NLSIR

# THE X$^{th}$ NLSIR SYMPOSIUM ON "REGULATING E-COMMERCE IN INDIA" – A TRANSCRIPTION

## I. SESSION I: BUSINESS MODELS AND REGULATION OF FOREIGN INVESTMENT

The opening session of the symposium was moderated by Mr. Aradhya Sethia, a final year student of the National Law School of India University, who began with a framework presentation. He highlighted that the fundamental question underlying regulation in any sector is whether old classifications and tools of law are sufficient, or whether an entirely new framework is necessitated by modern developments.

Mr. Aradhya brought forth Press Note 3/2016, released by the Department of Industrial Planning and Promotion (*hereinafter* "Press Note"), which sought to clamp down on existing business structures violating the foreign direct investment (*hereinafter* "FDI") policy. It makes a distinction between 'marketplace' and 'inventory' e-commerce business models, and permits 100% FDI in the former. Though the definition of neither model is clear, the basic distinction between the two is that e-commerce players act as intermediaries instead of holding inventories and selling directly to the consumer in a marketplace model. The Press Note qualifies the permission granted to marketplace e-commerce entities by capping the total sales originating from a single supplier at 25%. However, there remains some ambiguity about the scope of the phrase "total sales". Furthermore, there is also a lack of clarity about the sweep of the phrase "support services" that has been included within the purview of e-commerce by the new rules.

Mr. Aradhya thus focused on how the FDI policy contains no 'bright-line' rules, which in turn begs the question of whether transformative technological advancements in the area can be addressed within the scheme of the extant legal categories.

Mr. Ashish Chandra, General Counsel of Snapdeal was the first speaker of the session. He remarked that for the Press Note to come into effect, the RBI needs to issue a Gazette Notification, which had not been done till the date of the session. However, he noted that the Press Note had already elicited actions of corporate restructuring by the e-commerce companies seeking to comply with the new conditions. According to him, when the RBI will ultimately notify the Press Note, it will result in a typical "interpretative hustle" over whether the Press Note came into force on the day it was published by the DIPP or on the date of its notification.

Mr. Chandra discussed how the investor community views the Press Note as a positive development. Its publication has provided them with a modicum of certainty as to compliance requirements in the sector, a welcome change from the previously unknown nature of their legal obligations. For the first time, the sector has been formally, though partially, opened up. Now, the expectation within the sector is further liberalization of the FDI sector in staggered phases, as was done in the case of the pharmaceutical and defence sectors.

The second panel speaker was Mr. Mahesh Murthy, Founder of Pinstorm, who emphasized how the changes in law regulating e-commerce were a product of lobbying efforts of digital companies. The digital sector is characterized by the presence of services that enjoy overwhelming control of their relevant markets. Mr. Murthy pointed out that Google, YouTube, Gmail, Android, and WhatsApp are unparalleled leaders in their domains. They have a sort of "*dominance of dominance*", that creates immense potential for successful lobbying.

He discussed how the law in India has not been conducive to investment in the e-commerce sector so far. The lack of clarity in the law, coupled with high taxation rates, continued to discourage investors from supporting nascent e-commerce ventures. The restraints previously placed by the FDI policy further contributed to the malaise. Until now, the e-commerce entities were operating in the grey area of law, where they were complying with the letter of the law, but were continually undermining its spirit through their operations. This, according to him, was true for all the major players—Flipkart, Snapdeal, and Amazon. These companies have all made investments in warehousing projects, have the wherewithal to provide back-end operations, and in fact, do so in some cases. Viewed against this backdrop, Indian regulators have lacked behind the changing business realities of the sector as their actions have been shaped by business. Ideally, it is the law that they frame which should influence business practice.

On this point, Mr. Chandra expressed his agreement with Mr. Murthy in saying that the Indian government has always been very slow in adapting to changes in the digital economy.

The third speaker of the session was Ms. Ashwini V, Partner at Samvad Partners. She began by noting that the current policy of the country was to gradually allow foreign investment in order to protect the local entrepreneur from external competition.

