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## EXECUTIVE SUMMARY

E-commerce and digital trade in India have seen an exponential growth in a past few years in all the streams, be it grocery, electronics or general retail, and the industry has expanded from 20 billion USD in 2015 to nearly 84 billion USD in 2021. Benefits of e-commerce have been commonly accepted worldwide, which includes convenience and increased accessibility to range by the consumers, and it is a fact the e-commerce is here to stay. In this background, it becomes quintessential to ensure that benefits of the e-commerce ecosystem are reaped by all the stakeholders, viz., the platform, the sellers and the buyers. Presently, e-commerce is dominated by a few big platforms and a few big sellers, who are generally affiliated to the platforms, which often puts smaller sellers in a disadvantageous positions owing to reduced visibility in the market. Although the market size of the e-commerce has grown, the small sellers have not seen the benefits at the same pace. Therefore, it is important to formulate a policy for e-commerce with a focus on all the stakeholders.

In order to have a policy focusing on inclusive growth of all, it is crucial to address the following concerns which address the fundamental issues of neutrality and fairness on the platforms-

- 1) ***Lack of platform neutrality***- Neutrality is the fundamental basis of the e-commerce marketplace, which entails that no seller should be given preference over the other seller on any e-commerce platform, and e-commerce marketplace should ensure a level playing field on its platform. Often platforms may enter in a practice of giving preference to a few sellers in terms of better listing or better discounts, which may put them in a better position before a consumer. Sometimes, lack of neutrality is a result of some form of vertical relation between the platform and such preferred sellers. Lack of neutrality is a serious concern for sellers in the present digital economy where we are witnessing a shift in consumer behaviour, and sellers look towards the platforms for an access to consumers.
- 2) ***Deep discounting***- Excessive discounting is a serious concern when the same is funded by the platform. Such practice has an exclusionary effect and while in a short term it may benefit some consumers, in the long run, the same has a potential to disrupt the market in favour of a few, which in turn may lead to reduced choices and higher prices for consumers. Therefore, the practice of such an excessive discounting needs a check and needs to be appropriately addressed in the policy. Further, the manner in which these discounting operates is that these marketplace fund discounts for sales done by such preferential sellers, thus, in effect, creating a distortionary e-commerce climate.
- 3) ***Use of data to gain advantage***- Data is the most sought after thing by the e-commerce companies. Holistic analysis of the consumer data, manufacturer data and seller data, gives competitive advantage to the platforms in in all the aspects. There have been investigative reports indicating that major ecommerce platforms study the data about other brands on their platform and exploit that proprietary data to launch competing products (private labels) on their marketplace. Similarly, personal data can be used for

targeted advertising, which may be used by the platforms to the advantage of certain sellers. Thus, concerns are raised about e-commerce platforms capitalizing on data that is neither created by them (created by consumers) nor for them (created by the seller of the concerned product or service).

- 4) ***Exclusive arrangements and launches***- Exclusive arrangements and launches have been adversely affecting the offline sellers since they do not get supplies from the companies to sell in the offline channel. Such practice has an effect on the sellers as well as on the customers who are forced to approach a particular platform to buy a product. It is understood that e-commerce platforms are supposed to be neutral in their approach towards the listings on their website and such agreements make the platform an unfair marketplace.
- 5) ***M&A in the e-commerce hampers the platform neutrality***- The rapid growth and expansion of Indian e-commerce has been characterized by mergers and acquisitions by digital platforms. The nature of firms acquired by an incumbent platform also spans direct competitors in the larger aggregator market, sellers on the platform, sellers operating in a different niche, strategic sellers to expand existing networks of the platform etc. The consequence of such mergers and acquisitions is most directly felt by the firms listed on the platform, which are now pitted against the acquiree, that is conferred with significant benefits in terms of competition.

The aforementioned practices dilute the competitive equilibrium, and it leads to a situation where only a handful of players are able to take advantage of this digital boon. The e-commerce policy should give a due weightage to aforementioned concerns while formulating the way ahead for the industry. Although, in India, there are several existing laws such as Foreign Direct Investment Policy, Competition Act, 2002, Consumer Protection Act, 2019 and E-Commerce Rules, 2019 thereunder, the Information Technology Act, 2000 and its allied rules, which governs the e-commerce from different lenses, but as we suggest in the present the paper, due weightage should also be given to an idea of setting up a specialized regulator. Owing to technicality of the e-commerce platforms, and the web of several stakeholders with different concerns, it is desirable to have such a regulator to implement the inclusive e-commerce policy, which would have ex ante regulations to be applicable in e-commerce segment, for the benefit of entire ecosystem.

**Praveen Khandelwal**  
**Secretary General**

## **I. GROWING SIGNIFICANCE OF DIGITAL TRADE AND E COMMERCE IN PARTICULAR IN THE LAST FIVE YEARS, ACCENTUATED BY THE PANDEMIC**

### **A. PRESENT MARKET SIZE OF THE SECTOR AND FUTURE GROWTH OF THE SECTOR**

1. The E-commerce sector has seen significant growth in Indian markets over the last few years. The shift from physical aisles to virtual carts has been driven by increasing internet and technology penetration, growth of logistics and warehouses, modernisation of payment systems, changes in consumer spending and preferences among other factors, which have enabled e-commerce to be more efficient and accessible than ever before. The digitization of the global and domestic economy owing to increasing internet user base and favourable market conditions, reiterates the continuing potential of the Indian e-commerce industry.
2. Thus, it comes as no surprise that the e-commerce market in India has seen an exponential growth in terms of seller and consumer base, as well as the revenue generated. As per a report by Statista, the value of the ecommerce industry in India has increased from USD 20 billion to nearly USD 84 billion in 2021.<sup>1</sup> It is also estimated that by 2027 the e-commerce industry would be worth around USD 200 billion, a significant difference from the market value of this industry merely a few years ago in 2018 when the same was pegged at USD 22 billion.<sup>2</sup>
3. According to the Market Study on e-commerce in India by the Competition Commission of India (CCI), in the last seven years, e-commerce in the commodities category in India has risen at a compound annual growth rate (CAGR) of 57 percent and is anticipated to grow by 18.6 percent until 2022<sup>3</sup>. The figures presented by other sources are even more optimistic. According to the 'E-Commerce Report' published by the Indian Brand Equity Foundation<sup>4</sup>, Indian e-commerce is expected to reach USD 99 billion by 2024, growing at a 27% CAGR over 2019-24 and reach the USD 111 billion and USD 200 billion figures by 2024 and 2026 respectively. With online penetration of retail expected to reach 10.7% by 2024, it is highly likely that India's e-commerce business will rise 7 times to USD 300 billion within this decade<sup>5</sup>.

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<sup>1</sup> E commerce market value India 2014-2027, Statista Research Department. Accessible at: <https://www.statista.com/statistics/792047/india-e-commerce-market-size/>.

<sup>2</sup> *Id.*

<sup>3</sup> Competition Commission of India, Market Study on E-Commerce in India, Key Observations and Findings, Para 14. Accessible at: [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Market-study-on-e-Commerce-in-India.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf).

<sup>4</sup> Indian E-commerce Industry Report, Indian Brand Equity Foundation (November 2021). Accessible at: [https://www.ibef.org/industry/ecommerce.aspx#:~:text=Indian%20E%2DCommerce%20Industry%20Report,K%20B%20\(November%2C%202021\)&text=E%2Dcommerce%20has%20transformed%20the,to%20reach%20US%24%20350%20billion.](https://www.ibef.org/industry/ecommerce.aspx#:~:text=Indian%20E%2DCommerce%20Industry%20Report,K%20B%20(November%2C%202021)&text=E%2Dcommerce%20has%20transformed%20the,to%20reach%20US%24%20350%20billion.)

<sup>5</sup> *Id.*

4. A few key statistics related to the diverse segments of e-commerce have been mentioned below:
- i. General Retail - The market size of the online retail industry in India which amounted to approximately USD 60 billion in 2020, is forecasted to reach USD 73 billion by 2022<sup>6</sup> and USD 120-140 billion by 2026<sup>7</sup>. This is supplemented by an increasing penetration of retail, which is expected to reach 10.7% by 2024, compared to 4.7% in 2019.<sup>8</sup> In fact, as of 2020, India had the third-largest online shopper base of USD 140 million after China and the USA.<sup>9</sup>
  - ii. Grocery - The Indian online grocery market is estimated to reach USD 18.2 billion in 2024 from USD 1.9 billion in 2019, expanding at a CAGR of 57%.<sup>10</sup> The online grocery market in India is expected to touch \$24 billion by 2025.<sup>11</sup>
  - iii. Electronics – This category was amongst the earliest adopters of e-commerce and as of 2020, accounted for 60% of e-tail Gross Merchandise Value (“GMV”) in India.<sup>12</sup> Mobile phones in particular, accounted for 37% of the overall GMV in India’s e-commerce market in 2020, the largest by far among all categories.<sup>13</sup>
  - iv. Food Delivery - The Food and beverages segment reported 72% order volume growth in January-August 2021 as compared to the same period last year.<sup>14</sup> In 2020, the Indian online food delivery market was expanded to around USD 4.35 billion, a strong increase compared to 2019, when the market size was around USD 2.9 billion.<sup>15</sup> The sector is expected to see increased growth, reaching a value of nearly USD 13 billion U.S. in 2025<sup>16</sup> with a staggering CAGR of 28.94% during 2020-2026.<sup>17</sup>

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<sup>6</sup> Statista Research Department, Market size of online retail industry in India 2015-2022. Accessible at: <https://www.statista.com/statistics/759428/india-e-retail-industry-market-size/>

<sup>7</sup> Indian E-commerce Industry Report, Indian Brand Equity Foundation (November 2021). Accessible at: [https://www.ibef.org/industry/ecommerce.aspx#:~:text=Indian%20E%2DCommerce%20Industry%20Report,K%20B%20%20\(November%2C%202021\)&text=E%2Dcommerce%20has%20transformed%20the,to%20reach%20US%24%20350%20billion.](https://www.ibef.org/industry/ecommerce.aspx#:~:text=Indian%20E%2DCommerce%20Industry%20Report,K%20B%20%20(November%2C%202021)&text=E%2Dcommerce%20has%20transformed%20the,to%20reach%20US%24%20350%20billion.)

<sup>8</sup> Retail & E-commerce Report, Invest India (National Investment Promotion and Facilitation Agency).

<sup>9</sup> *Supra* at Note 7.

<sup>10</sup> *Supra* at Note 7.

<sup>11</sup> Consultancy.in, 'Indian e-grocery market to touch \$24 billion by 2025', (10 March 2021). Accessible at: <https://www.consultancy.in/news/3561/indian-e-grocery-market-to-touch-24-billion-by-2025>

<sup>12</sup> Accessible at: <https://www.livemint.com/industry/retail/mobiles-consumer-durables-online-share-to-drop-as-other-categories-grow-report-11639129661452.html>.

<sup>13</sup> *Id.*

<sup>14</sup> Unicommerce, 'Emerging Ecommerce Segments Report 2021 - Jan-Aug 2021 Vs Jan-Aug 2020'.

<sup>15</sup> Statista Research Department, 'Market size of online food delivery in India 2019-2020, with estimates until 2025'. Accessible at: <https://www.statista.com/statistics/744350/online-food-delivery-market-size-india/>

<sup>16</sup> *Id.*

<sup>17</sup> Globe News Wire, 'India 21.41 Billion Online Food Delivery Market to 2026: Focus on Bangalore, Delhi NCR, Mumbai, Hyderabad & Pune'. Accessible at:

- v. Travel Bookings - In the Travel & Tourism market, it is expected that by 2026, 56% of total revenue for the industry will be generated through online sales alone.<sup>18</sup>
  - vi. Home Décor and Furnishings – An erstwhile unorganised category, the segment has reported over 50% order volume growth in the past few years.<sup>19</sup> In January - August 2021, the GMV has increased by 88% and the order value has increased by nearly 119% as compared to the same time period in the previous year.<sup>20</sup>
  - vii. Fast Moving Consumer Goods (FMCG) – Changing consumer behaviour along with increasing e-commerce adoption has contributed to an exorbitant volume growth of 74% for the FMCG segment for the period of January-August 2021, compared to the same period in 2020.<sup>21</sup> As India's e-commerce orders volume increased by 36% in the last quarter of 2020, personal care, beauty and wellness segment turned out to be the largest beneficiary.<sup>22</sup>
5. Therefore, it is clear that there has been a drastic shift in consumer preferences in moving from physical aisles to virtual carts. This is largely owed to changing consumer preferences over the years as several consumers these days, even for high value or expensive products, prefer purchasing them online, owing the convenience that e-commerce platforms bring with them. Specially during the pandemic, a large proportion of the consumer base has opted for online shopping, owing to the convenience as well as safety.
6. As of 2021, the active e-commerce penetration stands at 76.7%<sup>23</sup> and there are nearly 1.2 million e-commerce transactions every day.<sup>24</sup> Consequently, the seller base is also looking to shift online to meet consumer demands and utilize the benefits of the growth of logistics and warehouses, internet penetration, mobile commerce, payment's modernisation, consumer spending etc. Hence, there is a shift in the entire ecosystem and e-commerce is becoming an integral part of the industry.

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<https://www.globenewswire.com/newsrelease/2021/05/17/2230423/28124/en/India-21-41-Billion-Online-Food-Delivery-Market-to-2026-Focus-on-Bangalore-Delhi-NCR-Mumbai-Hyderabad-Pune.html>

18 Statista Mobility Market Outlook, 'Travel Tourism Report 2021'. Accessible at: <https://www.statista.com/outlook/mmo/traveltourism/india#:~:text=User%20penetration%20is%205.2%25%20i n,through%20online%20sales%20by%202026.>

19 *Supra* at Note 14.

20 *Id.*

21 Indian Retailer. Com, 'Beauty & Personal Care and Health & Pharma Segment Registering Maximum E-Commerce Growth in 2021'. Accessible at: <https://www.indianretailer.com/article/data/analysis/beauty-personal-care-and-health-pharma-segment-registering-maximum-e-commerce-growth-in-2021.a7422/>

22 *Supra* at Note 4.

