CUTS Comments on

The Draft Amendments of the Consumer Protection (E-Commerce) Rules, 2020

Submitted to the D/o Consumer Affairs

As per your letter no. J-10/3/2018-CPU dated 30.06.2021 seeking comments on the Draft amendment of Consumer Protection (E-Commerce) Rules, 2020 from the Voluntary Consumer Organisations, please consider the following submission of Consumer Unity & Trust Society (CUTS International). CUTS International is a consumer organisation as well as a policy think tank headquartered in Jaipur, India.

Like many other consumer organisations, CUTS firmly believes that the emerging e-commerce ecosystem in India has benefitted consumers and that the same needs to be promoted without hindrances. Any regulation introduced in the e-commerce space must be optimal, i.e., it must be least restrictive to achieve the regulatory objective. It must also pass the tests of necessity, legality and proportionality. The benefits of regulation to consumers must outweigh the costs attached to the same.

The proposed draft amendments seem to be failing on these parameters. CUTS proposes applying Regulatory Impact Assessment tools so that optimal regulations are designed, capable of achieving the desired objectives at least cost to stakeholders.

Be that as it may, we, however, appreciate the effort and intent of the government in dealing with consumer concerns in the e-commerce space while proposing amendments to the Consumer Protection (E-Commerce) Rules, 2020 (E-commerce Rules).

Considering the aforesaid, the following are the comments divided into two parts – preliminary comments, general comments around the proposed amendments; and comments on merits, containing clause-by-clause comments, remarks and recommendations.

Preliminary Comments

Need for amendments not established

The draft amendments have been proposed within a year of the notification of the Consumer Protection (E-Commerce) Rules, 2020. According to the PIB Press Release of June 21, the necessity for the proposed amendments is that "*since the notification of these rules, the Government has received several representations from aggrieved consumers, traders and associations complaining against widespread cheating and unfair trade practices being observed in the e-commerce ecosystem*."[1]

It is humbly submitted that mere receiving such representations does not establish the need for the proposed amendments. It should have been established beforehand that the present rules [whether under the Consumer Protection Act, 2019 (CP Act) or any other legislation] failed to deal with the alleged 'cheating' and 'unfair trade practices' in such representations. More so, 'cheating' is a criminal offence under the Indian Penal Code. Similarly, 'unfair trade practices' (UTPs) have been included under the CPA, where it has been defined comprehensively.

In addition, investigations on 'preferential treatment' and 'deep discounting/predatory pricing' – key issues that the present draft amendments aim to address – are ongoing by the Enforcement Directorate under the FDI Rules (Press Note 2) and by the Competition Commission of India (CCI) under the Competition Act, 2002. The outcomes of such pending investigations would have given more precise insights as to where regulatory gaps exist, and hence would have better informed any policy intervention with respect to concerns in the e-commerce space.

It must therefore be established that the existing available legal provisions failed to deal with the novel concerns, including those mentioned in the said representations by aggrieved consumers, for which the draft amendments have been proposed. Alas! This was not done in the present case and the government jumped to the conclusion that "*there was an evident lack of regulatory oversight in e-commerce which required some urgent action*".

[1] https://pib.gov.in/PressReleasePage.aspx?PRID=1729201

Amendments exceed the scope provided under the CP Act

Since the Consumer Protection (E-Commerce) Rules, 2020 draws its power from Section 101(2)(zg)[2] of the Consumer Protection Act, 2019 (read with Section 94). Therefore, it is important to analyse the scope provided under these sections.

> **101.** (*1*) The Central Government may, by notification, make rules for carrying out any of the provisions contained in this Act.
>
> (*2*) Without prejudice to the generality of the foregoing power, such rules may provide for, —
>
> (*zg*) the measures to be taken by the Central Government to prevent unfair trade practices in e-commerce, direct selling under section 94;
>
> **94. To** prevent unfair trade practices in e-commerce, direct selling, and to protect consumers' interest and rights, the Central Government may take such measures in the manner as may be prescribed.

A plain reading of the texts suggests that the scope of the rules under this provision should be restricted only to 'prevent unfair trade practices in e-commerce'. A comprehensive definition of 'unfair trade practices' is provided in Section 2(47) of the CP Act, 2019.

