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LEGAL AND TAXATION ISSUES CONCERNING E-COMMERCE

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ABSTRACT

The Internet has evolved from a network of computers to a global social phenomenon. Once a medium that offered access only to a few, the smartphone and mobile network revolution has thrown it open to a much wider and more varied audience. In the process it is transforming itself from a place where people exchange information to a place where people conduct business as well. The convenience provided by online business transactions – e-commerce – is the reason why more and more users are turning to the Internet for their buying and selling. This is not only changing the face of retailing and rewriting the rules of the game but also throwing up new challenges to the legal, policy-making and taxation fraternity at a pace that they are ill-equipped to deal with. This paper presents some of the major conceptual characteristics of e-commerce and the legal and taxation challenges that arise therefrom. It then suggests the approach that could be adopted for tackling these legal and taxation issues.

“If your business is not on the Internet, then your business will be out of business”

Bill Gates

Founder of Microsoft Corporation

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From its humble beginnings as a network connecting computer networks (a network of networks, hence *Inter-Net*), the Internet has changed beyond recognition, and if there is one company that arguably has contributed most to the transformation of the Internet, it is surely Google. Therefore it would be apt to use the words of Google's former CEO and now Executive Chairman Eric Schmidt to describe the modern Internet. In his book "The New Digital Age" co-authored with Jared Cohen, Director of Google Idea, he states that the Internet has transformed from a means of "electronic information transmission" to

*"... an omnipresent and endlessly multifaceted outlet for human energy and expression. It is at once intangible and in a constant state of mutation, growing larger and more complex with each passing second. It is a source for tremendous good and potentially dreadful evil, and we're only just beginning to witness its impact on the world stage"*²

More interestingly, from the legal point of view they go on to say:

*"The Internet is the largest experiment involving anarchy in history. Hundreds of millions of people are, each minute, creating and consuming an untold amount of digital content in an online world that is not truly bound by terrestrial laws. The Internet [is] the world's largest ungoverned space"*³

The "ungoverned space" aspect of Internet has gained a lot of importance in legal circles due to its implications on jurisdiction, applicability of laws of different countries and law enforcement. Indeed in the early days after the Internet was thrown open to private commercial use by the United States government, many commentators and academics pronounced that it would be beyond the reach of the legal system of any nation, a "wild west" which would evolve its own laws and norms.

2 Schmidt, Eric & Cohen, Jared. (2013). *The New Digital Age: Reshaping the Future of People, Nations and Business*. John Murray (Publishers), UK.

3 *Ibid.*

For a medium that is so closely intertwined with society, it is but natural that the Internet should also be used for conducting business, i.e. e-commerce. Since business involves not only a legal mechanism but taxation as well, it is of great interest to policy makers. However, business is a fairly complex entity as it is, and when it is conducted in an environment described as the “world’s largest ungoverned space”, the complexity is even greater. For authorities in India that are just about coming to grips with the complexities of governing the Internet, this added complexity of regulating e-commerce is aggravating an already tough challenge.

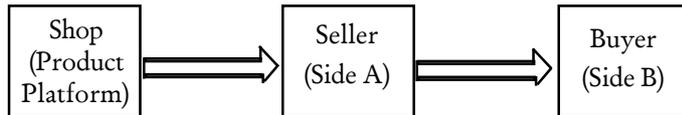
The common perception of e-commerce is that it is in an online shop similar to the shops we are familiar with in real space. However it is much more than that, and therefore it is appropriate to lay out the basic concepts of the technology involved. In this paper the author lists out the different e-commerce models and their characteristics and then discusses the legal and taxation issues that arise.

PLATFORMS

For business transactions to take place on the Internet, an enabling technology solution has to be in place. This is provided by the “platform”. A platform is a product, service or system providing a technological environment that allows different types of users and complementary business partners to interact and benefit from the platform’s underlying functionality. The business partners are called **complementors**.