23 Sandhya Keelery, 'E-commerce in India - statistics & facts'. (August 2021). Accessible at: <https://www.statista.com/topics/2454/e-commerce-in-india/#dossierKeyfigures>

24 Retail & E-commerce Report, Invest India (National Investment Promotion and Facilitation Agency).

7. The exponential growth in the ecosystem necessitates the fact that the exponential growth presents a win for all stakeholders in the market: starting with e-commerce aggregators, business users/ suppliers and end users/ final consumers.

***B. Benefits of e-commerce and how they should benefit everyone if applied harmoniously and in a fair manner***

8. E-commerce offers a multitude of benefits to both sets of stakeholders served by a platform i.e., consumers and businesses.

i. Benefits to consumers:

- Consumers can access a plethora of products at reduced prices, and multiple payment options from the convenience of their homes. Hence, they are able to avail those products and services that were previously inaccessible due to constraints of price, location, delivery, information etc.
- One of the most fundamental advantages of e-commerce is the enlargement of consumer choices which is served by an ever-increasing catalogue that can be compared for prices at the swipe of a finger. Further, the search and compare functionalities of e-commerce platforms decrease search time and costs.
- E-commerce never sleeps and hence, time is also no longer a constraint as with technological advancements, the efficiency and speed of distribution and provision is only enhanced.
- The chosen products and services can be speedily returned/delivered at the customer's doorstep.

ii. Benefits to businesses:

- The most important advantage is accrued in the form of a large consumer base. E-commerce increases market access and participation of businesses and allows them to serve a wider segment of consumers.
- With improvements in logistics and distribution networks, the start-up costs and initial capital requirements are reduced. Businesses may purchase services from the platform such as warehousing, payment processing, advertising and promotion etc.
- Digitization, digital cataloguing, digital marketing are resulting in an increased visibility for businesses and consequently, access to consumers. E-commerce also helps in standardization and scalability for MSMEs.

9. On the basis of the aforementioned, it is clear that all stakeholders seek to benefit from the advantages offered by e-commerce if the same are distributed in a fair and impartial manner. Conversely, unfairness and partiality in the e-commerce value chain can lead to harmful and permanent consequences. It is evident that e-commerce marketplace platforms have a significant upper hand while allowing consumers and businesses to interact on their platform. Therefore, if there is asymmetry on the part of the marketplace platform, then businesses will be unable to supply their products and services uninterrupted and unhindered. As a result, competition, innovation, price and quality will be severely affected.
10. Most importantly, ultimate harm will be caused to the consumers who will have to suffer in the form of *“reduced options due to the shrinking pool of sellers and resultant lack of competition, as well as the risk of platforms flexing their newly acquired market power by increasing prices directly or indirectly (for example, in the form of invasive collection and use of consumer data). Reduced contestability in the market for e-commerce may, among other things, prevent emergence of new innovative companies which could offer cheaper or better goods and services to consumers.”*<sup>25</sup> One of the primary issues is bundling of services which are now being imposed by the e-commerce aggregators or marketplace platforms, which in turn, increases the cost of distribution / commission. The legal & policy instruments should strive for unbundling of services from the marketplace platform, which would really unlock the potential of benefits in form of lower prices & innovation.
11. In this regard, the CCI Market Study on E-commerce also recognized the following priorities for effective competition in the e-commerce sector:
  - a. Ensuring competition on merits to harness efficiencies for consumers
  - b. Increasing transparency to create incentive for competition and to reduce information asymmetry
  - c. Fostering sustainable business relationships between all stakeholders
12. E-commerce expands distribution channels and mechanism, fosters market growth, improves consumer choices and spurs innovation among businesses. However, to ensure that it continues to do so, and that the e-commerce landscape delivers efficiently for all stakeholders, it is pertinent to lay down a comprehensive regulatory framework founded on the principles of fairness, good governance and transparency while keeping consumer’s choice and right at its center

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<sup>25</sup> Fair and Competitive E-marketplaces (F.A.C.E.): The Business Users’ Narrative, Working Paper by Vidhi Centre for Legal Policy, September 2021.



*C. Effects of pandemic and how reliance on distribution channels have accentuated post pandemic*

13. Despite depressed consumer spending and economic slowdown in light of COVID-19 induced disruptions/challenges, according to NASSCOM, India's e-commerce market continues to grow at 5%, with expected sales of USD 56.6 billion in 2021. A report on the Indian e-commerce industry by India Brand Equity Foundation depicts that in the last quarter of 2020 alone India's ecommerce volume order increased by 36% signifying the growing reliance on ecommerce by the general population affected by the constraints of the COVID-19 pandemic.<sup>26</sup>
14. The increased transition into online buying has been spurred by pandemic-induced restrictions and rapid improvements in technological infrastructure to enhance consumer experience. As a result, there is an accelerated expansion of e-commerce towards new businesses, customer groups and product/service categories for example, online ordering and express delivery from *kirana* stores. These changes are likely to be long term in light of uncertainty over the pandemic, convenience of the new purchasing habits, learning costs and the incentive to capitalise on the new sales and distribution channels which have gained unprecedented relevance.
15. In this regard, the papers written by various think-tank on the business users' narrative of such e-commerce platforms, and also discussing the effects of pandemic assume importance<sup>27</sup>. The below mentioned observations are of relevance, especially in the context of online intermediation, digital markets, particularly considering the effects of pandemic: -
  - i. The rise of digital economy has accelerated manifold due to the pandemic-induced lockdown in several countries. We observe that anti-competitive practices continue regardless of governing laws, irreversibly altering markets and that competition principles, especially by '*gatekeeper*' firms that provide online intermediation services, every passing day.
  - ii. An increasing part of economic activity is going to be facilitated by digital players and channelled through the internet, and a small number of firms have occupied key intermediation positions and large social media companies are adding to this distortion by creating their own marketplaces, allowing unregulated/unregistered social commerce entities on their platform.,
  - iii. This tectonic shift in markets is thus posing challenges for lawmakers and enforcers on how to address the consequent bargaining power imbalance and

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<sup>26</sup>Indian Brand Equity Foundation, 'E-commerce – January 2021'. Accessible at: <https://www.ibef.org/download/E-Commerce-January-2021.pdf>.

<sup>27</sup> Vidhi Centre for Legal Policy, Fair and Competitive E-marketplaces (F.A.C.E) || The Business Users perspective, Working Paper.f

information asymmetry between platforms and their business users. This imbalance and the resulting concerns were elaborately discussed in the Market Study on E-Commerce in India (“**market study**”) by the CCI<sup>28</sup> and the draft National e-commerce Policy<sup>29</sup> (“**2019 Policy**”). It has been seen that an increasing number of complaints being filed with the CCI, raising concerns that some of these bigger e-commerce firms have, in some sense, become private regulators dictating terms and conditions to participants in their ecosystems. Even if users are uncomfortable with those terms, there are often few viable alternatives to some of the services offered. Bigger firms enjoy a strong network effect, polarise markets, which increase the value of a digital service for consumers and business users, and switching to newcomers is unattractive.

- iv. It becomes very important that the rules of engagement between business users/Sellers/payment providers/logistic providers/warhosing providers and marketplace platforms are such that this unequal power relative to other businesses in a vertical relationship is not exploited by marketplace platforms, and competition on merits is preserved. Increasingly, competition regulatory architecture must be mindful of the dynamics of these relationships rather than narrowly focusing on static price competition. Similarly, it is also essential to build strong consumer trust and protect the rights of the consumers, who will bear the ultimate natural consequence of the same.
- v. The explosion of online commerce has changed the dynamics of consumer preferences and transactions. As a competition regulator, it is thus imperative that the CCI ensures that all stakeholders get an equal opportunity to compete on merits and get a fair chance by e-commerce marketplace platform and ensure that it does not act as a gatekeeper that limits consumer’s choice<sup>30</sup>
- vi. The search and comparison functionalities of the intermediary platforms, their reach and scale, and the network effects that work in their favour, lead to huge consumer footfalls on these platforms thereby making presence on these marketplace platforms critical for the visibility and competitive ability of sellers/service providers.
- vii. Recent reports and studies (national as well as international) strengthen this conviction by showing how a few large marketplace platforms can control online distribution because of a variety of factors, including strong network effects in the digital environment, and their ability to access and accumulate

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<sup>28</sup> Competition Commission of India, Market Study on E-Commerce in India, Key Observations and Findings, Para 14. Accessible at: [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Market-study-on-e-Commerce-in-India.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf).

<sup>29</sup> Draft National e-Commerce Policy- India’s Data for India’s Development. Accessible at: [https://dpiit.gov.in/sites/default/files/DraftNational\\_e-commerce\\_Policy\\_23February2019.pdf](https://dpiit.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf)

<sup>30</sup> [https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act\\_en.pdf](https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf)

large amounts of data. These characteristics equip these large marketplace platforms with such market power that their actions can influence and affect competition between business users significantly. The market power held by these digital platforms has accentuated due to the pandemic because of the changing landscape of customer preferences and nature of transactions, making traditional businesses increasingly dependent on a limited number of large online platforms, further contributing to the bargaining power asymmetry between large online platforms on the one hand and their users on the other.

- viii. The pandemic has further cemented our reliance on digital platforms for buying goods and services, meeting people, accessing information and working amidst lockdowns and social distancing rules. E-marketplace platforms essentially act as facilitators between buyers and sellers of goods and services. As the facilitator, the platform decides the rules for the market on which buyers and sellers operate. Resultantly, by design, the platform occupies a more advantageous position than its users, who in effect might only accept the terms pre-formulated by the platform.
  - ix. The above trend must be taken seriously by lawmakers because the counterfactual - allowing privately owned, democratic legitimacy lacking digital marketplace platforms to set the rules of Indian e-commerce, without identifying and mitigating the long-term risks and the economic harm they can cause- is a scenario which we cannot afford because it would not only be anti-competitive but also against the best interests of the consumer.
  - x. The e-commerce marketplace platforms in India exhibits a clear pattern of concentration, where very few E-marketplace platform giants hold control over a large part of the market, which makes them indispensable for sellers/business users desirous of accessing their sizeable online consumer base. Lockdowns and social distancing norms imposed in the wake of the pandemic have further nudged business users to become all the more reliant upon e-commerce marketplaces to reach consumers. Consequently, dealing with e-commerce marketplaces has become unavoidable for many business users and has arguably led to such giants strategically positioning themselves as 'gatekeepers' wherein they control the entry of new players and subsequently the manner in which sellers/service provider/business users transact on the e-commerce marketplace platform.
16. Therefore, the pandemic has accelerated the growth of e-commerce due to increasing reliance on online distribution channels for provision for goods and services. This shift from brick-and-mortar stores to online marketplace platforms stands true for all sectors as consumer preferences point to increased online ordering for grocery and other essential items, online food-delivery as well as online shopping for electronics, apparel and other non-essential or luxury items.

## II. THE GROWING SIGNIFICANCE OF E-COMMERCE MARKETPLACE PLATFORMS AND THEIR CHARACTERISTICS

### A. *How do these e-commerce marketplace platforms perform in the market?*

17. E-commerce marketplace platforms entities also referred as “Aggregators” are platforms that connect existing sellers/inventory based e-commerce sellers(webstores)/ service providers to consumers i.e., they aggregate offers for goods and services from competing sellers, both from physical stores and webstores, so that the consumer can compare and choose the best product at one place. The effect of this set-up is to provide greater choice to consumers and value addition to all stakeholders.<sup>31</sup> On an e-commerce marketplace platform, so that the consumer can choose between competing products and services.
18. In theory, the aggregator builds a portfolio of goods and services where each seller can utilise the aggregator’s network for various services that they would have had to provide and pay for by themselves in the absence of the aggregator and consumers can choose the sellers from which they would like to buy goods or services. However, in practice, the dependency of sellers and consumers upon the aggregator enables it to take advantage of this set up.
19. The aggregator model is applied across various industries such as hotel and travel booking, logistics, retail goods, taxi/cab booking, pharmaceuticals, real estate etc. By providing a digital environment for facilitating transactions between consumers and sellers, the value proposition of aggregators is that of convenience, on-demand and cost effectiveness for the consumer. In the process, the aggregators usually generate revenue through transaction fees for enabling or executing the transaction and eventually, may themselves compete with the sellers in the market for provision of products and services.
20. In doing so, aggregator platforms can bring efficiency gains to firms by taking care of and rationalising certain side-activities such as managing bookings, arranging warehousing and logistics, processing payments and can also enhance capacity utilisation by making the real-time availability of products/services easily visible online. They also facilitate price comparisons and provide consumers with valuable information about service quality through user ratings and reviews. This reduces information asymmetries between consumers and service providers, presumably pushing service providers to enhance service quality and value-for-money. However, as they become enterprises having market power and achieve

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<sup>31</sup>Alberto Bailin Rivares, Peter Gal, Valentine Millot and Stéphane Sorbe, ‘Like It Or Not? The Impact Of Online Platforms On The Productivity Of Incumbent Service Providers’ Organisation for Economic Co-operation and Development. Accessible at: [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP\(2019\)17&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP(2019)17&docLanguage=En)

economies of scale and amass a critical mass of users, the aggregators, due to the market power gained from network effects (as discussed subsequently), start dictating the terms of competition for consumers as well as service providers. The erstwhile discounts are recuperated and sellers are marginalized as the marketplace platform itself starts competing in the downstream market.<sup>32</sup> These features mean that once a platform reaches a certain size, it can be extremely difficult for smaller new entrants to challenge them effectively. The reasons, which enable such conduct, have been outlined in the subsequent sections.

