

E-COMMERCE AND REGULATION IN INDIA: E COMMERCE IS BENIGN FOR RETAIL MARKET

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The boom of E-commerce in recent years has transformed the way consumers avail goods and services. The brick-and-mortar retail stores, who for decades maintained their stronghold on localities are threatened by the online purchases that is not limited by geographical boundaries. The growth of e-commerce presents both opportunities and challenges to competition policy as online retailing has the potential to increase retail competition, to enhance consumer choice and to facilitate innovation in product distribution. However, at the same time certain dynamics may prompt anticompetitive agreements or unilateral conduct, including the advent of dominant online platform operators.²

ECONOMIC RATIONALE FOR E-COMMERCE:

Broadly, the economic advantages of E-Commerce can be categorized as follows³: -

Cost Reductions: Electronic transactions through the internet avoid many of the operating costs related to processing an order. Before the transaction, internet technology reduces the costs of searching for suppliers and buyers and making price and product comparisons. During the transaction, ecommerce reduces the cost of communicating transaction details (travel costs, paper processing, etc.). After the transaction, e-commerce lowers the costs of monitoring contractual performance and permits inventory and supply management to be automated.

Competition: The global crisis kickstarted a massive shift from offline to online buying and selling across almost to all the age groups, geographies, and economic status. Being the second largest e-commerce market in the world, the Indian e-commerce sector is projected to touch USD 99 billion by 2024 according to IBEF.⁴ As more big brands are heading online, competition is ramping up. Retail giants like Walmart have seen a 74% increase in online sales during the pandemic.⁵ Similarly, retailers for products not usually sold online before have been inundated with online demand – mostly a shift in the need for household essentials, personal care products, other health essentials and books.⁶

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² OECD, Directorate For Financial And Enterprise Affairs Competition Committee, 2018 [https://one.oecd.org/document/DAF/COMP/M\(2018\)1/ANN3/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/M(2018)1/ANN3/FINAL/en/pdf)

³ UNECE, Impact of Globalization on National accounts, UNECE https://unece.org/fileadmin/DAM/stats/groups/wgna/GuideByChapters/Chapter_13.pdf

⁴ How e-commerce players can boost business growth amidst increasing competition, Financial Express, February 28, 2021 <https://www.financialexpress.com/brandwagon/how-e-commerce-players-can-boost-growth-amidst-increasing-competition/2203483/>

⁵ Shelly E. Kohan, Walmart's Online Sales Have Surged 74% During The Pandemic, Forbes, May 19, 2020 <https://www.forbes.com/sites/shelleykohan/2020/05/19/walmart-revenue-up-86-e-commerce-up-74/?sh=519144c966cc>

⁶ Andrew Lipsman, US Ecommerce by Category 2020, E-marketer, July 22, 2020 <https://www.emarketer.com/content/us-ecommerce-by-category-2020>

Better organization of production processes: As e-commerce clearly reduces transaction costs, firms may be led to reorganize the structure of their production network or supply chain. Better organization of production includes centralization of management and administration.

Multiple Choices: Product differentiation is a business strategy in which firms attempt to create and exploit differences between their products and those offered by competitors. These differences may lead to competitive advantage if customers perceive and welcome the difference. Greater variety benefits consumers through wider choice. Consumer e-commerce, such as internet shopping, can widen choice through access to a wider range of sellers; niche sellers of specialized products may then be able to realize enough economies of scale to become profitable.