Thus, in a strict sense, the Consumer Protection (E-Commerce) Rules, 2020 must confine itself to deal with 'unfair trade practices' (as defined under the Act) happening in 'e-commerce' space to protect 'consumers' (as defined under S.2(7) of the CP Act, 2019). Any provision in the impugned rules going beyond this scope or mandate would be *ultra vires* of the CP Act.

In other words, those provisions of the proposed amendments to Rules, which do not fall into the ambit of 'unfair trade practices' or are not meant to protect 'consumers' as defined under the Act, would be exceeding the mandate provided under the Act. In this regard, many provisions of the proposed amendments to the Rules, though meant to address important concerns, appears to be outside of the said mandate (see below in Comments on Merit).

Goes beyond consumer-facing concerns

Most of the provisions in the proposed amendments are largely meant for platform-to-business (P2B) concerns (or business-to-business (B2B) to some extent), and are not in strict sense consumer-facing concerns. Though intent to address such P2B concerns is

[2] **There seems to be a typographical error in the opening lines of the E-Commerce Rules, 2020, which may be corrected. There is no clause (zg) for sub-section 1 of section 101, it is for sub-section (2).**

welcome, it is humbly submitted that the consumer protection regime is not the right framework to deal with them, even though it may indirectly affect consumer.

The most crucial underlining issue with respect to P2B concerns is the maintenance of 'platform neutrality'[3] by e-commerce entities. To ensure platform neutrality, the emerging consensus is two-fold: (a) CCI to deal with it on case-by-case basis; and (b) crafting a new P2B regulation (maybe on the lines of EU's Digital Market Act) after considering various facets in an in-depth manner and involving a multi-stakeholder process. An excellent P2B regulation to discipline platform neutrality would require a whole-of-government approach, including the competition regime, data protection regime and FDI rules in the e-commerce space, among others.

Platform neutrality is an essential yet very delicate matter, which needs to be dealt with in a coordinated manner. As the digitalisation of Indian market is still at a nascent stage, any P2B regulation optimality is also very important.

Ambiguity

The E-Commerce Rules largely fail to consider unique models of e-commerce and impose the same or similar obligations upon them. A 'one-size-fits-all' approach adopted, that too with this kind of micro-detailed rules, would, among other things, create ambiguity and uncertainty. This will also harm future innovations and emerging e-commerce models. This may pose a hurdle in the growth of the e-commerce ecosystem, which is still at a nascent stage in India. Since e-commerce has proved to yield several benefits to consumers, the proposed amendments can go against consumer interests.

Burden and Cost of compliance – smaller and new firms

Another issue that needs to be kept in mind is the ease of doing business for smaller and newer firms. The proposed amendments would most likely increase the compliance burden and costs related to it, on not only the new and upcoming e-commerce entities (start-ups), but also sellers on such entities. This will badly hurt small players, which may either go out of the market or hesitate to be part of the emerging digital market in India.

These proposed regulations can pose as entry barriers, which will hurt competition in the emerging digital economy.

Overlapping jurisdictions

At most places, the proposed amendments have entered into the domain of other regulators, particularly the data protection/regulation regime and competition regime.

[3] 'Platform neutrality' refers to non-discriminatory treatment by the platform towards all the sellers that are linked to it.

While synergy must be needed with such other regulations, addressing those under the consumer protection rules can be futile.

Apart from creating new fronts for regulatory turf-wars, it will also add to policy uncertainty prevailing in the digital space, which will adversely affect investment and growth of the e-commerce ecosystem. This hence may go against consumer interests.

Discrimination between online and offline

Many of the provisions of the proposed amendments do not apply to brick-n-mortar players, thus creating an uneven playing field. There will be more regulatory burden on online players, which will discourage small businesses from onboarding. It is understood that the government intends fast onboarding of small businesses on e-commerce platforms. This intent may get a jolt due to the proposed amendments.

Misuse of executive's rule-making power

Last but not the least, most of the proposed amendments are better suited to be addressed under a substantive law than to be dealt under rules made by the executive. The rigour of the parliamentary process is mooted before such proposed amendments become the law of the land. In this sense, the proposed amendment seems to be a misuse of the executive's rule-making power.