#### ***A. Growing importance of data as an asset***

21. Traditional inputs to a business include intellectual and industrial resources such as funds, machinery and even technology in contemporary times, which operate as capital to fuel business. With the growth and development of digitization and e-commerce in particular, data has become one of the most significant inputs for modern businesses in the form of ‘digital capital’.
22. Data is what companies require to provide better services, or more personalised service, which ultimately hooks the user to such services. Such platforms collect, store, and use large amounts of data, derived from consumers that transact upon them. This accumulated consumer data is a ‘veritable goldmine for E-marketplaces’ for the reason that the business model of digital platforms such as E-marketplaces marketplace is premised on the personal/transactional data of users and the consequent flow of this data from one side to another. They can utilise these humongous data sets to analyse consumption trends and monetize this knowledge in various ways including to compete against the sellers on their platform by developing their own competing products (private labels) and services for which there is demonstrated consumer appetite.<sup>33</sup>
23. Hence, data is the market power. Once an enterprise has enough number of users and their data, as well as capacity to convert such data into useful information, it is very difficult for a new enterprise to enter the market and capture the consumer base. Access to data for a long time may be used by a superior algorithm to improve their service and to attract even more users. Any attempt for the same would require a huge amount of resources. The platforms which attracts consumers for free or a negligible fee, target consumers using their data. The model on which their business works is ‘digital advertising’. The model, being different from traditional advertising model, targets consumers with personalised advertisement. The core methodology by which these online platforms work can be defined through the concept of attention economy, which works simply on attracting limited human attention. The online platforms, of every kind, work on this concept to engage the number of hours an individual spends on such platform.

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<sup>32</sup> *Id.*

<sup>33</sup> Fair and Competitive E-marketplaces (F.A.C.E.): The Business Users’ Narrative, Working Paper by Vidhi Centre for Legal Policy, September 2021.

### **C. Network effect & economies of scale**

#### **- What is network effect and how does it operate?**

24. Network effects occur when the value of a service to its users increases as the total number of users increases. They are characterized as the increased usefulness of a service to the users with a rise in the number of users using the service, a platform business model that creates value by facilitating exchanges between two or more interdependent groups, usually consumers and producers. . As soon as the platform attains a critical mass of users, the cost of joining the platform is outweighed by the value of joining the platform, with most of that value being derived from the power of the network. This creates a positive feedback loop for services that are offered, wherein an increase in the number of users / input to a service improves the value of the service to other users and therefore further attracts new users, thereby enabling the marketplace platform to strengthen its market position.
25. The positive feedback loop operates in the following manner: the number of consumers contributes to the value derived by each producer in a platform. As the value derived by each producer increases, the number of producers finding the economic activity profitable also increases. Consequently, as more producers join the economic activity, the value for the consumer increases (for instance in the form of increasing choice in the market). This then further attracts more consumers, completing the loop. It is a self-reinforcing loop wherein the number of consumers increase as the number of sellers, who choose the platform to sell products because of access to more consumers, and/or variety of goods being sold by these sellers on the platform increase. .
26. Therefore, network effects are premised on the principle of utility, wherein the utility for a consumer from a platform increases with a rise in the number of users on the platform. Further, the platform itself achieves a competitive lead in the market as the consumer derives benefit through not only the product/service, but also by virtue of being on the platform's network itself. This reinforces the strength of the existing platform, enables them to act as a gatekeeper and a potential barrier to entry as new entrants are unable either to collect the data or to buy access to the same kind of data, as the established platforms.

#### **- ECONOMIES OF SCALE**

27. Economies of scale refer to a situation where the average costs of production decrease with increasing scale in terms of the number of goods or services produced. This phenomenon operates in all markets, but is particularly extreme in the case of e-commerce. This peculiarity also results in pre-existing dominant players having a huge competitive advantage over new entrants in terms of the

price at which the service of the platform is offered.<sup>34</sup> EU has proposed to introduce a new criteria, which are partly quantitative on the bases of which core platform services are designated as gatekeepers, giving powers to European Commission to carry out market investigations, allowing for updating the obligations for gatekeepers when necessary and sanctioning bad behaviour<sup>35</sup>

28. In simple terms, the effect of economies of scale in the context of digital marketplaces platform is that the platform can infinitely defer their profits as long as they are accumulating new customers and they can afford to do so because their incremental cost with every new customer is negligible. This is in sharp contrast to the traditional expectation of any firm i.e., profit maximisation. As a result, this situation necessitates regulation and legal framework to consider these facets and frames of reference.



<sup>34</sup> Fair and Competitive E-marketplaces (F.A.C.E.): The Business Users' Narrative, Working Paper by Vidhi Centre for Legal Policy, September 2021.

<sup>35</sup> <sup>35</sup> [https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act\\_en.pdf](https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf)



### III. EXISTING LAWS WHICH DEAL WITH E-COMMERCE SECTOR

29. As highlighted in the preceding part, e-commerce market in India has gained a lot of traction and its growth has been on a steep upward trajectory. The numbers indicate that India will be a flourishing \$350 bn e-commerce market by 2030.<sup>36</sup> But with such a steep rise, the regulatory framework will have to be fine-tuned to cater to the rights and obligations of the end-consumer, intermediate consumer as well as the e-commerce entities.
30. In this part we will lay down the existing laws which regulate the e-commerce market in India especially from the perspective of consumer (both end consumer and intermediate consumer) interest and the issues being faced by the law to catch up with transitioning business models and need for regulating e-commerce market.

#### A. Foreign Direct Investment Laws

31. As has been enunciated in the Draft E-commerce Policy of 2019 (**2019 Policy**),<sup>37</sup> the Foreign Direct Investment Policy (**FDI Policy**) in e-commerce has been developed in order to ensure that the e-commerce marketplace platform provides a level playing field to all participants, while ensuring that distortionary effects, either through means of price control, inventory or vendor control does not happen.
32. The Consolidated FDI Policy of October 2020<sup>38</sup> has made a demarcation from FDI perspective as to what constitutes an “*Inventory based model of e-commerce*”<sup>39</sup> and “*Market Place based model of e-commerce*”<sup>40</sup>. It is pertinent to note that 100% FDI under automatic route is permitted in marketplace model of e-commerce only, subject to meeting certain conditions which would ensure neutrality of the platforms, while disallowing any FDI in inventory-based model of e-commerce.<sup>41</sup> To gather a clear understanding under the FDI Policy, E-commerce has been defined<sup>42</sup> to mean the buying and selling of goods and services including digital products over digital & electronic network. Thus, it mostly covers all digital market platforms.

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<sup>36</sup> Invest India, ‘E commerce’. Accessible at: <https://www.investindia.gov.in/sector/retail-e-commerce/e-commerce>

<sup>37</sup> Draft National e-Commerce Policy- India’s Data for India’s Development Page 19. Accessible at: [https://dpiit.gov.in/sites/default/files/DraftNational\\_e-commerce\\_Policy\\_23February2019.pdf](https://dpiit.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf)

<sup>38</sup> Department for Promotion of Industry and Internal Trade Ministry of Commerce and Industry Government of India Consolidated FDI Policy. Accessible at: [https://dpiit.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020\\_0.pdf](https://dpiit.gov.in/sites/default/files/FDI-PolicyCircular-2020-29October2020_0.pdf)

<sup>39</sup> Para 5.2.15.2.2 (iii), FDI Policy; *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.*

<sup>40</sup> Para 5.2.15.2.2 (iv), FDI Policy; *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.*

<sup>41</sup> Para 5.2.15.2.3 (iv), FDI Policy.

<sup>42</sup> Para 5.2.15.2.2, FDI Policy.



33. In light of the above mandates and distinction maintained in different models of e-commerce for the purpose of FDI, following caveats under FDI Policy needs to be noted:
- i. Under the FDI Policy, E-commerce entity providing a marketplace are mandated to not exercise ownership or have control over the inventory i.e. goods purported to be sold. Such an ownership or control over the inventory will render the business into inventory-based model. Inventory of a vendor will be deemed to be controlled by e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies.<sup>43</sup>
  - ii. Furthermore, an entity having equity participation by 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 marketplace entity.<sup>44</sup>
  - iii. E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field. Services should be provided by e-commerce marketplace entity or other entities in which ecommerce marketplace entity has direct or indirect equity participation or common control, to vendors on the platform at arm's length and in a fair and non-discriminatory manner. Such services will include but not limited to fulfilment, logistics, warehousing, advertisement/ marketing, payments, financing etc. All terms and condition, including cash back provided by group companies of marketplace entity to buyers shall be fair and non-discriminatory.<sup>45</sup>
  - iv. E-commerce marketplace entity will not mandate any seller to sell any product exclusively on its platform only.<sup>46</sup>

#### **ISSUE AND ANALYSIS**

34. The root of the above restriction lies in the FDI policy for e-commerce lies in the FDI policy in retail trading sector. To protect the small traders/kirana/MSME, Government of india enacted FDI policy that allow 100% FDI in single brand retail trading(SBRT) and B2B cash and carry. However, in case of Multi-Brand Retail Trading(MBRT), FDI upto 51% is allowed only though Government approval route with a large number of conditions to protect the business of MSMEs and small traders.
35. Since inventory based e-commerce is nothing but operating a multi-brand retail store through the electronic means, no FDI has been allowed in case of such

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<sup>43</sup> Para 5.2.15.2.4 (iv), FDI Policy

<sup>44</sup> Para 5.2.15.2.4 (v), FDI Policy

<sup>45</sup> Para 5.2.15.2.4 (ix), FDI Policy

<sup>46</sup> Para 5.2.15.2.4 (xi), FDI Policy

model of e-commerce under the FDI policy. However, to enable the proliferation of technology that can help MSME and Kiranas, 100% FDI through automatic route has been allowed to setup e-commerce marketplace platform with a caveat that any entity operating such technology platform will not own/control inventory of any seller on the platform as that will tantamount to operation of multi-brand retail trading.

36. The above conditions are strict and clear in their intent to prohibit the entities with FDI to carry out any kind of electronic version of MBRT (Multi-Brand Retail Trading) i.e. Inventory Based e-commerce, however, few multinational e-commerce entities with heavy arsenal of funding, operating in India under the guise of complex business structure have attempted to flout the above FDI conditions.<sup>47</sup> The FDI Policy is put to multifarious interpretations and e-commerce entities structure their relationship as marketplace with sellers, in such a way that they are in a position to control either seller on their platform or the inventory and also escape the scrutiny of the enforcement agencies. Under the guise of such control or ownership over sellers, the issue also permeates from being a mere FDI Policy violation to also being an anti-competitive conduct (*discussed in the next section on Competition Law*). The mitigating measures and strict action for enforcement of the law in letter and spirit are of paramount importance. Otherwise, the FDI Policy on e-commerce would fail in its very objective of catering to the interests of domestic manufacturers, traders, sellers, MSMEs, start-ups and creation of level playing field in retail.

#### **B. Competition Act, 2002**

37. The Competition Act, 2002 (“**2002 Act**”) and the CCI are well equipped to effectively deal with any distortionary conduct of e-commerce entities. The very objective of the 2002 Act is captured in following terms<sup>48</sup>:

*“It shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India.”*

38. The enforcement powers under Section 3 of the Act deals with anti-competitive agreements in both horizontal and vertical supply chain having appreciable adverse effect on competition in the market.<sup>49</sup> Additionally, Section 4 of the 2002 Act aids in keeping check on abusive behaviour of dominant entity in the market.

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<sup>47</sup> See News Reports <https://www.hindustantimes.com/india-news/ed-books-amazon-to-probe-alleged-fema-fdi-violations-101611851371466.html> ; <https://economictimes.indiatimes.com/industry/services/retail/future-retail-independent-directors-claim-amazon-deal-violates-fema-fdi-rules/articleshow/87570352.cms?from=mdr> ; <https://www.businesstoday.in/latest/story/amazons-takeover-of-cloudtail-violates-indias-fdi-rules-says-cait-316632-2021-12-23>

<sup>48</sup> Section 18 of the Competition Act, 2002.

<sup>49</sup> See Section 3, 19(3) of the Competition Act, 2002.

39. However, with the growth in digital market catering to various e-commerce players, there are times when the abusive conduct of an e-commerce entity may skip the scrutiny of the regulator because it is not a dominant entity. In light of the same, such a practice has been condemned by authorities around the world with the European Commission observing that these entities may not be dominant due to presence of other players in the market, but act as a **gatekeeper**, and thus their conduct (including their one sided marketplace terms they enter with business users) can be determined under Section 3 of the 2002 Act.<sup>50</sup> These entities are the provider of core-service platform and have substantial and significant market power, possessing the potential to disrupt the market and pass on the ultimate harm to end-consumers.
40. In India, platform companies are in the practice of incurring losses right from inception due to the absence of sunset clauses on capital infusion from overseas principals (thriving on investor valuation). Such companies operate under different business models in their home country but such models are not permissible in India. Lack of sectoral sunset clause on such investments that are primarily used as cash burn to provide deep discounts add to market distortions.
41. Having graphed the preliminary construct of law, let us dive into the issues around e-commerce entities which are being examined by the CCI.

#### **QUESTION WHICH ARE BEING PRESENTLY INVESTIGATED BY THE CCI**

42. The CCI has been nimble in its approach to take stride and utilize the Competition Act to examine the conduct of various e-commerce players whether it be against the giant e-commerce marketplaces<sup>51</sup> or online intermediation platform<sup>52</sup> or Food Aggregator platforms<sup>53</sup> etc. In this part we will list the issues which have popped up in the recent past in the e-commerce market having or likely to have an appreciable adverse effect on competition in the market. These are the issues which the antitrust regulator is currently dealing with:
- i. Whether the e-commerce entities engage in conduct which result in preferential listing of few sellers on their platform as compared to other sellers?

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<sup>50</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector, **Digital Markets Act [DMA]**, Brussels, 15.12.2020 COM (2020).

<sup>51</sup> Competition Commission of India, Case No. 40 of 2019, In Re: Delhi Vyapar Mahasangh and Flipkart Internet Private Limited and Amazon Seller Services Private Limited and Ors. Accessible at: <https://www.cci.gov.in/sites/default/files/40-of-2019.pdf>. See also, <https://timesofindia.indiatimes.com/business/india-business/supreme-court-rejects-amazon-flipkarts-plea-against-cci-investigation/articleshow/85172175.cms>

<sup>52</sup> Competition Commission of India, Case No. 14 of 2019, Case No. 01 of 2020

<sup>53</sup> The Economic Times, NRAI seeks CCI intervention into Swiggy, Zomato 'anti-competitive' practices. Accessible at: <https://economictimes.indiatimes.com/tech/technology/nrai-writes-to-cci-on-deep-discounting-by-swiggy-zomato/articleshow/84140327.cms?from=mdr>.

