



Online E Commerce - An Aid Or A Disruption In The Free Market Economy – A Case Study Of Online Food Delivery Platforms In India vis a vis The Competition Act, 2002

Anuradha Jha

Assistant Professor , University School of Law & Legal Studies, GGSIPU, Delhi

Tanvi Sharma

PhD. Scholar , University School of Law & Legal Studies, GGSIPU, Delhi.

Abstract

Online business transactions have been an important tool in today's world. The Selling and purchasing of goods has also taken a paradigm shift in recent years with people selling and purchasing goods through online portals. It offers two things that the regular market could never provide i.e. (a) Convenience and (b) range to choose from. It also saves time as the buyer no longer need to go to the market and select something from a wide range, which would take more time and would be a more expensive practice. The paper attempts to study the issues concerning market competition and fair standards of trading in online food delivery Apps vis a vis the Competition Act ,2002. The core areas causing bargaining power imbalance and information asymmetry between e-commerce marketplace platforms and their business users have been discussed.

Key Words - Information asymmetry, platform neutrality, e-commerce, market fairness

INTRODUCTION

Online trading is both cost effective and a time saver. The market for online food delivery portals has seen a significant rise in countries all over the world including India. As per a report recently “with online food delivery and takeaway market predicted to raise at a Rate of 15.25 percent till 2021, and an increasing number of customers preferring to ‘order-in’ their food, it is not surprising that a number of restaurants and delivery services have jumped onto the Rat Race.”¹

As far as India is concerned, it is the fastest growing market for the e-commerce sector. Revenue from the sector is expected to increase from USD 39 billion in 2017 to USD 120 billion in 2020, growing at an annual rate of 51 percent, the highest in the world.² Consumers benefit from ecommerce for the convenience of accessing it anytime and from anywhere with internet access. The mobile phone subscriber base in India has increased from 904.51 million in March 2014³ to 1173.75 million in September 2019.⁴ The number of internet users has increased from 445.96 million in 2017 to 665.31 million in 2019 and is expected to increase to 829 million in 2021.⁵ Besides the growth in smart phone penetration and access to internet, the growth of e-commerce has been enabled through introduction of cash on delivery at a time when Indians were still adapting to digital payments. Discounts and deals offered by the marketplaces, faster deliveries including one-day delivery and access to a large product range, especially in tier II and tier III cities where choices were limited, revolutionized retail as well as service delivery.

E-commerce in India has attracted investors from across the world. Although funding in the e-commerce sector started in 2009, it gathered momentum in 2014 and maximum investment of around USD 3500 million took place in 2017 in 124 funding rounds. Since 2009, the e-commerce sector has received around USD 13,338 million in 904 funding rounds. Due to the increase in investments in the e-commerce sector, new companies started to enter the market since 2009. Maximum numbers of new e-commerce companies i.e. 1650 were formed in 2015. At present around 4757 e-commerce startups are active in India.⁶

E-commerce in the goods category in India has grown at a compound annual growth rate (CAGR) of 57% in last seven years, and is expected to grow by 18.6% till 2022.⁷ The online retail market in India is estimated to be worth USD 17.8 billion in terms of gross merchandise value (GMV)⁸ as of 2017.⁹ As of July 2018, the number of transactions in e-commerce retail was 1-1.2 million per day and on e-commerce platforms was 55-60 million

¹ 2. <https://lawrato.com/startup-legal-advice/what-are-the-legalrequirements-to-startup-food-delivery-business-13331>, last visited on 10.04.2020

² [Indian Ecommerce Industry Report](https://www.ibef.org/industry/ecommerce.aspx), IBEF, 2019. <https://www.ibef.org/industry/ecommerce.aspx>

³ Telecom Regulatory Authority of India - March 2014, Page 1. https://main.trai.gov.in/sites/default/files/PR-TSD-Mar-12_05_14.pdf

⁴ Telecom Regulatory Authority of India - September 2019, Page 1. https://main.trai.gov.in/sites/default/files/PR_No.118of2019_0.pdf

⁵ Indian Ecommerce Industry Report, IBEF 2019, Page 3. <https://www.ibef.org/download/E-Commerce-October-2019.pdf>

⁶ Data on year-on-year funding and number of start-ups till 31st Mar'19 sourced from Tracxn.

⁷ Economic Impact of Internet Services in India, Internet and Mobile Association of India (IAMAI), Page 6

⁸ GMV is the total value of merchandise sold through an online platform during a certain period of time.

⁹ Indian Ecommerce Industry Report, IBEF, October 2019, Page 9. <https://www.ibef.org/download/E-Commerce-October-2019.pdf>

per month.¹⁰ The growth engine has been smart phones, with only or primarily online retailers or e-tailers witnessing their sales mix shifting heavily into smart phone and electronics, supported by direct partnerships with brands.¹¹ As per a Working Paper of UNIDO, nearly half (45%) of the manufacturing output in India comes from the Micro Small & Medium Enterprises (MSMEs) and 43% of the MSMEs participate in online sales in India.¹²

The sales from online travel bookings in India is likely to reach USD 39.09 billion by 2021,¹³ growing at a CAGR of 16% between 2015 and 2021.¹⁴ In hotel booking, an increase has been witnessed across all star categories in reservations using online reservation systems and other websites, with the all-India average increasing from 10.3% in FY 13 to 24.5% in FY17.¹⁵

The food tech industry in India is estimated to grow at a CAGR of more than 12% between 2016 and 2021,¹⁶ driven by the growth in internet and smartphone penetration. As per National Restaurant Association of India (NRAI) report, during FY 16 to FY 19, the delivery marketplaces raised 90% of the total funding, while remaining proportion of total funding amount raised was equally split between cloud kitchen (35%) and other business models (21%) in the food tech industry.¹⁷ India's food tech expansion is no longer a metro phenomenon, as non-metro cities grew seven times faster (quarter on quarter) as compared to metro cities (80% growth vs 12%).¹⁸

Against this backdrop, it becomes important to study the issues concerning market competition and fair standards of trading. The present study attempts to highlight the issues concerning the online food delivery App's vis a vis the Competition Act, 2002 and the solutions thereof.

