

Promotion and Regulation of E-commerce in India |

*Submission to the Department Related
Parliamentary Standing Committee on
Commerce*

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About Vidhi

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For any clarifications / queries in relation to this submission, please email Manjushree RM, Senior Resident Fellow, Competition Law, at manjushree@vidhilegalpolicy.in

Background

The e-commerce boom, today, is at the forefront of the digital revolution in India. Online marketplaces ('E-marketplaces') have grown increasingly popular in the past decade owing to the multiplicity of benefits they offer to both sellers and consumers, in comparison to traditional brick and mortar markets. E-marketplaces are platforms that serve as the infrastructure upon which sellers operate, in order to reach consumers. Additionally, sellers can also purchase services from the E-marketplace which includes warehousing, storage, packaging and shipment facilities of products. To consumers, such E-marketplaces offer products at massively discounted rates coupled with facilities such as door-step delivery and return services, which thereby result in high consumer satisfaction. Popular examples of E-marketplaces in India include Amazon, Flipkart, Myntra, Swiggy and Zomato.

The rise of E-marketplaces in India has, however, not been without problems. The e-commerce market in India exhibits a clear pattern of concentration, where few E-marketplace giants hold control over a large part of the market, making them indispensable for sellers/ business users seeking access to such E-marketplaces' sizeable online consumer bases. Lockdowns and social distancing norms imposed in the wake of the COVID-19 pandemic have further nudged business users to become acutely reliant upon E-marketplaces to reach India's 50 million internet consumers. Evidently, presence on E-marketplaces has become a 'necessity' for businesses. This necessity has arguably led to such giants strategically positioning themselves as 'gatekeepers' wherein they control the entry points to and subsequently the manner in which transactions take place in the e-commerce market.

Additionally, numerous allegations of anti-competitive and unfair trade practices such as deep discounting, self-preferencing of private labels owned by platform operators, and opacity regarding search rankings, reviews and usage of data have been routinely levelled against platforms by their business users. This has compelled several trade organizations and unions in India to repeatedly approach the Competition Commission of India ('the CCI'), the Ministry of Commerce and Industry and the Enforcement Directorate to remedy the same. At this juncture, adopting a carefully calibrated framework for e-commerce, particularly to regulate the relationships between business users and online platforms ('Platform-to-Business relationships'/ 'P2B relationships'), is essential.

Key Issues pertaining to E-marketplaces in India

1. The dependence of business users on 'gatekeeper' E-marketplaces and the resultant asymmetry in bargaining powers in the P2B equation

Markets wherein platforms operate tend to pivot towards concentration, owing to several peculiarities at play, such as network effects, data feedback loops, economies of scale and scope, coupled with beginner's move advantage. India's e-commerce market is no exception and is concentrated with very few E-marketplaces holding a large part of the market share. This has resulted in a situation where a large number of business users are dependent on a handful of E-marketplaces to reach consumers. As detailed above, this dependence has increased drastically since the COVID-19 pandemic.

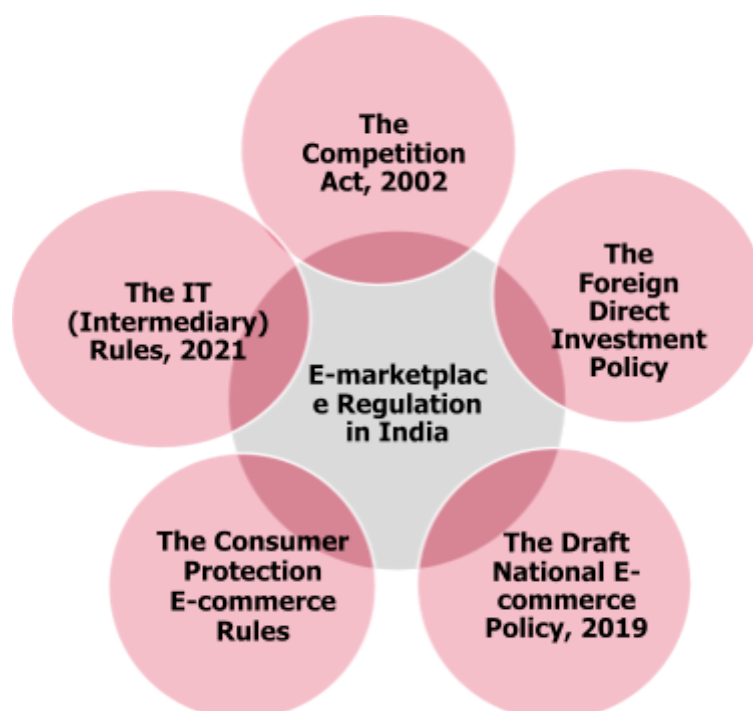
Such E-marketplaces have therefore emerged as 'Gatekeepers' of the Indian e-commerce market wherein they possess the ability to decide with whom and how transactions in the e-commerce ecosystem take place. As such, E-marketplaces set the terms and conditions of operation within the Indian e-commerce ecosystem and business users, due to their dependence on such platforms, are seldom in the position to negotiate.

