
VIEWS ON THE PROPOSED AMENDMENTS TO CONSUMER PROTECTION (E-COMMERCE) RULES, 2020

The emergence of global supply chains, rise in international trade and the rapid development of E-Commerce have led to new delivery systems for goods and services and have provided new opportunities for consumers. The E-Commerce Sector in India (“**E-Commerce Sector**”) has been the backbone in the fight against the Covid-19 pandemic and it was because of this sector that the basic needs of the people could be met with. On the other hand, the development of the E-Commerce Sector has rendered the consumer vulnerable to new forms of unfair trade and unethical business practices and violation of personal data and information secrecy. Misleading advertisements, tele-marketing, multi-level marketing, direct selling, flash sales and e-tailing pose new challenges to consumer protection.

For redressal of such issues, the Consumer Protection Act, 2019 (“**Consumer Act / Act**”) came into effect on 20 July, 2020 replacing the almost three decades old previous Consumer Protection Act, 1986 (“**Erstwhile Act**”). The Consumer Act also ensured to bring the E-Commerce Sector under its structured umbrella.

The introduction of the Consumer Protection (E-Commerce) Rules, 2020 on 23 July 2020 (“**E - Commerce Consumer Rules / Rules**”) was intended to make a paradigm shift in the regulation of the E-Commerce Sector. However, recently the Government of India (“**GOI**”) through the Ministry of Consumer Affairs, Food and Public Distribution (Department of Consumer Affairs) (“**Ministry of Consumer Affairs**”) has felt the need to seek views / comments / suggestions on the proposed amendments to the Consumer Rules (“**Proposed Amendment**”) because of multiple complaints being received against widespread cheating and unfair trade practices. The new draft proposes a host of changes such as:

- ❧ Mandatory registration requirements for online retailers;
- ❧ Greater scrutiny of flash sales;
- ❧ Enhanced liability of E-Commerce Entities;
- ❧ A stronger grievance redressal mechanism.

We appreciate the endeavours and intent of the GOI, as it has clearly recognised the urgency for reforms in the E-Commerce Sector. We hereby submit our views and observations with respect to E-Commerce Rules and more particularly to the Proposed Amendments. Our views and observations with respect to the Proposed Amendment are structured in two parts.

The First part discusses the existing framework of the E-Commerce Consumer Rules and the intent behind introducing such rules.

The Second part encapsulates our recommendations and suggestions to the Proposed Amendment.

PART 1

A. Rationale, Objectives and Intended Outcome of the E-Commerce Consumer Rules, 2020

1. The Consumer Act defines 'E-Commerce' under Section 2(16)¹, as “*buying or selling of goods or services including digital products over digital or electronic network*”.
2. Furthermore, Section 94 of the Act allows the central government to regulate the unfair trade practices and protect / secure the rights of the consumers. Additionally, Section 101 (2) (zg) of the Act provides the central government to formulate rules by notification in furthering the objectives of Section 94 of the Act.
3. The E-Commerce Consumer Rules were notified by the GOI on 23 July 2020. The E-Commerce Consumer Rules were framed under the Consumer Act to regulate all E-Commerce activities and transactions. The E-Commerce Consumer Rules have sought to govern all such E-Commerce activities by laying down duties and liabilities to be adhered to by E-Commerce Entities, marketplace for E-Commerce Entities, sellers on marketplace, and inventory E-Commerce Entities.
4. The E-Commerce Consumer Rules are made applicable to (i) an E-Commerce Entity operating in India and also (ii) an E-Commerce Entity which ‘systematically offers’ goods and services to consumers in India. The Rules are expected to deter the E-Commerce Companies from indulging in unfair trade practices while protecting the rights of the consumers at the same time.

B. Salient Features of the E-Commerce Consumer Rules, 2020

5. Applicability:

- (i) The E-Commerce Consumer Rules 2020 apply to all goods and services bought or sold over the digital or electronic network including digital products. However, they do not apply to any activity carried out in personal capacity not being part of any professional or commercial activity undertaken on a regular or systematic basis.
- (ii) Interestingly, E-Commerce Consumer Rules 2020 are also applicable to an E-Commerce Entity which is not established in India, but systematically offers goods or services to consumers in India. This would mean that the E-Commerce Rules 2020 would apply to both local and international E-Commerce Entities irrespective of where they are established.
- (iii) No amendments have been proposed with respect to this section of the E-Commerce Consumer Rules. However, as the Consumer Act does not envisage a specific section regarding its extraterritorial application, the E-Commerce Consumer Rules seems to apply to E-Commerce Entities situated outside India as well.

¹ <https://egazette.nic.in/WriteReadData/2019/210422.pdf>

6. Duties of E-Commerce Entities:

Entity² means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce but does not include a seller offering his goods or services for sale on a marketplace E-Commerce Entity. In the Proposed Rules the definition is extended to include within its ambit any “related party” as defined under Section 2(76) of the Companies Act, 2013. The Rules provide for certain conditions which the E-Commerce Entities are required to comply with which are set out below:

- (i) **Nodal Officer:** The Rules require an E-Commerce Entity to appoint a nodal person of contact or an alternate senior designated functionary who is a resident in India, to ensure compliance with the provisions of the Consumer Act or the Rules. The Rules do not, however, set out any qualifications of such nodal officer.
- (ii) **Disclosure of Information:** An E-Commerce Entity is required to provide the following information on its platform: (i) its legal name; (ii) principal address of its headquarters and all branches; (iii) name and details of its website; (iv) contact details of customer care as well as of grievance officer; and (v) details of the importer or seller of imported goods and services. This ensures that the customer has full disclosure of the E-Commerce Entity thereby reducing cases of fraud.
- (iii) **Grievance Redressal:** An E-Commerce Entity is required to establish a grievance redressal mechanism and to appoint a grievance officer for consumer grievance redressal. While this is a welcome move to protect the consumer's interest, it may be a challenge for small / micro businesses operating as E-Commerce Entities as it can increase the overall cost to set up such a mechanism.
- (iv) **No manipulation of price:** Further, an E-Commerce Entity is also prohibited from manipulating the price of the goods or services offered on its platform in such a manner as to gain unreasonable profit by imposing on consumers any unjustified price having regard to the prevailing market conditions. However, it remains unclear as to what constitutes price manipulation.
- (v) **Cancellation Charges and Consent of Consumers:** An E-Commerce Entity is prohibited from imposing cancellation charges on consumers after confirming the purchase unless such charges are also borne by the E-Commerce Entities upon unilateral cancellations. Again, while such a move is quite welcome it may not be entirely feasible across the broad spectrum. It is recommended that the Rules should clarify or provide an exception for cancellation charges on consumers who cancel the order once it has been shipped by the E-Commerce Entity for certain cases. For instance, a grocery focussed platform or a food delivery service, having an order cancelled after perishable products are shipped for delivery, would be unable to recover the costs and may also be unable to penalise irresponsible consumer behaviour.
- (vi) Very specific amendments have been proposed with respect to appointment of Chief Compliance Officer, Nodal Contact Person for 24x7 coordination with law enforcement, establishment of Grievance Redressal Mechanism of E-Commerce Entity, prohibition with regard to mis-selling of goods or services, cross-selling of goods or services, abuse of dominant

² Rule 3(b) of the E-Commerce Consumer Rules

position, disclosure of relevant information, providing necessary information to government agency, prevention and detection of cyber security incidents. Interestingly, some of the proposed amendments such as appointment of Chief Compliance Officer etc. are similar to the new notified rules which have come into force i.e. Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 (“**IT Rules, 2021**”). Additionally, keeping in mind the increasing number of cases of E-Commerce Giants obstructing competition laws in India, the proposed amendments also made an effort to reprimand E-Commerce Companies who are in violation of the Competition Act (“**Competition Act**”).

