The present paper seeks to focus on regulation of E-Commerce under the Consumer and Competition Law and Policy Framework only and endeavours to critically analyse the various policy interventions through such policy framework in regulating unfair trade practices and anti-competitive conduct of E-Commerce players. The paper attempts to analyse in detail the recently proposed amendments to E-Commerce Rules 2020, in order to ascertain their efficacy in regulating the unfair trade practices indulged in by E-Commerce entities as also their impact on the sector as such. The paper also seeks to examine the role of Competition Law in E-Commerce and an attempt has been made to study the enforcement interventions made by Competition Commission of India (CCI) in digital economy.

I Introduction

E-COMMERCE has been witnessing exponential growth in recent times. COVID-19 has further accelerated the pace of shift of consumers from traditional brick and mortar stores to E-Commerce platforms.[1] This shift is not peculiar to India as similar growth stories have been observed across the globe. However, despite the high rate of growth of E-Commerce in India, online retail still constitutes a small segment of total retail market. As of 2019, online retail constituted only 4.7 percentage of total retail and is likely to constitute 10.7 percentage of total retail market by 2024.[2]

The faster growth of E-Commerce in India has been enabled by a facilitating policy support by Government of India in permitting 100 percentage FDI under automatic

1 The Indian E-Commerce market is expected to grow to US$ 111.40 billion by 2025 from US$ 46.2 billion as of 2020. By 2030, it is expected to reach US$ 350 billion. *Available at*: https://www.ibef.org/industry/ecommerce.aspx (last visited on Dec. 10, 2022).

2 As per E-Commerce Report (Nov., 2021) by India Brand Equity Foundation (IBEF).

route in the marketplace model of E-Commerce.[3] The investments made by Government of India in rolling out fiber network is further likely to spur the entire E-Commerce ecosystem as more citizens will be connected to digital network.

Digital markets have attracted the attention of governments and regulators across the world and have been key focus area of regulation. The increased shifting of physical markets towards digital markets has accentuated the need to have a closer look at the digital markets. No doubt, digital markets are bringing in innovation and an enhanced consumer experience, at the same time, they are giving rise to various concerns which need suitable policy intervention.

Presently, E-Commerce in India is governed and regulated by various regulatory bodies and different horizontal regulations. The Reserve Bank of India was the first to move in regulating E-Commerce and it released guidelines for Internet banking as early as in 2001. MeitY (the Ministry of Electronics, Information and Technology) also realised the importance of regulation of E-Commerce and accordingly, exercising its powers under the Information Technology Act, 2000 (IT Act), it introduced the Information Technology (Intermediaries Guidelines) Rules 2011.Apart from recognition of the operational models of E-Commerce companies through the FDI Policy in 2016,the E-Commerce continues to be under fragmented sectoral regulation under various laws through amendments from time to time. Presently, E-Commerce is governed by multiple sectoral regulations[RBI, FSSAI, IRDA, Motor Vehicles Act, Consumer Protection Act 2019 (CPA, 2019) *etc.*] apart from competition regulation (CCI).The proposed Data Protection Bill is likely to add one more layer of regulation to E-Commerce.

As the evolving E-Commerce has significantly contributed to consumer good and welfare, it is imperative that such burgeoning ecosystem of E-Commerce is not unduly constricted through multiple and overlapping regulations and sector specific compliance requirements, which may have an unintended effect not only on the growth of the sector but on the consumer interests itself.

The present paper seeks to focus on regulation of E-Commerce under the Consumer and Competition Law and Policy Framework only and endeavours to critically analyse the various policy interventions through such policy framework in regulating unfair trade practices and anti-competitive conduct of E-Commerce players. The paper attempts to analyse in detail the recently proposed amendments to E-Commerce Rules, 2020 in order to ascertain their efficacy in regulating the unfair trade practices indulged in by E-Commerce entities as also their impact on the sector as such. The paper also seeks to examine the role of Competition Law in E-Commerce and an attempt has

3 In India, there are three type of e-commerce business model (i) Marketplace base model (ii) Inventory base model (iii) Hybrid model of inventory based and market place e-commerce model.

been made to study the enforcement interventions made by the antitrust body of India *i.e.,* Competition Commission of India (CCI) in digital economy.

II E-Commerce and consumer law

The Consumer Protection (E-Commerce) Rules 2020[4] (hereinafter "E-Commerce Rules") had been notified by the Central Government on July 2, 2020. After the notification of the Rules, several representations were received by the Government of India from different stakeholders particularly consumers complaining against unfair trade practices being indulged-in by E-Commerce operators rampantly. In light of the above, the government proposed to amend the E-Commerce Rules for protecting the interest of the e-consumers. Accordingly, the Government mooted amendments in the E-Commerce Rules in 2021 and put the proposed amendments in public domain to elicit views / comments / suggestions till July 6, 2021, which was extended till July 21, 2021.[5] The proposals to amend the existing E-Commerce Rules attracted a lot of public and stakeholder attention due to the sheer scope of the proposed regulation and the potential impact thereof upon the E-Commerce ecosystem.

