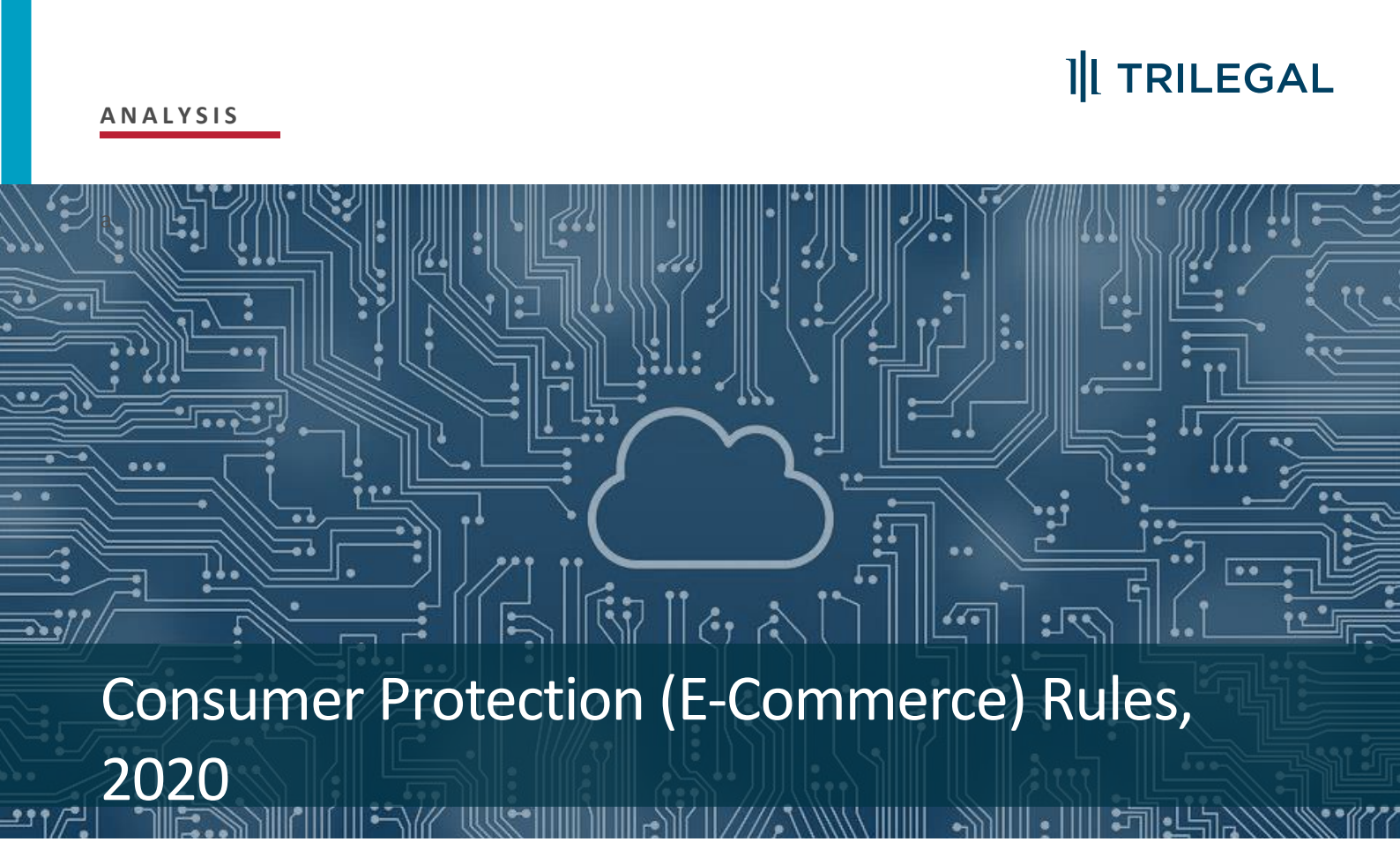




Consumer Protection (E-Commerce) Rules, 2020

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The Ministry of Consumer Affairs, Food and Public Distribution has recently notified the Consumer Protection Act, 2019 (**CPA 2019**) and the Consumer Protection (E-Commerce) Rules, 2020 (**E-Commerce Rules**). The CPA 2019 introduced significant changes to the 1986 law, to address unique issues arising in this era of digitization and e-commerce (refer to our update on CPA 2019, [here](#) [Need to update]). The E-Commerce Rules provide a framework to regulate the marketing, sale and purchase of goods and services online.

