

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

*Submission to the Ministry of Consumer Affairs,
Food & Public Distribution.*

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Background

In July 2020, the Ministry of Consumer Affairs, Food and Public Distribution notified the Consumer Protection (E-Commerce) Rules, 2020 (**‘E-commerce Rules’**) under the Consumer Protection Act, 2019.¹ The E-commerce Rules provide a framework to regulate all goods and services bought or sold over digital or electronic networks, across all models of e-commerce and electronic retail.² The key features of the E-commerce Rules are as follows:

- **Duties of e-commerce entities:** The E-commerce Rules enumerate duties that all e-commerce entities must comply with, which includes the display basic information such as the name of the e-commerce entity and contact details, provide adequate disclosures for imported goods and services, maintain transparency regarding refunds and consumer consent for purchases, establish consumer grievance redressal mechanisms and apply best efforts to participate in the National Consumer Helpline.³
- **Liabilities of marketplace e-commerce entities:** In addition to the general duties enlisted above, the E-Commerce Rules impose specific liabilities on marketplace e-commerce entities. These include certain due diligence requirements such as ensuring that descriptions of goods and services as provided by the sellers are accurate, providing disclosures concerning any differential treatment meted out to goods, services or sellers of the same category and taking reasonable efforts to maintain a record of regular sellers who offer goods or services on the e-marketplace.⁴
- **Duties of sellers using marketplace e-commerce entities:** The E-commerce Rules also mandate that sellers offering goods or services through e-commerce marketplace entities to provide specific information to the marketplace entities, including seller entity details, price and breakup price, relevant details about the goods or services offered for sale by the seller including country of origin, importer and manufacturer details, delivery details, relevant guarantees or warranties applicable, and all other mandatory notices and information required by applicable laws. Additionally, sellers must ensure the accuracy of advertisements as displayed on the marketplace, and also appoint a grievance officer for timely grievance redressal.⁵

On 21st June 2021, the Ministry of Consumer Affairs Food and Public Distribution, Department of Consumer Affairs, published draft amendments to the E-Commerce Rules (**‘Draft Rules’**) for public comments. This submission sets out our comments on the Draft Rules on specific issues as identified by us. The comments also set out a brief context to the issues sought to be highlighted through our submission. We hope that our comments and drafting suggestions will be useful to the Ministry of Consumer Affairs, Food and Public Distribution in finalizing the Draft Rules.

¹ <https://consumeraffairs.nic.in/sites/default/files/E%20commerce%20rules.pdf>

² Rule 2(1) of the E-Commerce Rules.

³ Rule 4 of the E-commerce Rules.

⁴ Rule 5 of the E-commerce Rules.

⁵ Rule 6 of the E-commerce Rules.

Comments on the Draft Rules

I. Issues

1. *The homogenous applicability of the Draft Rules to entities irrespective of their size*

The Draft Rules, in a view to further consumer welfare, seek to propose numerous accountability and transparency enabling obligations upon *all* e-commerce entities. These obligations include the appointment of a Chief Compliance Officer,⁶ Nodal Contact Person,⁷ a Resident Grievance Officer⁸ and the setting up of a Grievance Redressal Mechanism on the entity's website.⁹ The Draft Rules also seek to impose personal liability on the Chief Compliance Officer if he fails to ensure exercise of adequate due diligence on the part of sellers.¹⁰ Additionally, marketplace e-commerce entities are also proposed to be made liable for the losses suffered by a consumer on the account of a defaulting seller.¹¹

While the above measures are a welcome step in fostering accountability for e-commerce entities, a blanket applicability of such requirements upon all e-commerce entities irrespective of their size may prove to be onerous and cumbersome for smaller e-commerce companies and start-ups. In fact, the increased compliance costs and exposure to liability may decelerate the growth of smaller e-commerce business and drive potential competitors of existing incumbent giants away from the Indian e-commerce market.