At the outset, it is apposite to note that the proposed amendments to the E-Commerce Rules seek to provide a robust regulatory mechanism over E-Commerce platforms to protect the interests of consumers who purchase goods or avail services through digital modes. This, of course, would go a long way in attaining and reinforcing the objectives of the CPA, 2019 in protecting the interests of E-Commerces of E-Commerce in a more organised, systematic and institutional manner. In fact, the proposed dispensation would provide an *ex-ante* check and balance over E-Commerce entities in regard to their unfair business practices and this may minimize the *ex-post* complaints filed before the consumer fora by consumers of E-Commerce. Thus, the *ex-ante* regulatory requirements would supplement the *ex-post* enforcement task of consumer fora and would help achieve the larger objectives of law in a more coherent, efficient and speedier way.

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4 The Consumer Protection (E-Commerce) Rules, 2020 envisage the duties and liabilities of e-commerce entities. The rules are apply to all electronic retailers offering goods and services to Indian consumers irrespective of their place of registration. The rules require e-tailers to facilitate easy returns, address customer grievances and prevent discriminating against merchants on their platforms. The rules apply to all goods and services bought or sold over any digital platform; all forms of unfair trade practices across all models of E-commerce.

5 The proposed amendments to extant E-Commerce Rules are yet to be finalised. As per media reports, *available at:* https://economictimes.indiatimes.com/industry/services/retail/draft-ecommerce-policy-rules-to-be-released-together-soon/articleshow/88578236.cms, the Department for Promotion of Industry and Internal Trade (DPIIT) under the Ministry of Commerce is likely to release the draft E-commerce Policy, which will lay down the rules for online trade and address gaps in overall digital commerce policy; alongwith the revamped E-Commerce Rules by the Ministry of Consumer Affairs, Food and Public Distribution, which will aim at ensuring consumer interest.

Scope of coverage

The E-Commerce Rules, by virtue of their overarching coverage as provided in Rule 2,[6] are applicable in respect of "*all goods and services bought or sold over digital or electronic network* including all models of E-Commerce *i.e.*, marketplace or inventory models of E-Commerce; all E-Commerce retail, including multi-channel single brand retailers and single brand retailers in single or multiple formats; and all forms of unfair trade practices across all models of E-Commerce."[7]

Notwithstanding such wide coverage, the definition of "E-Commerce entity" as provided in Rule 3(b)[8] essentially confines coverage of these Rules to marketplace platform operators only (as is evident from reference to sellers offering goods or services for sale on such platforms), and thereby excludes the applicability thereof to other modes of E-Commerce such as where a seller is providing goods or delivering services through its own website. Further, including entities within the sweep of "E-Commerce entity" who are engaged by platforms for fulfillment of orders may cover even logistic arms, storage facilities and payments gateway *etc.* even though the principal selling entity itself is excluded from the scope of the definition. End-consumers do not have any privity of contract with such service providers. It may not be appropriate to disperse the single node liability of platform by roping in other peripheral service providers. The "related party" may extend the coverage vast and may affect the efficiencies brought about by joint ventures.

Accordingly, it is imperative that the coverage of the Rules and definition of "E-Commerce entity" are in sync, so that they do not exclude any mode of E-Commerce providing goods or services. Else, the regulatory mechanism under the Rules would create an uneven and discriminatory field, besides being in conflict with the declaration of universal application of the rules to all types of E-Commerce *i.e.*, whether platform based or direct retail through website, as provided in Rule 2.

Cross-selling

The definition of "cross-selling"[9] as proposed is confined to sale of goods or services which are related/adjacent/complimentary. The supplementary impositions need not

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6 E-Commerce Rules 2020, r. 2: Detail scope and applicability of the Rules in E-Commerce.

7 *Ibid.*

8 E-Commerce Rules, 2020, r. 3(b): defines "e-commerce entity" as meaning "any person who owns, operates or manages digital or electronic facility or platform for electronic commerce, including any entity engaged by such person for the purpose of fulfillment of orders placed by a user on its platform and any 'related party' as defined under Section 2(76) of the Companies Act, 2013, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity [the underlined portion is proposed to be inserted vide the 2021 draft amendments to E-Commerce Rules, 2020]".

9 R. 3(c) proposes definition of "Cross-selling" as "sale of goods or services which are related, adjacent or complimentary to a purchase made by a consumer at a time from any e-commerce entity with an intent to maximise the revenue of such e-commerce entity".

be in neighbouring products or services and any type of cross-selling whether for related products or otherwise should be brought within the discipline of "cross-selling". Further, to introduce the requirement to establish "intent" for showing cross-selling, is not in accord with the standards and norms of a civil statute, as such requirements are appropriate for criminal legislations. Establishing "intent" would place a high threshold of burden upon the consumers and thereby upon consumer fora and may result in exoneration of E-Commerce entities in various cases of cross- selling.

As such, the criminal standards of establishing "intent" need to be removed. So also, the phrase "….*to maximize the revenue of such E-Commerce entity*" from the proposed definition as maximizing revenue *per se* may not be the concern from consumer welfare perspective so long as no harm is caused to the consumers and the entity concerned is not commanding any market power or dominance.

In fact, consumers may be deprived of various complimentary products that are offered by various players *gratis* across consumer goods categories and such blanket prohibition upon E-Commerce entities may rather result in consumer harm than providing any tangible benefits to the consumers. Maximizing revenue is a legitimate business objective and in the absence of any predatory behaviour by a dominant entity having significant market power, such overarching embargo on such behaviour *per se*, may not be appropriate and hence may be considered for deletion from the proposal.

