

FMCG

OVERVIEW OF THE LEGAL AND REGULATORY FRAMEWORK



Overview of the Legal and Regulatory Framework: FMCG

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Legal and Regulatory Framework in India: FMCG

Legal and Regulatory Framework in India: FMCG

i. Background and Overview of the FMCG Industry in India

- Fast Moving Consumer Goods (FMCGs) are those goods that are sold at a quick pace at a relatively low price point. Very often, FMCGs have a short shelf life because of high consumer demand and because they often tend to be perishable. The average consumer buys these products on a regular basis for use in their daily lives. The industry is characterized by low-profit margins and a high volume of sales. Some significant examples of FMCGs include milk, fruits, vegetables, cereals, packaged foods, medicines, and toiletries. To broadly classify the FMCG sector into categories, it consists of food and beverages, healthcare, and other goods including household and personal care.¹ In essence, FMCG is a subset of the larger retail sector.

Figure 1

Food & Beverages	Household care	Personal care
Includes staples such as cereals, pluses, salt and sugar; tea, coffee, bottled water, biscuits, breads, cakes and other snack foods.	Includes laundry soaps, detergents, fabric softeners, dish/utensil cleaners, toilet cleaners, floor cleaners and air fresheners	Tooth paste, mouth wash, dental floss, hair oils, shampoo, conditioners, personal washes(soaps), facewashes and deodorants.

- The FMCG sector is one of the largest sectors of the Indian economy. Despite nationwide lockdowns, the FMCG sector grew by 16% in 2021, a nine-year high in growth. The projections show that the FMCG sector is purported to accelerate its growth at an even quicker rate. The FMCG market in India is predicted to increase at a growth rate of 14.9% to reach US\$ 220 billion by 2025, from US\$ 110 billion in 2020. Further, E-commerce segment is forecast to contribute 11% to the overall FMCG sales by 2030.² As the sector with arguably the most impact on the daily lives of consumers, the regulatory and legal framework that governs this sector becomes crucial to understand.
- In the Union Budget 2023, Nirmala Sitharaman provided some welcome news to the FMCG Sector. The important updates came in the form of capex investment as well as investments in the agriculture sector as well. These, combined with the breathing space allowed to the common man by revision of tax slabs would be a boon for the FMCG Sector, as there would now be further purchasing power for more consumers.
- The following chapters shall provide a broad overview of laws, rules, and regulations applicable to the FMCG sector in India followed by a critical analysis of some of the regulatory concerns faced by the FMCG industry.

Regulatory Overview

Introduction - Setting the Context

1. The FMCG Industry in India covers a wide variety of products ranging from toiletries to pre-packaged foods. Each category of products under the broad umbrella of FMCG has its own set of regulatory compliances, apart from the general compliances that most businesses are subjected to. This section will elaborate on a few key compliances that entities in the FMCG sector are required to

i. OPERATIONAL LICENSES

2. Prior to starting an FMCG business of any kind, there are myriad licenses and permissions that need to be secured.

A. Trade License

3. A Trade License is a certificate issued by municipal authorities permitting one to carry out business in a specific location. "Trade premises" means any premises used or intended to be used for carrying on any trade or industry.³ An FMCG business perhaps planning on establishing a physical warehouse, store, or any other commercial entity must approach the relevant municipal authority to secure its trade license.
4. For instance, take the case of Delhi, any person who desires to establish a business of a General Trade or Storage is required to obtain a license from the Municipal Corporation of Delhi.⁴ In certain municipal regions, trade licenses can be obtained digitally by visiting the website of the respective municipal department, filling out the relevant form, submitting the required documents, and paying the necessary fees.⁵

B. Shops and Establishment Registration

5. Each state in India has a Shops and Establishment act that regulates the conditions of employment in commercial establishments. Registration is mandatory for all kinds of commercial establishments under these federal establishments. For instance, Delhi is regulated by the Delhi Shops and Establishments Act, 1954. The occupier of a commercial establishment must approach the Chief Inspector of the Labour Commission, Government NCT of Delhi to register their establishment and receive a certificate for the same. This certificate is⁶ required to be prominently displayed at the establishment.
6. The application for registering a commercial establishment requires the following information to be included:
 - (a) the name of the employer and the manager, if any;
 - (b) the postal address of the establishment;
 - (c) the name, if any, of the establishment;
 - (d) the category of the establishment, i.e., whether it is a shop, commercial establishment, residential hotel, restaurant, eating house, theatre, or other place of public amusement or entertainment; and
 - (e) [the number] of employees working about the business of the establishment.⁷

C. GST Registration

7. Since July 2017, India moved to the Goods and Services Tax (GST) system that aimed to bring the entire nation under a single market. All businesses whether it be trade, commerce, or manufacturing must mandatorily get themselves registered on the basis of specified threshold turnovers. The registration can be obtained by filing an application online and the business will be provided with a GST Identification Number (GSIN). If a business operates from multiple states, then it must obtain registration for each state.

D. Incorporation of a Company

8. The Ministry of Corporate Affairs (“MCA”) is primarily concerned with the administration of the Companies Act 2013, the Companies Act 1956, The Limited Liability Partnership Act, 2008 & other allied Acts, rules & regulations framed mainly for regulating the functioning of the corporate sector in accordance with the law. Companies in India have to comply with the rules and regulations as established by The Companies Act, 2013.
9. Any company with operations in India would require to be incorporated. The MCA has recently developed the SPICe form or Form INC-32, which enables the creation of a business with a single application for reservation of name, incorporation of a new company, and/or allocation of Director Identification Number (“DIN”). Every company incorporated after February 2020 was required to submit an application using the two-part INC-32 or SPICe (Simplified Proforma for Incorporating a Company Electronically) form for the reservation of name, incorporation of the company, and, if applicable, the allocation of DIN.
10. At the point of incorporation, a company would require its Articles of Association and Memorandum of Association. Article of Association contains the rules and regulation that are relevant for the internal management of the company. The Article of Association have to be in a particular format as prescribed by Schedule 1 of the Companies Act, 2013. The Memorandum of Association (“MOA”) is a document that contains the company's constitution and serves as the basis for its structure. It is known as the company's charter. It defines the extent of the company's activity, the aims for which it was founded, its authority, and its interactions with the outside world. MOA of the company needs to be submitted when the incorporation process is taking place.
11. There are certain other compliances that a company must adhere to at the stage or right after incorporation. A company must ensure that they conduct a minimum of 4 board meetings in one financial year.⁸ A minimum of 120 days need to exist between 2 of these board meetings. A few other compliances that need to be met under The Companies Act, 2013 have been laid down below:

Figure 1

Date	Compliance
Within 30 days from Incorporation	A board meeting must be conducted where the director must disclose their interests. ⁹
	Filling of Resolutions of the company to the Registrar ¹⁰

	Appoint the 1st Auditor till the conclusion of first AGM ¹¹
	File the form INC 22 with the MCA to establish a registered office ¹²
Within 2 months from Incorporation	Issuance of share certificates via Form SH-1. ¹³
On or before 15th day of July every year	Foreign Liabilities and Assets Return ¹⁴

E. Legal Metrology Packaged Commodities Regulations

The Legal Metrology Act, 2009 ('LM Act') enforces standards for weights and measures and regulates goods that are sold by weights and measures. The Legal Metrology framework becomes relevant for retail industry under the Legal Metrology (Packaged Commodities) Rules,2011 ('LM Packaged Commodities Rules') which regulates packaged items of all kinds. Every entity manufacturing importing or packing pre-packaged commodities, must get registered with the relevant Director/Controller of Legal Metrology in the appropriate area.¹⁵

F. Importer Exporter Code –

12. An Importer-Exporter Code ('IEC') is a mandatory business identification code if any product is to be exported out of or imported into India. An application needs to be made to the Directorate General of Foreign Trade.

G. NOC from Fire Department

13. An NOC is needed from the Fire Department of the city where the entity is functioning in case certain conditions are met. These conditions vary from one state to another. These particular NOC also function as a fire safety certificate which need to also be periodically reviewed. Delhi for example requires all business buildings which have a height of more than 15 meters or having ground plus four upper stories need to get an NOC. These buildings need to get all this NOC before the construction of the building and must adhere to all the fire safety rules that the relevant legislation would require. These Fire Safety Certificates need to be renewed once every 3 years for non-residential building by submitting FORM I from the first schedule of the Delhi Fire Service rules 2010. Most fire departments of various states follow the code of practice as set forth by the National Building Code of India, 2005.

H. Pollution Control Board

14. There are certain provisions regarding pollution that need to be adhered to by a company. These are governed by the Ministry of Environment, forest and climate change, specifically the Central Pollution Control Board under it. Apart from these different states will have different sets of rules that need to be followed. Such as a particular level of air quality must be maintained else further cause for investigation can arise for Delhi Pollution Control Committee to investigate.