Comments on Merits

1. Amendment to the definition of "e-commerce entity" [Rule 3(1)(b)]

The proposed amendment widens the existing definition of "e-commerce entity" to include: (i) any entity engaged for the fulfilment of orders and (ii) any 'related party' as defined under the Companies Act, 2013.

Vide this proposed definition, specific logistics (like warehouses), delivery systems (delivery boys, postal firms, including India Post) and perhaps even payment firms would be part and parcel of the term "e-commerce entity" and so will be any 'related parties' (e.g. having a common chain of directors, more than 10% ultimate common shareholders, 5% shareholding in related entities etc.). In sum, almost the whole e-commerce ecosystem will be part of the definition of 'e-commerce entity' and all the provisions will apply to all parts of the ecosystem *mutatis mutandis*.

Therefore, this inclusive definition will pose severe confusion, ambiguity and interpretation problems in disputes and for compliance purposes. A mere plain reading

of the existing rules and the proposed amendments keeping this comprehensive definition makes it difficult to grasp many provisions.

For instance, would logistic, delivery and e-payment firms also have same liabilities, responsibilities and duties of 'e-commerce entity' (as per the existing definition)? Similarly, the proposed amendment sub-rules 6(5) and 6(6) pertains to relationship between 'e-commerce entity' with those that have already been included in the definition. Say, for example, 6(6)(b) requires none of the related parties to be enlisted as sellers. Since, as per the proposed broader definition, 'related parties' are also included in the term 'e-commerce entities', making the provision highly confusing.

It may also be noted that the Parent Act – the Consumer Protection Act, 2019 – uses the definition "electronic service provider," which is akin to the term "e-commerce entity" used under the Rules. This was perhaps deliberately done to align with the term "e-commerce entity" under different regulations like FDI Rules. The proposed amendment will, therefore, negate such alignment of definitions.

Recommendation: In light of the above, CUTS recommends that the proposed amendments be taken back. Let the existing distinction between 'e-commerce entities' and 'entities engaged for the fulfilment of orders' continue.

2. Cross-Selling [Rules 3(1)(c) and 5(12)]

The existing definition under 3(1)(c) suggests that a consumer purchases 'from' e-commerce entities, which might not be the case if it is a 'marketplace e-commerce entities' where the purchase is actually from any seller enlisted 'at' such e-commerce entity.

Secondly, the definition of cross-selling does not give a clear picture of what it means. It does not seem to correspond with the general meaning of the term cross-selling. Therefore, an explanation of this sub-rule can add some clarity. The purpose of this provision is also not clear.

Under Rule 5(12) e-commerce entities that are engaged in cross-selling are obligated to provide adequate disclosure to consumers, viz.: (a) name of the entity providing data for cross-selling, and (b) data of such entity used for cross-selling.

While the concern of data sharing of consumers/users by digital market players without the knowledge of such consumers/users is genuine, dealing with the same under the consumer protection rules does not seem to be a correct approach. A comprehensive data protection regime (Personal Data Protection Bill), which is likely to be enacted anytime shortly, is the proper forum for this purpose. The PDP Bill covers the disclosure requirements, including the kinds mentioned in the proposed amendments.

Recommendation: As this proposed provision is not explicit and goes into the upcoming data protection regime domain, the same either may be deleted or sufficiently reviewed to engender clarity. The purpose behind this proposition may also be communicated to the public.

3. Fall back liability [Rules 3(1)(d) and 6(9)]

Though the definition of 'Fall back liability' under Rule 3(1)(d) is quite narrow in scope (only when any seller fails to deliver due to negligent conduct etc.), it can open a pandora box. It would be easy in future to widen the scope of such rules, viewing the ease with which Executive can amend rules. Holding marketplace e-commerce entities liable under Rule 6(9), goes against the fundamental legal principle to hold such entities accountable for conducts of third parties.

It is also to be noted that 'marketplace e-commerce entities' are mere 'intermediaries' and enjoy safe harbour against third-party conduct. Technically sellers on e-commerce platforms are not their agents; they operate on a principal-to-principal basis. The FDI rules under Press Note 2 warrant marketplace entities to not control any sellers on their platform and not to provide any warranty for goods sold on such marketplace. Thus, the proposed amendment also goes against the spirit of FDI rules.