Fall-back liability

The "fall back liability[10] clause seeks to place legal obligation upon online platforms who are essentially intermediaries for the negligent conduct, omission or commission of any act of the sellers, who are registered with the platform, in fulfilling the duties and liabilities which causes loss to consumers.

To begin with, such imposition of liabilities upon the intermediaries through a subordinate legislation such as the proposed amendments to the E-Commerce Rules may not be legally tenable as such intermediary platforms enjoy protection against legal action for the acts and omissions of the sellers, under the Information Technology Act, 2000. It may be pointed out that section 79 of the Information Technology Act, 2000, in certain instances, provides exemption to intermediaries from liability. As per the section an intermediaries will not be liable for any third-party information, data or

10 The proposed amendments to E-Commerce Rules seek to insert Rule 3(d) therein by providing definition of "Fall back liability":

Rule 3(d). "Fall back liability" "means the liability of a marketplace e-commerce entity where a seller registered with such entity fails to deliver the goods or services ordered by a consumer due to negligent conduct, omission or commission of any act by such seller in fulfilling the duties and liabilities in the manner as prescribed by the marketplace e-commerce entity which causes loss to the consumer."

communication link made available by them.[11] Thus, any subordinate legislation such the proposed Rules which overreaches the supreme legislations, may not stand judicial scrutiny and may be declared *ultra vires*.

Besides, holding marketplace E-Commerce entities liable for the acts of sellers registered with them, may make this form of business model highly unattractive and unviable, which has otherwise grown very fast. This may deprive the willing consumers from buying goods or availing services through such channels.

Flash sale

The proposed Rule 5(16)[12] imposes a blanket ban upon flash sales.[13] It is submitted that such sweeping and blanket embargo upon flash sales, without any empirically validated harm to consumers or markets due to such sales, may deprive consumers of discounts and reduction in prices. This may also interfere with freedom of trade. Further, the issue of predatory behaviour and practices of such E-Commerce entities, such as deep discounting, may be appropriately examined by CCI. As such, to create an additional and overlapping regulatory mechanism to address such issues without any supporting enforcement infrastructure and expertise, may not be necessary.

The proviso to definition of "flash sale" seems to confine meaning of "flash sale" to those which are organised "…*by fraudulently intercepting the ordinary course of business using technological means with an intent to enable only a specified seller or group of sellers managed by such entity to sell goods or services on its platform…".*

The use of terms such as "fraudulently", "intent" *etc*. may not be appropriate as this may have the effect of placing a high threshold in the civil law for establishing proscribed behaviour of E-Commerce entities, which may not be desirable looking at the summary nature of the proceedings of consumer fora and the need to deliver speedier justice to consumers of unfair trade practices.

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11 Information Technology Act, 2000, s. 79.

12 The proposed amendments to E-Commerce Rules seek to insert Rule 3(e) therein by providing definition of "Flash sale" and further by proposed Rule 5(16) imposes a blanket ban upon flash sales:

Rule 3(e). " 'Flash sale' means a sale organized by an e-commerce entity at significantly reduced prices, high discounts or any other such promotions or attractive offers for a predetermined period of time on selective goods and services or otherwise with an intent to draw large number of consumers

Provided such sales are organised by fraudulently intercepting the ordinary course of business using technological means with an intent to enable only a specified seller or group of sellers managed by such entity to sell goods or services on its platform."

13 The Government seems to have provided clarification on "flash sale". See report, *available at*: https://economictimes.indiatimes.com/tech/technology/govt-clarification-on-flash-sales-compounds-confusion-among-e-tailers/articleshow/83757968.cms?from=mdr(last visited on Dec.20, 2022).

Mis-selling

The proposed amendments seek to insert the following definition of "mis-selling":

Rule 3(k) defines 'mis-selling' "*as an E-Commerce entity selling goods or services by deliberate misrepresentation of information by such entity about such goods or services as suitable for the user who is purchasing it*". The explanation provides that misrepresentation means: [14]

> (i) the positive assertion, in a manner not warranted by the information of any entity making it, of that which is not true;
>
> (ii) any display of wrong information, with an intent to deceive, gain an advantage to the E-Commerce entity committing it, or any seller claiming under it; by misleading consumer to the prejudice of E-Commerce entity, or to the prejudice of anyone claiming under it;
>
> (iii) causing, however innocently, a consumer to purchase such goods or services, to make a mistake as to the substance of the thing which is the subject of the purchase

To begin with, it is observed that the misrepresentation itself should be made actionable without requiring such misrepresentation to be deliberate.

Further, explanation to the definition of "mis-selling" is mutually contradictory in as much as clause (i) thereof requires such misrepresentation to be actuated by "intent" whereas misrepresentation relatable to clause (iii) makes this category of misrepresentation to be actionable even if it is done *innocently*. As mentioned already, mental elements should not be introduced in the Rules and thereby in the adjudicatory process of consumer fora. This may create higher threshold for consumers to prove their claims. Mental elements should not be made the prerequisites for establishing consumer harm and for obtaining remedies under the consumer protection law.

Registration of E-Commerce entities

The new Rules stipulate registration by E-Commerce entities[15] It is not readily evident as to what are the prerequisites for registration of E-Commerce entities by Department for Promotion of Industry and Internal Trade (DPIIT). Neither such requirements have been spelt out in the proposed amendments nor any enabling provision by way

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14 Rule. 3(k) of the proposed amendment to the Rules.

