

## E-Commerce in the Context of Trade, Competition and Consumer Protection in India

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## Executive Summary

E-Commerce, though relatively a new concept of doing business, has changed the way of doing business by a significant extent. It has become one of the major factors contributing to the globalisation of businesses. It has substantial impact on trade and consumer welfare at national, regional as well as at multilateral levels. Voluminous efforts are going on to negotiate multilateral rules of digital trade. The last five years have experienced a paradigm shift in the global trade arena with developing countries taking the lead in proposing E-Commerce as a catalyst of achieving socio-economic developmental objectives through trade.

The potential growth in its E-Commerce sector has persuaded India to formulate a national E-Commerce policy as well as discussing it at the multilateral/plurilateral level. Recently, in March 2018, India organised a mini ministerial meet inviting 40 World Trade Organisation (WTO) Member Countries, where E-Commerce was one of the important issues of discussions, wherein it did not agree to its discussion during 11<sup>th</sup> WTO Ministerial Conference held at Buenos Aires in December 2017. This shows the increasing focus of the Indian government in this important sector.

This paper aims at reviewing challenges and status in India *vis-a-vis* E-Commerce sector in the context of cross-border trade, consumer protection and competition issues. Further, some policy reforms have also been suggested in this regard which can be considered for the upcoming E-Commerce policy in India. The paper identifies following important challenges for E-Commerce in India, in the above-mentioned contexts:

### **International trade**

Difficulties in deciding and collecting custom duties; absence of proper regulatory framework for governing cross-border E-Commerce; high rate of cyber risk; frauds and security threats; change in product pricing with change in country/region; complexities in return; exchanges and refund; and unreliable transit duration and lack of transparency on delivery.

### **Consumer protection**

Data security; digital payments failure; manufacturing and expiry dates not known to the consumer; delay in delivery of the goods; origin of goods is unknown; quality issues; return and refund policies are not clear; and dispute redressal, especially in case of cross-border exchange.

### **Competition related issues in infrastructure and transaction**

Competition concerns in the big data and artificial intelligence era, particularly the winner-takes-all phenomenon; access to Internet and data; relevant market; resale price maintenance; parallel import; exclusive agreements; predatory pricing; and collusive behaviour.

The important policy recommendations of the paper to better regulate E-Commerce sector in India are: policy required on developing adequate infrastructure to enable online commerce; develop a strong dispute redressal mechanism, especially for cross-border transactions; create regulatory framework to address issues related to cyber security and data protection; framing comprehensive set of guidelines on standards and harmonisation of customs procedures; making a comprehensive rural E-Commerce strategy; and facilitating micro and small enterprises to use E-Commerce platform through capacity building.

# 1. Background and Context

E-commerce has completely altered the way economic activities are undertaken. The use of information and communication technology (ICT) for selling and purchasing of goods and services has immensely increased which has given birth to a new market called as e-commerce. According to a number of proposals and working papers presented at the World Trade Organisation (WTO), e-commerce, if, well regulated, can have positive effects on developing economies, particularly on its micro, small, and medium enterprises (MSMEs) sector, as it can be a contributory factor to the goals of sustainable economic growth and enhanced public welfare.

E-commerce has been defined differently by various organisations. "E-commerce is understood to mean the production, distribution, marketing and sale or delivery of goods and services by electronic means," according to WTO Work Programme on E-commerce (1998).<sup>1</sup>

The Organisation for Economic Co-operation and Development (OECD) endorsed two definitions of e-commerce transaction<sup>2</sup> viz., broad and narrow definitions. It has broadly defined e-commerce transaction as "an electronic transaction is the sale or purchase of goods or services, whether between businesses, households, individuals, governments, and other public or private organisations, conducted over computer mediated networks. The goods and services are ordered over those networks, but the payment and

the ultimate delivery of the goods or services may be conducted on or off-line". While according to the narrow definition, "an Internet transaction is the sale or purchase of goods or services, whether between businesses, households, individuals, governments, and other public or private organisations, conducted over the Internet. The goods and services are ordered over those networks, but the payment and the ultimate delivery of the goods or services may be conducted on or off-line".

"Electronic commerce means the supply of goods or services or both, including digital products over digital or electronic network", Section 2(44), The Central Goods and Services Tax Act, 2017, Govt. of India.<sup>3</sup>

Considering the above-mentioned definitions, there are broadly two aspects of defining e-commerce viz. households and individuals; enterprises and governments. The definition of e-commerce for households and individuals more specifically involve the use of Internet for placing orders for goods and services and include buying financial investments, booking travel and accommodation, participation in lotteries and betting, participation in auction through online platforms. While for enterprises and governments, e-commerce refers to placing orders online, generally through websites, exchange of electronic messages, and structured transmission of data or documents through electronic means. Thus, various forms of e-commerce can be summarised as below:

**Figure 1: E-Commerce Forms and Transactions**

	<b>Government</b>	<b>Business</b>	<b>Consumer</b>
<b>Government</b>	<b>G2G</b> <i>e.g. co-ordination</i>	<b>G2B</b> <i>e.g. information</i>	<b>G2C</b> <i>e.g. information</i>
<b>Business</b>	<b>B2G</b> <i>e.g. procurement</i>	<b>B2B</b> <i>e.g. trade</i>	<b>B2C</b> <i>e.g. trade</i>
<b>Consumer</b>	<b>C2G</b> <i>e.g. tax compliance</i>	<b>C2B</b> <i>e.g. price comparison</i>	<b>C2C</b> <i>e.g. auction market</i>

Source: Coppel (2000)<sup>4</sup>

There are different aspects of electronic transactions as suggested in various definitions. For the purpose of this paper, e-commerce means selling and purchasing of goods and services through online platform in domestic as well as international market in the forms of B2B and B2C.

