

## Ministry of Consumer Affairs, Food, and Public Distribution

# Draft E-commerce Rules, 2021

### Relevant to All Mahindra Businesses

06 July 2021

## Introduction

The Ministry of Consumer Affairs, Food, and Public Distribution, Government of India notified and made effective the provisions of the Consumer Protection (E-Commerce) Rules, 2020 under the Consumer Protection Act, 2019 from July 24, 2020. The Ministry has now released a draft amendment to the E-Commerce Rules on June 21, 2021 and requested for views, comments, or suggestions

## Applicability

- Regulate the activities of an ‘e-commerce entity’
- The term ‘e-commerce entity’ hitherto was defined to mean ‘persons who own, operate or manage a digital or electronic facility or platform for electronic commerce’.
- Propose to amend the definition to now include: **(i)** entities engaged by e-commerce entities for the purpose of fulfilment of orders placed by a user on its platform; and **(ii)** related parties.
- E-commerce businesses that operate as a limited liability partnership or a registered partnership under relevant Indian laws are also included within the draft rules.

## Salient Features:

- **Mandatory registration:** All e-commerce entities that intend to operate in India need to be registered with the Department of Promotion of Industry and Internal Trade (**DPIIT**) and the registration number must then be displayed on their platform.
- **Appointment of officers:** The draft rules propose that each e-commerce entity shall appoint:
  - (i) a chief compliance officer who will be liable for obligations of the e-commerce entity for compliance with the Act and the e-commerce rules and for the information or data made available or hosted by the e-commerce entity; (ii) a nodal contact person for coordination with law enforcement agencies; and (iii) a resident grievance

- **Grievance redressal:** E-commerce entities will also be required to publish the contact details of the grievance officer on their online platforms, along with the relevant procedure for a consumer to register a complaint.
- **National consumer helpline:** E-commerce entities will be required to partner with the National Consumer Helpline.
- **Duties of E-Commerce Entities:** i) Ban on flash sales, ii) Discourage misleading advertisements
- **Regulation on Imported Goods:** If any imported goods or services are offered for sale, the e-commerce entity will be required to: **(i)** provide identification details of the importer; **(ii)** identify goods based on country of origin; **(iii)** provide an option to filter according to country of origin; and **(iv)** present users with suggestions and alternatives of domestic goods at the time the imported goods are being viewed. Further, e-commerce entities will be required to provide a ranking for goods in a manner that does not discriminate against domestic goods or sellers.
- **Mis-selling:** Mis-selling means the selling of goods and services by the deliberate misrepresentation of the information provided by the e-commerce entity about the suitability of goods and services to the consumer purchasing it. The e-commerce entities are not to indulge in mis-selling.
- **Cross-selling:** The e-commerce entities must display in a clear manner on their platform the name of the entity providing data for cross-selling and the data of such entity used for cross-selling.
- **Express consent requirements:** Explicit consent is to be taken for consumer information being made available to third parties and for recording a purchase. The explicit consent must be recorded through affirmative action and cannot be in the form of pre-ticked checkboxes.
- **Abuse of dominant position:** E-commerce entities cannot abuse their dominant position including the use of any information collected by them to give themselves an unfair advantage.
- **Product disclosure:** The 'best before' or 'use before date' of the product must be prominently displayed on the platform of the e-commerce entity.
- **Other disclosures:** i) name of the seller shall be displayed in the same size font as the name of the e-commerce entity on the invoice provided by the e-commerce entity. Clear and prominent disclosures must be made by the e-commerce entity for the identification of sponsored products on their platform and ii) clear and prominent disclosures must be made by the e-commerce entity for the identification of sponsored products on their platform.