She highlighted the fact that in India, more than one authority has the power to regulate e-commerce. This leads to conflicting directives issued by these agencies thereby breeding confusion in what is already an underdeveloped area of law. Such conflicts arise because the agencies are charged with differing objectives and they are likely to hinder e-commerce entities in determining the true nature of their obligations. For instance, the RBI and DIPP notifications operate at the national level while the provisions of the Shops and Establishment Act function at the state level. According to her, the Indian regulatory scheme needs to evolve principles that allow for the harmonious interpretation of such differing provisions.

The next speaker was Mr. Chetan Nagendra. He noted that in so far as the prohibition on foreign investment in the Business-to-Consumer (*hereinafter* "B2C") e-commerce is concerned, the Press Note creates an exception for Single Brand Retail Trading (*hereinafter* "SBRT"). This would potentially impact a large number of market players who sell their products through their own websites, especially smartphone companies. To avail of the exception, the manufacturer—the investee entity—must be a single brand retail trading entity that operates through brick and mortar outlets. Furthermore, the FDI must be lower than 49% before an application is made to the DIPP for grant of status as a single brand retail trader. If the FDI at the relevant time is higher than 51%, then 30% of the procurement must be made from specified local manufacturers. Here too, an exception is made for "state-of-the-art or cutting edge technologies."

According to Mr. Nagendra, there are various advantages of adopting this route. It allows market players to operate brick and mortar stores as well as e-commerce portals. Thus, the need to pay commissions to the e-commerce marketplace is dispensed with, thereby increasing margins for both the manufacturers as well as the sellers. It also gives market players more autonomy in shaping their digital presence.

However, Mr. Nagendra also highlighted certain issues relating to SBRT that remain unaddressed. *First*, the differing FDI limits don't seem to have a rational basis. While the limit is set at 49% before an application is made to the DIPP for approval, it is set at 51% before procurement from local manufacturers becomes necessary, without any justification or rationale being given for the same. *Secondly*, there is no specified time within which the DIPP has to take a decision on the SBRT status. In fact, over the past year, the government hasn't rendered a single decision on the matter, leading to uncertainty among the applicants. *Thirdly*, the scope of the term "state-of-the-art and cutting edge" has not been defined. This creates particular difficulties for the technology sector where products generally have a short marketplace life but where securing the waiver is crucial since manufacturing capacities are severely deficient in India. *Fourthly,* it is unclear how sub-brands are to be classified under the new policy. And *lastly*, there is some doubt as regards the exact number of brick and mortar stores that have to be run by a SBRT entity.

Mr. Nagendra concluded on the note that the cleanest regulatory route for SBRT entities would be to base their manufacturing in India. As per the Press Note, 100% FDI is now allowed in B2B and B2C e-commerce marketplaces created by such entities. However, he noted that the ability of high tech producers to adopt this route is limited because of technological and labour deficiencies in the country. Another option is the adoption of hybrid models such as experience stores and online portals that are routed through a separate e-commerce marketplace.

Finally, the session was opened for questions from the audience. The first question was whether it is practicable to cap a seller's share to 25% of a marketplace entity's total sales, given that it is difficult to prevent any given seller from becoming a dominant force in a market economy. Mr. Chandra responded to this by explaining the 'curated fulfilment model' that is now followed by e-commerce entities. The entities follow a practice of storing the products of sellers in warehouses, which in effect makes them the bailee of the goods. They then provide packaging, couriering and delivery services to users. This has been possible because 100% FDI is allowed in the transportation, warehousing and payment sectors and it gives e-commerce companies greater control over the quantities of different products sold via their platform.

The next question posed was on the policy implications of allowing FDI in the inventory model. In responding to the question, Mr. Murthy stated that the distinction between the inventory and marketplace model is very little in practice. Given this economic reality, the question of its policy implications is moot. The curated fulfilment model, as explained by Mr. Chandra, effectively amounts to the inventory model. He thus reiterated that the e-commerce companies comply with the letter and not the spirit of the law.

## II. SESSION II: INDIRECT TAXATION: CHALLENGES AND CONCERNS

The second session was moderated by Mr. Nigam Nuggehalli, Professor, Azim Premji University. Mr. Shubham Jain, a fourth year student at the National Law School of India University delivered the framework presentation for the session.