Key provisions of the E-Commerce Rules are analysed below:

1 Scope and Application

The E-Commerce Rules apply to:

- a. all goods/services bought or sold over digital or electronic network, including digital products,
- b. marketplace e-commerce entities (**Marketplace Entities**) and inventory e-commerce entities (**Inventory Entities**),
- c. all e-commerce retail, including multi-channel single brand retailers and single brand retailers in single and multiple formats such as single brand retailers who use multiple distribution channels such as offline retail stores in addition to e-commerce, and
- d. all forms of unfair trade practices (as defined under the CPA 2019) across all models of e-commerce.

Marketplace Entities are those entities which provide an information technology platform to facilitate transactions, while Inventory Entities own the inventory of goods/services and sell them directly to consumers. The E-Commerce Rules also apply to entities which are not established in India but systematically offer goods or services to consumers in India.

In parallel, entities engaged in e-commerce are also governed by numerous other regulations, including the Legal Metrology (Packaged Commodities) (Amendment) Rules, 2017 (**LM Rules**) which requires all e-commerce entities to display certain information on their websites, the Foreign Exchange (Non-Debt Instrument) Rules, 2019 (**NDI Rules**), which places specific conditions on Marketplace Entities with foreign direct investment, the Information Technology Act, 2000 (**IT Act**), which apply to electronic transactions and communications, and the Information Technology (Intermediaries Guidelines) Rules, 2011 (**IG Rules**), which regulate intermediaries. Further, certain provisions of the Draft E-Commerce Policy published by the Department for Promotion of Industry and Internal Trade (**Draft Policy**) are also likely to be relevant to e-commerce entities.

2 Implications for B2C and B2B entities

The CPA 2019 and E-Commerce Rules govern consumer purchases. The term 'consumer' is defined under the CPA 2019 as any person who buys goods or services for consideration but excludes any person who makes a purchase for 'commercial use', with the exception of goods bought for the purpose of earning livelihood by means of self-employment. Therefore, the CPA 2019 and the E-Commerce Rules do not typically govern

The E-Commerce Rules provide a framework to regulate the marketing, sale and purchase of goods and services online pursuant to which all e-commerce entities, including B2B ecommerce entities and sellers using e-commerce are required to follow a set of obligations in respect of consumers and users of an e-commerce platform.

purchases made by companies for their commercial operations. Given this, sole partnerships and entrepreneurs are not excluded from the definition of consumer. If any customer on a purely B2B platform were to purchase goods and services for 'self-employment', they would be considered 'consumers' and the B2B platform would be liable under the E-Commerce Rules to the extent of such a sale.

Further, the E-Commerce Rules introduce the concept of a 'user', which has a wider definition than consumer and includes any person who accesses or avails any computer resource of an e-commerce entity. Given that the CPA 2019 includes body corporates within the meaning of 'person', a user may include an individual as well as companies. In addition to their obligations in respect of consumers, e-commerce entities are required to provide specific information to users regarding the sellers on their platform, the goods or services available on the platform and the payment methods available on the platform (see Sections 5 and 7). Therefore, while the CPA 2019 and E-Commerce Rules intend to only govern consumers, the reference to a 'user' gives rise to ambiguity as to whether pure B2B e-commerce entities are also required to provide the specified information to users who are not classified as consumers.