- **Other obligations:**

- i. The name or brand associated with that of the marketplace e-commerce entity cannot be used by sellers of goods or services for promotion or offer for sale, on an e-commerce platform in a manner which would imply brand association between these two entities.
- ii. E-commerce entities shall not mislead consumers by manipulating search indexes based on the search query provided by the consumer.
- iii. E-commerce entities shall not use information collected by marketplace e-commerce entities for the sale of goods bearing a brand or name which is common with that of the marketplace e-commerce entity or promote themselves as being associated with the marketplace e-commerce entity if it amounts to an unfair trade practice and impinges on consumer interest.
- iv. E-commerce entities are to provide information under their control and/or assist government agencies within 72 hours from being provided with a written order for prevention, detection, investigation, etc. of offences under any law.

## **Liabilities of Marketplace E-Commerce Entities**

- **Fall back liability:** The concept of “**Fall back liability**” has been introduced in the draft rules wherein marketplace e-commerce entities will be liable for losses caused to consumers as a result of a failure in the delivery of goods and services by a seller on their platform due to negligent conduct, omission, or through the commission of any act by a seller in fulfilling their duties and liability.
- **Ban on sale of goods to sellers:** Marketplace e-commerce entities cannot sell goods or services to their registered sellers on their platforms or advertise a body of sellers for the purpose of subsidizing a sale on their platform.
- **Limitations on indirect activities:** Related parties and associated enterprises of marketplace e-commerce entities shall not take an action which the e-commerce entities themselves cannot undertake. Further, the related parties and associated enterprises of marketplace e-commerce entities cannot be listed as sellers on their platforms and any information collected by them shall not be used to provide an unfair advantage to them.

- **Non-discrimination by logistics service providers:** Logistics service providers of the e-commerce entity are not to provide differential treatment to sellers of the same category on their platform. However, logistics service providers of a marketplace e-commerce entity are required to provide a disclaimer including terms and conditions governing their relationship with the sellers and any different

## Summary of the Industry Reactions / Concerns

- i. Guidelines might also serve as a regulatory roadmap for the evolution of a dynamic e-commerce market.
- ii. The amended definition of e-commerce entities does not provide any interpretative guidance on the term ‘fulfilment of order’. A broad interpretation of this term will include any entity that is engaged by the e-commerce entity for the fulfilment of orders (like logistics service providers). Such an interpretation would require these entities to also comply with all the regulations mentioned in the proposed amendment which would impose extremely onerous obligations on them.
- i. The draft rules introduce increased compliance requirements for e-commerce entities such as the registration with the DPIIT, the appointment of compliance officers, and mandatory partnering with the National Consumer Helpline. These proposed amendments are applicable to all e-commerce entities similarly without differentiating them on the basis of the size of the entity, their relevant industry, sector, etc. Such requirements would significantly affect smaller e-commerce entities as they may not be able to comply with these increased compliance requirements, thereby defeating the objective of the rules to promote fair competition.
- ii. The obligation to appoint a chief compliance officer and the liabilities imposed upon such officer seems to be inspired by a similar obligation under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021. The requirement to appoint the other two officers is also spelt out in the IT intermediary rules. Social media platforms that are required to appoint such officers are finding it difficult to appoint chief compliance officers due to the nature of liability imposed on them under the IT intermediary rules. E-commerce entities might face a similar hurdle too if this provision is retained in the present form.
- iii. The draft rules also lay down strict liabilities on e-commerce entities without clarifying their scope. While the amendment proposes to ban flash sales, it fails to adequately define what

would constitute a flash sale, thereby creating ambiguity amongst e-commerce entities as to the amount and frequency of discounts that they can offer to consumers without falling foul of the rules.

- iv. Introduction of fallback liability is another instance where the lack of clarity of the provision would cause its subjective enforcement. Since it would be difficult to ascertain negligence of the seller resulting in losses to the consumer, not all instances of losses to the consumer caused by seller negligence would be covered under this liability. The requirement that platforms engaging in cross-selling would need to disclose the data of the entity that is providing the relevant data to the platform is an extremely wide requirement and will be difficult to implement if this provision is retained.
- v. The provision enunciating a complete ban on the ability of marketplace e-commerce entities to have their related parties and associated enterprises listed as sellers on the platform or sell goods to any seller on the platform would significantly affect the operational structure of e-commerce entities who are otherwise permitted to sell products on their own marketplace in terms of other applicable laws. Provisions like these must be relooked at in the context of the overall scheme of the Act.
- vi. This proposal discourages e-commerce players from forming joint ventures in India that are primarily meant to ensure faster product delivery to consumers.