Further, the phrase 'loss to consumer' has been left open-ended. It is not clear whether the loss is limited to financial losses or includes related losses. This demands a clarification.

Furthermore, placing such liabilities on e-commerce entities may also harm small sellers as the former would be reluctant to onboard them on their platforms, fearing defaults in delivery. It may also place hurdles for new and upcoming start-ups that may not withstand such liabilities, thus harming the growth of the sector.

It is understood that there may be fly-by-night sellers operating to dupe consumers, but the proposed amendments may not be the right way in dealing with them. Instead, policing and law enforcement should be made more effective to catch hold of such culprits. Marketplace e-commerce entities can help in providing evidence based on their digital trails.

Recommendations: In light of the aforesaid, CUTS proposes the deletion of the proposed amendments related to "Fall back liability" and resists any temptations to introduce such a concept.

4. Flash sale [Rules 3(1)(e) and 5(16)]

The definition of 'Flash sale' in Rule 3(1)(e) is quite ambiguous. Phrases like 'significantly reduced prices', 'high discounts', 'attractive offers', 'fraudulently intercepting the

ordinary course of business' etc. are very subjective and unclear. Rule 5(16) imposes a blanket ban on 'flash sales'.

Even after the clarification in the press release (of June 21) that third-party sellers' flash sales are not banned, the confusion remains due to the ambiguity of the definition. Usage of another terminology 'back to back' sales, adds to the prevailing confusion.

This may also be contradictory for some e-commerce entities as the FDI rules specifically prohibit marketplaces from exercising an influence on pricing. Further, such provisions do not apply to brick and mortar counterparts, creating an uneven playing field.

Such confusion and ambiguity may harm the emerging e-commerce ecosystem in India, where consumers would like a promotion. It must also be noted that most consumers eagerly look forward to sales on e-commerce platforms. Thus, any blanket ban would harm consumer interests.

Recommendation: The provisions with respect to 'Flash sale' may either be deleted or thoroughly reviewed and made unambiguous. There should not be any ban on sales.

5. Mis-selling [Rules 3(1)(k) and 5(11)]

'Mis-selling' by any seller as envisaged in the proposed amendments to the E-Commerce, 2020 can be very well dealt with within the provisions of 'unfair trade practice' and 'misleading advertisement' of the CP Act, 2019.

Further, liability for mis-selling should not be on the e-commerce entity, if any seller (third party) indulges in the same.

Recommendation: The provisions with respect to 'mis-selling' may either be deleted since the same can be dealt with relevant provisions in the parent Act i.e., CP Act, 2019.

6. Registration with DPIIT [Rule 4]

As per the June 21 PIB Press Release, the requirement for every e-commerce entity, which intends to operate in India to register with the Department of Promotion of Industry and Internal Trade (DPIIT) has been proposed to help create a database of genuine e-commerce entities for consumers to verify the genuineness of the entity before transacting on it.

It is to be noted that the E-Commerce Rules, 2020 already have provisions for mandatory disclosure requirements for e-commerce entities, which include the physical address and contact details etc. Such information can also be loaded on the website of the consumer protection regulator or the website of D/o Consumers Affairs for consumers to vet e-

commerce entities. Thus, serving the purpose for which this extra registration requirement has been proposed.

This extra layer of registration can also be looked at from the perspective of ease of doing business as this can increase the compliance cost of entities. This would particularly hurt the new start-ups and upcoming players.

Recommendation: This proposed extra layer of registration with DPIIT may be relooked and, if possible, done away with if there are alternative arrangements available to consumers to vet the genuineness of e-commerce entities.

7. Prohibition on display or promotion of misleading advertisement [Rule 5(4)]

Misleading advertisement has been dealt with within the CP Act, 2019, which should suffice to discipline the sellers, whether online or offline. There are other codes that deal with misleading advertisements. For instance, the Food Safety and Standard Act and Drugs & Cosmetics Act have provisions regarding misleading advertisements related to food and drugs, respectively. In addition, the Advertising Standard Council of India also has rules on the subject matter and has a monitoring mechanism in place.