We therefore suggest that a calibrated approach be adopted towards regulating e-commerce entities. Accordingly, the additional duties and liabilities sought to be introduced through the Draft Rules should be made applicable specifically to only e-commerce entities that qualify a certain threshold, devised particularly to regulate e-commerce giants. For example, such calibration can be devised based on factors such as the number of active users, extent of reliance of consumers and business users on the service provided by the platform, market capitalization of the platform or its parent company, and so on.¹²

The view that digital companies of a certain size need specialized targeted regulation has gained global acceptance.¹³ For example, the Digital Services Act Package proposed by the EU in February 2020 targets platforms that are designated as 'gatekeepers'. Designation as a gatekeeper is based on well-defined criteria and reviewed periodically. Similarly, in the UK, the new regime for digital businesses will be applicable to companies with 'Strategic Market Status'. A similar approach is being adopted by Germany. In the US, the Federal Trade Commission, the US antitrust regulator, has been extremely vocal about Big Tech and the need for nuanced regulation to ensure a level playing field, especially under the new chairperson Lina Khan.

⁶ Rule 5(4)(a) of the Draft Rules

⁷ Rule 5(4)(b) of the Draft Rules

⁸ Rule 5(4)(c) of the Draft Rules

⁹ Rule 5(4)(d) of the Draft Rules

¹⁰ Rule 5(4)(a) of the Draft Rules

¹¹ Rule 6(9) of the Draft Rules.

¹² <https://www.deccanherald.com/opinion/panorama/draft-e-commerce-rules-one-size-cannot-fit-all-1003020.html>

¹³ <https://www.deccanherald.com/opinion/panorama/draft-e-commerce-rules-one-size-cannot-fit-all-1003020.html>

Such a calibrated approach to e-commerce regulation has also gained fervor within India. The prescription of stringent obligations only upon certain entities that qualify a certain threshold may be observed in the recently notified Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ('IT Rules'). The IT Rules classify social media intermediaries based on the number of registered users¹⁴ and impose differential obligations upon them.¹⁵ For example, the requirement of appointing a Chief Compliance Officer, a Nodal Contact Person and a Resident Grievance Officer have only been placed on 'significant social media intermediaries' that qualify a certain threshold of registered number of users notified by the Central Government.¹⁶

2. Regulatory overlap with the mandate of the Competition Commission of India ('CCI')

Increased competition in a market often results in increased consumer welfare. As such, the Draft Rules aim to promote free and fair competition,¹⁷ through placing prohibitions of abuse of dominance,¹⁸ unfair pricing¹⁹ and self-preferencing,²⁰ issues that fall squarely within the mandate of the CCI established under the Competition Act, 2002.²¹ Although the Competition Act, 2002 is sector agnostic and must work complementarily with other sector specific statutory instruments including the Consumer Protection (E-Commerce) Rules, 2020, an express transplanting of powers under the Competition Act, 2002 into the Draft Rules may provide avenues enforcement overlaps, forum shopping and regulatory arbitrage. Moreover, such an overlap of mandate will give an advantage to existing e-commerce giants which have the money and manpower to devote to multiple legal proceedings as can potentially delay conclusion of legal proceedings and enforcement of orders endlessly.

It is therefore suggested that the manner of regulation of e-commerce platforms and division of this responsibility amongst regulators be consciously designed with a view to avoid overlaps of mandate. Additionally, a robust mechanism of co-operation between various ministries/regulators and the CCI must be devised. Such co-operation is expected to result in increased enforcement success, administrative efficiency, expertise building as well as bolstering the ease of doing business.

3. The liability of E-commerce Entities for misleading advertising by sellers

Rule 5(4) of the Draft Rules proposes to make e-commerce entities liable for misleading advertisements on the platforms of such e-commerce entities in the course of business or otherwise. Such a liability imposes an obligation upon such entities to carry out a vetting process of the numerous advertisements by its sellers which may prove to be extremely onerous, especially for smaller e-commerce companies.