7. Duties and Liabilities of Marketplace E-Commerce Entities

- (i) Marketplace E-Commerce Entity³ means an E-Commerce Entity which provides an information technology platform on a digital or electronic network to facilitate transactions between buyers and sellers. There are no amendments proposed to the definition of ‘Marketplace E-Commerce Entity’ in the Proposed Amendments.
- (ii) Every marketplace E-Commerce Entity is required to disclose and display information about the sellers offering goods and services on its platform including information relating to return, refund, exchange, warranty and guarantee, delivery and shipment, modes of payment, and grievance redressal mechanism, for enabling the consumers to make informed decisions.
- (iii) The Rules require E-Commerce Platforms to publish a significant amount of information in a clear and accessible manner. The information requirements vary for inventory-based Platforms and marketplace Platforms, with the latter being required to publish information, including the country of origin of goods. However, the Rules are conspicuously silent on how this will be assessed, especially for assembled goods, repackaged goods, or goods manufactured in one country, under licence, by an entity in another country.
- (iv) Further, marketplace E-Commerce Entities are also required to display, inter alia, terms and conditions generally governing its relationship with sellers on its platform. Importantly, the Rules require a marketplace E-Commerce Entity to include in its terms and conditions governing its relationship with the sellers a description of any differentiated treatment which it gives or might give between goods and services or sellers of the same category.

8. Duties of Sellers on Marketplace E-Commerce Entities

- (i) The Rules prohibit the sellers from adopting any unfair trade practice, representing themselves as consumers to post product reviews and misrepresenting the quality or features of any goods or services offered by them.
- (ii) The Rules impose obligations on sellers against representing themselves as consumers, posting reviews about goods or services, or misrepresenting their quality, along with back-to-back information disclosure obligations, including on pricing, mandatory notices and expiry dates, country of origin, details of goods and services, exchange, returns and refunds, shipping details, guarantees of authenticity or genuineness of imported goods, and other guarantees or warranties under applicable law.

³ Rule 3 (g) of the E-Commerce Consumer Rules, Rule 3 (j) of the Proposed Amendment

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- (iii) The obligations of Platforms with respect to appointing grievance officers, prohibitions, and restrictions with respect to returns and false advertising, also extend to sellers. Considerations mentioned above on these issues would also be relevant for sellers. While the large institutional sellers may still be able to put these in place, these conditions may prove onerous for small sellers.
 - (iv) And also, the obligation on the sellers to provide the country of origin of the goods might be tricky in the case of assembled goods and the agency model of E-Commerce.

PART 2

- C. **Observations in the Proposed Amendment** (For the ease of reference, additions are marked in **green**, with omissions in **Red**):

9. **Revised definition of E-Commerce Entity:**

E - Commerce Consumer Rules	Proposed Amendment
Rule 3(b)	<p>Rule 3(b):</p> <p><i>“E-commerce entity means 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 fulfilment 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”</i></p>

- (i) By way of the Proposed Amendment to Rule 3(b), the definition of ‘E-Commerce Entity’ has been widened wherein it has been clarified that any entity employed by the ‘E-Commerce Entity’ and any related party defined under Section 2(76) of the Companies Act, 2013 shall fall under the definition of ‘E-Commerce Entity’. However, any seller offering his goods or services for sale on a marketplace E-Commerce Entity shall be excluded.
- (ii) Such employed entities and related parties would include entities utilised by their platforms for fulfilment, etc., of goods and services delivered on their platforms.
- (iii) It means that companies may ensure that entities such as those rendering last mile delivery services comply with the relevant rules and regulations E-Commerce Entities themselves are mandated to follow.

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- (iv) **Wide Applicability of Proposed Amendment which may prove to be too onerous for some ‘E-Commerce Entities’:**
 - (a) It is also pertinent to highlight the very wide scope of application as is envisaged by the proposed amendment. The non-obstante clause of Rule 2 dealing with and relating to the scope and applicability of the proposed rules is couched in the following terms:

*“(2) Notwithstanding anything contained in sub-rule (1), these rules shall apply to a e-commerce entity **which is not established in India**, but **systematically** offers goods or services to consumers in India.” (Emphasis and Underlining Supplied)*

- (b) Section 1(2) of the parent act i.e. Consumer Protection Act, 2019 states that “*it extends to the whole of India except the State of Jammu and Kashmir.*” Without even going into the issue of whether the E-Commerce Rules are susceptible to challenge on ground of being ultra vires of the parent act on account of having a wider scope of application than what is permissible under the Parent Act⁴, it is pertinent to state that such a wide application will result in consequences on E-Commerce Entities around the world, and the rules may prove to be too onerous for such E-Commerce Entities to be complied with.
- (c) That the proposed amendment requires an E-Commerce Entity to appoint a chief compliance officer responsible for ensuring compliance with the Act, a nodal person of contact for 24x7 coordination with law enforcement agencies, and a ‘resident grievance officer’. All the three aforesaid persons shall be **residents of and citizens of India**. Further, since these rules apply to all E-Commerce Entities which ‘*systematically*’ offer goods to consumers in India, it seems, the proposed rules shall apply to practically all existing E-Commerce Entities. To further illustrate this, there are several entities which qualify as ‘E-Commerce Entity’ as defined by the E-Commerce Rules which manage platforms such as ebay.com, www.macys.com, www.asos.com, www.nastygal.com, www.beautybay.com, etsy.com, www.lulus.com, jcrew.com, www.strawberrynet.com just to name to name a few.
- (d) These aforementioned E-Commerce Entities seem to ‘**systematically**’ offer goods to consumers in India. Albeit, the majority of these aforementioned E-Commerce Entities ‘systematically’ offer goods to consumers in India, their primary consumer base lie within their own domestic area/ country. Further, even though their sales to India would comprise of a very small fraction, they would still be under an obligation, *inter alia*, to appoint a **chief compliance officer** responsible for ensuring compliance with the Act, a **nodal person** of contact for 24x7 coordination with law enforcement agencies, and a ‘**resident grievance officer**’. Further, all the three aforesaid persons shall be **resident of and citizens of India**, and such appointments together with other requirements under the rules such as disclosure requirements may prove to be too onerous for such ‘E-Commerce Entities’ especially when they are conducting a majority of their business activities beyond India. Not only will the compliance of the rules be onerous, but the enforcement thereof will also be very difficult since these E-Commerce Entities would function from beyond the territories of India and cater to very small fraction of consumers in India.
- (e) Further, the term ‘*systematically*’ used under the clause which determines the scope of application of these E-Commerce Rules is vague, ambiguous and open to subjective interpretation. It is therefore, recommended that these rules be made applicable to entities against a more objective standard. For example, the application of E-Commerce Rules may be subject to the **proportion of turnover** derived from sale of goods or services to consumers in India. Likewise, the application of these E-Commerce Rules may in addition