I. Drugs and Cosmetics Licenses

15. An FMCG entity that desires to enter the business of drugs and cosmetics, then it must comply with the regulatory framework set up under the Drugs and Cosmetics Act, 1940 ('**DC Act**'). No person is permitted to manufacture for sale, distribute, sell, stock, exhibit, or offer for sale any drug or cosmetic, except in accordance with a valid license. The Drugs and Cosmetics Rules, 1945 for drugs, and the Cosmetics Rules, 2020 for cosmetics lay down the relevant registration/license procedures for obtaining permission to begin ventures in drugs and cosmetics. In terms of regulatory bodies, drugs are regulated by the Central Drugs Standard Control Organisation ('**CDSO**') and the State Drugs Standard Control Organisation ('**SDCO**'). Licenses and registration of cosmetics are handled by the Drugs Controller General of India and the state drugs controller, with their official designations varying from state to state. Lastly, the Department of AYUSH issues licenses for Ayurvedic, Unani, Siddha, Homeopathic, and herbal drugs and cosmetics.
16. As there are several sorts of Drug and Cosmetic licenses, the type of license necessary is contingent on the goods, services, activities, and company type. The applicant must submit an online application in accordance with the categories listed below, together with the applicable fees and supporting documentation:¹⁶¹⁷

Figure 2

Form	Description
COS-1	Application for a certificate of registration to import cosmetics
COS-3	Permission to import or manufacture new cosmetics in India
COS-5	License to manufacture cosmetics for sale or for distribution
COS-6	Loan License to manufacture cosmetics for sale or for distribution
Form 8 & Form 8A	License to import drugs
Form 19 & 19A	License to sell, stock or exhibit or offer for sale, or distribute of drugs
Form 24	License to manufacture or distribution of drugs for sale purpose
Form 24A	Loan license for drug

J. Waste Management Compliance in India

17. There are various waste management and environmental legislations both centrally and specific to certain states. These legislations make retail companies liable to comply with them and sometimes give reports regarding the waste management done by their organization.

18. In the following table various legislations have been laid out along with the compliance liability that these legislations impose on the company.

Figure 3

Legislation	Compliances
Biomedical Waste (Management and Handling) Rules, 1998	<p>All health care facilities need to comply with the obligations set forth in the act. Dispensaries that generate Biomedical waste need to submit an application, along with the relevant application fees, asking for authorization from the State pollution control board. This needs to be reauthorized every three years.</p> <p>The State Pollution Control Board must receive a yearly report detailing the categories and quantity of BM trash treated. Sanctions: Failure to comply with the aforesaid regulations will result in a fine of 1,000,000 INR and/or imprisonment for up to five years.</p>
The Batteries (Management and Handling) Rules, 2001	<p>Any entity which deals with lead-acid battery comes under the application of this particular act.</p> <p>They need to file an application for Importer registration or renewal at the BRMS (Batteries Registration and Management System).</p> <p>Bulk-Consumers need to file half yearly returns with the SPCB.</p> <p>An advance customs approval is necessary for the import of batteries into India from other countries for recycling purposes.</p>
The E-Waste (Management and Handling) Rules, 2011	<p>The collection and recycling or disposal of e-waste created during the production of electrical and electronic equipment. Any firm involved with the sale of electrical and electronic equipment's comes under the application of these particular rules.</p> <p>Products that are near their end of life need to be sent to a registered dismantler or recycler.</p> <p>Collection centres need to established by these particular firms.</p> <p>Contacts details of authorized collection centres also need to be provided to the consumers of their products.</p>

	<p>Need to submit an application for obtaining an authorization from the state pollution control board or pollution control committee. The authorization if granted will be valid for a period of five years. Renewal should be applied for a minimum of 60 days before the expiry of the previous license.</p> <p>Annual report of handling of the E-waste must be submitted on or before the 30th day of June.</p>
The Plastic Waste (Management and Handling) Rules, 2011 Plastic Waste Management Rules, 2016	<p>SPCB registration is mandatory for recyclers. Validity of which lasts for a total of three years.</p> <p>No shop may provide plastic bags without charge. Rules governing the separation of virgin, renewable, and biodegradable plastic must be followed.</p> <p>Single use plastic items which have low utility and high littering potential are not allowed to be used anymore</p>
	<p>Producers, importers, and brand owners who offer the items to the market are primarily responsible for the collecting of old multi-layered plastic sachets, pouches, or packaging. They must have a mechanism for collecting the plastic garbage that their goods generate. This collection plan must be provided to the State Pollution Control Boards together with the application for Consent to Establish, Operate, or Renewal. The Brand Owners whose consent was renewed prior to the announcement of these rules are required to submit this plan within one year of the notification of these rules and implement it within two years.</p> <p>The producer must apply for registration with the Pollution Control Board or Pollution Control Committee, as applicable, of the State or Union Territory administration concerned.</p> <p>No producer may manufacture or use plastic or multi-layered packaging for the packaging of goods without first registering with the relevant State Pollution Control Board or Pollution Control Committees.</p> <p>Every producer is required to maintain a record of the person engaged in the supply of plastic used as a raw material for the production of carry bags, plastic sheets, or similar products, plastic sheet covers, or multi-layered packaging.</p>

K. FSSAI License –

19. Assuming that the FMCG entity wishes to engage in the business of food, then it must obtain a license to begin the same. The Food Safety and Standards Act, 2006 ('**FSS Act**') defines a 'food business' as "*any undertaking, whether for profit or not and whether public or private, carrying out any of the activities related to any stage of manufacture, processing, packaging, storage, transportation, distribution of food, import and includes food services, catering services, sale of food or food ingredients*". There is an express provision under the FSS Act, restricting any person from carrying on any food business without a license.

The FSS Act has set up a regulatory body, namely, the Food Safety and Standards Authority of India ('**FSSAI**') to formulate regulations that carry out the functions of the FSS Act. To this effect, the FSSAI has notified the Food Safety and Standards (Licensing and Registration of Food Businesses) Regulation, 2011 ('**FSS Licensing Regulation**') with detailed provisions regarding the application, renewal, and suspension of licenses. Licenses are issued by FSSAI as per the 'Kind of Business' of the food business. For instance, an FMCG entity that merely sells food items without being involved in its production would require a 'trade/retail' license. An FMCG entity that sells food items manufactured by a third party but under its brand name would require a 'relabeller license'. An FMCG entity that sells its food items through an online portal would be obligated to obtain an 'e-commerce license'.¹⁸

20. There are two types of licenses under the FSS Licensing Regulation – A Central License and a State License. Businesses may get either a Central or State License as per the criteria laid down under the FSS Licensing Regulation.¹⁹ Refer to Figure No.4 for a breakdown of which food businesses require which license.

Figure 4

TYPES OF LICENSES UNDER FSS LICENSING REGULATIONS

CENTRAL LICENSE

Authority – Central License applications are made to the Designated Officer appointed by the Chief Executive Officer of the FSSAI.

Entities that require a Central License –

- Dairy units including milk chilling units equipped to handle or process more than 50,000 litres of liquid milk/day or 2500 MT of milk solid per annum.
- Vegetable oil processing units and units producing vegetable oil by the process of solvent extraction and refineries.
- All slaughter houses equipped to slaughter more than 50 large animals or 150 or more small animals including sheep and goats or 1000 or more poultry birds per day.
- Meat processing units equipped to handle or process more than 500 kg of meat per day or 150 MT per annum.

STATE LICENSE

Authority – State License applications are made to the Designated Officer appointed by the Food Safety Commissioner of the relevant State or UT.

Entities that require a State License – All Food Businesses that are not mandated to obtain a Central License.

- All food processing units other than mentioned under aforementioned heads including relabellers and repackers having installed capacity more than 2 MT/day except grains, cereals and pulses milling units.
- 100 % Export Oriented Units.
- All Importers importing food items including food ingredients and additives for commercial use.
- All food business operators manufacturing any article of food containing ingredients or substances or using technologies or processes or combination thereof whose safety has not been established through FSSAI regulations or which do not have a history of safe use or food containing ingredients which are being introduced for the first time into the country
- Food Business Operator operating in two or more states.
- Food Business Operators selling their wares through the internet using e-commerce channels.

L. Agmark Certification

21 Agmark is a certification mark for agricultural produce assuring that they conform to the grade standard notified by the Directorate of Marketing & Inspection ('DMI'), Department of Agriculture, Cooperation and Farmers Welfare, Ministry of Agriculture & Farmers Welfare under Agricultural Produce (Grading Marking) Act, 1937. These standards have been notified on a commodity-specific/cluster of commodities basis. To date, standards for 222 agricultural products have been notified. While this is a voluntary scheme, FSSAI has mandated certification for certain products under the Food Safety and Standards (Prohibition and Restriction on Sale) Regulations 2011.

