

# Education Sector Hotline

September 09, 2020

## CONSUMER PROTECTION E-COMMERCE RULES: SHOULD ED-TECH PLATFORMS COMPLY?

The Consumer Protection (E-Commerce) Rules, 2020 ("**Rules**")<sup>1</sup> have recently been enacted under the Consumer Protection Act, 2019 ("**Act**"). For the uninitiated, India recently revamped its consumer protection laws to bring in better mechanisms for redressal of disputes, stricter liabilities, etc<sup>2</sup>.

The new Rules govern not only commonly known and understood "e-commerce" platforms<sup>3</sup> where consumers can buy/sell goods, but are applicable to almost any platform or e-commerce provider, including marketplace and inventory based models, which provide digital products or services to the consumer<sup>4</sup>.

## IS ED-TECH CONSIDERED "E-COMMERCE" AND THE ENTITY AN "E-COMMERCE ENTITY"?

The Act defines "e-commerce"<sup>5</sup> as buying or selling of goods or services<sup>6</sup> including digital products over digital or electronic network. With this wide a definition, any entity which offers services over the internet may be considered an "e-commerce entity".

Further, the Rules define an "e-commerce entity"<sup>7</sup> to mean any person who owns, operates or manages digital or electronic facility or platform for electronic commerce. This definition does not include a seller offering his goods or services for sale on a marketplace e-commerce entity.

Any Ed-Tech platform providing or facilitating services (such as online tutoring, test prep, skill based learning courses) etc. for a fee would likely fall within the definition of an "e-commerce entity".

Some clarity is provided in the Rules on different models of e-commerce entities.

The first classification is a "marketplace e-commerce entity" which is an e-commerce entity that provides an information technology platform on a digital or electronic network to facilitate transactions between buyers and sellers<sup>8</sup>. An Ed-tech platform model connecting prospective students to teachers or allowing students to purchase courses offered by different educational institutions from its platform may be covered within this definition if they are considered to be "facilitating transactions" between such students and course offerors. There are however some nuances to this connected with what is considered as offering a "service". This is discussed below.

The other classification covered specifically in the Rules is the "inventory e-commerce entity"<sup>9</sup> which is defined as an e-commerce entity which owns the inventory of goods or services and sells such goods or services directly to the consumers. Ed-Tech platforms that curate own courses and offer such courses on their platform are likely to be covered under this definition.

Depending on the model, Ed-Tech platforms will need to decide whether they are a market place or an inventory based e-commerce entity.

## ARE THE RULES APPLICABLE TO ED-TECH PLATFORMS OFFERING FEE OR FREEMIUM SERVICES?

The Rules are certainly applicable to EdTech platform which provides services for a fee. Platforms which offer services for free are exempted from the applicability of these Rules because definition of services in the Act does not include the rendering of any service free of charge.

However, questions remain on the treatment of platforms that operate on a freemium model or provide a combination of free services with paid upgrades. Such platforms will need to examine if the Rules will be applicable to all services provided or only to those aspects which are provided for a fee.

## IS IMPARTING "EDUCATION" A SERVICE?

Conflicting views have been taken by courts in India on whether educational institutes can be said to provide a "service" and therefore if such institutions are governed by the provisions of the consumer protection laws in India.<sup>10</sup> Based on the judgments, it may be possible to say that since educational institutions are not for profit in nature and do not provide commercial services, they do not fall within the purview of the consumer protection law in India. However, educational institutions are differentiated from coaching institutes, test prep centres etc which fall within the purview of service providers.<sup>11</sup>

Based on the above, an educational institution providing courses online may/may not be governed by the Act and the Rules. Ed-Tech platforms that provide a range of services including courses offered by educational institutions may still have to comply with the Rules, at least to the extent the platform is said to be offering a service vis-a-vis the consumer. Since the applicability of the Rules depends on the model adopted by Ed-Tech platform, a case by case analysis will be required to determine if compliance with the Rules is required.

