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# 1. Background

The Indian e-Commerce market is one of the fastest growing sector today. Given the deep percolation of the internet and increased access to mobile / smart phones especially in tier II and tier III cities, the sector has seen a phenomenal growth thus far, despite the economic slowdown, reduced consumer spends owing to the pandemic. The Indian e-commerce market is further expected to become USD 11,140 Crores by 2025 from USD 4,620 billion in 2021<sup>1</sup>, This sunrise sector is predicted to contribute to 6.5% of the total retail market by 2023.<sup>2</sup>

However, the Indian regulatory framework applicable to an e-commerce business is fairly involved. An e-commerce business in India needs to comply with multiple regulations, with each one not being necessarily aligned in what constitutes an e-commerce business.

Primarily the Indian regulation segregate e-commerce businesses into two kinds, viz. inventory e-commerce entities and marketplace e-commerce entities. Inventory e-commerce entities are e-commerce entities wherein requisite inventory of goods and services is owned by those e-commerce entities and is directly sold to the consumers.<sup>3</sup> On the other hand, marketplace e-commerce entities involve e-commerce entities that provide the digital or electronic technology or the platform for facilitating the transactions between a purchaser and a seller. e-commerce entities are further classified based on the parties they cater too. An e-commerce entity may engage in Business to Business ('**B2B**') activities, or in Business to Consumer ('**B2C**') activities, or in Consumer to Consumer ('**C2C**') activities, or in Consumer to Business ('**C2B**') activities, or in any other related and variant activities.<sup>4</sup> The manner and extent to which the Indian regulations apply to each of these e-commerce entities varies. This Primer provides an insight into these various regulations and acts as a ready reference for setting up an e-commerce business in India.

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<sup>1</sup> India Brand Equity Foundation, 'E-Commerce Industry in India (2021) < <https://www.ibef.org/industry/ecommerce.aspx>> accessed 31 July 2021.

<sup>2</sup>Lok Sabha Secretariat, 'E-Commerce in India' (2021) <[http://164.100.47.193/Refinput/New\\_Reference\\_Notes/English/01022021\\_110859\\_102120439.pdf](http://164.100.47.193/Refinput/New_Reference_Notes/English/01022021_110859_102120439.pdf)> accessed 31 July 2021.

<sup>3</sup> Consolidated FDI Policy 2020 and Consumer Protection (E – Commerce) Rules 2020.

<sup>4</sup> Nishith Desai Associates, 'E-Commerce in India' (2019) <[https://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research%20Papers/E-Commerce\\_in\\_India.pdf](https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/E-Commerce_in_India.pdf)> accessed 31 July 2021

## 2. Applicable Laws

### I. Foreign Direct Investment Laws

*Relevance: E-commerce entities that seek to obtain or consider obtaining foreign funding for their operations, need to comply with the foreign direct investment laws in the country.*

#### Consolidated FDI Policy Circular of 2020<sup>5</sup>

Under the automatic route, 100% Foreign Direct Investment ('**FDI**') is permitted for a marketplace e-commerce entity engaging in Business to Business ('**B2B**') e-commerce. However, for inventory e-commerce entities, or for those undertaking activities other than B2B, no FDI is permitted.

Some other FDI conditions that apply to eligible marketplace e-commerce entities include:

- B2B transactions

Marketplace e-commerce companies may enter into B2B transactions with the sellers on the platform. They may provide them with warehousing, logistics, payment collection, and other services.

- No control over inventory

A marketplace e-commerce entity cannot exercise control (here, control involves a situation where 25% of the orders of a vendor are due to the marketplace in question or any of its group companies) or ownership over inventory. Any such ownership and control would cause the marketplace e-commerce entity to become an inventory e-commerce entity.

- Prohibition on related sellers

A seller who is a beneficiary of the marketplace e-commerce entity's equity or whose inventory is controlled by such an entity or its group companies is not permitted to sell on that marketplace.

- Disclosures

The marketplace e-commerce entity must clearly provide for the name, address and other contact details of the seller. The seller would be responsible for the delivery of goods, the customer satisfaction component, any warranty/guarantee once the sale is over.

- **Payments**

The marketplace e-commerce entity is allowed to facilitate payments as per the guidelines issued by the Reserve Bank of India (**'RBI'**), such as the Guidelines on Regulation of Payment Aggregators and Payment Gateways (**'PA and PG guidelines'**),<sup>6</sup> as outlined in Section 2.III. below.

- **Non-discrimination**

Marketplace e-commerce entities cannot influence (directly or indirectly) the prices on the platform. Additionally, warehousing, logistics, and other services provided by marketplace e-commerce entities or their related companies to vendors must be at an arm's length and in a non-discriminatory manner. Cash-back facilities must also be provided by the marketplace in a fair and non-discriminatory way.

- **Cash and carry wholesale-trading**

Marketplace e-commerce entities would have to adhere to the guidelines on cash and carry wholesale trading as specified in the above-mentioned consolidated FDI circular.

- **Exclusivity**

The marketplace e-commerce entity must not mandate any seller to sell their products exclusively on its platform.

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<sup>6</sup> Reserve Bank of India, Guidelines on Regulation of Payment Aggregators and Payment Gateways 2020.

## II. Legal Metrology Laws

*Relevance: E-commerce entities selling goods that involve pre-packaging, are required to observe the obligations under legal metrology laws.*

Legal Metrology Act, 2009 read with Legal Metrology (Packaged Commodities) Rules, 2011<sup>7</sup>

### A. Mandatory Declarations for E-Commerce Entities

E-commerce entities would need to make certain mandatory declarations on the digital or electronic network that facilitates transactions between buyers and sellers. They include:

- Contact details  

The name and address of the manufacturer. If the manufacturer is not the packer, the name and address of the packer as well as the manufacturer. Further, if the goods are imported, the name and address of the importer.
- Country specification  

In case of imported goods, the name of country of origin, manufacture or assembly.
- Generic names  

The common or generic names of the packed commodity. If the package contains multiple commodities, the name and number of commodities within the package.
- Net quantity  

The net quantity (as per standard units of weights and measures) or the number of the commodity.
- Perishable goods

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<sup>7</sup> Legal Metrology (Packaged Commodities) Rules 2011, Rule 6(10).

In case of perishable items, the 'best before' date, unless this condition is not provided for under any other law.

- Sizes

If the sizes of the items are relevant, the various sizes.

- Pre-packaged commodities

Declarations specific to 'pre-packaged' commodities under these rules.

- Others

Any other declaration as specified under the rules.

## **B. Specific Requirement for Marketplace E-Commerce Entities**

For marketplace e-commerce entities in specific, the responsibility of the correctness of the declarations would be on the manufacturer or the seller or the dealer or the importer (**M/S/D/I**), in the following scenarios:

- Hosting

When the e-commerce entity has a limited function of temporarily hosting the information of M/S/D/I on the communication system (to which M/S/D/I have access to).

- Passive conduit

When the marketplace e-commerce entity neither initiates the transmission, nor selects the receiver of the transmission, nor selects or edits the information contained within the transmission.

- Due diligence

When the marketplace undertakes due diligence in relation to the rules applicable to an 'intermediary' under the Information Technology Act, 2000 (**IT Act**), and other related laws.



### III. Payments Laws

*Relevance: E-commerce entities with online payment options (unlike cash on delivery options) and/or with online credit options without a cash withdrawal, are required to observe the laws on payments in India.*

#### PA and PG Guidelines<sup>8</sup>

‘Payment aggregators’ (‘PAs’) have been defined as entities that seek to facilitate transactions between a merchant and a customer. They enable such merchants to accept various payment instruments from the customers, so that the merchant need not set up a payment integration system. ‘Payment gateways’ (‘PGs’) on the other hand, are defined as entities that provide the technological infrastructure to facilitate online payments without the requirement of having to handle funds.

These guidelines are applicable to marketplace e-commerce entities in two ways:

- **Marketplaces offering PA services**

By a specified timeline, marketplaces must either discontinue their PA services or must separate it from their marketplace business and would need apply for authorization. It is however unclear whether a ‘Chinese Wall’ approach needs to be taken here, or a ‘drop-down subsidiary’ model needs to be taken here.<sup>9</sup>

- **Marketplaces discontinuing/not offering PA services**

Marketplaces that engage the services of a PA would be regarded as a ‘merchant’ under the guidelines. The key guidelines as applicable to such entities include the following:

- **Clear delineation**

Agreements among merchants, PAs, acquiring banks and other parties must clearly delineate the roles and responsibilities of each of the parties

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<sup>8</sup> Reserve Bank of India, Guidelines on Regulation of Payment Aggregators and Payment Gateways 2020.