INDIA: UNDERSTANDING E-COMMERCE FROM A COMPETITIVE LENS

The Competition Act, 2002 ('Act') is well-equipped to deal with all kinds of anti-competitive conduct by virtue of Section 3 and Section 4. The primary anti-competitive concern that has been raised against e-commerce entities is vertical restraints like exclusive agreements, resale price maintenance (RPM) and deep discounts. The vertical restraints are not *per se* illegal and are analysed by the Competition Commission of India (CCI) on a rule of reason-based approach. Section 19(3) of the Act lays down⁷ the analytical framework to examine whether an agreement/arrangement/understanding has or is likely to have an AAEC. Only those agreements/arrangements/understanding whose net effect is anti-competitive i.e., anti-competitive effects exceed the pro-competitive effects, are proscribed by the Act. The CCI for the first time⁸ elaborated the pro-competitive effects of vertical agreements in E-commerce while dismissing allegations of RPM raised by Snapdeal against KAFF Appliances (India) Pvt. Ltd. The CCI at paras 48-49 held as follows: -

“48.....vertical agreements deserve a rule of reason analysis, simply owing to the fact that the vertical agreements are concluded between entities operating at different levels in the production chain who generally produce complementary products or services and are not as such placed in a competitive relationship. To safeguard their respective interests, such entities necessarily enter into number of commercial agreements, many of which may not necessarily be anti-competitive and rather may be efficiency enhancing with sound economic justifications. Since these parties are not producing substitutes as such and thus not competing as such, their incentives are generally aligned to that of end consumer. In such a scenario, it becomes imperative that the competition authorities which are mandated to proscribe anti-competitive agreements, do not end up restraining pro-competitive commercial agreements/arrangements.

⁷ [Note: Negative Factors are (a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; (c) foreclosure of competition by hindering entry into the market. Positive Factors are (d) accrual of benefits to consumers; (e) improvements in production or distribution of goods or provision of services; or (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.]

⁸ Case No. 61 of 2014, available at <https://cci.gov.in/sites/default/files/61-of-2014.pdf>

49. Further, many a time, the vertical agreement safeguards the interest of the end-consumer. Though restraints like minimum RPM may affect price competition amongst retailers/distributors, in situations where intra-brand price competition among retailers/distributors is likely to create an incentive to free ride in the short run and under-provisioning or complete eradication of such useful services in the long run, imposition of such vertical restraint may not only be desirable from the manufacturer-retailers' point of view but also from the point of view of consumers.”

The CCI has the expertise to deal with vertical restraints in the E-commerce sector on a case-to-case basis as required under Section 3(4) read with Section 19(3). For instance, the CCI has dismissed allegations of anti-competitive conduct against players like Amazon⁹, Flipkart¹⁰, Snapdeal¹¹, Swiggy¹² and at the same time, is investigating the *prima facie* anti-competitive conduct of Amazon¹³, Flipkart¹⁴ and Makemytrip¹⁵. While scrutinizing such matters related to E-Commerce players, the CCI has now realised the concept of ‘network effects’, and how owing to these network effects, the players that are already established in the market have a wide consumer base, thereby, making it extremely difficult for new entrants to effectively compete in the market. For instance, according to GlobalData’s estimate, India’s e-commerce market doubled between 2017 and 2020, with Flipkart and Amazon dominating the space. In 2020 alone, the country’s online commerce market hit \$60.5 billion, and it’s expected to reach \$111.3 billion by 2024.¹⁶ This means that the two big players that have been firmly established in the market with deep pockets, are the only competing forces. Therefore, the CCI clearly possesses the required expertise to analyse the vertical restraints of these players from all relevant perspectives.

Notwithstanding the abovementioned instances of vertical restraints, CCI has not been remiss in scrutinizing abusive and unilateral conduct of dominant platforms. For instance, in three different cases pertaining to Google namely Umar Javeed v. Google LLC¹⁷; XYC v. Alphabet Inc. & Ors.¹⁸ and; Kshitiz Arya v. Google LLC & Ors.¹⁹, the CCI *prima facie* found that the mandatory pre-installation of GMS under the MADA; mandatory use of Google Play’s payment system for paid apps & in-app purchases with a commission of 30% (and 15% in certain cases) to be paid to Google and; making pre-installation of Google’s proprietary apps (particularly PlayStore) conditional upon signing of ACC for all

⁹ Case No. 09 of 2020, available at <https://www.cci.gov.in/sites/default/files/09-of-2020.pdf>