## Conclusion

The scope of India's new e-commerce rules, as proposed by the Department of Consumer Affairs, goes beyond online retail (Amazon and Flipkart) and spills over into food delivery (Swiggy and Zomato) and even ride-hailing (Ola and Uber). As per industry sources, definition of e-commerce entity also includes delivery and pickup agents under the proposed rules. It appears that OEMs would also fall under the ambit of proposed (draft) amended Consumer Protection (E-Commerce) Rules, 2020 as all OEMs are also using On-line platforms to take bookings/sell their vehicles. Therefore, OEMs might need to comply with the several new requirements that have been mentioned in the draft rules. Industry players have been accusing that the present policy approach tends to micro-manage e-commerce. It will adversely affect the ecosystem, which in turn would go against consumer interests.

## New Ecomm Rules have Indian Etail Cos in a Knot

### On display or promotion of advertisement by sellers



Etailers should not allow 'misleading' ads potentially on pricing, quality, guarantee. They shouldn't advertise sellers offering discounts. This could impact growing online advertising business of etailers.

### On imported goods and services, details of sellers and offering domestic alternatives



Etailers have to ensure product listings have the details of country of origin (CoO) which is an arduous task given Flipkart and Amazon have millions of product listings. Further what could be really difficult to implement is recommending local alternatives each time a consumer is buying imported goods or services. Ranking local alternatives would be difficult to implement too. Etailers and sellers both are not enthusiastic about maintaining these details.

### Cancellation charges and explicit consumer consent

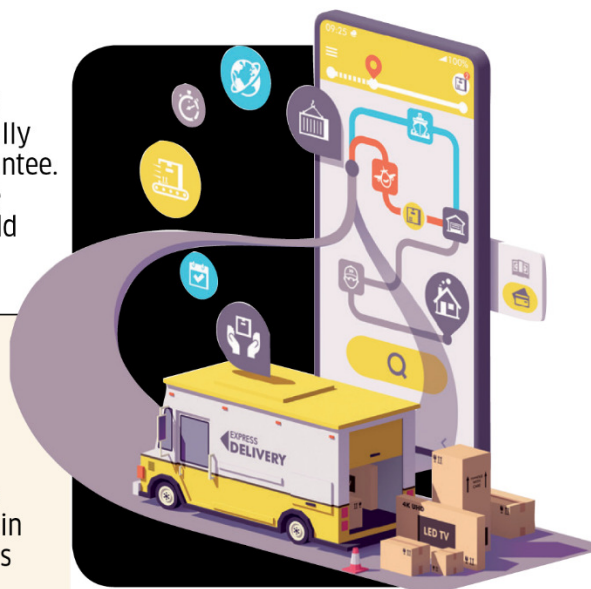


Etailers typically highlight certain products as being non-returnable at pre-purchase stage and generally offer free exchange or refunds to consumers. Explicitly asking for consumer consent can only strengthen the online shopping experience for consumers.

### No ecomm entity shall indulge in mis-selling of goods or services



Likes of Flipkart and Amazon India operate the marketplace. For platforms offering services, like food delivery, travel, they too act as a marketplace.



### Etailers shouldn't mislead users by manipulating search results



Jury is still out on how these algorithms work on online marketplaces in India and abroad. In India, Flipkart and Amazon India are accused of promoting their brands, sellers by tweaking search results.

### Flash sale

Government's original proposal indicated a blanket ban on all flash sales but a clarification later said it won't apply for 'conventional' flash sales. It is not clear what a conventional flash sale is.

### Etailers shouldn't permit usage of their name for brands –if such practices amount to unfair trade practice and impinges on the interests of consumers.

Private brands of Flipkart and Amazon, who have the prefix of the ecommerce brand attached to them, will be under scrutiny.