Figure 5

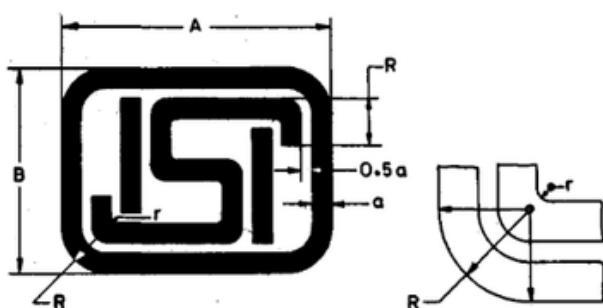
Product wise conditions for mandatory Agmark Certification		
Name of the Product/Product Category	Conditions for Agmark Certification	Relevant Agmark Rules under Agricultural Produce (Grading Marking) Act, 1937
Blended Edible Vegetable Oil	Mandatory Certification	Blended Edible Vegetable Oils Grading and Marking Rules, 1991
Fat Spread	Mandatory Certification	Fat Spread Grading and Marking Rules, 1994

Ghee	Ghee having less Reichert value and a different standard for Butyrometer reading at 400 C than that specified for the area in which it is imported for sale or storage is required to have mandatory Agmark Certification	Ghee Grading and Marking Rules, 1938
Muti-source Vegetable Oils		Vegetable Oils Grading and Marking Rules, 1955

M. BIS Certification

- 22 Bureau of Indian Standards (“**BIS**”) is the National Standard Body of India, established under the BIS Act of 2016 for the harmonious development of standardization, marking, and quality certification of goods, as well as topics related to or incidental to these operations. The Indian Standards established by BIS form the basis for its Product Certification Schemes, which provide Third Party Assurance of the Quality, Safety, and Reliability of products to consumers.²⁰
- 23 The BIS certification programme is essentially voluntary in nature. However, for a number of goods, conformity with Indian Standards is mandated by the Central Government for a variety of reasons, including public interest, protection of human, animal, or plant health, environmental safety, avoidance of unfair trade practices, and national security.²¹ For such items, the Central Government in consultation with BIS issues a Quality Control Order (“**QCO**”) mandating corresponding to the Indian Standard(s) mentioned in the QCO a requirement to bear the Standard Mark under a Licence or Certificate of Conformity from BIS. If a retailer wishes to affix a Standard Mark on their products, then they must ensure that the same conforms to the relevant Indian Standard, and then they must apply for a BIS license or a Certificate of Conformity.²² BIS has made products liable for mandatory compliance with Indian Standards and placement of the standard mark through different schemes.

Figure 6 Monogram for Standard Mark



Periodic Compliances

Periodic Compliances

- 1 The regulatory burden does not end once permissions are obtained for setting up a business. Several other routine regulatory compliances need to be observed.

A. Labour Law Compliances

- 2 India has a plethora of labour and employment laws in place to regulate wages, industrial relations, and working conditions. The Ministry of Labour and Employment has recorded that there are over forty central labour laws under the Ministry. Key laws and compliances under the same are listed below:

Figure 7

Name of the Act	Key Compliances
Industrial Disputes Act, 1947 and the Industrial Disputes (Central) Rules, 1957	Employers of workmen in an industrial establishment shall give notices of commencement and termination of lay-off within seven days of such commencement or termination.
The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and the Employees' Provident Funds Scheme, 1952	The employer is required to pay both the contribution payable by himself and also, on behalf of the member employed by him directly or by or through a contractor, the relevant contributions to the provident funds.
The Contract Labour (Regulation and Abolition) Act, 1970 and the Contract Labour (Regulation & Abolition) Central rules, 1971	Contractors are prohibited from undertaking work through contract labour without a valid license from the licensing authority.
The Factories Act, 1948 and model rules under the Factories act, 1948	No site shall be used for the location of a factory or no building in a factory be constructed, reconstructed, extended or taken into use as a factory or part of a factory, or any other extension of plant or machinery carried out in a factory unless previous permission in writing is obtained from the State Government or the Chief Inspector.
The Minimum Wages Act, 1948 the Minimum Wages (Central) Rules, 1950.	A wage slip is required to be issued by every employer to every person employed by him at least a day prior to the disbursement of wages.

B. Compliances under Legal Metrology

- 3 Legal metrology is important for FMCG entities as it establishes and enforces standards of weights and measures that need to be adhered to by products. Any entity will need to ensure that their product/s all comply with the various rules and compliances set forth under the Legal Metrology Act, 2009, and The Legal Metrology (Packaged Commodities) Rules, 2011.
- 4 FMCG entities will need to make certain declarations on all their products which include the name and address of the manufacturer of their product or the name and address of the importer of that particular product. Additionally the common or generic name of that product shall be mentioned along with the quantity of that product in the standard unit of weight or measurement. The month and year of manufacturing or importing of the product along with the maximum retail price should also be affixed on the packaged commodity.

C. Compliances under FSSAI

- 5 The FSSAI has issued several regulations that food businesses must comply with if they seek to run operations in India.

Figure 8

Regulation	Details
Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011	<ul style="list-style-type: none"> • These regulations lay down standards along with a list of permitted additives that different categories of food products must comply with. Food items are broadly categorized into three types – <ul style="list-style-type: none"> ◦ Standardized Food – Foods for which standards have been laid down in these regulations. ◦ Proprietary Foods – Foods that are made of ingredients that are standardized. ◦ Others – These may include novel foods that require product approval from FSSAI • Food items that do not meet the standards specified in these regulations or contain additives that are not permitted, then they may be deemed as ‘sub-standard’ and/or ‘unsafe’. • These regulations further establish a food category system with each category and sub-category of food having a unique identifier number.
Food Safety and Standards (Import) Regulations, 2017	<ul style="list-style-type: none"> • No person is permitted to import food into India without a valid import license in accordance with FSS Licensing Regulations.

	<ul style="list-style-type: none"> Once a consignment of imported food arrives at the port, the Integrated Declaration Form filed by the importer will be forwarded to the Food Import Clearance System of FSSAI for processing. The regulations also specify storage requirements for imported food so as to minimize cross-contamination with other food items and maintain its sanctity. The FSSAI is empowered to order the prohibition of the import of any articles of food based on risk perception or outbreak of disease.
Food Safety and Standards (Advertising and Claims) Regulations, 2018	<ul style="list-style-type: none"> These regulations lay down specifications regarding the advertising and claims that businesses may make regarding their articles of food. In general, claims made regarding food must be truthful, unambiguous, meaningful, and not misleading and help consumers to comprehend the information provided. Claims regarding the nutritional or health attributes of food are required to be scientifically substantiated. The regulations also stipulate certain criteria that must be met if advertisements/claims wish to use certain terms including but not limited to ‘natural’, ‘fresh’, ‘pure’, ‘traditional’, and ‘original’.
Food Safety and Standards (Labelling and Display) Regulations, 2020	<ul style="list-style-type: none"> All pre-packaged foods are required to be labelled as per the specifications in these regulations. Pre-packaged foods cannot engage in labelling of foods in a manner that is false, misleading, or deceptive or is likely to create an erroneous impression regarding its character in any respect. Some declarations on the labelling of food articles are mandated by these regulations. These include <i>inter alia</i>: <ul style="list-style-type: none"> a. Name of the food b. List of ingredients c. Nutritional information d. Declaration of veg/non-veg e. Declaration regarding food additives f. Name and address of manufacturer and marketer/re-packer g. FSSAI logo and license number h. Net quantity i. Retail Price j. Expiry/Use By date k. Declaration regarding allergens

Food Safety and Standards (Safe food and balanced diets for children in school) Regulations, 2020	<ul style="list-style-type: none"> These regulations prohibit businesses from advertising, marketing or selling food products high in saturated fat or trans-fat or added sugar or sodium in school campus or to school children in an area within fifty meters from the school gate in any direction.
Miscellaneous	The FSSAI has also notified standards and special requirements for certain categories of foods, namely, Health Supplements, Nutraceuticals, Food for Special Dietary Use, Food for Special Medical Purpose, Functional Food and Novel Food, Organic Foods, Alcoholic Beverages, Foods for Infant Nutrition, Ayurveda Ahara and Vegan Foods.

D. Compliances under Consumer Protection Act

- 6 In 2019, the Legislature enacted the Consumer Protection Act, 2019 to replace the Consumer Protection Act, 1986. The Act regulates matters relating to violation of consumer rights, unfair trade practices, misleading advertisements *inter alia*.
- 7 When the goods or services are hazardous, dangerous or unsafe the Central Consumer Protection Authority (“CCPA”) has the power to recall goods. They can also pass an order which directs the seller to reimburse the price of the hazardous, dangerous or unsafe goods to the purchaser of such goods. They can also pass an order to discontinue practices that are unfair or prejudicial to the consumer’s interest.²³
- 8 If a seller engages in advertising that is false or misleading and is prejudicial to the interest of any consumer or is in contravention of consumer rights then the CCPA can pass an order to make the seller discontinue such actions.²⁴ In case of non-compliance of such an order the Central Authority can also impose a fine up to 10 Lakhs, and further it may also prohibit the endorser of false advertisement to not endorsing any product or service for a period which may extend to one year.²⁵
- 9 The Act also imposes certain conditions pertaining to liabilities of sellers:²⁶
 - a. If the seller has substantial control over the designing, testing, manufacturing, packaging or labelling of a product that caused the harm.
 - b. If the seller altered or modified the product in a manner that such modification is the substantial factor in causing the harm.
 - c. If the seller made an express warranty of a product independent of any express warranty given by the manufacturer, and the product failed to correspond to his express warranty, causing the damage.
 - d. If the identity of the manufacturer of the product sold by the seller is known, or if the manufacturer of the product is not subject to law of the land in a way that is cannot be passed or enforced against him.
 - e. He failed to exercise reasonable care in assembling, inspecting, or maintaining the product, or he failed to pass on the warnings or instructions of the product maker on the hazards involved or the correct use of the product, and his failure was the direct cause of the injury.