⁴ The Consumer Protection Act is applicable to the whole of India whereas the E-Commerce Rules are applicable even to E-Commerce Entities which are not established in India

to the proportion of business/ turnover derived from India, provide for a **threshold of turnover** beyond which E-Commerce Entities shall come within the scope of application. To illustrate this recommendation, the rules may provide that all E-Commerce Entities whose turnover from sale of goods and services to consumers in India exceeds 5% of the total turnover shall be subject to these rules. Additionally, and only as an illustrative example, it may be provided that, if the turnover from sale of goods and services attributable to consumers in India exceed Rs. 5 Crores (or such other figure as may be deemed appropriate based on cogent data) in any given time-period (For example in the financial year preceding the year in which the rules are proposed to be introduced or goods are offered to consumers in India), then such E-Commerce Entities may be brought within the ambit of the proposed E-Commerce Rules. This will render all the ambiguities surrounding the vague term ‘*systematically*’ redundant and give an objective criteria for bringing certain E-Commerce Entities bringing about certainty and consistency of application of the E-Commerce Rules as well as uniformity of approach, all of which are desirable characteristics of any legal regime.

- (f) Further, it may be borne in mind that the present E-Commerce landscape is dominated by foreign funded entities, which enjoy a large customer base and increasing revenues, therefore, the rules should not be framed in such manner which prove to be too onerous for **local domestic start-ups lest it will lead to high barriers of entry for Indian start-ups looking to find a mark in these ‘markets’**.

10. **Disclosure regarding cross-selling of goods:**

E - Commerce Consumer Rules	Proposed Amendment
Not present	<p>Rule 3(c):</p> <p><i>“Cross-selling” means sale of goods or services which are related, adjacent or complimentary to a purchase made by a consumer at a time from any ecommerce entity with an intent to maximise the revenue of such e-commerce entity”</i></p> <p>Rule 4 (12):</p> <p><i>“.....(12) An e-commerce entity which is engaged in cross-selling of goods or services shall provide adequate disclosure to its users displayed prominently in a clear and accessible manner on its platform:</i></p> <p><i>(a) Name of the entity providing data for cross-selling,</i></p> <p><i>(b) Data of such entity used for cross-</i></p>

	<i>selling....”</i>
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- (i) The concept of “Cross-Selling” does not form part of the E-Commerce Consumer Rules. The same has been introduced as a proposed Amendment.
- (ii) The proposed amendment requires E-Commerce Entities to make ‘adequate disclosures’ ((a) Name of the entity providing data for cross-selling, (b) Data of such entity used for cross-selling.) to its users in a clear and accessible manner on its platform.

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- (iii) In 2018, the Competition Commission of India (“CCI”), passed an order under Section 27 of the Competition Act against Google and imposed a penalty of 135.86 Crores for abusing its dominant position for the relevant market of online general web search service in India and relevant market of online search advertising in India. In the order, CCI has made observations highlighting concerns of third parties regarding Google using its dominance to cross-sell its own products⁵.
- (iv) Interestingly, the Proposed Amendment seems to add further confusion to the existing laws regulating E-Commerce Sector. Given that there has always been an overlap between consumer and competition law, it would be interesting to see how courts in India would interpret the same.

11. Final liability to rest on the E-Commerce Platform:

E - Commerce Consumer Rules	Proposed Amendment
Not Present	<p>Rule 3 (d):</p> <p><i>“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</i></p>

⁵ *Matrimony.com Limited v. M/s Google Inc., USA and others*, Case Nos. 07 & 30 of 2012, Date: 08.02.2018. Appeal (Competition Appeal(AT) - 17/2018) pending before National Company Appellate Tribunal

	<p><i>marketplace e-commerce entity which causes loss to the consumer”</i></p> <p>Rule 6 (9):</p> <p><i>“(9) A marketplace e-commerce entity shall be subject to a fall-back liability where a seller registered on its platform 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...”</i></p>
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- (i) In 2018, the Odisha District Consumer Disputes Redressal Commission (“**ODCDRC**”)⁶ raised the question of liability of online marketplaces in cases of defective products and services. The OSDRC found Amazon to be negligent and stated that when Amazon allows a third party seller to operate on its platform, its responsibility cannot be lost sight of. One such order was also passed by the Chattisgarh State Consumer Disputes Redressal Commission (“**CSCDRC**”)⁷, wherein Amazon was held liable for Defective phone supplied to a customer. In appeal, Amazon argued that it was only a facilitator, and the ‘conditions of use’ (mentioned on the website) clearly state that there was a bipartite contract between a registered seller and customer and was subsequently absolved.
- (ii) Even in the United States of America⁸, California Court of Appeal held Amazon liable for the online sale of faulty batteries, emphasizing that Amazon had the ability to adjust the cost of liability between itself and its third party sellers. A review petition preferred by Amazon was declined by the California Supreme Court.
- (iii) Given that E-Commerce Giants often call themselves as intermediaries /facilitators, it would be interesting to see how the Courts in India would interpret such the Proposed Amendment.

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- (iv) An E-Commerce Entity is prohibited from imposing cancellation charges on consumers after confirming the purchase unless such charges are also borne by the E-Commerce Entities upon unilateral cancellations.

⁶ Mr. Supriyo Ranjan Mahapatra v. M/s. Amazon Development Centre India Pvt. Ltd, Consumer Complaint No. 42 of 2015

⁷ Amazon Seller Services Pvt. Ltd. vs Love Kumar Sahu & Anr., Appeal No. FA/2018/05

⁸ Oberdorf v. Amazon.com Inc, No. 18-1041 (3d Cir. 2019)

- (v) Again, while such a move is quite welcome it may not be entirely feasible across the broad spectrum. It is recommended that the Proposed Amendment should clarify or provide an exception for cancellation charges on consumers who cancel the order once it has been shipped by the E-Commerce Entity for certain cases.

12. **Ban on fraudulent “flash sales”:**

E - Commerce Consumer Rules	Proposed Amendment
Not Present	<p>Rule 3 (e):</p> <p><i>“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</i></p> <p><i>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.”</i></p> <p>Rule 5 (16):</p> <p><i>“...(16) No e-commerce entity shall organize a flash sale of goods or services offered on its platform...”</i></p>

- (i) The concept of “Flash Sale” was not there in E-Commerce Consumer Rules. The same has been introduced as a proposed Amendment.
- (ii) The proposed rules also seek to ban “flash sales” on E-Commerce Platforms, However, the Ministry has clarified that “conventional E-Commerce flash sales are not banned. Only specific flash sales or back to back sales which limit customer choice, increase prices and prevent a level playing field are not allowed.” This ensures the maintenance of a level playing field for all E-Commerce Entities and prevents the curtailment of consumer choices.

