

**KEY FACETS OF THE CONSUMER PROTECTION ACT, 2019 AND E-COMMERCE RULES****1. INTRODUCTION**

The erstwhile Consumer Protection Act, 1986 and the rules and regulations framed thereunder (the “**CPA 1986**”) were formulated with a view to protect the interests of the consumers and prescribed a mechanism for settlement of consumer disputes.

With the dynamics revolving around buying and selling of products and services changing rapidly in light of advancement in technology and increasing use of e-commerce, there was a dire need to suitably amend and update the laws pertaining to consumer protection in India. Accordingly, on August 06, 2019, the Parliament of India passed the landmark Consumer Protection Bill, 2019, with the objective of providing timely and effective administration of both consumers and sellers, taking into account modern advancements in the mediums of commerce. The Consumer Protection Act, 2019 (the “**CPA 2019**”) was published in the official gazette of India on August 09, 2019. However, the provisions of the CPA 2019 did not immediately come into effect.

On July 15, 2020, the Ministry of Consumer Affairs, Food and Public Distribution (the “**Ministry**”), through the Department of Consumer Affairs (the “**DCA**”), issued a notification appointing July 20, 2020 as the date from which certain provisions of the CPA 2019 shall come into effect. Thereafter, on July 23, 2020, the Ministry through the DCA issued another notification, appointing July 24, 2020 as the date from which the remaining provisions of the CPA 2019 shall come into effect (the July 15, 2020 and July 23, 2020 notifications, collectively the “**Enforcement Notifications**”). Effectively, by virtue of the Enforcement Notifications, all the provisions of the CPA 2019 have now been notified and are effective. The CPA 2019 amends and replaces the CPA 1986 in its entirety.

Further, for the purposes of preventing unfair trade practices in e-commerce, direct selling and also to protect the interest and rights of consumers, the CPA 2019 allows the Central Government to take such measures as may be required<sup>1</sup>. Pursuant to the aforesaid powers, the Central Government has notified the Consumer Protection (E-Commerce) Rules, 2020, on July 23, 2020 (the “**E-Commerce Rules**”).

**2. CHANGES BROUGHT ABOUT BY THE CPA 2019**

Some of the major overhauls that have been brought forth in the CPA 2019 read with the E-Commerce Rules have been provided below:

**2.1. Providing more teeth to e-commerce transactions**

Although the provisions of CPA 1986 were deemed comprehensive enough to also apply to e-commerce entities, there were no specific provisions in this respect under CPA 1986. The CPA 2019 defines ‘e-commerce’ as the buying or selling of goods or services including digital products over digital or electronic

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<sup>1</sup> Please refer Section 94 of CPA 2019.

network, which is further categorised into marketplace and inventory-based models of e-commerce. This definition is aligned with the present definition of 'e-commerce' under the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (the "NDI Rules"). It is important to note that the CPA 2019 defines services to include, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, telecom, boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information. Accordingly, among other platforms, platforms providing services such as ride-hailing and hospitality may also be governed by the provisions of CPA 2019 and the E-Commerce Rules, if such services are provided for a fee.

A variety of welfare-oriented provisions have been implemented by the E-Commerce Rules by imposing duties and liabilities on: (i) e-commerce entities – both marketplace-based (the "Marketplace Entities") and inventory-based; and (ii) the sellers on Marketplace Entities. We have categorized the impact on these entities in further detail below:

### 2.1.1. E-commerce entities

All e-commerce entities are required to be incorporated in the form of a company under the Companies Act, 2013 or a foreign company or an office, branch or agency outside India owned or controlled by a person resident in India. It may be worthwhile to note that the E-Commerce Rules also apply to an e-commerce entity which is not established in India, but systematically offers goods or services to consumers in India, thereby expanding the scope of applicability of these rules to foreign owned e-commerce platforms. All e-commerce entities are required to comply with a host of obligations, including the following<sup>2</sup>:

- (a) Unfair trade practise: E-Commerce entities are required to refrain from any unfair trade practice<sup>3</sup>, whether in the course of business on its platform or otherwise. In this context, unfair trade practice refers to such trade practice which adopts any unfair method or unfair or deceptive practice for the purpose of promoting the sale, use or supply of any goods or for the provision of any service. Such practices may include: (a) manipulating the price of goods or services offered on the e-commerce platform in such a manner so as to gain unreasonable profit; (b) making arbitrary classification of consumers to offer discounts; (c) publishing misleading representations concerning the characteristics of products; (d) refusing to take back or withdraw defective goods or deficient services and refusing to refund the consideration; or (e) disclosing to third parties any personal information given in confidence by the consumer unless such disclosure is made in accordance with the provisions of applicable law (this may also lead to consequences under the Information Technology Act, 2000 (the "IT Act") and its corresponding Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011). Considering that the definition of 'unfair trade practices' includes a host of practices/ actions pertaining to a buy and sale transaction, e-commerce entities need to be careful about any statement, information or representation about a product being sold through their platforms.
- (b) Level playing field: E-commerce entities can neither manipulate the price of the goods or services offered on its platform in such a manner as to gain unreasonable profit, nor discriminate between consumers of the same class or make any arbitrary classification of consumers. This is in line with the

<sup>2</sup> Please refer Rule 4 of E-Commerce Rules.

<sup>3</sup> Please refer Section 2(47) of CPA 2019.

NDI Rules which state that e-commerce entities providing marketplace shall not directly or indirectly influence the sale price of goods or services and shall maintain level playing field. The aspect of ensuring a level playing field by the e-commerce entities is further reinforced by the fact that the obligations of the e-commerce entities to maintain a level playing field is not only vis-à-vis the sellers on their platform, but also the consumers who purchase goods or avail services through their platform.

- (c) Grievance redressal: E-commerce entities are required to establish an adequate grievance redressal mechanism and appoint a grievance officer for consumer grievance redressal in a time efficient manner. This may however lead to some anomaly in the manner of resolving the grievances of the consumers, as even the sellers operating on the Marketplace Entity's platform are required to establish a similar grievance redressal mechanism. This may potentially lead to a situation of passing the buck and shirking of responsibility amongst the seller and the e-commerce entity. It would be beneficial if the Ministry comes up with adequate clarifications in this respect in order to distinguish the circumstances under which a consumer would have recourse to the grievance redressal mechanism of the seller and of the e-commerce entity, as currently, these aspects remain unanswered.
- (d) Cancellation charges: E-commerce entities are prohibited from imposing cancellation charges on consumers who choose to cancel their order after confirming purchase unless similar charges are also borne by the e-commerce entity, if they cancel the purchase order unilaterally for any reason. To this end, the e-commerce entities (specifically, Marketplace Entities) may need to enter into back to back arrangements with the seller under the terms of contracts with the sellers, vis-a-vis the cancellation terms offered to the consumers, so that such e-commerce entities are able to recover such charges from the sellers, in the event the cancellation was necessitated due to defaults on the part of the seller or the seller's inability to supply such products or services.
- (e) Affirmative consent: E-commerce entities must only record the consent of a consumer for the purchase of any goods or service offered on its platform where such consent is expressed through an explicit affirmative action, and no such consent should be recorded automatically, including in the form of pre-ticked checkboxes. This draws special attention to the aspect of 'suggested products' or 'you may also want to buy' options which are provided by e-commerce platforms to the consumers with pre-ticked check boxes on those products, to lure consumers into buying such products in the course of placing their orders. With the introduction of these obligations, the e-commerce entities may not be allowed to bundle such products automatically with pre-ticked options other than for the products specifically opted for by the consumer.
- (f) Payment methods: E-commerce entities are required to effect all payments towards accepted refund requests of the consumers as prescribed by the Reserve Bank of India or any other competent authority within reasonable timelines and furnish exhaustive information on available payment methods, the security of those payment methods, any fees or charges payable by users, the procedure to cancel regular payments under those methods, charge-back options, if any, and the contact information of the relevant payment service provider. In this regard, the actual processing of the refund within the required time frame shall be the duty of the seller. The e-commerce entity's role shall stand restricted to facilitating the refund and returns process and effecting payments for accepted refunds (by the seller) in accordance with the guidelines of the Reserve Bank of India. This is also in line with the provisions contained in the NDI Rules.

