

# **Public Consultation on the Proposed Amendments to the Consumer Protection (E-commerce) Rules, 2020**

**Submission from IT for Change**

**July 2021**



# Public Consultation on the Proposed Amendments to the Consumer Protection (E-commerce) Rules, 2020

## Response from IT for Change, July 2021<sup>1</sup>

### 1. Introduction

E-commerce in India is booming, with the industry expected to clock USD 55 billion in sales in 2021.<sup>2</sup> The Covid-19 pandemic has boosted e-commerce sales, with order volume growing by 36% in the last quarter of 2020.<sup>3</sup> In July 2021, the business consultancy firm Redseer predicted that the number of online shoppers will increase to 190 million in calendar year 2021 – a significant increase of 40 million new shoppers from the previous year.<sup>4</sup> However, the rapid expansion of e-commerce has not translated into higher levels of consumer satisfaction. Emerging digital marketplaces in India are rife with complaints of widespread cheating and unfair trade practices.<sup>5</sup> According to the Department of Consumer Affairs (housed in the Ministry of Consumer Affairs, Food and Public Distribution), over 22% of consumer grievances in India between April 2017 and February 2021 pertained to transactions on e-commerce platforms.<sup>6</sup>

Against this backdrop, the proposed amendments to the Consumer Protection (E-commerce) Rules, 2020, are laudable for attempting to expand the scope of the regulatory challenge against unfair trade practices in different models of e-commerce. Firstly, they train the spotlight on the new forms of business malpractices in the e-commerce domain that harm consumer interests: such as mis-selling [Rule 5(11)], opaque cross-selling [Rule 5(12)], and flash sales [Rule 5(16)].

Secondly, the proposed amendments recognise that in the e-commerce domain, market power is synonymous with data power. Accordingly, they seek to institute curbs on the market power of dominant e-commerce players through restrictions on the re-use of consumer information collected by e-commerce entities [Rule 5(14)(e)] and the manipulation of product search indices in response to user queries [Rule 5(14)(c)].

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<sup>1</sup> This submission has been prepared by Anita Gurumurthy, Nandini Chami, Vinay Narayan and Amshuman Dasarathy.

<sup>2</sup> <https://www.newindianexpress.com/business/2021/jul/01/indias-e-commerce-sector-to-clock-usd-55-billion-sales-in-2021-2323865.html>

<sup>3</sup> <https://www.ibef.org/industry/ecommerce/infographic>

<sup>4</sup> Supra note 1

<sup>5</sup> <https://pib.gov.in/PressReleasePage.aspx?PRID=1729201&fbclid=IwAR09V8fKGNnGyn64XfUgA2qAV2rCs0Z2Xrg5j49zhTeJZ64DKDpM3AM77qg>

<sup>6</sup> <https://theprint.in/india/over-22-of-consumer-complaints-in-india-in-last-4-years-are-linked-to-e-commerce-sector/622383/>

Thirdly, the proposed amendments are rightly grounded in the view that consumer interests are inextricably linked to a free and fair e-commerce marketplace. Consumers may welcome the shopping bargains offered by dominant e-commerce platforms, with media surveys suggesting that over 72% of consumers in India are opposed to the ban on flash sales in the proposed amendments to the e-commerce rules.<sup>7</sup> However, any gains for consumers in the short run from deep discounting and predatory sales tactics employed by dominant e-commerce companies to edge out competition will invariably lead to adverse consequences in the form of competition failure in the digital marketplace. This will hurt consumer interests in the long term. As Lord Tyrie, a former head of the United Kingdom's Competition and Markets Authority observed in 2019, "markets, mergers and consumer protection legislation all [should] contribute to the same end".<sup>8</sup>

Consumer protection legislation, therefore, needs to operate in lockstep with competition law towards the creation of a level playing field for e-commerce entities. To put this differently, all aspects of consumer welfare cannot be remedied through consumer protection rules for the e-commerce domain. Regulation to specifically curb monopolistic tendencies in the digital marketplace should also be implemented in parallel, such as the European Commission's proposed Digital Markets Act that aims to address market-distorting business practices of dominant platforms to create a level playing field that in the final analysis guarantees consumer welfare.<sup>9</sup> Sector-specific legislation of e-commerce models may also become important as the fine balance between public interest and creating an enabling environment for e-commerce innovation has to be set differently in different domains. For example, China has recently announced new regulations that limit for-profit business models and prohibit foreign investment in the private education industry (including in the ed-tech marketplace)<sup>10</sup> to overhaul a sector that state authorities say has been "hijacked by capital".<sup>11</sup>

The Consumer Protection (E-commerce) Rules, 2020, (hereinafter 'Draft Rules') is a useful starting point to tackle these challenges. However, we believe, its effectiveness hinges on addressing some significant gaps in the current text, including:

- The homogeneous application of transparency and accountability obligations across all classes of e-commerce entities, without attention to excessive regulatory burdens on smaller players.