## DO THESE RULES APPLY TO INDIAN PLATFORMS OR FOREIGN EDTECH PLATFORMS AS WELL?

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The Rules specifically provide that an “e-commerce entity” which is not established in India, but systematically offers goods or services to consumers in India is also governed by the Rules. There is no threshold provided in the Rules for determination of the term “systematically”. This will have to be determined on a case to case basis.

## WHAT ARE THE COMPLIANCES REQUIRED UNDER THE RULES?

### A. Applicable to all e-commerce entities.

There are certain compliances which are applicable to all e-commerce entities. Some of the key compliances are:

- **Nodal officer:** The Rules also require e-commerce entities to appoint nodal officers or an alternate senior designated functionary who is resident in India, to ensure compliance with the Act.
- **Explicit consent for purchase:** As per the Rules, recording consent of a consumer’s purchase of any goods or services should only be by way of an explicit and affirmative action. Consent cannot be recorded automatically (including in the form of pre-ticked checkboxes).
- **Grievance redressal mechanism:** Entities must establish an adequate grievance redressal mechanism and appoint a grievance officer for consumer grievance redressal. Name of the entity with its address of its headquarters and branches, designation and contact details (email, phone etc) of the grievance officer and customer care must be displayed prominently on the platform. This can be achieved by updating the website terms. Obligation to appoint grievance officer already exists under rules framed under the Information Technology Act, 2000. What is important to know is that e-commerce entities are required to ensure that the grievance officer acknowledges the receipt of any consumer complaint within forty-eight hours and redresses the complaint within one month from the date of receipt of the complaint

Additional compliances pertaining to levy of cancellation charges after purchase, refunds, price manipulations, differentiation between class of customers etc. are also provided in the Rules.

### B. Applicable to marketplace and inventory e-commerce entities

Some common compliances for both marketplace and inventory e-commerce entities include providing the following information in a clear and accessible manner to the customers:

- **Information on returns, refunds etc.:** It is now mandatory to provide information on return, refund, exchange, warranty and guarantee, delivery and shipment, modes of payment, any other similar information which may be required by consumers to make informed decisions.
- **Payment methods:** Necessary information on payment methods and security of those payment methods must be provided to consumer.
- Other information required to be provided includes any fees or charges payable by users, the procedure to cancel regular payments under those methods, charge-back options, if any, and the contact information of the relevant payment service provider.

### C. Applicable to inventory e-commerce entities:

- **No fake reviews:** Inventory e-commerce entity cannot falsely represent itself as a consumer and post reviews.
- **Return and refund in case of defect:** Platforms are required to provide refunds if services are defective, or if the goods or services are not of the characteristics or features as advertised;
- **Advertising standard:** Advertisements need to be honest and consistent with actual characteristics, access and usage of goods or services offered.

Inventory based platforms who vouch for the authenticity of goods or services (explicitly or impliedly) can be liable for actions taken in relation to authenticity of goods or services sold through the platform.

### D. Applicable to marketplace e-commerce entities:

- **Undertaking by sellers:** Entities must ensure that sellers<sup>12</sup> provide an undertaking to the entity to the extent that all descriptions, images and other content pertaining to the goods or service provided are accurate and correspond directly to the appearance, nature, quality, purpose and other general features specified in the undertaking;
- **Information:** The following information must be provided in a clear and accessible manner on the platform:
  - Details about the sellers<sup>13</sup>
  - An explanation of the main parameters which are most significant in determining the ranking of goods or sellers on its platform
- **Terms and conditions:** The terms and conditions of the entity with its sellers must provide a description of any differentiated treatment which it gives or might give between goods or services or sellers of the same category. Based on this, entities will have to clarify if the entity provides sponsored results.

In addition to the above, the Rules also provide duties for sellers on marketplaces. Some such duties include:

- **Written contract:** Sellers must have a prior written contract with the entity;
- **Information from sellers:** Sellers must provide certain information to the e-commerce entity for display on its platform including total price with breakup of all charges, all mandatory notices and information provided by applicable laws; information on the goods/services offered, name and other details of the seller’s grievance redressal officer<sup>14</sup>;
- **No fake reviews:** Similar to the inventory model, sellers also are prohibited from posting fake reviews on the platform;
- **Return and refund in case of defect:** Sellers are required to provide refunds if services are defective, or if the goods or services are not of the characteristics or features as advertised.