The world has witnessed phenomenal growth in terms of electronic transactions and India is among the leading countries. According to the United Nations Conference on Trade and Development (UNCTAD), the global e-commerce turnover accounted for US\$22.1tn (B2B US\$19.9tn and B2C US\$2.2tn) in 2016, which is 6 per cent higher than previous year. "In 2014 cross-border online sales from the B2C segment totalled US\$328bn - the equivalent of 1.4 per cent of global

exports of goods and services and 16.9 per cent of global B2C e-commerce. These transactions involved 309 million consumers that is to mention, that 27.1 per cent of the people who make online purchases acquire goods or services from abroad."

It is estimated that in 2020 more than 1 billion people will make cross-border purchases online. However, international e-commerce is highly concentrated in a handful of countries: 47 per cent of those who made international online purchases in 2013 bought goods or services in the US, 38 per cent in the UK, 31 per cent in China and Hong Kong, followed by Canada (17 per cent), Australia (16 per cent) and Germany (13 per cent) as per Global B2C E-commerce Report 2015, E-Commerce Foundation.

**Table 1: Region-wise E-commerce Turnover in the World (US\$bn)**

Region	2012	2013	2014	2015
World	1,255.5	1,552.0	1,895.3	2,272.7
Asia-Pacific	392.6	567.3	822.8	1056.8
North-America	411.7	482.3	572.5	644.0
Europe	411.1	452.4	446.0	505.1
Latin America	27.3	33.2	25.8	33.0
MENA	11.1	14.7	21.7	25.8

Source: Global B2C E-commerce Report 2014 & 2016, Ecommerce Foundation

Table 1 shows the region-wise e-commerce turnover in major parts of the world. The table reveals that Asia-Pacific has the highest e-commerce turnover from 2013 to 2015. Though Latin America (LA) has quite low volume of e-commerce as compared to other regions, it has registered the second highest growth rate in 2015 as compared to 2014. Thus, LA is among the highest emerging markets in e-commerce along with India in Asia-Pacific region.

So far as the massive growth and future projections of the e-commerce sector are concerned, they are subject to issues such as, investment, regulation, competition,

consumer protection and welfare, and trade related matters in case of cross-border e-commerce. This change in trend (growth) has attracted more attention at various multilateral platforms, such as the WTO, primarily by developed countries including few developing countries from Africa and Latin America, to consider the inclusion of e-commerce as an important catalyst for trade liberalisation and ultimately socio-economic development.

In the recently concluded 11<sup>th</sup> Ministerial Conference of the WTO at Buenos Aires, no outcome was reached on e-commerce. Members decided to extend the practice of not imposing customs duties on electronic transmissions for another two years and agreed to continue the Work Programme on electronic commerce. It was also approved to instruct the General Council to hold periodic reviews in its sessions to be held in July and December 2018, and July 2019.

India did not agree to initiate discussions on e-commerce etc., as it wanted to pursue agendas such as permanent solution to food security issue. In the context of India, e-commerce sector is subjected to many issues such as competition and regulation, consumer protection and also cross-border trade.

This paper aims at reviewing challenges and status of existing regulatory mechanism in India governing e-commerce sector mainly in context of cross-border trade, consumer protection, and competition issues. Further, some policy reforms have also been suggested for the better regulation/growth of this sector especially in context of the above-mentioned issues.

## 2. E-commerce Sector in India

India has also seen a phenomenal growth in e-commerce. However, there is no official government source, which provides data on e-commerce but some reports have been published by the private sector. "Being driven by a young demographic profile, increasing Internet penetration and relative better economic performance, India's e-commerce revenue is expected to jump from US\$30 billion in 2016 to US\$120 billion in 2020, growing at an annual rate of 51 per cent, the highest in the world. While in terms of base, India may be lower than China and other giants like Japan, the Indian rate of growth is way ahead of others. Against India's annual expansion of 51 per cent,

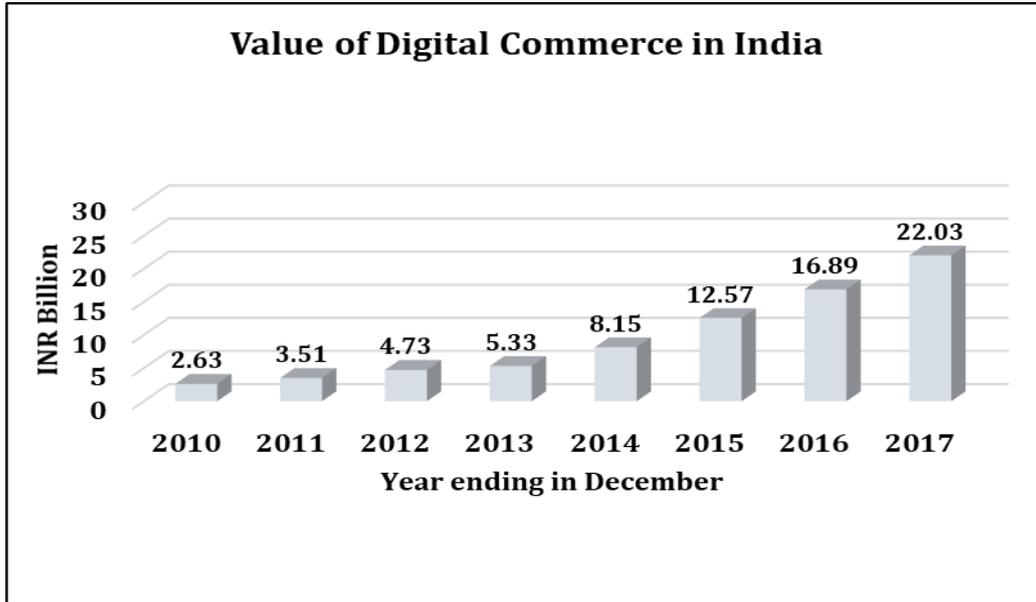
China's e-commerce is growing at 18 per cent, Japan 11 per cent and South Korea 10 per cent," ASSOCHAM-Forrester Study (2016).