In the past, companies typically engaged in producing and selling products or services. But with the advent of the Internet and cloud computing, more and more companies are implementing application ideas that allow communities of participants to interact and transact business. Well-known examples are Facebook, Skype, Google Maps and PayPal, while newer ones like Uber (which connects customers with individual taxi operators), Airbnb (which connects accommodation seekers with people who wish to let out rooms) are mushrooming every day. Not surprisingly, some of them are facing legal scrutiny. To better understand this phenomenon let us examine different types of platforms that operate in real space and cyberspace:

In the real world shops provide a facility for customer to purchase goods as depicted in the following figure:

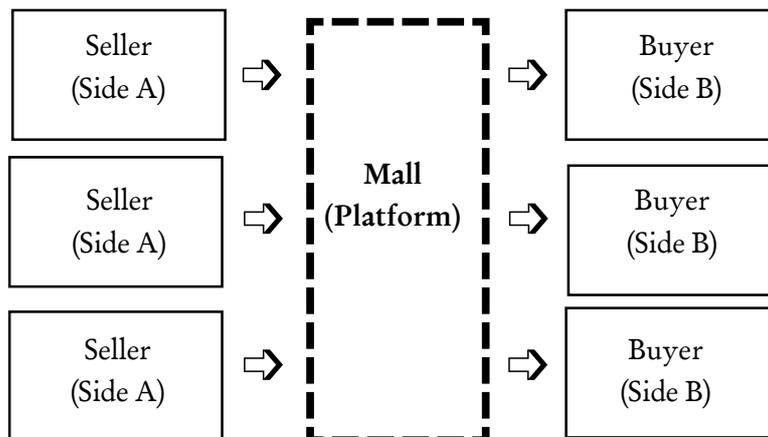


Another way at looking at the above relationship is that shops are platforms that provide a valuable input to the seller, i.e. they provide a means for the seller (side A) and buyer (side B) to conduct transactions between themselves. There is only a one-is-to-one relationship and therefore traditional shops are an example of a **One-Sided Platform** also called a **Product Platform**. Only one side (Side B in this case) is the customer who transacts with the other side, i.e., Side A, while the platform only serves as a facilitator.

This relationship is similar if the platform (i.e. the shop) is used by a retailer who resells products manufactured by someone else. This relationship, depicted in the following figure, constitutes a **Reseller Platform**. Note that only one side is the customer in this platform – in this case the manufacturer (side A).



Shopping Malls provide a different type of platform as depicted in the following figure:



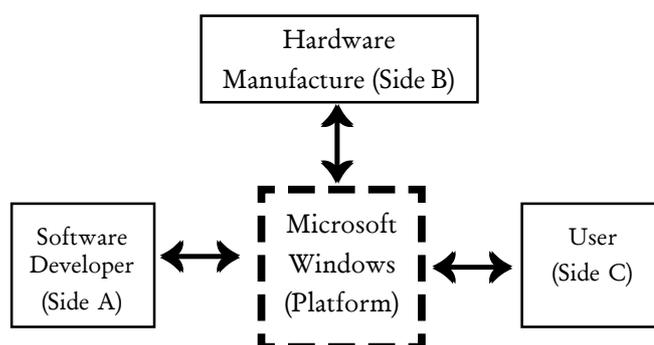
Here multiple sellers hire retail space from the Mall (platform), and are therefore customers for the Mall. The other side i.e. the buyer transacts only with the seller of his choice but is not the customer of the platform. Therefore this is also another form of a one sided transaction because the platform makes money only from one side – side A the seller.

Now let us consider the case of a credit card company like Visa or MasterCard. The transaction flow is as follows:



Here VISA provides the means for a buyer and merchant to transact by providing a platform for payment. For this both the sides pay a fee to the platform for the service that it provides, the cardholder by way of card fees and the merchant by way of commission on sales. This is an example of a **two-sided platform**.⁴

Similarly, there can be **Multi Sided Platforms (MSPs)** in real space that provide a means for different users to transact business that results in multiple revenue streams from multiple players. The ‘Microsoft Windows’ platform is an example of a multi-sided platform in real space, since it provides a platform where users (buyers) can transact with application developers (sellers) and hardware suppliers. All the sides generate revenue streams for the platform and are therefore customers of the platform. The structure is as follows:



⁴ Note that even if the credit card company provides the credit card service free, i.e. does not charge monthly or annual fees from the cardholder, the latter still has a customer relationship with the credit card issuing company because he/she consumes the service provided by the credit card company.

From the above schematic, we notice that there are two essential characteristics that define a multi-sided platform:

1. The platform facilitates a direct interaction between the two or more participants (sides).
2. Each side or group of participants is a customer of the platform in a meaningful way, irrespective of whether it is paying or non-paying.