Consequently, the dependence has resulted in asymmetry in bargaining powers between E-marketplaces and the sellers desirous of operating on them. As such, business users find themselves at the risk of being ‘imposed’ with unfair contract terms such as most favoured nation and mandatory discounting clauses, by E-marketplace giants. The asymmetry is only expected to steepen given the exponential growth of e-commerce in India and the rising numbers of platform-dependent entrepreneurs and sellers.

2. *The extant regulatory framework governing E-marketplaces is fragmented and exhibits gaps, particularly in regulating P2B relationships*

The regulation of e-commerce, and resultantly of unfair practices concerning E-marketplaces is largely amorphous and fragmented. Arguably, such a fragmented approach, involving a multitude of regulators and their laws, is inevitable considering that ‘e-commerce’ refers to a business model i.e., the buying and selling of good and services electronically, and not a sector *per se*. While some laws apply uniformly to all e-commerce businesses, the exact scope of regulatory scrutiny depends upon a variety of factors including the nature of the goods and services transacted and the jurisdiction of operation of the given e-commerce entity.

In the specific context of the regulatory landscape governing P2B issues in E-marketplaces, the **Competition Act, 2002**, the consolidated **Foreign Direct Investment Policy**, the **Draft E-commerce Policy 2019**, the **Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021** and the **Consumer Protection (E-commerce) Rules, 2020** are noteworthy.



The aforementioned statutory instruments collectively regulate several aspects pertaining to the P2B equation in E-marketplaces. While the Competition Act, 2002, primarily follows an *ex-post* model of regulation, i.e., regulation that is applied retrospectively once the conduct has already occurred, the other instruments apply *ex-ante*, i.e., they apply prospectively to regulate future conduct of E-marketplaces.

The Consumer Protection (E-commerce) Rules, 2020 and the Draft E-commerce Policy, 2019 are primarily consumer-welfare centric and therefore have minimal bearing on P2B competition regulation whereas the Foreign Direct Investment Policy and the IT Intermediary Rules, 2021 are limited in their applicability as the former applies to only foreign funded entities in India while the latter mandates obligations particularly upon social media intermediaries, news publishers and news aggregators. Finally, the Competition Act, 2002 allows the Competition Commission of India ('CCI') to intervene *ex-post* only when statutorily demonstrable anti-competitive conduct takes place by a 'dominant entity'. As no entity in the e-commerce market is singularly dominant, and as such, the market resembles an oligopolistic concentration, the circumstances in which the CCI

may intervene are limited. It is apparent that despite the existence of several statutory instruments, a comprehensive approach to regulate issues arising from the asymmetry in bargaining power in the P2B equation remains scant.

3. Lack of a comprehensive ex-ante approach to regulate E-marketplaces and P2B relationships

Presently, the Indian regulatory framework governing E-marketplaces does not espouse a comprehensive ex-ante framework for regulating P2B issues. The lack of such *ex-ante* framework coupled with predominant reliance on an ex-post model to regulate anti-competitive issues in the P2B equation have resulted in unsatisfactory outcomes for the following reasons.