3 Presence in India

The E-Commerce Rules specifically recognise and govern entities that are not established in India but systematically offer goods or services to consumers in India such as offshore online marketplaces. The E-Commerce Rules require such e-commerce entities to have:

- a. a company incorporated in India, or
- b. a company incorporated outside India which has a place of business in India, including through electronic mode, and conducts any business activity in India, or
- c. an office/branch/agency outside India owned or controlled by a person resident in India. E-commerce entities must also appoint an Indian resident as a nodal person of contact to ensure compliance with the CPA 2019.

This provision appears to be a move to ensure regulatory and enforcement control over foreign entities who offer goods and services in India and is in line with a similar classification under the Personal Data Protection Bill, 2019, which extends its applicability to foreign entities who carry on business in India.

Further, this provision appears to require all existing e-commerce entities to necessarily fall within one of the above categories. It is not clear if these requirements are forcing existing entities who operate e-commerce platforms, such as limited liability partnerships (**LLPs**), to convert into companies or incorporate as companies. Though there is no clear rationale behind this move, a similar approach has also been taken in the NDI Rules. As per the NDI Rules, only companies are allowed to conduct e-commerce and the definition of e-commerce entity does not include within its ambit LLPs.

4 Duties of E-commerce Entities

The E-Commerce Rules require all e-commerce entities to:

- a. display basic information such as their name, contact details and address prominently on the platform;
- b. establish consumer grievance redressal mechanisms, including a customer care number and a grievance redressal officer for the platform whose details should be published on the platform;

- c. apply best efforts to participate in the National Consumer Helpline, for quick resolution of consumer complaints;
- d. mention the name and details of the importer for imported goods or services;
- e. ensure consumer consent for the purchase of goods or services is expressed through an explicit and affirmative action, and not in an automatic manner such as a pre-ticked checkbox; and
- f. effect all refunds according to RBI prescriptions and within a reasonable period.

Further, in line with provisions of the CPA 2019, the E-Commerce Rules require e-commerce entities to refrain from:

- a. adopting unfair trade practices;
- b. imposing cancellation charges when the e-commerce entity cancels the purchase unilaterally, unless similar charges are also borne by the e-commerce entity due to a cancellation by a seller;
- c. manipulating the price of goods/services offered on their platform with an aim to gain unreasonable profit having regard to the prevailing market conditions or any other relevant considerations;
- d. discriminating between consumers of the same class or making arbitrary classifications of consumers affecting their rights under the CPA 2019. For instance, if offers and coupon codes are provided only to certain consumers, this classification should have a reasonable basis.

There is a lack of clarity regarding what activities may be classified as resulting in 'unreasonable' or 'unjustified' profits. This lack of clarity may result in consumer protection authorities scrutinizing pricing mechanisms used by e-commerce entities. For instance, several e-commerce entities use algorithms to make price determinations based on a range of factors, and it is unclear whether profits arising from such pricing mechanisms may be considered 'unreasonable'. An example of this is ride-hailing applications which often impose 'surge pricing' based on the demand at a particular time or place. While these practices are data-driven and therefore not *per se* arbitrary, the prohibition on price manipulation under the E-Commerce Rules may leave scope for consumers to move against e-commerce entities who engage in such price modification. E-commerce entities would have to now ensure internal compliances and price justifications to ensure that algorithm-based pricing decisions do not fall foul of this restriction. Another consequence of this provision is a discrepancy in the regulation of the same products across different distribution channels, with strict pricing restriction for online retail while offline retail continues to be governed primarily by the free market. This may have an adverse effect on the growth of e-commerce.

Data-driven pricing may also become an issue when it is used to provide offers or discounts to specific classes of consumers. There is no clarity on what a 'reasonable basis' for such a classification may be, and this may lead to uncertainty with respect to the use of algorithms to customize offers or target specific consumers.

5 Liabilities of Marketplace Entities

In addition to the general duties listed above, the E-Commerce Rules impose specific requirements on Marketplace Entities. These include:

- a. reiterating the due diligence requirements on intermediaries under the IT Act and the IG Rules;
- b. ensuring that descriptions of goods and services are accurate and correspond directly with the features of such goods and services through an undertaking by the seller;

- c. describing any differential treatment that is given to goods, services or sellers of the same category. This may include options available for a seller to offer sponsored advertisements on the platform; and
- d. taking reasonable efforts to maintain a record of sellers who repeatedly offered goods or services that have been removed by the platform under intellectual property laws or the IT Act.