### 2.1.2. Marketplace Entities

In addition to the aforesaid obligations applicable to all e-commerce entities, there are certain obligations specific to Marketplace Entities which are a subset of e-commerce entities, as discussed below:

- (a) Undertaking from sellers: Marketplace Entities are mandatorily required to require sellers to furnish appropriate undertakings with respect to the specifications and descriptions of the products. Towards this end, the Marketplace Entity should undertake measures to ensure that it does not itself make false or misleading statements in the form of advertisements which may probably fall within the purview of 'unfair trade practices' under the CPA 2019.
- (b) Information regarding sellers and parameters for ranking of goods: Marketplace Entities are required to furnish and provide to the consumers detailed information about the sellers, including contacts details and any rating or other aggregated feedback. Additionally, Marketplace Entities are required to provide an explanation of the main parameters which are most significant in determining the ranking of goods or sellers on their platform and relative importance of those main parameters. This would effectively require adoption of an advanced system by Marketplace Entities to establish a uniform system of gradation of the products and the sellers on their platforms.
- (c) Other essential information: Amongst other information, Marketplace Entities are required to provide information on their platforms which enables consumers to make an informed decision. Such information should include information relating to return, refund, exchange, warranty and guarantee, delivery and shipment, modes of payment, and grievance redressal mechanism, and any other similar information which may be required by consumers to make informed decisions.
- (d) Differential Treatment: Marketplace Entities are required to include in their terms and conditions a description of any differentiated treatment that is being given or might be given between goods or services or sellers of the same category, in line with the objective of creating a level playing field.
- (e) Record of relevant information: A record of information is required to be maintained by Marketplace Entities which allows for the identification of all sellers who have repeatedly offered goods or services that have previously been removed or access to which has previously been disabled under certain applicable laws such as Copyright Act, 1957, the Trade Marks Act, 1999 or the IT Act. However, no Marketplace Entity shall be required to terminate the access of such seller to its platform but may do so on a voluntary basis.

Any Marketplace Entity may be eligible to avail an exemption from liability under the E-Commerce Rules as an 'intermediary', pursuant to Section 79(1) of the IT Act provided that it complies with sub-sections (2) and (3) thereof and also with the provisions of the Information Technology (Intermediary Guidelines) Rules, 2011 (the "**Intermediary Rules**").<sup>4</sup> In terms of Section 79(1) of the IT Act, an intermediary (in the present case, the Marketplace Entity) is exempted from liability arising on account of any third party information, data, or communication link made available or hosted by it, irrespective of any other provision contained in any other law which may be in force (including the E-Commerce Rules), that imposes such liability. However, the above exemption from liability shall be available to the Marketplace Entity, subject

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<sup>4</sup> Please refer Rule 5(1) of E-Commerce Rules.

to its compliance with the following requirements as mentioned in sub-section (2) of Section 79 of the IT Act: (i) the function of Marketplace Entity is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or (ii) (a) the Marketplace Entity does not initiate the transmission; (b) the Marketplace Entity does not select the receiver of the transmission; (c) the Marketplace Entity does not select or modify the information contained in the transmission; and (d) the Marketplace Entity observes due diligence while discharging its duties under the IT Act and the Intermediary Rules and any other guidelines that the Central Government may prescribe in this behalf.

However, the immunity from liability will not be available to the intermediary in terms of the IT Act if it is linked in the commission of the unlawful act and/ or upon receiving actual knowledge, or on being notified by the Government agency that any information, data or communication link residing in, or connected to a computer resource controlled by it is being used to commit the unlawful act, it fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Due to the limited role played by the Marketplace Entities in the market, there is a need to provide certain exemptions to them in order to protect them from large adversarial implications due to acts of third parties. In the event certain Marketplace Entities do not squarely fall within the contours of sub-section (2) of Section 79 of the IT Act, such Marketplace Entities will not be able to take benefit of the exemption available thereunder and the E-Commerce Rules.