India's Science, Technology and Innovation Policy (2013), has been a vital force behind its growing e-commerce sector. This policy has created an enabling environment for innovations such as digital payments, hyper-local logistics, analytics driven customer engagement and digital advertising. The policy has also brought forth a number of promising government initiatives such as 'Digital India', 'Start-up India', and 'Make in India', which have made a significant contribution to the growth of e-commerce.

Further, the promulgation of Information Technology Act (2008) is an additional milestone as it recognizes emerging issues such as e-contracts and e-signatures. Section 10 A of IT Act 2008 asserts that "Where in a contract formation the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of electronic record, such contract shall not be deemed unenforceable solely on the ground that such electronic form or means was used for that purpose."

"The e-commerce market in India has grown at a compound annual growth rate (CAGR) of 30 per cent between December 2011 and December 2016. It is estimated to reach INR 220,330 crore<sup>5</sup> by December 2017", Digital Commerce Report 2016.<sup>6</sup> In 2016, 56.37 per cent e-commerce market was covered by travel sector while remaining 43.63 was covered by non-travel sectors, such as e-tail (35.45 per cent), utility services (3.72 per cent), matrimony and classified (2 per cent) and other online services (2.45 per cent).

**Figure 2: Growth of E-commerce in India**

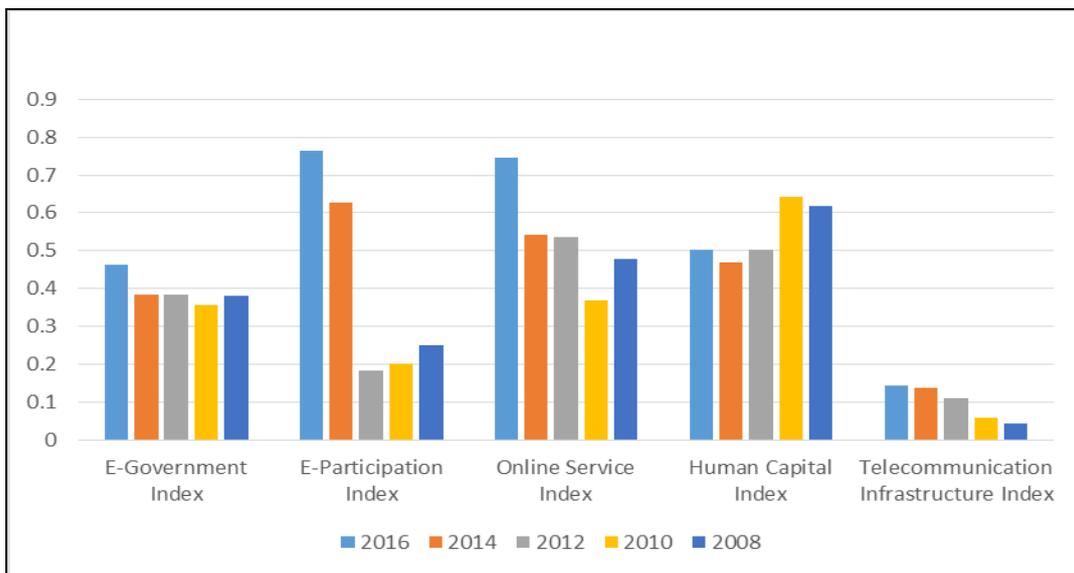


Source: Digital Commerce Report 2016

This growth is further evidenced by India’s increasing performance in e-sector index as given in Figure 3. The Figure highlights the following aspects:

- Unprecedented growth of e-participation index due to revolutionised delivery of services and also, a new system of digitalised governing process through single window policy,
- E-governance index (refer to Figure 3) has risen gradually attributing to flagship programmes like ‘Digital India’ and
- Telecommunication infrastructure is experiencing slow growth as compared to other e-sector indexes.

**Figure 3: E-sector Index in India**



Source: UN E-Government Knowledge Database

### 3. Trade Related Matters in Case of Cross-border E-commerce

The global digital economy has experienced tremendous developments in the last two decades, thus generating new and greater prospects for cross-border trade and investment. However, 11<sup>th</sup> WTO Ministerial Conference did not result into any significant outcome on e-commerce but there are strong possibilities that this issue will be among the important areas in future negotiations at this multilateral platform. This section examines the issue and challenges for cross-border e-commerce in the context of India.

#### 3.1 E-Commerce at the WTO

The WTO launched the E-Commerce Work Programme in 1998, in recognition of the rapid growth of global e-commerce and futuristic legal issues that would arise. The Work Programme covers trade-related issues arising from global e-commerce, and further explores the economic development opportunities afforded by e-commerce for developing, and most importantly least developing countries. The foregoing e-commerce issues at the WTO are handled by four important bodies which take care of same issues related to trade in goods and services also. These bodies with their relevant role are described below:

##### ***Council for Trade in Goods***

The Council for Trade in Goods is charged with the examination of e-commerce aspects relevant to the provisions of GATT 1994, the multilateral trade agreements covered under Annex 1A of the WTO Agreement, and the approved work programme. Hence, the issues to be examined include:

- Market access for and access to products related to e-commerce,
- Valuation issues arising from the Application of the Agreement on Implementation of Article VII of the GATT 1994,
- Issues arising from the application of the Agreement on Import Licensing Procedures,

- Customs duties and other duties and charges as defined under Article II of the General Agreement on Tariffs and Trade (GATT) 1994,
- Standards in relation to e-commerce,
- Rules of Origin, and
- Classification Issues.