First, *ex-post* competition enforcement works best when complemented with and supported by ex-ante regulation. Sectoral regulators, through ex-ante regulation, 'set the rules of the game' and competition authorities, through *ex-post* regulation, act as 'umpires of the game'. By way of example, the Telecom Regulatory Authority of India regulates telecommunication companies *ex-ante* and the CCI regulates their anti-competitive market conduct such as predatory tariffs *ex-post*. Both regulators have convergent roles in pursuing the same goal of maximizing consumer welfare. The resultant enforcement from a combination of the two approaches effectively regulates the market and sets boundaries for players to operate within. As explained above, the *ex-ante* regulation of 'E-marketplace platforms' does not fall under the purview of a specific sector or a statute, although aspects of it are regulated in a fragmented manner primarily by the MeitY, DPIIT and the Ministry of Consumer Affairs, Food and Public Distribution. Particularly, with respect to P2B competition issues, there appears to be a regulatory vacuum. Arguably, this lack of streamlined *ex-ante* regulation has not only created a blind spot in the regulation of competition concerns in digital platforms but has also compromised the efficacy of *ex-post* regulation. For instance, the recent *ex-post* investigations by the CCI against E-marketplaces have been time consuming since there are no predetermined rules set by a specific ministry or regulatory body on what amounts to acceptable or non-acceptable conduct. Adding to this, there is a lack of clarity as to which regulator or ministry is to assume regulatory charge over anti-competitive conduct of digital platforms in India.

Second, *ex-post* enforcement does not always lead to optimal restoration of competition in evolving and fast paced markets, especially involving gatekeepers. As noted by United Kingdom's telecom regulator, *ex-ante* regulation is specifically required for those entities that act as gatekeepers but may "escape the legal/economic definition of dominance (although they have the clear potential to become dominant)" and where "end users of services faces significant switching costs in moving to another supplier or service". Further, as evidenced by the recent United States House Judiciary Committee's investigations into giants such as Apple, Google, Facebook and Amazon, investigations into incumbent players in digital markets can be resource-intensive and time-consuming. In the meanwhile, the market may irreversibly tip in favour of the gatekeepers and consequently drive out competitors. The resultant harm, both to the market and competitors, may be irremediable.

Third, *ex-post* competition investigations are an ad hoc solution, as they are limited to the narrow claims made in each specific case. They may do little to address similar anti-competitive conduct arising in regard to the same entity's conduct in a different / associated market or a different entity's conduct resulting in the same issues as investigated. Further, when an entity's behaviour is a recurring pattern (for instance, the series of investigations that the CCI has launched against Amazon), addressing them through ex-ante regulation results in significantly increased administrative efficiency

International Experience

The Draft Rules place This section provides a brief overview of the key international regulatory developments to foster the growth of an inclusive e-commerce, while accounting for asymmetries in the P2B equation.

1. The European Union

The European Union's ('EU') regulatory responses to P2B competition issues are as follows:

- o **The E-Commerce Directive (EC Directive):** The EC Directive was formulated in 2000 to prevent fragmentation of various rules applicable to e-commerce businesses across the EU and boost legal certainty through an enabling framework for these businesses to thrive in.
- o **The EU Regulation on Platform-to-Business Relations ('EU P2B Regulations):** In 2019, the EU P2B Regulations were implemented to impose specific obligations on intermediary platforms. Being the first step in platform regulation, the EU P2B Regulations adopt a light-touch approach and impose increased disclosure and transparency obligations to address the power imbalance between platforms and their business users, albeit without any concrete restrictions on the actions of digital platforms. The obligations seek to create a transparent environment for business users by mandating platforms, inter alia, to disclose and provide descriptions of the manner in which search rankings are determined and terms of access and use of aggregated data.
- o **The Digital Markets Act ('DMA'):** In 2020, the EC proposed DMA which seeks to increase contestability and fairness of markets in which identified large '**Gatekeeper**' platforms operate. In addition to existing ex-post obligations under the EU competition law, the proposed DMA seeks to impose ex-ante obligations on such platforms and is also applicable to 'core platform services' provided by E-marketplaces to business users in the EU. The tools under the DMA include restrictions on most-favoured nation clauses, self-preferencing and also includes mandates on data portability and data sharing.