15 Registration of e-commerce entities:

"Rule 4(1) Every e-commerce entity which intends to operate in India shall register itself with the Department for Promotion of Industry and Internal Trade (DPIIT) within such period as prescribed by DPIIT for allotment of a registration number.

Provided that the DPIIT may extend the period for registration of such e-commerce entity for sufficient reason, to be recorded in writing.

(2) Every e-commerce entity shall ensure that such registration number and invoice of everyday order is displayed prominently to its users in a clear and accessible manner on its platform"

of rules or other such instrument has been conceived or made in this behalf. Registration *simpliciter* without any conditions thereto may be vacuous exercise. Also, it is not clear as to what useful purpose would be served through such additional registration requirement when entities before commencing business have to register either under the Companies Act or the Partnership Act or the LLP Act *etc.* The Rule states that every E-Commerce entity which "*intends"* to operate in India shall register itself with DPIIT meaning thereby the existing operating entities need not register. This may itself create discrimination and an uneven field between the incumbents and the new entrants.

It is also important to point out that no specific consequence by way of penalty or otherwise is provided for non-compliance with such registration requirement and other requisitions such as display requirement of registration number by E-Commerce entity. A general declaration that the provisions of the CPA, 2019 shall apply for any violation of the provisions of these Rules, may not suffice.[16]

Further, such compliance requirements with no tangible benefits to consumers, may only result in increased costs for consumers as firms may pass on the burden incurred on such additional regulatory compliance, upon the end consumers.

Duties of E-Commerce entities (appointment of grievance officer/ nodal officer/compliance officer etc.)

The E-Commerce Rules outline duties of E-Commerce entities including the duty to appoint a nodal officer.[17] The Rule proposes that E-Commerce entities are to obligated to appoint a nodal person of contact or an alternate senior designated functionary (who is resident in India, to ensure compliance with the provisions of the Act or the rules made thereunder). No mechanism has been provided in the Rules to ensure monitoring with such requirements. Further, a general declaration that the provisions of the CPA, 2019 shall apply for any violation of the provisions of these Rules, may not suffice.[18]

Specifically, the E-Commerce Rules contains prohibition against display or promotion of misleading advertisement whether in the course of business on its platform or otherwise.[19] This above prohibition will be on E-Commerce entities.

The above proposed obligation upon E-Commerce entities under Rule 5(4) not to allow display/ promotion of misleading advertisement (whether in the course of business on its platform or otherwise), puts a heavy burden of due diligence upon E-Commerce platform operators to ascertain the misleading advertisements displayed

16 E-Commerce Rules, 2020 r. 8.

17 R. 4(to be numbered as r. 5 post-proposed amendments) outlines duties of E-commerce entities.

18 *Supra* note 13.

19 Rule 5(4).

by sellers registered with online platforms. When millions of orders are placed on online platforms everyday, it will be impossible for the platform to ascertain the accuracy of each and every advertisement put by the sellers to advertise and market their products on the platform. Besides, even such requirement is not backed by any mechanism to enforce or monitor the same. The only obligation that can be put upon the E-Commerce entity in this regard, is the situation where E-Commerce entity is notified or reported to take down such product from the platform due to misleading nature of the advertisements. Alternatively, platform operators may be obligated to obtain a suitable declaration in this regard from the sellers.

The mechanism may provide a ruse to platforms to delist the sellers, not preferred by them, and may become an arbitrary tool in the hands of platforms in the garb of compliance with this proposed norm to be followed by E-Commerce entities.

The E-Commerce Rules[20] further require E-Commerce entities to establish an adequate grievance redressal mechanism keeping in consideration the number of grievances ordinarily received by such entity and specifically mandates appointment of a Chief Compliance Officer (CEO) who shall be responsible for ensuring compliance with the CPA, 2019 and rules the Act. The CEO shall be liable in any proceedings relating to any relevant third-party information, data or communication link made available or hosted by that E-Commerce entity where he fails to ensure that such entity observes due diligence while discharging its duties under the Act and rules made thereunder. [21]

The proposal *vide* Rule 5(5) to obligate E-Commerce entities to appoint compliance officers and consequent liability therefor, requires some clarifications. It appears from Rule 5(5)(a) that compliance officer shall be personally responsible for ensuring compliance and shall be liable accordingly. The proviso, however, says that no liability shall be imposed upon *E-Commerce entity* without being given an opportunity of being heard. It is thus not understood as to why an opportunity of being heard is accorded to E-Commerce entity, and not to Compliance Officer, when the liability is fixed upon the compliance officer personally. Analogously, providing of opportunity of being heard to E-Commerce entity is meaningless when the rule makes compliance officer personally liable for such non-compliance.

