

E-COMMERCE – LEGAL PERSPECTIVE*

INTRODUCTION

Electronic commerce and data are emerging as key enablers and critical determinants of India's growth and economic development. India is the fastest growing market for the e-commerce sector.



Source: IBEF

E-commerce in India has attracted investors from across the world.

Within a short period in the recent past, the significance of economic activities in the digital space has grown substantially, both globally and in India.

There is no universally accepted definition of e-commerce. Yet various definitions have been drawn by different organizations. Few of such definition of e-commerce are as below:

Department for Promotion of Industry and Internal Trade (DPIIT), FDI Policy, 2017: "e-Commerce" means buying and selling of goods and services, including digital products over digital and electronic network.

Ministry of Electronics and Information Technology (MeitY): "e-Commerce" is a type of business model, or segment of a larger business model, that enables a firm or individual to conduct business over an electronic network, typically the internet. Electronic commerce operates in all four of the major market segments: business to business, business to consumer, consumer to consumer and consumer to business.

Consumer Protection Act, 2019: e-Commerce" means buying or selling of goods or services including digital products over digital or electronic network.

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Views expressed in the Article is the sole expression of the Author and it does not express the views of the Institute.

Central GST Act, 2017: “electronic commerce” means the supply of goods or services or both, including digital products over digital or electronic network.

World Trade Organisation(WTO): The term "electronic commerce" is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means. (Work Programme on Electronic Commerce, 1998)

DRAFT NATIONAL E-COMMERCE POLICY 2019

Draft National E-Commerce Policy prepared by Government of India addresses six broad areas of the e-commerce ecosystem viz. data, infrastructure development, e-commerce marketplaces, regulatory issues, stimulating domestic digital economy and export promotion through e-commerce. The Policy takes into account interests of all stakeholders including investors, manufacturers, MSMEs, traders, retailers, startups and consumers. The National e-Commerce Policy has been formulated with a vision to provide a level-playing field to all stakeholders, including the individual consumers and MSMEs and start-ups.

CCI: 'MARKET STUDY ON E-COMMERCE IN INDIA: KEY FINDINGS AND OBSERVATIONS'

The Competition Commission of India (CCI) released a Report titled 'Market Study on E-commerce in India: Key Findings and Observations' on 8th January, 2020.¹ The Market Study on E-commerce in India ('the study') was initiated by the CCI in April 2019 with a view to better understand the functioning of e-commerce in India and its implications for markets and competition. The objective was also to identify impediments to competition, if any, emerging from e-commerce and to ascertain the Commission's enforcement and advocacy priorities in light of the same.

The study, a combination of secondary research, questionnaire survey, focused group discussions, one-on-one meetings, a multi-stakeholder workshop and written submissions of stakeholders, covered the three broad categories of e-commerce in consumer goods (mobiles, lifestyle, electrical & electronic appliances and grocery), accommodation services and food services. 16 online platforms, 164 business entities [including sellers (manufacturers and retailers) and service providers (hotels and restaurants)] and 7 payment system providers from across India participated in the study. In addition, 11 industry associations, representing different stakeholder groups, also participated.

The study has helped to gather useful insights and information on the key features of e-commerce in India, the different business models of e-commerce players, and the various aspects of commercial arrangements between market participants involved in e-commerce. The study has also provided an opportunity to learn from business enterprises on how they are responding to the advent of digital trade and has helped gauge the key parameters of competition in digital commerce.

The study confirms that online commerce is gaining importance across the sectors studied. The share of online distribution and its relative importance vis-à-vis traditional channels varies significantly across products. This divergence constrains construction of a unified competition narrative and points to the need for product-specific assessment of market and competition dynamics. Online commerce, as the study shows, has increased price transparency and price competition. The search and compare functionalities of online platforms have lowered search cost for consumers and have provided them with a wide array of alternatives to choose from. For businesses, e-commerce has helped expand market participation by aiding innovative business models.

¹ Available at: https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf

The report released presents the key trends identified and also discusses the issues that may, directly or indirectly, have a bearing on competition, or may hinder realisation of the full pro-competitive potential of e-commerce. These include the issues of lack of platform neutrality, unfair platform-to-business contract terms, exclusive contracts between online marketplace platforms and sellers/service providers, platform price parity restrictions and deep discounts. The CCI is of the view that many of these issues would lend themselves to a case-by-case examination by the CCI under the relevant provisions of the Competition Act, 2002. The report outlines these issues and presents the observations of the CCI on the same without assessing whether a conduct is anti-competitive or is justified in a particular context.

On the basis of the market study findings, the enforcement and advocacy priorities for the CCI in the e-commerce sector in India are, *inter alia*, the following:

- i. Ensuring competition on the merits to harness efficiencies for consumers
- ii. Increasing transparency to create incentive for competition and to reduce information asymmetry
- iii. Fostering sustainable business relationships between all stakeholders

The insights gained from the study will inform antitrust enforcement in these markets. Nonetheless, bargaining power imbalance and information asymmetry between e-commerce marketplace platforms and their business users are at the core of many issues that have come up in the market study. Thus, without a formal determination of violation of competition law, improving transparency over certain areas of the platforms' functioning can reduce information asymmetry and can have a positive influence on competition outcomes.