### 2.1.3. Sellers selling on platforms of Marketplace Entities

The sellers selling on the platforms of Marketplace Entities are specifically mandated to ensure certain compliances including in terms of providing product specifications, providing information/ advertisement to consumers, refund and exchange policies, grievance redressal mechanism and having transparency of dealings with e-commerce entities, etc., in addition to the general provisions of the CPA 2019<sup>5</sup>.

### 2.1.4. Impact on inventory-based e-commerce entities

The kind of duties imposed on these entities are also similar to the duties imposed on a seller operating on the platforms of Marketplace Entities.

## 2.2. **Product Liability**

One of the crucial additions in CPA 2019 is the introduction of the concept of product liability. 'Product liability' refers to the responsibility of a 'product manufacturer', 'product service provider' or 'product seller', of any product or service, to compensate for any harm caused to a consumer by such defective product manufactured or sold or by deficiency in services relating thereto.

### 2.2.1. Categorization of sellers for attribution of product liability

The CPA 2019 has introduced three distinct buckets for categorising sellers, namely:

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<sup>5</sup> Please refer Rule 6 of E-Commerce Rules.

- (a) Product Manufacturer<sup>6</sup>: A 'product manufacturer' means a person who: (i) makes any product or its parts; or (ii) assembles parts made by others; or (iii) puts his own mark on any products made by any other person; or (iv) makes a product and places such product for commercial purpose; or (v) designs, produces, fabricates, constructs or re-manufactures any product before its sale; or (vi) being a product seller of a product, is also a manufacturer of such product;
- (b) Product Service Provider<sup>7</sup>: A 'product service provider' in relation to a product, means a person who provides any service in respect of such product. In this regard, it may be worthwhile to examine whether an e-commerce entity may be classified within the contours of a 'product service provider'. The definition of the term 'service' provided under the CPA 2019 means service of any description which is made available to potential users but does not include the rendering of any service free of charge. Accordingly, e-commerce entities that merely provide a platform to facilitate the seller and consumer to transact, may not be construed to be product service provider, as technically, the e-commerce platform does not charge the consumer for providing such services and such services are provided 'free of charge'. However, e-commerce entities that provide consumers services such as logistics and warehousing and charge the consumer for such services, may not be able to take the benefit of falling outside the scope of 'product service provider' under the CPA; and
- (c) Product Seller<sup>8</sup>: A 'product seller' in relation to a product, means a person who in the course of business, places such product for commercial purpose and includes: (i) a manufacturer who is also a product seller; (ii) a service provider, but does not include: (a) a seller of immovable property, unless such person is engaged in the sale of constructed house or in the construction of homes or flats; (b) a provider of professional services in any transaction in which, the sale or use of a product is only incidental thereto, but furnishing of opinion, skill or services being the essence of such transaction; (c) a person who: (I) acts only in a financial capacity with respect to the sale of the product; (II) is not a manufacturer, wholesaler, distributor, retailer, direct seller or an electronic service provider; (III) leases a product, without having a reasonable opportunity to inspect and discover defects in the product, under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor. In this regard, it remains to be tested whether online platforms that offer real estate intermediary services, by engaging in the business of facilitating the sale of properties by providing access to the platform on which the seller and consumer transact, will be covered within the ambit of 'product seller' (or not).

### 2.2.2. Actions on product liability and tests for determining liability

The CPA 2019 entitles a complainant to initiate a product liability action against a product manufacturer or a product service provider or a product seller, as the case may be, for any harm that may have been caused to him on account of a defective product having been provided to such complainant<sup>9</sup>. In this regard, a 'product liability action' refers to a complaint which can be filed by a person before the concerned adjudicating authority for claiming compensation for the harm caused to him. The CPA 2019 lays down certain criteria for determining the liability of product manufacturers, product service providers and

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<sup>6</sup> Please refer Section 2(36) of CPA 2019.

<sup>7</sup> Please refer Section 2(38) of CPA 2019.

<sup>8</sup> Please refer Section 2(37) of CPA 2019.