The E-Commerce entities are further obligated to publish prominently on their website/ mobile based application (or both), the name and contact details of the grievance officer as well as mechanism by which a user may make complaint against violation of the provisions of the rule or any other matters pertaining to the resources and services made available by it on its platform, and the grievance officer shall receive and acknowledge any order, notice or direction issued by the appropriate government, any competent authority or a court of competent jurisdiction.[22]

20 E-Commerce Rules, 2020, R. 5(5).

21 *Ibid.*

22 *Ibid.*

The multiplicity of requirements to appoint nodal contact person, resident grievance officer and chief compliance officer; may add compliance burden upon the entities which is likely to be passed upon the consumers by way of enhanced costs. In the absence of any statutory mechanism to monitor compliance of these stipulations or a specific mechanism to ensure compliance, no tangible benefits are likely to accrue to consumers. It should suffice if E-Commerce entities are left to devise their own self-regulatory mechanism in respect of grievance redressal or compliances. Whether such functions should be discharged by separate designated officers or by one officer, should also be left for the E-Commerce entities to decide.

Additional compliances by E-Commerce entities selling imported goods or services

Rule 5(7) provides that where an E-Commerce entity offers imported goods or services for sale, it shall:

> (a) mention the name and details of any importer from whom it has purchased such goods or services, or who may be a seller on its platform;
>
> (b) identify goods based on their country of origin, provide a filter mechanism on their E-Commerce website and display notification regarding the origin of goods at the pre-purchase stage, at the time of goods being viewed for purchase, suggestions of alternatives to ensure a fair opportunity for domestic goods;
>
> (c) provide ranking for goods and ensure that the ranking parameters do not discriminate against domestic goods and sellers.

The proposal in Rule 5(7) to obligate E-Commerce entities to comply with requisitions made thereunder such as mentioning of details of importers and identifying goods based on their country of origin; are burdensome and unworkable. Such obligations can be more appropriately discharged by the sellers registered with online platforms than the platforms themselves.

The requirement of suggesting domestic alternatives in Rule 5(7)(b) is impractical besides having the effect of affecting organic search parameters and skewing algorithms. For example, every time a person tries to book flight on a foreign airline, which might be cheaper than Indian alternative, does the foreign airline need to flash an Indian airline?

Moreover, such Rules do not apply to brick-and-mortar players who are handling 95% sales.

Also, Rule 5(7)(c) is made applicable in the case of "goods" only leaving out "services" from its ambit for reasons which are not readily discernible. Search-bias through ranking

parameters may also happen in sectors providing services such as hospitality, travel, food delivery *etc.*

Obligation upon E-Commerce entities against search bias

E-Commerce entities have been further obligated to ensure that no search bias takes place on their platforms.[23] Issues of search bias/ preferential treatment/ self-preferencing may be left to CCI which has already investigated such case of search bias against dominant entities.[24] Consumer fora may not have the necessary technical expertise or wherewithal to examine manipulation in algorithms. Also, it may not be necessary to create parallel jurisdiction between CCI and Central Consumer Protection Authority (CCPA) on these aspects when already a regulatory authority is well-equipped to address such issues.

Proceedings before CCI are inquisitorial unlike adversarial proceedings before consumer fora and as such public enforcement of Competition Law through its already existing and well-equipped multidisciplinary investigation arm backed with forensic support, can more suitably address issues of algorithmic collusions than leaving it to individual consumers before consumer fora to establish such algorithmic manipulations or to the consumer fora themselves, in the absence of any technical expertise available with them.

Furthermore, provisions relating to sharing of consumer data must be left to the proposed Personal Data Protection Authority *i.e.,* through parliamentary legislative route than through subordinate legislatures such as Rules.

Abuse of dominant position by dominant entity

Rule 5(17) declares that no E-Commerce entity holding a dominant position in any market shall be allowed to abuse its position. An explanation to this, further states that for the purpose of this clause "abuse of dominant position" shall have the same meaning as prescribed under the Competition Act, 2002 (section 4).[25]

The proposed Rule 5(17) is superfluous as already the Competition Act, 2002 forbids abuse of dominant position and therefore to repeat the same legislative prohibition in subordinate legislation may rather diminish the impact of supreme law made by the Parliament. Such unnecessary insertions may inadvertently impinge upon the jurisdiction of other regulators without any tangible benefits and as such may be avoided. Also, it may create jurisdictional overlaps and wastage of resources of two agencies in pursuing the same cause.

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23 Rule. 5(14) (c) – (f).

24 *Available at:* https://www.cci.gov.in/sites/default/files/07%20%26%20%2030%20of%202012.pdf (last visited on Nov. 30, 2022

25 Rule. 5(17).

III E-Commerce and competition law

Role of CCI

The modern competition law with an aim to secure efficient allocation of economic resources, seeks to promote and protect the process of free market competition. As per common belief, it is ultimately concerned with the protection of consumers' interest and when the competition is thwarted or damaged, consumers' interest is harmed.

Consumer protection law and competition law have common goal of promotion of consumer welfare. At the root of both consumer protection and Competition Law is the recognition of an unequal relationship between consumers and producers. Protection of consumers is accomplished by setting minimum quality specifications and safety standards for both goods and services and establishing mechanisms to redress their grievances. The objective of competition is met by ensuring that there are sufficient numbers of producers so that no producer can attain a position of dominance. If the nature of the industry is such that dominance in terms of market share cannot be avoided, it seeks to ensure that there is no abuse on account of this dominance. Competition Law also seeks to forestall other forms of market failure, such as formation of cartels, leading to collusive pricing, division of markets and joint decisions to reduce supply. Mergers and acquisitions also need to be regulated as they reduce competition.[26]