In view of the foregoing, the report enumerates certain areas for self-regulation by the e-commerce marketplace platforms. These have been advocated with a view to reduce information asymmetry and promote competition on the merits. The CCI under its advocacy mandate urges the e-commerce platforms to put in place the following transparency measures.

Search ranking

- i. Set out in the platforms' terms and conditions a general description of the main search ranking parameters, drafted in plain and intelligible language and keep that description up to date.
- ii. Where the main parameters include the possibility to influence ranking against any direct or indirect remuneration paid by business users, set out a description of those possibilities and of the effects of such remuneration on ranking.
- iii. Introduction of the above-mentioned features, however, should not entail, disclosure of algorithms or any such information that may enable or facilitate manipulation of search results by third parties.

Collection, use and sharing of data

Set out a clear and transparent policy on data that is collected on the platform, the use of such data by the platform and also the potential and actual sharing of such data with third parties or related entities.

User review and rating mechanism

Adequate transparency over user review and rating mechanisms is necessary for ensuring information symmetry, which is a prerequisite for fair competition. Adequate transparency to be maintained in publishing and sharing user reviews and ratings with the business users. Reviews

for only verified purchases to be published and mechanisms to be devised to prevent fraudulent reviews/ratings.

Revision in contract terms

Notify the business users concerned of any proposed changes in terms and conditions. The proposed changes not to be implemented before the expiry of a notice period, which is reasonable and proportionate to the nature and extent of the envisaged changes and to their consequences for the business user concerned.

Discount policy

- i. Bring out clear and transparent policies on discounts, including *inter alia* the basis of discount rates funded by platforms for different products/suppliers and the implications of participation/non-participation in discount schemes.

GOVERNING RULES & REGULATIONS

E-commerce companies are subject to various extant rules and regulations. Owing to the cross cutting nature of e-commerce, different laws and regulations across sectors govern the present e-commerce activities, some of which are Income Tax Act, 1961, Consumer Protection Act, 1986/2019, Information Technology Act, 2000, Foreign Exchange Management Act, 1999, Payment and Settlement Systems Act 2007, Companies Act, 2013 and laws related to Goods and Services Tax.

FOREIGN DIRECT INVESTMENT ON E-COMMERCE SECTOR

100% FDI under automatic route is permitted in marketplace model of e-commerce. FDI is not permitted in inventory based model of e-commerce. It may be noted that Inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly and Marketplace based model of e-commerce means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller.

Conditions for FDI in e commerce

- Digital & electronic network will include network of computers, television channels and any other Internet application used in automated manner such as web pages, extranets, mobiles etc.
- Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on B2B basis.
- E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfillment, call centre, payment collection and other services.
- E-commerce entity providing a marketplace will not exercise ownership or control over the inventory i.e. goods purported to be sold. Such an ownership or control over the inventory will render the business into inventory based model. Inventory of a vendor will be deemed to be controlled by e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies.
- An entity having equity participation by e-commerce marketplace entity or its group companies, or having control on its inventory by e-commerce marketplace entity or its group companies, will not be permitted to sell its products on the platform run by such marketplace entity.

- In marketplace model goods/services made available for sale electronically on website should clearly provide name, address and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller.
- In marketplace model, payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines of the Reserve Bank of India.
- In marketplace model, any warrantee/ guarantee of goods and services sold will be responsibility of the seller.
- E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field. Services should be provided by e-commerce marketplace entity or other entities in which e-commerce marketplace entity has direct or indirect equity participation or common control, to vendors on the platform at arm's length and in a fair and nondiscriminatory manner. Such services will include but not limited to fulfilment, logistics, warehousing, advertisement/marketing, payments, financing etc. Cash back provided by group companies of marketplace entity to buyers shall be fair and non-discriminatory. For the purposes of this clause, provision of services to any vendor on such terms which are not made available to other vendors in similar circumstances will be deemed unfair and discriminatory.
- E-commerce marketplace entity will not mandate any seller to sell any product exclusively on its platform only.
- E-commerce marketplace entity will be required to furnish a certificate along with a report of statutory auditor to Reserve Bank of India, confirming compliance of above guidelines, by 30th of September of every year for the preceding financial year.

E-COMMERCE UNDER THE CONSUMER PROTECTION ACT, 2019

Section 94 of the Consumer Protection Act, 2019 deals with measures to prevent unfair trade practices in e-commerce, direct selling, etc. it states that for the purposes of preventing unfair trade practices in e-commerce, direct selling and also to protect the interest and rights of consumers, the Central Government may take such measures in the prescribed manner.