##### ***Council for Trade in Services***

This Council is responsible for examining the treatment of e-commerce in the General Agreement on Trade in Services (GATS) framework. The issues to be examined include:

- Article I of GATS which covers the scope or modes of supply,
- Article II, addressing the Most Favoured Nation (MFN) principle
- Article III covering transparency,
- Increased participation of developing countries as covered by Article IV,
- Domestic regulation, standards, and identifying competition,
- Protection of privacy, public morals and the prevention of fraud,
- Market access commitments on electronic supply of services,
- National Treatment, and
- Access of using of public telecommunications,

##### ***Council for Trade Related Aspects of Intellectual Property Rights (TRIPs)***

The purpose of the Council is to examine and report on the intellectual property issues arising from e-commerce – the issues include:

- Protection and enforcement of copyright and related rights,
- Protection and enforcement of trademarks, and
- New technologies and facilitation of transfer of technology

##### ***Committee for Trade and Development***

The Committee for Trade and Development gives an account of the financial, economic and development

implications of e-commerce to developing countries.

The major implications are:

- Impact of e-commerce on the trade and economic prospects of developing countries, notably Small and Medium Enterprises (SMEs)
- Challenges to and means of enhancing participation of developing countries in e-commerce in particular as exporters of electronically delivered products,
- Role of improved access to infrastructure and transfer of technology, and movement of people,
- Use of information technology in the integration of developing countries in the multilateral trading system,
- Implications for developing countries of the possible impact of electronic commerce on the traditional means of distribution of physical goods, and
- Financial implications of e-commerce for developing countries.

### 3.2 Current State of Play

The Friends of E-Commerce Group recognised the following pertinent issues as far as e-commerce is concerned:

- The need to assess the opportunities and challenges for Least Developed Countries (LDCs) and Developing Countries (DCs) in e-commerce,
- Member states should be keen on assistance to reduce the knowledge gap between developed and developing countries,
- Considering reinforcement of the significance of e-commerce as an engine for development of Micro, Small and Medium Enterprises (MSMEs) in DCs and LDCs,
- Explore mechanisms for capacity building among DCs and LDCs to better understand the application of technology to trade needs, and
- Recognise efforts that have previously been made by DCs and LDCs in terms of achievements and constraints as far as e-commerce is concerned.

Going forward, the above should be the key pointers that provide a comprehensive exposé on the imminent challenges and opportunities within the ambit of GATT, TRIPs, and GATS as opposed to pushing for an additional Agreement/Text.

Despite the absence of standard global regulations on e-commerce, there has been a tectonic shift in the global trading arena in the past decade that has seen many WTO Member States embrace e-commerce either formally or informally. The key question may not necessarily lie on the capacity or importance of Member States catching up with the trend, but looking at the efficiency or deficiency of the diverse multilateral trade regulations to gauge whether current or emerging issues are well covered to ensure fair trade.

It is worth noting that the G-20 at the conclusion of its Summit in September 2016 included a proposal for an international organisation to be referred to as the Electronic World Trade Platform (e-WTP) to enhance easier market access for the MSMEs. The Summit recognised the importance of a more inclusive, liberalised and innovation-driven trade that expands the benefits of globalisation<sup>7</sup>.

The proposed e-WTP is set to complement the WTO with the primary purpose being simplifying processes to enable MSMEs participate in global trade through e-commerce. To that extent, there are proposals to simplify regulations, lower barriers to entry to new markets and offering small businesses easier access to financing.

Although the debate is picking up multilaterally, a good number of WTO Member States who comprise the G-20 have a well-structured system of e-commerce.

The Foreign Direct Investment (FDI) Policy permits up to 100 per cent FDI under automatic route in Business-to-Business (B2B) e-commerce. No FDI is permitted in Business-to-Consumer (B2C) e-commerce except in the following circumstances:

- Selling products through e-commerce retail, which are manufactured in India,
- A single brand retail trading entity operating through brick and mortar stores, and
- An Indian manufacturer is permitted to sell its own single brand products through e-commerce retail. In this case, the Indian manufacturer would be the investee company – the owner of the Indian brand and manufactures in India. Further, in terms of value, at least 70 per cent of its products should be made in house, and at the most 30 per cent can be sourced from Indian manufacturers.

- Difficulties in deciding and collecting custom duties,
- Absence of proper regulatory framework for governing cross-border e-commerce and dispute resolution,
- High rate of cyber risk, frauds and security, for example, risk related to payment and low penetration of debit and credit cards,
- Difficulty in tax and regulatory compliance complemented with ambiguity on applicable tax rates,
- Content restriction on national security and other public policy grounds, which may affect business in the field of information services, such as the media and entertainment sectors,
- Change in product pricing with the change in country/region,
- Complexities in return and exchanges, logistics and reverse logistics,
- Inadequate knowledge and awareness among the buyers/consumers,
- Unreliable transit duration and lack of transparency on delivery, and
- Competition concerns in the big data and artificial intelligence era, particularly the winner-take-all phenomenon.

The proposed Trans Pacific Partnership Agreement (TPP) and Regional Comprehensive Economic Partnership (RCEP) also address e-commerce issues exclusively and perhaps in details. The TPP's e-commerce chapter includes commitments ensuring that companies and consumers can access and move data freely subject to agreed upon safeguards.

There are additional commitments on matters concerning market access, national treatment, and unreasonable restriction, such as arbitral blocking of websites, prohibition of imposition of customs duties on digital products, and facilitating electronic transactions and trading.