He began by identifying the basic issue involved in taxing e-retailers: within which of the extant categories—sales or service tax—should e-retailers' commission be classified? The e-retailers contend that the money accrued to them is not in the nature of a commission but rather a fee to access their platform, and hence should not be charged as a tax. He highlighted another problem with regard to the determination of the place of transaction. This is further problematic as some states impose octroi duties on goods entering their states. While the GST Model Bill provides some clarity on these issues, it also introduces new challenges. The foremost among them is arriving at an appropriate definition of e-commerce itself.

The first speaker for the session was Mr. Pramod Jain, Head of Taxation at Flipkart. He began by acknowledging that the taxation regime has not kept up with the emergence of new e-commerce business models. Consequently, the government has always been catching up with the laws. The laws in force (the GST Bill had not been passed at the time of the Session) relevant to the taxation of e-commerce are very old and continue to suffer from the possibility of Centre-State and interstate conflicts.

Mr. Jain pointed out the expanded choice provided to the consumer by the growth of the e-commerce sector. The digital and transparent nature of the transactions facilitates more efficient collection of tax as against the typical delays associated with brick and mortar sales. Each transaction is now recorded online and the ready availability of information enables the tax department to hold the industry accountable. This extends to the imposition of sales tax on the original retailer as well. Even for payment options such as Cash-on-Delivery, the original vendor is not paid in cash by the B2B e-commerce entities.

Thus, this digitization of information allows the sector to adapt to the new GST regime with ease. According to Mr. Jain, as the industry has grown, the tax authorities have become more stringent in their methods of assessment and collection, even in the absence of clear-cut laws.

To a question raised by a member of the audience on the modality of information collection in respect of Income Tax, Mr. Jain responded by saying that the tax authorities are given adequate powers under the Income Tax Act as well. Another panelist, Mr. D.P. Nagendra Kumar, Principal Commissioner of Excise and Customs, further added that the GST law also contains similar enabling provisions. However, he was still concerned that business rivals may access confidential information given to the authorities. Addressing this concern, Mr. Jain clarified that the disclosure of information is ordinarily a part of e-commerce companies' contracts with their retailers.

Mr. Jain then moved on to address the question of which government has the right to tax under the Central Sales Tax Act (*hereinafter* "CST Act"). When there is a pre-determined order, the tax is payable in the state of origin. However, there have been instances of double taxation imposed in the sector as well. To challenge such an order for double taxation, the retailer has to pay a 25% deposit fee before filing an appeal, thereby making it difficult for the companies to seek remedy. Mr. Jain pointed out that writ petitions were currently being heard against such double taxation.

In so far as the statutory provision is concerned, the position of law is fairly clear—Section 3 of the CST Act states that the tax can be paid to the origin state but not to the destination state. He pointed out the practice of some authorities to treat B2B entities as agents of the seller. Under the VAT scheme, a dealer liable to pay tax includes not just the actual seller, but also anyone who sells the goods. This includes auctioneers, agents, and brokers. Since the seller advertises his goods on its platform, they considered pursuing B2B entities for tax evasion. According to Mr. Jain, this is akin to taxing the Times of India for the sale of products it advertises in its newspaper.

He then addressed the question of octroi or entry tax levied by certain states. Though these states never levied octroi on telemarketing companies, they began levying octroi on e-commerce companies. The underlying objective was to protect the local trader by targeting the vastly more popular e-commerce sector. This was later struck down by the Uttarakhand and Bihar High Courts.

At this point, Mr. Samsuddha Majumder, Partner, Trilegal, noted that in states like U.P. and Jharkhand, the problem is exacerbated by the requirement to obtain an import permit before importing goods from another state. He stated that if such movement were international in nature, these restrictions would stand in violation of India's treaty obligations and its regrettable that state governments are being permitted to impose such restrictions in case of inter-state trade. Expressing agreement with Mr. Majumder's views, Mr. Jain noted that despite the constitutional protections given to trade and commerce, state governments continue to pursue stifling taxation measures.

