

CUTS COMMENTS ON

THE DRAFT E-COMMERCE GUIDELINES FOR CONSUMER PROTECTION, 2019

Context

At the outset it may be noted that the emerging ‘e-commerce’ ecosystem in India is benefiting consumers, including in terms of enhanced choice and ease of buying goods & services. Thus this e-commerce ecosystem, which is still in nascent stage in India, should be promoted and facilitated, for which ‘optimal’ regulation should be preferred and over-regulation, which is more restrictive than to achieve the desired objective, needs to be discouraged. This theory also applies to consumer protection regulation, thus requiring policy/rule makers to be cautious while drafting regulations.

A good consumer protection regime will enhance much needed consumer trust in e-commerce, which in turn will help facilitate the deepening of the ecosystem. On the one hand, if the regime is below optimal, consumers will suffer. On the other hand, if the regime exceeds the ‘optimality’, it will adversely affect the development of the e-commerce ecosystem, which in turn will go against consumers’ interest. The following comments from CUTS International, therefore, among others, are largely from the optimal regulation perspective.

General Comments

- Since, the subject is of global interest and importance, the Guidelines may be drafted and formatted keeping the vast national and international audience in consideration.
- *Prima facie*, the proposed draft Guidelines seem to be exceeding ‘optimality’ and also encroaching into the domains of other regulators.
- The draft Guidelines, still uses “Consumer Protection Act, 1986” when the new Act has been enacted in 2019 and which tends to repeal the earlier Act (Section 107, Consumer Protection Act, 2019)
- Generally, guidelines are issued under a parent Act and it mentions the provisions under which the same have been issued. The present Guidelines

should also mention that it has been issued under the CPA, 2019 (i.e. under Section 94 read with Section 101(2)(zg) of the CPA, 2019)

- Generally, guidelines are not used for defining ‘terms’ and the same is mainly done in the parent Act itself. However, the present Guidelines not only define certain terms, but also deviates from definitions under its parent Act i.e. CPA, 2019. In addition, the Guidelines have not used certain terms that are defined in the parent Act, and have used certain terms that are not defined in the parent Act.
- While devising liabilities for e-commerce platforms, the Guidelines fail to make distinction between inventory-model (where platforms also play dual role of intermediaries as well as suppliers) and marketplace-model of e-commerce, which are mere intermediaries.
- It is also imperative that new/ small e-commerce players are not required to bear disproportionate compliance costs. Hence, it is suggested that certain relaxations such as a moratorium on certain provisions are provided to new entrants in the market. For instance, the 90 day-period for compliance with the conditions (as provided under clause 3(a) of the guidelines) could be relaxed for the newer/ smaller players. The threshold for distinguishing newer/ smaller players from experienced/ bigger players could be determined based on market/ turnover/ number of users/ years of operation, subsequent to extensive stakeholder consultation.
- There should be clarity between provisions/ issues subject to jurisdiction of other regulatory entities, in addition to the Department of Consumer Affairs (such as issues related to intermediary liability and data protection).
- In accordance with the Pre Legislative Consultative Policy of the Government, the Department of Consumer Affairs should undertake rigorous cost-benefit analysis/ impact assessment of the Guidelines to ensure that optimal regulation is designed, capable of achieving the desired outcomes at least cost to stakeholders.¹