¹⁰ ibid

¹¹ "E-Tailing: Tumultuous platform-seller history but latest govt. norms could accelerate shift to a more stable relationship", Published on: Feb 2019. <https://redseer.com/newsletters/e-tailing-market-updates/>

¹² "National report on e-commerce development in India", Department of Policy, Research and Statistics, Working Paper 15/2017, 2017, United Nations Industrial Development Organization https://www.unido.org/sites/default/files/2017-10/WP_15_2017_.pdf

¹³ eMarketer Forecasts India's Digital Travel Sales <https://www.emarketer.com/Article/eMarketer-Forecasts-Indias-Digital-Travel-Sales-Will-Top-225-Billion-This-Year/1016257>

¹⁴ Online travel could make up 43% of total market by 2021", <https://www.livemint.com/Companies/8VgCJU0SGjdr125tgbbk6H/Online-travel-could-make-up-43-of-total-market-by-2021-Pra.html>

¹⁵ "Indian Hotel Industry – Review & Prospects", CARE Ratings Industry Research, January 7 2019, page 17. <http://www.careratings.com/upload/NewsFiles/Studies/Indian%20Hotels%20Industry%20Dec%202018.pdf>

¹⁶ TechSci Research report "India Foodtech Market By Operation Type, By Source of Order, By Payment Method, Competition Forecast and Opportunities, 2011 – 2021", April 2016. <https://www.techsciresearch.com/news/1002-india-foodtech-market-to-grow-at-12-cagr-till-2021.html>

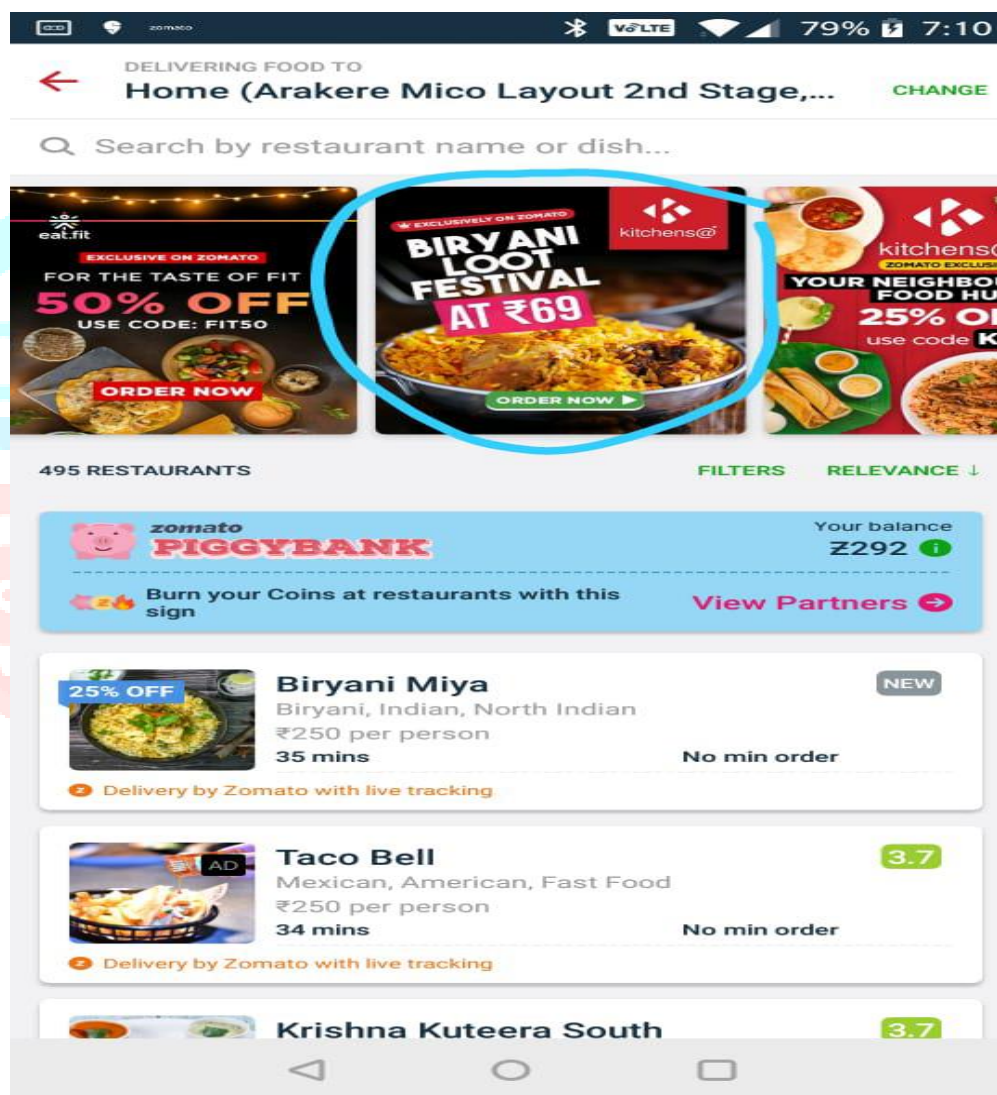
¹⁷ "NRAI India Food Services Report 2019", National Restaurant Association of India, 2019, page 179

¹⁸ "Quiet Revolution in India's Traditional Internet Sectors", Redseer Consulting Newsletter, as accessed on 23 September 2019.

In 2019, more than 500 small and mid-sized restaurants filed a Petition with the Competition Commission of India and the Prime Minister's office urging them to bring an end to the anti-competitive practices being adopted by online food aggregators.¹⁹

It was asserted in the Petition that Swiggy, Zomato, Uber Eats and Food Panda (all of them are online food delivery businesses) have been continuously found to misuse their dominant position with the aim to wipe out small and medium enterprises. The following allegations were raised in the Petition:-

- (A). Zomato:- They have been offering unsustainable discounts below the cost price to customers. This is to ensure that small restaurants and eateries suffer losses and shut down. An example of this as given below:-

