

The new consumer protection act decoded: What will be its impact on the e-commerce sector?

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With the objective of further fortifying the interest of consumers and reinforcing the legal framework for the timely and effective administration and settlement of consumer disputes, the government has recently enacted the Consumer Protection Act, 2019 (2019 Act). The 2019 Act has substituted the more than three decades old Consumer Protection Act, 1986 (Erstwhile Act) and has expanded the scope of consumer protectionism in the time where consumerism has advanced beyond brick-and-mortar stores. In order to keep up with the rapid developments in the modern age retail trade, the 2019 Act has formally included within its scope and reach the realm of B2C e-commerce. The expression 'e-commerce' is defined under the 2019 Act as "buying and selling of goods/services, including digital products over the digital/electronic network". Now, any person who buys any goods or avails any services whether offline at a brick-and-mortar store or online at a digital/electronic network through electronic means or by teleshopping, direct selling or multi-level marketing will be covered by the protection available under the 2019 Act. This article fleshes out some of the key implications of the 2019 Act on the B2C e-commerce sector.

What are the implications of the 2019 Act?

Unfair trade practices

With an exclusive focus on B2C e-commerce, the Ministry of Consumer Affairs, Food and Public Distribution (Department of Consumer Affairs), Government of India, has introduced the draft Consumer Protection (e-Commerce) Guidelines which seek to prevent fraud and unfair trade practices in B2C e-commerce space (e-Commerce Guidelines). These guidelines are still in the draft stage and are being finalised by the government basis the responses/suggestions from all stakeholders. Having said that the e-Commerce Guidelines, amongst other things, obligate e-commerce entities to maintain a level-playing field and prohibits them from directly or indirectly influencing the price of the goods or services that are listed for sale on their platform. As on date, only e-commerce entities with foreign investment were required by the foreign exchange control law to ensure compliance with these foregoing obligations. However, if these guidelines get notified, it will become mandatory for every e-commerce player, with or without foreign investment, to ensure that it maintains a level playing field for all sellers and does not engage in any unfair method or deceptive practice that may influence transactional decisions of the customers.

Statutory recognition to product liability claims

The 2019 Act is the first-ever legislation that has introduced the penal regime governing product liability claims in India. Prior to the 2019 Act, a consumer had to rely on a number of different statutes (such as the Indian Contract Act, 1872, the Erstwhile Act and the Sale of Goods Act, 1930) coupled with judicial activism to establish and enforce a product liability claim against the product manufactures in India. Even the courts had acknowledged that the doctrine of strict product liability did not exist in India. Under the aegis of the 2019 Act, however, a consumer is now statutorily entitled to claim compensation *for any harm, injury, death or damage arising from a defective product* from a product manufacturer, a product seller or a product service provider. Hailed as a significant development, the law now (subject to certain exceptions of course) holds a seller or a service provider liable as well for *defective products*. *This development will* largely and directly impact e-commerce platforms which are operating on an inventory-based model and have amongst other things exercised substantial control over the designing, testing, packaging or labelling of a product, failed to exercise reasonable care in inspecting or maintaining the products whilst in their possession/storage or have made an express warranty of a product independent of any express warranty from the manufacturer. Nevertheless, this regime will result in the e-commerce sellers heavily relying on the contractual back-to-back indemnity arrangements in some shape and form with the product manufactures in order to mitigate their potential product liability risk exposure.

Sale of spurious products

Faced with the swelling malpractice of spurious goods invading households across all product segments including FMCG and drugs, the government has sought to curtail this menace by introducing a penal regime in this regard under the 2019 Act. The 2019 Act imposes a penalty on the manufacturing for sale, selling, storing, distributing or importing of any spurious goods. Criticism on this subject matter has in the recent years been already directed against e-commerce players, but now with the introduction of an enabling penalising framework (which also entails imprisonment and suspension or cancelation of trading license), e-commerce entities will now have to pro-actively ensure that its platform does not become a safe haven for counterfeit goods.

The e-Commerce Guidelines as well seek to impose a contributory or secondary liability on e-commerce entities for guarantying the authenticity of the goods sold on their platforms if such goods are in fact spurious in nature. Additionally, these guidelines also obligate an e-commerce entity to accept the return of spurious goods and refund the underlying purchase amount within a maximum period of 14 days from the return of a spurious goods. In our view, the ensuing filtering process may prove to be an immediate concern especially for the large e-commerce players given the volume of the stock / sellers involved and will in turn result in additional compliance costs on the already burdened pockets of e-commerce companies.

Unfair contracts

A new concept of 'unfair contract' has been introduced under the 2019 Act and it extends to all contracts which are entered into between a manufacturer/seller/ service provider on one hand and a consumer on the other hand. A consumer can now file a complaint and challenge contracts which are unfair, arbitrary and which cause significant change in the rights of the consumers. Some of the specific instances of unfair contracts that are indicated under the 2019 Act are the contracts which (a) seek to impose a penalty on the consumer for the breach of contract that is disproportionate to the loss occurred due to such breach; (b) provide for the unilateral assignment of the contract without the consent of the consumer; and (c) impose any unreasonable or disadvantageous charge, obligation or condition on the consumer.