<sup>9</sup> Please refer Section 83 of CPA 2019.

product sellers<sup>10</sup>. Additionally, the CPA 2019 also provides for certain exceptions to the rule of product liability, such as the product being misused, altered, or modified (in the case of product seller).<sup>11</sup>

In this regard, it may be imperative to note that the concept of product liability may create some concerns for Marketplace Entities, as they may be construed to be playing the role of product service providers under certain circumstances (*as discussed above*). It may also be noted that the CPA 2019 defines 'harm' to include mental agony or emotional distress attendant to personal injury or illness or damage to property.

### 2.3. Constitution of a new Central Consumer Protection Authority as the new regulator

The CPA 2019 has constituted a Central Consumer Protection Authority (the "CCPA")<sup>12</sup> to regulate and enforce the provisions of CPA 2019 with emphasis being on protection of consumer interests. A complaint may be forwarded either in writing or in electronic mode to the CCPA<sup>13</sup>. Upon receiving any such information or complaint, or upon receiving directions from the Central Government, or of its own accord, the CCPA may undertake investigation<sup>14</sup> through a separate investigation wing of its own. It is also interesting to note that the CCPA has also been included in the definition of 'complainant'<sup>15</sup>, thereby allowing them to act as a guardian of the consumers and initiate class action suits on behalf of the consumers on matters such as those relating to unfair trade practises or misleading advertisements. On July 24, 2020, the Ministry constituted the CCPA as a body corporate having its headquarters at New Delhi.

### 2.4. Widening the scope of persons covered as 'consumers'<sup>16</sup>

Under the CPA 1986, the definition of a 'consumer' was rather narrow and did not explicitly cover consumers buying through e-commerce portals, although it was deemed that a consumer who buys goods or procures services through e-commerce portals would be covered under such definition. The CPA 2019 has made the definition inclusive and clarificatory, so as to include a consumer who buys any goods or hires any services through electronic means or by teleshopping or direct selling or multi-level marketing. Accordingly, the purchasers of products sold through various e-commerce websites, such as Amazon, Flipkart, Nykaa, Myntra, etc. in India stand explicitly included within the definition of a 'consumer'.

Further, the E-Commerce Rules provide for the definition of 'user' which extends to any person who accesses or avails any computer resource of an e-commerce entity. It is interesting to note that as per the definition contained in the E-Commerce Rules, a user may not necessarily be a 'consumer' in terms of the CPA 2019 and essentially all provisions of the CPA 2019 in relation to sale of goods and services lie vis-à-vis the consumers. Consequently, a 'user' may not be able to initiate any action against an e-commerce entity under the CPA 2019 in case of any grievances, until and unless such user gets categorized as a 'consumer'. It may be interesting to note that even though a user is not classified as a 'complainant' for the purposes of CPA 2019, such user may be able to forward a letter or notice to the CCPA to bring into its notice any information related to the e-commerce entities and/ or the sellers, which may be misleading to

<sup>10</sup> Please refer Sections 84, 85 and 86 of CPA 2019.

<sup>11</sup> Please refer Section 87 of CPA 2019.

<sup>12</sup> Please refer Section 10 of CPA 2019.

<sup>13</sup> Please refer Section 17 of CPA 2019.

<sup>14</sup> Please refer Section 19 of CPA 2019.

<sup>15</sup> Please refer Section 2(5) of CPA 2019.

<sup>16</sup> Please refer Section 2(7) of CPA 2019.

the general public or qualifies as unfair trade practice. Since the CCPA is vested with the right to take *suo moto* action against issues relating to violations of consumer rights or unfair trade practices, it may be able to take cognizance of such matters, initiate investigations and take appropriate actions against such entities.

## 2.5. Unfair contracts

The CPA 2019 has introduced the concept of ‘unfair contracts’ which includes all such contracts, between a manufacturer or trader or service provider on one hand, and a consumer on the other, which are heavily weighed against the interest of the consumers<sup>17</sup>. The CPA 2019 allows room to the consumers to file complaints against such unfair contracts<sup>18</sup>. Contracts which may have unfairly worded clauses such as those that are in the nature of imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage may fall within the ambit of ‘unfair contracts’ and consumers can initiate action in terms of the CPA 2019 in relation to such contracts.