Bestowing the e-commerce entities with an extra duty to regulate advertisement on its platform can not only increase the compliance burden of such entities, but it may also be going beyond its mandate as an 'intermediary'. In addition, the sellers on the platform can face another layer of regulation, which may enhance their cost of compliance.

Recommendation: This provision may be deleted, as 'misleading advertisement' is significantly regulated under the parent Act and other related laws.

8. Appointment of various officers for grievance redressal [Rules 5(5)(a), 5(5)(b), 5(5)(c) and 5(5)(d)]

The proposed amendments require the appointment of a Chief Compliance Officer (COO) by e-commerce entities, in addition to the existing requirement to appoint a grievance officer and nodal contact person. There also seems to be functional overlap between these three officers in an e-commerce entity.

This would add to the compliance burden of e-commerce entities, which will hurt more to start-ups and upcoming e-commerce platforms. Our new Central Farm Acts envision e-commerce platforms to be established by farmer cooperatives and other entrepreneurs, for which there is significant ease of establishment. Imagine the cost and burden of compliance on such new entities from these new requirements that the proposed amendments are bringing.

In addition, there are overlaps with similar obligations applicable to 'intermediaries' under the IT Act. It is not clear whether the same person can be appointed as a grievance officer to cater to the requirements of the e-commerce rules and intermediary rules.

Consumers need a contact point on an e-commerce entity, where s/he can communicate their grievances. Consumers want the e-commerce ecosystem to flourish and not be bogged down by unnecessary regulatory requirements. Optimality of regulation is a must.

Recommendation: The requirement of having multiple officers may not be necessary for grievance redressal. Thus, the proposed amendment needs to be reviewed, including the concept of 'personal liability' for COOs.

9. Country of Origin, and more [Rules 5(7)(a), 5(7)(b), 5(7)(c)]

There is already an existing provision whereby e-commerce entities must provide 'country of origin' of products on their platforms. The proposed amendments introduce additional requirements such as filter mechanism, notification regarding the origin of goods at the pre-purchase stage, and obligation to suggest alternatives to ensure fair opportunity for domestic goods. Further, e-commerce entities would be required to provide a ranking for goods in cases of imported products, ensuring that ranking parameters do not discriminate against domestic goods and sellers.

Are these additional requirements essential? Is it easy to suggest alternatives? Would it be mandatory for e-commerce entities to provide 'ranking' of goods? If yes, whether those platforms which do not provide such rankings will have to provide for this necessarily? Will this not substantially increase the cost of compliance and hurt new and upcoming players?

Most importantly, whether in suggesting alternatives and ranking, would marketplaces be able to maintain their neutrality and not go beyond their role as mere facilitators? These are questions that need to be answered before finalising the proposed amendment. Most likely, the answers would be in negative.

Under the proposed amendments, the entity will also be required to mention the name and details of any importer from whom it has purchased such products or who may be a seller on its platform. In this regard, firstly, it may be noted that 'marketplace e-commerce entities' do not purchase or sell goods. Secondly, if sellers are required to mention such names and details, it will enhance their compliance burden, which will adversely affect small online sellers. Thus, this may also go against the present public and private efforts to onboard small businesses as digitalisation becomes imperative in the pandemic-ridden world.

Secondly, there are no such compulsions on the offline sellers; hence this would create an uneven playing field between offline and online sellers and would act as a disincentive for small players to go online.

Recommendation: Providing any additional requirement apart from displaying the 'country of origin' may be guarded against. When the e-commerce ecosystem is evolving and for consumers' good, increasing compliance burden on entities and sellers can go against consumer interests.

10. Private label and 'platform neutrality' [Rules 5(14)(d) and 5(14)(f)]

The intent behind these provisions seems to check any discriminatory practices adopted by any e-commerce entity favouring private label (or its brand) and other substitutable products on its platform.

It is part of the 'platform neutrality' bracket, which is an important issue to be dealt with. However, the consumer protection regime does not seem to be a suitable platform to deal with this issue since these are platform-to-business (P2B) concerns and not direct consumer concerns. While CCI can deal on a case-by-case basis under the competition regime, we may require a separate P2B regulation (such as EU's Digital Market Act) to avoid any breach of 'platform neutrality' by e-commerce entities.