(iii) Some of the major concerns with the respect to Flash sales are as follows:

- a) **Vertical Agreements** - As per Section 3(4) of the Competition Act, vertical agreements / arrangements and other agreements / arrangements which do not fall under section 3(3) would be considered as anti-competitive agreements/arrangements only if they are involved in unfair trade practices. However, 'exclusive supply agreements' or 'exclusive distribution agreements' are considered sometimes as anti-competitive. In fact, all major web portals operate as a marketplace wherein different sellers sell their products by showcasing them to the customers on the website and for the same the website charges a commission that depends upon the product being sold. In the recent past, CCI⁹ has examined such vertical agreements concerning E-Commerce Entities.
- b) **Predatory Pricing** - Organisation for Economic Co-operation and Development ("OECD")¹⁰ defines predatory pricing as a deliberate strategy, usually by a dominant firm, of driving competitors out of the market by setting very low prices or selling below the firm's incremental costs of producing the output (often equated for practical purposes with average variable costs). Once the predator has successfully driven out existing competitors and deterred entry of new firms, it can raise prices and earn higher profits.

The Competition Act¹¹ defines 'Predatory Pricing' as *"the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of goods or provision of services, with a view to reduce competition or eliminate the competitors."*

Interestingly, this issue of predatory pricing falls within the domain of the CCI and it would be interesting to see how courts interpret the Proposed Amendment.

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- (iv) **Concept of Flash-Sales in the Proposed Amendment go beyond the objectives of the Consumer Protection Act as well as the consumer-seller relationship:**
 - (a) Without prejudice to the issues relating to ambiguity and vagueness surrounding the phrase 'flash-sales' which shall be dealt with in the latter part of this submission, it is also pertinent to analyse the relevancy of inclusion of the concept of 'flash sales' in light of the objectives of the Consumer Protection Act vis-à-vis the Competition Act, 2002.
 - (b) It may be prudent to reproduce the definition of 'flash sale' i.e. Rule 3(e) for the sake of ready reference and convenience before expounding the nature and objectives for the enactment of Consumer Protection Act and Competition Act. Rule 3(e) of the proposed amendment which defines 'flash sale' in the following terms:

⁹ Mr. Mohit Manglani v. M/s Flipkart India Private Limited and Others, Case No. 80 of 2014

¹⁰ <https://www.oecd.org/competition/abuse/2375661.pdf>

¹¹ Section 4 (2) Explanation (b) of the Competition Act, 2002

“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.”

- (c) The long title of the Consumer Protection Act is couched in the following terms and discloses the objectives for its enactment:

“An Act to provide for protection of the interests of consumers and for the said purpose, to establish authorities for timely and effective administration and settlement of consumers' disputes and for matters connected therewith or incidental thereto.”

- (d) The long title of the Competition Act also discloses the purpose for its enactment, in the following terms:

“An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.”

- (e) Furthermore, Section 18 of the Competition Act, 2002 provides that it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.
- (f) A bare reading of the above provisions make it apparent that the Consumer Protection Act has been primarily introduced for the purpose of *inter alia* settlement of consumer disputes and for that purpose it seeks to establish authorities such as the Central Consumer Protection Authority as well as the District Commissions, State Commissions and the National Commission. It is evident that the Consumer Protection Act seeks to protect consumers' *rights in personam*. On the other hand, there are a plethora of judgments which point to the sole conclusion that the proceedings under the Competition Act are proceedings *in rem*.¹² In ***Re: Indian Motion Picture Producers' Association v. Federation of Western India Cine Employees***,¹³ the Competition Commission of India clarified that the “orders of the Commission are *in rem* and not *in personam*. As such, if an order is issued for market correction, the Commission is not obligated to take cognizance of successive ‘informations’ brought by different parties’ agitating the same issue.”
- (g) This distinction between the aforementioned legislations is also evident from the definition of ‘consumer’ as provided for under the Consumer Protection Act, 1986 which covers only the end-consumers who purchase goods for personal purposes but does not include a person who obtains such goods for re-sale or commercial purpose.¹⁴

¹² For instance, see *Samir Agarwal v. Competition Commission of India* [2020 SCC Online SC 1024]

¹³ 2018 SCC OnLine CCI 4

¹⁴ Section 2(6) of the Consumer Protection Act defines ‘Consumer’

The Competition Act, 2002, on the other hand, to fulfil its objectives of promoting and sustaining competition, includes even those ‘consumers’ who purchase goods for ‘commercial purpose’.¹⁵ Likewise, the Competition Commission of India in its booklet titled – “*Introduction to Competition Law*”¹⁶ clearly highlight the aforesaid distinction between Consumer Protection Act and Competition Act whilst stating that the former provides for *rights in personam* whereas the latter provides for *rights in rem*.

- (h) Having established the nature, purpose and the objectives of the aforesaid legislations, it may be prudent to state that concepts such as ‘flash sales’ as have been defined in the proposed amendment affect *rights in rem* whilst distorting competition thereby falling squarely within the domain of Section 3(4) of the Competition Act. The proposed amendment seeks to define ‘flash sales’ as those which “*fraudulently intercept 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 ‘flash sales’ as have been defined and contemplated by the proposed amendment, are those which offer ‘*high discounts*’, sale at ‘*significantly reduced prices*’ and adversely affect the overall market. The definition contemplates fraudulent interception of ordinary course of business with an intent to “*enable only a specified seller or group of sellers*” to sell goods or services on its platform. **Therefore, the definition contemplates an immediate ‘harm’ to ‘sellers’ and not ‘consumers’ who in the short run will stand to benefit from such unreasonably high discounts.**
- (i) Therefore, the definition of ‘flash sales’ as is being contemplated by the proposed amendment prejudice the interest of sellers (as opposed to only consumers) and affect the *rights in rem* as opposed to *rights in personam* of any single consumer. **Flash sales, in fact, prejudicially affect competitors of the sellers more than consumers.** The clarification issued by the Ministry of Consumer Affairs, Food and Public Distribution, by way of a press release dated 21.06.2021, also state that only those flash sales are sought to be prohibited which ‘*prevent a level playing field*’ which make it evident that these flash sales pose an antitrust issue.
- (j) It is evident that ‘flash sales’ as is defined by the proposed amendment distort competition in much the same way as discount programmes such as loyalty rebates, and tend to foreclose markets when ‘*the opportunities for other traders to enter into or remain in market are significantly limited.*’¹⁷ Therefore, throughout the world, including in mature (antitrust) jurisdictions, it is antitrust authorities/ laws which deal with such discounting methods by generally applying various tests such as the ‘rule of reason’ to ascertain whether such discounting schemes are anti-competitive or not. Therefore, it is the Competition Authority which is the appropriate body/ authority to analyse whether a ‘discounting scheme’ amounts to ‘flash sales’ in the nature contemplated by the proposed amendment by weighing such ‘agreements’ under Section 3 (4) or Section 4 of the Competition Act.