E. FDI Policy

i. FDI in Retail

Foreign Direct Invest (“**FDI**”) in Single Brand Product Retail Trading (“**SBRT**”) is 100% permissible through the automatic route. This is, however, subject to a few conditions.

- a. The product should be sold under the same name both in India and internationally.
- b. SBRT would only cover products that are branded during marketing.
- c. When proposals involve foreign investment beyond 51%, sourcing of 30% of the value of goods purchased, will be done from India, preferably from MSMEs, village and cottage industries, artisans, and craftsmen, in all sectors. The measure of domestic sourcing will be self-certified by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts that the company is required to maintain.
- d. SBRT entities operating through brick-and-mortar stores may also undertake operations through e-commerce. E-commerce activities may be undertaken by the SBRT entity as long as it opens a brick-and-mortar store within 2 years from starting online retail.

The other avenue for FDI in FMCG is Multi Brand Retail Trading (“**MBRT**”). As far as multi-brand retail trading is concerned, FDI is limited to 51% through the Government approval route. FDI in MBRT is subject to the following conditions

- a. Fresh agricultural produce, including fruits, vegetables, flowers, grains, pulses, fresh poultry, fishery and meat products, are permitted to be unbranded.
- b. Minimum amount to be brought in by the foreign investor, would be US \$ 100 million.
- c. At least 50% of total FDI brought in the first instalment of US \$ 100 million, shall be invested in 'back-end infrastructure' within three years. 'Back-end infrastructure' includes capital expenditure including investment made towards processing, manufacturing, distribution, design improvement, quality control, packaging, logistics, storage, ware-house, agriculture market produce infrastructure, land cost and rentals etc.
- d. At least 30% of the value of procurement of manufactured/processed products purchased must be sourced from Indian micro, small and medium industries, which have a total investment in plant & machinery not exceeding US \$ 2.00 million. Sourcing from agricultural co-operatives and farmers' co-operatives would also be considered in this category. The procurement requirement would have to be met, in the first instance, as an average of five years total value of the manufactured/processed products purchased, beginning 1st April of the year during which the first instalment of FDI is received. Subsequently, it would have to be met on an annual basis.
- e. Retail sales outlets are permitted to be set up in cities with a population of more than 10 lakh as per 2011 Census or any other cities as per the decision of the respective State Governments, and may also cover an area of 10 kms around the municipal/urban agglomeration limits of such cities. Retail locations will be restricted to conforming areas as per the Master/Zonal Plans of the concerned cities and provision will be made for requisite facilities such as transport connectivity and parking.
- f. Retail sales outlets may be set up in those States/Union Territories which have agreed, or agree in the future, to allow FDI in MBRT under this policy. The list of States/Union Territories that have allowed FDI in MBRT is as follows –
- g. Andhra Pradesh, Assam, Delhi, Haryana, Himachal Pradesh, Jammu & Kashmir, Karnataka, Maharashtra, Manipur, Rajasthan, Uttarakhand. Daman & Diu and Dadra and Nagar Haveli.
- h. Government will have the first right to the procurement of agricultural products.
- i. Retail trading, in any form, by means of e-commerce, is not permissible, for companies with FDI, engaged in the activity of MBRT.

ii. FDI in E-commerce

- 12 The guidelines for FDI in e-commerce split e-commerce entities into ‘Inventory based model of e-commerce’ and ‘Marketplace based model of e-commerce’.
- a. Inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.
 - b. Marketplace based model of e-commerce means providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller.
- 13 100% FDI under the automatic route is permitted in the marketplace model of e-commerce. FDI is not permitted in inventory-based model of e-commerce.
- 14 FDI in e-commerce is permitted subject to adherence to prescribed conditions, significant of which are summarised below-
- a. E-commerce entity providing a marketplace will not exercise ownership or control over its inventory. Such ownership or control over the inventory will render the business into an inventory-based model. Inventory of a vendor will be deemed to be controlled by the e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies.
 - b. An entity having equity participation by the e-commerce marketplace entity or its group companies, or having control on its inventory by e-commerce marketplace entity or its group companies, will not be permitted to sell its products on the platform run by such entity.
 - c. In a marketplace model, goods/services made available for sale on a website should clearly provide the name, address, and other contact details of the seller. Post sales, delivery of goods to the customers, and customer satisfaction will be the responsibility of the seller.
 - d. E-commerce entities providing a marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.
 - e. An e-commerce marketplace entity will not mandate any seller to sell any product exclusively on its platform.
 - f. An e-commerce marketplace entity with FDI shall have to obtain and maintain a report of a statutory auditor by the 30th of September every year for the preceding financial year confirming compliance with the e-commerce guidelines.

F. Intellectual Property Laws

- 15 In the FMCG sector, intellectual property compliances will fall mostly under the ambit of Trademark Law. Trademark registration provides exclusive rights to trademark owners, and can be obtained for words, logos, numerals, slogans, and devices. In India, the Trademarks Act, 1999 governs this realm. The process of registering a Trademark, and some compliances that will need to be obtained will be listed as follows. Prior to registration, a thorough trademark search needs to be conducted in order to ensure that no similar or identical trademarks exist. This ensures that no costly litigation ensues in the future. In order to register a trademark, one must go to Trademark Registry India and file an application for the trademark after ensuring that it is legitimate. The application is filed under Form TM-A, with the prescribed costs. The application should contain Logo or the Trademark, Name and address of the trademark owner, Classification or Trademark Class, Trademark used since date, and

Description of the goods or services. The approval process for a trademark can take anywhere from 12 to 18 months, and upon completion, the trademark may be objected to, conditionally approved, or fully approved. If it is accepted unconditionally, the trademark can be published in the Trademark journal; if it is approved conditionally, the trademark will be published if the criteria are met. In the event of an objection, the party who filed it will have the chance to contest this specific decision. A possible third party will have three to four months after publication to file a challenge against the filing of this trademark. In the event of resistance, the Registrar will conduct a fair hearing, and if there is no opposition, the trademark will be registered. A registration certificate must be obtained by the business. This procedure must be performed every ten years. Renewal occurs on an application made under Form TM-R.

G. Compliances under GST

- 16 Any company which is conducting its business in India and meets the threshold for the aggregate turnover as prescribed by the Government of India during a financial year is eligible for GST registration. Businesses that have a turnover of Rs.20 Lakhs or more in a financial year, as well as places like the North Eastern States and hill stations who have businesses with a turnover of about Rs. 10 Lakhs or more in a financial year will meet the minimum threshold set. If a private limited company is registered under GST, it is compulsory for them to file GST return. A GST return is a document containing details of all income/sales and/or expenses/purchases that a GST-registered taxpayer (every GSTIN) is required to file with the tax administrative authorities. This is used by tax authorities to calculate net tax liability. Under the GST regime, regular businesses having more than Rs.5 crore as annual aggregate turnover have to file two monthly returns and one annual return.
- 17 Each state will also have its own SGST act that is going to be valid on entities. Companies need to register with their specific state as well, for example in Delhi, entities which have an aggregate turnover of more than 20 Lakh rupees need to register. After registration a Unique Identity Number will be granted pending verification.
- 18 IGST is a tax imposed on all interstate sales of goods and/or services or across two or more states or Union Territories. In addition, the IGST charge and collection are controlled by the IGST Act of 2017, as revised from time to time.
- 19 There are various compliances that need to be adhered to under the CGST Act, 2017. Firstly, there is a turnover based registration compliance where, if the prescribed threshold is crossed, the FMCG entity will need to register under the GST regime. The limits are provided under Section 22 of the CGST Act. Next, a registered supplier in an invoice has to ensure the presence of the following- Invoice number and date; Customer name; Shipping and billing address; Customer and taxpayer's GSTIN; Place of supply; HSN code; Item details; Taxable value and discounts; Rate and amount of taxes; Whether GST is payable on a reverse charge basis; and Signature of the supplier. Filing of returns is the most important cog of compliance and needs to be done per the time prescribed.