Marketplace Entities may also provide add-on services such as warehousing, logistics, order fulfilment, payment collection etc., and several platforms already do so. The CPA 2019 introduces the concept of product seller which includes entities that market, prepare, maintain, 'place a product for commercial purpose' and provide services in respect of such products. Such entities may be held liable for harm caused to a consumer. In this context, the E-Commerce Rules are silent on the treatment of add-on services being provided by Marketplace Entities, and this may result in them being classified as product sellers for the purposes of a product liability claim. However, this is counter-intuitive to their classification as intermediaries in the sale process, and further clarity is required in this regard.

Marketplace Entities are also required to display certain details prominently to users of their platform. These include information to enable consumers to make informed decisions such as:

- a. all information provided by sellers to Marketplace Entities should be displayed to the users of the platform (see Section 6 below);
- b. information relating to available methods of payment, returns and refunds, exchanges, warranties, delivery and shipment, and grievance redressal mechanisms of the platform;
- c. information on the available payment methods; and
- d. any aggregated ranking or feedback about the seller or goods, along with a plain and easily available description explaining the main parameters for determining such a ranking and their relative importance.

The LM Rules require packaged commodities to contain details including name and address of the manufacturer, importer, packager, and the country of origin. The E-Commerce Rules appear to have incorporated the requirements under the LM Rules within its ambit as well. Accordingly, E-commerce entities that sell these commodities are required to display this information as well.

6 Duties of Sellers using Marketplace Entities

Sellers offering goods or services through Marketplace Entities must provide specific information to Marketplace Entities, including seller entity details, price and breakup price, relevant details about the goods or services offered for sale by the seller including country of origin, importer and manufacturer details, delivery details, relevant guarantees or warranties applicable, and all other mandatory notices and information required by applicable laws.

In addition, sellers must have a prior written contract with the respective e-commerce entity, ensure accurate advertisements, and appoint a grievance officer for timely grievance redressal. The requirement to appoint a grievance officer may be onerous on small or individual sellers such as sole proprietorships, and no exception has been provided for such cases. Sellers must also refrain from adopting unfair trade practices, false representations, and refusing refunds as required under the CPA 2019.

Therefore, in order to ensure compliance with the E-Commerce Rules, Marketplace Entities must now ensure that sellers adhere to these requirements. This can presumably be done through contractual obligations.

7 Liabilities of Inventory Entities

Given the business model of Inventory Entities, the E-Commerce Rules require them to comply with all the obligations imposed on Marketplace Entities as well as sellers. Particularly, all display requirements applicable to Marketplace Entities will also apply to Inventory Entities, including all information prescribed under the LM Rules (as discussed in Section 5). However, certain requirements that are specific to Marketplace Entities, such as the due diligence requirements under the IT Act and seller-related compliance, will not apply to Inventory Entities.

Further, similar to the sellers on Marketplace Entities, Inventory Entities are also required to provide specific information such as price and breakup price, country of origin of imported goods, delivery details, applicable guarantees or warranties, and all other mandatory notices and information. Inventory Entities must also refrain from adopting unfair trade practices, false representations, and refusing refunds as required under the CPA 2019.

Notably, Inventory Entities that explicitly or implicitly vouch for the authenticity of the goods or services sold by them, or guarantee that such goods or services are authentic, would have to bear appropriate liability in any action related to the authenticity of such goods/services.

8 Contraventions

The provisions of CPA 2019 will apply to any violations of the E-Commerce Rules, and in such cases, e-commerce entities may be required to comply with relevant sanctions and directions by the authorities. Non-compliance with such directions may result in fines or imprisonment. The E-Commerce Rules also incorporate requirements under the LM Rules and other applicable laws and in the absence of any clarity, penalties under the LM Rules may also be levied on the e-commerce entity in case of non-compliance.

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