¹⁵ Section 2(f) of the Competition Act, 2002

¹⁶ Introduction to Competition Law (Part-II, Consumer Associations/ NGOs); available on https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/Part%202%20Consumer%20Association%2021%20nov_0.pdf

¹⁷ United States Court of Appeal, 11th Circuit; *McWane, Inc. v. FTC*, 783 F.3d 814, 837 (11th Cir. 2015)

- (k) Therefore, it is recommended that the concept of ‘flash sales’ be altogether discarded from the proposed amendment leaving it to be dealt with by the Competition Commission of India. The introduction of the aforesaid concept in the subsidiary rules framed by the Central Government under the Parent Act is wholly unnecessary given the fact that there is an expert body already in place to deal with such issues.
- (l) Further, since these issues including those which are incidental and ancillary to ‘flash sales’ are already being actively dealt¹⁸ with and analysed by the Competition Commission of India, prevalence of similar concept in the subsidiary rules [i.e. Consumer Protection (E-Commerce) Rules, 2020] under a different Act i.e. Consumer Protection Act, 1986 would aggravate the prevailing issues related to ‘overlapping jurisdiction’ and ‘concurrent jurisdiction’ which would result in an establishment of uncertain legal regime, which may not be a desirable outcome.
- (m) Additionally, we are conscious of the FDI Policy in E-Commerce which allows 100% foreign investment under the automatic route¹⁹ as well as the advent of ‘*capital dumping*’ which has adversely impacted the Indian start-up ecosystem.²⁰ The last decade has seen several (E-Commerce) Entities operate at a loss over an extended period of time.²¹ The ability of such (E-Commerce) Entities to function at a loss is often on account of foreign venture capital funds. ‘Flash sales’ of the nature contemplated by the proposed amendment is also a consequence of ‘capital dumping’ and these may be inquired into by an expert body/ legally authorised department/ tribunal/ commission capable of dealing with the subject of ‘capital dumping’ rather the Central Consumer Protection Authority, the Consumer Commissions established by the Consumer Protection Act for the purpose of effective administration and settlement of consumers' disputes.
- (n) In light of the foregoing it is recommended that the concept of ‘flash sales’ be altogether discarded the proposed amendment as it is beyond the framework of Consumer Protection Act, 1986 as was envisaged by the Parliament of India.

13. Prohibition of mis-selling of goods:

E - Commerce Consumer Rules	Proposed Amendment
Not Present	Rule 3 (k): <i>“mis-selling” means an e-commerce entity selling goods or services by</i>

¹⁸ Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited Case No. 40 of 2019, 13.01.2020

¹⁹ See Press Note 2 (2018); Review of the policy on Foreign Direct Investment (FDI) in e-commerce issued by DIPP, Ministry of Commerce dated 26.12.2018; available at https://dipp.gov.in/sites/default/files/pn2_2018.pdf

²⁰ “Here’s how capital dumping is hurting the Indian startup ecosystem”; by SSIU, June 19, 2017; available on <https://medium.com/@ssiuniversity/heres-how-capital-dumping-is-hurting-the-indian-startup-ecosystem-583f84fe0ed8>

²¹ Amazon Seller Services had recorded a net loss of Rs 5,685.4 crore in FY19. Its revenue, however, grew 43 per cent to Rs 10,847.6 crore in FY20 from Rs 7,593.5 crore in FY19; See ‘*Amazon India’s E-Commerce unit loss widens to Rs 5,849.2 crore in FY20..*’ by Money Control, dated 25th Dec., 2020; available at <https://www.moneycontrol.com/news/business/amazon-indias-e-commerce-unit-loss-widens-to-rs-5849-2-crore-in-fy20-revenue-up-43-6269341.html>

	<p><i>deliberate misrepresentation of information by such entity about such goods or services as suitable for the user who is purchasing it.</i></p> <p><i>Explanation:</i></p> <p><i>Misrepresentation here means:--</i></p> <p><i>(i) the positive assertion, in a manner not warranted by the information of any entity making it, of that which is not true;</i></p> <p><i>(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;</i></p> <p><i>(iv) 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”</i></p> <p>Rule 5 (11):</p> <p><i>“(11) No e-commerce entity shall indulge in mis-selling of goods or services offered on its platform.”</i></p>
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- (i) The new rule propose a ban on the “mis-selling” of goods and services offered on E-Commerce Platforms. It intends to prevent misrepresentation of information of goods and services by E-Commerce Entities.

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- (ii) False or misleading representations and deceptive marketing practices in promoting the supply or use of a product or any business interest is considered as an unfair trade practices under the Consumer Act. However when such deceptive practices leads to denial in market access to other entity, it can become a major competition issue.
- (iii) It would be interesting see that how the courts in India will interpret the unfair trade practices in relation to misrepresentation. Therefore, it is recommended that there should be a more clear-cut definition of what constitute unfair trade practice and practical legal remedy to tackle such

circumventing practices by E-Commerce Entities specifically Multinational Companies and Small Vendors.

14. **Duties of E-Commerce Entities:**

E - Commerce Consumer Rules	Proposed Amendment
Rule 4	<p>Rule 5:</p> <p><i>“1. where an e-commerce entity is a company incorporated under the Companies Act, 1956 (1 of 1956) or the Companies Act, 2013 (18 of 2013) or a foreign company covered under clause (42) of section 2 of the Companies Act, 2013 (18 of 2013) or Partnership incorporated under the Indian Partnership Act, 1932 (9 of 1932) or a Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008 (6 of 2009) an office, branch or agency outside India owned or controlled by a person resident in India as provided in sub-clause (iii) of clause (v) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999), it shall 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 there under...”</i></p> <p><i>“4. No e-commerce entity shall allow any display or promotion of misleading advertisement whether in the course of business on its platform or otherwise.”</i></p>

- (i) The proposed amendment aims to protect consumers from all forms of misleading advertisements. It requires E-Commerce Entities to take measures to prevent misleading advertisements on their respective platforms.
- (ii) There is no specific legislation to deal with false advertisements in India, however, the Consumer Protection Act, provide remedies against companies who engage in false advertisements of their products. The Advertising Standards Council of India (“**ASCI**”) has established the ASCI

Consumer Complaints Council to deal with false advertisements. The objective of ASCI is to maintain and enhance the public's confidence in advertising and ensure that advertisements conform to the Code for Self-Regulation which requires advertisements to be truthful and fair to consumers and competitors.

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- (iii) The Rules require E-Commerce Platforms to publish a significant amount of information in a clear and accessible manner. The information requirements vary for inventory-based Platforms and marketplace Platforms, with the latter being required to publish information, including the country of origin of goods.
- (iv) However, the Rules are conspicuously silent on how this will be assessed, especially for assembled goods, repackaged goods, or goods manufactured in one country, under licence, by an entity in another country.