### 3.3 Challenges

Whilst there is political goodwill to foster e-commerce in India, there are still imminent challenges impinging upon its development, such as rural penetrability, taxation, standardisation, cyber-security, data protection, entrenchment of SME, competition regulation, consumer protection and welfare and minimal incentives. Additionally, there is a gap in regulations and/or policy and institutions, despite India has more liberalised e-commerce sector as compared to other regions.

The following are the key challenges for deepening e-commerce between any two regions:

## 4. Consumer Awareness, Protection, and Welfare

### 4.1 Legal Recognition of E-Commerce

The unprecedented growth of e-commerce in the recent past due to various benefits like time saving, variety, easy transfer of money, getting goods at the doorstep, has also resulted in an increased number of cases against consumer rights and welfare. The important laws protecting consumer welfare in e-commerce sector are as following:

#### **UNCITRAL Model Law**

United Nations General Assembly adopted the United Nations Commission on International Trade Law (UNCITRAL) model on e-commerce on January 30, 1997, through a resolution.<sup>8</sup> The UNCITRAL was used as a forum by the government to develop the

universally acceptable e-commerce laws. The purpose behind drafting UNCITRAL model on e-commerce was to serve as a base document for creating a uniform international law, which could be used by various countries while amending their own laws and practices on e-commerce. The Information Technology Act, 2000 that facilitates e-commerce and its governance in India, is based on the UNCITRAL model on e-commerce. The Act legally recognises electronic contents, electronic records and electronic transactions.

### ***E-consumer protection by organisations***

The OECD, International Chamber of Commerce (ICC), and International Consumer Protection and Enforcement Network (ICEPEAN) are among such organisations, which have issued specific guidelines to protect consumer rights in e-commerce. Moreover, OECD has given some guidelines to protect consumers in online marketplace. Some of the guidelines are as follows:

- Equal consumer protection when buying online or offline
- Disclosure of complete information to the e-consumer, which also includes the information about the transactions
- The payment system must be secure and reliable
- Alternate dispute resolution in the case of international trade

The International Chamber of Commerce (ICC) released 'Guidelines on advertising and marketing on the Internet' in 1996. The guidelines issued by the ICC were meant to set standards of ethical conduct to all promotional activities like marketing and advertising on the internet with respect to consumer protection, such as meeting consumer privacy expectations, to improve public confidence in advertising, minimise the need of governmental legislation etc.

The ICEPEAN aims to preserve and protect the interest of consumers all over the world. It shares information about activities taking place across borders, which might be of use to consumers and promote their interests.

## **4.2 The Indian Laws and E-commerce**

India has witnessed a rapid growth in e-commerce, which has resulted in number of cases against consumer rights and welfare also. There are various existing laws, which cover e-commerce in one or the other way. Some of the important such laws are:

- The Foreign Direct Investment (FDI) policy regulates foreign investment into the e-commerce industry,
- Copyright Act 1957 and Trademark Act 1999: If a seller is selling fake goods of a well-known brand through an e-platform, the lawful brand of such goods might sue seller under the said Acts,
- Consumer Protection Act, 1986 (COPRA): COPRA was enacted to protect the rights of consumers. The Act provides six basic rights to the consumers viz., right to be protected against unfair trade practices, right to be informed, right to be assured, right to be heard, right to seek redressal against unfair trade practice and restrictive trade practices and right to consumer education. The consumer has same rights if purchasing goods or services through e-platforms also. The law document covers businesses as customers,
- The Information Technology Act, 2000 (IT Act): The IT Act validates the electronic transactions stating: "An e-commerce transaction is legal if the offer and acceptance are made through a reasonable mode". The Act provides legal framework to internet governance and it also gives recognition to digital signatures and electronic records,
- Food Safety and Standards Act, 2006 and Drugs and Cosmetics Act 1940: The e-commerce portal can be penalised under the said Acts for selling adulterated or prohibited goods,
- The Information Technology (Amended) Act 2008: To increase the security of e-commerce transactions, the Act was amended in 2008. The amended Act provides for protecting personal data under Section 43A,

- The Information Technology (Intermediaries Guidelines) Rules, 2011 state that the intermediary must not knowingly host or publish any prohibited information and if done, should remove them within 36 hours of its knowledge, and
- The Consumer Protection Bill, 2018 has only tabled in Lok Sabha and has to go through several processes. It intends to replace the 31-year old Consumer Protection Act 1986 and it will cover e-commerce separately.

#### 4.3 Consumers' problems in e-commerce

- **Data security:** A consumer has to share his/her name, contact number, address, bank details and other related information while purchasing goods or services through e-platforms. The data is always at risk of falling in the wrong hands.
- **Digital payments failure:** The refund of online payments generally takes about 5-15 days if the payment process fails and the amount is deducted.
- **Manufacturing and expiry dates not known to the consumer:** While buying offline a customer can always check the best before or the expiry date of the product, but in case of online purchase, the consumer does not know such details. However, the government has recently made it compulsory to show details on e-shopping portals.
- **Delay/fraud in delivery of the goods:** The goods, purchased online, are sometimes not delivered within the timeframe given to the customer. Additionally, either many a times consumers are delivered stone/waste etc. instead of the good or products falling short of quality/size/weight etc. as compared to described on online shopping portal.
- **Origin of the goods is unknown:** Sometimes consumers have to compromise with quality of the product, as the information regarding place of origin of the goods is not displayed at e-shopping platforms.

- **Quality issues:** Many cases have been reported where consumers have received counterfeit or replica goods instead of the original one.
- **Return and refund policies are not clear:** Due to the virtue of e-shopping, a customer can not touch or try the product before purchase. For this companies offer provisions to exchange or return the commodity but sometimes these policies are not clear.
- **Dispute redressal mechanism, especially in case of cross-border exchange:** Dispute redressal is a big challenge from the consumers' point of view as many consumers face several ambiguities between placing an order and receiving the final delivery. This issue becomes complex in case of cross-border exchange.