<sup>9</sup> Cyril Amarchand Mangaldas, ‘FIG Papers (No. 5 : Series -1) : RBI Payment Regulations – 2009 to 2021: Bank ‘nodals’ to PA/PG licenses!’ (2021) <<https://corporate.cyrilamarchandblogs.com/2021/03/fig-papers-no-5-series-1-rbi-payment-regulations-2009-to-2021-bank-nodals-to-pa-pg-licenses/#page=1>> accessed 29 July 2021.

in relation to handling of complaints, refund transactions, return policy, customer grievance redressal mechanism, among others.

- Customer data
  - The merchant website cannot store customer card data and other related data. However, it may store limited amount of data (in compliance with applicable standards) for transaction-tracking purposes.
  - The agreement with the merchant must have clauses for the provision of security or privacy of customer data, compliance with Payment Application-Data Security Standard and incident reporting obligations. A security audit may be undertaken to check the merchant's compliances.
  - PAs may request for periodic security assessment reports from the merchants (based on risk assessment or at the time of contract renewals).

## Master Directions on Prepaid Payment Instruments<sup>10</sup>

Generally, e-commerce entities issue 'Closed System'<sup>11</sup> prepaid instruments ('PPIs'). These facilitate the purchase of products and services of the issuer entity and do not allow for cash withdrawal. For instance, Zara India provides a credit option on its website whenever an item has been returned. A consumer may use that amount to purchase another item from the company for a limited time period.

It must be noted that these PPIs cannot be used for the payments and settlements of other companies. Hence, it has been stipulated that the operation and issuance of these PPIs would not require RBI's approval.

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<sup>10</sup> Reserve Bank of India, Master Direction on Prepaid Payment Instruments 2021.

<sup>11</sup> Reserve Bank of India, Master Direction on Prepaid Payment Instruments 2021, para 2.2.1.

## IV. Information Technology Laws

*Relevance: E-commerce entities are required to comply with the information technology laws of the country, as they operate digitally.*

### IT Act and the Rules Thereunder

Under the IT Act, an ‘intermediary’ has been defined as any person who receives, stores or transmits electronic records or provides service with respect to that record, on behalf of another person.<sup>12</sup> Though online marketplaces have been made to explicitly fall within this definition, inventory e-commerce entities would also come within this broad definition.

#### A. Duties of an Intermediary under the IT Act

Duties of intermediaries under the IT Act and the rules thereunder include the following:

- Preserving and retaining

Intermediaries must preserve and retain any information as required by the Central Government.<sup>13</sup>

- Monitoring

The Central Government has the power to intercept, monitor or decrypt any data ‘generated, transmitted, received or stored in any computer resource’. Such an authorization may be granted on the basis of any for the six mentioned grounds, viz. security of the state, public order, preservation of India’s sovereignty and integrity, criminal investigations, among others.<sup>14</sup>

- Blocking

The Central Government is empowered to block public access to any information online, regardless of whether such information is hosted on websites or mobile applications.<sup>15</sup>

- Monitoring and collecting

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<sup>12</sup> Information Technology Act 2000, s 2(w).

<sup>13</sup> Information Technology Act 2000, s 67C

<sup>14</sup> Information Technology Act 2000, s 69.

<sup>15</sup> Information Technology Act 2000, s 69A.

Authorized authorities are empowered to monitor and collect traffic data to enhance cybersecurity and to identify, analyse, and prevent any intrusion or spread of computer virus.<sup>16</sup>

- **Cooperating**

Intermediaries must cooperate with the Indian Computer Emergency Response Team ('**ICERT**') when they are called upon to provide certain information, or for any other direction.<sup>17</sup>

- **Protecting**

If intermediaries dealing with sensitive personal data are negligent with implementing reasonable security measures, due to which there is wrongful loss or wrongful gain to someone, they need to compensate to the effected individuals.<sup>18</sup>

Accordingly, the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data) Rules, 2011 ('**SPDI Rules**') are applicable when persons and body corporates engaging in commercial activities undertake collection, processing, disclosure, or storage of 'personal information' ('**PI**') and/or 'sensitive personal information' ('**SPI**'). PI is defined as any information that is directly or indirectly capable of identifying a natural person. On the other hand, SPI involves personal information in the nature of passwords, financial data, biometric information, medical records, among others, as provided to the body corporate for providing a certain service.

The compliances under these rules are as follows<sup>19</sup>:

- **Privacy policy**

- The body corporate that collects, receives, handles, stores, or processes PI including SPI must provide for a privacy policy on its website (such that its available for viewing to the providers of personal information).

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<sup>16</sup> Information Technology Act 2000, s 69B.

<sup>17</sup> Information Technology Act 2000, s 70B.

<sup>18</sup> Information Technology Act 2000, s 43A.

<sup>19</sup> Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules 2011.

- Such policy must clearly contain the practices and policies of such body corporate, type personal information collected, purpose and usage of such collection, disclosure of personal information, and reasonable security practices in place.
- **Collection of PI (including SPI)**
  - Reasonable steps must be taken to ensure that the PI provider has knowledge about the collection, purpose, recipients, contact details of the agency collecting and the agency retaining any PI.
  - PI collected must be subsequently used only in accordance with the purposes of such collection.
  - Providers of PI may request for a review of their data. They may request for any corrections in case of inaccuracies, and body corporates need to oblige if feasible.
  - The body corporate must give providers an option to not provide such PI at the time of collection, or withdraw the given consent at any time. However, the body corporate may choose not to provide the relevant goods and services in case the said option has been exercised by the providers.
  - PI must be kept secure as per the standards under these rules.
  - A Grievance Officer must be appointed, whose details must be published on the website and who must redress grievances within one month.
- **Collection of SPI**
  - Before collecting SPI from the provider, the body corporate needs to obtain consent regarding the purpose and use of such data in the form of a written letter, fax or e- mail.
  - Such SPI must not be collected unless it is for a lawful purpose that is necessary for such purpose.
  - SPI cannot be retained for a period that is longer than necessary for the purposes of such data collection and usage or under law.
- **Disclosure of SPI**

- Disclosure of SPI requires prior permission from the provider, which may be included in the contract with the body corporate.
- Such prior permission is not necessary if the disclosure is for the performance of a legal obligation.
- Body corporates cannot publish SPI.
- The third-party receiving the disclosed SPI, cannot disclose it any further.
- **Transfer of SPI**
  - Transfer of SPI to another country requires consent of the PI provider and equivalent protection of the SPI by the transferee as the body corporate.
  - Additionally, such a transfer may only be made pursuant to a lawful contract.
- **Reasonable security practices for PI protection**
  - Reasonable security practices and procedures, such as a comprehensive documented information security program and information security policy that contains managerial, technical, operational, and physical security control measures that are in proportion with the information assets, must be adopted.
  - The international Standard IS/ISO/IEC 27001 is provided as an indicative standard for the level of security that is required.
  - A body corporate may follow standards other than IS/ISO/IEC codes of best practices for data protection, provided such codes of best practices are (i) approved and notified by the Central Government and (ii) certified or audited on a regular basis by an independent auditor (approved by the Central Government).
  - If a body corporate follows the prescribed or approved codes of best practices, it will be deemed to have reasonable security practices in place.

It must be noted that the non-compliance of each of the aforementioned obligations of intermediaries have stringent repercussions under the respective IT Act provisions.

## **B. Safe Harbour Protections for Certain Intermediaries**

Intermediaries are exempted from the liability of any third-party content (such as, information, data or communication link) that has been made available or hosted by them.<sup>20</sup> However, this privilege is qualified and can be availed only if, among others,:<sup>21</sup>

- **Passive conduit**

The intermediary neither initiates transmission, nor selects the receiver of the transmission, nor selects or edits the information contained within the transmission; and

- **Due diligence**

The intermediary observes due diligence while discharging the duties under the IT Act and the guidelines issued by the Central Government.

Inventory e-commerce entities would not be able to avail this safe harbour, as they would not be able to satisfy the requirement under point 1 above of being passive conduits. They would most likely actively participate in the selling processes or in the transmissions. However, the court would decide on their safe harbour eligibility on a case-to-case basis.