- ii. Whether the e-commerce entities engage in the unfair practice of ‘deep discounting’ wherein they fund these discounts to select few preferred sellers on their platform?
  - iii. Whether e-commerce entities have exclusive tie-ups with sellers on their platform? Whether the e-commerce entities incentivise their tie-ups through favourable terms of listing?
  - iv. Whether the e-commerce entities have private labels listed on their platform and thus they violate the principle of platform neutrality being a marketplace?
  - v. Whether e-commerce entities have tie up with brands for selective launches, and such exclusive launched products are sold exclusively through preferred sellers?
  - vi. Whether the e-commerce entities have any preferred relationship in terms of commissions, discounts etc with select sellers?
  - vii. Whether e-commerce entities have any stake (in terms of equity or otherwise), directly or indirectly, in any of the sellers? If yes, does this translate into any preference?
  - viii. Whether the e-commerce entities have enforced price parity agreements with sellers on their platform and are thus killing the intermediate consumer market and harming the end-consumer in long run?
  - ix. Whether the e-commerce entities by acting as gatekeepers, engage in coerced bundling of their services and kill the business efficiency of sellers listed on their platform?
  - x. Whether the e-commerce entities charge arbitrary, discriminatory or exorbitant commissions on their platforms?
  - xi. Whether the e-commerce entities engage in the practice of data masking and using the data to build their own private labels as wrongful gain?
43. It is to be noted that under Competition Act, the definition of consumer is wide enough to include both the end-consumer as well as the sellers. Thus, the above questions of market conduct by e-commerce entities are being analysed from both the end-consumer as well as seller’s perspective.

#### **DESCRIPTION OF THE ISSUES UNDER CONSIDERATION**

44. The CCI on January 08, 2020 released its Market Study.<sup>54</sup> The Report has covered the three broad categories of e-commerce:

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<sup>54</sup> Competition Commission of India, Market Study on E-Commerce in India, Key Observations and Findings. Accessible at: [https://www.cci.gov.in/sites/default/files/whats\\_newdocument/Market-study-on-e-Commerce-in-India.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf) .

- consumer goods (mobiles, lifestyle, electrical & electronic appliances, and grocery);
  - accommodation services;
  - food services.
45. Here, the present part flags the major issues and concerns identified by CCI in its Market Report and present our key analysis. *(Please note the abusive market conducts listed below have been discussed in detail in Part IV of the Report).*

**a. Platform Neutrality & attendant concerns:**

- i. The CCI identified that the concern regarding platform neutrality emanates from situations where the online platforms serve as both a marketplace and a competitor on that marketplace. They vertically integrate when they operate in the products traded on it and tend to give preferential treatment to their private labels.
- ii. Further, there have been concerns that there are certain sellers who are being given preferential treatment in terms of better and more prominent listing, better commercial terms and conditions including reduced commissions, reduced delivery and warehousing charges etc. It is imperative to ensure that e-commerce marketplace platforms are neutral platforms, with no affiliations towards any seller or set of sellers. This is essential for the consumers to have a fair market with real choice. The consumers should have a wide array of sellers to choose from and also know the basis of rankings of each seller available on the platform so that they can make an informed choice. Promoting limited sellers on e-commerce platform reduces customer choices, and due to reduced effective competition, cost to consumer increases in the longer run in addition to a marketplace diminishing to inventory based e-commerce.
- iii. There have been certain investigative reports which have come out in the public domain where leading e-commerce behemoths have certain “Special Merchants” which were be given preference in listing over other sellers on their platform. These special merchants account for over 35% of the online sales in that platform, and all exclusive launches and private labels are sold only by such special merchants. If the reports are actually true, this needs to be checked and regulated urgently to ensure fairness and neutrality in business operations. Reports have also emerged that such e-commerce marketplace platforms have been launching their own private brands in India with the help of customer data on their platform. Consumer data has become crucial in present market with the rise of e-commerce, and therefore, consumer interests in usage of such consumer data by companies needs to be protected. Marketplace platforms are using customer data to identify customer demands and makes its own private label to compete with other

sellers / brands. Reports depicts that this practice, off late, by e-commerce marketplace platforms by launching their own products actively harming the interests of other sellers on the platform. Not only do these platforms use customer data for their own advantage without any effective consent of the user, they also harm sellers by using data of their sales and their fast moving products. By identifying the customer's preference and behavioural patterns, platforms promote their own products on their platforms by way of targeted listing, mostly promoting their own products.

- iv. Further, only few of the preferred sellers are given access to the inventory of private labels.
- v. Additionally, e-commerce marketplace platforms enter into exclusive launch agreement with different smartphones manufacturers for launch of certain smartphones. These online exclusives smartphones are driven by sale of popular brands, especially in the smartphone and electronic appliance segment. Such sales on e-commerce portals only happen via these preferred sellers. Therefore, there are several instances of exclusive online sale of smartphones that take place on a regular basis, and non-preferred sellers are regularly excluded from huge revenue streams that such anticipated launches could bring. This exclusion extends to offline brick and mortar stores as well because such exclusive launch agreements are not executed with offline retail stores at all.
- vi. Even the products which are non-exclusive on the platform are difficult to be sold on the platform by any normal retailer. A true marketplace would be where any seller wanting to sell the product is allowed and commercially feasible to list its products. However, these e-commerce aggregators ensure that only few preferential sellers are able to sell online because they get better terms of trade including lower commission rates than a normal seller. This commission makes it very difficult for normal sellers to maintain their margins by listing their products on these platforms, thereby leading to limited number of non-preferred sellers on their platform. For example, for most of the offline smartphone retailers, the margin (depending upon the brands) is 5%-7% of the price of the smartphone. In this margin, they must maintain their cost of operations. However, the commission charged by e-commerce marketplace platform entity itself ends up being more than the margin that retailers get.
- vii. There have been instances where leading food service marketplace platforms have launched private label cloud kitchens and such cloud kitchens are given terms which are way better than those extended to other restaurants. In fact, reports suggest that the marketplace platforms entities actively engage in such practice of creating private label cloud kitchens so that their revenues increase coupled with minimum guarantee schemes.

- viii. Many marketplace platforms take all steps to ensure that their preferred sellers (who in many cases are actually associated enterprises of these ecommerce portals) are given enviable digital real estate on the results page on their platform, but they further strengthen the bias in favour of preferential sellers to the detriment of other sellers. Under these circumstances, it is not possible for a normal retailer to sell the products online on these portals. This directly limits the choices for the customers. This conduct affects the consumer's right of access to a fair and balanced marketplace. In the long run, such conduct has a larger ramification once all the other sellers are out of the market and only a handful of sellers remain, the bargaining power of the consumer will be nil, and it will lead to huge consumer loss.
- ix. The policies adopted by these marketplace platforms disrupt competition and gravely affects MSMEs, small traders and retailers. The Draft National E-Commerce Policy, 2019 acknowledges the fact that maintenance of level playing field is a crucial issue and focuses on connecting MSMEs, small vendors, traders etc. to the 'digital ecosystem'. The importance of marketplace platforms for growth of MSMEs has been recognized by many jurisdictions including by the World Trade Organization (WTO) and International Chamber of Commerce (ICC)<sup>55</sup>.
- x. Reduced choices at marketplace platforms eventually leads to increased prices and due to the lack of effective competition, ultimately, consumers would be put to loss. This also harms the consumers since they are being misled to believe that these e-commerce platforms are marketplaces in the true sense. This is not only a violation of the Consumer Protection Act, 2019 but also amounts to unfair trade practice.
- xi. As has been laid down by law and regulators in India, every platform which acts as an intermediary or facilitator must act in a fair and equitable manner, without giving any preferential treatment, to further the ultimate interest of the consumer (juxtaposing e-commerce as an intermediary and facilitator of digital market, with the role of SEBI as a neutral facilitator of platform and enabling the interaction of brokers and buyers).<sup>56</sup>

***b. Unfair Platform-to-business Contract Terms:***

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<sup>55</sup> <https://iccwbo.org/publication/wto-business-focus-group-1-msmes-and-e-commerce/>

<sup>56</sup> In the matter of: National Stock Exchange of India Limited (NSE) and Others, 2019 SCC OnLine SEBI 120; See also re: *Manoj K Sheth and National Stock Exchange of India*, Case No. 35 of 2019, CCI; See also Regulation 7(2) of the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2018 and explanation thereof; a stock exchange has to be "demutualised" i.e., the ownership and management of the stock exchange ought to be segregated from the trading rights or clearing rights, as the case may be, in terms of these regulations.

46. Marketplaces have acquired the role of gatekeepers as highlighted in the preceding part. A fragmented supply side and only a few major intermediary platforms create a situation of asymmetry of bargaining power.
- i. The issues of unilateral revision in contract terms, bundling (tying of distinct products) as a vertical restraint,<sup>57</sup> and imposition of ‘unfair’ contract terms by the major platforms have led to growing unease and tension in platform-business relations.
47. It is usually expected that brand building will happen when small businesses/retailers sell on a reputed platform and they will be able to use the platform’s brand value and goodwill for the growth of their business. The same is also expected to decrease advertising costs for small firms. Further, any retailer can distinguish themselves from their competition only through differentiation, which translates into high repeat customer rates. However, in practice, the stronghold of the marketplace platforms does not allow differentiation in effective terms and leaves no space for the retailer’s individual identity. Rather, the platform is able to take advantage of the retailer’s quality/efficiency of products and services and what should have been the retailer’s goodwill, becomes synonymous with the platform. Therefore, the practices of ecommerce platforms discourage brand development for the sellers and instead focus on building the platform’s brand by reaping the benefits of the retailer’s efforts. For example, when a consumer buys a coffee mug from an e-marketplace, they rarely remember the name of the seller. The consumer almost always only remembers that they bought it from the concerned e-marketplace. This also defeats the narrative that a seller’s individual advertising and marketing costs decrease because that is taken care of by the platform. In actuality, the platform is only advertising and marketing itself and not the sellers per se. Further, discounts, if any which are forced upon the sellers to give to get appropriate listing, do not get any benefit in terms of consumer perception since these e-commerce aggregators advertise that they are the ones giving discount, which in turn, helps their gross merchandize value.
48. As a result, there is no brand building for the sellers but instead, only the platform brand value increases by virtue of an increasing number of transactions on the platform. In fact, the entire exercise of data masking coupled with price parity (as detailed in the subsequent sections) is with the sole intent that the brand of the platform increases. Such a practice may not be beneficial for the consumers because it ultimately creates dependency and reduces consumer choice.
49. Additionally, consumers expect consistent shopping and ordering experiences. The rise of e-commerce platforms is to support this customer expectations.

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<sup>57</sup> EC Microsoft, Case COMP C- 3/37/792, reaffirmed by Court of First Instance in case of Microsoft v. Commission, Case T-201/04, decided on 17.09.2007 at Para 859



However, this consistency does not take place in practical terms. Particularly, in the case of those platforms that bundle delivery and listing of firms, there is always a factor of difference in each transaction and how that product/service is delivered to different consumers or the same consumer at different instances. There is nothing to ensure that consumer experiences are truly consistent and this also affects the reputation of the firm due to factors beyond the firm's control.

**c. Platform Parity Clauses:**

- i. A platform price parity clause restricts sellers/service providers from offering their goods or services at lower prices on other platforms. It is contractually imposed by a platform on the sellers/service providers to guarantee the lowest price for the platform itself.
- ii. Platform price parity clauses are called 'wide' if they apply to prices offered on all other platforms, including the seller's/service provider's own website and are considered 'narrow' if they prevent the seller/service provider from setting a lower price on its own website, while imposing no condition vis-à-vis prices on other platforms. Platform parity clauses can potentially lead to higher commission rates and discourage entry.

**d. Exclusive Agreements:**

- i. A platform with market power, by forging exclusive contracts, may be able to prevent the market from being more competitive. Thus, the benefits accruing from competitive markets such as lower prices, better products or more choices may be lost. Exclusive agreements may make rival platforms incur significant additional costs to induce the brands/service providers to give up the exclusive contract with the major platform.

**e. Deep Discounts:**

- i. Discounts offered by the platforms in the early years are typically seen as a means to establish network effects for user on-boarding. However, discounts can harm competition when used as an exclusionary device by enterprises with market power in the form of 'deep discounting'.
- ii. Deep discounts *per se* are not a reflection of efficiency gains or cost savings and at the same time it creates distortionary effects on the supply side of the markets.
- iii. Further, the practice of selling its own inventory at discounted prices by the e-commerce players to its preferred sellers has been extensively documented by the Income Tax Appellate Tribunal in Case no 202 & 693 /Bang/2018. In that case, the personnel of e-commerce players have themselves admitted that they indulge in predatory pricing 'only to capture the market and help its retailers to survive' in the recently developing E-commerce. Thus, these platforms can capture the market by burning cash and thereby remove the existing sellers

from the market. It has a detrimental end result on the consumers. It has been seen in past as well that after successfully removing the other sellers from the market, these platforms tend to substantially increase the price of their products thereby affecting the consumers. Some of these activities by marketplace have come under grave scrutiny in other jurisdictions like the US where these marketplaces used loss funding to eliminate a small company e.g. Quidsi, which operated [www.diapers.com](http://www.diapers.com), a website selling baby supplies. The United States Sub Committee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary (“Sub-Committee Report”), released a report in 2020, confirming that e-commerce entity faced losses of \$200 Million in one month to drive its rival, Quidsi out of the market of providing baby supplies.<sup>58</sup> Thereafter, Quidsi had to sell its operations to none other than Amazon itself. In 2017, Amazon shut down Diapers.com citing profitability issues but industry experts believe that this has been done solely for decreasing the number of online options for consumers.<sup>59</sup>

50. While predation may be beneficial for consumers in the short run when prices charged by the firm with superior market power are particularly low, it becomes detrimental for consumers in the long run: Once the existing competitors are driven out of the market, the predator achieves a position which allows it to raise prices or charge supra-competitive prices. With no competitors in the market, the consumers are now forced to pay the higher prices without any alternatives and the erstwhile benefits of below-cost pricing are lost.