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<sup>7</sup><https://theprint.in/economy/72-consumers-in-india-against-ban-on-flash-sales-on-e-commerce-sites-survey-finds/700202/>

<sup>8</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/781151/Letter\\_from\\_Andrew\\_Tyrie\\_to\\_the\\_Secretary\\_of\\_State\\_BEIS.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf)

<sup>9</sup>[https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets\\_en#what-are-the-benefits-of-the-digital-markets-act](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en#what-are-the-benefits-of-the-digital-markets-act)

<sup>10</sup> According to a document authored by China's State Council and the Communist Party's Central Committee. See

<https://www.thehindu.com/news/international/china-forces-tutoring-companies-to-go-non-profit/article35515541.ece>

<sup>11</sup> <https://www.bloomberg.com/news/articles/2021-07-25/china-to-overhaul-private-education-sector-hijacked-by-capital>

- Lack of clarity on the applicability of the prohibition on flash sales.
- Lack of harmonisation with competition law and personal data protection legislation (existing provisos in the Information Technology Act, 2000 as well as the draft Personal Data Protection bill).
- Absence of guarantees for public scrutiny of product ranking algorithms.
- Omission to uphold the individual and collective economic rights of platform users (third-party sellers and consumers) in e-commerce datasets currently enclosed by dominant platforms.

The following sections discuss these gaps in greater detail and provide specific recommendations on the way forward.

## 1. A differentiated approach across classes of e-commerce entities

The Draft Rules seek to impose transparency and accountability obligations upon e-commerce entities in the interest of consumer welfare, such as:

- appointment of a Chief Compliance Officer,<sup>12</sup> Nodal Contact Person,<sup>13</sup> and Resident Grievance Officer;<sup>14</sup>
- setting up of a Grievance Redressal Mechanism on the e-commerce entity's website;<sup>15</sup>
- personal liability on the Chief Compliance Officer if they fail to exercise adequate due diligence on the part of sellers;<sup>16</sup>
- fall-back liability on e-commerce entities for failure to deliver the goods or services ordered by a consumer due to negligent conduct, omission, or such acts by the seller.<sup>17</sup>

According to Rule 3(1)(b) of the Draft Rules, the definition of e-commerce entity includes “any person who owns, operates or manages digital or electronic facility or platform for electronic commerce” and their associates and related parties except for third-party sellers merchandising their wares on e-commerce marketplaces. Transparency and accountability obligations are proposed to be implemented horizontally and uniformly across all e-commerce entities. There is no distinction between dominant “marketplace e-commerce entities” and smaller retail start-ups operating an inventory model of e-commerce.

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<sup>12</sup> Rule 5(4)(a) of the Draft Rules.

<sup>13</sup> Rule 5(4)(b) of the Draft Rules.

<sup>14</sup> Rule 5(4)(c) of the Draft Rules.

<sup>15</sup> Rule 5(4)(d) of the Draft Rules.

<sup>16</sup> Rule 5(4)(a) of the Draft Rules.

<sup>17</sup> Rule 6(9) of the Draft Rules.

Such a blanket approach is likely to prove to be onerous and cumbersome for smaller e-commerce companies and start-ups with limited revenue and small employee bases. The Competition Commission of India's 2020 Market Study on E-commerce in India highlights that micro, small, and medium enterprises (MSMEs) play a critical role in digital retail commerce. Over 45% of manufacturing output comes from MSMEs and nearly 43% participate in online sales.<sup>18</sup> Provisions such as the imposition of fall-back liability may act as a hurdle for new and upcoming start-ups that may not have the capital to withstand such liabilities, thereby harming the overall growth of the sector.