It is pertinent to note that Rule 3(b)(x) of the IT Rules, with a similar view to curb misleading information, mandates intermediaries to put in the required stipulations in its user agreement with its

¹⁴ Rule 2(1)(v) and Rule 2(1)(w) of the IT Rules.

¹⁵ Rule 3 and Rule 4 of the IT Rules.

¹⁶ Rules 4(1)(a)(b) and (c)

¹⁷ Press note <https://pib.gov.in/PressReleasePage.aspx?PRID=1729201>

¹⁸ Rule 5(17) of the Draft Rules https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Comments_eCommerce_Rules2020.pdf

¹⁹ Draft Rule 3(e) on flash sale.

²⁰ Draft Rule 6(6)

²¹ Section 4 of the Competition Act, 2002 prohibits abuse of dominance and predatory pricing. The preamble of the Competition Act, 2002 read with section 7 and 18 establish the mandate of the CCI as promoting competition in India. Additionally, the issues of self-preferencing were recently tried by the CCI in the case of *XYZ vs Alphabet and Ors.* Please refer to <https://www.cci.gov.in/sites/default/files/07-of-2020.pdf> for the order.

business users, privacy policy or rules/regulations applicable to such business users, to not display any information that is misleading or patently false and untrue.²² Additionally, Rule 4(3)(b) places an obligation upon significant social media intermediaries to make identifiable disclosures to users about content that can be classified as advertising, marketing or is sponsored.²³ The IT Rules therefore have attempted to put in place due diligence measures that must be adopted by intermediaries to prevent misleading information as opposed to making such intermediaries liable to the same. It is therefore recommended that the Draft Rules similarly stipulate due diligence requirements upon e-commerce entities to curb misleading advertisements as opposed to imputing direct liability upon them. An unintended fall out could be that e-commerce entities will include stringent indemnity clauses or demand a huge safety deposit for sellers to be able to access its platform. Once again, such measures will most severely impact small-scale sellers who may not have the bargaining position to negotiate with established platforms that serve as gatekeepers for them.

Moreover, the language of Rule 5(4) is very wide and may be read to include advertisements placed on the e-commerce platform not by its sellers but way of pure play advertisements. For example, an e-commerce start-up may take up paid advertisements such as through Google Ads to supplement its income till such time as it generates enough traffic to break even in its marketplace services. In such scenarios, it may not be fair to expect the platform to vet the information provided by advertisers.

II. Drafting Suggestions

1. *To define the nature of sales sought to be prohibited unambiguously*

The Draft Rules place a prohibition on e-commerce entities from organizing ‘flash sales’²⁴, understood in accordance with Rule 3(e) of the Draft Rules. However, the Press Notification dated 21st June 2021²⁵ released by the Ministry of Consumer Affairs, Food and Public Distribution states that conventional flash sales are not banned, but only specific flash sales or back-to-back sales which limit customer choice, increase prices and prevent a level playing field are not allowed.

The above distinction between conventional flash sales and other specific flash sales that are sought to be banned appears to be ambiguous. Therefore, there needs to be clarity on the precise scope and applicability of this prohibition.

2. *To enable the Chief Compliance officer to take the defence of reasonable care/due diligence*

In accordance with Rule 5(5)(a) of the Draft Rules, the Chief Compliance Officer is made liable for his failure to ensure compliance by e-commerce entities with certain due diligence obligations prescribed under the Consumer Protection Act, 2019 and the rules framed thereunder. Such an attribution of liability without the defence of reasonable care/due diligence available to such compliance officers may

²² Rules 3(b)(x) of the IT Rules

²³ Rule 4(3)(b) of the IT Rules

²⁴ Rule 5(16) of the Draft Rules

²⁵ Press note <https://pib.gov.in/PressReleasePage.aspx?PRID=1729201>

prove to be legally untenable. In comparable provisions of other statutes, an exception of reasonable care/due diligence in regards to such liability has been specifically made.²⁶

²⁶ For example, see section 66 of the Insolvency and Bankruptcy Code, 2016; section 48 of the Competition Act, 2002.

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