H. Competition Act

- 20 Compliances under the Competition Act, 2002 are of three different types. Firstly, there should be no anti-competitive agreements that are entered into by FMCG entities. Section 3 of the Competition Act defines and bans anticompetitive agreements. Anti-Competitive agreements refer to those, that would have a significant adverse impact on competition (AAEC) in Indian marketplaces. A business should NOT discuss, enter into an agreement with, or engage in any

collaborative action with a rival on the price or quantity of items sold or the terms under which they are offered. There are two kinds of agreements that could be entered into. Horizontal Agreements, as defined by Section 3(3) of the Act, may be reached between firms operating at the same level of production or supply chain. "Vertical Agreements" under Section 3(4) of the Act are entered into between businesses operating at different levels of the value chain. These Horizontal and Vertical Agreements include any agreements that:

- (a) determine directly or indirectly purchasing or selling prices;
- (b) restrict or regulate production, supply, markets, technological development, investment or service provision;
- (c) share the market or the source of production or the supply of services by allocating the geographical area of the market, the kind of products or services, the number of clients on the market, or in any other comparable manner;
- (d) result directly or indirectly in bid-rigging or collusive bidding.

21 For instance, take the case of exclusive dealing. Exclusive dealing agreements are agreements in which one party promises to deal exclusively with another and, thus, not to deal with competitors of the other. Such agreements can raise issues under antitrust laws because, by denying competitors access to the goods or services (inputs) offered by the promisor, they can exclude those competitors from the marketplace or materially handicap their ability to compete. These have been the subject of multiple anti-trust cases concerning digital entities, for instance, in the case of *Lifestyle Equities C.V. and Anr. V. Amazon Seller Services private Ltd*, the petitioners alleged that Amazon leverages its control over the platform and gives preferential treatment to its own preferred seller, Cloutail India Private India. This preferred entity gets offered deep discount and higher search rankings. This makes many manufacturers sell exclusively through the preferred sellers of Amazon. Similar allegations were also made in the case of *All India Vendors Association v. Flipkart India Private Ltd*. Due to allegations of tie-ups and exclusive dealings the CCI ordered an investigation into Flipkart and Amazon through the case of *Delhi Vyapar Mahasangh v. Flipkart Internet Private Limited and its affiliated entities* and Amazon Seller Services Private Limited and its affiliated entities. This resulted in Amazon ending its relationship with Cloutail.

22 Secondly, the Competition Act under Section 4 prohibits any enterprise or group from abusing its dominant position in a way that would enable it to operate independently of the competitive forces prevailing in the market. This dominant position would allow it to affect its competitors or consumers or the market in its favour, and the same is prohibited. An abuse of dominant position occurs when a firm-

Directly or indirectly, imposes unfair or discriminatory

- condition in purchase or sale of goods or service; or
- price in purchase or sale (including predatory price) of goods or service

Limits or restricts

- production of goods or provision of services or market therefor; or
- technical or scientific development relating to goods or services to the prejudice of consumers; or

Indulges in practice or practices resulting in denial of market access in any manner; or

Makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

Uses its dominant position in one relevant market to enter into, or protect, other relevant market.

- 23 Lastly, mergers, acquisitions, and combinations are regulated under Section 5 of the Act. There are reporting requirements that are imposed which need to be followed as well. Any acquisitions, mergers or combinations that exceeds the threshold limit, in terms of assets or turnover in India and abroad, are to be reported and scrutinized by the CCI.

I. Advertising restrictions

- 24 The Central Consumer Protection Authority issues these guidelines which will apply to all advertisements regardless of the medium or format. Hence any FMCG organization wanting to advertise its products will have to adhere to the rules stated in this particular legislative text.
- 25 It includes conditions for non – misleading, valid advertisement that need to be adhered to. It also sets guidelines regarding bait advertisement for all prospective advertisers.
- 26 Certain goods which are prohibited from advertising used to advertise using surrogate marketing, alcohol companies in particular did this. Under the new guidelines, surrogate advertising has been prohibited.
- 27 Further guidelines for goods claiming to be free were set in place. These include not having any kind of hidden charge other than the unavoidable cost of responding to the advertisement, collecting the free product or getting its delivery done.
- 28 Advertisement targeted towards children also need to adhere to a stricter set of rules for the health and welfare of minors. Furthermore, certain duties were given that need to be upheld by the manufacturer of the goods:
- a. Claims which can objectively be proven must be substantiated if the central authority asks them to be substantiated.
 - b. Source and date of independent research must be mentioned in case the aforementioned research is the basis of a claim.
 - c. Advertise shall not refer to a person, firm or institution in case it brings an advantage to the product or negatively affects the entity being referred unless requisite permission has been obtained.
 - d. Advertisement shall not contain statement or imagery which either directly, indirectly or by omission are likely to mislead the consumer about the product, advertiser or any other product or advertiser.
 - e. Advertisement should not abuse the trust of the customer and should explicitly and in clear terms mention the price and guarantee time period for the service or the product.
 - f. Any advertisement related to lottery or prize competitions must clearly define the terms and condition of such events. This is so that the customer can obtain a true and fair view of their prospects regarding the lottery or prize competition.

W

Recent Developments

Recent Developments

A. FSSAI Developments -

i. Introduction of Food Safety and Standards (Labelling and Display) Regulations, 2020

- 1 In December 2020 the FSSAI revamped its pre-existing food labelling regulation (Food Safety and Standards (Packaging and Labelling) Regulations, 2011). The FSS Labelling Regulations introduced several new compliances such as declarations regarding food allergens, modified format for the non-vegetarian logo, labelling requirements on non-retail packaged foods, disclosure of the percentage of essential ingredients, extension of labelling requirements to food items being sold on e-commerce platforms and disclosure of the percentage of contribution to Recommended Dietary allowance along with the nutritional information. Food Business Operators ('FBOs') were given until July 1st 2022 to modify their labels and packaging in accordance with the new regulations. Since the FSS Labelling Regulations were introduced, they have already been amended three times as of date.

ii. Regulations for special categories of foods –

With an increase in the demand and supply of vegan and/or organic products in the markets, FSSAI

- 2 has responded with standards and labelling requirements for the same. To that effect, FSSAI has notified the Food Safety and Standards (Organic Foods) Regulations, 2017 ('**FSS Organic Foods Regulations**') and the Food Safety and Standards (Vegan Foods) Regulations, 2021 ('**FSS Vegan Foods Regulations**').

The FSS Organic Foods Regulation does not even provide a definition for 'organic foods'. It states that organic food offered for sale must comply with other organic food programmes such as the National Programme for Organic Production ('**NPOP**') under the Agricultural and Processed Food Products Export Development Authority ('**APEDA**') or the Participatory Guarantee System for India ('**PGS-India**') under Department of Agriculture and Farmers Welfare. Further, there is a requirement for a specific logo that needs to be affixed on organic packaged foods. Strangely, the requirement and format for the organic logo do not come from the FSS Organic Foods Regulation but instead from the FSS Labelling Regulations. This creates a framework wherein if an FBO desires to get organic certification and attach the organic logo to their product, they will have to comply with upwards of 3 regulations and Governmental Programmes.

- 3 The FSS Vegan Foods Regulations provide a definition of what constitutes vegan food and provide the requirement and format for a vegan logo to be affixed to packages of vegan foods. The Regulations go on to provide a certification mechanism for food products to qualify as vegan. However, complications similar to organic foods can be expected in vegan foods as well. APEDA has set up a committee to form policies, standards and certifying mechanisms for the manufacturing of vegan products targeted at the export market. It can be reasonably expected that APEDA's vegan policy will have its definitions, certification system and logo. This will lead to tremendous confusion among FBOs that wish to label their products as vegan.

III. Proposed amendments to front of the pack labelling that will potentially overhaul and over-complicate the labelling design and compliance mechanisms followed by FBOs.

- 4 FSSAI and the Legal Metrology Division of the Department of Consumer Affairs have come up with draft amendments that have sparked great debate in the food labelling regulatory space.
- 5 In August 2022 the Department of Consumer Affairs proposed amendments to the LM (Packaged Commodities) Rules requiring that prime constituents of any packaged commodities along with their percentages be declared on the Front of the Pack ('FoP').
- 6 In September 2022, the FSSAI came out with draft amendments to the FSS Labelling Regulations. These introduced the concept of Front of Pack Nutritional Labelling ('FoPNL') to discourage consumers from consuming High, Fat Sugar, salt ('HFSS') food. The draft amendment conceptualises a five-star rating system wherein a score would be calculated for each food item based on values assigned to them which then be generated into a rating out of 5. A logo containing the rating of each product is proposed to be mandatorily affixed to the FoP of packaged foods.
- 7 In status-quo, a majority of the declarations required to be made on food packages are required to be part of the Principle Display Panel ('PDP'). These amendments depict that Governmental authorities have extended their breadth of influence to micro-manage the FoP of packaged food items as well.