## 5. Competition and Regulation

There are many sectors (for example, telecom, retail, postal, finance etc. related to goods and services) that form part of the whole ecosystem in which e-commerce operates. Any regulatory intervention (or at times non-intervention) anywhere in the ecosystem can create competition concerns with respect to e-commerce. Off late e-commerce is being significantly linked to 'data-driven' business models, where consumer/users' interactions generate valuable set of data/information.

Such business models are based upon the analysis of these huge set of usage data (*Big Data*) that enhances their competitiveness. This emergence of digital market economy is giving rise to new set of competition concerns, which is challenging traditional competition enforcement paradigms.

The following paragraphs endeavour to identify and introduce core competition concerns with respect to e-commerce in this *Big Data* era, which are part of the contemporary policy debates. Competition concerns in e-commerce are, generally, divided into two broad categories – infrastructural and transactional.

## 5.1 Infrastructure-related Competition Concerns

### Access to Internet

Internet is the basic requirement for e-commerce to work. Any restriction or discrimination in access to Internet could yield anti-competitive effect. Most part of 'net neutrality debate' is about non-discrimination on part of Internet Service Providers (ISPs).

Trouble might aggravate when ISPs are also content providers (competitors). There has been instances of ISPs vertically integrating (or indulging in differential interconnection arrangements) with content providers, and hence, giving special treatment, such as free, easy or fast connectivity over that for other competitors.

Mobile manufacturers have also been found to be discriminating amongst different content providers in form of pre-loaded apps. Similarly, mobile operating systems and Internet browsers have been found to indulge in discriminatory practices *vis-à-vis* competing content providers.

One of the arguments provided by such discriminators has been that since operating systems or browsers are free of charge and that users have choice to switch over, such discriminations are not anti-consumer. This

argument, however, should be seen in the light of growing importance of consumer/usage data for e-commerce. Much of the contemporary competition concerns are around access to such consumer/usage data.

### Access to data

Today with increased digitisation (transformation of physical goods into information, like music, videos, books, etc.), the most important competitive advantage seems to have moved from production and distribution to 'information (data) and its management' (Autoritat de la Competencia, November 2016).<sup>9</sup>

Therefore, new business models, based on a phenomenon called *Big Data* (capturing huge amount of information, and rapidly processing them), adopt different strategies to attract more and more users and encourage their digital interactions on a platform. The importance bestowed on data by neo-business model can be understood from the following recent high-priced acquisitions of firms having huge usage data and people's private information.

**Table 2: Billion Dollar Acquisitions**

S. No	Acquirer	Acquired	Price (US\$)	Year
1	Microsoft	LinkedIn	26bn	2016
2	Facebook	WhatsApp	19bn	2014
3	Microsoft	Skype	8.5bn	2011
4	Google	Nest	3.2bn	2014
5	Google	DoubleClick	3.1bn	2008
6	Audi/BMW/Mercedes	Here	2.8bn	2015
7	Google	YouTube	1.6bn	2006
8	Google	Waze	1.1bn	2013
9	Facebook	Instagram	1bn	2012

Source: Autoritat de la Competencia, November 2016

The 'network effect' and interactions in two-sided markets, coupled with the use of algorithms (where machine learns itself, refines and further improve quality of service; artificial intelligence) creates a 'winner takes all' situation, thereby favouring market concentration and dominance. This triggers (or should trigger) attention of competition authorities and policymakers.

To illustrate, example can be cited that of competition between search engines – Google and Bing. After Google began to use its ranking algorithm, it attracted more number of users, which further refined the same algorithm. Greater number of interactions at Google perpetually enhanced its quality of search, attracting more users. Now even if Bing improves its design, it will not be able to perform like Google, because of lack of 'interactions'. It can be seen that the structure of such type of market is reduced to a single operator (winner takes all), which in itself raises competition concern.<sup>10</sup>

According to an OECD publication, "The economic properties of data suggest that data is an infrastructural resource, which in theory can be used by an unlimited number of users and for an unlimited number of purposes as an input to produce goods and services".<sup>11</sup> In this digitisation era, these large data sets are becoming a core asset in an economy, fostering new industries, processes and products and creating significant competitive advantages.<sup>12</sup> Hence, more and more investments are being made for mass collection of data.

Viewing all this, 'data' is often termed as a basic input and essential, for the functioning of the economy, as a whole and of significant economic value.<sup>13</sup> Here comes one of the most contentious issues: ensuring access to such information/data. If data can be conceptualised as an essential input, there can be circumstances when ensuring access to such information would be imperative for the economy, in general, and competition, in particular.

The European Commissioner for Competition, Margaret Vestager, recently observed, "If a company's use of data is so bad for competition that it outweighs the benefits, we may have to step in to restore a level playing field...we need to pay close attention to these markets and to act when it is necessary".<sup>14</sup>

However, who owns such data – users or operators? If the users own these data, then, on the one hand, the operators (investors) would have to persuade them to voluntarily allow usage of their data, and on the other hand, this would give right to users to obtain a copy of all the collected information.<sup>15</sup>

This, in turn, could bestow rights on users to switch personal data from one firm to its rival firm – right to data portability. Thus one can port all his data, for example, from Google to Bing, which can make latter competitive to former in terms of quality. It seems that some technological solutions that could enhance access to such data by competing firms are on cards. For instance, Telefonica, the Spanish multinational firm, had recently announced that they are working on a platform that will allow users themselves to manage their own data, whereby operators who want to make use of it, will pay for it.<sup>16</sup>

Similar concept of 'personal data stores' to ensure control over personal data is also being talked about.<sup>17</sup> Decentralisation of data storage is also being advocated as one of the ways towards solution.