15. Appointment of Officers:

E - Commerce Consumer Rules	Proposed Amendment
Rule 4	<p>Rule 5:</p> <p><i>5. Every e-commerce entity shall establish an adequate grievance redressal mechanism having regard to the number of grievances ordinarily received by such entity from India, and shall appoint a grievance officer for consumer grievance redressal, and shall display the name, contact details, and designation of such officer on its platform.</i></p> <p><i>a. appoint a Chief Compliance Officer who shall be responsible for ensuring compliance with the Act and rules made thereunder and 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 there under:</i></p>

	<p><i>Provided that no liability under the Act or rules made thereunder may be imposed on such e-commerce entity without being given an opportunity of being heard.</i></p> <p><i>Explanation. — For the purpose of this clause “Chief Compliance Officer” means managerial personnel or such other senior employee of an e-commerce entity who is a resident and citizen of India.</i></p> <p><i>b. appoint a nodal contact person for 24x7 coordination with law enforcement agencies and officers to ensure compliance to their orders or requisitions made in accordance with the provisions of law or rules made thereunder.</i></p> <p><i>Explanation. — For the purpose of this clause “nodal contact person” means employee of an e-commerce entity, other than the Chief Compliance Officer, who is resident in India and a citizen of India;</i></p> <p><i>c. appoint a “Resident Grievance Officer”, who shall, subject to clause (b), be responsible for the functions referred to in sub-rule (2) of rule 3.</i> <i>Explanation. — For the purpose of this clause, “Resident Grievance Officer” means the employee of an e-commerce entity, who is resident and a citizen of India;</i></p> <p><i>d. Grievance redressal mechanism of e-commerce entity:</i></p> <p><i>a. The e-commerce entity shall prominently publish on its website, mobile based application or both, as the case may be, the name of the Grievance Officer and his contact details as well as mechanism by which a user may make complaint against violation of the provisions of this rule</i></p>
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	<p><i>or any other matters pertaining to the resources and services made available by it on its platform, and the Grievance Officer shall –</i></p> <p><i>i. receive and acknowledge any order, notice or direction issued by the appropriate government, any competent authority or a court of competent jurisdiction.”</i></p>
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- (i) As against requiring E-Commerce Entities to appoint a grievance officer and displaying the name, designation and contact details, under the proposed amendment under clause, instead of just one grievance officer, E-Commerce firms will now be required to appoint a “Chief Compliance Officer”, a “Nodal contact person,” a “Resident Grievance Officer” and also prominently display the “Grievance redressal mechanism” in the interest of consumer protection.
- (ii) However, it may be a challenge for small / micro businesses operating as E-Commerce Entities to establish such a mechanism as it can increase the overall cost to set up such a mechanism. There is a need to take in consideration the interest of small vendors and retailers, as they can face a huge financial distress while setting up such a mechanism.

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- (iii) The Rules require an E-Commerce Entity to appoint a nodal person of contact or an alternate senior designated functionary who is a resident in India, to ensure compliance with the provisions of the Consumer Act or the Rules. The Rules do not, however, set out any qualifications of such nodal officer. Some clarity with respect to this aspect should be mentioned in the Proposed Amendment.
- (iv) **Grievance Redressal Mechanism:**
- (a) An E-Commerce Entity is required to establish a grievance redressal mechanism and to appoint a grievance officer for consumer grievance redressal. While this is a welcome move to protect the consumer's interest, it may be a challenge for small / micro businesses operating as E-Commerce Entities as it can increase the overall cost to set up such a mechanism.
- (b) Therefore, there is a need to take in consideration the interest of small vendors and retailers, as they can face a huge financial distress while setting up such a mechanism. An exemption on the basis of the average annual turnover could be an aspect which may be helpful.
- (v) **Absence of sound enforcement mechanism of the proposed amendment:**
- (a) It is also evident that the rules provide certain compliances on part of E-Commerce Entities which have been discussed in the preceding part of this ‘note’. For example, the proposed amendment provides for the following:

- Every E-Commerce Entity shall appoint a **Chief Compliance Officer** who shall be responsible for ensuring compliance with the Act and rules made thereunder;
 - Every E-Commerce Entity shall appoint a **Nodal Contact Person** for, inter alia, 24x7 coordination with law enforcement;
 - Every E-Commerce Entity shall appoint a **Resident Grievance Officer**.
- (b) Further, all of these aforementioned persons are to be residents of and citizen of India. Additionally, the proposed amendment in addition to requiring positive acts on part of E-Commerce Entities such as appointment of aforesaid persons, also contain prohibitions such as proscribing flash-sales and mis-selling of goods.
- (c) Further, when the proposed amendment is juxtaposed with the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, (hereinafter referred to as the '**IT Rules**') there are certain glaring similarities which emerge. The **IT Rules** also provide for appointment of aforesaid persons i.e. Chief Compliance Officer, nodal contact person, and a Resident Grievance Officer. All of these persons are also required to be resident in India. The IT Rules specifically embody provisions which deal with non-observance of IT Rules. Rule 7 of the IT Rules states as follows:
- “7. **Non-observance of Rules.**—Where an intermediary fails to observe these rules, the provisions of sub-section (1) of section 79 of the Act shall not be applicable to such intermediary and the intermediary shall be liable for punishment under any law for the time being in force including the provisions of the Act and the Indian Penal Code.”*
- (d) Further, **such provisions which provide for consequences for non-observance of Rules is not a mere formality but a practical necessity.** This is evident from the recent events involving a social media technology giant which failed to appoint the chief compliance officer which led to a real possibility of invocation of the aforesaid Rule 7 of IT Rules by the Central Government.²² In so far as the proposed amendment relating to E-Commerce Rules is concerned, there is a conspicuous absence of any rule which provides for consequences of non-observance of rules. Rule 9 in the proposed amendment merely states that *the provisions of the Consumer Protection Act, 2019 (35 of 2019) shall apply for any violation of the provisions of these rules.* Therefore, violation of proposed amendment would render a person liable to be proceeded against in accordance with the provisions of Consumer Protection Act. This provision i.e. Rule 9 of the E-Commerce Rules suffers from an anomaly. The Consumer Protection Act itself does not envisage any penal measures for the offence of flash-sales or for failure in appointing the aforementioned officers, and therefore, it is uncertain how the amendment is proposed to be enforced. This begs the question of how provisions of the parent act will apply for violation of proposed amendment when the parent act itself is silent on these aspects and do not provide for any penalty in respect of such specific violations.
- (e) Therefore, it seems that there is a dearth of sufficient enforcement mechanism and the Consumer Protection Act does not contain sufficient penal measures to ensure strict

²² Twitter fails to appoint all 3 statutory officers in India; by Pankaj Doval, dated 2nd Jul, 2021; Times of India

adherence and compliance of the proposed amendment which may provide unnecessary leeway to E-Commerce Entities which maliciously seek to wriggle out of their obligations under the proposed amendment. In this background, it is recommended that successful enforcement of the proposed rules may require an amendment in the parent act providing for an enforcement mechanism of offences such as penal provisions for flash-sales, or failure in appointment of officers envisaged by the proposed amendment.