E-COMMERCE BUSINESS MODELS

MSPs are not very common in commercial transactions in real space, but in cyberspace they are widespread and possess different degrees of complexity. This is because the technology of the Internet is very conducive to the design and operation of MSPs. Therefore some commentators have voiced the opinion that the latest era of the Information Age could well be termed as the Age of Platforms, due to the explosive growth in cyberspace of markets defined by platform competition rather than product competition. In other words, more and more companies operating in cyberspace are offering platforms where consumers and providers can interface and conduct transactions directly without the need for traditional middleman. For example the Google Android system provides an MSP where smartphone makers, app makers, service providers (mobile and Internet) and the customers come together to create an ecosystem to transact business.

With this background let us examine the different e-commerce business models that exist in cyberspace.

ONLINE SHOPS

This business model closely resembles its counterpart in real space i.e. the traditional shop. The seller physically stocks the products he sells and uses an online presence (i.e. website) to display their products, book orders, and collect payments. Most manufacturers who directly sell their products follow this model. From the taxation perspective this type of e-commerce is the simplest to handle because it mirrors the situation in real space and is amenable to existing laws.

ONLINE MARKETPLACES

An online marketplace is an e-commerce platform which enables multiple complementors to display their product, pricing and inventory information so that customers can place orders. The platform operator provides the means for processing the orders. Order fulfilment is done by the respective complementor. There are two types of business models followed by online marketplaces:

Open Marketplaces. These marketplaces only connect buyers and sellers, leaving the mechanics and logistics of the transactions to the respective counterparties i.e. the buyers and sellers. A number of big online retailers follow this business model, the most prominent being eBay, the world's largest ecommerce platform and Alibaba, the Chinese retail giant and Indian start-up OLX.com. Alibaba has created an e-commerce platform that enables small businesses and branded manufacturers alike to connect with potential buyers. It does not participate in the sale transaction, does not sell anything directly to the customer and does not provide any warehousing facilities to its complementors.

Managed Marketplaces. These marketplaces are more akin to traditional retailing in the sense that the platform operator maintains "fulfilment centres" which aggregate orders and despatch the goods on behalf of the complementor. Sometimes the goods may also be repacked before despatch. Amazon, the world's largest online retailer follows this model.⁵ It has established very large distribution centres which not only handle its own products but also act as facilitation centres for its complementors.

INDIAN LAWS ON E-COMMERCE

In India retailing is governed by state and central acts that define the various stakeholders in the supply chain and stipulate appropriate levies on the transactions. More importantly, foreign direct investment (FDI) in retail has been strictly controlled. Although in 2013 the government had allowed FDI in multi-brand

5 O'Connor, Clare. *Wal-Mart Vs. Amazon: World's Biggest E-Commerce Battle Could Boil Down To Vegetables*. Forbes Business. April 24, 2013. <http://www.forbes.com/sites/clareoconnor/2013/04/23/wal-mart-vs-amazon-worlds-biggest-e-commerce-battle-could-boil-down-to-vegetables/>

retail, the change of government in 2014 injected some ambiguity in this issue. The official position vis-à-vis FDI pertaining to E-commerce is contained in the Consolidated FDI Policy Circular of 2015⁶, which allows:

- i) 100% FDI in Cash & Carry Wholesale Trading/Wholesale Trading (including sourcing from MSEs). Wholesale trading would include resale, processing and thereafter sale, bulk imports with ex-port/ex-bonded warehouse business sales and B2B e-Commerce.
- ii) 100% FDI in E-commerce activities i.e. buying and selling by a company through the e-commerce platform.

However, the FDI policy permits only Business to Business e-commerce and prohibits e-commerce based retail trading in any form by companies with FDI which are engaged in the activity of single-brand or multi-brand retail trading.

Owing to these legal restrictions on retailing companies with foreign investment, they have tried to adopt strategies to circumvent the rules. Flipkart.com is essentially an Indian owned and operated e-commerce company having foreign venture capital. It was initially operated through a front company WS Retail, but later shifted to the marketplace model. Amazon earns money by allowing its vendors to sell their products via its website and makes a cut on the sale.⁷ One could argue that this is no different from Walmart's business model because Walmart also allows vendors to sell their products via its stores and makes a cut from every sale. The difference is that while Walmart buys the product and sells it to the end customer, Amazon claims that it only charges vendors for the use of the Amazon website, an ingenious way of circumventing the FDI in retail restrictions.