B. Competition Law Updates

- 8 The Competition Act of 2002 was created to foster and preserve market competition, safeguard consumer interests, and guarantee market players' freedom of trade.²⁷ It formed the Competition Commission of India (CCI) in order to eradicate practises that impede market competition. However, a decade has passed since the Competition Act, 2002 came into force. With the coming of the digital era the way businesses operate have fundamentally changed. In 2018, the Ministry of Corporate affairs set up the Competition Law Review Commit to align the Competition Law framework in India with the economic developments that have taken place in the country.
- 9 *Key Changes under the new Bill:*
 - i. **Anti-competitive agreements:** According to the Act, anti-competitive agreements include any arrangement linked to the manufacture, delivery, storage, or control of goods or services that may have a significant negative impact on competition in India. If certain requirements are met, any agreement between organisations or individuals engaged in identical or similar operations would have a detrimental impact on competition. The bill states that also firms or individuals not involved in identical or similar operations would be deemed to be a member of such agreements if they actively participate in their advancement.
 - ii. **Regulation of combinations based on transaction value:** The Act forbids any person or business from engaging into a combination that may have a substantial anticompetitive impact. The restriction applies to transactions involving parties with: I cumulative assets more than Rs 1,000 crore or (ii) cumulative revenue greater than Rs 3,000 crore, subject to specified limitations. The bill increases the definition of combinations to encompass deals above Rs 2,000 crore in value.²⁸

- iii. **Time limit for combination approval:** The Act stipulates that the CCI must provide a decision on an application for combination permission within 210 days. The proposed legislation decreases this time restriction to 150 days.²⁹
- iv. **Decriminalization of certain offences:** The bill modifies the type of punishment for specific offences from fine to penalty. These offences mainly talk about noncompliance of commands of CCI and Director General directives against anticompetitive agreements and dominant position misuse.³⁰
- v. The Bill authorises the CCI to end an investigation if the business offers a settlement, or. CCI might specify the approach and execution of the framework of settlement and commitment by rules.³¹

C. Drugs and Cosmetics Updates

- 10 In 2020, the Ministry of Health and Family released the Cosmetics Rules 2020 in furtherance of the powers conferred to it under the Drugs and Cosmetics Act, 1940 in order to separately codify the rules for cosmetics. All the cosmetics licenses prior issued will be valid until eighteen months from the date of issue of the notification, i.e., 15th December 2020. Some of the key points of the rules are laid down below:
- i. **New Cosmetics:** The Rules have introduced a different category for 'new cosmetics' defined as "a cosmetic which contains a novel ingredient that has not been used anywhere in the world or is not recognized for use in cosmetics in any National or International literature."³² Persons who desire to import or manufacture new cosmetics are required to apply to the Central Licensing Authority along with data on the safety and effectiveness of the cosmetic.³³
 - ii. **Cosmetics Quality:** The Cosmetic Rules 2020 prohibit the manufacturing and/or import of cosmetics that do not meet the essential quality and safety requirements. In addition, some raw materials (as listed in Annex A of Indian Standard IS 4707 Part 2) are forbidden.³⁴
 - iii. **Imports:** The Cosmetic Rules 2020 ban the importation of cosmetics in the following circumstances:
 - a. Sale, production, and distribution of the questioned cosmetic are forbidden in its country of origin.
 - b. The cosmetic containing "hexachlorophene" (considered to be dangerous to humans);
 - c. The Use by Date or Use Before Date is fewer than six months after the import date;
 - d. The cosmetic that has undergone animal testing after November 12, 2014.³⁵
 - iv. **Voluntary Recall Mechanism:** The Rules impose an additional obligation on the manufacturer/his authorised agent to withdraw cosmetics from the market if the manufacturer/their authorised agent believes or has reason to believe that such cosmetics are likely to affect the customer's health or have a negative impact, and are therefore potentially unsafe. In such a case, the responsible producer or certified agent must promptly remove the cosmetics from the market, declare the reasons for the withdrawal, and notify the SLA (State Licensing Authority) or the CLA (Central Licensing Authority), as applicable.³⁶
 - v. **Manufacture of Cosmetics for Distribution or Sale:** The Cosmetic Rules 2020 require the applicant to provide a self-declaration confirming conformity with good manufacturing practices and other sets of regulations. It also illustrates the requirement of acquiring different permits for each location when production occurs at many locations. In addition, concurrent with the import of the Registration Certificate, the licence for manufacture/loan must be valid in perpetuity and be subject to the payment of a retention fee within five years on the date the licence was issued.

- vi. **Digitisation of applications:** The Cosmetics Rules allow application forms to be submitted online in contradiction to the prior licensing requirements.

D. Legal Metrology Developments

- 11 In 2020, the Legal Metrology Division of the Department of Consumer Affairs published a “Stakeholder consultation on proposal of decriminalization of Legal Metrology Act, 2009” (“proposal for decriminalization of LM Act”). The proposal for decriminalization recognizes that criminal offence often requires the standard of proof to be beyond reasonable doubt, a much higher threshold than the standard adopted for civil wrongs. This has brought into question the efficiency of criminal law in dealing with misconduct which are of technical nature, such as those covered under the Legal Metrology Act, 2009. Thus, the proposal aims to shift from criminal to civil liabilities for transgressions under the Act.
- 12 Below is a summary of the amendments proposed in the document:
- i. Proposal includes amendment to certain sections of the Act with the intention of decriminalising them.
 - ii. Proposal increases the penalty for the sections that will be decriminalised. It also includes provisions for cancelling of licenses that have been granted if compounding is not done.
 - iii. Proposed Amendment to Section 49:
 - iv. Initially only a person at the director level could be nominated to be responsible but the proposed amendment will allow the nominated person to also be at the managerial level.
 - Proposed Amendment to Section 2(r): Harmonizes definition of sale with the one mentioned in the Constitution of India.
 - v. Key difference being inclusion of the word ‘services.’
 - vi. Addition of provision: Penalty for selling pre-packaged products over the MRP. Currently, the provision for it is under the Legal Metrology (Packaged Commodities) Rules, 2011.
 - viii. Amendment to Section 48: Penalties under Sections 26, 41, 42 & 43 may be made compoundable.

E. Consumer Protection Law Updates

- 13 In 2020, the Department of Consumer Affairs notified the Consumer Protection (E-Commerce) Rules, 2020 to specify the duties and liabilities of e-commerce entities and sellers.
- 14 Any business which sells any and all goods and services sold via the ecommerce platform will come under the new E-commerce rules. Any FMCG entities selling their wares online will come under these particular rules.³⁷ Key compliances under the rules are summarized below:
- i. These rules make it an obligation upon to company to appoint a nodal officer who will ensure compliance with the provisions of this particular act. Since 2020 every E-commerce organization needs to establish and set up a grievance redressal mechanism and a grievance officer shall be appointed for the same. The information of this officer must also be displayed on their E-commerce platform.
 - ii. All complaints must be acknowledged within 48 hours and solved within a period of one month.

- iii. No cancellation charges must be charged unless similar charges are also borne by the FMCG entity.
- iv. Consent taken for purchase of product should be explicit in nature, a pre-ticked check box for example will not qualify.
- v. Every e-commerce firm must prominently display the following information on its platform in a clear and accessible manner for its users:
 - (A) legal name of the online business;
 - (B) the primary physical address of its headquarters and its branches;
 - (C) name and information about its website;
 - (D) contact information, including email address, fax, landline, and mobile phone numbers, for customer service and the grievance officer.

F. Labour Law Updates

- 15 As mentioned above, the labour law framework in India is overtly complex, consisting of a deluge of legislations. There are currently approximately 40 Central legislations and over 100 State Legislations regulating various aspects of labour law. The 2002 Second National Commission on Labour (“**NCL**”) found existing legislation to be complex, with archaic provisions and contradictory definitions. To ensure ease of compliance and bring out uniformity in labour laws, the NCL recommended the coalition of central labour laws into broader groups such as (i) industrial relations, (ii) wages, (iii) social security, (iv) safety, and (v) welfare and working conditions.
- 16 In 2019, the Ministry of Labour and Employment introduced four labour codes to consolidate Central labour laws. The four codes are summarised below:
- i. The Code on Wages, 2019*
- 17 The Code applies to every employee. The federal government will make wage-related decisions for industries including railroads, mines, and oil fields. State governments will make all other employment-related decisions.
- 18 According to the Code, the federal government will establish a minimum wage which will be called the floor wage that takes into consideration the living conditions of employees. Additionally, it may establish various minimum salaries for different geographic regions. Before determining the minimum wage, the federal government may confer with the Central Advisory Board and state governments.
- 19 The minimum wages set by the federal and state governments must be above the floor wage. If the present minimum wages set by the federal or state governments are more than the floor wage, the minimum wages cannot be then reduced.
- 20 The minimum wage shall be changed and reviewed no more often than every five years by the federal or state governments.
- 21 When determining minimum wages, the federal or state government may consider criteria such as:
 - a. the skill of employees and
 - b. the complexity of the task.

