



ERGO

Analysing developments impacting business

STRICTER RULES PROPOSED FOR E-COMMERCE ENTITIES

2 July 2021

Background

The Ministry of Consumer Affairs, Food, and Public Distribution, Government of India (**Ministry**) notified and made effective the provisions of the Consumer Protection (E-Commerce) Rules, 2020 (**E-Commerce Rules**) under the Consumer Protection Act, 2019 (**Act**) from 24 July 2020. Our Ergo on the E-Commerce Rules can be accessed [here](#).

The Ministry has now released a draft amendment to the E-Commerce Rules on 21 June 2021 (**Draft Rules**) and has requested for views, comments or suggestions to be submitted by 6 July 2021.

Applicability

The E-Commerce Rules regulate the activities of an 'e-commerce entity'. The term 'e-commerce entity' hitherto was defined to mean 'persons who own, operate or manage digital or electronic facility or platform for electronic commerce'. The Draft Rules propose to amend the definition to now include: (i) entities engaged by e-commerce entities for the purpose of fulfilment of orders placed by a user on its platform; and (ii) related parties.

E-commerce businesses which operate as a limited liability partnership or a registered partnership under relevant Indian laws are also included within the Draft Rules.

Proposed additional compliance requirements under the Draft Rules

- **Registration.** All e-commerce entities that intend to operate in India need to be registered with the Department of Promotion of Industry and Internal Trade (**DPIIT**) and the registration number must then be displayed on their platform.
- **Appointment of officers.** The Draft Rules propose that each e-commerce entity shall appoint: (i) a chief compliance officer who will be liable for obligations of the e-commerce entity for compliance with the Act and the E-Commerce Rules and for the information or data made available or hosted by the e-commerce entity; (ii) a nodal contact person for coordination with law enforcement agencies; and (iii) a resident grievance officer who would be responsible for

certain obligations of the e-commerce entity. Each of these officers needs to be a resident and citizen of India.

- Grievance redressal. E-commerce entities will also be required to publish the contact details of the grievance officer on their online platforms, along with the relevant procedure for a consumer to register a complaint.
- National consumer helpline. E-commerce entities will be required to partner with the National Consumer Helpline.

Proposed new duties of e-commerce entities

- Ban on flash sales. E-commerce entities are not to engage in organizing flash sales. A "flash sale" has been defined as a sale organized by an e-commerce entity at significantly reduced prices, high discounts or promotions for a pre-determined period of time for select goods or with the intent of drawing a large number of customers. The ban on flash sales has been further clarified by the government in a press release which stated that conventional flash sales by third party sellers are not banned on an e-commerce platform but only flash sales which limit consumer choice by indulging in 'back-to-back' or 'flash' sales are banned.
- Misleading advertisements. E-Commerce entities are to ensure that they do not display or promote misleading advertisements.
- Imported goods. If any imported goods or services are offered for sale, the e-commerce entity will be required to: (i) provide identification details of the importer; (ii) identify goods based on country of origin; (iii) provide an option to filter according to country of origin; and (iv) present users with suggestions and alternatives of domestic goods at the time the imported goods are being viewed. Further, e-commerce entities will be required to provide ranking for goods in a manner that does not discriminate against domestic goods or sellers.
- Mis-selling. The e-commerce entities are not to indulge in mis-selling. Mis-selling means the selling of goods and services by the deliberate misrepresentation of the information provided by the e-commerce entity about the suitability of goods and services to the consumer purchasing it.
- Cross-selling. The e-commerce entities must display in a clear manner on their platform the name of the entity providing data for cross-selling and the data of such entity used for cross-selling.
- Express consent requirements. Explicit consent is to be taken for consumer information being made available to third parties and for recording a purchase. The explicit consent has to be recorded through an affirmative action and cannot be in the form of pre-ticked checkboxes.
- Abuse of dominant position. E-commerce entities cannot abuse their dominant position including the use of any information collected by them to give themselves an unfair advantage.
- Product disclosure. The 'best before' or 'use before date' of the product must be prominently displayed on the platform of the e-commerce entity.

- Other disclosures.
 - The name of the seller shall be displayed in the same size font as the name of the e-commerce entity on the invoice provided by the e-commerce entity.
 - Clear and prominent disclosures must be made by the e-commerce entity for the identification of sponsored products on their platform.
- Other obligations.
 - The name or brand associated with that of the marketplace e-commerce entity cannot be used by sellers of goods or services for promotion or offer for sale, on an e-commerce platform in a manner which would imply brand association between these two entities.
 - E-commerce entities shall not mislead consumers by manipulating search indexes based on the search query provided by the consumer.
 - E-commerce entities shall not 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 themselves as being associated with the marketplace e-commerce entity if it amounts to an unfair trade practice and impinges on consumer interest.
 - E-commerce entities are to provide information under their control and/or assist government agencies within 72 hours from being provided with a written order for prevention, detection, investigation, etc of offences under any law.

