



Regulatory Alert Delivering Clarity

Changes in FDI conditions in e-commerce activities

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Background

Government of India (GOI) had amended the Foreign Direct Investment (FDI) Policy on e-commerce vide Press Note No.3 dated 29 March 2016 and permitted 100 per cent FDI in the marketplace model of e-commerce (e-commerce marketplace entities) under the automatic route. FDI was not allowed in inventory based model of e-commerce.

In order to provide clarity and strengthen the regulatory framework governing FDI in e-commerce marketplace entities in India and to bring level playing field among online and offline traders, GOI has further amended the consolidated FDI policy Circular of 2017 (FDI Policy) in relation to FDI in e-commerce entities by Press Note No. 2 dated 26 December 2018 (PN-2 of 2018).

The amendments shall be applicable to all e-commerce marketplace entities having FDI with effect from 1 February 2019.

Highlights of the amendments in FDI Policy as per PN-2 of 2018

Before proceeding to understand the changes made by PN-2 of 2018, it may be necessary to refer to certain defined terms in the FDI policy which are as under:

- **Inventory based model of e-commerce** - Inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by the e-commerce entity and is sold to consumers directly.
- **Marketplace based model of e-commerce** - Marketplace based model of e-commerce means providing of an information technology platform by an e-commerce entity on a digital and electronic network to act as a facilitator between buyer and seller.
- **Group Company** - means two or more enterprises which, directly or indirectly, are in a position to: (i) exercise 26 per cent or more of voting rights in other enterprise; or (ii) appoint more than 50 per cent of members of board of directors in the other enterprise.

PN-2 of 2018 has amended Para 5.2.15.2.4 of the FDI policy. The amendments of the FDI policy primarily relates to "Other conditions" applicable to FDI in e-commerce marketplace entities. These are as follows:

Sr. No.	Existing Clause before amendment	Amended Clause	Comments
1.	Clause (iv) – E-commerce entity providing a marketplace will not exercise ownership over the inventory i.e. goods purported to be sold. Such an ownership over the inventory will render the business into	Clause (iv) – E-commerce entity providing a marketplace will not exercise ownership or control over the inventory i.e. goods purported to be sold. Such an ownership or control over the inventory will render the business into inventory based model.	<ul style="list-style-type: none">• If a vendor purchases more than 25% of its inventory from E-commerce marketplace entity or its "group" companies, the sale of inventory of such vendor shall be deemed to be controlled by the market place e-commerce entity.

	<p>inventory based model.</p>	<p>Inventory of a vendor will be deemed to be controlled by e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies.</p>	<ul style="list-style-type: none"> • In addition to the ownership of inventory, if the e-commerce marketplace exercises control (as defined) over inventory, it will be deemed to be an inventory based model where FDI is not permitted. • There would be practical challenges for E-commerce marketplace entity to ascertain if more than 25% of total purchases of such vendors are from the marketplace entity or its group companies. This aspect requires further clarity from the GOI.
<p>2.</p>	<p>Clause (v) – An e-commerce entity will not permit more than 25% of the sales value on financial year basis affected through its marketplace from one vendor or their group companies</p>	<p>Clause (v) – An entity having equity participation by e-commerce marketplace entity or its group companies, or having control on its inventory by e-commerce marketplace entity or its group companies, will not be permitted to sell its products on the platform run by such marketplace entity.</p>	<ul style="list-style-type: none"> • The earlier 25% cap of sales by one vendor on e-commerce platform is now done away with. • E-commerce marketplace entities now cannot sell inventory of group companies or entities where it holds equity stake or where it has control on inventory as mentioned in clause (iv) above.
<p>3.</p>	<p>Clause (ix) E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.</p>	<p>Clause (ix) E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field. Services should be provided by e-commerce marketplace entity or other entities in which e-commerce marketplace entity has direct or indirect equity participation or common control, to vendors on the platform at arm's length and in a fair and non-discriminatory manner. Such services will include but not limited to fulfilment, logistics, warehousing,</p>	<ul style="list-style-type: none"> • Various services to be provided by E-commerce marketplace entity or its group companies to the vendors shall be at arm's length basis and on similar terms which are made available to all other vendors. • Further, group companies of E-commerce marketplace entity are now restricted from providing cash back offers to buyers at favourable terms and now it has to be fair and non-discriminatory.

		advertisement/ marketing, payments, financing etc. Cash back provided by group companies of marketplace entity to buyers shall be fair and non-discriminatory. For the purposes of this clause, provision of services to any vendor on such terms which are not made available to other vendors in similar circumstances will be deemed unfair and discriminatory.	
4.	No such clause	New Clause (xi) added – E-commerce marketplace entity will not mandate any seller to sell any product exclusively on its platform only.	<ul style="list-style-type: none"> • This will prevent exclusive tie-up arrangements with vendors and e-commerce marketplace entities.
5.	No such clause	New Clause (xii) added- E-commerce marketplace entity will be required to furnish a certificate along with a report of statutory auditor to Reserve Bank of India, confirming compliance of above guidelines, by 30th of September of every year for the preceding financial year.	<ul style="list-style-type: none"> • This will cast a formal independently verifiable obligation on e-commerce marketplace entities to ensure that the FDI Policy is complied with.

Conclusion

The amendments will provide clarity to stakeholders and will maintain level playing field among online and offline traders.

Sources: Press Note No. 2 (2018 Series) dated 26 December 2018 issued by Department of Industrial Policy & Promotion, Government of India and Press release dated 26 December 2018 issued by the Press Information Bureau of the Government of India.

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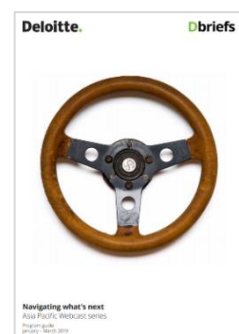
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