### ***Search Rankings***

51. Apart from the above key issues, the Market study also highlighted that e-commerce entities should set out a ***clear and transparent policy on data*** that is collected on the platform, the use of such data by the platform and also the potential and actual sharing of such data with third parties or related entities.
52. The rigged and sponsored search ranking and listing of sellers on the platform is also a major issue which compromises the free will of the consumer. The Netherlands Authority for Competition & Markets published its study on sponsored internet ranking and its effects on competition and consumer welfare (“**ACM study / study**”).<sup>60</sup> According to the ACM Study, while discussing the harm on competition and market from sponsored ranking, it has been observed that sponsored ranking may limit competition and consequently harm consumer free choice. The payments for a better position can be at the expense of competition on price and quality. After all, it is possible to appear higher in the ranking with an extra payment instead of making a better offer. The suppliers who

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<sup>58</sup> Pg. 263, Sub-Committee Report.

<sup>59</sup> Pg. 264, Sub-Committee Report.

<sup>60</sup> Report dated 2<sup>nd</sup> February, 2021. Accessible at: <https://www.acm.nl/sites/default/files/documents/sponsored-ranking-study-acm.pdf>

occupy a higher position in the search results because of their payments may be less relevant to the consumer than the other suppliers. The consumers can be misled by this if it is unclear that the order of the search results presented has been influenced by payment.<sup>61</sup>

### **C. Consumer Protection Laws**

53. On one hand wherein, the Competition Act, 2002 addresses and caters to both the end-consumer as well as the intermediate consumer, the Consumer Protection Act, 2019 read along with the Consumer Protection (E-Commerce) Rules, 2020 addresses and regulates the specific conduct of e-commerce entities for protection of consumer's interest.
54. Under the Consumer Protection Act, 2019, e-commerce entities qualify as service providers under definition of "electronic service provider". Electronic service provider is defined under Section 2(17) of the Act as *'a person who provides technologies or processes to enable a product seller to engage in advertising or selling goods or services to a consumer and includes any online market place or online auction sites'*.
55. It defines e-commerce entities as *any person who owns, operates or manages digital or electronic facility or platform for electronic commerce, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity.*<sup>62</sup>
56. The E-Commerce Rules of 2020 imposes strict obligations on marketplace as well as inventory-based e-commerce entities to further the interest of end-consumer and to streamline the consumer grievance redressal mechanism and combat unfair trade practices. Furthermore, it addresses the issue of private labels and consumer interest by obligating that every marketplace e-commerce entity shall include in its terms and conditions generally governing its relationship with sellers on its platform, a description of any differentiated treatment which it gives or might give between goods or services or sellers of the same category.<sup>63</sup>
57. Additionally, the government has proposed amendments to the E-Commerce Rules of 2020 for which public consultation was also done till July 2021. The key areas in which the proposed amendment delves into are;
  - i. cross-selling (the issue of bundling and tying of services, as discussed in above part));

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<sup>61</sup> Id at Para 5.1, 5.2.

<sup>62</sup> Rule 3(1)(b).

<sup>63</sup> Rule 5(4).

- ii. Ban on Flash sale by misusing the data by the e-commerce platform (back-to-back sales which limit customer choice, increase prices and prevents a level playing field);
- iii. Establishment of a comprehensive grievance redressal mechanism and appointment of a Chief Compliance Officer;
- iv. to distinctly identify and inform consumers about sponsored listings;
- v. Ban on listing of related parties and associated enterprises as seller on the platform (the issue of operation of private labels, as discussed in above part) as discussed above.
- vi. Ban on the e-commerce marketplace entities selling goods and services on wholesale basis to the sellers listed on the marketplace platform.

**D. Information Technology Act, 2000 and allied Rules**

58. This part deals with the practice of data masking, private and wrongful gains on accumulated customer data and unclear data sharing policy by e-commerce entities. Building on the previous part under the Competition law, wherein the CCI Market Study on e-commerce highlighted that e-commerce entities should set out a ***clear and transparent policy on data*** that is collected on the platform, the use of such data by the platform and also the potential and actual sharing of such data with third parties or related entities.
59. In India, presently the customer data privacy as a concept is statutorily governed by Section 43A of the Information Technology Act, 2000 (“**IT Act**”) read with the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (“**SPDI Rules**”).
60. As the position of law in India stands, for any sharing and transfer of personal data concerning Indian citizen, the SPDI Rules govern the conduct of such body corporates<sup>64</sup> (e-commerce entities here). Now in regards to sharing of information of customers of these e-commerce entities with third-parties, Rule 6(1) of SPDI Rules states that:
- “Disclosure of sensitive personal data or information by body corporate to any third party shall require prior permission from the provider of such information, who has provided such information under lawful contract or otherwise, unless such disclosure has been agreed to in the contract between the body corporate and provider of information, or where the disclosure is necessary for compliance of a legal obligation.”*
61. Furthermore, Rule 4 of the SPDI Rules state that body corporate collects, receives, possess, stores, deals or handle information of provider of information, shall

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<sup>64</sup> Section 43A, IT Act – Explanation (i) “**body corporate** means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities.”

provide a privacy policy for handling of or dealing in personal information including sensitive personal data or information and they shall also provide for –

- i. Clear and easily accessible statements of its practices and policies;
  - ii. type of personal or sensitive personal data or information collected
  - iii. purpose of collection and usage of such information;
  - iv. disclosure of information including sensitive personal data or information;
  - v. reasonable security practices and procedures
62. It means information can be shared with third-parties if explicit consent has been taken in privacy policy and the user/ customer is aware about it about the nature and use of such data sharing. Presently, as discussed above, private labels are developed by marketplace by using such seller' and customer's data. The issues arises is whether sellers and consumer are aware that their data is used, perhaps without their consent, to develop private labels.
63. In addition to the above rules on data privacy, the Ministry of Electronics and Information Technology (“MeitY”) has notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“IT Rules, 2021”) on 25th February, 2021. The IT Rules, 2021 read with Section 79 of the IT Act provides ‘safe-harbour’ to e-commerce entities role as an intermediary provided, they undertake due diligence enumerated under the law.

#### **ISSUE AND ANALYSIS**

64. If we take a look, Section 72A, IT Act reads as:

*“Punishment for disclosure of information in breach of lawful contract – Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.”*

65. Now, as has been noted in the CCI Market Study also, e-commerce marketplace entities do not share customer data with the listed sellers/ enterprises on their platform and vice versa by indulging in data masking, despite taking consent from customers for the same in their privacy policy.

66. While such data is not shared, the e-commerce entities themselves use such data to their own advantage to set up their own private labels or to support ‘cloud kitchens’, or to give effect to preferential or skewed contractual terms for business gains. This in itself is a characterization of wrongful gain<sup>65</sup> to the e-commerce entities by misusing consumer data and using it for purposes other than it is consented for in their privacy policy.
67. This practice stands in stark violation of consumer trust and also in violation of Section 72A of the Information Technology Act, 2000 along with Rule 4(iii) of the SPDI Rules which puts an embargo on e-commerce entities to clear spell out in their privacy policy the purpose of collection and usage of such information collected from user. The e-commerce entities under the guise of ambiguous and vague terms in their privacy policy are using consumer data for their own private advantages.
68. However, due to lack of awareness amongst consumer and sellers and due to necessity of *locus standi* for initiating action against the e-commerce entities, the said abuse of data of consumer is prevalent but a veiled practice. This practice needs the attention of the authorities and must be remedied by bringing suitable changes at the earliest.

#### **E. Other applicable laws**

69. An e-commerce entity must also conform to the labelling and packaging norms set by various regulations made under relevant laws and the rules therein such as:
- i. Legal Metrology Act, 2009;
  - ii. Food Safety and Standards Act, 2006;
  - iii. Drugs and Cosmetics Act, 1940.
70. Additionally, Legal Metrology Act, 2009 read with Legal Metrology (Packaged Commodity) Rules, 2011 mandate the e-commerce entities to display requisite information about the goods displayed on sale, such as, units, dimensions, weight, etc. on product page itself.
71. It is pertinent to note that there are certain international jurisdictions where there have been attempts to regulate e-commerce. For example, EU has introduced its regulation on promoting fairness and transparency for business users of online intermediation services (*P2B Regulation*)<sup>66</sup>. It seeks to regulate the relation between online platforms and their business users. The Regulation applies to the entire spectrum of the online platform economy, affecting nearly 7,000 online intermediation services operating in the EU, which among others include:

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<sup>65</sup> Section 23 of Indian Penal Code, 1860 defines ‘wrongful gain’ and ‘gaining wrongfully’.

<sup>66</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1150&from=EN>; see also [https://www.ey.com/en\\_gr/tax/tax-alerts/law-alert-new-rules-for-online-platforms-and-online-platforms-and-business-users](https://www.ey.com/en_gr/tax/tax-alerts/law-alert-new-rules-for-online-platforms-and-online-platforms-and-business-users)

- Online advertisement and auction websites;
  - e-commerce marketplaces;
  - software application stores;
  - social media; and
  - search engines.
72. These new rules ban certain unfair practices, such as changes to online terms and conditions without cause, mandate transparent ranking and internal complaint-handling mechanisms to be in place as well as authorize representative organizations and associations to judicially represent business users against infringements of the said rules by online platforms and search engine providers.



#### IV. PRACTICES WHICH ARE PREVALENT IN THE SECTOR

73. Having set the background, it is important to note existing business practices of e-commerce marketplace platform entities that are not only against consumers but anti-competitive but also against the small traders in India. These practices need to be addressed immediately:

##### A. Lack of Platform Neutrality

74. The concept of platform neutrality is closely related to and derived from the term 'network neutrality' which entails that an entity which has a substantial stake in one layer of the industry, should not selectively favor any entity which works in the layer of the industry below or above it.<sup>67</sup> In the realm of e-commerce, concerns have been raised regarding certain marketplace platforms giving preference to the sellers and service providers listed on their platform.<sup>68</sup> This preference is usually shown via better and more prominent listings on the website, better discounts, better terms and conditions including lowered/zero commissions, selective cash backs, marketplace funding discounts for sales made via those preferential sellers etc. Such a conduct has an effect on the consumer's choice since they usually buy products which are listed on the top of the search results that are easily accessible on the platform or have better discounts and delivery terms attached to it. There are consumer studies which show that a vast majority of sales happen via those sellers who are listed at the top of the search results, thus listing practices must be completely fair to ensure benefit for the entire ecosystem.

75. Another concerning effect of lack of platform neutrality can be seen as a result of vertical integration of the platform with business partners listed on their very platform. Because of its vertical integration and development into upstream and downstream sectors, it is both the owner and a user of the platform. This gives it an incentive to keep other companies off its platform, which it can do by refusing to deal with them and then charging exorbitant commission rates, making it unsustainable for them to sell their items. Platforms' differential treatment, whether in terms of self-preferencing or delivering more favorable business terms to some than to others, raises worries about fairness & neutrality. Privileged treatment for a class of sellers listed on the e-commerce website equates to exclusivity through discounts and favorable listings, excluding and foreclosing other competitors.

76. The absence of platform neutrality can also be viewed via search bias on e-commerce websites. In 2018, the CCI held an e-commerce giant liable for violation of Section 4 of the Competition Act, 2002 by indulging in a search bias by giving

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<sup>67</sup> T Wu and Alfred A Knopf, 'The Master Switch: The Rise and Fall of Information Empires' (2010).

<sup>68</sup> See Aditya Kalra, Exclusive: Amazon deployed secret strategy to dodge India's regulators, documents show, Thomson Reuters. Accessible at: <https://www.reuters.com/article/amazon-india-operation-ecommerce-idUSKBN2AH1HY>



ranking to its own specialized services and by manipulating the search results.<sup>69</sup> Similarly, the European Commission imposed a fine against an e-commerce giant for favoring its own shopping services through its search engine results.<sup>70</sup> This had an effect on the third-party sellers listed on that platform and it was opined by the CCI that it caused harm to the consumers as well.<sup>71</sup> It was further opined that an e-commerce entity is supposed to provide neutral and unbiased results on their website. It was pointed out via a news report that certain e-commerce companies had been indulging in search bias to prefer certain big sellers and evade laws in India that were meant at protecting the interests of the small sellers in the ecosystem.<sup>72</sup>

77. The French Digital Council on platform neutrality, in a detailed opinion, elaborated that platform neutrality is meant to ensure the protection of consumer interests as well as promote the role of the internet as a catalyst for innovation, creation, expression and exchange.<sup>73</sup> The Report of the French Digital Council on Platform Neutrality makes the following observations on the principle of neutrality which are relevant for e-commerce platforms in the present scenario:

- *The goals behind the neutrality principle should also be factored into the development of digital platforms: while extremely useful and innovative, their growth must not be allowed to hamper the use of Internet as a forum for creation, free expression and the exchange of ideas.*
- *Platform neutrality can be viewed from two angles: the traditional defensive angle designed to protect liberties, including freedom of expression, free trade, free access to data and content and free competition; or the offensive angle aimed at developing user power in the long term, promoting economic and social progress, creating the right conditions for a multitude of user types and encouraging innovation. This neutrality approach contributes to sovereignty in the broadest sense, i.e., the ability to act and make decisions.*
- *Suggestions to improve platform neutrality include establishing best practice and platform neutrality observation and rating networks, that could focus on the sustainability of platforms' practices with regard to partners (developers,*

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<sup>69</sup> Competition Commission of India, Case No. 07 and 30 of 2012, In Re: Matrimony.com Limited and Google LLC & Ors. Accessible at: <https://www.cci.gov.in/sites/default/files/07%20%26%20%2030%20of%202012.pdf>

<sup>70</sup> General Court of the European Union, Judgment in Case T-612/17, Google and Alphabet v Commission (Google Shopping), PRESS RELEASE No 197/21. Accessible at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf>

<sup>71</sup> Competition Commission of India, Case No. 07 and 30 of 2012, In Re: Matrimony.com Limited and Google LLC & Ors. Accessible at: <https://www.cci.gov.in/sites/default/files/07%20%26%20%2030%20of%202012.pdf>

<sup>72</sup> Aditya Kalra, Amazon documents reveal company's secret strategy to dodge India's regulators, Reuters Special Report. Accessible at: <https://www.reuters.com/investigates/special-report/amazon-india-operation/>

<sup>73</sup> Conseil National du Numérique (CNNum, French Digital Council), Platform Neutrality: Building an open and sustainable digital environment. Accessible at: [https://cnnumerique.fr/files/uploads/2014/06/PlatformNeutrality\\_VA.pdf](https://cnnumerique.fr/files/uploads/2014/06/PlatformNeutrality_VA.pdf)

*publishers, customers, users, etc.) and their fairness to web users. For example, these networks could rate: constancy of API access conditions, constancy, clarity and fairness of terms of service, particularly with regard to personal data, portability and interoperability of the users' digital goods on a platform, or barriers erected to its removal, disclosure of bias in ranking mechanisms, compliance of the platform's own services to its relevance criteria for ranking results.*

- *User disclosures regarding how their data is used should be written in such a way that any reasonably informed person can comprehend them. As part of a digital literacy endeavor, people must also be informed about relevance criteria and algorithm controlling principles. The lack of platform neutrality can be countered by making information accessible to the consumers in terms of related party listings or any preferential treatment on ecommerce platforms.*

78. It is also relevant to highlight the Recommendation of the Council on Competitive Neutrality in OECD/LEGAL/0462 adopted on 31/05/2021<sup>74</sup>, which defines competitive neutrality as a principle according to which all enterprises are provided a level playing field with respect to a state's ownership, regulation or activity in the market. In simple terms, it is a framework within which all enterprises, irrespective of their ownership (whether state-owned or privately owned) or nationality (domestic or foreign), face the same set of rules and where State action does not result in a competitive advantage for a particular market participant<sup>75</sup>. While the principle of competitive neutrality was propounded in the context of state-owned entities, it can be squarely applied to the functioning of e-commerce platforms. This is because the rationale behind competitive neutrality is that state-owned entities may distort competition due to the benefits granted to such entities which enable them to indulge in self-preferencing, create entry barriers etc. which do not allow competitors to sustain in the market. Hence, it is important to ensure that they are subject to the same competitive pressure as private enterprises. Similarly, incumbent online platforms engage in unfair practices and confer preferential treatment to their own private label and subsidiaries which compete with other firms on the same platform. This prevents fair competition on neutral terms and has an effect of distorting the market.