CCI interventions in E-Commerce

CCI has been very proactive in dealing with anti-competitive practices in E-Commerce. It hasreceived cases against different E-Commerce entities (including their associate/ holding companies *etc.*) operating as marketplace platforms, search engine service providers operating in different verticals, online sellers/ service providers *etc.*, alleging anti-competitive practices and abuse of dominant position in contravention of the Competition Act's provisions. It would be appropriate to discuss some key interventions of CCI in E-Commerce:

In *Delhi Vyapar Mahasangh* v. *Flipkart and Amazon,*[27]Delhi Vypaar Mahasangh filed an Information before CCI against Flipkart and Amazon alleging that these marketplaces are foreclosing non-preferred traders or sellers from accessing these online market places through vertical arrangements with their respective 'preferred sellers'. It was alleged in the information that exclusivity through discounting and preferential listings is being provided by having exclusive tie-ups in the relevant market with the smart phone companies.[28]

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26 Consumer Protection and Competition Policy, *available at:* https://niti.gov.in/planningcommission.gov.in/docs/plans/planrel/fiveyr/11th/11_v1/11v1_ch11.pdf (last visited on Dec. 20, 2022).

27 2020 SCC OnLine CCI 3.

28 *Ibid.*

After examining the Information at *prima facie* level, CCI *vide* its order dated January 13, 2020 observed that there were four alleged practices on these marketplaces *viz.* exclusive launch of mobile phones, 'preferred sellers' on the marketplaces, deep discounting and preferential listing/promotion of private labels, which needed to be investigated. Exclusive launch and preferential treatment combined with the deep discounting practices of platforms may create an ecosystem that might have an adverse effect on competition.[29]

Accordingly, CCI directed the Office of the Director General (DG) to cause an investigation into the matter against Amazon, Flipkart and their affiliated entities. After some litigation before high court and Supreme Court, the matter is presently pending investigation before the DG.

In *Federation of Hotel and Restaurant Associations of India* v. *MMT/ GoIbibo/ OYO*, Case No. 14 of 2019,[30] an information was filed by Federation of Hotel and Restaurant Associations of India against MMT/ GoIbibo/ OYO alleging that MMT and Goibibo (MMT-Go) indulged in certain anti-competitive practices *inter alia*, including predatory pricing, charging of exorbitant commissions from hotels, registering and providing on its platform illegal and unlicensed bed and breakfast and misrepresentation. Further, MMT-Go allegedly imposed a price parity in their agreement with hotel partners whereby the hotel partners were not allowed to sell their rooms at any other platform or even on its own online portal at a price below the price at which it is being offered on MMT-Go's website/portal. In addition to it, the hotel partners were under obligation to observe room parity whereby they could not refuse to provide rooms on MMT-Go at any given point of time if the rooms are being provided on any other platform. Furthermore, it was alleged that MMT and OYO entered into confidential commercial agreements wherein MMT had agreed to give preferential treatment to OYO on its platform, further leading to a denial of market access to Fab Hotels and Treebo in violation of section 3 as well as section 4 of the Competition Act. [31]

On taking cognisance of the information, CCI noted that MMT-Go and OYO operate in different relevant markets. In the '*market for franchising services for budget hotels in India*', OYO was held to be possessing a significant market power, though it was not found to be in dominant position. In "*market for online intermediation services for booking of hotels in India*", MMT-Go was *prima facie* held to be dominant as a "Group".[32]

As regards the room and price parity imposition through agreements, CCI observed, "though the magnitude of the anticompetitive effects of these agreements *inter alia*

29 *Ibid.*

30 2019 SCC OnLine CCI 37 also available at: *available at :* https://www.cci.gov.in/images/antitrustorder/en/1420191652260686.pdf (last visited on Dec. 10, 2022).

31 *Ibid.*

32 *Ibid.*

will depend on the market power of the platform, given the *prima facie* dominance of MMT-Go, such parity restriction needs to be investigated to gauge its impact under Section 3(4) as well as Section 4 of the Competition Act, which deal with vertical restraints and abuse of dominant position respectively." [33]

As regards the allegation of denial of market access to competitors of OYO pursuant to the commercial agreement between MMT and OYO, CCI *prima facie* opined that if MMT gives preferential treatment to OYO on its portal pursuant to an agreement between them, to not list the closest competitors of OYO on the platform, may potentially be contravening the provisions of section 3(4) of the Competition Act, which needs to be investigated. [34]

In view of the above, an investigation was opened up by CCI *vide* its order dated October 28, 2019 and the Office of the Director General was directed to investigate into the matter.

Vide the said order, CCI also ordered investigation in respect of other allegations which included predatory pricing, misrepresentation due to delayed de-listing and manipulation of market dynamics and charging of service fee by MMT-GO respectively. CCI *prima facie* found a case for investigation against MMT-Go for contravention of section 4 as well as section 3(4) of the Competition Act. As regards OYO, investigation under section 3(4) of the Competition Act has been ordered. The matter is currently under investigation.[35]

In *Meru Travel Solutions Private Limited* v. *UBER*, Case No. 96 of 2015,[36] Meru Travel Solutions Private Limited filed an information against UBER alleging that owing to its deep pockets, it has indulged in a series of anti-competitive practices of predatory pricing, imposition of unfair conditions *etc.* with the intent of establishing monopoly and of eliminating otherwise equally efficient competitors from the relevant market. Uber was alleged to be having dominant position in 'radio taxi services in Delhi and NCR' (relevant market in this case) and owing to its dominant position, it was alleged to have adopted certain abusive practices such as offering of unreasonable discounts to the customers leading to abysmally low/predatory prices to oust its competitors from the market. Further, it was alleged that Uber had an *incentive policy* which was not economically justified and was only aimed at exclusively attaching the drivers to its network so as to exclude its competitors having access to such drivers. Thus, Uber was alleged to have abused its dominant position in the relevant market.[37]

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33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

36 2016 SCC OnLine: CCI 12 : [2016] CCI 12.