Recommendation: The consumer protection regime should restrict itself to direct consumer-facing concerns and leave business-side concerns for other relevant regulatory regimes.

11. Regulation of consumers' data [Rules 5(12), 5(14)(e), 5(14)(f) and 6(6)(a)]

The provision requires express and affirmative consent of consumers regarding the use of their data (which are also called users' data or 'personal data' or personal information under existing or upcoming regimes).

Data regulation should be left on the data regulation regime under IT Act or the upcoming PDP Bill. It will be futile to open another front to regulate such data, including posing severe jurisdictional overlap problems.

As far as 'leveraging' of data collected by platforms to use for providing unfair advantage to its related parties and associated enterprises are concerned [Rule 6(6)(a)], it also comes within the bracket of 'platform neutrality', which need to be dealt by the CCI under the Competition Act. A new P2B regulation can also be introduced in this regard. The consumer protection regime is not the right forum to deal with such issues.

Recommendation: The consumer protection regime is not the right legal framework to deal with the regulation of consumers' data. It is better to leave this to be dealt with under the data protection regime. The issue of 'platform neutrality' should be left for the CCI. D/o Consumer Affairs may also like to propose a new P2B regulation, which DPIIT can look into.

12. Abuse of dominance [Rule 5(17)]

The proposed amendment to check abuse of dominance by e-commerce platforms should be better left for the CCI to deal with under the Competition Act, 2002. It would be futile to have dual regulation on the same subject matter. CCI is already facing turf wars with some other regulatory authorities like TRAI and SEBI. Let us not open another front.

Recommendation: Delete the proposed Rule 5(17)

13. Liabilities of marketplace [Rules 6(5), 6(6)(b), 6(7)]

The proposed amendments to add new liabilities of marketplace e-commerce entities are mainly related to business-to-business (B2B) or P2B concerns and should not be part of the consumer protection regime. They may indirectly affect consumer interests, but regulating them under consumer protection law would add unnecessary complexity to a consumer-friendly regime. It will disturb the simplicity of the present regime. In other words, most proposed amendments would be either *ultra vires* to the parent law or would be against its spirit.

Rule 6(5) extends the concept of 'platform neutrality' to logistic service providers, which is fine as a concept, but the same need not be dealt with under the consumer protection regime. It should be better left for the competition regime to deal with such issues.

More so, if we apply the proposed amendment to the definition of 'e-commerce entity', all logistic service providers will be part and parcel of this definition and would be required to adhere to all obligations assigned to any 'e-commerce entity'. One can imagine the complexity of viewing the desired simplicity of a consumer-friendly consumer protection regime.

The Rule 6(6)(b) requires an e-commerce entity to ensure that none of its related parties and associated enterprises are enlisted as sellers for sale to the consumer directly. This will surely hurt the domestic e-commerce entities, as, under FDI rules, the foreign entities are already obliged to follow this.

It is understood that the intent behind this proposal is to ensure platform neutrality, which can better be achieved through a stand-alone P2B regulation and/or be dealt with on a case-to-case basis by the CCI. Burdening this business-side concern to be dealt within the consumer protection regime is unwarranted. In the liberalised regime, enlisting

related parties and associated enterprises by marketplace e-commerce entities should not *per se* be problematic. What could be problematic is non-adherence by such entities to the principle of platform neutrality.

The proposed amendment in the form of Rule 6(7), whereby no marketplace e-commerce entity can sell goods or services to any person registered as a seller on its platform, can go against the present FDI rules and hence need to be guarded against. In any case, these are of the P2B genre and hence should not be addressed under the consumer protection regime.

Recommendation: The B2B and P2B concerns being proposed to be dealt with under the consumer protection regime should be guarded against. The main issue underlining these concerns is that of platform neutrality, which should be left for the CCI and/or any P2B regulation that may come up in the future. The consumer protection regime should retain its simplicity.

For any clarifications, please contact:

Ujjwal Kumar
Policy Analyst, CUTS International
Email: ujk@cuts.org
Mobile: +91-9199030799

****