79. Competitive neutrality prescribes that “Enterprises, regardless of their ownership, location or legal form, are not ultimately responsible for regulating the market(s) in which they currently or potentially compete (especially regarding entry or

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<sup>74</sup> Organisation for Economic Cooperation and Development, Recommendation of the Council on Competitive Neutrality. Accessible at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462>.

<sup>75</sup> Organisation For Economic Cooperation And Development, Competition Policy In Eastern Europe and Central Asia Focus On Competitive Neutrality. Accessible at: <Http://Www.Oecdgvh.Org/Pfile/File?Path=/Contents/About/Newsletters/Issue-No.-15-July-2020&Inline=True>

expansion of existing players)”.<sup>76</sup> Therefore, digital platforms operating as e-commerce marketplaces or aggregators of different firms and competing with the same firms in distribution of goods and services, cannot arbitrarily regulate or restrict some sellers while preferencing their own interests. Platforms which are in a position to confer privileges to their own private labels and subsidiaries distort competition. Competitive neutrality occurs where no entity operating in an economic market is subject to undue competitive advantages or disadvantages. Hence, competitive neutrality is necessary to ensure a level playing field for all the market participants operating on the platform.

80. Neutrality is a fundamental principle in the e-commerce sector, just as is for the stock exchanges, which by the inherent role they play, are expected to be neutral. Regulation 41 of the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012 deals with equal, fair and transparent access, which ensures that neutral, fair and transparent conduct of exchanges. Therefore, a stock exchange cannot engage in affording preferential treatment to a select few brokers in the market. Such a practice is bad in law and is not at all fair and equitable. The notion which is enchanted here is that a stock exchange or internet being a facilitator has to always be neutral. It is submitted that similar standards should be brought into force for e-commerce marketplaces as well. Similarly, there is a need to statutorily ensure that platforms do not have any direct or indirect relationship with the sellers on their platform or sell their own products on their platform like an inventory based model that is actually the seller itself as it sells its own good and services and instead of facilitating the sale of goods and services belonging to third parties.
81. The inherent aspect of platform neutrality is that there must be fair & non-discriminatory treatment for all sellers / business users and hence getting into arrangement with brands for exclusive launches via preferential sellers, launch of private labels via preferential sellers, setting up private labels / cloud kitchens must be deprecated.

#### **B. Deep Discounting**

82. Another interlinked practice that is usually carried out on e-commerce platforms is deep discounting or platform funded discounts. The E commerce market study defines deep discounting as a practice in which an e-commerce marketplace company offers heavy discounts on goods or services listed on its platform. This practice takes away the choice from the suppliers and consumers and in the long run, it can be viewed as an exclusionary practice which eliminates other players from functioning in a market. As per the market study report, there was near universal agreement among sellers/service providers that online discounts were

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<sup>76</sup> Organisation for Economic Cooperation and Development, Recommendation of the Council on Competitive Neutrality. Accessible at: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462>.

the most important element impacting consumer choice.<sup>77</sup> While reduced costs help consumers, it is believed that the increased focus on discounts creates a risk to market and ultimately the consumer, through non-price characteristics like as quality and innovation, which could harm customer interest in the medium to long term.<sup>78</sup> An e-commerce platform should be purely neutral and should not fund any discounts. The moment it funds discounts, and benefit of such discount is received by certain sellers, it inherently becomes discriminatory in nature and distorts the level playing field which affects sellers' as well as consumers' interest. Further, the concerns surrounding deep discounting per the sellers/ service providers in the E commerce market study were<sup>79</sup>:

*“i) discounts are discriminatory ii) discounts imposed by platforms in exercise of their superior bargaining power adversely affects the business models of the service providers iii) discounts push prices to below cost levels in certain product categories and impair the offline small retailers' ability to compete.”*

83. Market studies have pointed that deep discounting by an ecommerce platform is linked to a loss leading approach which pays higher returns in the future.<sup>80</sup> It has been shown that deep discounting by an ecommerce platform is linked to a loss-making strategy which pays off with absolute control of the market with due course of time.<sup>81</sup> While analyzing an e-commerce giant which was held liable for below cost pricing of books on its platform, the research paper analyses an approach taken by the US Government that due to the presence of multiple innovators in the market, one e-commerce giant cannot have dominance over it.<sup>82</sup> It was observed and reported that by obtaining a mass customer base through below cost pricing, the said e-commerce entity now occupies a 65% control of the market today.<sup>83</sup> This finding leads to the assertion that if the deep discounting policies of e-commerce entities are left unchecked today, they will definitely drive out the existing players in the future which would stifle innovation and lead to a loss of choice for the consumers as well.
84. In most instances of discounts offered on ecommerce platforms, the discounts are funded by the platform themselves. This approach leads to a loss-making/cash burn strategy which would be compensated by higher customer attraction and retention towards their platform. The flip side of this story is that the other sellers

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<sup>77</sup> E Commerce Report para 24, Page 9.

<sup>78</sup> E commerce Report, Para 24, page 9.

<sup>79</sup> E commerce Report, Para 10 page 33.

<sup>80</sup> Lina M. Khan, Amazon's Antitrust Paradox, 126 Yale L.J. (2016). Available at: <https://digitalcommons.law.yale.edu/ylj/vol126/iss3/3> (Lina M. Khan is the current chairperson of the Federal Trade Commission, USA)

<sup>81</sup> *Id.*

<sup>82</sup> *Id* at page 761

<sup>83</sup> *Ibid* at page 761

listed on their platforms or competing entities in the market are not able to sustain in the market or even sustain their margins in the market. There have been instances previously, where excessive discounting strategies have been used by e-commerce platforms just to eliminate the competition.<sup>84</sup> That being the case, the ultimate loss bearer left is the consumer who will have a reduced bargaining position due to lesser competition. Therefore, to deal with this issue a proper framework needs to be put in place.

85. The unfair competition from the deep discounting by the e-commerce marketplace entities is not only limited to the sellers listed on the platform but also affects the physical shops selling the goods and services in the same categories in which deep discounting is carried out by the marketplace entities. Such cash burning strategy followed by foreign companies leads to foreign capital dumping and defeats the basic purpose of imposing the restrictions on FDI in MBRT and Inventory based e-commerce/webstores.

### **C. Use of data to gain advantage**

86. In the current day and age, personal data including consumer preferences, the transaction data, products sales data etc has become most sought-after by e-commerce companies. Personal information like shopping habits, consumer details, consumer preference etc. can help a business in improving its products and services and also targeted advertisement and marketing. Due to a lacuna in terms of governing personal data, there has been a misuse of such data by e-commerce giants to gain control over the market. A recent investigation by Reuters suggests that e-commerce companies misuse the consumer and business partner's data to improve its products.<sup>85</sup> Further, another report indicates that e-commerce platforms were studying the data about other brands on their platform and exploiting that proprietary data to launch competing products on their marketplace.<sup>86</sup> Such a conduct by the e-commerce companies harms the right of privacy and also has an impact on the existing players, third parties in the market who are either not being provided access to their own data or are being sidelined from the market by this exclusionary approach of the platforms.
87. Personal data can be used for targeted advertising and, more broadly, for firms to better understand consumer behavior and allocate resources accordingly by analyzing and using it. Companies that mine data pooled in proprietary databases can be seen to be profiting from an intangible asset that they can exploit or sell to third parties in a more or less aggregated form in this regard. The Organization for

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<sup>84</sup> See the concerns noted in the United States Sub Committee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary Report, 2020 at Pg. 263.

<sup>85</sup> Jeffrey Dastin, Chris Kirkham and Aditya Kalra, Amazon wages secret war on Americans' privacy, documents show, Reuters Special Report. Accessible at: <https://www.reuters.com/investigates/special-report/amazon-privacy-lobbying/>.

<sup>86</sup> Aditya Kalra and Steve Stecklow, The Imitation Game, Reuters Special Report. Accessible at: <https://www.reuters.com/investigates/special-report/amazon-india-rigging/>.

Economic Cooperation and Development (OECD), in a report on digital economy, pointed out that in principle, using data from closely related markets is not exclusionary as long as it is obtained through merit-based competition.<sup>87</sup> If the company in question is a new entry, such a tactic can indeed improve competition on the second market. However, in some situations, the practice of a corporation with a dominating position on the initial market using customer information for cross-selling purposes to investigate a target market may be considered abusive conduct. When e-commerce companies do not share the data pertaining to the third-party sellers to whom they are indulging in an unfair conduct by limiting the access for development of the third parties listed on their website but utilizing the same data for the improvement of their products and services.

88. The use and misuse of data by digital platforms also gains importance in light of the growing perception that consumers continue to demand personalized shopping experiences which can only be delivered by aggregator platforms by virtue of their data pool. However, a firm cannot personalize its products and services till it is given comprehensive data about its customers' behaviour. Further, this personalization and improvement based on customer feedback is based on a seller's unique product/service. Thus, concerns are raised about e-commerce platforms capitalizing on data that is neither created by them (created by consumers) nor for them (created by the seller of the concerned product or service).
89. Lack of transparency and neutrality is against the very idea of a "marketplace" which must cater to all the stakeholders in the value chain equally in a fair and equitable manner. Increased transparency in a marketplace is beneficial for consumers as it conforms to the expectations of consumers that firms must be transparent, authentic and readily available for the customers. While the shift from physical marketplaces to e-marketplace should have increased accountability, in effect there is no transparency. Rather, there is information asymmetry for both sellers and consumers. Neither of these stakeholders are aware of the mechanisms that facilitate sudden discounts, flash sales, fluctuating prices etc. for the same product and service categories. Such practices eat into the seller's margins and consumers are unable to plan/time their purchases.
90. The E-commerce market study lays down an observation that across the hospitality and food industry, the service providers were not provided access to customer data by the e-commerce platforms but the same was being utilized by the e-commerce platform for launching and promoting their own services in the form of cloud kitchens.<sup>88</sup> On the one hand, a lack of transparency in the platforms' functioning and practices may allow for possible platform market distortion, while

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<sup>87</sup> Directorate For Financial And Enterprise Affairs Competition Committee, The Digital Economy 2012, DAF/COMP(2012)22. Accessible at: <https://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf> .

<sup>88</sup> E-commerce Report, Para 71, page 25.

on the other hand, consumer choice may not reflect consumer preference with perfect information. The three elements, which according to the business users of the platforms, are susceptible to manipulation/exploitation by platforms, are search results, sellers'/service providers' data and user review/rating mechanisms. Improved transparency in these areas, can reduce data asymmetry, which can positively affect all the entities in the ecosystem.<sup>89</sup>

91. There is a need for regulation of the usage and sharing of data by e-commerce entities to have a level playing field and prevent the misuse of the right of privacy of consumers accessing the platforms.

**D. Use of data to create private labels**

92. During the House Antitrust Subcommittee hearings, one of the digital platforms revealed that it had been copying the features and services being provided by competitors.<sup>90</sup> This practice was a result of the ever growing dominance of the digital giant through its marketplace and through usage of data available on its platform. This type of a practice is closely related to the rise of private labels being launched by the e-commerce marketplace platforms. In a Reuters report, it was elaborated that one e-commerce marketplace giant had been misusing the data from its website to develop products with the help of data of other sellers and list these products so created on its marketplace platform.<sup>91</sup> Further, these marketplace platforms also tend to provide better and more prominent listings for their private labels controlled directly or indirectly through their affiliates. The marketplace platforms have been using customer data for its own advantage without any effective consent, express or implied, of the user. By identifying the customer's preference and behavioral patterns, e-commerce marketplace platforms promote their own products on their platforms by way of targeted listing – and attacking the choice of consumers directly. Use of customer data by such marketplace platforms for their own advantage is disrupting the market. The sellers and other manufacturers are devoid of this data, despite being the primary sellers. It is important to understand that the platforms are only meant to facilitate trade between manufacturers/ sellers and consumers. Despite this, it is the facilitators who have been gaining undue access to such data. The manufacturers, who spend a great deal of resources and time into research and development are put in a disadvantageous position to lose to such marketplace platforms.
93. It has been noted that the e-commerce marketplace platforms tend to have a direct or indirect control on the private labels or cloud kitchens listed on their own

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<sup>89</sup> E-commerce Report, Para 88, page 30.