Additionally, such privilege would not be available if<sup>22</sup>:

- **Active participant**

Intermediary has conspired, aided, abetted, or induced the commission of an unlawful act, and

- **Public authorities**

The intermediary fails to take a timely appropriate action when it gains knowledge (upon 'receiving actual knowledge' or upon being notified by

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<sup>20</sup> Information Technology Act 2000, s 79.

<sup>21</sup> *ibid.*

<sup>22</sup> Information Technology Act 2000, s 79.

the government) that the information hosted by it is being used to commit an unlawful act.

To avoid losing its safe harbour, intermediaries must observe due diligence and additional duties in the following manner<sup>23</sup>:

- **Disclosures**

The intermediary must conspicuously publish rules and regulations, privacy policy, and user agreement on its website and/or mobile application.

- **Content of the disclosures**

The intermediary must explicitly mention in the aforementioned disclosures that a user of its computer resource may not host, display, share, upload, modify, among others, any information that is of the mentioned nature (for instance, such information is harmful to the child, or that it violates any law for the time being).

- **Periodic reminders**

The intermediary must remind the users atleast every year of its disclosures (including any changes made to them) mentioned under point 1 above as well as the fact that non-adherence with the disclosures would lead to termination of the user's right to access or use the computer resource or the removal of non-compliant data.

- **Public authorities**

Upon receiving knowledge that the intermediary (by way or a court order or upon being notified by a relevant government or its agency) hosted, stored, or published is unlawful information, it must cease doing so immediately.

- **Temporary storage of information**

Any temporary storage of information by the intermediary within a computer resource and within its control (without any human or algorithmic control for onward transmission of such information to

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<sup>23</sup> Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, Rule 3 and 7.



another computer resource) would not amount to hosting, storing, or publishing.

- **Data retention**

When the intermediary collects registration data from the user, it must be retained for at least 180 days after any withdrawal or cancellation of such registration. In certain situations, intermediaries are required to also preserve withdrawn or cancelled information for 180 days or longer, for investigation purposes, as authorized by the court or a governmental agency.

- **Reasonable security measures**

The intermediary must undertake reasonable security measures, as per the aforementioned SPDI Rules, to protect its consumer resource.

- **Assistance to governmental agencies**

The intermediary must, within 72 hours of notice from the appropriate governmental agency, provide information in its control, or assist such agency for the purposes of identity verification, prevention, investigation, detection, or prosecution of offences or cyber security incidents.

- **Reporting to ICERT**

Cyber security incidents and information related to them must be reported to ICERT by intermediaries as per the Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013.

- **Technical configuration**

It must also not partake in any act that would or has the potential to change the technical configuration or to change the normal course of operation of the computer resource for circumvention of laws.

- **Grievance redressal mechanism**

The intermediary must appoint a Grievance Officer, who, among others, would have to acknowledge a complaint (regarding non-compliance of matters specific to computer resources, including 3 of the the rules in question) within 24 hours and must dispose it within 15 days.

Complaints in relation to material involving sexual or impersonated content, must involve a reasonable endeavor by the intermediary to remove it within 24 hours. The intermediary must have in place mechanisms to receive complaints regarding non-compliance of matters specific to computer resources, including 3 of the rules in question, and regarding material involving sexual or impersonated content.

### C. The European Economic Area ('EEA') Angle

The General Data Protection Regulation ('GDPR') of the EEA regulates the processing of personal data, and the free movement of personal data.<sup>24</sup> It is applicable to the processing of personal data with respect to the activities of data controllers and processors established in the EEA.

However, the GDPR also has an extra-territoriality angle. GDPR obligations are even applicable to entities not 'established' in the EEA in two scenarios, viz. if their activities include the processing of personal data of individuals in the EEA, in connection with offering goods or services to, or the monitoring of activity of those individuals.<sup>25</sup> Hence, Indian data controllers and processors indulging in the aforesaid activities, would need to comply with the GDPR obligations accordingly.

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<sup>24</sup> General Data Protection Regulation, art 1.

<sup>25</sup> General Data Protection Regulation, art 3.

## V. Consumer Protection Laws

*Relevance: B2C E-commerce entities engaging in offering goods and/or services over a digital or an electronic network are required to adhere to the laws in relation to consumer protection.*

### Consumer Protection Act, 2019 ('CPA') read with E-Com Rules<sup>26</sup>

E-Com Rules apply to all goods and services bought or sold over digital or electronic network including digital products, all models of e-commerce (including marketplace and inventory models of e-commerce), all e-commerce retail (including multi-channel single brand retailers and single brand retailers in single or multiple formats), and all forms of unfair trade practices across all models of e-commerce.

These rules do not apply to any personal activity carried out by a natural person. Essentially, these rules only apply to online businesses that include entities that undertake commercial/professional activities on a regular or a systematic basis. Further, the rules even extend to foreign entity that systematically offers goods or services in India.

It must be noted that, a contravention of the aforementioned rules would be dealt with as per the penalties mentioned in the CPA.

#### A. E-Commerce Entities' Duties

Duties of e-commerce entities under the E-Com Rules include:

- Form

Where an e-commerce entity is a company incorporated under 1956/2013 Companies Act, Foreign Companies, or an office/branch or an agency outside India but controlled by a resident in India, it is required to appoint a nodal person of contact or alternate senior designated functionary to ensure compliance of these provisions.

- Disclosures on the website

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<sup>26</sup> Consumer Protection (E-Commerce) Rules, 2021.

It must provide information in clear and accessible manner on its website:

- legal name of its e-commerce entity;
- principal geographic address of all high court of its website;
- name/details of the website;
- email, fax, landline, mobile numbers of both the customer care and the grievance officer.

- Adequate grievance redressal mechanism

Must appoint a grievance officer who is required to acknowledge the complaint within forty- eight hours and redress it within a month.

- Imported goods or services

If the entity sells imported goods or services or has a seller (as defined under the CPA) who does, the name and details of that importer must be included on the website.

- Convergence process

Must endeavor to become a partner in the convergence process of National Consumer Helpline of the Central Government.

- Consent

Only when the consent is expressed through an explicit and affirmative action, can the entity record it for purchase of goods or services.

- Non- discrimination

No entity can discriminate between consumers of the same class or make any arbitrary classification affecting their rights under the CPA or its rules.

- Prohibition of manipulation

No entity can manipulate prices of its goods or services to gain unreasonable profit by imposing on consumers any unjustified price

after taking into consideration the prevailing market conditions, the essential nature of the good or service, among others.

- **Prohibition of unfair practices**

An e-commerce entity must not engage in any form of unfair practice.

- **Cancellation charges**

An e-commerce entity cannot impose cancellation charges on a customer, unless it has an obligation bear them when there is a unilateral cancellation of an order for some reason.

- **Refund requests**

An e-commerce entity must effect the refund payments, within a reasonable period of time, and as per the applicable laws.

## **B. Marketplace E-Commerce Entities' Duties**

Duties of marketplace e-commerce entities under the E-Com Rules include:

- **Intermediary safe harbour**

A marketplace e-commerce entity that seeks to benefit from the exemption under the IT Act, must comply with the relevant provisions under the said legislation and its rules thereunder.<sup>27</sup>

- **Accuracy undertaking**

Entities must require the sellers through an undertaking to ensure that the description, images, and other details correspond accurately to the concerned product's appearance, description, purpose among others.

- **Disclosures**

Every entity is required to provide the below-mentioned details in clear and accessible manner on its website:

- Contact and additional details of the sellers;
- A marketplace e-commerce entity, on a request in writing made by the consumer after the purchase of goods or services, is required to provide

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<sup>27</sup> Information Technology Act, 2000, Section 79.

them with all the requisite details of the seller to whom the purchase was made.

- A ticket number for each complaint raised, in order to track the status of the complaint;
  - Information relating to refund, return, exchange, warranty, guarantee, delivery, modes of payment, available payment methods, security of those payment methods, any fees, or charges payable by the user, procedure to cancel regular payments, and the contact information of the relevant payment service provider.
  - Information provided by the seller, as outlined in Section 2.V.C below;
  - A clear and intelligible explanation on the parameters taken into consideration while ranking sellers or goods on the platform.
- Differentiated treatment

In its terms and conditions, a description of any differentiated treatment which it gives or might give between goods or services, or seller of the same category must be mentioned.

▪ Records

Entities must make reasonable efforts to record identification information of sellers who have repeatedly been offering goods and or services that have been removed or access to which has been disabled under applicable laws.

## C. Sellers' Duties

Duties of seller under the E-Com Rules are as follows:

▪ Unfair trade practices

A seller must not adopt unfair trade practices.