Mr. DP Nagendra Kumar was the next speaker for the session. He began by highlighting that a slew of B2C transactions are conducted under the aegis of purportedly B2B entities. He also acknowledged that the tax administration has made the procedure more complicated. Hence, the administration works on a "model based on suspicion". Further, while the confusion over whether it is the origin or the destination state that is entitled to impose sales tax exists, the introduction of the GST will give the consumption or destination state revenue, even though the tax will be collected at the point of origin.

He pointed out that the Central Government has held that in a B2B model, the e-commerce operator is a provider of services such as sales promotion, advertisement, and packaging. Given that the GST seeks to embrace the principle that the consumption state has the right to receive tax, the rules on the place of provision of supply could also raise issues. This is so because the place of supply and place of consumption do not always coincide. To explain this further, Mr. Kumar took an example of an hotelier in Bombay who hires an architect from Bangalore, though the hotel project in respect of which the architect's services are hired is in Kerala. He said that in this case, the service would ultimately be 'consumed' in Kerala, even though it is the state of Bombay that will receive the tax.

Mr. Samsuddha Majumder was the third speaker for the session. He first addressed the question of classification of digital content. He noted that in the *TCS* case, software was conceived as a good. Today, most people in India who sell downloadable or physical software charge both VAT and service tax. In state-wise transactions, whether VAT or CST is payable is determined by where the goods end up. CST applies as long as it passes through to another state, irrespective of the location of buyer/seller. Excise and entry duties on goods are charged in addition to VAT. Compliance with these requires detailed returns.

He then discussed the issue of the cascading effect of taxation. Most taxes are in the nature of value-added taxes, such as excise and service tax, leading to a tax on tax at every stage of value addition. Pre-GST, these taxes operate in separate silos. However, under the GST regime one would pay less as one pays only a lump sum amount. The GST regime thus allows for the removal of this cascading effect by making each kind of tax ratable against its own stream. The rationale for separate streams under the GST is to prevent the mingling of state and central revenue. Under a unified dual tax structure, reporting and compliance would also be made easier. The reduction of interstate barriers would also stymie the currently rampant levels of corruption.

In his concluding remarks, Mr. Majumder observed that the classification of taxable events has proven especially litigious in the past. Mr. Rajesh Simhan, Partner, Nishith Desai Associates agreed and said that the creation of different bands for different types of product under GST is also likely to lead to similar disputes. Further, Mr. Majumder pointed out that the taxability of digital content would also undergo a change with the passage of the GST Bill. Previously, the business provider enlisting services had to largely pay tax on reverse charge basis. Now, it will be the service provider who will have to pay tax.

Mr. Kumar agreed with Mr. Majumder on the fact that taxation imposed with a view to promote or discourage behaviour, such as a sin tax, creates market distortions and the government should implement such policy goals with caution. Mr. Majumder then took a question from the audience on the implications of the return of goods on ownership. Responding to it, he said that in a marketplace model, the goods are never subject to the ownership of the e-commerce entity. Though the platform acts as a guarantor of the payment in respect of the vendor, on return, the ownership is returned to the vendor.

Mr. Rajesh Simhan was the last speaker for the session. He primarily focused on cross-border supply. An international seller would have to account for the laws of his home country, of any intermediary country, as well as the various tax conventions.

He noted that the service tax net has been significantly expanded in the last six months. There were two broad changes. *First*, an equalization levy is now charged whenever distinguishing between direct and indirect taxes becomes tricky. This was used against Google and similar B2B services in respect of online advertisements and other notified services. A specific levy to the tune of 6% was imposed on the gross amount charged. *Secondly*, a change has occurred in the place of provision rules. While the general rule is to deem the rendering of service in the location of the recipient, for B2B companies, this is reversed, even though B2C companies are required to appoint agents in India to facilitate compliance.

Finally, the Session was opened for questions to all the speakers. The first question was how the 15% tax on digital goods would be imposed. In response, Mr. Kumar stated that ordinarily, notices are sent to providers, who would either comply with it in order to continue with their Indian operations or would consider pulling out.

The next question was on the scope of tax policy advocacy in the country. Mr. Nagendra Kumar described the untapped space for advocacy through the example of the GST Model Bill. He argued that the tax authorities had largely drafted the Bill, and when public comments came pouring in, very little human resources were available in assessing the feedback. He believes that taxation should be a consultative process, and for that reason, the scope for tax advocacy must only increase in the future.

