

By email: ecom-dipp@gov.in

Subject: Comments on 'Draft National E-Commerce Policy'

Ref: Draft National E-Commerce Policy accessed through hyperlink: <https://dipp.gov.in/whats-new/draft-national-e-commerce-policy-stakeholder-comments>.

Dear Sir,

We are grateful for the opportunity to comment and provide suggestions on the 'Draft National E-Commerce Policy'.

The draft policy has been issued at an opportune time that could significantly influence the growth trajectory of burgeoning e-commerce sector in India. Though the draft policy is a forward looking document that deals with multitude of aspects concerning e-commerce sector in India, our comments are however restricted to the Foreign Direct Investment ('FDI') norms prescribed for e-commerce sector in India.

We offer our comments below on rationalization of E-commerce Sector specific FDI policy:

1. Background:

- 1.1. The genesis of permitting FDI in the 'Marketplace model of e-commerce' has been brought out on Page 19 of the *Draft National E-Commerce Policy*. The FDI policy for e-commerce sector has been principally guided by the vision of creating a level-playing field between all participants and to discourage the situation of capital dumping in India. Additionally, the threat to the livelihood of small offline retailers of multi-branded products has often been cited to substantiate the existence of FDI policy for this sector.
- 1.2. Paragraph 15.2 to Regulation 16.B of FEMA Notf. 20(R)/2017 dated 07/11/2017 [Foreign Exchange Management (Transfer or Issue of Security by Person Resident Outside India) Regulations, 2017] lays down the Sector Specific policy for Total Foreign Investment pertaining to individual sectors. Para 15.2 was introduced based upon Press Note 3 of 2016 issued by DIPP which corresponds to the e-commerce sector. There were allegations of circumvention of Press Note 3 of 2016 which prompted the Government to issue Press Note 2 of 2018. Issuance of Press Note 2 of 2018 (w.e.f. 01.02.2019) has effectively replaced Press Note 3 of 2016. Corresponding amendments have also been made to FEMA Notf. 20(R)/2017 vide G.S.R.No.78(E) dated January 31, 2019.
- 1.3. Most of the changes introduced in Press Note 2 of 2018 are in line with the spirit of law that has always intended to disallow B2C trading in any manner. There has been no alteration of

the definitions segment of Press Note 3 of 2016 (including the definition of Marketplace based model of e-commerce) which bears witness to the stated position that foreign investment was allowed even then only into a marketplace entity which acted as a facilitator between the buyer and a seller.

2. Concerns regarding Press Note 2 of 2018:

2.1. Changes were introduced with regard to two important conditions contained in erstwhile Press Note 3 of 2016 to ensure that the spirit of FDI policy is not vitiated. The changes are summarized below:

Condition	Press Note 3/2016	Press Note 2/2018
(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 inventory based model.	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 inventory based model. <i>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.</i>
(v)	An e-commerce entity will not permit more than 25 percent of the sales affected through its marketplace from one vendor or their group companies.	<i>An entity having equity participation by ecommerce marketplace entity or its group companies or having control on its inventories by ecommerce marketplace entity or its group companies will not be permitted to sell its products on the platform run by such marketplace entity.</i>

2.2. Even after introduction of key changes in these conditions, it has been alleged by various market participants and widely reported in the press that though the e-commerce companies have simply restructured their business affairs to comply with the letter of law, yet there is want of compliance with the spirit of law^{1,2}.

2.3. Para 2.1 and 2.2 is merely a proxy to highlight concerns arising out of tweaking of FDI policy at various occasions and its shortcoming to enforce compliance with spirit of law.

2.4. At the same time, it may be mentioned that none of the conditions contained in Press Note 2 of 2018 apply to any Indian entity acting as an e-commerce marketplace which does not have FDI. For e.g. condition (ix) which restricts e-commerce marketplace entity to allow exclusive

¹ <https://economictimes.indiatimes.com/industry/services/retail/key-amazon-seller-cloudtail-returns-in-a-new-avatar/articleshow/67877172.cms>

² <https://economictimes.indiatimes.com/industry/services/retail/flipkart-bets-on-alpha-beta-tango-to-sync-with-fdi-norms/articleshow/68056263.cms>

product sale on its platform does not apply to e-commerce marketplace run by Indian entity not having any FDI.

2.5. Viewed on a holistic basis, Press Note 2 of 2018 indeed discriminates against entities having FDI.

3. Suggestions:

3.1. The intent of FDI Policy has always been to create a level-playing field between all market participants and to avoid a situation of capital dumping. This level-playing field may continue to remain exposed to distortion by way of capital dumping or other means (irrespective of involvement of foreign capital / FDI) since capital dumping / other means may be resorted to by even Indian conglomerates which do not have FDI.

3.2. It is therefore our humble suggestion:

- **To reconsider the subsistence of FDI policy for e-commerce sector and surrender it to market forces completely³; or**
- **Alternatively, to extend the application of FDI policy conditions on e-commerce sector to Indian entities that do not have FDI.**

We sincerely hope that the above comments may be useful to the DPIIT in framing of 'National Policy on E-commerce'.

Yours sincerely,

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³ Competition Act, 2002 would continue to govern such circumstances.