CCI ORDER INVESTIGATION AGAINST FLIPKART AND AMAZON

In the case of *Delhi Vyapar Mahasangh, Informant and Flipkart Internet Private Limited Opposite Party No. 1 & Amazon Seller Services Private Limited and its affiliated entities Opposite Party No. 2 (Opposite Parties)*, Case No. 40 of 2019 Order dated 13th January, 2020 the informant alleges that there is a clear violation of Section 3(4) read with Section 3(1) of the Competition Act. Allegedly, there is an existence of various vertical arrangements between (i) Flipkart with their preferred sellers on the platforms; and (ii) Amazon with their preferred sellers on the platforms, respectively which leads to a foreclosure of other non-preferred sellers from the online marketplace. These preferred sellers are also alleged to be affiliated with or controlled by Flipkart/Amazon either directly or indirectly. Further, it is alleged that the e-commerce company provides deep discounts to a select few preferred sellers on its platform which adversely impacts non-preferred sellers such as members of the Informant. Besides receiving deep discounts, such assured sellers also receive preferential listing on the website. It is alleged that Amazon and Flipkart are able to cross-subsidise because of the huge amount of funding received from their investors, which has resulted in incentives that allow pricing below cost on their platforms, through their sellers, resulting in creation of high entry barriers and high capital costs for any new entrant in the market. Resultantly, the existing sellers find it difficult to launch their own portals or marketplaces in order to compete with the OPs.

The Commission has carefully perused the information, documents filed by the Informant and relevant information available in the public domain and the Commission notes that the Informant has levelled allegations against Flipkart and Amazon marketplaces under Section 4 of the Act on account of joint dominance. The Commission notes that it is a settled position that the Act does not provide for inquiry into or investigation into the cases of joint/collective dominance as the same is not envisaged by the provisions of the Act. Therefore, the Commission need not deliberate further on allegations on account of joint dominance as the same being untenable under the Act.

The Commission notes that Flipkart marketplace and Amazon marketplace are Ecommerce entities, following a marketplace based model of e-commerce. They essentially provide online intermediation services to sellers on one side and consumers on the other. These platforms / market places and the sellers selling on these platforms operate at different stages of the vertical/supply chain. Thus, any agreement between platforms and sellers selling through these platforms can be examined under section 3(4) of the Act, which deals with agreements amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services.

The issue of preferential listing should also be viewed in conjunction with the foregoing. Competition on the platforms may get influenced in favour of the exclusive brands and sellers, through higher discounts and preferential listing. Thus, the allegations are interconnected, and warrant a holistic investigation to examine how the vertical agreements operate, what are the key provisions of such agreements and what effects do they have on competition. Given that both the major platforms are stated to follow the same mechanics in terms of their exclusive tie ups and preferential terms with brands/sellers, competition between the platforms prima facie does not play a role in mitigating the potential adverse effect on competition on the platforms.

Thus, the Commission observes that the exclusive arrangements between smartphone/mobile phone brands and e-commerce platform/select sellers selling exclusively on either of the platforms, as demonstrated in the information, coupled with the allegation of linkages between these preferred sellers and OPs alleged by the Informant merits an investigation. It needs to be investigated whether the alleged exclusive arrangements, deep-discounting and preferential listing by the OPs are being used as an exclusionary tactic to foreclose competition and are resulting in an appreciable adverse effect on competition contravening the provisions of Section 3 (1) read with Section 3(4) of the Act.

In view of the foregoing, the Commission is of the opinion that there exists a prima facie case which requires an investigation by the Director General ('DG'), to determine whether the conduct of the OPs have resulted in contravention of the provisions of Section 3(1) of the Act read with Section 3(4) thereof, as detailed in this order. Accordingly, the Commission directs the DG to cause an investigation to be made into the matter under the provisions of Section 26(1) of the Act. The Commission also directs the DG to complete the investigation and submit the investigation report within a period of 60 days from the receipt of this order.

Further, the Commission also made clear that nothing stated in this order shall tantamount to a final expression of opinion on the merits of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made therein.

INTERIM STAY BY KARNATAKA HIGH COURT

Amazon filed a petition before the Karnataka High Court challenging the order of Competition Commission of India's (CCI's) investigation and argued that the investigation would cause irreparable loss or injuries. The Karnataka High Court has granted an interim stay on investigation.

CONCLUSION

The e-commerce sector is expected to keep growing in future. Better enforcement policy as well as Rules and Regulations pertaining to e-commerce sector will contribute significantly to growth of this sector in long run.

Source:

1. A Draft National e-Commerce policy
2. CCI: Market Study on E-Commerce In India, Key Findings and Observations
3. CCI Releases 'Market Study on E-commerce in India: Key Findings and Observations. Available at <https://pib.gov.in/PressReleasePage.aspx?PRID=1598745>
4. <https://www.cci.gov.in/sites/default/files/40-of-2019.pdf>