- 22 The federal or state government may determine the number of hours that constitute a standard workday. In the event that workers work beyond a standard workday, they are entitled to overtime pay, which must be at least double the standard rate.
- 23 Under the Code, an employee's pay may be withdrawn for a variety of reasons, including
- penalties
 - absence from duty
 - accommodation provided by the employer
 - recovery of advances paid to the employee.

These deductions should not exceed fifty percent of the entire salary of the employee.

- 24 All workers whose monthly earnings do not exceed a certain sum, as determined by the federal or state government, will be eligible for a yearly bonus. The bonus will be at least 8.33 percent of his salary, or 100 rupees whichever is greater. The company will also share a portion of the gross profits to the workers. This will be provided according to an employee's yearly salary. The maximum bonus an employee may get is 20% of his yearly salary.
- 25 The Code prohibits discrimination based on gender in matters related to wages and recruitment of employees for the same or similar work. Work of similar nature is defined as work that requires the same level of skill, effort, experience, and responsibility.
- 26 The Code stipulates penalties for infractions committed by an employer, such as paying less than the required wages or violating any provision of the Code. Depending on the nature of the offence, the potential penalties include imprisonment for three months and a fine of up to one lakh rupees.

ii. The Industrial Relations Code, 2020

- 27 Infractions punishable by up to one year in jail or a fine will be compoundable. For offences carrying a fine, compounding is permitted for an amount equal to 50 percent of the maximum fine. For crimes punishable by jail, 75% compounding is permitted. 50% may be compounded if a "penalty" is imposed (e.g., for failing to maintain registers) and 75% may be compounded for "offences" (e.g., for falsifying records).
- 28 Under the 2020 Bill, establishments with at least 300 employees are obliged to get government approval prior to closure, layoff, or retrenchment.
- 29 The 2020 Code raises the requirement for the definition of a factory to 20 employees for manufacturing facilities that use electricity and 40 workers for manufacturing facilities that do not use electricity.

iii. The Code on Social Security, 2020

- 30 The Code stipulates varying application levels for the schemes. For instance, the EPF Scheme applies to businesses with 20 or more workers. The ESI Scheme will apply to select enterprises with 10 or more workers, as well as any establishments deemed by the central government to do hazardous or life-threatening work. These levels are subject to modification by the federal government. Unless they are already registered under another labour regulation, all qualifying enterprises are obliged to register under the Code.

- 31 The 2020 Bill modify the punishments for specific offenses. For instance, the maximum sentence for interfering with an inspector's duties has been reduced from one year to six months. Similarly, the penalty for unlawfully deducting an employer's contribution from an employee's wages has been reduced from one year in prison or a Rs 50,000 fine to a Rs 50,000 fine alone.
- 32 The 2020 Bill emphasises that schemes for gig workers and platform employees may be supported by a mix of federal, state, and aggregator contributions. Schedule 7 of the Bill contains a list of aggregators for this purpose. These include nine categories, such as ride-sharing services, food and grocery delivery services, content and media services, and e-marketplaces. Any contribution by such an aggregator may be between 1% and 2% of the aggregator's yearly revenue, as determined by the government. However, this contribution cannot exceed 5% of the total amount paid or due to gig workers and platform employees by an aggregator.

iv. The Occupational Safety, Health and Working Conditions Code, 2020

- 33 The initial 2019 Bill submitted before the parliament permitted the competent government to announce the maximum daily work hours for employees. The 2020 Bill sets the daily maximum at eight hours.
- 34 The 2019 Bill made it possible for the relevant authorities to restrict the employment of women for harmful activities. The 2020 Bill stipulates that women will be eligible for employment in all institutions and for all sorts of job. It further stipulates that if they are obliged to engage in hazardous or risky tasks, the government may order the business to provide necessary safety precautions before hiring them.
- 35 The 2020 Bill creates a Social Security Fund for the benefit of unorganised employees. The Fund shall be credited with the amount collected from various Code fines, including the amount obtained via compounding. The government may also designate other funding sources for the Fund.

Issues and Challenges faced by the Retail Industry

Issues and Challenges faced by the Retail Industry

A. Growth of e-commerce and increasing relevance of big data

- 1 The FMCG Industry in India has seen a reshaping, especially over the last decade. With the increasing penetration of digitization in both urban as well as rural areas, the way Indians shop has changed forever. What would otherwise have been a slow organic shift was sent into overdrive with the advent of the Covid-19 Pandemic. Lack of access to traditional marketplaces and shutdowns imposed by the government created the perfect environment for e-commerce to supplant the physical markets of earlier. Currently, the physical FMCG sector has seen competition arising from online entities such as Amazon Fresh, Big Basket, Zepto, and Blinkit. India has a large consumer base for e-commerce goods, as cheap mobile data and access to smartphones has resulted in the growth of e-tailers like Amazon. Consequently, there has been an erosion of the consumer base for physical retailers, a challenge that the industry is facing. The sheer convenience offered by e-commerce platforms, backed by incentives that brick and mortar outlets cannot compete with are luring more consumers than ever. This has been helped by the mushrooming of different types of goods and services that are available on these platforms. Everyday use items such as groceries and other consumable products and all kinds of allied services can be procured on e-commerce platforms.
- 2 Apart from convenience and variety, e-commerce platforms also bring with them Big-data backed analytics to create the best consumer experiences. From targeted advertisements to consumers which predict their needs and wants through an analysis of their consumption patterns, to inventory analysis by checking demand and supply, big data has revolutionized the FMCG marketplace. Analytics have allowed e-commerce entities to turn their data into meaningful insights that they can leverage to define new go-to-market strategies with a better approach to winning customers. Technology has been the biggest driving force in the last 3 decades, and the FMCG industry is no exception. Optimization has been the end goal for every business, and with big data analytics, that goal seems within reach for e-commerce platforms.
- 3 However, regulators have become increasingly cognizant of how e-commerce entities impact the retail space. For instance, in December 2021, the CCI revoked the approval it had awarded the Amazon-Future combination, noting that this deal was just a front for Amazon to enter the physical retail sector in India.³⁸

B. GST

- 4 With the advent of the updated regime of taxation under the Goods and Service Tax, new compliances were imposed on the FMCG industry. For smaller sellers especially, this introduced significant burdens in terms of restructuring and compliance which they had to account for. The intricacies of the law caused great confusion, and the subsequent amendments and changes for a few years caused even further hassle for the retail industry. Some of the difficulties that exist are highlighted here. Apart from increase costs which lead to lower profits, there were other compliance-based issues as well. An intended consequence was to reduce the amount of black money transactions that took place before the implementation of the GST regime. However, this has not been entirely effective as FMCG with thin margins now choose to sell material without creating an official bill at all.

- 5 It takes substantial manual efforts and time-consuming processes for extracting transactional level data from Point-of-Sale billing software for filing GST returns.
- 6 Unavailability of input tax credit on civil construction costs adds costs on retail sector companies who regularly update new stores and renovate their existing ones.

C. Multiplicity of compliances which impacts ease of doing business – demand for platforms like Maharashtra's Maitri

- 7 The Indian regulatory framework is problematic for FMCG sellers in several ways but the biggest issue that it poses is that the whole system is too complicated in nature. There are myriads of forms that need to be submitted and a bundle of regulations to be complied with. In several cases these compliances are repeated in multiple legislative bodies and leading to redundancy and increase in compliance costs.
- 8 It is impractical for a company to be adhering to these many regulations and as a matter of fact increases the floor to enter the marketplace. A new FMCG entity trying to compete in a saturated marketplace will find itself unable to do so. A lot of these regulations also just have a criminal sentence attached to them which is quite unfair considering the complicated web of compliances that have been built by the regulatory bodies in India.
- 9 There have been steps taken in the right direction, the government is currently looking to decriminalize The Legal Metrology Act, 2009 which will reduce the punitive measures taken by the act. At the same time government platforms such as 'National Single Window System' which compiles all the approval requirement across 26 central departments and 16 state departments is a breath of fresh air. Such platforms must be encouraged and their scope increased to include more departments and regulatory bodies.

D. Demand for Industry Status

- 10 Almost every large industry in India is governed by a regulator, or has a Ministry that looks into its functioning and addresses issues that crop up from time to time. This is necessary for a situation where reactivity is necessary to ensure that not only the industry, but also consumers feel relatively safe and protected. However, it is surprising that in India, an industry that is as large and contributes as much to the economy- the Retail Industry, if not the FMCG sector, doesn't have 'industry' status yet. This is an oversight that has far reaching ramifications, and needs correction. Indeed, in light of the Covid-19 pandemic and the subsequent economic upheavals, the need for an 'industry status' is immediate. The MSME sector and retail are the biggest avenues for economic growth and have been one of the fulcrums of the India's post-Covid growth phase.
- 11 The issues that arise with this sector are primarily fuelled by the lack of a ministry or department which can act as a regulator to govern the retail industry. This leads to a lack of assistance and coordination for players in the retail industry in doing their business. This is however exacerbated by the fact that there exist a significant number of compliances and licenses that need to be applied for and complied with. Compliance with the weights and measurement act, food safety act, shop and establishment act, labour laws, board and signage law and fire laws, coupled with the fact that there are multiple departments to seek permission and licenses from. This can be alleviated if the retail sector is provided with industry status. This will not only help in getting access to a

department/ministry which can regulate them, but also provide reactive and quick changes when necessary for the market to function in a better and responsive way. The retail sector is the second largest employer in India after agriculture at present and an industry classification will help those employed by it in getting different benefits like access to bank funds at right rates, a chance to be in eyes of the foreign investors and face similar laws, pricing mechanism and costs across the country.