▪ Misrepresentation

A seller must not falsely represent itself as a consumer and post reviews or such on its goods or services.

▪ Cancellation of goods or stoppage of services

A seller must not refuse to take back goods or withdraw or discontinue services purchased or agreed to be purchased, or refuse to refund consideration, if such goods or services are defective, deficient, spurious, does not match its description or delivered late from the stated schedule. However, in case of a force majeure, the consumer cannot refund the consideration if the goods or services are delivered late.

- **Miscellaneous duties:**

- A seller is required to have prior written consent by the marketplace e-commerce entity to sell its goods or services.
- A seller is required to appoint a grievance officer as per the guidelines mentioned above.
- A seller is required to ensure that the advertisement of the goods or services matches its actual characteristics, access, and usage;
- A seller is required to provide to the e-commerce entity its legal name, address, the name and details of its website, customer care, contact details, and where applicable, GSTIN and PAN details.

- **Disclosures**

A seller must provide these details to the e-commerce entity for disclosing it on their website:

- All contractual information required to be disclosed by law;
- Total price in single figure of any good or service, along with the breakup price for the good or service, and all the compulsory and voluntary charges such as delivery charges, as applicable;
- All mandatory notices and information provided by applicable laws, and the expiry date of the good being offered for sale, where applicable;
- All relevant details about the goods and services offered for sale by the seller including country of origin which are necessary for enabling the consumer to make an informed decision at the pre-purchase stage;

- Name and details of importer, and guarantees related to the authenticity or genuineness of the imported products;
- Relevant details related to delivery and shipment of such goods or services;
- Accurate information related to terms of exchange, returns, and refund including information related to costs of return shipping in a clear and accessible manner.

## D. Inventory E-Commerce Entities' Duties

Under the E-com Rules, the duties of inventory e-commerce entities include:

- **Disclosures**

The following information must be accurately displayed on the entity's website:

- Information relating to refund, return, exchange, warranty, delivery, among other information for the consumer to make an informed decision;
- All mandatory notices provided by law;
- All contractual information required by law;
- Ticket number for each complaint raised in order to track the status of the complaint;
- The total single figure price including the breakup of costs showing all the compulsory and directory fees/charges;
- Information regarding payment methods, security of that method, refundable fees, any other ancillary costs.

- **Misrepresentation**

An inventory e-commerce entity cannot falsely represent itself as consumer and post reviews/ratings for its own goods or services

- **Cancellation of goods or stoppage of services**



An inventory e-commerce entity must not refuse to take back goods or withdraw or discontinue services purchased or agreed to be purchased, or refuse to refund consideration, in certain cases, viz. if such goods or services are defective, deficient, spurious, does not match its description or delivered late from the stated schedule. However, in case of a force majeure, the consumer cannot refund the consideration if the goods or services are delivered late.

- **Authenticity of goods or services**

Any entity that explicitly or implicitly vouches for the authenticity of goods or services, would bear the appropriate liability in any action related to deficiency, or defect or any other challenge to such authenticity.

- **Advertisements**

An entity must ensure that the advertisement of the goods or services matches its actual characteristics, access, and usage.

## CPA read with Direct Selling Rules<sup>28</sup>

Direct Selling Rules apply to all goods and services bought or sold through direct selling<sup>29</sup> including direct selling businesses and direct sellers utilising e-commerce platforms.

The Direct Selling Rules allow direct selling businesses and sellers to engage in sale or marketing of products of direct selling businesses through e-commerce platforms. Accordingly, for direct selling businesses and direct sellers selling via direct sales as well as through e-commerce platforms, there would be an overlap in compliance burden as they will be additionally subject to the E-Com Rules.

Further, in the past there has been some confusion on whether e-commerce platforms such as Amazon, Flipkart, Snapdeal and 1MG can list products of direct selling businesses such as Amway, Modicare and Oriflame without their consent. The Division Bench of the Delhi High Court in *Amazon Seller Private Limited vs. Amway India Enterprises*<sup>30</sup> held that there was no restraint for e-commerce platforms from listing products of direct selling businesses without

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<sup>28</sup> Consumer Protection (Direct Selling) Rules, 2021

<sup>29</sup> The CPA, defines “direct selling” to mean marketing, distribution and sale of goods or provision of services through a network of sellers, other than through a permanent retail location.

<sup>30</sup> 2020 (81) PTC 399 (Del)

their consent. However, it must be noted that the Direct Selling Rules have been notified subsequent to the order in the above case. Further, an appeal against this judgement of Division Bench of Delhi High Court is pending in the Supreme Court<sup>31</sup>.

While the judgement of the Supreme Court will settle this matter and provide clarity on the legality of listing products of direct selling businesses, to avoid any confusion in this regard, the direct selling businesses can include consent requirements for undertaking any such activities on an e-commerce platform in their contracts with the direct sellers.

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<sup>31</sup> (SLP(C) No. 006460/2021)

## VI. Competition Laws

*Relevance: E-commerce entities are required to comply with the competition laws of the country, as they seek to promote and maintain competition among the various relevant markets in the country.*

### Competition Act, 2002<sup>32</sup>

The Competition Act, 2002 (**‘Competition Act’**) broadly regulates three types of conduct:

- Anticompetitive agreements, including cartels<sup>33</sup>

Agreements that cause or that are likely to cause an ‘appreciable adverse effect’ on the competition in India are prohibited. These include agreements among competitors (horizontal agreements) and agreements between persons and entities located at different levels of the supply chain (vertical agreements).

- Abuse of dominant position<sup>34</sup>

Abuse of an enterprise or group’s dominance is prohibited.

- Combinations<sup>35</sup>

Entering into combinations in the form of mergers, acquisitions and amalgamations that cause or are likely to cause ‘appreciable adverse effect’ to the competition in India are prohibited. The jurisdictional thresholds for an application under the merger control law have been notified and are revised from time to time.<sup>36</sup> Additionally, exemptions under the said thresholds have also been notified and revised.<sup>37</sup> Before proceeding to check the jurisdictional thresholds, it is important for the entity to assess the assets that are qualified to be added to the threshold calculation.

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<sup>32</sup> Competition Act 2002.

<sup>33</sup> Competition Act 2002, s 3.

<sup>34</sup> Competition Act 2002, s 4.

<sup>35</sup> Competition Act 2002, s 5 and 6.

<sup>36</sup> Competition Commission of India, ‘Frequently Asked Questions’ < [http://www.cci.gov.in/sites/default/files/whats\\_newdocument/FAQ%27s\\_Combinations.pdf](http://www.cci.gov.in/sites/default/files/whats_newdocument/FAQ%27s_Combinations.pdf) > accessed 1 August 2021. See also Competition Commission of India, ‘Notifications’ < <https://www.cci.gov.in/notification/111> > accessed 1 August 2021.

<sup>37</sup> See Competition Commission of India, ‘Notifications’ < <https://www.cci.gov.in/notification/111> > accessed 1 August 2021.

## VII. Intellectual Property Laws

*Relevance: All e-commerce entities are required to comply with the intellectual property laws in India.*

### Copyright Act, 1957 ('CA')<sup>38</sup>

The CA protects the content and design of the e-commerce website, the software underlying the e-commerce website, datasets stored, among others, only if they satisfy all other requirements under law.

### Trade Marks Act, 1999 ('TMA')<sup>39</sup>

The TMA protects logos, tag-lines, domain names, among others, of an e-commerce website, provided that all other requirements under law are satisfied. Additionally, the TMA prohibits unauthorized meta-tagging and counterfeiting practices.

### Patents Act, 1970 ('PA')<sup>40</sup>

The PA protects functionality and methods of the software underlying e-commerce websites, provided they satisfy all other requirements under law. However, patentability of 'computer programs per se'<sup>41</sup> is barred.

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<sup>38</sup> Copyright Act 1957.

<sup>39</sup> Trade Marks Act 1999.

<sup>40</sup> Patents Act 1970.

<sup>41</sup> Patents Act 1970, s 3(k). See also *Ferid Allani v Union of India* (2014) W.P.(C) 7/2014.

## VIII. Gig Economy Labour Laws

*Relevance: E-commerce entities that employ gig workers or platform workers would need to take cognisance of the laws mentioned below.*

The gig economy broadly represents a market system of flexible and temporary jobs, such as freelancers, independent contractors, among others.<sup>42</sup> This line of work comprises of platform-based work as well, i.e. where platforms such as mobile apps, connect service providers, working usually on a commission, with customers.<sup>43</sup> In India, some examples of gig workers and platform workers *inter alia* include Uber, Ola drivers and Swiggy, Zomato delivery agents.