<sup>90</sup> Sarah Perez, In antitrust hearing, Zuckerberg admits Facebook has copied its competition, Techcrunch. Accessible at: <https://techcrunch.com/2020/07/29/in-antitrust-hearing-zuckerberg-admits-facebook-has-copied-its-competition/>

<sup>91</sup> Aditya Kalra and Steve Stecklow, The Imitation Game, Reuters Special Report. Accessible at: <https://www.reuters.com/investigates/special-report/amazon-india-rigging/>



platforms, which is a serious concern. Such a vertical integration may prove to create an incentive for the platform to improve their own products and provide them better listing at the expense of the other sellers listed on their platforms, thereby affecting the neutrality of the platforms.<sup>92</sup> As an intermediary this results in a conflict in their role, and they can misuse their leveraging power on the platform to provide better listings for their own private labels. It has been observed that in terms of introducing new products, third-party sellers suffer the early costs and risks; by simply spotting them, the platform only gets to offer them after their success has been proven.<sup>93</sup> This type of an approach is counter intuitive to the efforts put in by the sellers and it makes the playing field uneven for them to function.

94. The use of data plays an important role in the launch of private labels since this gives an unfair advantage to the e-commerce platform since they do not share the data with the other sellers on their website. This allows them to see the product categories generating maximum sale and profits without any research and development and make relevant and more customer-centric private labels. Further, the private label products are sold by the preferential sellers on the platform who have direct or indirect ties to the e-commerce marketplace platform. In this background, the idea that firms can improve brand and product discovery by showcasing/listing their products and services on a platform becomes artificial when a platform's preferential sellers/subsidiaries are competing with downstream firms listed as sellers and service providers on the same marketplace platform.
95. Presently, the existing E-commerce Rules as well as the proposed amendments to the Rules, the marketplace platforms are required to disclose their relationships with the sellers on the platform. Despite the law in force, the platforms have refrained from disclosing their relationship with the sellers and a consumer cannot locate the same anywhere while purchasing goods on e-commerce. Further, as explained above, mere disclosure of relationship is neither sufficient nor ideal because from the consumer's perspective, relationship between the seller and the platform provides undue advantage to the related/controlled sellers and reduced the choices to the consumers.
96. To protect the consumer's interest in short, mid and long term, it is the responsibility of the Government to ensure neutrality of e-commerce marketplace platform and should effectively prohibit relationships between the e-commerce marketplace platform and sellers/service providers. It is imperative that the e-commerce marketplace platform should not have any relationship with their sellers, and they should only act as pure marketplace, which facilitates transaction

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<sup>92</sup> E Commerce Report, Para 86, page 29.

<sup>93</sup> Lina M. Khan, Amazon's Antitrust Paradox, 126 Yale L.J. (2016). Available at: <https://digitalcommons.law.yale.edu/ylj/vol126/iss3/3> (Lina M. Khan is the current chairperson of the Federal Trade Commission, USA)



and connects sellers and buyers. Additionally, the platforms (or any of their related/ group entities) should not be allowed to sell their own products in the market. Lack of neutrality on such platforms seriously affects rights of the sellers and manufacturers, and choices of consumers and therefore, requires immediate action in the interest of the entire e-commerce ecosystem.

**E. Exclusive arrangements and launches**

97. A recent business practice that is rampantly being adopted is exclusive tie-ups and arrangements of the marketplace platform with brands/manufacturers. This has led to exclusive launches of some products only on certain e-commerce platforms which are unavailable on other e-commerce platforms or offline retail stores. Such practices have been adversely affecting the offline sellers since they do not get supplies from the companies to sell in the offline channel. The E-commerce report highlighted that the exclusive agreements are generally found in two ways: via agreements under which a certain product offering is exclusively launched on a single e-commerce marketplace platform or via agreements which make an e-commerce marketplace platform list only one particular brand in a specific category.<sup>94</sup> Both these approaches, have an effect on the sellers listed on the platform as well as on the customers who are forced to approach a particular platform to buy a product. It is understood that e-commerce platforms are supposed to be neutral in their approach towards the listings on their website and such agreements make the platform an unfair marketplace.
98. It has also been observed by the market study that:
- “... smartphone brands are launching their newest products exclusively on one of the two major goods’ marketplace platforms, through the ‘preferred sellers’ of the platform concerned operate exclusively on a platform and do not multi-home. These ‘preferred sellers’ home. Thus, during the initial period after launch, these products are available exclusively on a single online platform and are made available to the offline/brick and mortar retailers later.”*
99. This observation gives rise to the consideration that such agreements are harming the e-commerce landscape and if left unchecked would lead to the loss of companies/sellers functioning in the market. The report also observed that exclusive agreements may cause rival platforms to invest significant additional costs in order to persuade brands and service providers to drop their exclusive contracts with the big platform. Further, when a major platform lists only one brand/service provider in a certain product category, it can be difficult for competitor brands/service providers to get their items in front of consumers.
100. Another manner in which e-commerce platforms are entering into exclusive agreements are with banks and financial institutions to provide additional

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<sup>94</sup> E-commerce report, para 73, page 26.

discounts and benefits to the users who avail that banks' or financial institution's services for making payment on the platform. While additional discounts and benefits are good for the consumers in the short run, it is important to note that these bank discounts/cash backs are made available only by certain sellers who are related or associated with the marketplace platform. This imposes further incentive on customers to buy products from the particular preferred seller which lists the products thereby leading to loss of choice to the consumer. Further, this also imposes a restriction on the other banks and service providers who do not enter into agreements with the e-commerce marketplace platforms since their customer base and transactions reduce as well. This type of a practice needs to be regulated as it provides an ecommerce platform with high bargaining power to get more customers on its platforms at the expense of upsetting the entire ecosystem of rival platforms, banks, service providers and even sellers listing their products on their platform.

101. While these exclusive launches and arrangements are said to have a positive impact on the entire ecosystem, the reality is that it leads to loss of supplies for the offline retailers and imposes a restriction on them from listing their products online. Such exclusive agreements put a restriction on the offline retailers from listing their products online by either a restrictive clause by the suppliers themselves or in the form of higher commission rates being charged by the platforms for listing of products which eats into the profit margin being targeted by the sellers. This form of an exclusionary approach requires urgent attention through a robust ecommerce policy.

#### **F. Price parity, thus ensuring no development of complimentary channels**

102. Platform price parity occurs when sellers and service providers are restricted from listing or selling their goods at lower prices on other e-commerce marketplace platforms. This restriction may not just be limited to other competing marketplace platforms, but also on the own website/app of the manufacturer / sellers and service providers. This type of a practice may impose a barrier of entry to other competing platforms and can also lead to higher commission rates by platforms. While it can be argued that a positive effect of having price parity is that it solves the problem of free riding, the market study observed that a case-by-case approach should be followed for evaluating such clauses from the competition perspective.<sup>95</sup> One of the disadvantages that price parity offers is that it stifles growth and innovation and leads to a smaller number of choices available for the sellers and consumers. A new entrant can only penetrate the market when it has better rates to offer. Due to such clauses, a new entrant is restricted to reach out to the consumer by offering better rates than the established players. When there are no new

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<sup>95</sup> E commerce report, Para 96, page 32.

entrants in the market and there is no other channel of distribution available to the suppliers or retailers then the entire ecosystem is affected.

103. Price parity clauses have been taken seriously by the competition law regulators internationally. In a German case, one of the e-commerce giant was restricted from exercising its price parity clause as it was viewed to be a hindrance to the new competitors.<sup>96</sup> It was further observed that the price parity specification not only affects the pricing of online distribution via a seller's own webstore, but also has a direct effect on Internet marketplace operators.<sup>97</sup> This practice by bigger ecommerce marketplace platforms is restrictive in its approach, as it does not allow the smaller player to make a competitive entry in the market and therefore, such conduct creates an entry barriers. Lack of regulation of the same in India needs to be filled in through appropriate legislation in the form of stringent e-commerce rules. Similarly in the hotel industry also, price parity clauses have been considered anti-competitive by the German competition regulator which had ruled that even a narrow price parity clause (which restricts the seller to maintain price parity only on some channels) breaches competition law.<sup>98</sup>

**G. M&A by the foreign marketplace entities is also hampering platform neutrality**

104. The rapid growth and expansion of Indian e-commerce has been characterized by mergers and acquisitions by digital platforms. This has happened in varying degrees and formats ranging from a minor stake of less than 10% to a complete acquisition. Further, the nature of firms acquired by an incumbent e-commerce marketplace platform also spans direct competitors to the sellers on the platform, sellers operating in a different niche, strategic sellers to expand existing networks of the platform etc. The consequence of such mergers and acquisitions is most directly felt by the firms listed on the platform, which are now pitted against the acquiree that is conferred with significant benefits in terms of competition. Hence, what is presented as a growth strategy for the platform, actually creates non level playing field for the independent sellers registered on the e-commerce marketplace platform.
105. The idea behind an e-commerce “marketplace” is that of neutrality and a level playing field. However, once these fundamentals are compromised, the result is a concentration of the market in the favour of a few. For instance, a giant e-commerce marketplace acquiring a major retailer on its platform visibly compromises the neutrality of that platform by according preferential treatment in

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<sup>96</sup> The Bundeskartellamt, “Amazon removes price parity obligation for retailers on its Marketplace platform, B6-46/12”, 9 December 2013. Accessible at: [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2013/B6-46-12.pdf%3F\\_\\_blob%3DpublicationFile%26v%3D2](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2013/B6-46-12.pdf%3F__blob%3DpublicationFile%26v%3D2)

<sup>97</sup> Id.

<sup>98</sup> The Decision of Bundeskartellamt has been affirmed by the German Federal Court (*Bundesgerichtshof*) on 18.05.2021, <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021099.html>

search, discovery and listing to the acquired retailer as opposed to other retailers on the platform that compete without any externally conferred advantages. Further, an online food services aggregator that operates its own private label restaurant on its platform or offers its own infrastructure to cloud kitchens, compromises the neutrality of the platform by preferentially listing such private labels/cloud kitchens. It is also in a position to use its significant volume of data on user profiles and consumer preferences to curate food menus in precisely those areas where consumer demand is maximum or supply is lacking. This is detrimental to the interests of other restaurants listed on the same platform who do not have access to such data and artificial order boosting mechanisms. Therefore, the ethos of platform neutrality is diluted by the demonstrable capacity of online platforms to skew algorithms, target advertisements and offer search, ranking, discovery, listing etc. in their own favour.

106. Any stake or interest on the platform's part, no matter direct/indirect or small/large, on the e-marketplace, inherently distorts the position of equilibrium. Further, it boils down to the control of key strategic assets or eliminating a competitor from the marketplace. Any platform that acts as a marketplace i.e., a facilitator of distribution of goods and services from one stakeholder to another has an obligation to remain fair, impartial and neutral to ensure accountability and transparency in the process. In fact, a major reason for consumers to order from an online marketplace is information symmetry through transparency in price, quality, listing etc. Lack of neutrality is inherently against the idea of marketplace itself. As a result, any stake, be it even 1 share, in the downstream competition makes the platform biased.
107. The same concerns were also echoed in Market Study which reported the concerns of such integration in the following terms:

*“The concern regarding platform neutrality emanates from situations where the online platforms serve as both a marketplace and a competitor on that marketplace. Platforms essentially vertically integrate when they operate in the products traded on it, which may be through manufacturing/selling of private labels or by having direct or indirect interest in retail or through operating their own cloud kitchen brands. Such vertical integration may create an incentive to improve the platform's own/related entity's market position relative to its competitors by engaging in preferential treatment on the platform.”*<sup>99</sup>

108. Therefore, the competitive equilibrium is severely affected by the merger and acquisition activity of e-commerce platforms. Any such activity turns the platform further away from its obligation of being neutral, fair and unbiased to its stakeholders and instead, makes the platform biased, partisan and unfair thereby

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<sup>99</sup> E-commerce report, para 86.

weakening the competition on the marketplace. The natural effect of the same would be seen by the consumers in form of reduced competition, and reduced choices, which will eventually lead to price increase.

## V. OUR SUGGESTIONS

109. Having discussed the nature of e-commerce, the stakeholders and technicalities involved, and the associated concerns in the market, we put forth the following suggestions, which should be given due weightage in the e-commerce policy of India-

- i) At present, in the absence of an e-commerce policy, the only source of the definition of e-commerce is the present FDI policy that intends to prevent the entry of FDI companies to operate in any kind of MBRT and/or control inventory through offline or online mode. Therefore, two models of e-commerce i.e., “marketplace model of e-commerce” and “inventory based model of e-commerce” are often referred and compared side by side. The definition of e-commerce, clearly capturing the role of a neutral e-commerce marketplace and the MRBT store operating in electronic form is the need of hour.
- ii) The inventory-based model of e-commerce is the electronic form of a store/shop, i.e., webstore, where the owner of the webstore sells their goods directly to the consumer on principal to principal basis. It is an entity which is the seller itself, selling the goods and services owned by it through electronic means/internet. Such entity can also be called as a “e-commerce store” or “webstore” and carries out MBRT through electronic means
- iii) On the other hand, the marketplace model of e-commerce is an entity which establishes the online platform to act as an e-commerce intermediary connecting buyers and sellers through electronic network/internet. The **e-commerce marketplace entity** is a digital mall akin to a physical shopping mall. Presently, there is an inherent case of conflict of interest as marketplace uses the consumer data that it generates on its platform (which are to a great extent, data of the individual seller) for its own advantage. The dual role played by platforms of being a marketplace and a seller create an inherent conflict of interest between the platform’s role as intermediary on one hand and as a market participant on the platform on the other. In the online platforms when they serve as both a marketplace and a competitor on that marketplace, have the incentive to leverage their control over the platform in favour of their private label products to the disadvantage of other sellers/service providers on the platform. The marketplace does not operate like a neutral physical mall, which it should since they have to be free & fair. In contradistinction with a physical mall or a marketplace, the e-commerce marketplace is closely

involved in supply and distribution, and is oftentimes, a stakeholder in the said process. A mall owner is a relatively passive player compared to an e-commerce market platform. The mall owner is simply content with the rent he receives, and does not play any role in steering traffic towards a particular store, nor is he a stakeholder in the sales or price etc. The mall owner is not a facilitator of sale or distribution in the manner in which these are e-commerce aggregators are. A physical mall gives space to retailers to set-up shops and sell goods to consumers who visit the mall. Similarly, e-commerce marketplace entity creates a digital mall in which third party sellers can sell goods and service to the consumers. The marketplace entity controlling the sellers or inventory of the sellers on their e-commerce platform has an **inherent conflict of interest** as such entity would always like to provide preferential terms to their related / preferential sellers as compared to the ordinary sellers registered on their platform. Under these circumstances, the ordinary sellers become non-competitive as compared to related sellers who in turn dominate selling on these platforms. Further, as the number of connected consumer's increases, network effect takes shape, and the platform tends to become a gatekeeper who decides the winning sellers on the platform. Such conflict of interest will have same negative impact on the small traders irrespective of the ownership of the marketplace entity be it foreign or Indian.

