

Imminent need for uniform laws for ecommerce in India

BY ET CONTRIBUTORS | JAN 28, 2020, 01.32 PM IST

By Aarushi Jain & Gowree Gokhale

A new policy is around the corner. The ideal way would be to have all digital businesses governed only by central law. But that may require Constitutional amendments. In the meantime, a mechanism should be envisaged to enable centre and states to make uniform pan-India policies for ecomm platforms, irrespective of the matter being a state subject.

70 years ago, the Constitution of India segregated the powers of the central government and the states, providing a list of subjects on which the centre, the states, and both the centre and states could make laws.

Matters of state importance, such as public health, tourism, trade, entertainment, amongst others, were kept within state government's jurisdiction. Thus, local businesses in the state followed the state laws to carry on their operations.

This segregation worked perfectly till the digital medium disrupted the brick and mortar world. In pre-ecommerce times, businesses complied with the laws of the State in which they were physically present, either directly or through their agents or distributors.

The advent of a platform economy has turned business models on their head. Sellers and buyers in different States are getting connected. These platforms are intermediaries who facilitate the sale and purchase of goods and services. They do not own the transacted goods or services themselves. Being intermediaries, such platforms are regulated by the Information Technology Act, which is a central law. However, there seems to be a growing trend where States are trying to impose compliances on these platforms.

One example is Karnataka, which has a legacy with app-based cab booking platforms. Karnataka enacted laws to regulate such platform and has, at times, even placed a ban on their operation, or declared some of their services illegal under local law.

Take another example. It pertains to the amendment to Tourism law in the State of Goa. Goa proposes to regulate online service providers a.k.a e-commerce platforms by mandating them to register in the state, make them responsible for quality standards, safety etc. Such state-wise compliances create hurdles in ease of doing business in India for these platforms. Operating in states which impose onerous obligations may result in loss of business interest by platforms in the relevant state, ultimately affecting state fiscal and consumers.

Another issue arises from conflicting court orders. At one point in time, the Madras High Court had banned the online sales of medicine through e-pharmacies altogether — a judgement that was later reversed.

In another case, the Delhi High Court prohibited online sales of medicines without a valid license. Whether or not the Delhi High Court order also operates in other States is not clear. In this case, the relevant law is the Drugs and Cosmetics Act, 1940, which is a central law but is applied differently by different State High Courts.

The next issue that arises is for businesses (not platforms) which are online but have to comply with state-specific laws. Skill gaming websites, for instance, are subjected to state-specific laws. To illustrate, though rummy has been declared as a game of skill, at present the same is prohibited in Telangana.

On the tax side, the recent constitutional amendment at the time of introduction of GST did not properly clarify one issue. When the local bodies were allowed to retain their ability to tax entertainment, it should have been clarified that the same should not apply to digital businesses as well. Some local bodies in Madhya Pradesh are seeking to impose entertainment tax on digital businesses, leading to administrative and implementation hassles.

The bottom line is that different state laws, and their varying interpretations and enforcements are creating confounding uncertainties for digital businesses.

A new-e-commerce policy is around the corner. Ease of doing business for e-commerce platforms should be at the fore of it. The ideal situation would be to have all digital businesses governed only by central law. But that may require Constitutional amendments. In the meantime, a mechanism should be envisaged in the policy to enable centre and state governments to formulate uniform policies across the country for e-commerce platforms, irrespective of the matter being a state subject. This will help in shaping the role of the government as a facilitator and give further boost to e-commerce in India.

Aarushi Jain is leader of the Education and Intellectual Property practice; and Gowree Gokhale is seasoned expert and leader of IP, Technology, Media and Entertainment laws at strategy and research based international law firm, Nishith Desai Associates.)