At present, Indian labour laws barely cater to the interests of gig workers.

*Firstly*, though there are labour legislations that have a broad definition of an ‘employee’<sup>44</sup> or a ‘workman’<sup>45</sup>, the judiciary has been fairly inactive in attempting an inclusive approach with regard to gig workers.

*Secondly and relatedly*, labour legislations require the existence of an employee-employer relationship before one can avail the benefits of that legislation. In the *Workmen of Nilgiri v. State of Tamil Nadu* case,<sup>46</sup> the court stipulated the following factors that need to be considered while determining the existence of an employee-employer relationship – (1) extent of control and supervision, (2) who is the appointing authority, (3) right to reject, (4) who is the pay master, (5) nature of work, (6) nature of establishment, among others. Gig workers have a very flexible approach, may work for two or more employers at the same time, may be paid per task, and are essentially entrepreneurs in their own way. It is hard to say that they would be able to satisfy the burdensome requirements of an employee-employer relationship.

Considering the above two elements, gig workers would not be able to become beneficiaries of industrial dispute settlement mechanisms, social security benefits, minimum wages, among others, within the Indian framework of labour laws.

<sup>42</sup> ASSOCHAM, ‘The rising GIG Economy of India’ (2021) <<https://www.primuspartners.in/wp-content/uploads/2021/02/Gig-Economy-Report.pdf>> accessed 21 June 2021.

<sup>43</sup> ASSOCHAM, ‘The rising GIG Economy of India’ (2021) <<https://www.primuspartners.in/wp-content/uploads/2021/02/Gig-Economy-Report.pdf>> accessed 21 June 2021.

<sup>44</sup> Minimum Wages Act 1948, S 2(i), Payment of Gratuity Act 1972, s 2(e), Employee Provident Fund and Miscellaneous Provisions Act 1952, s 2(f).

<sup>45</sup> Industrial Disputes Act 1947, s 2(s).

<sup>46</sup> *Workmen of Nilgiri Coop. Mkt. Society Ltd. Vs. State of Tamil Nadu and Ors.* 2004(17)AIC581.

## Unorganised Workers Social Security Act, 2008 (‘UWSSA’)

UWSSA has the potential to bring in gig and platform workers within its ambit. The legislation defines an ‘unorganised worker’ as any home-based worker, self-employer worker or any other worker who is within the organised sector but is not covered by the mentioned labour laws such as the Employee Provident Fund and Miscellaneous Provisions Act, 1952, Minimum Wages Act, 1948, Payment of Gratuity Act, 1972, Industrial Disputes Act, 1947, among others.<sup>47</sup> As mentioned above, gig and platform workers are excluded from the said legislations, thereby creating a potential for them to be beneficiaries under the UWSSA.

Nevertheless, the legislation lacks an adequate mode of implementation, regulation of working conditions of the unorganised sector, creation of a corpus of funds for social security purposes, and any penalty for non-implementation.<sup>48</sup> It does not effectively bind the government with any serious commitments. Till date, gig and platform workers have not been able to get their rights under this legislation materialised.<sup>49</sup>

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<sup>47</sup> Unorganised Workers Social Security Act 2008, s 2(m).

<sup>48</sup> Dipankar Debnath, ‘Way Forward for Empowering of Unorganized Workers in India: A Review of the Unorganised Workers Social Security Act, 2008’ (2014) <[https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/ijlj5&id=247&men\\_tab=srchresults](https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/ijlj5&id=247&men_tab=srchresults)> accessed 24 June 2021. See also, Paromita Goswami, ‘A Critique of the Unorganised Workers’ Social Security Act’ (2009) <<https://www.epw.in/journal/2009/11/commentary/critique-unorganised-workers-social-security-act.html>> accessed 30 June 2021.

<sup>49</sup> See also, Himanshu Upadhyaya, ‘The Missing National Social Security Funds for India’s Unorganised Sector Workers’ (2020) <<https://thewire.in/labour/national-social-security-fund-unorganised-workers>> accessed 30 June 2021.

## IX. Advertising Laws

*Relevance: E-commerce entities would need to consider the legal obligations that arise out of advertising goods or services digitally viz. through a website, a mobile application or social media.*

Laws that regulate the content in advertisements include, among others:

### Code for Self-Regulation of Advertising Content in India<sup>50</sup>

The Advertising Standards Council of India ('ASCI') developed this code, which may be voluntarily (and not mandatorily) complied with by digital advertisers. The aim of this code is to control the nature of advertisements, and to ensure that they are not offensive, misrepresentative or illegal in nature.

### Guidelines for Influencer Advertising in Digital Media, 2021<sup>51</sup>

These ASCI guidelines seek to ensure that consumers are able to clearly identify the promotional content that is meant to influence consumer behaviour for a commercial gain. They are applicable in a situation where an influencer has a 'material connection'<sup>52</sup> with the advertiser. Such 'material connection'<sup>53</sup> is not limited to monetary consideration, and includes discounted or free products, among other mentioned perks.

### CPA read with E-Com Rules

The seller and the inventory e-commerce entity must ensure that the advertisements are not misrepresenting the goods and services' characteristics.

### Legal Metrology Act, 2009

An advertisement containing the retail sale price of a pre-packaged commodity must involve a declaration of the net quantity or the number of the product contained in the package, as specified.<sup>54</sup>

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<sup>50</sup> The Advertising Standards Council of India, The Code for Self-Regulation of Advertising content in India.

<sup>51</sup> *ibid*

<sup>52</sup> *ibid*

<sup>53</sup> *ibid*

<sup>54</sup> Legal Metrology Act 2009, s. 18

## The Indecent Representation of Women (Prohibition) Act, 1986

An advertisement that indecently represents women cannot be aired.<sup>55</sup>

## The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply, and Distribution) Act, 2003

There is a prohibition on advertisement of cigarettes and tobacco products.<sup>56</sup>

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<sup>55</sup> The Indecent Representation of Women (Prohibition) Act 1986, s 3.

<sup>56</sup> The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply, and Distribution) Act 2003, s 5



## X. Telemarketing Laws

*Relevance: E-commerce entities often indulge in marketing and promotional practises that involve text messages and voice calls to consumers.*

### Telecom Commercial Communication Customer Preference Regulations, 2018 (“TCCCPR”)<sup>57</sup>

Under TCCCPR, Commercial Communication (“CC”) is defined as any message or voice call using telecom services, where the primary goal is to inform, advertise, or solicit business for, (a) goods or services, (b) a supplier or prospective supplier of goods or services, (c) business or investment opportunities, or (d) a provider or prospective provider of such opportunities.

Additionally, Unsolicited CC (“UCC”) is defined as CC that is not in accordance with the consent requirements or the registered preferences of the telecom subscribers. UCC does not include communications made under the direction of the Central Government and the Telecom Regulatory Authority of India (“TRAI”).

TCCCPR, among others, provide for the following:

- Registration of senders

Senders such as e-commerce entities, banks, telemarketers, and other businesses indulging in CC must be registered with telecom service providers. This would help reduce the ability of unknown entities to reach customers with fraudulent or dubious messages or calls.

- Registration of headers

Headers or alphanumeric string of characters or numbers are assigned to a sender of commercial communications in order to segregate different kinds of messages relating to special offers, one-time passwords, balance enquires, among others. Registration of such headers is provided for.

- Consent of the subscriber

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<sup>57</sup> The Telecom Commercial Communication Customer Preference Regulation, 2018.

The subscriber has complete control over their consent to receiving commercial communication. They can revoke consent subsequently.

- Registered templates

The concept of registered templates has been introduced for both message service and voice communication in order to prevent mixing of promotional and transactional messages.

- Distributed ledger technology

Telecom service providers would need to adopt distributed ledger technology, to ensure compliance of obligations related to commercial communications.

- Complaint mechanism

Telecom service providers must establish mechanisms to resolve complaints made by the customers and to take remedial action against the senders of UCC.

- Ecosystem

Every telecom service provider is required to create an ecosystem containing the specified functions, to regulate the delivery of commercial communications to the customers.

## XI. Drugs Laws

*Relevance: E-commerce entities that are involved in the online sale of drugs must comply with the drugs laws of the country.*

### Drugs and Cosmetics Act, 1940 read with Drugs and Cosmetics Rules, 1945<sup>58</sup>

The said legislative framework aims to regulate the import, manufacture, distribution and sale of drugs and cosmetics. However, it does not explicitly contain any provisions for online sale or distribution of drugs, viz. e-pharmacies, among others.