In the same vein, there are concepts whereby the collector of data would have to offer an API (application programming interface), so that users can always access this information and offer it to competitors. It might also be possible that a common market platform can come up where different operators, possessing information, can resell it to other operators.<sup>18</sup>

India is in the process of drafting a new law on data protection. A Committee has been formed under Justice B. N. Srikrishna for this purpose. The Srikrishna Committee has published a white paper and has

sought public opinion on queries, related with various dimensions of data protection, contained therein.

## 5.2 Transaction-related Competition Concerns

Although from policy perspective, e-commerce can have various forms but discussions are largely confined to Business-to-Business (B2B) and Business-to-Consumers (B2C).

### **Relevant market**

The first transaction-related competition issue that arises with respect to e-commerce is: whether online shops and traditional brick and mortar shops constitute the same market? Market definitions might be difficult to make because price discrimination could become more widespread and important. This is because e-commerce enables sellers to more easily obtain and use information concerning consumer preferences and willingness to pay.<sup>19</sup>

The Competition Commission of India (CCI) had looked into this matter on at least two occasions. In 2014, CCI came to conclusion that “these two markets are different channels of distribution of the same product and are not two different relevant markets”.<sup>20</sup>

Confirming the above view in 2015, CCI held that “the relevant market for a product marketed through an e-portal is not product specific, but includes all its substitutes which can exercise a restraint on the pricing of such product”.<sup>21</sup>

More so, the essence of CCI order is that: the exclusive marketing arrangements between e-portals and manufacturers/suppliers do not create any entry barriers in the market, as the manufacturers/suppliers are free to sell their products on their own websites as well as the physical market. E-portals, in fact, improve price transparency, allowing consumers to make a more informed decision, and thereby enhance competition.<sup>22</sup>

### **Resale price maintenance**

In *Ashish Ahuja vs. Snapdeal*, the CCI looked into the issue of resale price maintenance (RPM), an anti-competitive agreement whereby retailer is obliged to

sell at predetermined price fixed by the suppliers. In this case, complainant is engaged in selling various computer and mobile accessories, whereas opposite party (Snapdeal) is a popular online market place, wherein different players sell their products for which the web portal charges a commission. The Complainant used to sell its product via the e-portal of the opposite party.

Subsequently, the Complainant was removed from the e-portal and was not allowed to sell its product. The reason for Snapdeal to take such a step was that the manufacturer (ScanDisk) insisted that the storage device (relevant product) sold through the e-portal should be bought from its authorised dealer to avail after-sale service warranties. The complainant alleged that by this practice, Snapdeal and ScanDisk are indulging in RPM, curtailing the freedom of sellers to offer better price for consumers.

The CCI did not find fault in such insistence upon ScanDisk and subsequent measure taken by Snapdeal. CCI observed that ScanDisk is within its rights to protect the sanctity of distribution channel and that vide its circular, ScanDisk had only clarified that the full range of all India after sales and warranty services offered by it is limited to those products brought from its authorised national distributors.

CCI stated “In a quality-driven market, brand image and goodwill are important concerns and it appears a prudent business policy that sale of products emanating from unknown/unverified/unauthorised sources are not encouraged/allowed”.

However, in another case, *M/s Jasper Infotech Private Limited (Snapdeal) Vs. M/s Kaff Appliances (India) Pvt. Ltd.*, with similar facts as above, the CCI had a *prima facie* opinion that Kaff was involved in RPM and ordered an inquiry. In this case, Kaff Appliances had written to Snapdeal that it would not extend warranties to the products sold by unauthorised dealers or distributors.

However, unlike ScanDisk in the earlier case, here Kaff Appliances had clearly mentioned, "If MOP of its products is not maintained then they will not allow Snapdeal to sell its products either by authorised or unauthorised dealers or distributors". This had led the CCI to conclude that there is a *prima facie* case of RPM under the Competition Act and ordered further investigation.

It might be noted that in *Ashish Ahuja vs. Snapdeal* also the discounted price offered by the Complainant was the core issue that triggered the manufacturer (ScanDisk) to issue a circular. However, there was no direct mention of MOP in the circular.

Moreover, had there been an investigation, more information would have come up that could have tilted CCI's conclusion. Be that as it may, the product involved in this case seems to have been obtained through 'parallel import'. It might be noted that parallel import is pro-competition, and the issue should have been raised before the CCI.

### **Parallel import**

One of clauses of the above-said ScanDisk circular is: "All third party importers apart from the above-named four authorised national distributors are parallel importers and ScanDisk Corporation does not authorise, endorse or support parallel importation".

It might be noted that different countries have different regimes with respect to parallel imports. India follows international exhaustion of Intellectual Property (IP) rights, except in case of copyright. Hence, the part of the circular that contravenes or does not go along with the Indian law can be invalid. This issue neither was raised by the Complainant before the CCI nor was it deliberated *suo motu*.

Nevertheless, issues related with parallel import are likely to be contentious in any multilateral arrangement on e-commerce. While taking any negotiating position, adequate weightage need to be given to the fact that allowing parallel imports is a pro-competition measure.

### **Exclusive agreements**

Network effects are clearly important in B2B exchanges because their value to both buyers and sellers depends on the liquidity they create for participants, which in turn depends on the number of buyers and sellers using the site. Pure network effects could also arise in the B2C context if consumers are able to use the network to share experiences concerning goods and services purchased.

