GUIDELINES FOR FDI IN E-COMMERCE

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E-commerce and its permissiveness in India has been a long debated and sometimes controversial topic. E-commerce not only faces a lot of opposition from the brick and mortar retail lobby but also suffers from the restrictive government policy on the Foreign Direct Investment (**"FDI policy"**). Some relaxations were brought in last year to allow a single brand retail entity operating through a brick and mortar store to undertake retail trading through E-Commerce, however, the confusion prevailed. In order to provide clarity to the extant FDI policy, the Department of Industrial Policy and Promotion (**"DIPP"**) has decided to issue guidelines for foreign direct investment in E-Commerce sector (**"Guidelines"**) vide Press Note No. 3 of 2016 on March 29, 2016.

A. INVENTORY BASED MODEL VS. MARKETPLACE MODEL

The Guidelines attempt to distinguish between the inventory based model and the marketplace model of E-Commerce, in addition to providing a definition of 'E-Commerce' and 'E-Commerce entity'[1]. The inventory based model has been defined as an E-Commerce activity where inventory of goods and services is owned by E-Commerce entity and is sold to the consumers directly as opposed to the marketplace model where an E-Commerce entity provides an information technology platform on a digital and electronic network where the entity acts as a facilitator between buyer and seller.

The Guidelines go on to state that 100% FDI under automatic route is permitted in marketplace model of E-Commerce. However, keeping in line with the extant position under the FDI Policy, DIPP has specified that FDI is not permitted in the inventory based model of E-Commerce.

B. FDI IN B2B AND B2C E-COMMERCE

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The Guidelines have also, in a consolidated manner, reiterated the recent amendments made in the E-Commerce sector last year[2], and stated as under:

i). FDI is permitted up to 100% under automatic route in Business to Business (**"B2B"**) E-Commerce.

ii). No FDI is permitted in the Business to Consumer (**"B2C"**) E-Commerce, except in the following circumstances:

a. A manufacturer will be permitted to sell its manufactured products in India through E-Commerce retail.

b. A single brand retail entity operating through brick and mortar store is permitted to undertake retail trading through E-Commerce.

c. An Indian manufacturer is permitted to sell its own single brand products through E-Commerce retail. Indian manufacturer would be the investee company, which is the owner of the Indian brand and which manufactures in India, in terms of value, at least 70% of its products in house, and sources, at most 30% from Indian manufacturers.

C. Other Sectoral Conditions

The Guidelines also enumerate certain other conditions applicable to E-Commerce sector, such as:

i). Although an E-Commerce marketplace entity will be permitted to enter into transactions with sellers registered on its platform on Business to Business (**"B2B"**) basis, the E-Commerce entity providing the 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 an inventory based model in which FDI is not permitted.

ii). An E-Commerce entity cannot permit more than 25% of the sale affected through its marketplace, from one vendor or its group companies.

Interestingly, the FDI policy on wholesale trading already had a condition that wholesale trading is permitted among group companies, provided that such sales do not exceed 25% of the total turnover of the wholesale venture. Now, this cap of 25% appears to have been extended to all sales occurring through E-Commerce entities, whether through group companies or any one vendor. While this move of the DIPP may level the playing field for vendors on marketplaces, the marketplace companies themselves may have to scramble to comply with this condition, by not sourcing more than 25% of its products from group companies or any single vendor (which may lead to more than 25% of the sale through the marketplace from one vendor) and ensuring that enough vendors are available on the marketplace to host the products. It is a known fact that many marketplace entities used to largely source from just one or two vendors without any cap on the percentage of sales from that particular vendor(s) (which would now get impacted).

iii). Goods/services made available on the marketplace website are to clearly provide the name, address and other contact details of the seller who shall be solely responsible for - delivery of goods, their warranty/guarantee and customer satisfaction subsequent to the sale and the warrantee/guarantee of the goods/services sold.

iv). Payments for such sale may be facilitated by the E-Commerce entity to the seller in conformity with the guidelines of the Reserve Bank of India ("**RBI**").

v). Another critical condition introduced seems to be regarding market competition, where the Guidelines simply state that *"E-Commerce entities providing marketplace will not directly or indirectly influence the sale price of goods and services and shall maintain level playing field."* The origin of this condition perhaps lies in the ongoing feud between online and offline (brick and mortar) retailers, who have alleged that the marketplace companies follow the practice of predatory pricing and influence prices of the goods to offer unsustainable discounts. With this condition, the onus for maintaining a level playing field seems to have been shifted to the marketplace.

D. CONCLUDING REMARKS

The Guidelines have to a large extent reiterated and consolidated the existing FDI policy on E-Commerce, and many of the conditions mentioned such as providing support to sellers with regard to logistics, warehousing, payment collection in compliance with RBI guidelines, etc. have already been in practice by those operating E-Commerce marketplaces.

However, the significance of these Guidelines, lies in the impact of the restriction of not effecting more than 25% of the sales from any single vendor and its group companies and the obligation to maintain a level playing field with regard to pricing of goods/services, on the current business model adopted by the E-Commerce. While the Guidelines have brought in clarity where there was none as the marketplace model while prevalent, had remained undefined and therefore ambiguous and open to speculative interpretations, the new restrictions could possibly impact the *free for all* growth of the marketplace model going forward.

Endnotes

1 'E- Commerce' has been defined to mean buying and selling of goods and services including digital products over digital and electronic network. 'E- Commerce entity' has been defined to mean a company incorporated under the Companies Act 1956/2013 or a foreign company under Section 2(42) of the Companies Act, 2013 or an office, branch or agency in India as provided in section 2(v)(iii) of FEMA, 1999, owned or controlled by a person resident outside India and conducting the E-Commerce business.

2 Please see Press Note 12 of 2015 dated 24th November, 2015.

Feedback