The final question was about the appropriateness of the definition of 'taxable event' since it had been pointed out that new economic activities, such the commercial use of data collection by big digital companies would not be covered by the existing definition. In response, Mr. Simhan agreed that this was indeed the case, thereby necessitating the creation of the equalization levy, to act as a means to tax otherwise un-taxable events. He was of the view that it instead of this, it would be better to amend the existing scheme in order to account for these technological developments.

## III. SESSION III: INTERPLAY BETWEEN E-COMMERCE AND COMPETITION LAW

The third session was moderated by Mr. Rahul Singh, Assistant Professor at National Law School of India University. The framework presentation was made by Ms. Aakarshi Agarwal, a fifth year student at National Law School of India University.

The first speaker for the session was Ms. Nisha Kaur Uberoi, Partner at AZB & Partners. She began by explaining the concept of a "relevant market" and factors such as, product characteristics, geographic boundaries of the market, consumer preference and intended end use that influence its determination. While the regulators seek to define product market narrowly, the industry would like to define it as broadly as possible to manipulate market share figures. She highlighted how this determination becomes very uncertain in the e-commerce sector where traditional factors such as transport costs and geographical extent may no longer be applicable.

Ms. Oberoi further used the example of a search engine to explain that as a platform connecting users to advertisers, the market is completely free for consumers and is chargeable only for the advertisers. This creates a consumer surplus. The stance of USA in such a scenario is very hands-off and consumer welfare centric which would help avoid Type 1 error or the error of false positives. Excessive regulation hampers innovation as is evident from the case of MySpace. MySpace was launched in 2005 and was acquired by NewsCorp in 2007. A few years after this acquisition, Facebook, a newer and more innovative product completely wiped out MySpace from the market. This shows that USA's non-interventionist approach results in Type 2 error or the error of false negatives where, in the face of non-interference by the regulator, the market itself takes care of the dominance. Similarly, regulators in USA did not intervene in the merger of the country's only two big radio satellite providers because they identified the dynamic nature of the market and expected new players with better technology to balance the market.

Unlike USA, EU follows an interventionist approach with the objective of increasing efficiency. The German position is that the judiciary looks at the efficiency of the process of competition and not at the inefficiency of the competitors. Thus, USA has a preference for Type 2 error whereas EU has a preference for Type 1 error.

Ms. Oberoi then discussed the *Snapdeal* case[1] as being the first case in the Indian context to discuss the issue of "relevant market." This case held that online and offline markets are merely different distribution channels and do not constitute different markets for the purpose of determination of "relevant market." Thereafter, in the *Flipkart* case[2], it was recognised that we might not yet be in a position where we can conclude that online markets are the same as offline markets or whether they are separate or sub-markets. The position as of today seems to be the one laid down in the *Snapdeal* case that online and offline markets are substitutable.

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1 *Ashish Ahuja, In re*, 2014 SCC OnLine CCI 65.

2 *Mohit Manglani* v. *Flipkart India (P) Ltd.*, 2015 SCC OnLine CCI 61.

The second speaker for the session was Mr. Manas Kumar Chaudhuri, Partner at Khaitan & Associates. He began by highlighting the entry barriers in a market created either by an existing player or a regulator. Low entry barriers are required to make the market competitive and a market free from entry and exit barriers is assumed to be free from dominance. He also discussed the huge benefit that the e-commerce sector would provide to the consumer, industry and economy. There have been allegations of e-commerce retailers practising predatory pricing and he debunked these claims on the ground that a predator must have dominant market share but e-commerce sector with its 4% market share is far from acquiring dominance. Moreover, predatory pricing only occurs when the retailer sells the product below cost price and not below market price. In the presence of a publicly disclosed MRP fixed by the manufacturer in India such collusion is not possible.

