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**REVIEW OF FDI POLICY IN E-COMMERCE**

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**Introduction**

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 % FDI in the marketplace model of e-commerce (e-commerce marketplace entities) under the automatic route. However, FDI was not allowed in inventory-based model of e-commerce.

With the Indian general elections being just around the corner, it appears that the Union Government has moved just in time to plug some of these alleged gaps in the FDI Policy (on e-commerce activities) by issuing PN 2 of 2018. PN 2 of 2018 primarily targets the following conditions for receiving FDI in e-commerce activities (in the marketplace model):

(a) control over inventory by the provider of the marketplace platform,

- (b) equity participation by the provider of the marketplace platform in the sellers that are selling on such platform,
- (c) fair and non-discriminatory dealings by the marketplace platform with such sellers, and
- (d) exclusivity arrangements between such platform and sellers.

**As per DIPP, through the latest Press Note (2/2018), government has only reiterated the policy provisions to ensure better implementation of the policy in letter and spirit. The amendments shall be applicable to all e-commerce marketplace entities having FDI with effect from 1 February 2019.**

## Key Highlights

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:

**E-commerce:** E-commerce means buying and selling of goods and services including digital products over digital & electric network.

**E-commerce entity:** E-commerce entity means a company incorporated under the Companies Act, 1956 or 2013 or a foreign company covered 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.

**Marketplace Model vs Inventory based Model:** A marketplace model of e-commerce is a model of providing an information technology platform by an e-commerce entity on digital and electronic network to act as a facilitator between buyer and seller. An inventor-based model of e-commerce, on the other hand, is a model where inventory of goods and services is owned by an e-commerce entity and is sold to consumers directly.

**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 2/2018 has mainly amended para 5.2.15.2.4 of FDI policy which relates to “Other conditions”. These are as follows:

Para:	As per Press Note No.2 /2018 (Post Amendment)	As per Consolidated FDI Policy dated 28.08.2017 (Prior to Amendment)	Comments
5.2.15.2	<b>E-Commerce Activities</b>		
5.2.15.2.4	<b>Other Conditions</b>	<b>Other Conditions</b>	
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 <b>ownership or control</b> over the inventory will render the business into inventory based model. 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.	E-commerce entity providing a marketplace will not exercise <b>ownership</b> over the inventory i.e. goods purported to be sold. Such an ownership over the inventory will render the business into inventory based model.	<ul style="list-style-type: none"> <li>• Under earlier condition, the FDI Policy stipulated that an E-commerce Entity shall not permit more than 25% of the sales value on a financial year basis from one seller or its group companies. The Earlier Condition has been omitted and the Press Note states that an E-commerce Entity shall be deemed to control the inventory of a seller (which is prohibited by the FDI Policy) if more than 25% of the purchases of such seller are from the E-Commerce Entity or its group companies (New Condition).</li> <li>• 'Ownership' or 'Control' over inventory of the sellers by a Marketplace Entity will be the primary test for differentiating a marketplace model of e-commerce from an inventory-based model of e-commerce, as</li> </ul>

Para:	As per Press Note No.2 /2018 (Post Amendment)	As per Consolidated FDI Policy dated 28.08.2017 (Prior to Amendment)	Comments
v.	An entity having <b>equity participation</b> 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.	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>opposed to the present 'ownership' only test.</p> <ul style="list-style-type: none"> <li>• 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.</li> <li>• The move is aimed to ensure that the market place entity or its related companies cannot control inventory under the FDI rules.</li> <li>• Earlier 25% cap was on sales by one vendor on e-commerce platform.</li> <li>• Vendors will not be permitted to sell their products on platforms run by a Marketplace Entity if such Marketplace Entity or its group companies have equity participation in the vendors or control over the inventory.</li> </ul>

Para:	As per Press Note No.2 /2018 (Post Amendment)	As per Consolidated FDI Policy dated 28.08.2017 (Prior to Amendment)	Comments
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 <b>at arm's length and in a fair and non-discriminatory manner</b> . Such services will include but not limited to fulfilment, logistics, warehousing, advertisement/ marketing, payments, financing etc. Cash back provided by group companies of	E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.	<ul style="list-style-type: none"> <li>• The Press Note2/2018 has introduced the term “equity participation” and accordingly if an E-Commerce Entity or its group companies has any “equity participation” in a company, such company shall not be permitted to sell goods on the E-commerce Marketplace.</li> <li>• The FDI Policy now stipulates that if an E-commerce Entity or any entity in which the E-commerce Entity has “direct or indirect equity participation” or is under common control, provides any services (including logistics, warehousing, payments, etc), such services should be provided to sellers in a fair and non-discriminatory manner.</li> <li>• Cashback offered to buyers by group companies of the Marketplace Entities are now required to be given on a fair and non-discriminatory basis.</li> <li>• As per the note, a market place e-commerce entity providing services to a vendor on terms which are not made available to other</li> </ul>

Para:	As per Press Note No.2 /2018 (Post Amendment)	As per Consolidated FDI Policy dated 28.08.2017 (Prior to Amendment)	Comments
	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.		vendors under similar circumstances will be treated as unfair and discriminatory.
xi.	E-commerce marketplace entity will not mandate any seller to sell any product exclusively on its platform only.	<b>No such provision.</b>	<ul style="list-style-type: none"> <li>• With this requirement, preferential treatment for one or more seller by a marketplace entity will no longer exist.</li> <li>• This restriction is to adversely impact exclusive arrangements between e-commerce marketplaces and telecom or goods manufacturing companies, to sell products exclusively on their online platforms</li> </ul>
xii.	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.	<b>No such provision.</b>	<ul style="list-style-type: none"> <li>• This obligation will ensure e-commerce entity having FDI to comply with the FDI Policy.</li> </ul>

## What DIPP Says

Clarifications reiterated existing conditions



Intent was to ensure implementation in letter & spirit

Consumer interest safeguarded

Customer will gain in a fair, competitive & transparent regime

**Policy does not place restriction on nature of products, such as private labels**

**FDI in sectors such as food governed by their own policy**