The Drugs Controller General of India on 31<sup>st</sup> December 2015 notified that the Drugs and Cosmetics Act, 1940 (**‘Drugs Act’**) read with Drugs and Cosmetics Rules, 1945 (**‘Drugs Rules’**) would be applicable to online sale of drugs as well.

The High Courts of Madras and Delhi ruled that the online sale of drugs cannot be done without obtaining requisite licenses under the Drugs Act and Rules.<sup>59</sup>

Through another notification by the Drugs Controller General of India on November 28, 2019, re-affirmed the existing position on online sale of drugs, viz. it cannot be done without valid licenses as applicable to physical pharmacies.

Some of the licenses that are applicable to e-pharmacies would include:

- Import licenses <sup>60</sup>
- Licenses for the sale of drugs other than homeopathic medicines<sup>61</sup>
- Licenses for the sale of homeopathic medicines<sup>62</sup>

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<sup>58</sup> Drugs and Cosmetics Rules, 1945.

<sup>59</sup> The Tamil Nadu Chemists and Druggists Association vs. The Union of India and Ors. (17.12.2018 - MADHC) : MANU/TN/6939/2018 and Zaheer Ahmed vs Union of India & Anr, Writ Petition (C) No:11711/2018.

<sup>60</sup> Drugs and Cosmetics Rules, 1945, Part IV.

<sup>61</sup> Drugs and Cosmetics Rules, 1945, Part VI.

<sup>62</sup> Drugs and Cosmetics Rules, 1945, Part VIA.

## XII. Food Laws

*Relevance: E-commerce entities that are involved in the online business of food or food ingredients must comply with the food laws of the country.*

A ‘food business operator’ (**FBO**) is the owner of the food business, or the person responsible for the compliance of the food business with food laws.<sup>63</sup> An ‘e-commerce food business operator’ (**E-FBO**) is a FBO that carries out activities related to food or food ingredients (such as manufacturing, importing, catering, among others), over a digital network.<sup>64</sup>

### Guidelines for Operations of E-Commerce Food Business Operators<sup>65</sup>

These guidelines provide for an explanatory memorandum for the statutory rules and regulations on e-commerce food entities in India. They include:

- Definitions;
- Business models of E-FBOs;
- Regulatory requirements –
  - Licensing and registration;
  - Supply chain compliance;
  - Food product listing and information;
  - Consumer complaints mechanism;
  - Responsibility towards recall.

### Notice for operationalization of Food Safety and Standards (Licensing and Registration of Food Business) Amendment Regulations, 2018<sup>66</sup>

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<sup>63</sup> Food Safety and Standards Act 2006, s 3(o).

<sup>64</sup> Food Safety and Standards Authority of India, Guidelines for Operations of E-Commerce Food Business Operators 2017 and Notice for operationalization of Food Safety and Standards (Licensing and Registration of Food Business) Amendment Regulations 2018.

<sup>65</sup> Food Safety and Standards Authority of India, Guidelines for Operations of E-Commerce Food Business Operators 2017.

<sup>66</sup> Food Safety and Standards Authority of India, Notice for operationalization of Food Safety and Standards (Licensing and Registration of Food Business) Amendment Regulations 2018.

This amendment stipulated the specific licensing and registration requirements, along with the responsibilities of E-FBOs.

## Food Safety and Standards (Labelling and Display) Regulations 2020<sup>67</sup>

These regulations prescribe the labelling requirements of pre-packaged foods as well as display of pertinent information on the premises where the food in question is manufactured, processed, served and stored. It must be noted that these regulations came into force on November 17, 2020, but they need to be complied with only after November 17, 2021.<sup>68</sup>

Specific e-commerce related compliances include:

- Food products sold via e-commerce must appropriately provide for the mandatory requirements of labelling as under the said regulations, before sale to the consumers.<sup>69</sup> However, the following information must be excluded<sup>70</sup>:
  - Batch or lot number;
  - Best before date or use by date or expiry date;
  - Manufacturing or packaging date.
- E-FBOs must get the requisite information (under chapter 3 of the regulations) from the FBOs and display it on their website.<sup>71</sup>

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<sup>67</sup> Food Safety and Standards (Labelling and Display) Regulations 2020.

<sup>68</sup> Food Safety and Standards (Labelling and Display) Regulations 2020, Reg 1(3).

<sup>69</sup> Food Safety and Standards (Labelling and Display) Regulations 2020, Reg 4(2).

<sup>70</sup> Food Safety and Standards (Labelling and Display) Regulations 2020, Reg 4(2).

<sup>71</sup> Food Safety and Standards (Labelling and Display) Regulations 2020, Reg 9(5).

## XIII. Other Laws

*Relevance: E-commerce entities would need to comply with additional legal obligations that have not been covered above. Inter alia, these include central, sector-specific, state-specific laws. Some of them have been covered below.*

### Tax Laws

Compliances specific to E-Commerce Operators ('**ECOs**') under the Central Goods and Services Act, 2017 ('**CGSTA**'),<sup>72</sup> equalization levy provisions,<sup>73</sup> Tax Deducted at Source ('**TDS**') and Tax Collected at Source ('**TCS**') provisions for ECOs,<sup>74</sup> among others, must be observed with.

ECOs are defined as individuals who own, operate or manage the digital platform for e-commerce, viz. supply of goods and services (including digital products) over a digital or electronic network.

### Insurance Laws

The key laws under this sector that are relevant for e-commerce entities are Guidelines on Insurance e-commerce dated March 9, 2017 ('**Insurance E-Commerce Guidelines**') and Insurance Regulatory and Development Authority of India (Insurance Web Aggregators) Regulations, 2017 ('**Insurance Web Aggregators Regulations**').<sup>75</sup> These laws were notified by the Insurance Regulatory and Development Authority of India ('**IRDAI**').

The Insurance E-Commerce Guidelines allow insurers and insurance intermediaries to create Insurance Self-Network Platforms ('**ISNPs**') in order to service as well as sell insurance policies. These guidelines regulate the establishment of such insurance e-commerce platforms and their code of conduct. On the other hand, the Web Aggregator Regulations have been enacted to regulate web aggregators as insurance intermediaries. Some of the activities undertaken by these web aggregators include, maintaining a website for displaying insurance product comparisons, selling insurance products online or through telemarketing, among others.

<sup>72</sup> Central Board of Excise and Customs, 'GST Sectoral Series: E-Commerce' < <https://www.cbic.gov.in/resources/htdocs-cbec/gst/faq-e-commerce.pdf;jsessionid=52AF1E8D5F90B6A34AEFF57C0494ECAF>> accessed 30 June 2021.

<sup>73</sup> Finance Act 2016, ch VIII.

<sup>74</sup> Income Tax Act 1961, s. 194-O and Central Goods and Services Act, s 52. t

<sup>75</sup> Insurance Regulatory and Development Authority of India, Guidelines on Insurance e-commerce 2017 and Insurance Regulatory and Development Authority of India (Insurance Web Aggregators) Regulations 2017.

## Environmental Laws

The Environment (Protection) Act, 1986 read with its solid, plastic and e-waste management rules create a gamut of environmental obligations for e-commerce entities. These series of rules are based on a very pertinent concept of ‘extended producer responsibility’<sup>76</sup>. The concept is based on the polluters-pays principle, and it makes producers accountable for the environmental consequences associated with their products (throughout such products’ life cycle).<sup>77</sup> This ensures that the responsibility of recycling products (that are at the last stage of their life cycle) shifts upstream towards the producers.<sup>78</sup> It must be noted that such producers may include manufacturers, sellers, brand owners, among others, as defined under the legal enactments as their scope and applicability.<sup>79</sup>

The Solid Waste Management Rules, 2016 prescribe obligations pertaining to sanitary products, disposable products, non-biodegradable products, among others.<sup>80</sup> These must be followed by manufacturers, brand owners, among others, as specified.<sup>81</sup>

The Plastic Waste Management Rules, 2016 prescribe obligations pertaining to plastic waste management (relating to packages and packing materials, among others) upon importers, producers and brand owners.<sup>82</sup>

The E-Waste Management Rules, 2016 create obligations pertaining to adequate channelization of e-waste upon every specified manufacturer, producer, consumer, bulk consumer, e-retailers, recyclers, among others.<sup>83</sup>

## Travel aggregator Laws<sup>84</sup>

Guidelines For Approval of Online Travel Aggregators, 2018 were laid down by the Ministry of Tourism to regulate ‘online travel aggregators’ (**OTAs**). This is a voluntary scheme of approval/re-approval that seeks to bring these entities

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<sup>76</sup> Yamini Gupt and Samraj Sahay, ‘Waste Management and Extended Producer Responsibility’ (2019) <<https://www.epw.in/journal/2019/18/special-articles/waste-management-and-extended-producer.html>> accessed 29 June 2021.