2. The United Kingdom

The United Kingdom's ('UK') Government and the UK's Competition and Markets Authority ('CMA'), which regulates competition aspects in relation to E-marketplaces, have taken the following steps:

- o **Proposed regime for gatekeeper equivalent entities:** Recognising the significance of prescribing *ex-ante* rules in fast-paced digital markets, the UK Government in 2020 announced a new *ex-ante* regime for regulating existing technology giants to ensure that businesses transacting with such giants are fairly treated. Similar to the DMA proposed by the EC, it seeks to identify and target entities that have attained 'Strategic Market Status' ('SMS'), in order to effectively regulate those that are in a position to exercise market power, irrespective of their non-dominance from a competition perspective.
- o **Creation of a Digital Markets Unit:** Enforcement of this regime is sought to be entrusted to a separate entity housed within the CMA, named as the Digital Markets Unit ('DMU'). The DMU will be empowered to make pro-competitive interventions ('PCIs') (pertaining to personal data mobility, data accessibility and interoperability) so it can impose tailored structural and behavioural changes upon SMS entities.

3. Germany

- o **Act against Restraint of Competition, 1958:** German competition law, i.e., the Act against Restraint of Competition, 1958 ('ARC'), explicitly recognizes abuse of collective dominance. Additionally, through an amendment to the ARC, an *ex-ante* regime for regulating the conduct of entities having '**Paramount Significance for Competition Across Markets**' ('PSCAM') has been introduced. The amendment stipulates that practices such as self-preferencing, anti-competitive tying and bundling, unfair contract terms and conditions that act as barriers to entry as anti-competitive unless the PSCAM entity prove otherwise. The amendment along with the EU P2B Regulations, are expected to promote fair play between large e-commerce platforms and businesses that operate on them.
- o The amendment has broadened the grounds for assessing abuse of dominance and relative market power. In the context of regulating P2B relationships, the amendment seeks to empower the German Federal Cartel Office to enhance its scrutiny of PSCAM entities.

Similar regulatory trends aimed at strengthening *ex-ante* competition regulation for platform giants are observed in Australia, Japan, the US and China, as encapsulated in the table below.

Australia	Japan	US	China
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<p>The 'Digital Platforms Inquiry Report 2019' recommends certain <i>ex-ante</i> obligations for large platforms and also recommends the establishment of a dedicated branch on digital market regulation in Australia's competition authority.</p> <p>In 2021, the Australian competition law was amended to set <i>ex-ante</i> standards through a 'Bargaining Code' upon platforms that have attained substantial market power, in order to promote fair play between such platforms and their business users.</p>	<p>The Improvement of Transparency and Fairness of Digital Platforms Act, 2021 ('TFDPA'), aims to take measures for securing transparency and fairness for business users trading on digital platforms.</p> <p>The TFDPA seeks to regulate 'Specified Digital Platforms' in an <i>ex-ante</i> manner by mandating transparency enabling measures in regard to data sharing, search ranking and differentiated treatment between sellers.</p>	<p>Following a detailed investigation into the most powerful platform giants operating in the US, the US House Judiciary Committee has proposed an antitrust legislative package consisting of six Bills that target the regulation of certain 'Covered Platforms'.</p> <p>The proposed Bills collectively seek to extend regulatory scrutiny upon the Covered Platforms in their dealings with their business users.</p>	<p>The Anti-Monopoly Guidelines for the Platform Economy, 2021 ('AML Guidelines') regulate Chinese technology giants, including e-marketplaces.</p> <p>In order to alleviate anti-competitive practices in P2B relationships, the AML Guidelines seeks to impose certain <i>ex-ante</i> obligations upon dominant entities such as prohibition of exclusivity obligations, price discrimination, refusal to supply, tying or bundling etc.</p>
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Key Recommendations

In light of the issues raised and the international practices surveyed, key recommendations that may be considered in respect of the Indian e-commerce landscape are as follows:

An inclusive E-commerce Policy that accounts for all stakeholders of the E-commerce ecosystem

The Draft E-commerce Policy that was floated by the DPIIT in 2019 awaits finalization. It is imperative that the policy is well-rounded and thorough, as it sets the stage for future enforcement and legislation related activities for e-commerce in India. In this regard, it is recommended that an expert committee be constituted with representatives from relevant groups of stakeholders, their attendant regulators and authorities, to deliberate on and recommend the requirements and contours of a comprehensive policy for an inclusive e-commerce ecosystem. Depending on the success of its implementation, long-term statutory and regulatory measures may be explored.