Mr. Chaudhuri further discussed entry barriers in the e-commerce sector in the European Common Market. There exists freedom to trade across the 29 states of the European Common Market. E-commerce sellers place restrictions on purchase of products based on the location of purchaser. This practise called geo-blocking discriminates between different buyers located in the European Common Market and amounts to a barrier to entry which might result in distortion of market. He imported the same principles to India to discuss whether geographical restrictions on inter-state e-commerce transactions would be permissible in India, given its federal structure. He also dealt with the issue of whether consumer surplus and selling products at a lower price in the online market than in the offline market would amount to an anti-competitive practice. He stated that any discussion on this topic must be cognizant of principles of consumer welfare which are one of the chief objectives of the Competition Act and must consider whether the surplus being generated is being passed on to consumers and whether in the face of such appropriation of surplus, the practice would still be anti-competitive.

Further, he compared the dimensions of the e-commerce sector in India to those in China and other countries to indicate that the sector has not yet assumed a dominant position. Digital payments in India constitute only 6% of the total payment as compared to 14% in China, 114% in France and more than 200% in UK. In such circumstances, he agreed with the Competition Commission of India's stance that the online and offline markets are substitutable and that the e-commerce sector has not yet assumed a dominant position.

The third speaker for the session, Mr. Ramji Srinivasan, Senior Advocate, Supreme Court of India, discussed the nascent nature of the field. He began by discussing the meaning of commerce and its evolution from the traditional marketplaces in villages and cities to online marketplaces. He emphasised that inspite of the very small presence of the online marketplace (it constitutes only 2% of the total retail expenditure), it has captured the attention of the world because it has the potential to disrupt ordinary commerce. This is the reason why the topic of e-commerce is being given so much importance by multiple governmental agencies.

Historically, the Silk Route had a very important role to play in international trade. Improvement in the channels of communication also improve trade. Telecommunication with its role in contemporary trade and commerce is the modern day equivalent of Silk Route which is indicated by the fact that an increase in tele-density results in a proportionate increase in GDP. However, this new form of communication also poses new challenges. Earlier market trends were predictable, but now it is impossible to predict where a new competitor might emerge. Unpredictability of market trends and inextricable linkages of markets characterise contemporary markets. In this context, he discussed the demonetisation drive in India assisting the growth of online payment portals such as PayTM, Mobikwik, Freecharge etc.

Mr. Srinivas then moved on to characterise technology as being disruptive of the contemporary market and stated his principle of the 3 Cs for explaining modern-day markets----consumers will celebrate, competitors will complain and the CCI. He then steered the discussion towards the role of CCI and whether its objective should be to protect competition or competitors. He argued that in the present-day dynamic market, CCI should only concern itself with protecting competition and not competitors as even monopoly sometimes incentivises new entrants with the promise of a share in profits. A decision to protect a competitor might actually be counterproductive and hamper innovation and consequently harm consumers. Therefore, dominance isn't necessarily bad for the market. He stated that the need of the hour is light-handed regulation and pro-active regulation is only required in certain instances such as price fixation.

The last speaker for the session was Mr. Rakesh Bhanot, Director, CCI. In his presentation, he expressed his personal views, distinct from his view as a regulator. He referred to the high growth rate of the e-commerce sector and the likelihood of the field seeing many competition cases in the future. *Prima facie*, e-commerce does not seem to be very different from the traditional sector. The shift from telephone to other modes of telecommunication is also very recent and its growth is dependent on the scale of use and availability of websites. He went on to define an e-commerce marketplace as a platform where buyers and sellers meet online, transcending geographical boundaries. Even though the marketplace is still in its growing stages, many conventional retailers have started feeling the impact. Walmart has closed more than 200 stores internationally. He further talked about the OECD round table conference and the subsequent report that analyses the positive impact of reducing instances of market power, price distribution and decrease in price discrimination. The report also highlights various concerns that the e-commerce sector has given rise to, including anti-competitive effects.

Mr. Bhanot further acknowledged that the CCI is faced with a difficult task today as it must reach a decision that balances the interests of both sides. The e-commerce sector has ensured that each seller is aware of the price fixed by the other seller leading to influencing of price everywhere. While this is not collusion *per se*, the effect of such price transparency is the same. Even though e-commerce seems to have increased the selection of goods available, reduced prices and overall increased benefit for consumers, Mr. Bhanot pointed out how this initial competitiveness of e-commerce would decrease competitiveness in the long run. Personalisation of sales and use of targeted advertisement, facilitated by large-scale collection of data and tracking of online activities would pave way for a different kind of price discrimination.