## Recommendations

1.1 A differentiated approach to regulation of e-commerce entities should be adopted, with a clear distinction between the obligations of entities operating in the marketplace mode and single brand/multi-brand retailers deploying an inventory model. Within each category of e-commerce business, the thresholds for transparency and accountability obligations/duties should be separately delineated on the basis of a range of factors: user base, market capitalization and so on. Such a delineation would protect consumer interests, without having a detrimental effect on the functioning of smaller entities.

1.2 Targeted legislation to tackle specific challenges for transparency and accountability arising from dominant marketplace e-commerce entities may be essential. A leaf can be taken out of the European Commission's proposed Digital Markets Act, 2020 that specifically targets 'gatekeeper platforms'. The Act defines a 'gatekeeper'<sup>19</sup> platform entity as one which satisfies the following criteria: "(a) it has a significant impact on the internal market; (b) it operates a core platform service which serves as an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future."<sup>20</sup>

<sup>18</sup> [https://cci.gov.in/sites/default/files/whats\\_newdocument/Market-study-on-e-Commerce-in-India.pdf](https://cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf)

<sup>19</sup> <https://www.linklaters.com/en/insights/blogs/linkingcompetition/2021/january/digital-platforms-the-gatekeepers-under-the-eus-new-digital-markets-act>

<sup>20</sup> Digital Markets Act, Art. 3(1), <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN>

## 2. Clarity regarding the ban on flash sales

Rule 5(16) of the Draft Rules bans e-commerce entities from organising a “flash sale” of goods or services offered on their platforms.<sup>21</sup> A “flash sale” has been defined in Rule 3(1)(e) of the Draft Rules as follows:

a sale organised by an e-commerce entity at significantly reduced prices, high discounts or any other such promotions or attractive offers for a predetermined period of time on selective goods and services or otherwise with an intent to draw large number of consumers. Provided such sales are organised by fraudulently intercepting the ordinary course of business using technological means with an intent to enable only a specified seller or group of sellers managed by such entity to sell goods or services on its platform.<sup>22</sup>

Subsequently, the Ministry of Consumer Affairs, Food and Public Distribution issued a press release with the clarification that:<sup>23</sup>

Conventional flash sales by third party sellers are not banned on e-commerce platform. But, certain e-commerce entities are engaging in limiting consumer choice by indulging in “back to back” or “flash” sales wherein one seller selling on platform does not carry any inventory or order fulfilment capability but merely places a “flash or back to back” order with another seller controlled by platform. This prevents a level playing field and ultimately limits customer choice and increases prices.

Without a definition of what constitutes “conventional flash sales” and providing the distinctions between ‘conventional’ and ‘fraudulent’ flash sales, the rules and the clarification compound regulatory uncertainty.<sup>24</sup> It is not clear if the clarification means suspension of big festival sales on major e-commerce platforms.<sup>25</sup> Media reports suggest that there is already widespread confusion among e-tailers and sellers in this regard.<sup>26</sup>

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<sup>21</sup> Rule 5(16) of the Draft Rules.

<sup>22</sup> Rule 3(1)(e) of the Draft Rules.

<sup>23</sup> The Ministry of Consumer Affairs, Food and Public Distribution’s Press Release 1729201, dated 21 June 2021.

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

<sup>24</sup> As the Centre for Internet and Society has highlighted in its submission. <https://cis-india.org/internet-governance/centre-for-internet-society-e-commerce-amendments>

<sup>25</sup> <https://www.thehindu.com/news/national/govt-moots-proposal-to-ban-flash-sales-on-e-commerce-sites/article34895024.ece>

<sup>26</sup> <https://economictimes.indiatimes.com/tech/newsletters/morning-dispatch/e-commerce-confusion/articleshow/83767528.cms?from=mdr>

## Recommendation

2.1 An explicit clarification is required about the regulatory intent of the provision on prohibition of flash sales. If the intent was to ban predatory pricing tactics of marketplace e-commerce entities, it is then recommended that the Draft Rules be amended to state as follows: “No e-commerce entity shall organize any sale that is in contravention to para 5.2.15.2.4 (ix) of the Consolidated FDI Policy Circular of 2020”. This para in the Consolidated FDI Policy Circular specifies that “E-commerce entities providing [a] marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.[...] Cash back provided by group companies of marketplace entity to buyers shall be fair and non-discriminatory.”