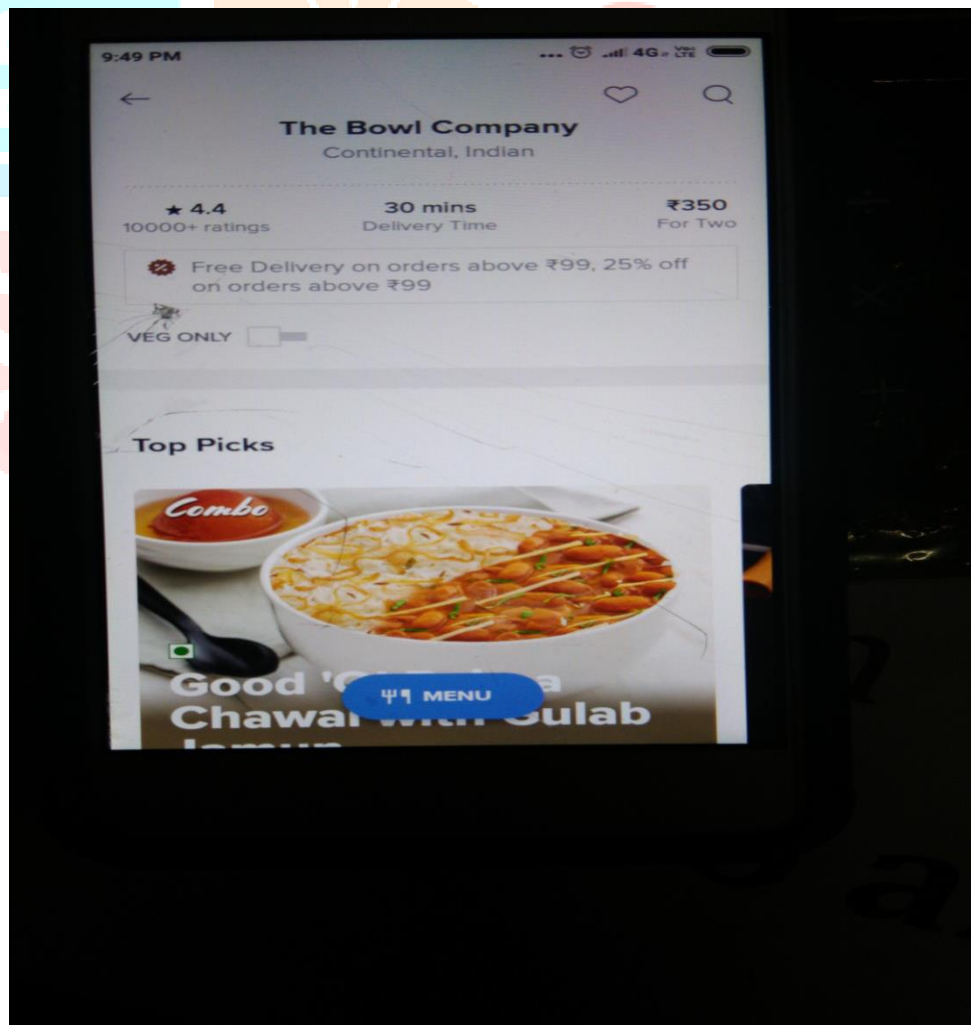


Secondly, they have started an in house company called Hyperpure. This company sells vegetables, chicken and other meat. Zomato forces the restaurants who want to list on the Zomato platform to purchase

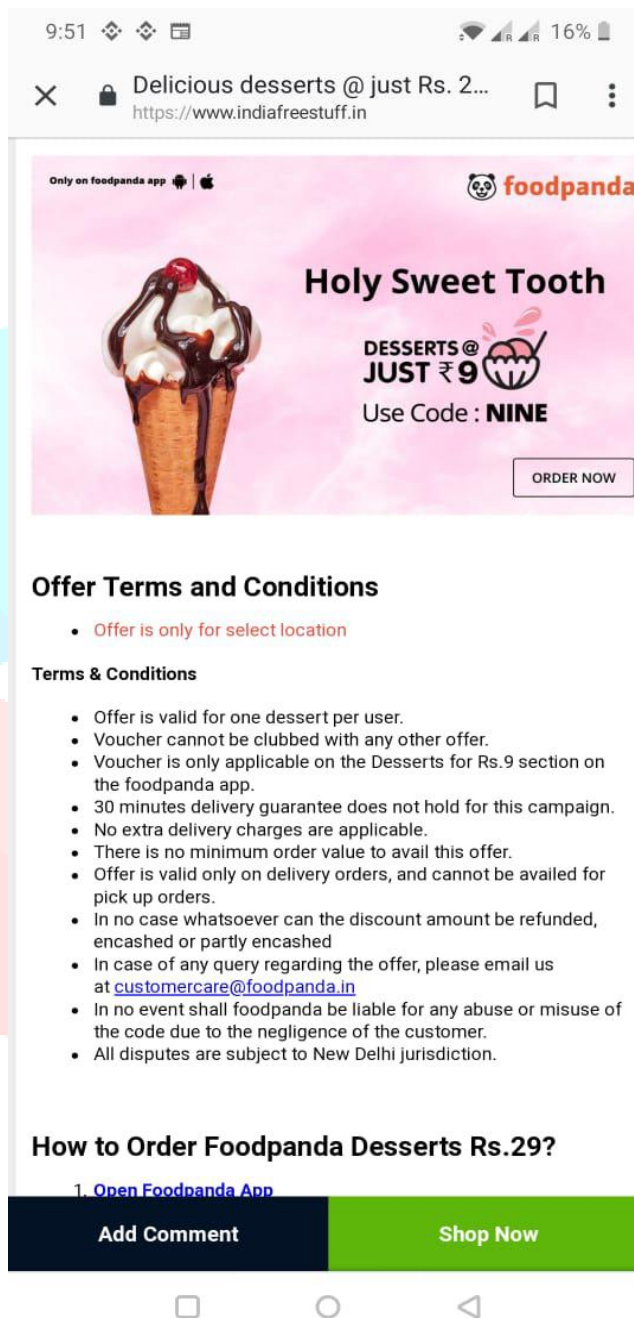
¹⁹ <http://tourismwings.com/2019/01/08/petition-filed-with-indias-competition-watchdog-cci-pmo-against-unethical-practices-of-these-food-delivery-platforms-zomato-swiggy-ubereats-foodpanda/> last accessed on 18.05.2020

raw vegetables, chicken and other meat from this company only. This is clearly in violation of the Competition Act.

- B. Swiggy: It has been alleged in the representation that they are unethically diverting customers to their own kitchen. Earlier, they started off with a food delivery platform. Now, they have started their own kitchen to monopolize the market. They use the customers visiting the platform for food delivery to their own kitchen. A normal client is required to pay huge tariffs to get their products listed on the platform. However the first advertisement which is shown to an end user on log in is Swiggys in house Kitchen - The Bowl Company. This amounts to misusing customer database who visit their platform to order food to their own kitchen, which in turn is detrimental to not only the interest of the entity (restaurant or kitchen) associated with Swiggy but also to many small scale and medium eateries and restaurants. There should be a clear law in India that there cannot be cross holding of a company which is into delivery of food services for clients to have a stake in any kitchen/restaurant. A screen shot of an advertisement of their own in house kitchen is as follows:-



C. Uber-Eats: Uber Eats too has been found to be offering unsustainable discounts on some deserts. Now, this unsustainable discount results in ousting of the small scale or medium scale eateries or restaurants because they cannot give unsustainable discounts, whereas the big MNC's who are funding these online food delivery app's can sustain these discounts for a long time, till the competition in the market is wiped out. Given below is an example of the unsustainable discount given by a Ubereats.



9:51 16%

Delicious desserts @ just Rs. 2...
https://www.indiafreestuff.in

Only on foodpanda app

foodpanda

Holy Sweet Tooth

DESSERTS @
JUST ₹9

Use Code : **NINE**

ORDER NOW

Offer Terms and Conditions

- Offer is only for select location

Terms & Conditions

- Offer is valid for one dessert per user.
- Voucher cannot be clubbed with any other offer.
- Voucher is only applicable on the Desserts for Rs.9 section on the foodpanda app.
- 30 minutes delivery guarantee does not hold for this campaign.
- No extra delivery charges are applicable.
- There is no minimum order value to avail this offer.
- Offer is valid only on delivery orders, and cannot be availed for pick up orders.
- In no case whatsoever can the discount amount be refunded, encashed or partly encashed
- In case of any query regarding the offer, please email us at customercare@foodpanda.in
- In no event shall foodpanda be liable for any abuse or misuse of the code due to the negligence of the customer.
- All disputes are subject to New Delhi jurisdiction.

How to Order Foodpanda Desserts Rs.29?

1. [Open Foodpanda App](#)

Add Comment Shop Now

The above-mentioned activities are hampering the competition in India, which also adversely impacts the nation's dream of Start Up India etc. The main idea behind all these anti-competitive practices is to bring in large amount of funding by their foreign contributors and to close down small and medium size restaurants.

LEGAL ISSUES CONCERNING COMPETITION

Given below are some of the legal issues concerning free competition in the market because of the entry of these online players:-

I. Platform neutrality

In the categories of goods and food services, there is an overwhelming concern regarding platform neutrality. In the goods space, the concern stemmed from the two broad issues of (a) platforms' own private label²⁰ products being in direct competition with other brands in the same product categories and (b) a set of platforms' 'preferred sellers' enjoying preferential treatment from the platforms. The market outcome on such platforms is allegedly being influenced or determined by the marketplace instead of it resulting from competition on the merits amongst the sellers/brands. In food services, the dual role played by platforms who own and list their cloud kitchen brands exclusively on the platform, akin to private labels, creates an inherent conflict of interest between the platform's role as intermediary on one hand and as a market participant on the platform on the other.

Thus, in essence, the issue that has come to the fore is that the online platforms, when they serve as **both a marketplace and a competitor** on that marketplace, have the incentive to leverage their control over the platform in favour of their own/preferred vendors or private label products to the disadvantage of other sellers/service providers on the platform. The platforms have a variety of mechanisms that they can use to act upon such incentive, including their access to transaction data and ranking of search results.

The intermediary role of the platform allows it to gather all such competitively relevant data as price, sold quantities, demand etc. pertaining inter alia to each product, seller and geography. On the consumers' side, this enables the platform to better target product recommendations for users and improve the quality of the platform. On the sellers' side, this may allow it to use such data to introduce its own private label or boost its own sale or that of its 'preferred sellers'. There have been specific instances of introduction of private labels by major goods marketplaces in top-selling niche product categories. In the food services segment, the issue of launching of own cloud kitchen brands in high demand food categories in hyper-local markets is a consequence of such cross-usage of data.

Sellers'/service providers' access to customers on platforms depends inter alia on the sellers' ranking on the platform's website in response to related search queries. Organic search ranking is generated by search algorithm of the platform and thus the platform is in control of the search parameters and results. The dual role of the platform gives rise to the concern of ranking biases that may be created by the platform as a discriminatory device. In the goods category, the platforms' private labels reportedly are typically showcased as bestsellers to customers,

²⁰ Private labels refer to brands owned by a platform, which are produced by a third-party manufacturer and are sold under the platform's brand name.

while in the food services segment the platforms' own cloud kitchens are given prominent placement. The study respondents were of the view that the 'black box' nature of the search algorithm constrained the customers' ability to identify the biases, thereby curbing the possibility of self-correction. Lack of transparency vis-à-vis the search ranking criteria was also raised as an issue generally which made a section of respondent service providers believe that the commissions paid by them influenced their search ranking and thus the so called organic listing on platforms also effectively amounted to paid listing.

User review/rating was identified by the platforms as a key input to search ranking determination. Lack of transparency and credibility issues around the user review and rating policy of some of these platforms is a factor that further allowed for search result manipulation, which in turn impacted their ability to compete effectively with the vertically integrated entities or the platforms' preferred entities.

In addition, there is a view that the commercial terms such as commission rates, penalties etc. for the platforms' own/preferred entities are different from what are offered to other sellers/service providers.

The food delivery marketplaces/aggregators having their own cloud kitchen brands on the other hand usually argue that cloud kitchens helped bridge the supply gaps that they were able to identify at both the levels of cuisines and geographies due to their unique position as a marketplace. Thus, cloud kitchens, both through partner restaurants and own private labels, aid in market expansion, according to them.

II. Platform-to-business Contract Terms

The other issue from the perspective of the business users of platforms have often raised, is the alleged exploitation of superior bargaining position by the platforms by way of imposition of 'unfair' contract terms. The platforms allegedly determine and revise the terms of engagement unilaterally, often causing harm to the business interest of the sellers/service providers. This has created an environment where the trust of businesses on platforms is undermined and they cannot expect to have a sustainable relationship with platforms.

Underlying the differences between the large platforms and their business users is the misalignment between their fundamental business objectives. These platforms focus on growth and on increasing the transaction volume/value generated on their platforms, which essentially drives their policies. Many such policies allegedly force the businesses to compromise on profitability and their brand equity. The business users often urge for the terms of engagement to be fair and equitable, which did not undermine their business goals. Businesses, especially in the service categories, also points out the rather disquieting trend of their decision-making power vis-à-vis key business variables de facto being shifted to the intermediary platforms.

The first issue of platform-business difference regarding their terms of engagement is one-sided contracts and unilateral revision of contract terms such as commission rates. It is surprising that there is no standard contract that is made available to all business users by a platform. The contracts are customised, which according to the

platforms is intended to address individual needs of the sellers/service providers who are not all similarly placed. The sellers/service providers however provide another argument by saying that that non-standard contracts did not mean the contracts were mutually negotiated, it only provided the platforms the scope for imposing any term and condition that suited their interest. According to them, there is a wide range of commission rates that sellers/service providers pay to the platforms, and the rates are increased arbitrarily by platforms without any negotiation.

The second issue is with respect to exploitative/unfair terms in contracts, which suited the interest of the platforms but undermined the business model of the service providers – such as deep discounting and bundling of services. The deep discounting practice followed by the major platforms seems to be the main grievance of the service providers with the online platforms. In online food ordering & delivery and online hotel booking, the discount schemes and the extent of discounts to be offered to customers are unilaterally decided by the large platforms, according to the hotels and restaurants. The platforms have often stated that their hotel/restaurant partners participate in the discount schemes only if they so desire. However, the partners stated that non-participation affected their visibility on the platform through lower search ranking thereby affecting their customer access and ability to compete effectively. They further argue that while initially these discounts were funded entirely by the platform, over the years the burden of funding discounts has been gradually shifting on to the hotels/restaurants. The restaurants usually perceive that search ranking on platforms is a function of discounts funded by a restaurant and participation in customer deals. Deep discounts are offered to drive consumer traffic on to the platform and is thus a major parameter of competition between platforms on the consumer side. However, this practice of unilateral discounting was allegedly undermining the market position of the service providers, i.e. the hotels and restaurants, by eroding their profitability and devaluing their products in the eyes of consumers. In the goods category, sellers were compelled to participate in discounts/deals often at unviable rates; as non-participation would result in low visibility.

The other contract term that the business users in the food service segment found to be an unfair imposition by the large platforms was the mandatory bundling of delivery service with listing service. This required the restaurants who wanted to list on a platform to also mandatorily register for the platform's delivery services. This choice, according to the restaurants, should be left with individual restaurants. The concern usually raised by the restaurants is threefold. Firstly, availing the platform's delivery services may drive up cost of doing business. Restaurants who have their own delivery fleet claims that they could provide this service to the consumers at a much lower cost. Secondly, when the platforms fulfill deliveries, they are in a position to influence competition between restaurants by denying/delaying delivery from some restaurants to customers, depending on the other terms of engagement between the platform and the restaurant. Thirdly, the restaurant partners were left with little insight into the orders generated via the platforms, which relates to the 'data masking' issue discussed below.

As per the restaurateurs, critical customer information is not shared by platforms with restaurants, while the same is mined for launching and promoting the platforms' own cloud kitchens. Data is critical to the hospitality industry and is not new for restaurants as they were maintaining customer data in analogue format based on customer feedback systems even before the advent of the technology platforms. Customer data does not only help restaurants understand customer profile and see what profile actually fits in the restaurant or in a delivery kitchen context but also gives the opportunity to the restaurant to get a direct feedback from the customer on the food delivered. This assumes particular importance when the food is not delivered by the restaurants directly to their customers but is done through an intermediary platform. Platforms are of the view that the data that was necessary for improving the restaurant partners' performance was being shared with them. However, restaurants states that the data shared by platforms is not customer-wise data but an aggregate picture of their periodic performance in terms of customer review and rating, which itself has its pitfalls and is susceptible to manipulation, according to the restaurants. If misuse of data or breach of privacy is the concern, the restaurants usually emphasize that the same would apply to both restaurants and the platforms and, thus, the platforms cannot keep away the customer data from the restaurants on the pretext of privacy. Customer details are an important brick in the entire system and only the intermediary cannot have the right to hold it. Thus, 'data masking' by large food delivery market places/aggregators has often been cited as an unfair imposition on the restaurants.

III. Platform Price Parity Clause

A platform price parity clause restricts sellers/service providers from offering their goods or services at lower prices on other platforms. It is contractually imposed by a platform on the sellers/service providers to guarantee the lowest price for the platform itself. Platform price parity clauses are called 'wide' if they apply to price offered on all other platforms, including the seller's/service provider's own website and are considered 'narrow' if they prevent the seller/service provider from setting a lower price on its own website, while imposing no condition vis-à-vis prices on other platforms. Online platforms in the service categories, i.e. online travel agencies and online food ordering & delivery platforms operating in India, typically include 'wide' parity provisions in their contracts with hotels and restaurants respectively. The rationale put forth by some platforms for stipulating such a clause is to ensure competitive price for consumers on their platform.

IV. Exclusive Agreements

Most sellers and service providers use multiple intermediary platforms to access online customers. The platforms also typically list an array of competing products and sellers on the platform in order to provide consumers with

the ability to search and compare across a broad range of offerings. However, the stakeholders also reported instances of exclusive agreements between brands/service providers and online platforms. Such agreements are of two kinds – (a) agreements under which a certain product offering is launched exclusively on a single online platform and (b) agreements which make a platform list only one brand in a certain product category.

As per the retailers, smartphone brands are launching their newest products exclusively on one of the two major goods' market place platforms, through the 'preferred sellers' of the platform concerned. These 'preferred sellers' operate exclusively on a platform and do not multi-home. Thus, during the initial period after launch, these products are available exclusively on a single online platform and are made available to the offline/brick and mortar retailers later.

In the food service category, instances of exclusive agreements between platforms and restaurants have been observed, under which restaurants commit to be listed exclusively on a platform. Restaurants enter into these agreements when exclusivity is incentivised by platforms by way of offering better terms of engagement, such as lower commission/service fee charged and business assurance.

In the accommodation service category, reportedly, a hotel chain in a particular category was listed exclusively on a major OTA and its rival chains were allegedly delisted from the platform.

V. Deep discounts

The major online platforms in India, while providing the technology infrastructure to connect sellers/service providers with buyers, may also be engaged in pricing by way of funding price discounts for the products listed on the platform. Many platforms, which operate as pure marketplaces without having their own inventory, do also offer discounts over and above the price set by the seller/service provider. This is purportedly aimed at customer acquisition and is pursued by the platforms as part of their growth strategy. The discounting practices of large online platforms have emerged as a major point of contention in the study.

Usually sellers/service providers are of the view that discounts offered by market places differ across sellers/service providers. The differential discounting structure, according to them, affects competition and the playing field on the platform. Owing to lack of transparency about what constitutes the basis for the extent of discounts available to a particular seller/service provider on a particular product, there is an apprehension amongst sellers/service providers that platforms use discounts as a discriminatory device. For instance, the exclusive partners were believed to be receiving higher discounts on their products. In the case of vertically integrated platforms, the studies have often revealed a wide spread perception amongst sellers/service providers that platforms' own products/ related entities benefitted from higher discounts, which in conjunction with assured visibility meant higher consumer traffic and better competitive market position for these products/players.

Secondly, in the service categories, when intermediary platforms offer discounts over and above the price set by the service provider, the service provider loses control over the final price that is offered to the customer. The final discounted price on online platforms has obvious influence on consumer expectation with respect to price of the same product available through other channels, for instance in case of walk-in bookings in hotels or in case of dine-in in restaurants. The extent of discount offered on the platforms is reportedly such that the service providers are not able to profitably match the same in the other modes of booking. This, according to them, creates an artificial price-distortion and drives consumers increasingly to online platforms, which in turn leads to higher dependence of service providers on these intermediary platforms. Further, the platforms, which are playing a pure matchmaking role without offering discounts, are not able to attract consumers at a scale that would allow the business users to consider them as comparable alternatives.

According to the service providers, the deep discounts upend the business model of the service providers who lose agency and the ability to protect their brand equity. Deep discounts, according to them, can lead to permanent value erosion of their products and undermine their market position.

Even when the service providers are funding the discounts, for instance in the food service category, it is the platform that reportedly decides the discount scheme and structure. These days, businesses individually have no say over the design of the discount schemes or the platform-business split on discounts. Given their dependence on platforms, businesses agree to such schemes and fear an adverse effect on their visibility otherwise. **The deep discounting practice of platforms, according to majority of small and mid-segment restaurants and hotels, is raising serious viability concern.**

ANALYSIS AND OBSERVATION ON THE ISSUES:-

I. Platform neutrality

The concern regarding platform neutrality emanates from situations where the online platforms serve as both a marketplace and a competitor on that marketplace. Platforms essentially vertically integrate when they operate in the products traded on it, which may be through manufacturing/selling of private labels or by having direct or indirect interest in retail or through operating their own cloud kitchen brands. Such vertical integration may create an incentive to improve the platform's own/related entity's market position relative to its competitors by engaging in preferential treatment on the platform.

Whether leveraging through preferential treatment of the platform's own or related entities would be a profitable business strategy for the platform and the effect that such a strategy is likely to have on competition **would depend inter alia on the nature of the market that the platform operates in, market power of the platform, i.e. the competitive constraints the platform faces, and any pro-competitive rationale justifying such conduct.** The issue of preferential treatment by platforms to its own products or to its own/related entities, including factual

establishment of the same and its effect on competition, is thus a matter of case-by-case determination by the Commission.

Notwithstanding the above, the lack of transparency in the platforms functioning and practices can on the one hand allow for possible distortion of competition on the platforms and on the other hand, consumer choice may not reflect consumer preference with perfect information. The three elements, which are susceptible to manipulation/exploitation by platforms, are search results, sellers'/service providers' data and user review/rating mechanisms. Without a formal determination of violation of the provisions of the Act, improving transparency in these areas can reduce information asymmetry, which in turn can positively influence competition not only on the platform but also between platforms. Making more information available on the search ranking criteria, collection, use and sharing of data, and review and rating mechanisms will thus help address the concern of the business users of platforms to some extent.

Understandably, there are limits to the amount of information that can be made explicit and it is also acknowledged that sharing of certain information may entail the risk of providing businesses the opportunity to game the systems. However, that should not constrain the platforms to strike an appropriate balance between minimising this risk and addressing the issue of opacity while putting in place a framework that ensures adequate transparency.

II. Platform-to-business Contract Terms

Online marketplace platforms create significant market opportunities and offer great potential for businesses to widen their market access. This also leads to a growing dependence of businesses on these platforms. A fragmented supply side and only a few major intermediary platforms create a situation of asymmetry of bargaining power. It is often found that this bargaining power imbalance and information asymmetry between platforms and their business users may be prejudicial to the interest of business users. Moreover, the possibility of multi-homing by businesses does not appear to act as a competitive constraint since all major platforms have similar practices on the sellers'/service providers' side of the marketplaces, which affect the businesses in similar manner. **The issues of unilateral revision in contract terms and imposition of 'unfair' contract terms by the major platforms have led to growing unease and tension in platform-business relations. Such an environment of conflict and mistrust may not be conducive for realizing the full potential of digital commerce, which promises myriad benefits to consumers, businesses and the economy.**

To foster trust and a sustainable relationship with the business users of the platforms, the platforms may devise ways to govern, inter alia, the following aspects to protect the interests of all contracting parties –i) negotiating framework for basic contract terms ii) discount policy iii) penalties and iv) conflict resolution.

Imposition of unfair condition or price in sale or purchase of goods and services by dominant enterprises is prohibited under section 4²¹ of the Act. Thus, the Competition Commission can intervene, on a case-by-case basis, in matters where unfair conditions or price is imposed through contractual provisions, by an enterprise that is dominant in the relevant market. Further, terms in a contract may directly or indirectly lead to exclusionary effect on competition while also being exploitative/ unfair to the business users. In such cases, the Commission can also examine these contracts under section 3(4)²² of the Act.

III. Platform Parity Clauses

²¹ 4. Abuse of dominant position.—

(1) No enterprise shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or services; or

(ii) price in purchase or sale (including predatory price) of goods or service; or Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market. Explanation.—For the purposes of this section, the expression—

(a) “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour;

(b) “predatory price” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

²² 3. Anti-competitive agreements.—

(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services. Explanation.—For the purposes of this sub-section, “bid rigging” means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

A review of the antitrust literature on price parity clauses shows that these restrictions can give rise to competition concerns. Firstly, existing platforms, in the presence of parity clauses, may not have sufficient incentive to compete on commission rates. Secondly, a new platform could charge lower commissions to service providers that offered a discounted rate, in order to gain a foothold in a concentrated oligopolistic market where incumbent platforms enjoy scale economies and network effects. Platform parity clauses imposed by incumbent platforms may serve as a barrier to entry by such low-cost platforms. Thirdly, these clauses can also help cement coordination or tacit understanding that may exist between platforms, by disincentivising deviation from a consensus rate of commission. Thus, platform parity clauses can potentially lead to higher commission rates and discourage entry.

Parity clauses can also generate efficiencies in certain circumstances and be justified on the ground that they protect investment incentives by preventing free riding. Platforms invest in making their web pages user-friendly and in improving search and comparison functionalities. Absent a price parity restriction, a service provider may take the advantage of these features of a superior quality platform to draw customer attention to its product and then sell the product through its website or another platform at a lower price. This may lead to consumers searching and comparing on qualitatively superior platforms and making the transaction on another platform or on the service providers' own website where they are charged the lowest price. If a large number of service providers and consumers behave in this fashion, the platform may factor in the same and lose incentive to invest in superior features. Thus, in absence of price parity restriction, competition on non-price parameters may be harmed in certain circumstances.

The competitive harms and efficiencies resulting from platform price parity clauses may vary across markets. It is a fact-specific question whether a price parity clause may be justified as pro competitive in any market and under what circumstances. The analysis of price parity clauses will inter alia take into account how plausible the free riding concern is, and to what extent it would affect the investment incentive for platforms to outweigh the direct loss to price competition caused by a price parity restriction.

As per the scheme of the Competition Act, platform parity clauses can be examined by the Commission under section 3(4) of the Act, in a rule of reason framework. The factors enumerated in section 19(3) of the Act allow the Commission to assess both harm to competition emanating from platform price parity clauses and any pro-competitive rationale that may justify the same. If the platform imposing the parity restriction is found to be an enterprise dominant in a relevant market, the conduct can be examined under section 4 of the Act.

IV. Exclusive Agreements

97. Exclusive agreements are not per se anti-competitive. However, they raise potential competition concern when used as an exclusionary tactic to foreclose competition to rivals or to impede entry. Such concern would be

pronounced when there is insufficient competition in either the platforms' market or the market where sellers/service providers compete. A platform with market power, by forging exclusive contracts, may be able to prevent the market from being more competitive. Thus, the benefits accruing from competitive markets such as lower prices, better products or more choices may be lost. Exclusive agreements may make rival platforms incur significant additional cost to induce the brands/service providers to give up the exclusive contract with the major platform. Listing of only a single brand/service provider in a given product category on a major platform can make it difficult for rival brands/service providers to get their products before the consumers. On the other hand, exclusive agreements can also generate efficiencies and improve competition among the brands of different manufacturers or service providers.

Exclusive agreements will therefore have to be analysed and assessed on a case-by-case basis. The Commission can examine exclusive agreements under section 3(4) of the Act in a rule of reason framework. When one of the contracting parties is a dominant enterprise, exclusive agreement can also be examined under section 4 of the Act.

V. Deep Discounts

Discounts lead to lower prices and can reflect cost savings arising from a variety of sources. Further, digital platforms are commonly known to pursue a growth-over-profit strategy of subsidising users resorting to low pricing strategies. Discounts offered by the platforms in the early years are typically seen as a means to establish network effects for user on-boarding. However, discounts can harm competition when used as an exclusionary device by enterprises with market power.

The usual concern raised by sellers/service providers with respect to discounts offered on/by marketplace platforms is threefold - i) discounts are discriminatory ii) discounts imposed by platforms in exercise of their superior bargaining power adversely affects the business models of the service providers iii) discounts push prices to below-cost levels in certain product categories and impair the offline small retailers' ability to compete.

An assessment of discounts for antitrust purposes typically involves evaluation of market power of the enterprise offering the discounts, the nature of the discounts, the intent/rationale behind the same and effect on competition.

The issue of discounts being purportedly used in a discriminatory manner by platforms may be assessed from the perspective of whether higher discounts are offered as an incentive to forge exclusive contracts and to curb multi-homing by service providers. The Commission, under section 3(4) of the Act, can evaluate such vertical agreements in a rule of reason framework to assess whether the disparity in discounts offered is used as a mechanism to induce exclusivity and whether the same leads to appreciable adverse effect on competition. In case a platform is dominant in a particular relevant market, the issue of discriminatory discounts can be examined under section 4(2) of the Act.

In the service categories studied, discounts are offered by even the pure intermediary platforms following marketplace model with no control over the inventory sold through them. As mentioned earlier, discounts are purportedly funded by platforms for consumer on-boarding. It is causing the service providers, i.e. hotels and restaurants to lose control over the price of their products sold/distributed through online platforms, which also affects price and sales through other channels. Discounting is a common business strategy but where the design of the discounting schemes is misaligned with the rational business practices of the service providers, the use of such discounts as a competitive strategy comes into question.

The issue can be examined by the Commission under section 4(2) of the Act, which prohibits imposition of unfair condition by dominant enterprises. Thus, under this provision, the Commission can examine the conduct of a dominant platform.

However, given that multiple major platforms in the same markets are stated to be engaged in this practice, what seems to lie at the core of this issue is an imbalance of bargaining power between platforms and businesses. Thus, the aspect of discounts as an unfair imposition, particularly in the context of accommodation and food services categories, may be amenable to be addressed through a fair and transparent contractual framework.

In the goods category, the issue is relating to online discounts on major goods platforms purportedly pushing the prices below cost and impairing the offline small retailers' ability to compete in certain product categories. It is a fact that the 'preferred sellers' appear to be operating exclusively on either of the two major platforms. Being the most successful and principal seller (in terms of sales) on a major marketplace platform would suggest that the same seller should be able to replicate the commercial success on a rival marketplace platform. However, that does not seem to be the case. While being an exclusive seller on a platform is not anti-competitive in itself, it is perplexing as to the nature of trade-off derived by such seller by limiting itself to a single marketplace platform. Unfair pricing contravenes the competition law under Section 4(2) of the Act when indulged in by a dominant enterprise. Nonetheless, the issue of discounts in the goods category may also be examined as part of exclusive/preferential agreements under Section 3(4) of the Act on a case by case basis.

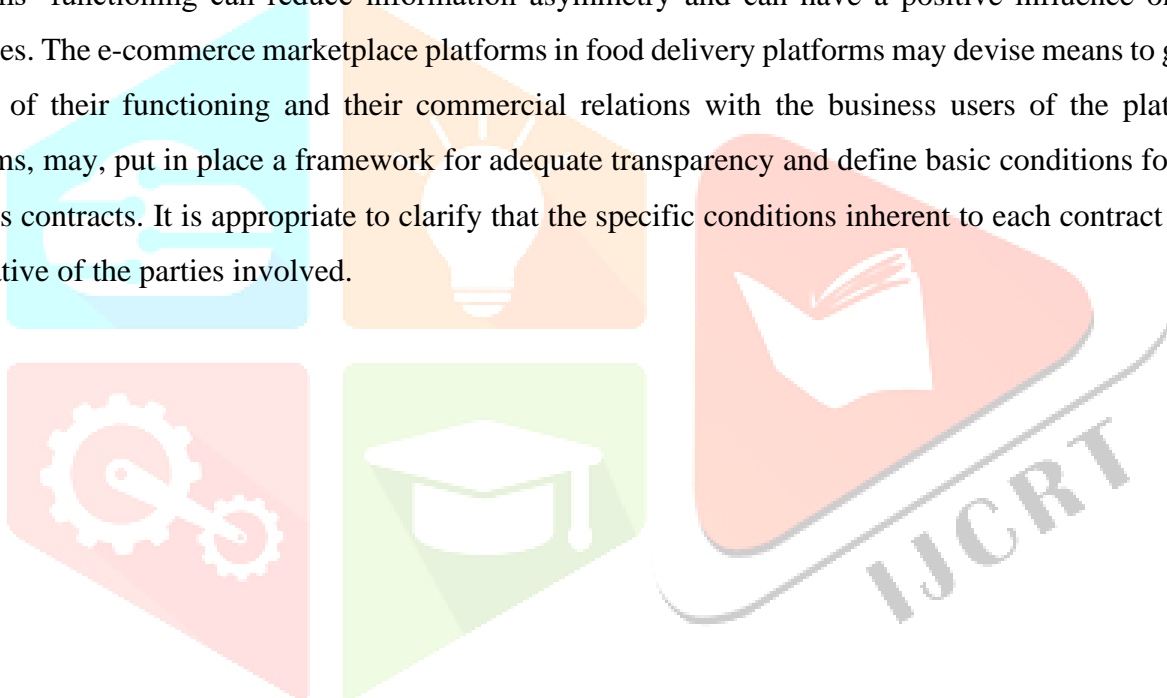
It is pertinent to mention that the study could not identify sources of cost savings that may fully explain the deep discounts. Discounts benefit consumers in the form of lower prices, and can help platforms create network. However, if the same is not a reflection of efficiency gains or cost savings and at the same time it creates distortionary effects on the supply side of the markets, the central question that arises is whether price competition of this form can be seen as competition on the merits.

The emphasis of consumer welfare standard is on efficiency-based competition on the merits. It is in this light that the discounting practices have to be seen. We have to recognize the role of introductory offers that are offered by a new entrant to overcome the incumbency advantage. For e-commerce platforms network externalities may need to be stimulated in the early stages of business development such that scale and demand efficiencies can be

promoted. Thus, for getting consumers to adopt the technology and for producers to shift to the distribution channel, discounts act as an incentive on the consumer side of the market. In so much as the continuation of discounts beyond a certain period is on account of the efficiency gains of an online channel, the consumer welfare standard does not frown upon such discounts. It is, however, not clear that these discounts are efficiency-based competition on the merits; and whether or not they are diminishing the competitive efficacy of the sellers/service providers.

CONCLUSION AND RECOMMENDATIONS

On the basis of the above-mentioned discussion it is quite evident that bargaining power imbalance and information asymmetry between e-commerce marketplace platforms and their business users are at the core of many issues that have come up in the discussion. Thus, improving transparency over certain areas of the platforms' functioning can reduce information asymmetry and can have a positive influence on competition outcomes. The e-commerce marketplace platforms in food delivery platforms may devise means to govern certain aspects of their functioning and their commercial relations with the business users of the platforms. These platforms, may, put in place a framework for adequate transparency and define basic conditions for platform-to-business contracts. It is appropriate to clarify that the specific conditions inherent to each contract should be the prerogative of the parties involved.



Given below are some of the self regulatory methods or the regulations that can be brought in by the relevant authorities:-

(A). Search ranking

- i) Set out in the platforms' terms and conditions a general description of the main search ranking parameters, drafted in plain and intelligible language and keep that description up to date.
- ii) Where the main parameters include the possibility to influence ranking against any direct or indirect remuneration paid by business users, set out a description of those possibilities and of the effects of such remuneration on ranking.

- iii) Introduction of the above-mentioned features, however, should not entail, disclosure of algorithms or any such information that may enable or facilitate manipulation of search results by third parties.

(B). Collection, use and sharing of data

- i) Set out a clear and transparent policy on data that is collected on the platform, the use of such data by the platform and also the potential and actual sharing of such data with third parties or related entities.

(C). User review and rating mechanism

- i) Adequate transparency over user review and rating mechanisms is necessary for ensuring information symmetry, which is a prerequisite for fair competition. Adequate transparency to be maintained in publishing and sharing user reviews and ratings with the business users. Reviews for only verified purchases to be published and mechanisms to be devised to prevent fraudulent reviews/ratings.²³

(D). Revision in contract terms

- i) Notify the business users concerned of any proposed changes in terms and conditions. The proposed changes not to be implemented before the expiry of a notice period, which is reasonable and proportionate to the nature and extent of the envisaged changes and to their consequences for the business user concerned.

(E). Discount policy

- i) Bring out clear and transparent policies on discounts, including inter alia the basis of discount rates funded by platforms for different products/suppliers and the implications of participation/non-participation in discount schemes.

Apart from the above-mentioned methods for self regulations, the relevant authority may make the following regulations for keeping a healthy market competition in the online food delivery market:-

²³ The Draft National E-commerce Policy, Department for Promotion of Industry and Internal Trade, Ministry of Commerce & Industry, Government of India, in Page 23, Para nos. 3.21 and 3.22, stipulates the requirement of authentic ratings and reviews https://dipp.gov.in/sites/default/files/DraftNational_e-commerce_Policy_23February2019.pdf

- (1). Make regulations to put an end to these unsustainable pricing of products by these so called MNC's.
- (2). Make regulations to ban or control any cross holding between one provider and another in the same supply chain. For example, swiggy is offering food delivery to restaurants, and at the same time having its own kitchen. Zomato on the other hand is offering food delivery to restaurants and forcing restaurants to purchase raw items from their own sister concern.
- (3). Appoint a food regulator in every province by the concerned ministry to ensure that the level playing field is never breached in the garb of cut throat competition.