- iv) To avoid such conflict of interest and contain market distortions it is essential that the marketplace platform must act in a **neutral manner** and should not have any relation with sellers (whether by shareholding, control or otherwise, directly or indirectly) or control sellers registered on the platform as that leads to marketplace to acting as seller itself, which is essentially, inventory-based model of e-commerce. Neither a marketplace entity should act as an inventory-based e-commerce entity, nor should inventory-based e-commerce entities act as a marketplace entity.
- v) An e-commerce regulator should be set up and it should be commissioned to look into unfair trade practices of both end consumer as well as the intermediate consumer (sellers on platform). This shall bring a unification in dispute redressal mechanism and expedite the approach of law. The technicalities revolving around the functioning of e-commerce and potential effects on the entire ecosystem needs expert body for regulation.
- vi) Incorporation of Sunset Clause on foreign direct investment in any e-commerce entity or its affiliates after getting the FDI in initial few years so as to avoid capital dumping. The companies may raise subsequent funding locally through local public offerings etc.
- vii) Protection of right to free and fair trade should be ensured for several small sellers who look forward to e-commerce platforms for their

livelihood and consumers who are equally dependent on such platforms for their needs.

Mandatory GST registration for Conducting e-commerce activities should be abolished.

- viii) Any marketplace platform entity shall not, directly, or indirectly, sell the goods or services to the sellers registered on its platform.
- ix) Any marketplace entity shall not directly or indirectly own or control inventory of the seller registered on its platform.
- x) Any marketplace entity shall not directly or indirectly own or control the any manufacturer registered as seller on the platform
- xi) Marketplace entity shall not act as inventory based and inventory-based e-commerce shall not act as marketplace entity
- xii) Inventory based e-commerce entity shall sell the products on Principal-to-principal basis
- xiii) All sellers registered on a marketplace platform shall be third party sellers only and not affiliated to marketplaces in any manner whatsoever.
- xiv) E-commerce platforms must not be allowed to provide differential commission rates to the sellers across a product category to put a check on preferential sellers being provided differential treatment on their platform
- xv) There should be a check on the deep discounts offered by the e commerce platforms to prevent misuse of market power against the smaller players in the market. In fact, the ecommerce markeyplace should not provide any discounts because it has an effect of being discmrinatory and distortionary.
- xvi) A marketplace entity shall not lease/lend its brand to seller or manufacturer registered as seller on its platform so that consumers are not confused between the marketplace and the actual seller
- xvii) While a marketplace platform is supposed to act purely as a trade intermediary as well as pure data intermediary, huge amount of data about the product, pricing, sellers, sold quantities, demand, consumers and their buying behaviours etc. This data should not be misused to create their own products and is often shared with preferred sellers on the marketplace platforms
- xviii) To prevent the practice of using end-consumer data by e-commerce entities for private and wrongful gains in violation of privacy rights, strict mandate must be brought by way of amendment under the Consumer Protection (E-Commerce) Rules, 2020. Additionally, only with respect to e-commerce, the locus for filing complaint against this unfair practice should be relaxed, modelled on the lines of Competition Act, 2002.as being implemented in EU.

- xxix) The approach of data masking by e-commerce entities and depriving intermediate consumer (seller) of business strategic data should be prohibited. We would like to suggest formation of a framework which provides access of consumer data, not amounting to sensitive personal data, to the sellers and third parties listed on the ecommerce platforms. Alternatively, the platforms should be restricted to use such data for their own advantage, such as for the purpose of investing in their own private labels.
- xxx) Similar to financial markets, just as stock exchanges facilitate traders with fair and equitable access to the marketplace, including access to the data the exchanges transmit, e-commerce marketplace entities should be subjected to the similar standards who may just act a facilitator and intermediary of technology platform.
- xxxi) If a single entity is running both marketplace platform and inventory-based e-commerce, then the two must be done in separate brand name for the purpose of transparency and to avoid any confusion in the mind of consumers
- xxxii) Marketplace entity to provide non-discriminatory treatment to all stakeholders connected on the platform. Such stakeholder may include (i) Sellers; (ii) Warehousing provider, (iii) Logistic/delivery provider;(iv) payment providers and any other provider providing services to the sellers.
- xxxiii) Registration of service providers through open APIs - E-commerce marketplace entity shall not decide and limit the payment options. E-commerce marketplace entity shall enable all payment options (authorised by Reserve Bank of India), provide non-discriminatory access and provide API for easy integration. Sellers shall be able to select the preferred service provider. This will enable an even play, instead of the limited options dictated by the e-commerce marketplace entities.
- xxxiv) If the marketplace decides differential tariffs such differentiation must be based upon logic and not done arbitrarily to include or exclude certain stakeholders. The rules for such differentiation must be published in a transparent manner on its website.
- xxxv) Any segmentation of consumer should not be done in a arbitrary manner and must be on the basis of sound logic that is published in a transparent manner.
- xxxvi) An e-commerce marketplace entity shall not be allowed to collect bundled fees from consumers for services provided with respect to the e-commerce platform and any other services provided by the entity to the consumer unrelated to the e-commerce platform to ensure transparency and prevent



cross-subsidisation. Each leg of the value chain must be unbundled and commission should be segregated for each bundled offering.

- xxvii) At present different e-commerce entities are regulated by different regulators which has led to a piece-meal approach to regulation leading to confusion among all stakeholders. In light of this, considering the boom in e-commerce and its unique sectoral issues we recommend the setting up of a dedicated e-commerce regulator to protect the interests of small traders, MSMEs, individuals and to ensure policy agility.
- xxviii) In pursuance of the same, it would be important to make the following changes in Consumer Protection (E-Commerce) Rules, 2020. The changes are proposed in the definition of ‘associated enterprise’. Two enterprises shall be deemed to be associated enterprises, if they are covered by the definition of associated enterprise in section 92A of Income Tax Act or meet any of the following criteria:-
- (a) enterprises are related to each other through a common chain of directors or managing partners;
  - (b) enterprises are related to each other through a common chain of shareholders, where such shareholders hold not less than 5 per cent of the shareholding in the related enterprises;
  - (c) enterprises having 5 per cent or more common ultimate beneficial ownership; (d) they are Affiliates; where ‘Affiliate’ means, with respect to any person, any other person who, directly or indirectly controls, is controlled by or is under common control with such person;
  - (d) where one enterprise can exercise a right to veto any decision, appoint one or more director(s) or in any other manner influence other entity’s decision making on any matter either through its shareholding or through an agreement including a shareholders’ agreement or otherwise;
  - (e) where one enterprise holds, directly or indirectly, shares carrying the voting power in the related entities;
  - (f) where any person or enterprise holds, directly or indirectly, shares carrying the voting power in the related entities; where one enterprise provides loans or guarantees to the other enterprise;
  - (g) where one enterprise holds direct or indirect economic participation through equity or otherwise;
  - (h) there exists between the enterprises, any relationship of mutual interest, as may be prescribed;
  - (i) there exists between the enterprises, any relationship of mutual interest, as may be prescribed.

## **Unified Cyber Regulatory Authority :**

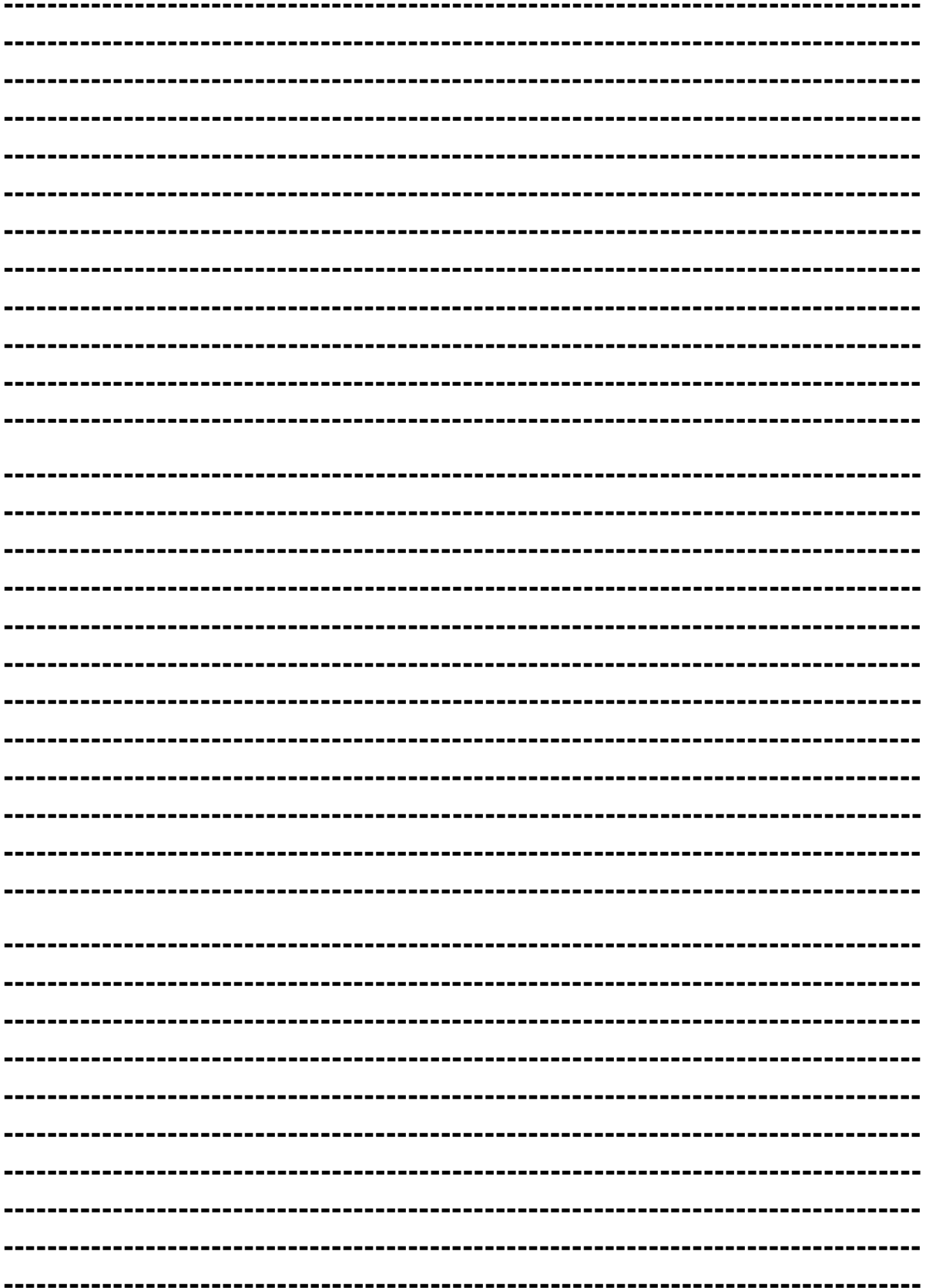
As a next forward it would be appropriate if the Government formed a unified Cyber Regulatory Authority. The internet and technology have revolutionized the way people operate and interact on an everyday basis. It has given impetus to traditional businesses, led to the emergence of new forms of businesses and business practices, and empower citizens by making information affordable, and accessible to all. Increased Internet penetration and adoption of technology at all levels of society coupled with rapid digitization across sectors have caused large-scale disruption in the society and economy and brought in its wake new and unforeseen issues and challenges. Redressal of these emerging and unforeseen issues, therefore, becomes crucial and requires a nuanced understanding and technical evaluation of various elements of the digital economy, including data, consumer behaviour, emerging technologies, etc., all of which serve as a building block for the digital ecosystem. In this regard, it becomes imperative that a streamlined and holistic approach to the regulation of the digital ecosystem is adopted at the highest level that helps address cross-cutting issues with cross-sectoral implications relating to the development, use, and adoption of technology.

India has a legacy of regulatory architecture across sectors wherein the subject-matter jurisdiction of each such regulator has evolved over time in a fragmented manner to address present concerns. This has left a significant portion of emerging technologies, products, services, online behaviour, business models, and practices to operate in a regulatory vacuum on account of either the issues having cross-cutting implications across sectors or the issues currently not falling within the domain of any regulator. Both these instances have also been a root cause of conflicts between regulators and have led to market uncertainty which has inhibited innovation and growth. This fragmented approach has also impeded the government's ability to fully and holistically capture the risks associated with any product, service, business model and/or business practice in the digital ecosystem and respond to it in a speedy manner. Further, various contemporary legislations and policies also envisage the setting up of narrowly tailored regulators. All of which is cumulatively furthering the government's ability to respond to the rapidly evolving challenges and needs of the digital ecosystem in a holistic and effective manner.

The dynamic nature of the Internet and technology and the innovation that it brings with it, and to deal with the diverse impacts and outcomes that arise out of the same across sectors, there is a need for an effective, coordinated and unified regulatory intervention by a multifaceted, specialized, dedicated, and responsive regulatory architecture. In this regard, a unified Cyber Regulatory Authority that straddles across areas such as data, development, use, and adoption of technology, consumer welfare, online behaviour, etc is the need of the hour. Such a regulatory authority must be supported by a dedicated, specialized, and responsive investigatory and adjudicatory mechanism.

It is to be noted that a unified regulator was proposed in 2013 for the financial sector in India by the Financial Sector Legislative Reforms Commission. The French Digital Council, United Kingdom's Centre for Data Ethics and Innovation; and Singapore's Info-communications Media Development Authority may serve as a useful reference in establishing such a unified, dedicated, and expert architecture for the digital ecosystem.

# Notes

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