## WHAT HAPPENS IN CASE OF NON-COMPLIANCE?

Non-compliance with the Rules can result in a complaint being filed under the Act against the Ed-Tech platform. This could result in a legal battle and eventual imposition of monetary penalties.<sup>15</sup>

## NEXT STEPS

With the focus in the last few months moving to e-learning, Ed-tech platforms in India have grown rapidly. Increasing

number of customers also means that platforms must be careful about the claims made on the platform regarding the services offered. An action by a user, i.e. a consumer, could not only lead to legal complications but can also be a huge brand risk. Hence, it is important for platforms to look into the applicability and compliance with these Rules at the earliest possible.

– **Aparna Gaur, Aarushi Jain & Vivek Kathpalia**

You can direct your queries or comments to the authors

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<sup>1</sup> The Rules came into force on July 23, 2020

<sup>2</sup> See <http://www.nishithdesai.com/information/news-storage/news-details/article/new-consumer-protection-law-in-india-broadening-the-horizon.html> for a summary of the provisions of the Act;

<sup>3</sup> As per Rule 3(1)(i), a "platform" is an online interface in the form of any software including a website or a part thereof and applications including mobile applications;

<sup>4</sup> Rule 2 of the Rules provides that the Rules apply to *(a) all goods and services bought or sold over digital or electronic network including digital products; (b) all models of e-commerce, including marketplace and inventory models of e-commerce; (c) all e-commerce retail, including multi-channel single brand retailers and single brand retailers in single or multiple formats; and (d) all forms of unfair trade practices across all models of e-commerce*

<sup>5</sup> Section 2 of the Act

<sup>6</sup> Section 2 of the Act defines "services" as *service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service*

<sup>7</sup> As per Rule 3(1)(b) of the Rules, "e-commerce entity" means any person who owns, operates or manages digital or electronic facility or platform for electronic commerce, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity

<sup>8</sup> Rule 3(g) of the Rules

<sup>9</sup> Rule 3(f) of the Rules

<sup>10</sup> The Supreme Court in P.T. Koshy & Anr. Vs. Ellen Charitable Trust & Ors., 2012 (3) CPC 615 (SC), has held that students are not 'consumers', 'education' is not a commodity and educational institutions are not rendering 'service'. Another later judgment of the Supreme Court in Civil Appeal Nos. 7003-7004 of 2015, P. Sreenivasulu & Anr. Vs. P.J. Alexander & Anr., dated 09.09.2015, held that educational institutions would come within the purview of the Consumer Protection Act, 1986 and that education is a service

<sup>11</sup> See Manu Solanki and Ors v. Vinayaka Mission University and Ors., I(2020)C P.J210(NC )

<sup>12</sup> As per Rule 3(1)(k) of the Rules, "seller" means a "product seller" as defined under the Act. Section 2(37) of the Act defines a "product seller", in relation to a product, as a person who, in the course of business, imports, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing such product for commercial purpose and includes— (i) a manufacturer who is also a product seller; or (ii) a service provider, but does not include— (a) a seller of immovable property, unless such person is engaged in the sale of constructed house or in the construction of homes or flats; (b) a provider of professional services in any transaction in which, the sale or use of a product is only incidental thereto, but furnishing of opinion, skill or services being the essence of such transaction; (c) a person who— (I) acts only in a financial capacity with respect to the sale of the product; (II) is not a manufacturer, wholesaler, distributor, retailer, direct seller or an electronic service provider; (III) leases a product, without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor;

<sup>13</sup> As per Rule 5(3) of the Rules, details must including the name of their business, whether registered or not, their geographic address, customer care number, any rating or other aggregated feedback about such seller, and any other information necessary for enabling consumers to make informed decisions at the prepurchase stage

<sup>14</sup> For a complete list of information to be provided, see Rule 6(5) of the Rules

<sup>15</sup> See <http://www.nishithdesai.com/information/news-storage/news-details/article/new-consumer-protection-law-in-india-broadening-the-horizon.html>

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