However, if this is not the intent of the Draft Rules, it is recommended that further clarity be brought in the definition of “flash sale” in Rule (3)(1)(e).

### 3. Harmonisation across regulatory jurisdictions

The Department of Consumer Affairs has taken a long-term, structural view of consumer protection in the Draft Rules to address the implications of anti-competitive tendencies in the e-commerce marketplace and the abuse of data power by dominant e-commerce players. While this frame is useful, it is also vital that the Draft Rules do not exceed the ambit of the parent legislation, i.e., the Consumer Protection Act, 2019, when attempting to address these problems. This is because any provision of the Draft Rules that exceed the mandate of the Consumer Protection Act, 2019 are liable to be struck down as ultra vires.

The proposed amendments on the ban of sale of “private labels”<sup>27</sup> as well as the prevention of abuse of its dominant position in the market by an e-commerce entity,<sup>28</sup> while laudable, impinge upon matters that currently fall under the jurisdiction of the Competition Commission of India. After the enactment of these rules, if there is a dispute pertaining to these provisions, there will be confusion regarding whether the violations of such provisions should be examined by the Competition Commission of India or whether it is a matter for adjudication by the Central Consumer Protection Authority. The overlaps in jurisdictions between the competition and consumer protection authorities could be easily exploited by dominant e-commerce entities to evade their obligations through forum shopping.

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<sup>27</sup> Rule 5(14)(d) and (f) of the Draft Rules.

<sup>28</sup> Rule 5(17) of the Draft Rules.

Similarly, the proposed provision in the Draft Rules requiring e-commerce entities to obtain consent from consumers for the disclosure of their personal information to third parties<sup>29</sup> also touches upon matters that are currently within the remit of the Information Technology Act, 2000 – the duties and liabilities of body corporates in relation to the digital processing of the sensitive personal information and data of third parties.<sup>30</sup> Harmonisation of penalties for personal data breaches across different pieces of legislation is important not only for coherence between the Draft Rules and the Information Technology Act, 2000, but also for adherence to the proposed Personal Data Protection Bill, when it is enacted as a law. In order to fully protect personal data of consumers, competition law also needs to be amended so that privacy considerations emerging from data pooling are an important criterion in evaluating the permissibility of mergers or acquisitions in the digital domain. For example, in January 2021, soon after WhatsApp announced that it would be sharing its customers' data with Facebook for enhancing targeted advertising without giving users any meaningful opt-out policy, the Turkish Competition Authority issued an injunction for suspension of the data integration of users in Turkey until such time that an ex-officio investigation into potential anti-competitive ramifications of this business measure is closed out.<sup>31</sup>

## Recommendations

3.1 A robust mechanism of cooperation between the Consumer Protection Authority and the Competition Commission of India needs to be adopted to prevent regulatory overlap about issues pertaining to anti-competitive conduct by e-commerce entities. This pertains to matters touched upon by Draft Rules 5(14)(d), 5(14)(f) and 5(17). In the long run, it would be desirable for India to institute a single authority for adjudicating competition law and consumer protection disputes, similar to countries such as Finland,<sup>32</sup> Ireland,<sup>33</sup> the UK,<sup>34</sup> and many others.<sup>35</sup>

3.2 Rule 5(14)(e) needs to be amended to: “[No e-commerce entity] shall make available any information pertaining to the consumer to any person other than the consumer without the express and affirmative consent of such consumer, obtained in accordance with the provisions of the Information Technology Act, 2000, and other relevant legislation on personal data protection as may be applicable.”

3.3 The following new rule be included in the Draft Rules: “The provisions of these Rules shall be in addition to, and not in derogation of any other law for the time being in force including, but not limited to, the Competition Act, 2002 (12 of 2003), the Information Technology Act, 2000 (21 of 2000) and other relevant legislation on personal data protection as may be applicable.”

<sup>29</sup> Rule 5(14)(e) of the Draft Rules.

<sup>30</sup> <https://www.legal500.com/developments/thought-leadership/personal-data-protection-law-in-india/>

<sup>31</sup> <https://www.rekabet.gov.tr/en/Guncel/competition-board-launched-an-investigat-c9382b8cb15ceb11812900505694b4c6>, cited in Kilic, B. (forthcoming) Turkey v. Facebook – The competition battle over WhatsApp. IT for Change publication.