The enactment of a new legislation for comprehensive e-commerce regulation

As demonstrated in section 2, in the absence of active intervention, the governance of e-commerce is expected to remain fragmented with a multitude of authorities regulating aspects of e-commerce that fall under their respective domains. Such a fragmented approach is inherently prone to arbitrage, overlaps and gaps. As such, a comprehensive framework that regulates e-commerce, and consequently E-marketplaces, may aid the Government in actively designing the way forward for Indian e-commerce. Key features of such a legislation should include the following:

o Separate nodal authority for e-commerce regulation

The establishment of a separate nodal authority for regulation of Indian e-commerce ('E-commerce Authority') that is responsible for implementation of the proposed legislation may be considered to resolve the extant

regulatory blur. Given that e-commerce in India is still nascent and evolving, the authority may additionally be tasked with carrying out periodic market studies and surveys to gauge the overall health of the e-commerce market to ensure swifter regulatory responses to upcoming problems.

- o **Mandatory inter-regulatory consultations**

The proposed legislation should also include mandatory consultation mechanisms between the proposed E-commerce Authority and the other authorities that presently regulate e-commerce in India. Such mechanisms are crucial in ensuring that the proposed E-commerce Authority does not worsen the existing problem of regulatory arbitrage and fragmentation, and is able to satisfactorily weave a coordinated approach towards policy, legislation and enforcement related activities concerning e-commerce.

- o **Targeted regulation of 'Gatekeeper' E-marketplaces**

The proposed legislation should include differential obligations for entities qualifying as 'gatekeepers' of the Indian e-commerce market. The criteria for assessing a gatekeeper may be formulated using metrics such as number of registered/active consumers and sellers on the platform, number of transactions taking place and volume of revenue generated, resources of the platform, volumes of data aggregated, its bargaining position vis-à-vis its business users and consumers, its gatekeeping function and ability to set the rules of the ecosystem.

- o **Introduction of new ex-ante tools**

In addition to the extant ex-post competition law framework, ex-ante regulatory tools, that may aid in effective tackling of anti-competitive behaviour by incumbent E-marketplaces, must be included in the proposed legislation in line with the practices in EU, UK, Japan, Germany and the USA. It is of note that such ex-ante instruments must selectively be applied only to those E-marketplaces giants that qualify a certain threshold, as a symmetric model of regulation, the instruments of which are made applicable to entities of all sizes, bears the risk of increased regulatory burden upon smaller entities in their nascency, while incumbent giants were previously allowed to flourish in a comparatively unregulated ecosystem. Such ex-ante tools may inter alia provide a list of prohibited and mandatory practices for gatekeeper E-marketplaces in order to effectively shape their conduct.

Miscellaneous recommendations

- o **CCI to adopt differentiated standards for assessing dominance in E-commerce markets**

Technically, within the framework of the Competition Act, 2002, the CCI is empowered to adopt a differentiated standard for ascertaining dominance in digital markets, given that dominance is assessed on a case-by-case basis. Guidance elaborating on such a different dominance standard for digital markets may be issued by the CCI following adequate public consultation. Such guidance will not only provide certainty to stakeholders but also have a far reaching signalling effect on all market players.

- o **Strengthening enforcement of the FDI policy**

Currently, effective enforcement has emerged as the biggest roadblock in relying on the FDI Policy to aid in building a fair and contestable e-commerce ecosystem. Its implementation remains complex given that the FDI Policy is drafted and enforced by different authorities, namely – the Department for Promotion of Industry and Internal Trade ('DPIIT') and the Enforcement Directorate ('ED'), respectively. It is imperative that the FDI Policy which directly regulates several P2B issues is effectively enforced, as it is presently one of the only ex-ante tools to regulate E-marketplaces.

- o **Dedicated digital markets division within the CCI**

To serve as an ombudsman for broader digital markets monitoring, including proactive engagement with all stakeholders, and to conduct expert studies on competition aspects of digital markets, a division dedicated to digital markets may be constituted within the CCI.

www.vidhilegalpolicy.in

Vidhi Centre for Legal Policy

A-232, Ratanlal Sahdev Marg, Defence Colony, New Delhi-110024

Contact:

011-43102767/43831699,

vidhi@vidhilegalpolicy.in