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View: Proposed e-commerce rules place unreasonable restrictions, unconstitutional in nature

Synopsis
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E-commerce sector has been a life-line having supported consumers in the pandemic, be it basic essentials, medicines et al. Supportive policies and an enabling framework can give a real push for effectively achieving goals and targets and create a vibrant ecosystem for all stakeholders- a handle with care approach will facilitate a practical ease of business.

Yet even before the first anniversary of the Consumer Protection **E-commerce Rules** issued under **Consumer Protection Act**, 2019 (CPA), the government has suggested substantial amendments to the said Rules. The amendments have created a flutter among all the stakeholders including organizations which promote consumer protection.

The objective of the CPA is consumer protection. However, the amendments appear to be disguised e-commerce policy changes in which micro manages the supply (business end) side under the garb of consumer protection.

Several provisions of original Rules and proposed amendments are unconstitutional, go beyond the CPA or are vague. In this article we have examined some of the key issues.

E-commerce may pose unique situations for consumer protection. However, law cannot violate the basic principle of intelligible differentia under Article 14 of the Constitution. Provisions that are not imposed on offline stores, could be imposed for online business only to the extent required to address change in medium. E.g. provisions such as - non-discrimination treatment to consumers, mandatory appointment of several officers for compliance with CPA and Rules, obligation to suggest domestic alternatives when e-commerce entity sells imported products - are applicable only to e-commerce entities. Will the government direct shop keepers: If someone asks for foreign perfume, you must also show domestic perfumes. This is clearly unfair discrimination against e-commerce platforms.

Several provisions control the supply side of the business, and are ultra vires the CPA; it imposes unreasonable restriction on the trade, thus unconstitutional. They are in fact against consumer interest. To illustrate: To deal with counterfeit e-commerce sales and to assure genuine products, ABC cosmetic brand decides to launch its own website. For business reasons, it does not deal with B2C sales. Hence, it onboards its distributors across India on this website as sellers. This will be prohibited under proposed amendments; as a marketplace entity cannot do B2B transactions with sellers on its website; and as a marketplace brand cannot be used to promote goods sold on a website. Isn't this illogical?

Associated enterprises and related party sellers are not allowed to sell on the marketplace. Let us examine the issue: Several group companies wish to go online. Instead of creating separate inventory-based websites, the group creates a

single entity to manage website and logistics for the group. Each group company will sell through this website. Proposed Rules say, you can't do this! No explanation has been provided for this restriction. Another example, a conglomerate has a marketplace entity and an investment entity. Investment entity has invested in several SMEs. Such SMEs potentially being related parties, cannot sell on the marketplace of the group. So the SMEs have to choose between investment and marketplace!

The proposed Rules seek to also deal with competition law. We already have the Competition Act and Competition Commission of India (CCI), as a regulator. In January 2020, CCI published a market study on e-commerce in India and suggested self-regulation by marketplaces for certain aspects. CCI is already investigating certain alleged anti-competitive practices in the e-commerce industry. Proposed Rules go against the construct of the Competition Act. It presumes that certain arrangements are anti-competitive or against consumer interest, without any scope for rebuttal of such presumption. Similarly, Rules also introduce provisions that should get covered in the proposed Data Protection Act. Such overlap in regulations and regulators goes against tenets of a harmonious eco-system.

The Rules also have other issues e.g. several provisions are vague, which will give unreasonable discretion in the hands of the regulator; new legal liability is imposed beyond the scope of the CPA; definition of e-commerce entity is overbroad to cover tech platforms and logistic supply providers; there is no clear distinction between different models of e-commerce entities; marketplaces are being held liable to ensure seller disclosures and delivery failure by sellers. Consumer protection is paramount, no doubt. But let us not forget the proportionality principle.

The e-commerce sale in India is still below 10 % of total sales in India. The proposed Rules will impose a huge compliance burden on startups and SMEs creating unnecessary hurdles. Instead, the focus must be on consumer education and awareness.

The Central Consumer Protection Authority (CCAP) is already in place with investigation and quasi-judicial powers. Therefore, consumer protection stands protected without the need to approach consumer fora for all issues. CCPA can deal with specific instances of unfair trade practices etc., rather than blanket control of and prohibition on various business and marketing activities through Rule making.

Ideal way forward? For all new age businesses there should be a uniform mechanism for effective resolution namely by co-regulatory and self-regulatory bodies. The law should set basic principles and let the industry experts implement it.

The Government has already adopted this approach for the **OTT** industry which now has a co-regulatory model. International best practices including **OECD** 2016, follow and support such an approach for e-commerce.

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