## 2.6. Inclusion of ‘endorsements’ under advertisement and misleading advertisements

Under CPA 2019, endorsements involving any depiction of the: (a) name, signature, likeness or other identifiable personal characteristics of an individual (such as influencers/ celebrities); or (b) name or seal of any institution or organisation, which makes the consumer to believe that it reflects the opinion, finding or experience of the person making such endorsement, have been brought under the scope of ‘advertisement’, thereby making the endorsers also face adverse consequences under the CPA 2019 for issuance, demonstration or communication of certain misleading information<sup>19</sup>. As a consequence, endorsers may be more proactive in ensuring that the advertisement does not issue misleading information and may choose to obtain adequate protection in the form of watertight contracts from their clients. Earlier under the CPA 1986, there were no specific provisions that attributed liability to endorsers for misleading advertisements, although some complaints have been filed against endorsers under provisions of the Indian Penal Code, 1860.

Further, the CCPA has been vested with the authority to take actions against false or misleading advertisements, including passing orders to discontinue such advertisement, issue corrective advertisement or to modify the same in such manner and within such time as may be decided by the CCPA, imposing penalties which may extend up to INR 50,00,000, imprisonment which may extend up to 2 years and prohibiting the endorser of a misleading advertisement from endorsing any particular product or service for a period of up to 3 years.<sup>20</sup> In contrast, the CPA 1986 merely contemplated the issuance of a corrective advertisement to neutralize the effect of the misleading advertisement.

## 3. CONCLUSION

With the evolution of trade, it had become imperative to amend the law relating to protection of the consumers. E-commerce is a dynamic and intricate market and our laws need to not only keep pace with the ever-changing dynamics but also provide for eventualities in the near future to prevent modern forms

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<sup>17</sup> Please refer Section 2(46) of CPA 2019.

<sup>18</sup> Please refer Section 2(6)(i) of the CPA 2019.

<sup>19</sup> Please refer Sections 2(1), 2(18) and 21 of CPA 2019.

<sup>20</sup> Please refer Sections 21 and 89 of CPA 2019.

of unfair trade and unethical business practices and provide for larger accountability. The CPA 2019 is an attempt by the Government to address issues such as unfair trade practices by prohibiting the manipulation of the price of goods or services, and the discrimination between sellers, and consumers of the same class. The CPA 2019 provides for easier access to avail relief by providing for a stronger consumer redressal mechanism as well as easing the procedures of filing complaints by consumers. The CPA 2019 has even gone a step further by the introduction of mediation and creation of the CCPA which can take *suo moto* cognizance of matters for the well-being of consumers.

The amendment to the e-commerce rules under the FDI Policy, 2017 in December, 2018 and which rules have now been subsumed under the NDI Rules, provided for the concept of level playing field which has now been elaborated under the E-Commerce Rules. The e-commerce rules under the NDI Rules provide that the responsibility of after-sales and warranty or guarantee of goods and services sold shall vest with the sellers. The E-Commerce Rules in addition to being aligned with the NDI Rules on this aspect, go further to elaborate the principle that the sellers should ultimately be responsible for defective goods or services. However, at the same time, the E-Commerce Rules recognise that the e-commerce entities play an important role as an intermediary and therefore levy an added level of responsibility on the e-commerce entities in the shape of grievance redressal and access to seller information among other things.

The introduction of the concept of product liability under CPA 2019 has underpinned the accountability of product manufacturers, product service providers and product sellers in ensuring worthy quality of goods and services in the market and is a step towards removing errant sellers from selling counterfeit, adulterated and spurious goods in the market, which were a major cause of concern. It may now become extremely essential for e-commerce entities to establish a significant internal compliance review mechanism in order to circumvent the adversities of being faced with liabilities on account of any defaults of the sellers operating on the e-commerce platforms and this may also necessitate significant interfacing between the Marketplace Entities and the sellers to ensure that required compliances are given effect to. It is in this context that the CCPA can play a constructive role to ensure a level playing field between the e-commerce entities, sellers, consumers and the brick and mortar stores.

The CPA 2019 will be tested and we will see the development of judicial literature under the CPA 2019. The effectiveness of the measures introduced under the CPA 2019 will depend upon the seamless functioning of the administrative machinery put in place for enforcement of the provisions of CPA 2019.

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