<sup>32</sup> <https://www.kkv.fi/en/about-us/>

<sup>33</sup> <https://www.ccpc.ie/business/about/about-us/>

<sup>34</sup> <https://www.gov.uk/government/organisations/competition-and-markets-authority>

<sup>35</sup> <https://www.ftc.gov/policy/international/competition-consumer-protection-authorities-worldwide>



#### 4. Transparency of ranking algorithms

Rule 5(7)(c) of the Draft Rules require e-commerce entities to “provide ranking for goods and ensure that the ranking parameters do not discriminate against domestic goods and sellers”.<sup>36</sup> Similarly, Rule 6(3)(f) requires e-commerce entities to provide users with “an explanation of the main parameters which are most significant in determining the ranking of goods or sellers on its platform”. While both these provisions are welcome additions in the interest of consumer protection, we believe that it is necessary for the Draft Rules to go further to overcome the unilateral and opaque informational intermediation practices of e-commerce entities that enable them to wield immense power over their users (both third-party sellers and consumers). E-commerce platforms are currently able to deploy their intelligence advantage to game market transactions, without any limits. They have been known to engage in algorithmic tactics that misrepresent supply and demand of goods and services, and adopt nudging practices that manipulate consumer choices.<sup>37</sup> Therefore, a specific counter-measure against algorithmic manipulation of product searches is necessary.

#### Recommendation

4.1 Rule 6(3)(f) should be amended in the interest of consumer protection, as follows:

“[Every marketplace e-commerce entity shall] ensure transparency, individually and collectively, about the processes that are used to determine the ranking of goods or sellers on its platform through an easily and publicly available description drafted in plain and intelligible language. This includes, but is not limited to, an explanation about the functioning of the product search and ranking algorithm and its various parameters.”

#### 5. Data rights of platform users

Draft Rule 5(18) allows for government access to any information/data held by an e-commerce entity for various purposes.<sup>38</sup> This provision grants extensive powers to government bodies to demand data from e-commerce entities without any judicial oversight or other checks and balances. Thus, such a provision fails to meet the standards of legality, necessity, and proportionality recognised by the Supreme Court in the Puttaswamy judgment.<sup>39</sup>

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<sup>36</sup> Rule 5(7)(c) of the Draft Rules.

<sup>37</sup> [https://itforchange.net/sites/default/files/add/Summary-Platform%20Planet\\_Development\\_in\\_the\\_intelligence\\_economy.pdf](https://itforchange.net/sites/default/files/add/Summary-Platform%20Planet_Development_in_the_intelligence_economy.pdf)

<sup>38</sup> Rule 5(18) of the Draft Rules.

<sup>39</sup> K.S. Puttaswamy & Anr. v. Union of India & Anr. (2017) 10 SCC 1.

On the other hand, as recognised in the Draft National E-commerce Policy 2019, e-commerce entities do not have any natural/de facto ownership rights in the transactions data and consumer information they collect in the course of their operations. As the draft policy observes: “Would an individual be expected to pay the [e-commerce] company for access to his own data? Would a Government be willing to pay private corporations for data about its citizens? These are crucial questions in determining what the Indian data regime should look like [in relation to e-commerce].”<sup>40</sup>

## Recommendations

In light of the above, we suggest that:

5.1 Rule 5(18) of the Draft Rules be deleted.

5.2 The Draft Rules be amended, and other supporting legislation on the governance of e-commerce data be enacted, to account for the following:

- the rightful access of investigatory agencies and regulatory authorities to consumer data (including personal and aggregate data, anonymised transactions data) from any e-commerce entity in the course of enquiries into complaints of business practices and malpractices. Such requests in relation to personal data must satisfy the fundamental and overarching principles of lawfulness, legitimacy, necessity, and proportionality in state processing of citizen data as underlined in Justice K.S. Puttaswamy (Retd.) vs. Union of India (2017).
- the right to data access of individual consumers in relation to their individual transactions data footprints on e-commerce platforms.
- the right to data access of third-party sellers in relation to their individual transactions data that is currently held by e-commerce platforms operating in the marketplace mode.
- the right of data cooperatives and other altruistic data organisations that are spearheading data stewardship models to demand access to raw, non-personal data resources aggregated by e-commerce entities.

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<sup>40</sup>[https://dipp.gov.in/sites/default/files/DraftNational\\_e-commerce\\_Policy\\_23February2019.pdf](https://dipp.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf)