

# Rules & Regulations Review

## Draft Rules under Consumer Protection Act, 2019

### Key Features of the Rules

- ◆ Eight Draft Rules have been notified under the Act. Some of these cover the composition of bodies set up under the Act. These include the Central Consumer Protection Authority (CCPA), the Central Consumer Protection Council, and the three tiers of consumer courts at the district, state and national level. They also specify the qualifications, selection process, term and conditions of service of the members to these bodies.
- ◆ The draft e-commerce rules set out detailed obligations of e-commerce entities and sellers on these platforms. Obligations of e-commerce entities include the duty to not influence the prices of products and services and the obligations of sellers include providing warranty or guarantee obligations for goods and services.
- ◆ The draft direct selling rules set out detailed obligations for direct selling entities towards direct sellers, and of direct sellers towards consumers. The obligations of direct selling entities include the duty not to force a direct seller to buy goods or services for an amount greater than they can recover from consumers. Direct sellers are required to ensure that complete information about products, prices, and payment and return policies are communicated to the end consumer.

### Issues and Analysis

- ◆ The composition, selection method, and conditions of service of members of the National Commission are contained in a set of rules (of 2020) notified under the Finance Act, 2017. An earlier version of these rules (of 2017) was struck down by the Supreme Court in 2019. It noted that the rules did not comply with previous Supreme Court decisions that stressed on securing judicial independence in the composition of tribunals, in the composition of their selection committee and in the security of tenure of members. The revised Rules do not fully incorporate the principles laid down by the Court.
- ◆ The e-commerce rules define e-commerce entities to include marketplaces as well as inventory models (where the platform also owns the inventory). However, the Rules do not distinguish between the liabilities of both. Further, e-commerce entities are liable for ensuring that advertisements of goods and services are consistent with their actual characteristics and usage conditions. It may be argued that pure marketplace models only provide a platform and cannot be expected to control the quality of the product.
- ◆ Any person who either marries a person who is currently married or commits bigamy cannot be selected as a member of the CCPA. The government may make an exception if it is satisfied that the marriage is legal under personal laws and there are 'other grounds' for doing so. It is unclear why such grounds for disqualification have been specified. Note that members of other bodies in the Act do not have such conditions.

## KEY FEATURES

The central government has published eight Draft Rules under Consumer Protection Act, 2019.<sup>1</sup> The Draft Rules regulate the composition, selection, qualification, tenure and removal of members of the regulator, the consumer commissions, and advisory bodies as well as consumer practices in e-commerce and direct selling businesses. In addition, Rules framed under the Finance Act, 2017 govern qualifications, terms of service and selection of members of the National Commission.<sup>2</sup> We present below a comparison between the rule-making powers specified under the 2019 Act and the specification in the Draft Rules of those provisions.

### Authorities established under the Act

The Act establishes various bodies including a regulator, and adjudicatory bodies and advisory councils at the district, state and national level. The central government will determine the qualifications, method of appointment, term, and removal of the President and members of the Commissions. The Draft Rules prescribe the composition, qualifications, method of appointment, term and removal of the members of these bodies.

**Table 1: Authorities established under the 2019 Act**

Authority	Features
District Commission (Jurisdiction on disputes up to one crore rupees)	<ul style="list-style-type: none"> <li>▪ <b>Composition:</b> Acts says the Commission will comprise of President and at least two members, with maximum to be prescribed by Rules. The Rules do not specify the maximum. At least one member must be a woman.</li> <li>▪ <b>Qualifications:</b> President must be a sitting or former District Court Judge or qualified to be one. For other members, must be: (i) at least 35 years old, (ii) possess a bachelor's degree, (iii) knowledge or experience of at least 15 years in certain fields such as economics, law and public affairs.</li> <li>▪ <b>Selection:</b> President to be appointed by state government in consultation with Chief Justice of the High Court of the state. For other members, based on recommendation of Selection Committee consisting of a High Court Judge and Secretaries of the Ministries of Law and Consumer Affairs of the state government.</li> <li>▪ <b>Term:</b> Five years or until 65 years of age, whichever is earlier. One-time re-appointment permitted,</li> </ul>
State Commission (Original jurisdiction of one to ten crore rupees and appeals from District)	<ul style="list-style-type: none"> <li>▪ <b>Composition:</b> Act says that the Commission will comprise of a President and at least four members, with maximum to be prescribed by Rules. The Rules do not specify the maximum. However, it states that not more than 50% of members can be from a judicial background and at least one member must be a woman.</li> <li>▪ <b>Qualifications:</b> President must be a sitting or former High Court Judge. For other members, must be: (i) at least 40 years old, (ii) possess bachelor's degree, (iii) have special knowledge or experience of at least 20 years in certain fields such as economics, law and public affairs.</li> <li>▪ <b>Selection:</b> Based on Selection Committee comprising of a High Court Judge (nominated by the Chief Justice of the High Court) and the Secretaries of the Ministries of Law and Consumer Affairs of the state government.</li> <li>▪ <b>Term:</b> Five years or until 67 years of age, whichever is earlier. One-time re-appointment permitted,</li> </ul>
National Commission (Original jurisdiction above ten crore rupees and appeals from State)	<ul style="list-style-type: none"> <li>▪ <b>Composition:</b> The Commission will comprise of four to 11 members. At least one member must be a woman.</li> <li>▪ <b>Qualifications:</b> President must be a sitting or former Supreme Court Judge or Chief Justice of a High Court. For other members, must be: (i) High Court Judge, or (ii) District Judge and Additional District Judge for ten years, or (iii) knowledge or experience of at least 25 years in certain fields such as economics, law and public affairs.</li> <li>▪ <b>Selection:</b> Based on Selection Committee comprising of a High Court Judge (nominated by the Chief Justice of the High Court) and the Secretaries of the Ministries of Law and Consumer Affairs of the state government.</li> <li>▪ <b>Term:</b> President: Four years or until 70 years of age, whichever is earlier; Other members: Four years or 65 years of age, whichever is earlier.</li> </ul>
Central Consumer Protection Authority	<ul style="list-style-type: none"> <li>▪ <b>Purpose (Act):</b> To regulate violations of consumer rights, unfair trade practices and misleading advertisements.</li> <li>▪ <b>Composition:</b> Chairperson, five central commissioners, five regional commissioners</li> <li>▪ <b>Selection:</b> Selection Committee chaired by Niti Aayog member and having two secretaries to central government.</li> <li>▪ <b>Qualification:</b> 25 years' experience in fields such as law, economics and public affairs.</li> <li>▪ <b>Term:</b> Five years or 65 years of age, whichever is earlier.</li> <li>▪ <b>Removal:</b> Insolvency or on recommendation of an inquiry committee for offences, misuse of position etc.</li> </ul>
Central Consumer Protection Council	<ul style="list-style-type: none"> <li>▪ <b>Purpose (Act):</b> To advise on promotion and protection of consumer rights</li> <li>▪ <b>Composition:</b> Up to 36 including Union Consumer Affairs Minister (Chairperson), Minister of state or Deputy Minister Consumer Affairs (Deputy Chair), Two MPs, two state ministers (by rotation), Consumer Affairs Secretary.</li> <li>▪ <b>Term:</b> Three years</li> </ul>

**Sources:** The Consumer Protection (Salary, allowances and conditions of service of President and Members of the State Commission and District Commission) Model Rules, 2019; The Consumer Protection (Qualification for appointment, method of recruitment, procedure of appointment, term of office, resignation and removal of the President and members of the State Commission and District Commission) Rules, 2019; The Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020; The Central Consumer Protection Authority (Selection and Term of Office of Chief Commissioner and other Commissioners) Rules, 2019; The Consumer Protection (Central Consumer Protection Council) Rules, 2019; The Consumer Protection Act, 2019; PRS.

## Provisions on e-commerce and direct selling

- **Act:** The central Government may make rules for preventing unfair trade practices in e-commerce and direct selling, and to protect the rights of consumers.
- **Draft Rules on E-commerce:** The Draft Rules define an “e-commerce entity” as an entity, in India or abroad, which conducts e-commerce business either through: (i) an inventory-based model, where the entity owns the inventory and sells it to consumer directly, or (ii) marketplace model, where entity acts as a technology platform facilitating transactions between buyers and sellers. The definition does not include entities which are specifically notified as such by the government for other purposes.
- **Conditions for carrying out business:** Every e-commerce entity intending to carry out business in India is required to comply with certain conditions within 90 days. These include: (i) the entity must be registered under Indian laws, (ii) the promoters or key management personnel of the company should not have been convicted of any crime punishable with imprisonment in the last five years.
- **Liabilities of an e-commerce entity:** These include the duty to: (i) not influence the prices of products and services, (ii) not adopt unfair methods to influence consumer decisions on products and decisions, (iii) display the terms of contract with a seller or service provider, (iv) take down listings of counterfeit products by sellers after conducting due diligence, (v) ensure that advertisements for marketing of goods and services are consistent with their actual characteristics and usage conditions, and (vi) specify healthcare and safety information of the goods and services listed for sale.
- **Liabilities of sellers:** These include: (i) having a written contract with the e-commerce entity to list or sell its products, (ii) providing mandatory safety and health care warnings and shelf life information, and (iii) bearing responsible for warranty or guarantee obligations of goods and services sold.
- **Consumer grievance redressal procedures:** Every e-commerce entity is required to: (i) provide a mechanism for users to submit their complaints on the website and publish the name and contact details of a grievance officer, and (ii) ensure redressal of the complaint within one month of receipt.
- **Draft Rules on Direct Selling:** The Draft Rules define a “direct selling entity” as one which sells goods through a direct seller. The definition does not include entities which are specifically notified as such by the government for other purposes. Direct sellers are persons who are appointed or authorized by a direct selling entity to undertake direct selling business. Direct selling business refers to any marketing, sale or distribution business as a part of a network of direct sellers, who operate at different levels of distribution, and who may recruit or sponsor further levels of direct sellers. The business is not carried out at a permanent location and does not include other multi-level subscriber schemes such as pyramid or other money circulation schemes.
- **Obligations of direct selling business:** Direct selling business is required to sign an agreement with direct sellers which: (a) does not force a direct seller to buy goods or services for an amount greater than they can recover from consumers, (b) allows for termination of contract in cases where the direct sellers has not sold any goods or services for up to two years, (c) provides repurchase or buyback guarantee to every direct seller at his request on reasonable terms, and (d) provide a cooling-off period for direct sellers to return any goods or services purchased by them, which will not be counted as a breach of contract.
- A direct selling entity cannot: (i) use unfair recruiting practices, including misrepresentation of actual or potential sales or earnings, (ii) make unverified representations or promises to direct sellers, (iii) require direct sellers to pay any minimum monthly subscription or renewal charges.
- **Obligations of direct sellers:** Direct sellers can only approach customers with prior appointment and must give them complete information about the products or service, its price, credit and payment terms, return policy, guarantee terms and after-sales services. The direct selling entity will be responsible for any grievances arising out the sale of products.

## Provisions on mediation

- **Act:** The Act also provides for mediation cells attached to the District, State and National Commissions. The Commissions may refer a matter for mediation if the parties consent to settle their dispute in this manner.
- **Rules:** The Draft Rules specify a list of matters which cannot be referred to mediation. These include: (i) medical negligence cases resulting grievous injury or death, (ii) cases involving serious fraud, or (iii) cases involving prosecution for criminal and non-compoundable offences (i.e. offences which cannot be settled).

## KEY ISSUES AND ANALYSIS

### Composition of National Commission and its selection body violate SC judgements

Consumer Protection Act: Clauses 29, 43 and 55

Draft Consumer Protection Rules on qualifications of members of state and district Commissions, 2019: Rules 3 and 4

Tribunal Rules, 2020: Rules 3, 4 and 9 read with Schedule

The Act sets up Consumer Disputes Redressal Commissions (consumer courts) at the district, state and national level, as quasi-judicial bodies for adjudication of consumer disputes. It also permits the central government to notify the method of appointment of the members of these consumer courts.

The Draft Rules specify the composition of the District and State Commissions and the method of appointment of the President and Members of these Commissions. The composition and method of selection of members of the National Commission is provided in the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020 (notified under the Finance Act, 2017).<sup>2</sup> Under the 2020 Rules, the President and Members of the National Commission will be appointed by a selection committee comprising: (i) the Chief Justice of India or any other Supreme Court judge; (ii) the President of the National Commission who must be a sitting or former Supreme Court judge or Chief Justice of the High Court; (iii) Secretary, Ministry of Consumer Affairs, Food and Public Distribution, and (iv) Secretary, Ministry of Commerce.<sup>2</sup> The Commission will have a mix of judicial and non-judicial (technical) members, with a term of up to four years.

The 2020 Tribunal Rules replace an earlier set of rules (in 2017) which were struck down by the Supreme Court in 2019.<sup>3</sup> The 2017 Rules changed the qualification, conditions of service and term of members of 26 tribunals, including the National Commission. The Supreme Court had examined various aspects of the Rules and noted that the 2017 Rules did not comply with previous Supreme Court decisions that stressed on securing judicial independence in the composition of the tribunal, in the selection committee appointing the tribunal members and in the security of their tenure. The composition of the National Commission, tenure of its members and the method of their appointments may violate the judgement of the Supreme Court. We discuss these below.

#### **The term of the President and Members of the National Commission may be too short**

The 2020 Rules state that the President and Members of the Commission will have a term of four years or till they reach 70 years of age (for the President) and 65 years of age (for other members), whichever is earlier. Under the 2017 Rules, members of the National Commission were to be appointed for three years. The Supreme Court struck this down and noted that a term of three years is too short, and by the time members cultivate adjudicatory knowledge, experience and efficiency, their term may be over. In doing so, it relied on an earlier judgement of the Court given in the context of the National Company Law Tribunal where the Court had recommended a term of five or seven years for the members of the Tribunal.<sup>4</sup> The four-year term specified in the 2020 Rules may contradict the judgement of the Supreme Court.

#### **Inclusion of technical members in the national, state and district commissions**

Under the Act, the National Commission is headed by a sitting or retired Supreme Court Judge or Chief Justice of a High Court and consists of a total of four to eleven members, who could be technical or judicial. One of the roles of the Commission is to hear appeals from orders of the State Commission on substantial questions of law. The composition of the Commission may contradict the principles used in a Supreme Court judgment regarding the composition of the National Tax Tribunal.<sup>5</sup> In that case, the Court questioned the competence of technical members, who may not have any knowledge or experience in the practice of law, in dealing with substantial questions of law. This case was re-affirmed by the Supreme Court while striking down the 2017 Tribunal Rules.<sup>3</sup>

The District and State Commissions also comprise technical members with expertise in certain areas such as economics, business, law, or public administration.<sup>6</sup> It is not clear if the resolution of a consumer dispute requires expertise of such technical members. The Supreme Court has held that technical members could be appointed to tribunals only if technical expertise is essential and not otherwise, to ensure the independence of tribunals.<sup>4</sup> For example, the Electricity Appellate Tribunal may require an electrical engineer as a technical member. However, note that similar provisions for technical members in the District and State Commissions existed in the Consumer Protection Act, 1986 (which this Act replaces).

#### **Executive involvement in appointment of Commissions**

Under the 2017 Tribunal Rules, members of the National Commission were to be appointed by a selection committee comprising four government nominees and one judicial member. While striking down the 2017 Rules, the Supreme Court had noted that appointments of members of the Tribunals are largely made by the nominees of the central government. The Court referred to its earlier judgements where it had stressed on the primacy of the

judiciary in deciding judicial appointments, to secure its independent functioning.<sup>3</sup> In one of these judgements, while examining the selection of members to the National Company Law Tribunal, the Court had directed for the constitution of a selection committee comprising two members each from the judiciary and the executive, with a judicial member as a Chairperson with a casting vote (in case of a deadlock).<sup>4</sup>

In the 2020 Rules, the selection committee for the National Commission comprises two judicial members and two government appointees. However, the Rules do not contain any provision on how a deadlock will be resolved. As it does not specify that the judicial member will have a casting vote in the case of a deadlock, this may violate the judgement of the Supreme Court.

### **Some issues with provisions of the Draft Rules on e-commerce**

Consumer Protection Act: Clause 94

The Draft Rules define e-commerce entities and outline the obligations of e-commerce entities and sellers in relation to sale of goods and services through such entities.<sup>7</sup> The Rules raise two issues. We discuss these below.

Draft Consumer Protection (e-Commerce) Rules, 2019: Rules 3, 4 and 5

#### **No distinction made between marketplace-model and inventory-model e-commerce entities**

The Draft Rules specify various obligations of e-commerce entities and sellers in relation to goods and services. E-commerce entities are defined to include inventory models (where the entity owns the inventory and sells it to consumer directly through its platform), marketplace models (where they only act as intermediaries for facilitating transactions between buyers and sellers) or a combination of the two. However, while specifying the obligations of e-commerce entities, the Rules do not make a distinction between the two models. As a result, it is unclear which obligations apply to marketplace models and which apply to inventory models.

For example, the Draft Rules state that e-commerce entities have the duty to not influence the prices (directly or indirectly) of products and services and to maintain a level playing field. These provisions prohibiting influencing of prices will not be relevant to an inventory model since in this model the e-commerce entity is also the seller of the product and must have the freedom to take decisions on pricing (for example, setting the price for its products). Again, the provisions on providing a level-playing field to all sellers will not apply to a pure inventory model where the e-commerce entity is the only seller on the platform.

#### **Certain obligations of e-commerce entities may be applicable to sellers of products and not to marketplaces**

The Draft Rules specify various obligations of e-commerce entities. These include the duty to not influence the prices (directly or indirectly) of goods and services, to display the terms of contract with a seller or service provider, and to take down listings of counterfeit products.

However, the Draft Rules also require e-commerce entities to ensure that advertisements for marketing of goods and services are consistent with their actual characteristics and usage conditions. It may be argued that these obligations should apply only to the seller of the product and to inventory models since the seller owns the product and is expected to provide details of the product including its characteristics and usage conditions while listing the item for sale on the platform. Pure marketplace models only provide a platform and do not control the quality of the product. Note that the Information Technology Act, 2000 (and its Rules) provide immunity for intermediaries from liability for hosting or transmitting third party information; this would cover e-commerce marketplaces such as an auction website.<sup>8</sup> This principle has been re-iterated by a judgement of the Delhi High Court.<sup>9</sup>

Also, note that under the Draft Rules, consumers have remedies against the e-commerce entity in cases where the delivered product does not conform to its description. If a product does not conform to the advertised product characteristics, the e-commerce entity is liable to accept return of goods and refund money within 14 days. Further, the 2019 Act allows the Central Consumer Protection Authority to impose penalties on the issuance of a false or misleading advertisement.

### **Disqualification of members of the regulator related to marriage**

Consumer Protection Act: Clause 94

The Act sets up the Central Consumer Protection Authority to promote, protect, and enforce the rights of consumers. The Authority will be headed by a Chief Commissioner and other Commissioners. The central government will decide the qualifications, method of appointment, term, and removal of the Chief Commissioners and Commissioners of the Authority by rules.

Draft CCPA (Selection and Term of Office of Chief Commissioner and other Commissioners) Rules, 2019: Rule 6

The Draft Rules provide certain grounds for disqualification from being appointed as a Commissioner.<sup>10</sup> These include disqualification if the person has: (i) married a person who has a spouse, or (ii) who having a spouse, married any other person. The Rules further states that the disqualification will not apply if the central government is satisfied that the marriage is permitted under the personal laws of the two parties involved *and* there are other

grounds for doing so. It is unclear why the grounds for disqualification of a Commissioner have been linked to the status of his marriage.

Further, it is also unclear why the central government must be satisfied of the 'grounds' for such marriage, even if it is found to be legal under personal laws. Note that similar grounds for disqualification do not apply to members of the Consumer Protection Councils (the advisory bodies) or the Consumer Commissions. For example, disqualification of members of the Consumer Commissions are limited to grounds such as conviction for offences involving moral turpitude or dismissal from government service.