For instance, Uber on the basis of data collected knows where you go often and accordingly sends alerts, deals and coupons. Such personalisation leads to behavioural discrimination ranging from mere price discrimination to more customizable forms of discrimination that would erode consumer surplus. Such sophisticated discrimination takes place because companies collude not just in person but also through the use of similar algorithm. This algorithmic collusion affects people even more gravely than traditional forms of collusion. On a final note, Mr. Bhanot indicated that in the future, CCI would have to deal with cases involving big data, privacy concerns and algorithmic collusion in addition to the other competition issues that the e-commerce sector poses.

## IV. SESSION IV: LIABILITY REGIMES: ENSURING COMPLIANCE

The last session of the symposium was moderated by Mr. Arun Binoy Mattamana. The framework presentation was made by Ms. Sakhi Shah, a fifth year student at National Law School of India University.

She laid down the central question for discussion — how to ensure compliance with the existing liability regime. She highlighted the operation of the liability exemption granted to e-commerce intermediaries under the existing framework, and stressed on exploring the possibility of making e-commerce websites liable under the Consumer Protection Act and the Narcotic Drugs and Psychotropic Substances Act.

The first speaker for the session was Mr. Pranav Mehra. He began by listing out 34 statutes that e-companies presently follow to ensure compliance with the legal framework governing them. Among several others, these include the Aircraft Act, Arms Act, Competition Act, Copyright Act, IT Act and the Young Persons (Harmful Publication) Act. He discussed each of these legislations and their requirments and how e-companies comply with them.

The second speaker for the session was Mr. Aditya Mudgal who gave a deep insight into the compliance issues faced by MNC manufacturers. These include protection of intellectual property, packaging and on-shelf advertising, consumer protection and data protection and privacy. He first dealt with the issues of counterfeiting relating to HP and Dove that arose in 2014. Products that are displayed in intermediary companies can damage the reputation of the intermediaries as well. Thus, in the absence of a seller identification system, intermediaries need to prevent e-commerce companies from getting undue general trade advantages. A two pronged approach can be followed to deal with this: *first*, monitoring brands online through specialized agencies; and *secondly*, moving towards a authorised seller model.

He then emphasized the need to protect consumers from deception at a time when the screen has substituted the process of buying. It is essential that the consumer makes an informed purchase and is fully aware of the displayed product. It is here that the Legal Metrology (Packaged Commodities) Rules, 2011 and the FSSAI Regulations come into play. Further, under the new Consumer Protection Bill, 2015, false representations can amount to unfair trade practices and attract liability. The Bill provides for product liability, more stringent penalties as well as refunds. However, on the aspect of refunds, Mr. Mudgal stated that it is yet to be seen whether the Indian economy is mature enough to handle refunds.

Lastly, on data protection and privacy, he discussed how e-commerce companies have unauthorized access to personal identifiable information such as consumer behaviour and preferences and misuse it for the purpose of targeted advertising. It is important that ISO standards for storage are followed, which are presently flouted by most start ups. There is a need for adopting and following the four cardinal privacy principles, namely trust, accountablity, data protection and responsibility.

The third speaker for the session was Ms. Vidushi Marda who began by pointing out the various e-commerce platforms and how each of them requires a separate liability regime. For e-companies like Flipkart, Amazon and Snapdeal, it is necessary that they follow the same rules as their brick and mortar stores. For intermediaries, some amount of due diligence is required. For the third platform consisting of a sharing economy of aggregators like Uber and Ola, another distinct set of rules is required.

She highlighted that the law in India encompassed in Section 79 of the IT Act mitigates the liability of the intermediaries. In *Shreya Singhal case*[3], the Supreme Court laid down actual knowledge as the standard for making an intermediary liable. Thus, e-commerce websites have to consider the aspect of safety closely. If a website is not practicing due diligence, then the platform should be attributed

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3 *Shreya Singhal* v. *Union of India*, (2015) 5 SCC 1.

with secondary liability. In such a situation, the users should have a human point of contact before whom they can seek remedy. Arbitration can also be explored as an option in such cases.