37 *Ibid.*

Though initially CCI closed the matter, the appellate tribunal and the Supreme Court ordered the Director General to investigate the matter and submit an investigation report.[38]

In *XYZ AND Alphabet Inc.*, Case no. 07 of 2020,[39] based on an information filed against Google and its affiliates, CCI initiated an investigation against Google in November, 2020 primarily related to three allegations:

(i) "firstly, in relation to the allegation of pre-installed *Google Pay* on Android smartphones resulting in a *"status-quo bias"* damaging the interest of other apps facilitating payments through UPI, the CCI noted that Google already has a significant market presence in UPI based digital payment applications market and it may affect the evolving and transitory market in its favour and thus, may disturb the level playing field.

(ii) secondly, in relation to mandatory use of Google Play Store's payment system and Google Play In-App Billing system by the app developers for charging their users for purchase of apps on Play Store and/or for In-App purchases, CCI was of *prima facie* view that mandatory use of application store's payment system restricts the choice of the app developers of selecting a payment processing system of their choice.

(iii) *thirdly,* in relation to excluding/discriminating other mobile wallets/UPI apps as one of the effective payment options in the Google Play's payment system, CCI noted that Google Pay and other competing UPI apps were integrated in Play Store with different methodologies which *prima facie* resulted in better user experience in case of Google Pay. This difference has the potential to shift users towards adopting Google Pay over other UPI based payment apps."[40]

In view of the above, Google, as per the CCI's *prima facie* view, has abused its dominant position in contravention of the section 4(2) of the Competition Act, therefore, the commission ordered an investigation in this matter by the Director General. The case is presently under investigation.

In *Umar Javed* v. *Google LLC*,[41] CCI ordered investigation against Google for imposing alleged restrictions on Android device manufacturers through various agreements *i.e.*, Mobile Application Distribution Agreement (MADA) and Android Compatibility Commitment (ACC). As per MADA, android device manufacturers will have to preinstall the entire suite of Google apps at a predetermined position, in order to be able to preinstall any proprietary app of Google, *e.g.*, Play Store. Pre-installation of

38 Competition Appellate Tribunal Appeal No.31/2016, *available at* http://compatarchives.nclat.nic.in/Attachments/JudgementList/4198_Meru.pdf

39 2020 SCC OnLine CCI 41.

40 See, cci.gov.in.

41 *Umar Javed* v. *Google LLC*, 2019 SCC OnLine CCI 42 (Case No 39 of 2018) also , *available at* https://www.cci.gov.in/sites/default/files/39-of-2018.pdf(last visited on Dec. 10, 2022).

Google apps may create behavioural bias among consumers and reduce the ability of rival apps to compete in the relevant market. ACC reduces the ability and incentive of device manufacturers to develop and sell devices operating on alternative versions of Android i.e. Android forks. The matter is under consideration of CCI.

In *Matrimony.Com Limited* v. *Google,* Case nos. 07 and 30 of 2012,[42] CCI levied a penalty of INR 135.86 crores upon Google for indulging in search bias in abuse of its dominant position in the relevant market. It was found by the CCI that ranking of Universal Results (news/ images/ local businesses) prior to 2010 were pre-determined to trigger at certain fixed (1st, 4thor 10th) position on the Search Engine Result Page (SERP) instead of by their relevance. Such practice of the Google was found to be in contravention of the provisions of section 4(2)(a)(i) of the Competition Act which pertain to imposition of unfair condition by a dominant enterprise and was also unfair to the users/consumers. On Google's Flight Commercial Unit, prominent display of Commercial Flight Unit by Google on SERP with link to Google's specialized search options/ services (Flight) in contravention of the provisions of section 4(2)(a)(i) of the Competition Act was found by CCI. Prohibitions imposed under the negotiated search intermediation agreements upon the publishers were also held to be unfair as they restricted the choice of these partners and prevented them from using the search services provided by competing search engines. Imposition of unfair conditions on such publishers by Google was found to be in contravention of the section 4(2)(a)(i) of the Competition Act. Given the gatekeeper role of Google, the order of the Commission was aimed at eliminating search bias, promoting competition on merits and creation of a level playing for all firms irrespective of their sizes. [43]

In *Prachi Agarwal* v. *Swiggy Bundl Technologies Private Limited*, Case No. 39 of 2019,[44] the Informants in this case alleged a contravention of the provision of Section 4 of the Act on account of *Swiggy* charging higher rates through its app/ website than the price/rares offered by the respective restaurant(s) in their outlets for walk-in customers, over and above the delivery charges. It was also stated by the informants that the customers generally are not aware about the price/ rates charged by a particular restaurant in the offline mode due to which they cannot compare the same with the rates listed/displayed on Swiggy's app/website. This, as per the Informants blinds the customers who are completely oblivious of the inflated prices charged by Swiggy.