¹⁰ Case No. 80 of 2014, available at <https://www.cci.gov.in/sites/default/files/802014.pdf>; Case No. 20 of 2018, available at <http://cci.gov.in/sites/default/files/20-of-2018.pdf>

¹¹ Case No. 17 of 2014, available at <https://www.cci.gov.in/sites/default/files/172014.pdf>

¹² Case no. 39 of 2019, available at <https://www.cci.gov.in/sites/default/files/39-of-2019.pdf>

¹³ Case No. 40 of 2019, available at <https://www.cci.gov.in/sites/default/files/40-of-2019.pdf>

¹⁴ *Id.*

¹⁵ Case No. 14 of 2019, available at https://www.cci.gov.in/sites/default/files/14of2019_0.pdf

¹⁶ Gabriela Barkho, How the pandemic strengthened Walmart-owned Flipkart’s market share, Modern Retail, May 13, 2021

[https://www.modernretail.co/platforms/how-the-pandemic-strengthened-walmart-owned-flipkarts-marketshare/#:~:text=According%20to%20GlobalData's%20estimate%2C%20India's,reach%20%24111.3%20billion%20by%202024](https://www.modernretail.co/platforms/how-the-pandemic-strengthened-walmart-owned-flipkarts-marketshare/#:~:text=According%20to%20GlobalData's%20estimate%2C%20India's,reach%20%24111.3%20billion%20by%202024;); <https://www.ibef.org/industry/ecommerce.aspx>

¹⁷ Case No. 39 of 2018, available at <https://cci.gov.in/sites/default/files/39-of-2018.pdf>

¹⁸ Case No. 07 of 2020, available at <https://cci.gov.in/sites/default/files/07-of-2020.pdf>

¹⁹ Case No. 19 of 2020, available at <https://cci.gov.in/sites/default/files/19-of-2020.pdf>

android devices manufactured/distributed/marketed by device manufacturers respectively to be an abuse of Google's dominant position under various provisions of Section 4 of the Act. Lastly, the CCI has further taken *suo motu* cognizance²⁰ after Whatsapp updated its privacy policy and imposed mandatory obligations on consumers to accept the same. The CCI found the updated privacy policy in light of data sharing between Whatsapp and Facebook to be an unfair imposition of terms and conditions and prima facie anti-competitive of Section 4(2)(e) of the Act.

Therefore, it can be seen that the CCI has not only recognized the potential anti-competitive practices in online markets but has also initiated investigations whenever deemed necessary on a case-to-case basis. With only over a decade of experience, the CCI has now understood its role in promoting competition in the market in the interest of 'ease of doing business' and not prohibiting businesses that clearly have multifarious pro-competitive effects. In fact, the Supreme Court²¹ and the High Courts have also recognized CCI's jurisdiction to investigate and adjudicate on matters that pose a threat to competition in the market irrespective of investigations by other regulators under different sectoral regulations.

Thus, the task is clearly cut out for CCI to weigh the factors enshrined in Section 19(3) to assess the competition in the market. In the case of vertical restraints in the E-Commerce market, it can be noted that nearly all factors mentioned in 19(3) are met and is ultimately up to the CCI to decide whether the positive factors outweigh the negative factors or vice versa. On the other hand, in cases where dominance is established, CCI has also reiterated that it will not refrain from exercising its jurisdiction when potential competition concerns arise.

OVER-REACH IN THE NAME OF CONSUMER PROTECTION?

With the introduction of the Consumer Protection Act, 2019²² ('**Act of 2019**') the Indian Parliament also felt the need to address the ever-growing market of E-Commerce and introduced the E-Commerce Rules, 2020²³. The Act of 2019 and the Rules intended to address a catena of consumer rights in relation to manufacturers, sellers and e-commerce platforms. For example, consumers have a right to sue a manufacturer for misleading advertisements; challenge standard contractual terms as being one-sided and hence, unfair; file a case for the provision of defective goods, deficient services, higher-than-agreed prices, and false representations on quality. As a matter of fact, the Act of 2019 provides for the establishment of a Central Consumer Protection Authority²⁴ ('**CCPA**') that can handle cases involving infringement of the rights of a class of consumers or cases that have a larger public interest. Moreover, the CCPA is also empowered with an investigative wing