<sup>77</sup> *ibid*

<sup>78</sup> *ibid*

<sup>79</sup> The Solid Waste Management Rules 2016, The Plastic Waste Management Rules 2016 and The E-Waste Management Rules 2016.

<sup>80</sup> The Solid Waste Management Rules 2016, Rule 17.

<sup>81</sup> *ibid*

<sup>82</sup> The Plastic Waste Management Rules 2016, Rule 9.

<sup>83</sup> The E-Waste Management Rules 2016.

<sup>84</sup> Ministry of Tourism, Guidelines For Approval of Online Travel Aggregators 2018.

on a common platform, to improve the quality of services in the tourism sector of the country, among others.

OTAs are defined as an intermediaries or agents selling travel products and services such as the airlines, hotels, car rentals, cruise lines, vacation packages, among others, using internet as a medium. Services such as MakeMyTrip, Airbnb, and Oyo would be qualified as OTAs.

## Online Alcohol Delivery Laws

Sale of alcohol (online or offline) is regulated on a state-to-state basis, where the state governments and their excise departments decide upon these issues. Presently, only a few states have allowed for online delivery of alcohol, viz. Delhi, Chhattisgarh, Tamil Nadu, among others.

Additionally, the Food Safety and Standards Authority of India requires E-FBOs seeking to obtain license under category 14 (which includes alcohol), to provide either<sup>85</sup>:

1. Self-declaration – A self-declaration that they are not going to engage in the online delivery of alcohol, or
2. No-Objection certificate – A No-Objection certificate from the respective state's excise department to proceed with such online delivery of alcohol.

## Other Sectoral Laws

There are sectoral laws such as Medical Devices Rules, 2017 and Cosmetics Rules, 2020 (both under the Drugs Act) that do not explicitly require e-commerce entities to comply with any of its provisions.<sup>86</sup> The former governs medical devices, while the latter governs beautifying cosmetics, among others.

It is generally good practice for such e-commerce entities to try and ensure that these compliances are in place. They can do so through contractual safeguards.

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<sup>85</sup> Food Safety Standards Authority of India, 'Online Sale of Alcoholic Beverages under FSSAI License by E- Commerce Food Businesses' (2019).

<sup>86</sup> Medical Devices Rules, 2017 and Cosmetics Rules, 2020.



## 3. Ambiguities

### I. Payments Laws

#### A. PA and PG Guidelines

PA and PG guidelines do not make any mention of e-commerce entities following an inventory-based model or any other business model (apart from marketplace-model), undertaking PA services. Hence, it seems to indicate that these other e-commerce entities may provide PA services along with their existing services.

Additionally, PA and PG guidelines make no mention of e-commerce entities providing PG services. It seems to indicate that all kinds of e-commerce entities may provide PG services. This would also imply that inventory-based e-commerce entities or other business models (apart from marketplace-model) may consider providing both, PA and PG services, as there is no such bar within the law.

## II. Intellectual Property Laws

### A. Graphical User Interfaces ('GUIs')

GUIs or screen displays allow users to interact with the electronic devices.

Despite including GUIs under the Design Rules, 2001, the Design Office has given conflicting decisions with respect to several GUI registration applications.<sup>87</sup> It has accepted some and rejected some. In cases where it rejected the applications, it believed that GUIs do not satisfy the definitional requirements under the Design Act, 2000 ('DA').<sup>88</sup>

In the Design (Amendment) Rules, 2021, the Locarno Classification published by World Intellectual Property Organisation (one of the categories of the Locarno Classification includes GUIs) was adopted for registration of designs and other obligations under the rules.<sup>89</sup> However, this adoption is subject to the proviso that the registration of any design would additionally be required to fulfill the above-mentioned definitional provisions of DA. It seems that this

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<sup>87</sup> Chadha & Chadha Intellectual Property Law Firm, 'Act of GUI: The Indian Dilemma' (2020) < <https://www.lexology.com/library/detail.aspx?g=fd26c2f9-f375-4a54-bca5-2b20abf33167>> accessed 3 July 2021.

<sup>88</sup> Design Act, 2000, s 2(a) and s 2(d). See, Nikhil Purohit, 'The Dilemma of Graphical User Interfaces: A Need to Rethink Design Protection?' (2020) < <https://spicyip.com/2020/08/the-dilemma-of-graphical-user-interfaces-a-need-to-rethink-design-protection.html>> accessed 30 July 2021.

<sup>89</sup> Design (Amendment) Rules 2021.

amendment has not changed the status quo and has not brought any clarity and/or assurance with respect to protection of GUIs as designs in India.

The Ministry of Electronics and Information Technology has mentioned that copyright protection can be sought for the 'GUIs (look and feel)'.<sup>90</sup> The High Court of Bombay emphasized that copyright in software programmes would also extend to their 'structure, sequence and organisation'.<sup>91</sup> This too indicates that GUIs can be given copyright protection in India. However, in the absence of any further guidelines in this regard, the scope and extent of copyright protection for GUIs is uncertain too.

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<sup>90</sup> Ministry of Electronics and Information Technology, 'Copyright' < <https://www.meity.gov.in/content/copyright> > accessed 30 June 2021.

<sup>91</sup> Maraekat Infotech Ltd. v. Naylesh V. Kothari 2016 SCC OnLine Bom 2369.

## 4. Key Cases

### I. Information Technology Laws

The Supreme Court of India,<sup>92</sup> re-interpreted the provision of the IT Act, which obligates an intermediary to remove or disable access to content that has been used to commit unlawful act(s).<sup>93</sup> It read down that provision to mean that the ‘receiving actual knowledge’ indicates receiving such knowledge through a court order passed in that regard. Additionally, the court held that the court order and the notification by the government must confine themselves to the matters under the article of the Indian Constitution that imposes reasonable restrictions on the fundamental right to speech and expression.<sup>94</sup> Hence, unlawful acts beyond what was laid down under the said constitutional provision would not be a part of the IT Act provision in question.

The High Court of Karnataka held that Snapdeal was an intermediary under the IT Act, and that it satisfied the conditions to be able to avail the safe harbour conditions.<sup>95</sup> Snapdeal was held not to be responsible for the alleged sale of products by third-party sellers on its platform.

### II. Consumer Protection Laws

The High Court of Karnataka held that the E-Com Rules make a distinction between marketplace and inventory e-commerce websites.<sup>96</sup> Snapdeal was held to fall under the marketplace e-commerce website category. As mentioned above, marketplace e-commerce entities under the E-Com Rules can avail the intermediary safe harbour benefits if they satisfy the requisite requirements under the IT Act and its rules. Upon analyzing this point, the court held that Snapdeal was compliant with the requisite laws and is therefore exempted from any liability that arose due to a seller’s actions on its platform. Here, the illegal action in question was the seller offering a particular drug in contravention of the Drugs and Cosmetics Act, 1949.

### III. Competition Laws

#### A. Online Retail and Marketplace Platforms

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<sup>92</sup> Shreya Singhal v. Union of India ( 2015 ) 3 MLJ 162 ( SC ).

<sup>93</sup> Information Technology Act, 2000, Section 79(3)(b).

<sup>94</sup> Constitution of India, Article 19(2).

<sup>95</sup> Kunal Bahl and Ors. vs. State of Karnataka (07.01.2021 - KARHC) : MANU/KA/0010/2021.

<sup>96</sup> *ibid*

Up until 2019, CCI has dismissed multiple cases against online retail and marketplace platforms such as Amazon and Flipkart due to finding that none of them hold a dominant position in the relevant market in question.<sup>97</sup> These cases involved allegations regarding abuse of dominance and other anti-competitive practices. CCI was of the view that marketplace platforms are still at a relatively nascent stage and that retail distribution models are evolving at a very fast pace. It noted that intervention in these markets would need a careful analysis, so as not to hinder innovation.<sup>98</sup>

The CCI ordered that the provision on Resale Price Maintenance ('RPM') within the Competition Act extends to online marketplace platforms, along with offline enterprises.<sup>99</sup> RPM includes any agreement to sell goods with a condition that the resale prices to be charged by the purchaser in question, must be as per the sellers' stipulations.<sup>100</sup> The exception to this is that there is a clear mandate that lower prices may be charged.<sup>101</sup> RPM essentially is a vertical imposition, where the manufacturer or the seller sets the resale price of the downstream party (a distributor, retailer, or a wholesaler). Such practice, depending on the threshold, harms the downstream price competition among the retailers or distributors or wholesalers, thereby harming consumer welfare too.