Specific Comments

1. In Clause 1, **Short Title & Commencement**, change the year from 2018 to 2019.

¹ <http://legislative.gov.in/sites/default/files/plcp.pdf>

2. In Clause 2, ***Definitions***

- a. "Act" should mean the Consumer Protection Act, 2019 (35 of 2019)
- b. "Consumer" definition should be that provided under the Consumer Protection Act, 2019 (35 of 2019), instead of the mentioned Consumer Protection Act, 1986.
- c. Delete the definition of "E-Commerce entity" and use instead definition of "Electronic Service Provider", for the reasons mentioned below:
 - i. The existing definition has been taken from India's Foreign Direct Investment (FDI) Policy, and hence may make the application of the Guidelines discriminatory against foreign-owned e-commerce platforms.
 - ii. The definition of "Electronic Service Provider" is not only given in the Consumer Protection Act, 2019, but is also neutral to sources of funding and ownership as well as nationality.
- d. No need to define "Electronic Record" as the same is provided under the Information Technology Act, 2000.
- e. The definition of term "Electronic Service Provider" is given, but the same has not been used in the substantive portion of the draft Guidelines.
- f. "Goods" is defined in the Consumer Protection Act, 2019, then why use definition of Sale of Goods Act, 1930?
- g. No need to define "Information" as the same is in the Information Technology Act.
- h. "Product seller" and "Product service provider" are defined in the Consumer Protection Act, 2019 and should be used in the Guidelines instead of defining "Seller" afresh.
- i. The definition of 'Service' in Consumer Protection Act, 2019 should be used instead of that of the outgoing Consumer Protection Act, 1986.

3. ***General Conditions for carrying out e-commerce business***

- a. In Clause 3(a), use the term "Electronic Service Provider" instead of "E-Commerce entity".

- i. No need to mention the Sub-clauses 3(a)(iv) and 3(a)(v), as the same are governed by the Information Technology Act (and rules framed thereunder) and RBI notification respectively. This may give impression of regulatory over-reach and creation of dual regulation on same matters, which in turn can be unnecessarily burdensome for 'electronic service providers'.
- ii. Sub-clause 3(a)(vi) with respect to details about sellers seems more restrictive than to meet the objective of transparency and consumer information. Particularly, including "clarification of sellers business identity and products they sell" seems burdensome on 'electronic service providers' and also on sellers on e-commerce platforms.

4. Liabilities of E-Commerce entity

- a. Use the term 'electronic service provider' as defined under the Consumer Protection Act, 2019, instead of 'E-commerce entity' as defined under the FDI Policy. Whatever liabilities the Guidelines prescribe should be applicable to all operating e-commerce platforms in India irrespective of their origin, nationality or ownership.
- b. Distinction should be made between inventory-model and marketplace-model of e-commerce, and the former should face higher liabilities (if fails to maintain 'platform neutrality') for their dual role as seller as well as platform service provider.
- c. For "***an e-commerce entity shall not***", clauses 4(ii) and 4(iii) are largely meant for inventory-model of e-commerce platforms. Applying this to all 'electronic service provider' would result in over-regulation posing hurdles for the emerging e-commerce ecosystem. These will particularly hurt any new entrant and may act as regulatory barriers to entry.
- d. For "***an e-commerce entity shall***", clauses 4(ii), 4(iii) and 4(iv) are unnecessarily burdensome for 'electronic service provider'. Such burdens should ideally lie on suppliers/advertisers and players in the payment sector. However, the e-commerce platform should be required to have a

framework in place to ensure that the other players provide this information on their platform.

- e. Clause 4(vi) related with protection of privacy is the domain of other regulation and should be deleted from the Guidelines.

5. *Liabilities of Sellers*

- a. No need to mention clause 5(b), hence should be deleted.
- b. Similarly, Clause 5(f), seems over regulation of sellers on e-commerce platform and could particularly be burdensome for small businesses, which mostly depend upon e-commerce platforms for delivery and shipping.

6. *Consumer grievance redress procedure*

- a. Clause 6(iv) is vague hence either should be reworded or removed. There may also be case where offline counterparts offer less transparent and effective consumer protection than online players.

Miscellaneous comments

- 'Electronic service providers' should be encouraged to mention the terms & conditions of contract in the vernacular language, in an easy and understandable language.
- Grievance redressal process of the 'electronic service providers' should be consumer-friendly, less cumbersome, and should extend to cross-border sales.
- Under clause 4 for "E-commerce Entity shall not", insert "restrict a consumer's right to give negative reviews and/or withhold publishing such negative reviews".
- Under clause 4 for "An E-Commerce Entity shall", insert "endeavour to propagate consumer education and awareness about e-commerce and digital competence".