6 See the Consolidated FDI Policy Circular of 2015 effective from May 12, 2015 available at http://dipp.nic.in/English/Policies/FDI_Circular_2015.pdf

7 *Flipkart top seller WS Retail to separate logistics arm Ekart into wholly-owned unit*. Economic Times, Jan 21, 2015. http://articles.economictimes.indiatimes.com/2015-01-21/news/58306262_1_ekart-ws-retail-logistics-arm. Also see *Here's how Flipkart is planning to reduce its dependence on WS Retail*. Business Insider May 12, 2015. <http://www.businessinsider.in/Heres-how-Flipkart-is-planning-to-reduce-its-dependence-on-WS-Retail/articleshow/47252934.cms>

The other issue concerns the applicability of existing commercial tax laws on ecommerce transactions. There is some confusion and uncertainty on the issue of whether e-commerce attracts the same tax regime as traditional retailing. For example, according to India's Minister of State for Commerce⁸, the same laws apply for e-commerce as well but the pull back by Karnataka regarding Amazon's activities seems to suggest uncertainty in the government. Till date the government has based their actions on extension of the existing laws and definitions to e-commerce companies, leading to some disputes. To examine this further let us first consider the different provisions of the statutes governing the conduct of business in India. The Central Sales Tax Act, 1956 gives the following definitions for the various terms used in connection with commercial taxation, such as 'business', 'dealer', 'place of business' and 'interstate sale'.

The Sales Tax regime in India stipulates that all sales within a State attract VAT (Value Added Tax) while Central Sales Tax or CST is applicable on inter-state sales. This may be superseded by the proposed Goods and Services Tax that the government intends to introduce in the coming months.

Some important issues arise when these laws are applied to ecommerce. Firstly let us examine the Amazon mode of ecommerce which is based on the managed marketplace model. It has "facilitation centres" such as the one in Bangalore, Karnataka, where they stock goods that are sold through their ecommerce portal. However the goods are not invoiced to Amazon, but remain the property of the sellers. When an item is purchased online, the seller's invoice is raised directly in the name of the buyer and the item is despatched. Officially, the actual transaction is between the seller and the buyer, while Amazon collects a commission for the services it offers. Another pertinent detail is that Amazon generates the invoice, despatches the goods and collects the payment, all on behalf of the seller. It then passes on the payment to the seller after deducting its commission.

8 *FDI rules for multi-brand retail to apply to e-commerce: Nirmala Sitharaman*. Business Standard, Aug 22, 2014. http://www.business-standard.com/article/companies/fdi-rules-for-multi-brand-retail-to-apply-to-e-commerce-nirmala-sitharaman-114082200455_1.html

Applying existing tax laws to the above online transaction throws up many challenges. Firstly there is the problem of identifying the “dealer” and his “place of business” for the purpose of registering under the commercial tax regime. Amazon claims that the dealer is the seller and his place of business is the facilitation centre. Therefore hundreds of sellers are registered as dealers at the facilitation centre. Furthermore, the place where the goods are stored and despatched from is operated by Amazon, which also collects the proceeds of the sale. As per Explanation 1 to clause 2(b)⁹, such a person is deemed as the dealer and therefore it is liable to pay VAT. Amazon, on the other hand, claims that it is not involved in the commercial transaction between the buyer and the seller. It only acts as a facilitator by allowing the seller to take advantage of its ecommerce portal. This is the crux of the dispute between Amazon and the Karnataka government.

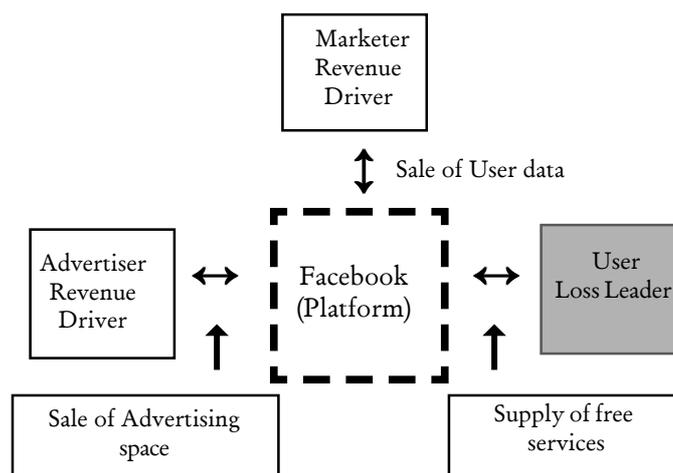
LOSS-LEADERS AND REVENUE-DRIVERS

Since MSPs by definition have more than one possible revenue generation possibilities the platform providers have the freedom to price their offering differently for the different sides. This assumes importance because of another characteristic of platforms, i.e. their utility and consequently their revenue generating potential grows exponentially as more and more users adopt them. This property called network externality, demonstrates the power of networks. For platforms to succeed they need to harness the full power of network externalities by accumulating the maximum number of users in the shortest time. Therefore their pricing models are such that one of the sides becomes a loss-leader while the other side or sides generate revenue.

For companies like Amazon, Flipkart and Alibaba the user is the loss-leader because they generally do not charge them for services. The revenue generating side is the commercial side where they make money from each transaction conducted. However the situation becomes a bit hazy with platforms such as Facebook, or Google search engine where the loss leader is the user who utilizes the service free

⁹ Central Sales Tax Act, 1956.

of charge and revenue is driven either by advertising or by sale of user data to marketers. The figure below depicts the various relationships:



The above raises a number of legal and taxation issues:

TAXATION ISSUES

The issue of taxation in cyberspace is a very complex one and therefore most Internet companies have managed to substantially avoid taxation, especially in India. The complexities involved are as follows:

1. The “free” services to the user are not entirely free because the platform collects valuable data about the user in exchange for the service. The use of the data so collected is governed by the EULAs that more or less give a free hand to the service provider¹⁰
2. The definition of the Service Provider is ambiguous in terms of taxation. Is he a “dealer” of goods (since it deals in selling of valuable goods i.e. consumer data); or a “service” since he provides service to the user; or is he both? This ambiguity allows companies such as Facebook and Google to avoid paying any tax to Indian authorities despite a robust presence in

¹⁰ Cf. *Bragg v Linden Research, Inc. and Philip Rosedale*. No. 06-4925, USDC (E.D. Pa., May 30, 2007)

India. Both these companies are multi-platform service providers and therefore they have one relationship with the customers to whom they provide social connectivity (Facebook) or search facility (Google) and another with the advertisers and marketers to whom they sell customer data. While the latter service is considered taxable the former is not.¹¹

3. Whether the provision of a “free” service as referred to in the above point can be considered truly free and therefore exempt from any form of sales tax (VAT or GST). Should this transaction be considered a “sale” where the service provider “sells” the service for a “consideration” that is the value of the consumer data collected?
4. For the purpose of taxation it is important to a) evolve a method for identifying and recognising revenue in multi-sided platforms; and b) quantifying this revenue for the purpose of taxation.
5. Should all the sides of an MSP be considered for taxation?
6. Can a platform provider such as Amazon claim that the fee it charges the sellers is a “royalty” or “technical licence fee” for the use of its platform (which is nothing but application software software) and not a commission?

It is pertinent to refer to certain international tax issues that have arisen under Double Taxation Avoidance Agreements (DTAAs)¹² in the context of e-commerce.

11 Interestingly B. D. Ahmed and S Mridul JJ, while hearing a PIL (*Govindacharya v Union of India & Ors*, W. P. 3672/2012) observed “How is Google paying (service tax), but not Facebook? How is Facebook exempted? We are finding it difficult to understand,” and went on to ask whether the government was “alive” to the issues of sale of data by social medial sites as well as the service of targeted advertisement provided by them. The government response was that Facebook Inc. has no office here while Facebook India has an office in a Special Economic Zone from where it is exporting services and thus, they are exempted from paying service tax. The bench also sought information from the government on what remittances were being made to Facebook from India and whether the transactions between the website and various Indian companies were in the nature of services. Unfortunately since the WP was regarding opening of online accounts by minors the final order did not address the taxation issue.

12 Countries enter into Double Taxation Avoidance Agreements to resolve the conflict between ‘source’ vs. ‘residence’ taxation so as to ensure that the same income is not taxed twice, though different aspects of the same income may be taxed in different jurisdictions.

Normally, under DTAA's business profits earned by the resident of one Contracting State through business carried on in the other Contracting State are taxable only in the State of residence, unless the resident has a 'Permanent Establishment' (PE) in the other Contracting State. A PE is defined as a fixed place of business through which the business of an enterprise is wholly or partly carried on. It does not have a separate legal identity of its own; it is a projection of the identity of the enterprise in a foreign land. The concept of a PE is wider than simply having a tangible space for carrying out business operations. E-commerce not only involves sale of goods/services *simpliciter* but also involves hiring of agents and marketing / advertising. These aspects have separate tax implications of their own. Since the internet is entirely seamless, business conducted over the internet gives rise to certain issues as to what can be considered a "fixed place of business through which the business of an enterprise is wholly or partly carried on."¹³

In case of e-commerce, a foreign enterprise need not require physical presence at all in a country for carrying on its business as a virtual presence may do the job. If this is the case, the definition of a PE in the DTAA's may be required to be amended to cover an intangible presence as well. This again gives rise to a question as to what constitutes a 'virtual' or an 'intangible' presence. While a mere website cannot be construed to be a PE, the presence of a web server in the tax jurisdiction may result in a PE. Indian courts have been grappling with these issues recently and two of the most relevant cases are listed below:

- i) *eBay International AG vs. ADIT*¹⁴- Mumbai ITAT held that revenue earned from operation of India-specific websites by a Swiss company, for facilitating the purchase and sale of goods and services to users based in India, was not taxable in India under the Indo-Swiss DTAA. Though the Swiss company had entered into marketing support agreements with two sister concerns in India, the Indian entities could not be considered as 'dependent agents' of the Swiss company so as to constitute a PE in India.

13 This definition appears as Article 5 of DTAA's. Cf. Article 5 of The UK/India Double Taxation Convention, signed Jan 25, 1993. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/412067/india-dtc.pdf

14 *eBay International AG vs. ADIT* TS-734-ITAT-2012(Mum).

- ii) *ITO v. Right Florists P. Ltd*¹⁵– Kolkata ITAT held that Google (Ireland) and Yahoo (USA) cannot be taxed in India in respect of sums received by them from an Indian florist for the purpose of online advertising. ITAT found that Google and Yahoo did not have web servers in India and thus there was no PE in India, since a website does not constitute a PE unless the servers on which websites are hosted are also located in the same jurisdiction.

It is important for e-commerce businesses to consider these issues as well, for the nature and scope of their operations is such that they may not even realize the revenue impact they have on taxing jurisdictions. A related issue is the question of Base Erosion and Profit Shifting (BEPS). This refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to locations where there is little or no economic activity or value creation. Some prominent US corporations, notably Apple, Google, and Caterpillar have applied this tax avoidance technique very effectively.¹⁶ E-commerce is by nature global it offers some scope for BEPS, but examining these issues would exceed the scope of this paper.

LEGAL ISSUES

The fact that MSPs operate in a virtual environment raises a number of ambiguities in terms of the applicability of laws of real space to their activities. Should platforms be considered just as connectors and hence absolved of all responsibility of what happens there? After all U.S. and Indian law exempts intermediaries of liability. However, there are some important differences that bear attention. For example, companies such as Airbnb, which connects accommodation seekers with people with rooms to let, has been investigated by New York authorities for violation of zoning laws. There have been cases of violence and assault among people who

15 *ITO v. Right Florists P. Ltd* TS-137-ITAT-2013(Kol)

16 *Moving Profits to Cut U.S. Taxes*. Bloomberg Quicktake, Aug 4, 2015. <http://www.bloombergview.com/quicktake/profit-shifting-avoid-tax>. Also see *Ireland Declares 'Double Irish' Tax Scheme Dead*. Forbes, October 15, 2014. <http://www.forbes.com/sites/kellyphillipsrb/2014/10/15/ireland-declares-double-irish-tax-scheme-dead/>

connected through Airbnb. Similarly Pennsylvania authorities are concerned that the activities of companies like Uber and Lyft may be illegal.¹⁷

For long Internet companies have made money by posing a simple “middlemen”, with little responsibility for the actions that take place on their platforms. This has allowed them to operate with a skeleton staff with most of the heavy lifting being done by the software. This raises the following issues:

1. Should platforms be considered as employers for the purpose of labour laws? For example should Uber be considered as the principal employer of the taxi operators and hence responsible for their employees’ benefits?¹⁸
2. Can the platform claim immunity from the actions of its users? Can Airbnb be held responsible for an assault by the landlord on the tenant who had connected through their platform?

17 Uber is a platform that connects taxi operators with customers and Lyft connects people needing a car ride with people who are willing to give them a lift. *Pa. lawmakers dive into ride-sharing debate about regulations for Uber, Lyft*. Triblive.com, June 12, 2015. <http://triblive.com/state/pennsylvania/8547228-74/regulations-uber-industry#ixzz3i3yzt3L3>. Recently both got approval from the Pennsylvania state authorities to operate in the state. Lyft Joins Uber in Getting Final OK for Pennsylvania Service. Insurance Journal, February 13, 2015. <http://www.insurancejournal.com/news/east/2015/02/13/357457.htm>
Also *AirBnB Flat Owner Jailed For Raping US Tourists*. SkyNews, Dec. 19, 2014. <http://news.sky.com/story/1395006/airbnb-flat-owner-jailed-for-raping-us-tourists>

18 Some US Courts are demonstrating a shift in favour of considering operators as employees. Cf. California Labor Commissioner in re *Barbara Berwick* holding that “Defendants [e.g. Uber] hold themselves out as nothing more than a neutral technological platform, designed simply to enable drivers and passengers to transact the business of transportation [T]he reality, however, is that Defendants are involved in every aspect of the operation. Drivers cannot use Defendants’ application unless they pass Defendants’ background and DMV checks. Defendants control the tools the drivers use. Defendants monitor the Transportation Drivers’ approval ratings and terminate their access to the application if the rating falls below a specific level.” Uber has appealed. Uber and rival Lyft also face other lawsuits in California. Cf. Forbes Mar 11, 2015. *Juries To Decide Landmark Cases Against Uber and Lyft*. <http://www.forbes.com/sites/ellenhuet/2015/03/11/lyft-uber-employee-jury-trial-ruling/>. The observations of Vince Chhabria, J. in the Lyft case put the dilemma into perspective: “At first glance, Lyft drivers don’t seem much like employees.... [b]ut Lyft drivers don’t seem much like independent contractors either.” And also stated that “The jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn’t very helpful in addressing this 21st Century problem.”

3. Should EULAs that disclaim any liability of the platform be considered valid in law?
4. Platform providers are intermediaries and therefore protected by law in the U.S. (section 230 of the Communications Decency Act and section 512 of the Digital Millennium Copyright Act), as well as in India (Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (G.S.R. 313(E)) and the Information Technology (Intermediaries guidelines) Rules, 2011 (G.S.R. 314(E)). These guidelines generally refer to content posted on the Internet. Should the law differentiate between users posting content and users entering people's homes and cars?

POLICY CONCERNS

The response of the legal system to the challenges posed by the explosion of activity on the Internet has been to try and apply existing laws of real space to cyberspace as well and in the process evolve precedents, legal tests and analogies to deal with new situations. However, as Chhabria J. has telling observed in *Lyft* “*The test the ... courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem.*”¹⁹ Till date the response of the courts and policy makers has ranged from a plethora of new laws enacted by the US to policy guidelines and opinions as issued by the EU. In India there is one over-arching act, the Information Technology Act that attempts to cover all issues connected with the Internet. These are buttressed by guidelines and Rules issued by the Government of India. In the absence of comprehensive Internet-specific laws the executive as well as judiciary have attempted to apply existing real space laws to cyberspace also, which have sometimes led to situations like the Amazon-Karnataka Government confrontation and the compliance issues faced by ecommerce portal Flipkart, discussed earlier, which are reminiscent of Judge Chhabria's remark about fitting square pegs in round holes.

With regard to ecommerce in particular applying existing rules and definitions to online transactions is bound to lead to some untenable situations. Ecommerce is a

¹⁹ *Ibid.*

new and efficient way of conducting business and subjecting it to existing policies and laws would negate its advantages, effectively stifling this technological innovation. However, as with any technological innovation, ecommerce also has both negative and positive outcomes, and care has to be taken to formulate laws and policies that combat negatives without affecting the positives. For example, let us consider the case of Uber which has revolutionised the way people hire taxis. Taxi services are heavily regulated in many cities such as Boston and New York where the city controls taxi licenses. As a consequence a taxi medallion in New York City can cost up to a million dollars (slightly less in Boston). An Uber taxi does not have to invest this amount and is not subjected to the same regulations as traditional taxis. Not surprisingly Uber has faced law suits from traditional taxi unions.²⁰ While there is need for a level playing field, subjecting Uber taxis to the same licensing procedures would effectively kill the innovation and deny the user the tremendous convenience that it provides. Furthermore, a typical Uber taxi operator earns about three times as much as a traditional operators and yet the service costs less than a ride in a traditional taxi of comparable specifications.²¹ Similarly an ecommerce site such as Amazon or Flipkart provides much greater customer convenience and lesser price than what is generally offered in a traditional retail shop.

The way forward is to consider ecommerce comprehensively from the technological and business perspective and frame regulations accordingly. For example, instead of trying to decipher whether Amazon should be considered a “dealer” or not under the existing rules or whether it violates FDI in retail guidelines, it would be better to accept that the managed marketplace model of ecommerce with or without facilitation centres is a legitimate and distinct way of doing business. After that comes the question of tax revenue. The VAT regime aims to tax only the value added at each stage of a commercial transaction. However, Amazon may claim that it is only providing a service and is therefore only liable for service tax on its

20 Cf. *Taxi Drivers Are Trying to Take Down Uber*.

21 This figure reflects the Indian situation for Uber taxi operators. Cf. comparison given in Economic Times report *How the ban hurts Uber drivers who earned at least Rs 45,000/month*, Harsimran Julka & Vasudha Venugopal. Dec 13, 2014. Also, Lawler, Ryan. *Uber Study Shows Its Drivers Make More Per Hour And Work Fewer Hours Than Taxi Drivers*. Techcrunch.com. Jan 22, 2015. <http://techcrunch.com/2015/01/22/uber-study/>.

commission. It may even claim immunity from service tax by terming its fees not as a commission for service but as a royalty or licence fee for use of its technology, which is only subject to tax deductible at source (TDS).

Instead of deliberating or litigating as to whether service tax or VAT or income tax is applicable, it is advisable to determine the amount of tax that should be recovered from ecommerce transactions, after being called by any name deemed appropriate and levied. This would remove all ambiguities regarding definitions of status and amount and nomenclature of taxation. Following the implementation of the Goods and Service Tax in India, it is possible that some more clarity may emerge.

Similarly in the case of taxi operators, the implication of labour laws, licencing requirements and any other repercussions (e.g. safety and security of passengers and liability of ecommerce company) can be considered and appropriate legislation, rules or guidelines be issued which specifically address the circumstances of online taxi operators. Other questions raised earlier in this paper regarding overseeing of EULAs, immunity of intermediaries etc. need to be debated and addressed without killing technological innovation. It should be specially borne in mind that there will be opposition from existing “brick and mortar” companies who would perceive a threat to their livelihood. However from the policy making perspective it is important to recognise that ecommerce is the future and trying to ignore it would be a retrograde step. “Brick and mortar” companies too need to acknowledge this reality and start adapting.

Of course, protection of consumer interests is an equally important legal issue and there should be a framework in place that specifically addresses consumer protection in the context of e-commerce. Transparency in commercial transactions is one aspect and that includes complete and accurate disclosure of the business/goods, after-sale redressal mechanisms, etc. But another aspect that perhaps requires more attention is that of privacy. India has no privacy laws in place as of now and consumer information is highly vulnerable. So while focussing on the impetus to be provided for ecommerce activities, it is desirable that a suitable law be enforced to regulate the use and storage of consumer information exchanged over the internet. Reference may be had to the Organization for Economic Cooperation and Development (OECD) Guidelines for Consumer Protection in the Context

of Electronic Commerce, 1999 that “reflect existing legal protections available to consumers in more traditional forms of commerce. Their aim is to encourage: fair business, advertising and marketing practices; clear information about an online business’s identity, the goods or services it offers and the terms and conditions of any transaction; a transparent process for the confirmation of transactions; secure payment mechanisms; fair, timely and affordable dispute resolution and redress; privacy protection; and consumer and business education. They are technology-neutral, encourage private sector initiatives that include participation by consumer representatives, and emphasise the need for co-operation among governments, businesses and consumers.”²²

Above all, it is important to accept that e-commerce is the future of doing business and therefore should be encouraged by all branches of governance. One policy that would definitely be regressive would be to subject e-commerce to archaic or impractical laws that would limit its growth.

22 Available at <http://www.oecd.org/sti/consumer/34023811.pdf>. The Guidelines are currently under revision and due in 2017.