E. Government restrictions on FDI

- 12 Foreign Direct Invest policies in India have gone through a series of shifts. Single Brand Retail Trading (SBRT) refers to a situation where goods are sold both domestically and internationally under the same brand name. All goods sold by a business or entity must be sold under that single brand name. The FDI Policy on SBRT has been operational since 2006.
- 13 In 2006, the Guidelines for FDI in Retail Trade of ‘Single Brand’ Products was released by the Department of Industrial Policy & Promotion (FC Section) in a Press Note.³⁹ The Guidelines allowed FDI up to 51%, with prior Government approval, in retail trade of ‘Single Brand’ products. This was, per the Press Note itself, ‘aimed at attracting investments in production and marketing, improving the availability of such goods for the consumer, encouraging increased sourcing of goods from India, and enhancing competitiveness of Indian enterprises through access to global designs, technologies and management practices.
- 14 Till 2011, the same Guidelines were applicable. However, the 2012 FDI Policy introduced a change in this regard.⁴⁰ It was decided to allow FDI up to 100% in the new Policy, increasing the limit from the previous 51%.⁴¹ Interestingly however, the reasons for this increase were not any different from the ones in the 2006 Note. The 2012 Policy however increased the list of conditions required for availing this 100% FDI through the Government route.
- 15 The next major amendment came in 2014, when the FDI Policy allowed for 100% FDI, but liberalized the regime.⁴² It allowed for the Automatic Route up to 49%, and the Government route beyond 49% only. This further eased the constraints on FDI in the retail sector.
- 16 The 2018 Policy further liberalized the regime by allowing 100% FDI through the automatic route, taking away governmental control on the sector.⁴³ This was done as part of the Governments initiatives to improve the ease of doing business in India, on January 10, 2018. Prior to the introduction of this move, approval from the Secretariat for Industrial Assistance in the Department of Industrial Policy and Promotion was required for FDI in SBRT over 49%. Further, for any addition to the product/ product categories to be sold under ‘single brand’, a fresh approval from the Government was required.⁴⁴ Removing government control over the industry is a fresh change and is better for the economy as a whole. Higher level of FDI allowed allows India to be a lucrative market space for foreign investors who will funnel high amount of capital into the emerging start up market. Reducing the complexity of the stringent regulatory framework also incentivizes more firms to look at FDI as a lucrative option.
- 17 From 2006 till 29.03.2018, information released by the government shows that 112 brands have obtained approval of Government for SBRT activities. FDI up to 100% under automatic route has been allowed in SBRT vide Press Note 1 of 2018 which was subsequently notified vide Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Amendment) Regulations, 2018 on 26/03/2018.⁴⁵

- 18 The 2018 Guidelines stated that for FDI in SBRT beyond 51%, 30% of the value of the goods procured should be sourced domestically, preferably from MSMEs, village and cottage industries, artisans and craftsmen, in all sectors. Such local sourcing requirement was required to be met as an average of 5 years' total value of goods purchased, at the beginning of April 1 of the year of opening of the first store by the SBRT entity and, thereafter, such condition was to be met on an annual basis.
- 19 The DPIIT clarified through Press Note 4 of 2019 that the sourcing requirement should be met, in the first instance, as an average of five years' total value of the goods procured, beginning April 1 of the year of opening of first store or start of online retail, whichever is earlier.⁴⁶ Further, entities could adjust their entire procurement of goods from India for their global operations against their mandatory 30% local sourcing requirements. Even sourcing for global operations done through group companies or indirectly via third parties such as contract manufacturers would be counted towards domestic sourcing obligations. This allowed for FDI in the e-commerce retail sector as well, a move that was lauded by foreign companies which wanted to expand in India.⁴⁷
- 20 The situation became a little complex due to an error in the FEMA (Non-Debt Instruments) Rules, 2019, which mistakenly required that any FDI in SBRT under the automatic route was permitted only till 49% and for FDI beyond 49%, government approval was required under approval route.⁴⁸ These rules were subsequently amended a few months later to incorporate the changes made by the 2018 and 2019 regimes, through a retrospective amendment.⁴⁹ However, this still did not incorporate the word online store, for which a further amendment of the NDI Rules was required in 2020, thus making them consistent with the FDI Policy.⁵⁰
- 21 The other avenue for FDI in retail is Multi Brand Retail Trading. As far as multi brand retail trading is concerned, FDI is limited to 51%, with prior government approval. No automatic route of FDI is available in case of MBRT. Moreover, retail trading in any form by means of e-commerce would not be permissible for companies with FDI engaged in the activity of multi-brand retail trading. In the past Indian Government has frowned upon creative joint venture models to circumvent majority foreign ownership in MBRT.
- 22 There is another significant issue relating to retail trading which needs clarification – whether 'sub-brands' constitute a single brand. For example, Marks & Spencer ('M&S') sell goods under sub-brands such as M&S Women, Autograph etc. under the M&S Parent brand. So, it becomes important from the perspective of restrictions under FDI Policy whether these sub-brands can be treated as a single brand or will fall under MBRT.

F. Intellectual Property Rights

- 23 The retail sector often falls prey to Intellectual Property Rights violations which result in the loss of billions of dollars to infringements and pirated materials. IPR plays a large role in the FMCG sector. Most market players own one or more kinds of intellectual property, like trademarks, patents and sometimes copyrights. These provide legitimacy and value to the brands and companies that participate in the FMCG sector and allow them to use their businesses, products, and inventions to

gain financial benefits and an edge over their competitors. The intrinsic value arising out of brand recognition in the sector needs to be protected, as that is the one differentiator in a saturated marketplace. If violations of intellectual property through means such as pirating, existence of the grey market, trademark violations, etc are rampant, they could potentially ruin businesses, which is why protecting IPR is extremely crucial. Intellectual Property Rights also gain an increased place of focus in E-commerce, especially in the form of licensing.

Appendix A

Indicative List of Relevant Licences

S. No.	Particulars	Department
1	Legal Metrology Packers Registration	Department of Legal Metrology, Maharashtra
2	EPR Registration for Plastic Waste Management	Central Pollution Control Board
3	Registration Certificate under Plastic Waste Management Rules	Maharashtra Pollution Control Board Note: This Registration is mandatory under Rule 13(1) of the PWMR 2016.
4	Shops and Establishment Certificate	Department of Labour, Mumbai
5	Trade License	Bombay Municipal Corporation (BMC)
6	Importer Exporter Code (IEC)	Office of Zonal Director of Foreign Trade
7	Fire NOC followed by Inspection Report	Maharashtra Industrial Development Corporation, Urban Development
8	Occupancy Certificate	Town Planning Department, Maharashtra Industrial Development Corporation
9	Consent to establish (under Plastic Waste Rules)	Maharashtra Pollution Control Board
10	GST Certificate	Department of Revenue
11	Sales Tax Registration	Commercial Taxes Department
12	Custom Registration	Office of the Chief Commissioner of Customs
13	Pan Card	Department of Income Tax
14	Tan Certificate	Department of Income Tax
15	VAT Registration	Department of Income Tax
16	Police NOC	Office of the Deputy Commissioner of Traffic Police, Mumbai
17	Lift and Escalator Inspection Certificates	Executive Engineer, Electrical Inspectorate, Maharashtra

18	Import and Store of Petroleum Permission (HSD)	Petroleum & Explosives Safety Organization (PESO)
19	DG Set Plan Sanction	Department of Energy, Maharashtra
20	DG Set Charging Permission	Department of Energy, Maharashtra
21	Registration of Diesel Generators Sets	Department of Energy, Maharashtra
22	Registration and License under Contract Labour Act	Department of LabourP.S: This license is required when an establishment or a contractor is employing labour on contractual basis.
23	Consent to Operate Approval	Maharashtra State Pollution Control Board
24	Sale Deed	Registrar Office, Mumbai
25	Load Sanction Letter	Superintending Engineer, Mumbai
26	Consent to Establish/ NOC for Pollution	Pollution Control Board
27	Exemption permission for Operating 24 X 7	Department of Labour, Maharashtra
28	Certificate of Registration for Contract Labour	Labour Commissioner, Department of Labour, Mumbai
29	Relevant Drug Licenses	Drugs and Cosmetics Act, 1940
30	Relevant FSSAI Licences	Food Safety and Standards Act, 2006

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Notes