Unlike a traditional brick and mortar store, an e-commerce platform relies heavily on the contractual terms for mitigating its risk exposure and safeguarding its interests against any third-party liabilities. These terms and conditions are typically in the form of a click wrap agreement and become binding on the consumer at the time of the registration on the platform and/or the purchase of goods or services on such platform. These are the standard terms and conditions which a customer needs to accept without any scope of negotiation or customisation. However, now with the introduction of the regime on 'unfair contracts', an e-commerce platform would have to ensure that the terms and conditions set out in its click wrap agreement or otherwise displayed on its platform are sanitised and kosher from the 2019 Act perspective. Typically, these term and conditions entitle the e-commerce platform to terminate a contract unilaterally without assigning any reason whatsoever. While this right serves to protect an e-commerce platform from genuine instances where the performance of a contract becomes impossible due to the acts of a third party seller (who has listed its products or services on the platform), it can, nevertheless, be argued that such a unilateral termination right is in fact disadvantageous to a consumer and hence should render the render a contact unfair under the 2019 Act.

Further, not the just the terms of the standard click wrap contract, with the notification of the e-Commerce Guidelines, a consumer could very well challenge the terms of the contacts between an e-Commerce entity and a seller as well if such a contract seeks to impose any unreasonable or disadvantageous charge, obligation or condition on the consumer. The reason being that the e-Commerce Guidelines propose to compel every e-commerce entity to display the terms of the contact between such entity and the sellers on its platform in order to enable the consumers to make an informed transactional decision whilst shopping on the platform. With the terms of such a contract being in the public domain, but without a consumer being party to such a contract, it would be interesting to see what contours the courts would actually set in practice whilst entertaining any such complaints of unfair contracts from the consumers.

Misleading advertising

A manufacturer and an endorser of a product can now be penalised with imprisonment under the 2019 Act for a misleading advertisement. The scope of the expression 'misleading advertisement' is quite broad and extends to penalise advertisements which conceal important information (for instance any potential side effects), contain a false description of goods or service or give a false guarantee to mislead a consumer. Interestingly, in cases where the warranty or the guarantee of a product is challenged by a consumer, the burden of proof is on the defendant (and not the consumer) to prove that the warranty or guarantee in question was provided basis the adequate or proper tests which were performed on the product. Having said that the 2019 Act provides an exception from liability in favour of certain persons who can prove that the publication of the advertisement was in the ordinary course of business of such a person. However, the 2019 Act does not clarify or define what does "in the ordinary course of business" imply or constitute.

From the perspective of third-party intermediaries (such as an e-commerce platform), a number of questions become relevant. Would an intermediary be construed as an 'endorser' under the 2019 Act if such intermediary provides an independent rating of a product or service which is advertised on its platform for sale? At the same time, would an intermediary be able to disclaim any liability for a misleading advertisement that is published on its platform by taking a defence that the publication of advertisement was in the ordinary course of such platform's business? The way the expression "endorsement" is defined under the 2019 Act, it appears that any e-commerce entity that makes any message or demonstration in support of an advertisement that has the effect of making a consumer believe that it reflects the opinion or finding of the e-commerce entity in respect of the advertised product could result in the e-commerce entity being categorised as an endorser of such product. Our view is supported by the proposed restrictions under the e-Commerce Guidelines which broadly prescribe that an e-commerce entity shall neither post reviews about the goods or services in their name nor shall they adopt any trade practice that may influence transactional decisions of the consumers.

Filing of complaint

The jurisdictional avenues for a consumer to file a complaint under the 2019 Act have been significantly expanded and the new regime allows a consumer to file a complaint from the place of his residence or the place where the complainant personally works for gain. This is unlike the regime under the Erstwhile Act where a complaint could be instituted only in the state where the goods were purchased or where the registered office address of the seller was situated. The manner of filing a complaint has also been eased to permit the consumers to file a complaint even electronically. While this change will certainly ease the logistical/jurisdictional challenges that were faced by the consumers in identifying the suitable forum for filing a complaint, sellers (who does not have a place of establishment at the place where the complaint is instituted) may end up insisting on out-of-court settlements in order to minimise litigation costs and expenses.

Conclusion

With the intent of safeguarding the interest of the consumers across all models of modern age retail trade, the 2019 Act aims to transform the jurisprudence pervading consumer protectionism from caveat emptor (let the buyer beware) to caveat venditor (let the seller beware). At the same time, by making the modern smartphone savvy consumers the prime focus of the new law, the 2019 Act is being hailed

by some as an all-inclusive legal regime that will help bolster further consumer confidence and spending spree in the e-commerce space. On the other hand, however, the 2019 Act is also being criticised in some corners of the retail industry as the compliance costs of the already cash strapped e-commerce sector is bound to swell. Having said that with the proscriptions on directly or indirectly influencing the price of the third-party listed goods / services or the transactional decisions of the consumers intensifying, the discounted flash sale models may soon become a thing of the past and e-commerce players whilst navigating the most competitive and volatile industry of India Inc. would have to bet on other innovative yet kosher revenue / contractual models in order to boost their profitability going forward.

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