(vi) **Ambiguity surrounding the phrase – ‘flash sales’:**

- (a) Without prejudice to the submissions which advance the notion that concept of ‘flash sales’ should altogether be discarded from the E-Commerce Rules, it is also pertinent to state that there exists ambiguity, vagueness and uncertainty surrounding the phrase “flash sale”.
- (b) ‘Flash sale’ as contemplated by the proposed amendment seem to be any promotional scheme which offers ‘*high discounts*’, ‘*significantly reduced prices*’ or other such promotions for a specific time period. However, the definition is qualified by the proviso to Rule 3(e) which contemplate only those schemes/ promotions which fulfil the following criteria:
 - The scheme must fraudulently intercept the ordinary course of business (The insertion of the term ‘fraudulently’ implies some degree of ‘*mens rea*’);
 - Such fraudulent interception must take place by way of technological means;
 - The scheme is coupled with an intent to enable only a specified seller or group of sellers to sell goods or services on its platform
 - The specified seller or group of sellers must be managed by the E-Commerce Entity.
- (c) It is evident that the aforementioned phrases such as, inter alia, ‘*significantly reduced prices*’, ‘*high discounts*’, interception of ‘*ordinary course of business*’, has not been defined by the proposed amendment leaving the definition open to several subjective interpretations. Further, Rule 16 of the Proposed Amendment proscribes and prohibits such a ‘flash sale’. Therefore, all E-Commerce Entities are specifically prohibited from organizing a ‘flash sale’ of the nature contemplated by Rule 3(e) of the proposed amendment. However, the definition as proposed by the ‘Proposed Amendment’ is replete with vague and ambiguous terms which are open to several interpretations, and therefore, the E-Commerce Entities may be at loss in deciphering which promotional schemes will amount to and constitute ‘*flash sale*’.
- (d) The ambiguity surrounding the phrase ‘flash sale’ is also evident from the fact that the concerned Ministry had to (by way of a press release dated 21.06.2021) come out with a clarification stating that only specific flash sales or back-to-back sales which limit customer choice, increase prices and prevent a level playing field are prohibited. Therefore, by way of a clarification, the concerned Ministry of Consumer Affairs, Food and Public Distribution has now introduced further qualifications before a promotional scheme by an E-Commerce Entity would amount to or constitute a ‘flash sale’. It was

clarified that conventional E-Commerce flash sales are not banned and only specific flash sales or back-to-back sales are proscribed only if they:

- Limit consumer choice,
 - Increase prices;
 - Prevent a level playing field.
- (e) Since the players in the market were not able to decipher which promotional schemes will amount to ‘flash sales’, the ministry issue the aforesaid clarification. However, this clarification still does not define the ambit of phrases such as ‘*significantly reduced prices*’, ‘*high discounts*’, interception of ‘*ordinary course of business*’ etc. Further, this gives rise to another question – “will the proposed rules surrounding flash sales be read together with the aforementioned press-note dated 21.06.2021 i.e. in addition to definition of flash sale under Rule 3(e), will the promotional scheme also have to meet the criteria stated in the clarification before they can be said to fall within the ambit of ‘flash sales’ as defined by Rule 3(e)? Since, the Consumer Protection Act under Section 101 only allows Rules to be framed by **way of notification**, therefore, under the law, the clarification issued by the Ministry of Consumer Affairs, Food and Public Distribution, do not qualify as ‘Rules’ and resultantly, cannot be placed reliance on, by any person.
- (f) In light of the foregoing and without prejudice to the submissions that ‘flash sales’ ought to be discarded from the proposed amendment, it is also recommended that ‘flash sales’ be defined using a clear, specific and unambiguous terms. Further, objective parameters or criteria must also be provided in the proposed amendments to provide all the stakeholders clarity on the true nature, scope, ambit and specific definition of ‘flash sales’. It would be wholly unfair to proscribe certain acts such as offering ‘flash sales’ by way of subsidiary rules, without comprehensively and sufficiently specifying the exact meaning, definition and scope of such prohibited acts which is sought to be prohibited. Certainty of law is a prerequisite before enforcement thereof.

16. **Misleading Information:**

E - Commerce Consumer Rules	Proposed Amendment
<p style="text-align: center;">Rule 4</p>	<p style="text-align: center;">Rule 5:</p> <p style="color: red;">“(6) Where an e-commerce entity offers imported goods or services for sale, it shall 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.</p> <p style="color: green;">(7) Where an e-commerce entity offers imported goods or services for sale, it shall:</p> <p style="color: green;">a. mention the name and details of any importer from whom it has purchased</p>

	<p><i>such goods or services, or who may be a seller on its platform;</i></p> <p><i>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;</i></p> <p><i>c. provide ranking for goods and ensure that the ranking parameters do not discriminate against domestic goods and sellers.”</i> <i>“(11) No e-commerce entity shall indulge in mis-selling of goods or services offered on its platform.</i></p> <p><i>(12) An e-commerce entity which is engaged in cross-selling of goods or services shall provide adequate disclosure to its users displayed prominently in a clear and accessible manner on its platform:</i></p> <p><i>a. Name of the entity providing data for cross-selling,</i></p> <p><i>b. Data of such entity used for cross-selling.</i></p> <p><i>(14) No e-commerce entity shall-</i></p> <p><i>c. mislead users by manipulating search result or search indexes having regard to the search query of the user;</i></p> <p><i>d. permit usage of the name or brand associated with that of the marketplace e-commerce entity for promotion or offer for sale of goods or services on its platform in a manner so as to suggest that such goods or services are associated with the marketplace e-commerce entity;</i></p>
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	<p><i>e. make available any information pertaining to the consumer to any person other than the consumer without the express and affirmative consent of such consumer, no such entity shall record such consent automatically, including in the form of pre-ticked checkboxes;</i></p> <p><i>f. use information collected by marketplace e-commerce entities, for sale of goods bearing a brand or name which is common with that of the marketplace e-commerce entity or promote or advertise as being associated with the marketplace e-commerce entity, if such practices amount to unfair trade practice and impinges on the interests of consumers.</i></p> <p><i>(15) Every e-commerce entity shall ensure that sponsored listing of products and services are distinctly identified with clear and prominent disclosures.</i></p> <p><i>(16) No e-commerce entity shall organize a flash sale of goods or services offered on its platform.</i></p> <p><i>(18) Every e-commerce entity shall, as soon as possible, but not later than seventy two hours of the receipt of an order, provide information under its control or possession, or assistance to the government agency which is lawfully authorised for investigative or protective or cyber security activities, for the purposes of verification of identity, or for the prevention, detection, investigation, or prosecution, of offences under any law for the time being in force, or for cyber security incidents:</i></p> <p><i>Provided that any such order shall be in writing clearly stating the purpose of seeking information or assistance, as the case may be.</i></p>
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	<i>(19) Every e-commerce entity shall display clearly and prominently in its invoice the name of the seller in the same font size as that of the e-commerce entity's name</i>
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- (i) The proposed amendments against requiring mentioning of the name and details of any importer or seller, it requires E-Commerce Entities engaged in selling imported goods and services to offer additional mechanisms to help consumers make an informed decision when buying imported products.

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- (ii) The Rules require E-Commerce Platforms to publish a significant amount of information in a clear and accessible manner. The information requirements vary for inventory-based Platforms and marketplace Platforms, with the latter being required to publish information, including the country of origin of goods. However, the Rules are conspicuously silent on how this will be assessed, especially for assembled goods, repackaged goods, or goods manufactured in one country, under licence, by an entity in another country.
- (iii) In case of a dispute, a marketplace Platform is required to assist customers by providing them with details of the relevant seller, necessary for effective dispute resolution. The extent of what or how much information is 'necessary' will have to be analysed, along with the scope of assistance that needs to be provided. An unfettered requirement, and the fact that gathering all the requisite data may be onerous. This may have the unintended consequence of reducing the diversity of options available to consumers.