²⁰ *Suo Moto* Case No. 01 of 2021, available at https://cci.gov.in/sites/default/files/SM01of2021_0.pdf

²¹ *Flipkart Internet Private Limited v. Competition Commission Of India & Ors.*
https://main.sci.gov.in/supremecourt/2021/16978/16978_2021_31_27_29263_Order_09-Aug-2021.pdf

²² The Consumer Protection Act, 2019 <https://consumeraffairs.nic.in/sites/default/files/CP%20Act%202019.pdf>

²³ Notification dated 23rd July, 2020, Department of Consumer Affairs, Ministry Of Consumer Affairs, Food And Public Distribution <https://consumeraffairs.nic.in/sites/default/files/E%20commerce%20rules.pdf>

²⁴ Notification dated 23rd July, 2020, Department of Consumer Affairs, Ministry Of Consumer Affairs, Food And Public Distribution <https://consumeraffairs.nic.in/sites/default/files/Estt%20of%20CCPA.pdf>

and provide remedies to resolve such consumer disputes. It can be said that the CCPA is analogous to the CCI at the helm of consumer affairs. Moreover, even the Draft E-commerce Rules 2021²⁵ (**‘Draft Rules’**) that was published for comments intended to appease²⁶ aggrieved consumers, traders and associations complaining against widespread cheating and unfair trade practices being observed in the e-commerce ecosystem. However, these Draft Rules that have faced significant opposition from within the Government and outside are burdensome and devoid of rationale for the following reasons: -

ENCROACHMENT ON CCI’S JURISDICTION

Under Section 4 of the Competition Act, 2002, the CCI has the exclusive jurisdiction to investigate matters concerning ‘abuse of dominant position’. However, a clause concerning the same has been included in the Draft Rules, 2021 and the Ministry of Corporate Affairs has opposed it by stating that a min-competition law regime under the consumer protection law is impermissible. It is submitted that the CCI is the competent authority to investigate the anti-competitive conduct of E-commerce players by taking into account all the anti-competitive and pro-competitive effects of their actions.

Apart from the abovementioned direct encroachment, the Draft Rules have also banned ‘flash sales’ and the listing of ‘associated enterprises’ by the e-commerce entities. In fact, the rules recognize the associated enterprises as ‘e-commerce entity’, thereby, bringing logistics service providers, payment gateways etc. within its fold which is devoid of any meaning whatsoever. The CCI is currently investigating the validity of these exclusive launches and vertical arrangements in the Amazon and Flipkart case, and such sales which are beneficial for the consumers owing to the discounted prices, do not find place in a consumer protection legislation.

ANTI-THEFT TO INTERMEDIARY LIABILITY

The Draft Rules have introduced the concept of ‘fallback liability’ which makes the E-commerce entity liable for the negligence and default of the seller. This is against the very principle of the ‘safe harbour protection’ granted to intermediaries under Section 79 of the Information Technology Act, 2000. Under the Section 79, an intermediary is not responsible for third party content on its platform. As a matter of fact, a division bench of the Delhi High Court recently in the case of Amazon Seller Services Pvt. Ltd. v. Amway India Enterprises Pvt. Ltd.²⁷ held that *“in terms of Section 79 of the Information Technology Act, 2000, there does not appear to be any distinction between passive and active intermediaries in so far as the availability of the safe harbour provisions are concerned. An intermediary is not liable for any third-party information, data or communication link made available or posted by it, as long as it complies with Sections 79(2) or (3) of the Act. The exemption under Section 79(1) from liability applies when the intermediaries fulfil the criteria laid down in either Section 79(2)(a) or Section 79(2)(b),*

²⁵ Notification dated 23rd July, 2020 (No.J-10/3/2018-CPU), Department of Consumer Affairs, Ministry Of Consumer Affairs, Food And Public Distribution https://consumeraffairs.nic.in/sites/default/files/file-uploads/latestnews/Comments_eCommerce_Rules2020.pdf