She further discussed the various options before the companies for dealing with their data privacy issues. They can either get an ISO certificate, practice self- regulation or get a blanket approval from the user. In the context of e-commerce, such issues surfaced when WhatsApp wanted to share its user information with Facebook. It is however essential to be wary of the adverse affects of sharing such meta data, as it is capable of giving anyone a fair idea about a person. She therefore stated that clearer rules are required for different types of e-commerce platforms and they have to be framed and looked at from a consumer's point of view.

The final speaker for the session was Mr. Arun Prabhu. He emphasized on how India now looks largely at a self-regulatory scheme. It has a monolithic regime that exercises two forms of regulation over intermediaries: due diligence and take-down regime. While the USA has different liability framework for different entities, this is not the case in India. However, it is necessary that we move towards the USA model and companies like Snapdeal and HUL that have one foot in the brick and mortar world have separate regulations to govern them.

He discussed the interface between regulated and unregulated sectors. While the brick and mortar seller has to follow a set of regulations in the regulated sectors, the same can't be properly enforced online. On the other hand, in case of unregulated sectors, the online seller is faced with a lot more regulations. There should thus be a balance of priorities since the amount of competition for a customer's click is not as robust in another market. In the Indian e-commerce market, since there are more providers than buyers, the consumer values price the most instead of user experience and reputation.

He pointed out that the *Shreya Singhal* case only talks about freedom of speech. While it may have solved problems on that front, since it does not deal with commercial speech there are still a lot of issues in freedom of commerce that are unaddressed. It is only with time that people will become more sensitive in terms of intellectual property. He noted how all the jurisprudence surrounding take-down regimes goes back to 79A, which is in fact not the right regime. In the event that a trademark is being infringed, there is no consistency or clarity on whether a Section 79 application alleging misleading information should be filed (which is easier) or a challenge under the Copyright Act be made.

After the presentations, the floor was opened for questions. The first question was on the appropriateness of saying that there is inconsistency in regulation (as *Shreya Singhal* only dealt with freedom of speech and not commercial speech), given that Section 79 of the IT Act does not really create liability in itself. Mr.

Arun Prabhu clarified that even though *Shreya Singhal* does not specifically carve out freedom of speech, the Supreme Court has usually distinguished between the two and used it in subsequent cases as well. A holistic interpretation of the judgment indicates that safe harbour has also been compromised.

The next question was on the need to have a stronger data localization regulation in India. To this, Mr. Mudgal suggested that the solution is not data localization, but a standard of commercially acceptable treatment of data as the former reduces data quality to a great extent. Ms. Marda further pointed out how data localization is just an artificial construct and poses several problems for companies complying with it as is happening in the case of China. Mr. Prabhu also stressed on the need for commensurate level of data protection to be practiced in the country importing data.

The next question was in relation to the kind of operations run by companies like Snapdeal in terms of packaging and labelling and whether they can really be called intermediaries if they package, label and refunds in such manner. Responding to this, Mr. Pranav Mehra clarified that Snapdeal does not label items as labelling is done by the manufacturers. As far as plastic waste management is concerned, Snapdeal only repackages with a bubble wrap (shrink wraps).

The last two questions were focused on the liability of intermediaries and how it is different from the liability of an ISP. In response, it was highlighted that the Consumer Protection Bill now defines intermediaries and many more companies can be brought under it. Both, the advertiser and intermediary can be made responsible. This means that if an advertiser makes any type of misleading claim, then even the intermediary can be held liable under the new regime. As far as difference with liability of ISPs is concerned, it was highlighted that even though the law doesn't make any such distinction, there should be a difference between the liability fastened on ISPs and intermediaries, as the latter have more knowledge and are not merely providing a pipeline as is the case with ISPs.

The session was concluded with a short presentation by Prof. Dr. Ashok Patil on the developments made in the Online Mediation Cell at NLSIU. Thereafter, Sharwari Pandit, Deputy Chief Editor, NLSIU delivered a vote of thanks to all speakers and attendees.