The CCI in a case, ordered an investigation against Amazon and Flipkart.<sup>102</sup> the CCI ordered an investigation against Amazon and Flipkart. It *prima facie* held in that order that the said two marketplaces have contravened the Competition Act, 2002, since entered into anticompetitive exclusive agreements, deep discounting and giving preferential listing to certain select sellers. The High Court of Karnataka has recently upheld the investigation.<sup>103</sup>

## B. Online Cab Aggregator Platforms

The CCI was of the view that Ola and Uber were not dominant in the relevant market and that the concept of collective dominance did not exist under the Competition Act.<sup>104</sup> Additionally, it also held that common investors and common investments may lead to weakening the competition to some extent

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<sup>97</sup> Mr Mohit Manglani v. M/s Flipkart India Private Limited and Others, Case No. 80 of 2014 and Mr Ashish Ahuja v. Snapdeal.com, Case No. 17 of 2014. All India Online Vendors Association v. Flipkart India Private Limited and Others, Case No. 20 of 2018.

<sup>98</sup> All India Online Vendors Association v. Flipkart India Private Limited and Others, Case No. 20 of 2018.

<sup>99</sup> Jasper Infotech Private Limited v. Kaff Appliances (India) Pvt. Ltd, Case No. 61 of 2014.

<sup>100</sup> Competition Act 2002, s 3(4)(e).

<sup>101</sup> *ibid.*

<sup>102</sup> In re: Delhi Vyapar Mahasangh and Flipkart Internet Private Limited and ors., Case No. 40 of 2019.

<sup>103</sup> The Hindu, 'CCI enquiry against Amazon, Flipkart cannot be crushed at initial stage: Karnataka HC' (2021) < <https://www.thehindu.com/news/cities/bangalore/cci-enquiry-against-amazon-flipkart-cannot-be-crushed-at-initial-stage-karnataka-hc/article35482496.ece> > accessed 29 July 2021.

<sup>104</sup> Meru Travel Solutions Pvt Ltd v. ANI Technologies Pvt Ltd and Others, Case No. 25-28 of 2017.

but did not find enough evidence of this element against Ola and Uber (who have common investments).

The CCI held that there was no collusion which suggests that the pricing algorithm of Ola and Uber unnaturally influenced the supply and demand, so as to ensure higher-than-otherwise fares to drivers.<sup>105</sup>

### C. Online Travel Aggregator Platforms

In an on-going case, the CCI directed an investigation against MMT group.<sup>106</sup> It was alleged that the group abused its dominant position in the relevant market and that it entered into several anti-competitive agreements with Oravel Stays Private Limited or Oyo. In a subsequent interim order, the CCI directed MMT group to re-list FabHotels and Treebo on the portals.<sup>107</sup> These franchise service providers had been de-listed earlier in an attempt to deny access to a pertinent distribution channel through market foreclosure.<sup>108</sup>

## IV. Intellectual Property Laws

### A. Counterfeit Goods

The High Court of Delhi held that marketplace e-commerce entities which , among others, display advertisements of the marks in question so as to promote counterfeit products, or offer such counterfeit products for sale, would result in trademark infringement.<sup>109</sup> Such infringement is specifically in the nature of falsification of trademarks as under the TMA.<sup>110</sup> Accordingly, in this case, the e-commerce marketplace in question was said to have lost its safe harbour protection under the IT Act due to its role in the commission of the said unlawful actions.

### B. Data Scraping

The High Court of Delhi passed an order permanently restraining a company from using automated or manual means to scrape data related to OLX's website.<sup>111</sup> The company in question scraped data pertaining to listings, photographs, among others, from OLX's website, and posted it on its website. The court held that such datasets are original literal works that deserve

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<sup>105</sup> Mr Samir Agrawal v. ANI Technologies Pvt Ltd (Ola) and Uber, Case No. 37 of 2018.

<sup>106</sup> In re: Federation of Hotel & Restaurant Associations of India (FHRAI) vs. MakeMyTrip India Pvt. Ltd. (MMT) & Others, Case No. 14/2019.

<sup>107</sup> *ibid*, Interim Order dated 9 March 2021.

<sup>108</sup> *ibid*

<sup>109</sup> Christian Louboutin SAS vs. Nakul Bajaj and Ors. (02.11.2018 - DELHC) : MANU/DE/4019/2018.

<sup>110</sup> Trade Marks Act, 1999, s 101 and 102.

<sup>111</sup> OLX BV and Ors. v. Padawan Ltd CS(COMM) 232/2016.

copyright protection under Indian laws. However, it must be noted here that there would not have been a copyright infringement if the company used the scraped data for its own private use.<sup>112</sup>

### C. Domain Names

The Supreme Court held that the use of same or similar domain names, especially in the e-commerce sector, could confuse consumers.<sup>113</sup> Such misuse of domain names could also give consumers the impression that the original domain name owner misrepresented their goods and/or services through their promotional activities. The resulting consequence of that would be that the original domain name owner would lose the said consumers. The court further held that a domain name has all the characteristics of a trademark and that one could find an action for passing off in these types of cases.

### D. Meta-tags

Meta-tags are the HTML codes that are meant to describe the contents of a webpage, but are not visible on the said webpage.

The High Courts of Bombay and Madras, have held that the unauthorised use of meta-tags is illegal and constitutes passing off.<sup>114</sup>

## V. Telemarketing Laws

The High Court of Delhi emphasised on the need for strict compliance of TCCCP and other related regulations.<sup>115</sup>

In an on-going case before the High Court of Delhi, the TRAI's move to delegate adjudicatory powers to the telecom service providers, among others, have been challenged.<sup>116</sup>

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<sup>112</sup> Copyright Act, s 52.

<sup>113</sup> *Satyam Infoway Ltd v Sifynet Solutions Pvt Ltd* (2004) 3 AWC 2366.

<sup>114</sup> See *Consim Info Pvt Ltd v Google India Pvt Ltd* (2013) (54) PTC 578 (Mad) and *People Interactive (I) Pvt Ltd v Gaurav Jerry* (Suit (L) No. 622 of 2014).

<sup>115</sup> *One97 Communications Limited and Ors. vs. Union of India and Ors.* (03.02.2021 - DELHC): MANU/DE/0250/2021

<sup>116</sup> *Indiamart Intermesh Limited v. TRAI W.P.(C) 2973/2021 & CM APPL.8985-8987/2021.*

## 5. Proposed Laws

*Relevance: E-commerce entities should ideally keep a track of the up-coming laws concerning them. Some of them have been listed below.*

### I. Personal Data Protection Bill, 2019

This law seeks to impose stronger data protection obligations on entities (including e-commerce entities) in relation to personal data protection. The key features in this bill, among others, include, extra- territorial application, more comprehensive obligations with respect to cross-border data transfers, rights of data principals, notice requirements, and other data protection principles.

### II. Draft National E-Commerce Policy (2019 and 2021 versions)

This law seeks to smoothen the fragmentary regulation that e-commerce entities are currently subject to, foster fair play, among others.

### III. Draft Amendments in 2021 to the E-Com Rules

These proposed amendments seek to strengthen the regulatory framework surrounding e-commerce entities and bring transparency within them. Some of the key features of these proposed rules are a fall-back liability on e-commerce entities, ban on flash sales, 'related parties' and 'associated enterprises' provisions, mis-selling and cross-selling provisions, among others.

### IV. Draft Amendments in 2018 to the Drugs Rules

These amendments have not yet been enforced and seek to regulate sale of drugs by e-pharmacies.

### V. Code on Social Security, 2020

A key change within this law is to provide for explicit protections for gig and platform workers.

## 6. Conclusion

In conclusion, as we have seen, several new provisions that are specific to e-commerce entities have been introduced over the past few years. However, the rapid growth and development within the e-commerce sector is proving difficult for the Indian legal regime to catch up to. It remains to be seen whether the upcoming laws for this sector are able to bridge the gap smoothly and in a timely fashion.



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