²⁶ <https://pib.gov.in/PressReleasePage.aspx?PRID=1729201>

²⁷ Amazon Seller Services Pvt. Ltd. v. Amway India Enterprises Pvt. Ltd., 2020 SCC OnLine Del 454

and Section 79(2)(c). Where the intermediary merely provides access, it has to comply with Section 79(2)(a), whereas in instances where it provides services in addition to access, it has to comply with Section 79(2)(b). The Amazon, Cloudfare and Snapdeal provide services in addition to simple online access. They have to comply with Section 79(2)(b). They have to show that they do not (i) initiate the transmission (ii) select the receiver of the transmission and (iii) select or modify the information contained in the transmission.”

This recognition of intermediary liability is settled in India after precedents like *Shreya Singhal v. Union of India*²⁸, *Myspace v. Super Cassettes*²⁹ and *Christian Louboutin v. Nakul Bajaj*³⁰, however, the Draft Rules 2021 seek to completely oust the protection of intermediary liability, in direct conflict with Section 79 of the IT Act, 2000. Therefore, the fastening of such liability is irrational and impermissible.

ONEROUS OBLIGATIONS ON E-COMMERCE PLATFORMS

The Draft Rules, 2021 further impose upon the e-commerce players burdensome obligations like setting up a grievance redressal system with grievance officer, nodal officer etc. However, the obligation is bestowed upon the players uniformly which implies that any new entrant would also have to set up the same mechanism as required of big players like Amazon and Flipkart. This is tedious and commercially unsound for new entrants in the market. In fact, the IT Rules of 2021³¹, confer such an obligation only on significant social media intermediaries that have users exceeding 50 lakhs.³² However, no such bifurcation has been made under the Draft Rules of 2021 making it devoid of rationale.

E-COMMERCE: THE WAY FORWARD

Like any industry which is spurred by evolution, the direct impact of the e-commerce growth has been on the creation of employment opportunities across the value chain. Apart from the direct employment contribution that has been made by the e-tail players, what is noteworthy is the indirect/adjacent employment generated in the allied industries like logistics, warehousing, IT/ ITeS, sellers and SMEs, and other support industries (like payment solutions, marketers, and advertisers). The projected figures are captured in a recent report by KPMG as follows³³: -

²⁸ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1.

²⁹ *Myspace Inc. v. Super Cassettes Industries Ltd.*, 2016 SCC OnLine Del 6382.

³⁰ *Christian Louboutin Sas v. Nakul Bajaj*, 2018 SCC OnLine Del 12215.

³¹ Intermediary Guidelines and Digital Media Ethics Code Rules, 2021, Ministry Of Electronics And Information Technology(MIETY), https://www.meity.gov.in/writereaddata/files/Intermediary_Guidelines_and_Digital_Media_Ethics_Code_Rules-2021.pdf

³² Notification dated 25th February, 2021, Ministry Of Electronics And Information Technology(MIETY), <https://egazette.nic.in/WriteReadData/2021/225497.pdf>

³³ Impact of E-Commerce on Employment in India, available at <https://assets.kpmg/content/dam/kpmg/in/pdf/2016/12/impact-of-ecommerce-on-employment-in-india.pdf>