Added to the concentrating power of any network effects, brand recognition and trust advantages could amount to barriers to further entry favouring first entrants, especially as regards B2C. The first mover advantages in both B2B and B2C could become quite significant if the parties owning them have the power to insist on exclusive arrangements.<sup>23</sup>

The CCI had dealt with exclusive agreements in *Manglani vs. M/s Flipkart India Private Limited and Others*<sup>24</sup>, where the Complainant dragged almost all the e-portals operating in India before it. It was alleged that these e-portals have been indulging in 'exclusive agreements' with sellers of goods/services, because of which the consumer is left with no choice in regards to terms of purchase and price of the goods and services.

This is because a consumer has either to accept the terms and conditions of the e-portal in totality or opt not to buy the product. Accordingly, the portal operator decides terms of re-sale, sale price, terms of payments, delivery period, quality and service standards, etc.

In their defence, the e-portals submitted that exclusivity, if any, is limited to online portals and not *vis-à-vis* brick and mortar stores. The manufacturer is free to sell the products in physical stores and on its own website. Further, there is no appreciable adverse effect on competition due to such exclusive agreements, to make the practice violative under the Competition Act.

The CCI did find presence of exclusive arrangements, however, it could not establish any appreciable adverse effect on competition, as per the laid down criterion. Therefore, there was no violation of the Competition Act pertaining to anti-competitive agreements.

### ***Predatory pricing***

In the above-discussed case<sup>25</sup>, CCI also looked into allegation of predatory pricing on part of the e-portals/e-commerce websites. It was contended that these e-portals have adopted the practice of purchasing goods from distributors/dealers on 21 to 30 days' credit and then subsequently selling these products at prices lower than the purchase prices.

The CCI, however, did not find these players individually dominant, even if e-portal market were taken as a separate relevant product market or a sub-segment of the market for distribution. Since they are not dominant, there was no question of abuse of dominance, such as predatory pricing.

### ***Collusive behaviour***

Algorithm and Artificial Intelligence, which are being used extensively by the e-commerce platforms, are also under scanner of few competition authorities. They are inquiring whether machine-to-machine collusion can happen and if yes, how to deal with them.

## **6. Conclusions and Recommendations**

There has been a transformation of how goods and services are produced, delivered, and consumed both domestically and internationally. We are, therefore, seeing more global value chains created due to increased and seamless flow of data across borders.

For a good number of developing countries, e-commerce is still at a rudimentary stage, to suggest that there is sufficient policy space to pursue strategic partnership, either North-South or South-South. Issues of mutual interest can be identified and built upon to ensure coherent strategy that encapsulates common

interests. The crux of the issues that should be considered is how best to foster e-commerce in India for boosting trade and investment.

This would be ideal for catalysing forward and backward linkages through integration into the regional and global value chain, in particular for key sectors in India, such as agriculture and services. With improved policy deliberations, there will be greater market access especially for small and micro enterprises whose growth is germane to India's attainment of India's Vision 2020, which is just a stone's throw away in addition to its Foreign Trade Policy.

The promulgation of the Information Technology Act (2008) is an additional milestone (though not adequate) as it recognises emerging issues, such as e-contracts and e-signatures. Section 10A provides: "Where in a contract formation the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case might be, are expressed in electronic form or by means of electronic record, such contract shall not be deemed unenforceable solely on the ground that such electronic form or means was used for that purpose".

Another strong contributory factor is India's political goodwill evidenced through the formulation of its Science Technology and Innovation Policy (STI, 2013), which creates an enabling environment for innovations, such as digital payments, hyper-local logistics, analytics driven customer engagement and digital advertisement. The policy has brought forth a number of promising government initiatives like 'Digital India', 'Start-up India' and 'Make in India' which have begun significantly contributing to the growth of the e-commerce.

## Recommendations

So far, India has rejected the push to set multilateral rules on e-commerce despite being part of the team proposed to set up e-WTP last year in its capacity as a member of the G-20. But, India will be bringing its e-commerce policy soon. It would be important to consider the followings:

- Since 1998, there have been working groups on e-commerce at the WTO but it has not been clear about the tangible efforts the working groups have made at the multilateral level to ensure a smooth transition for e-commerce. There is a strong need to speed up the efforts of E-commerce Work Program at the WTO,
- There is also a need to negotiate for Aid for Trade as far as e-commerce is concerned. It was discussed extensively in the Doha Round despite the stalemate, and this would be the perfect platform to revisit it, so that developing countries are boosted with the required infrastructure and capacity to handle e-commerce,
- India has a policy and institutional lacuna on e-commerce issues, at present even though e-commerce has recorded remarkable development, there is no distinct document that spells out the strategies, the institutional framework and the overall socio-economic development targets that can be fostered through e-commerce. A policy document would be a great negotiation tool in future, as it will clearly spell out India's interests in so far as multilateral trade liberalisation is concerned. However, recently the Government of India has announced to bring an e-commerce policy,
- Develop a strong dispute redressal mechanism, especially for cross-border e-commerce,
- Develop regulatory framework to address issues related to cyber security and data protection of cross-border transactions,
- Develop a comprehensive set of guidelines on standards and harmonisation of customs procedures,
- Facilitate MSMEs to use e-commerce platform through capacity building which will encourage their integration to online platform,
- Developing a comprehensive rural e-commerce strategy that would not only address the economic complexities in rural transformation but provide a roadmap to address structural adjustments of market transactions by creating simplified processes of information sharing and/or creating modalities in the form of prerequisite digital infrastructure to reduce market imperfections,
- Acts dealing with the online market, such as IT Act 2000, Consumer Protection Act, 1986, Indian Contract Act etc. should be strengthened in respect of e-commerce,
- E-platforms should give much deeper and more specific details of the products, and
- Spreading awareness among consumers while dealing with the digital world.

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