

OTTs can distribute original content without any restriction: Experts

E-commerce-related provisions in the FDI policy are far from perfect, both in terms of approach and drafting

[Gowree Gokhale & Vaibhav Parikh](#)

Last Updated at April 14, 2019 23:38 IST



Photo: iStock

Foreign direct investment in the e-commerce industry has been a hot topic for the last few years. Recently, there were some news reports on whether over-the-top (OTT) content platforms be covered by the restrictions under the FDI policy (policy). It is rather surprising how the news reports misinterpreted the relevant provisions. Unfortunately, the e-commerce-related provisions in the policy are far from perfect, both in terms of approach and drafting.

In this article, we have discussed why OTT content platforms are not covered by the restrictions, and in general, why the services sector ought not to have been covered under the e-commerce-related restrictions.

Let's revisit the history of the e-commerce-related provisions under the policy to get a better perspective. Historically, FDI was restricted in the retail sector for goods, both single-brand and multi-brand. Therefore, B2C e-commerce was restricted. Over a period of time, the policy was liberalised for single-brand and multi-brand goods, however, the e-commerce restriction continued (except to a limited extent for single-brand). In the meantime, technology platforms emerged, which connected buyers and sellers and thus, created initial marketplace models. The models further evolved to manage marketplaces, where in addition to connecting buyers and sellers, entities provided other services like logistics, customer support, and payment-related services for better customer service. Such entities or affiliated entities also started supplying goods to vendors on a wholesale basis (B2B). General view prevailed that such marketplaces are not themselves involved in retail trading and they carried out activities that were permitted under the policy, hence were eligible for FDI. Until 2016, the policy did not specifically acknowledge the marketplace model. However, it appears that since the role of marketplaces started expanding, the government thought it was prudent to come up with guidelines for marketplaces with FDI. In the meantime, marketplaces for services had also emerged, for instance, for taxi aggregation services, food delivery services and personalised services.

In 2016, the policy defined e-commerce to mean "buying and selling of goods and services, including digital products over the digital & electronic network". Thus, the definition included "services" as well. It further stated that subject to the FDI policy, companies could do B2B e-commerce, but not B2C e-commerce. However, the policy further clarified that without any government approval, 100 per cent FDI is permitted in entities involved in the sale of services through e-commerce (this will include inventory-based model, as defined below).

The policy also defines two terms:

Inventory-based model of e-commerce means an e-commerce activity where the inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly. Marketplace-based model of e-commerce means providing an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller.

Technically, the term "inventory" does not seem appropriate in relation to e-commerce platform offering services, whether on their own or as a marketplace. Keeping wording aside, in any event, it is very clear that for OTT subscription services, 100 per cent FDI is permitted. They are

not marketplaces; hence, the question of restrictions that apply to marketplaces does not arise. In short, they can distribute original content without any restriction.

Coming to the next point, the policy imposes some specific restrictions on marketplace companies. Some restrictions applied only in relation to goods while others to both goods and services. If one examines these restrictions, two questions emerge: Why are restrictions imposed only on FDI marketplace entities? Why are restrictions imposed on marketplaces for services?

On the first question, some of the restrictions and conditions in our view should also apply to all marketplaces or to none. There is no reasonable justification to make them applicable only to marketplaces having FDI.

On the second question, it is worth pondering that while there are no restrictions in entities having FDI to provide services through e-commerce, why are FDI entities providing a marketplace for such services regulated under the policy.

There is a need for clearer drafting of the policy in this regard. We hope that while framing the next version of the policy, the government takes these issues into account and removes reference to the marketplace for services from the restrictive provisions.

Gokhale is leader, technology, media & entertainment and telecommunications practice; Parikh heads the US operations, leader, corporate transactions and technology law practice at Nishith Desai Associates.

Views expressed are personal

First Published: Sun, April 14 2019. 23:35 IST