17. Dominant Position:

E - Commerce Consumer Rules	Proposed Amendment
Rule 4	<p>Rule 5:</p> <p><i>“(17) No e-commerce entity which holds a dominant position in any market shall be allowed to abuse its position.</i></p> <p><i>Explanation - For the purpose of this clause “abuse of dominant position” shall have the same meaning as prescribed under Section 4 of the Competition Act, 2002.”</i></p>

- (i) Under the proposed rules, E-Commerce Entities are prohibited from abusing their dominant positions in the market, so as to ensure a "free market".

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- (ii) **Striking of balance:**

- (a) That the tremendous growth of E-Commerce is a major threat to traditional stores. Many retail enterprises are stepping up by opening online stores and adopting tech solutions to offer e-payment options, quicker deliveries, and better customer experiences. However, small-scale brick-and-mortar stores with limited capitals and infrastructure accessibilities are struggling to keep up. This is hurting the interests of local vendors and may ultimately lead to closure of such shops with low capitals.
- (b) Therefore, there is a need to strike a balance between the two, so that the dominant e-marketplace entity does not hurt the interest of the small/local vendors and a level-playing field is available to them.

- (iii) **Harmonisation of laws and avoidance of overlapping:**

- (a) It is recommended that there should be harmonisation between Consumer Act and Competition Act. As there have been introductions in the proposed amendment which clearly fall within the domain of CCI, a clarification should be made that a reference would be made to CCI in case certain issues are found to be prevalent (which include E-Commerce Giants abusing their dominant position, information sharing).
- (b) Anti-competitive arrangements, operating at a loss to out players in the market etc.). In case such harmonisation does not take place, it would only lead to multiplicity of litigation.

- (iv) **Inclusion of Drip Pricing:**

- (a) That the Drip pricing, is a technique used by online retailers of goods and services whereby a headline price is advertised at the beginning of the purchase process, following which additional fees, taxes or charges, which may be unavoidable, are then incrementally disclosed or "dripped". This practice of misleading and inadequately disclosed fees at the time of final checkout is a breach of rights of consumers. It is a major concern, as the dominant e-market entities can use this deceptive tactics in order to gain competitive advantage over others.
- (b) It is recommended that the Proposed Rules must clearly define 'drip pricing' wherein the final cost of the product goes up due to additional charges, and should also provide remedies for protecting consumers against this by including penal provisions for violation. Further the proposed rules did not clarify as to how they keep check on such activities on e-platform and what is the penalty imposed on the e-marketplace entity which is involved in drip pricing.

D. Conclusion

18. The Proposed Amendment seeks to strengthen the rights of consumers and have been suggested at the correct moment. As stated in the Rajya Sabha Report, there have been several cases where sellers have tried to gain money by manipulating prices of goods, especially during the on-going pandemic. These rules will definitely reduce such practices that harm customers.
19. However, the Proposed Amendment seems to add further confusion to the existing laws regulating E-Commerce Sector. The Proposed Amendment certainly has tried to cover aspects which may cause trouble to the consumers in the future, but has not dealt with harmonisation of competition law and consumer law.
20. It may be prudent and desirable to clearly demarcate the jurisdictional boundaries of every legislation and frame subsidiary rules thereunder in such manner that they do not exceed these sacrosanct boundaries. Further, it is equally important that adequate care be taken by members of any drafting body that rules be framed in such manner that specific issues do not fall within the ambit of more than one statutory authority/ enactment lest the legal regime would replete itself with problems posed by overlapping and concurrent jurisdiction exercisable by different authorities.
21. In such light, it is recommended that concepts of 'flash sale' as well as 'abuse of dominance' be altogether discarded from the proposed amendment. On the other hand, (unfair) trade practices such as 'drip pricing' which adversely affect consumers' rights seemed to have escaped the attention of the drafters.
22. Certainty of law is an important characteristic of any sound and robust legal system. Enforcement of 'law' would be wholly unfair unless the 'persons' who are subject to such 'law' are made aware of the exact meaning, definition, nature, and scope of prohibitory acts under such law. In case of the proposed amendment, it would be wholly unjust, unfair and inequitable to enforce provisions which prohibit and proscribe certain acts / conduct such as offering 'flash sale' without clearly specifying the exact definition, scope and ambit of the phrase 'flash sales'.
23. It is the duty of the drafters to ensure that there no ambiguities remain surrounding the definition of an act/ conduct before rules are framed prohibiting such an act/ conduct. Likewise, the rules lay down certain information which ought to be published including the country of origin of goods. However, the Rules are conspicuously silent on how this will be assessed, especially for assembled goods, repackaged goods, or goods manufactured in one country, under licence, by an entity in another country, which ought to have been envisaged. It is not out of place to state that certainty of law is a prerequisite to enforcement thereof.
24. Further, any subsequent clarifications to any 'law' should form a part of the 'law' itself. Therefore, subsequent clarification to any subsidiary rules should be introduced by way of notification by the Central Government. 'Press releases' issued by the concerned ministry of the Central Government may, at most, qualify as an 'external aid' for interpretation and cannot strictly qualify as binding 'rules' and resultantly, cannot be placed reliance on, by any person. Therefore, the proposed amendment should contain all such 'clarifications'.

25. It is also pertinent to state that one of the most important aspects of any legislation is the scope of its application i.e. 'persons' which are subject to such law. Therefore, terms used to determine the scope of its application should be clear, unambiguous and otherwise, be determined by way of an objective criteria. Employment of 'vague' terms such as 'systematically' to determine the scope of application of rules will tend to foster uncertainty, which is a never a desirable characteristic in any legal regime.
26. As such, the proposed rules, rather than applying to all E-Commerce Entities which 'systematically' offer goods to consumers in India, should provide for an more objective and quantifiable standard such as proportion of turnover derived from sales to consumers in India and a minimum threshold of turnover derived which will render all ambiguities, subjectivity and vagueness surrounding the term 'systematically' redundant. Likewise, care should also be taken that these rules should not prove to be too onerous for our local domestic start-ups lest it will lead to high barriers of entry for Indian start-ups looking to find a mark in these 'markets'.
27. Further, any 'law' would prove to be 'futile' unless it contains clauses providing for a robust and sound enforcement mechanism. However, in the present case, even though certain acts such as 'offering flash sale' may meet the test of unfair trade practices, there is a conspicuous absence of specific and categorical penal provisions in the Consumer Protection Act, which could deal with violations of proposed rules such as, inter alia, failure in appointing officers or offering flash-sale. Such lacunae in law may provide unnecessary leeway to 'subjects' which maliciously seek to wriggle out of their obligations under the proposed amendment.
28. Finally, it goes without saying that we are hopeful that the Competent Authority shall give due consideration to our views and recommendations which have been advanced with the sole objective of assisting the Central Government in ensuring that laws regulating the E-Commerce Sector result in establishment of a sound and robust legal and economic regime thereby fostering an environment which provides opportunities for Indian domestic start-ups to make a mark in these foreign funded markets, and at the same time, adequately and sufficiently safeguards consumer interest.

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