- E-tail and the allied sectors, like logistics, warehousing, IT/ ITeS, expected to create direct employment for around 1.45 million of workforce by 2021, a significant jump from the 23,500 jobs which existed in 2012.
- The overall e-tail logistics and warehousing sector to directly employ more than 1 million people by 2021, becoming the largest contributor in terms of employment opportunities created by e-tail.
- Majority of the e-tail logistics workforce engaged in providing last mile connectivity, providing employment opportunities to people across tier II, tier III towns with no formal degrees. This is helping create an environment of more inclusive and balanced growth.
- E-tail expected to emerge as a destination for highly-skilled technology jobs employing nearly 0.3 million people by 2021. Besides technology, the regular corporate functions like HR, finance & accounts, administration etc. to add nearly 0.1 million work-force by 2021.
- E-commerce is providing opportunity to women to become independent entrepreneur and enabling them to perform both the roles of a homemaker and a career women. Recently launched online portal, named Mahila-e-Haat, is expected to benefit around 10,000 self-help groups and 1.25 lakh women.³⁴
- As part of the signed Memorandum of Understanding (MoUs), the Ministry of Communications and Information Technology plans to connect e-commerce companies with its 130,000 common service centers (CSCs) to potentially create 300,000 employment opportunities.³⁵
- Encouraged by enhanced customer reach, higher profits, and improved employment opportunities, 70% of the online sellers are expected to come from tier –II, tier III by 2018-19³⁶. Online trading platforms are also providing fresh lease of life to artists and craftsmen engaged in traditional art forms.
- Start-up ecosystem is attracting young entrepreneurs with 73% of the startup founders are less than 35 years old, and 9% are women. About 63% of the e-commerce ventures have been started by first time entrepreneurs.³⁷

Therefore, it is clear³⁸ that e-commerce boosts efficiency and has positive impact on gross domestic product; allows economies to increase participation in global value chain;

³⁴ India launches e-commerce portal Mahila e-Haat on International Women's Day: All you need to know, India Today, March 08, 2016, <https://www.indiatoday.in/education-today/gk-current-affairs/story/mahila-e-haat-312316-2016-03-08>

³⁵ Anita Babu, Connect India ropes in CSCs for e-commerce delivery in rural parts, Business Standard, September 20, 2015 https://www.business-standard.com/article/companies/connect-india-ropes-in-cscs-for-e-commerce-delivery-in-rural-parts-115093000267_1.html

³⁶ KPMG, Impact of E-Commerce on Employment in India, Report (Page 8), available at <https://assets.kpmg/content/dam/kpmg/in/pdf/2016/12/impact-of-ecommerce-on-employment-in-india.pdf>

³⁷ *Id.*

increases labor productivity and supports job creation, entrepreneurship, innovation, and creativity; leads to energy savings and lower carbon emissions and; potential to advance inclusive growth (developing economies, rural areas, women, etc.)

CONCLUSION

The Indian government is not oblivious to the significant potential of the E-commerce market. In fact, the DPIIT released the Draft National E-Commerce Policy³⁹ with an aim to create a framework for achieving holistic growth of the E-commerce sector along with existing policies of Make in India and Digital India. It was symbolic that an inclusive growth of the sector will be an important catalyst for achieving economic growth and other public policy objectives. Moreover, the consolidated FDI Policy of 2020⁴⁰ also places certain restrictions on e-commerce marketplaces to regulate the inflow of FDI (and its subsequent repercussions on the E-Commerce Market) such as ineligibility of inventory marketplace model (if more than 25% of the purchases of a vendor is made on the marketplace, it will be deemed to be inventory model and not eligible for FDI) and prohibition on e-commerce marketplaces to mandate sellers to exclusively sell their product on its platform only aim at ensuring a level-playing field in the market. Therefore, in light of the multi-faceted benefits of E-commerce to consumers and the national economy, it is extremely important that the policies and regulations are designed to regulate the sector without causing unnecessary burden on any stakeholder. The CCI is competent to investigate the matters that pose a threat to fair competition in the market on a case-to-case basis and the sectoral regulations concerning consumer protection should solely aim at regulating the e-commerce market in the interest of consumer rights.

³⁸ ADB, Embracing the E-Commerce Revolution in Asia and the Pacific, UNESCAP <https://www.unescap.org/sites/default/files/embracing-e-commerce-revolution.pdf>

³⁹ Draft National E-Commerce Policy, India's Data for India's Development, DPIIT, 2019 https://dpiit.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf

⁴⁰ Para 5.2.15.2.3 (Guidelines for FDI on E-Commerce Sector) and 5.2.15.2.4 (Other Conditions), available at https://dpiit.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020_1.pdf