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Revising The FDI Policy For E-Commerce

In respect to marketplace related provisions, the definition of the term marketplace is very wide to include pureplay technology platforms. There are quite a few Indian start ups who provide tech platforms for small and medium businesses to get online. They do not provide any other services, except payment integration, to such sellers. Such entities should not be considered as marketplace entities under the FDI policy. Due to condition (i) of Rules 15.2.3 of the Non-Debt Rules, if FDI comes into such tech starts ups (marketplace entity) and such FDI investor (group company) also has investments in manufacturing and single brand retail companies (sellers), then such other businesses will not be able to avail the platform of tech start-ups. This requires investor to choose between marketplace and seller entities. Hence, the government should re-examine the nature of entities that are likely to fall in the definition of marketplace and ascertain whether some of the provisions are in fact detrimental to Indian start-ups.

The provision with respect to exclusivity arrangement between marketplace and sellers should be taken out of FDI policy as it is more of a competition law issue than the FDI issue. There are other provisions that address the concerns of marketplaces having indirect control over goods.

Overall, the provisions with respect to SBRT, MBRT and e-commerce should be revisited, in the context of current realities and market surveys as also FDI numbers.

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Foreign direct investment (FDI) policy in e-commerce sector has been controversial. The focus always has been on whether the marketplaces have violated the existing FDI norms. In this article, we stay away from that discussion and provide recommendations for clarifications and further liberalization of the FDI policy on possibly lesser controversial aspects.

The recommendations are made keeping in mind aspects such as need for clear regulation, consumer right to have access to variety of goods and services and of course and need of further FDI for growth.

A manufacturing company having FDI is allowed to conduct B2C inventory-based e-commerce in India, obviously because, is it not conducting a trading activity. However, in some cases, the same entity may source / import some goods from third parties. If manufacturing entity creates an online platform to sell its manufactured goods, it cannot sell such third-party sourced goods on B2C basis on the same platform. Such manufacturing entities are already contributing to the Indian economy. Hence, such entities should be allowed to sell third party goods, at least to some extent e.g. 80 % manufactured and 20 % sourced goods, at least in the same category as the manufactured goods or ancillary or related to manufactured goods.

While 100% FDI is permitted in Marketplace, 100 % FDI is not permitted in multi brand retail trading in goods. Hence, certain conditionalities are imposed on marketplaces to ensure checks and balances. Certain conditions are also imposed on marketplaces for services. Since 100% FDI in e-commerce services is permissible, marketplaces for services should not be under any conditionalities. Due to these conditionalities, LLPs operating marketplaces for services potentially cannot attract FDI, unless it converts into a company.

100% FDI is permitted under automatic route for single brand retail trading (SBRT). However, such entities cannot operate e-commerce platforms unless they have or propose to have physical stores. This conditionality should be done away with. Even if SBRT entity does not have physical stores, it will still contribute to the economy through employment and logistics. The pandemic has shown us the need to consider offline and online market as a single market. Secondly, it should be clarified that if sub brands are sold under a single brand that still amounts to SBRT. Thirdly, to give impetus to the brands originating in India, the condition that “Indian brands should be owned and controlled by resident Indian citizens and/or companies which are owned and controlled by resident Indian citizens”, should be done away with. This condition creates unnecessary confusion for FDI. Fourthly, the sourcing norms should be simplified and SBRT entity should be given an option to contribute to the Indian economy and society through multiple routes, rather than only through sourcing. E.g. SBRT entity may contribute to the CSR above and beyond statutory requirement. Overall, SBRT related conditions should be simplified and make clearer, only then it will achieve its full potential and benefit of it being under 100% automatic route.

As a progressive policy, multi brand retail trading (MBRT) entities with FDI should be permitted to carry out e-commerce activity, subject to certain conditions (e.g. sale to be restricted in the states that have permitted such FDI). The decision in this regard also should be left to states and union territories.