### Lack of clarity in definitions in the Draft Rules and drafting issues

Consumer Protection Act: Clause 94

Draft Consumer Protection (e-Commerce) Rules, 2019: Rules 2, 3, and 6

Draft Direct Selling Rules, 2019: Rules 2 and 3

Draft CCPA (Selection and Term of Office of Chief Commissioner and other Commissioners) Rules, 2019: Rules 4, 9, 11 and 12

The Draft Rules specify various obligations of e-commerce entities and sellers of various goods and services. The Rules link the definition of the term 'goods' to the definition provided in the Sale of Goods Act, 1930. The 1930 Act defines 'goods' to mean any kind of movable property except actionable claims and money. A 'seller' refers to any person who sells such 'goods'. This definition differs from the definition of the term in the Consumer Protection Act, 2019 which define 'goods' to include any kind of movable property. It is not clear why the Draft Rules refer to a different definition of the term. Note that this difference in definition also exists in the direct selling rules.

Further, the Draft Rules on e-commerce and direct selling specify that every e-commerce entity or direct selling business which intends to carry out business in India is required to comply with certain conditions. One of these conditions requires that promoters or key management personnel of a company should not have been convicted of any crime punishable with imprisonment in the last five years. The Rules do not define as to who constitute "key management personnel". This may result in lack of clarity in the application of the rule. Note that under the Companies Act, 2013, the "key managerial personnel" of the company include its Chief Executive Officer, Chief Financial officer and other managing and whole-time directors.<sup>11</sup>

While specifying the grievance redressal mechanism, the Draft Rules on e-commerce also require e-commerce companies to provide a "mechanism/system to converge with NCH in grievance redressal process". However, the term 'NCH' is not defined anywhere in the Rules.

The Draft Rules on the Central Consumer Protection Authority also contain certain drafting errors. For example, Rule 12 of the Draft Rules refer to inquiries for misbehavior or incapacity by a Committee constituted Rule 9(2). However, Rule 9(2) contains provisions on vacancies and does not refer to an inquiry committee. Provisions for constitution of an inquiry committee are contained in Rule 11(2), in the context of removal of the Commissioners. Further, Rule 4(1) of the Draft Rules refer to the appointment of five central and five regional Commissioners to the Authority. However, the Act only refers to appointment of Commissioners of the Central Authority (who may be located in different regions) and does not provide for the appointment of "Regional Commissioners".

<sup>1</sup> The eight Draft Rules are: (i) the Consumer Protection (Salary, allowances and conditions of service of President and Members of the State Commission and District Commission) Model Rules, 2019, (ii) the Consumer Protection (Qualification for appointment, method of recruitment, procedure of appointment, term of office, resignation and removal of the President and members of the State Commission and District Commission) Rules, 2019, (iii) the Consumer Protection (Consumer Disputes Redressal Commissions) Rules, 2019, (iv) the Central Consumer Protection Authority (Selection and Term of Office of Chief Commissioner and other Commissioners) Rules, 2019, (v) the Consumer Protection (Central Consumer Protection Council) Rules, 2019, (vi) the Consumer Protection (e-Commerce) Rules, 2019, (vii) the Consumer Protection (Direct Selling) Rules, 2019, and (viii) the Consumer Protection (Mediation) Rules, 2019.

<sup>2</sup> The Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2020, [http://highcourt.cg.gov.in/drt/2020/endt\\_330\\_04032020.pdf](http://highcourt.cg.gov.in/drt/2020/endt_330_04032020.pdf).

<sup>3</sup> Rojer Mathew vs. South India Bank Ltd (2018)16SCC341.

<sup>4</sup> R. Gandhi v. Union of India, (2010) 11 SCC 1.

<sup>5</sup> Madras Bar Association v. Union of India, 2014 (10) SCC 1.

<sup>6</sup> The Consumer Protection (Qualification for appointment, method of recruitment, procedure of appointment, term of office, resignation and removal of the President and members of the State Commission and District Commission) Rules, 2019.

<sup>7</sup> The Consumer Protection (e-Commerce) Rules, 2019.

<sup>8</sup> Section 79 of The Information Technology Act, 2000, <https://www.indiacode.nic.in/bitstream/123456789/1999/3/A2000-21.pdf>.

<sup>9</sup> Amazon Seller Services Pvt Ltd and Ors vs. Amway India Enterprises Pvt Ltd and Ors 2020 (81) PTC 399 (Del).

<sup>10</sup> The Central Consumer Protection Authority (Selection and Term of Office of Chief Commissioner and other Commissioners) Rules, 2019.

<sup>11</sup> The Companies Act, 2013, <https://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf>.

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