Proposed liabilities of marketplace e-commerce entities

- Fall back liability. The concept of "Fall back liability" has been introduced in the Draft Rules wherein marketplace e-commerce entities will be liable for losses caused to consumers as a result of a failure in the delivery of goods and services by a seller on their platform due to negligent conduct, omission, or through commission of any act by a seller in fulfilling their duties and liabilities in the manner as prescribed by the marketplace e-commerce entity, which causes loss to the consumer.
- Ban on sale of goods to sellers. Marketplace e-commerce entities cannot sell goods or services to their registered sellers on their platforms or advertise a body of sellers for the purpose of subsidizing a sale on their platform.
- Limitations on indirect activities. Related parties and associated enterprises of marketplace e-commerce entities shall not take an action which the e-commerce entities themselves cannot undertake. Further, the related parties and associated enterprises of marketplace e-commerce entities cannot be listed as sellers on their platforms and any information collected by them shall not be used to provide an unfair advantage to them.
- Non-discrimination by logistics service providers: Logistics service providers of the e-commerce entity are not to provide differential treatment to sellers of the same category on their platform. However, logistics service providers of a

marketplace e-commerce entity are required to provide a disclaimer including terms and conditions governing their relationship with the sellers and any differential treatment that it gives between sellers of the same category.

Conclusion

Our primary observation on the E-Commerce Rules (in this [Ergo](#)) was that they seek to address consumer issues based on precedents rather than wider guidelines. This observation applies even more to the Draft Rules. Guidelines would have also served as a regulatory roadmap for the evolution of a dynamic e-commerce market.

The amended definition of e-commerce entities does not provide any interpretative guidance on the term 'fulfilment of order'. A broad interpretation of this term will include any entity that is engaged by the e-commerce entity for the fulfilment of orders (like logistics service providers). Such an interpretation would require these entities to also comply with all the regulations mentioned in the proposed amendment which would impose extremely onerous obligations on them.

The Draft Rules introduce increased compliance requirements for e-commerce entities such as the registration with the DPIIT, appointment of compliance officers and mandatory partnering with the National Consumer Helpline. These proposed amendments are applicable to all e-commerce entities similarly without differentiating them on the basis of the size of the entity, their relevant industry, sector, etc. Such requirements would significantly affect smaller e-commerce entities as they may not be able to comply with these increased compliance requirements, thereby defeating the objective of the rules to promote fair competition.

The obligation to appoint a chief compliance officer and the liabilities imposed upon such officer seem to be inspired from a similar obligation under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 (**IT Intermediary Rules**). The requirement to appoint the other two officers are also spelt out in the IT Intermediaries Rules. Social media platforms that are required to appoint such officers are finding it difficult to appoint chief compliance officers due to the nature of liability imposed on them under the IT Intermediary Rules. E-commerce entities might face a similar hurdle too if this provision is retained in the present form.

The Draft Rules also lay down strict liabilities on e-commerce entities without clarifying their scope. While the amendment proposes to ban flash sales, it fails to adequately define what would constitute a flash sale, thereby creating ambiguity amongst e-commerce entities as to the amount and frequency of discounts that they can offer to consumers without falling foul of the rules. Additionally, the introduction of fall back liability is another instance where the lack of clarity of the provision would cause its subjective enforcement. Since it would be difficult to ascertain negligence of the seller resulting in losses to the consumer, not all instances of losses to consumer caused by seller negligence would be covered under this liability. The requirement that platforms engaging in cross-selling would need to disclose the data of the entity that is providing the relevant data to the platform is an extremely wide requirement, and will be difficult to implement if this provision is retained.

The provision enunciating a complete ban on the ability of marketplace e-commerce entities to have their related parties and associated enterprises listed as sellers on the platform or sell goods to any seller on the platform would significantly affect the operational structure of e-commerce entities who are otherwise permitted to sell products on their own marketplace in terms of other applicable laws. Provisions like these must be relooked at in the context of the overall scheme of the Act.

The government has invited comments on the Draft Rules. It is hoped that pursuant to such public comments, and subsequent deliberations in light of those, the concerns

pertaining to the Draft Rules (including the ones set out above) will be appropriately addressed.

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