42 2018 SCC OnLine CCI 1 (Case nos. 07 and 30 of 2012) , *available at*: https://www.cci.gov.in/images/antitrustorder/en/07-and-3020121652434133.pdf (last visited on Nov. 30, 2022).

43 *Ibid.*

44 2020 SCC OnLine CCI 22.

CCI considered the information and the response of Swiggy with regard to the allegations made by the Informant. CCI observed that the Swiggy had no role to play in the pricing of the products offered by the restaurants on Swiggy's platform. In the facts and circumstances of the case, it was further noted by the CCI "*it may not be germane to define a precise relevant market and conduct further analysis. Having been satisfied with the averments of Swiggy that it had no role to play in the pricing of the products offered by the Partners on the platform".* CCI did not find a *prima facie* case of contravention of the provisions of section 4 of the Act.

Thus, it can be seen that CCI has been playing a key role in regulating the anti-competitive conduct of E-Commerce players through its interventions particularly in the cases which have impact upon a large number of consumers.

IV Conclusions and suggestions

The proposed amendments to the E-Commerce Rules, 2020 seek to provide a robust regulatory mechanism over E-Commerce platforms to protect the interests of consumers who purchase goods or avail services through digital modes. This, of course, would go a long way in attaining and reinforcing the objectives of the CPA, 2019 in protecting the interests of E-Consumers in a more organised, systematic and institutional manner. In fact, the proposed dispensation would provide an *ex-ante* check and balance over E-Commerce entities in regard to their unfair business practices and this may minimize the *ex-post* complaints filed before the consumer fora by consumers of E-Commerce. Thus, the *ex-ante* regulatory requirements would supplement the *ex-post* enforcement task of consumer fora and would help achieve the larger objectives of law in a more coherent, efficient and speedier way.

Evolving E-Commerce has significantly contributed to consumer welfare and more and more consumers are shifting towards purchases in online mode. The recent pandemic has also contributed in nudging consumers in availing services through online platforms. It is, therefore, imperative that such burgeoning ecosystem of E-Commerce is not unduly constricted through multiple and overlapping regulations and sector specific compliance requirements, which may have an unintended effect not only on the growth of the sector but on the consumer interests itself.

The proposed Rules seek to provide overarching *ex ante* prescription for all E-Commerce entities irrespective of their size or any other criteria. Such uniform compliance requirements, particularly that operate at regulatory level *ex ante,* may disturb the level playing field between big & incumbent players on the one hand and small & new entrants on the other, as these requirements may act onerously upon the latter even though they may remain otherwise compliant with such prescriptions. Also, additional compliances and norms to be followed by E-Commerce entities may further create a

discriminatory framework *vis-à-vis* brick-and-mortar players as well, who are handling about 95% sales and would not be covered by such *ex-ante* compliance and regulation.

Further, the proposals effect a paradigm change in the focus of consumer law and policy from regulating business-to-consumer (B2C) relations to regulating platform-to-business (P2B) and business-to-business (B2B) relations, an area more appropriate for regulation by other policy tools and agencies such as CCI/ ED/ Data Protection Authority/ IT Act *etc.* Such shift in approach and focus, apart from stretching the resources thin, may also inadvertently impinge upon the regulatory domain of other agencies and departments which are well-suited to discharge regulation of P2B and B2B transactions and conduct within their regulatory framework. For example, the reference in the proposed amendments to proscribed conduct of dominant undertakings under the Competition Act, 2002 is unnecessary as it may confuse consumers as to the appropriate forum for pursuing cases against exploitative abuses of dominant firms *i.e.* whether to pursue before consumer fora/ CCPA or before CCI. Similarly, the proposed Rules touch upon the regulatory framework of the Information Technology Act, 2000; the proposed Personal Data Protection Bill and Enforcement Directorate (FDI Regulations in E-Commerce). Potential overlaps amongst different organs may create jurisdictional issues and may also result in consumer detriment.

The proposed Rules seek to create a dedicated compliance mechanism and appointment of compliance officer from a sectoral perspective. In this, businesses must be allowed to have the flexibility to have a compliance mechanism through a single window mechanism across the sectors instead of mandating them to have multiple compliance officers for ensuring compliance with different regulations administered by different agencies and wings of the government. Such fragmented mechanism would result in enhanced costs for doing business and may again ultimately burden the end-consumers, besides resulting in micro managing the businesses and thereby interfering with freedom of trade. E-Commerce is a sunrise sector and any micro-management through granular policy prescriptions, may have the unintended consequence of affecting the growth and innovation in the sector. E-Commerce is a fast evolving sector and regulatory intervention has to be very calibrated and targeted lest it stifles growth and innovation.

Though a number of *ex ante* measures are required to be followed by E-Commerce platforms uniformly but in the absence of any institutional mechanism to monitor and enforce those measures, the same may not be in themselves sufficient to achieve their avowed objectives. A general provision in the Rules to provide that the provisions of the CPA, 2019 shall apply for any violation of the provisions of these Rules, may not be enough without any institutional and enforcement support.

In sum, a comity of regulators, working harmoniously in their respective fields governing E-Commerce, through inter-regulatory coordination would go a long way in creating an ecosystem of regulation which would not only protect consumer interests in E-Commerce without stifling businesses and innovation.

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