

E-Commerce - Introduction and recent FEMA / FDI developments

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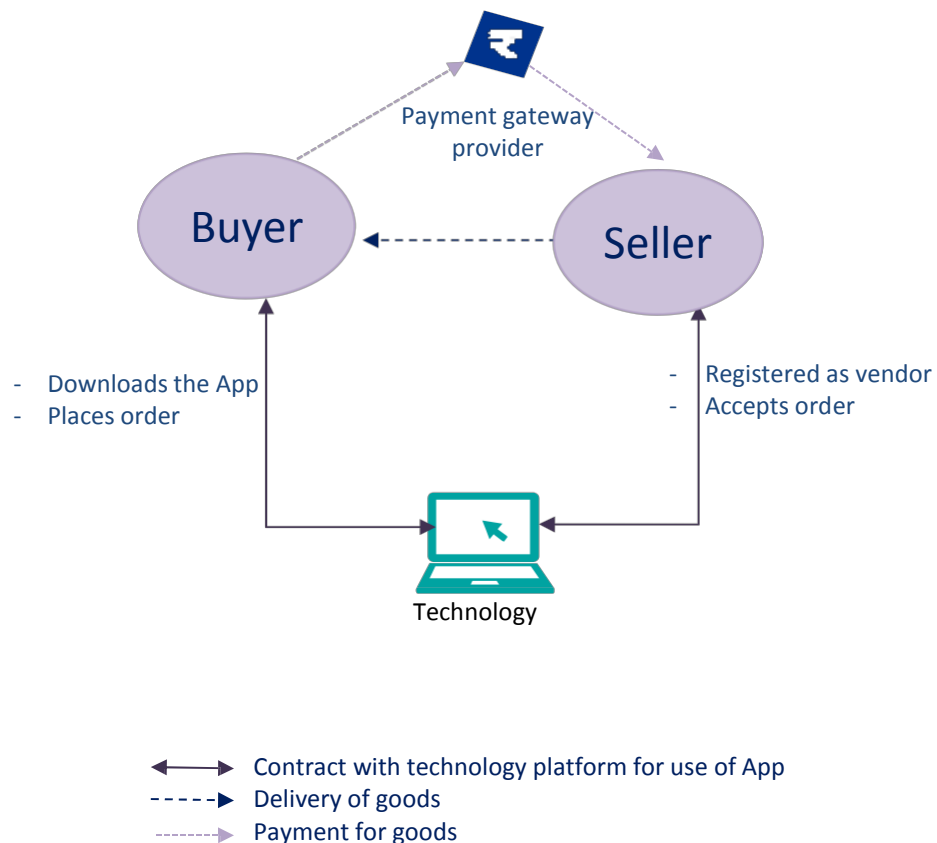
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E-commerce - evolution and FEMA updates

Introduction to e-commerce



What is e-commerce?

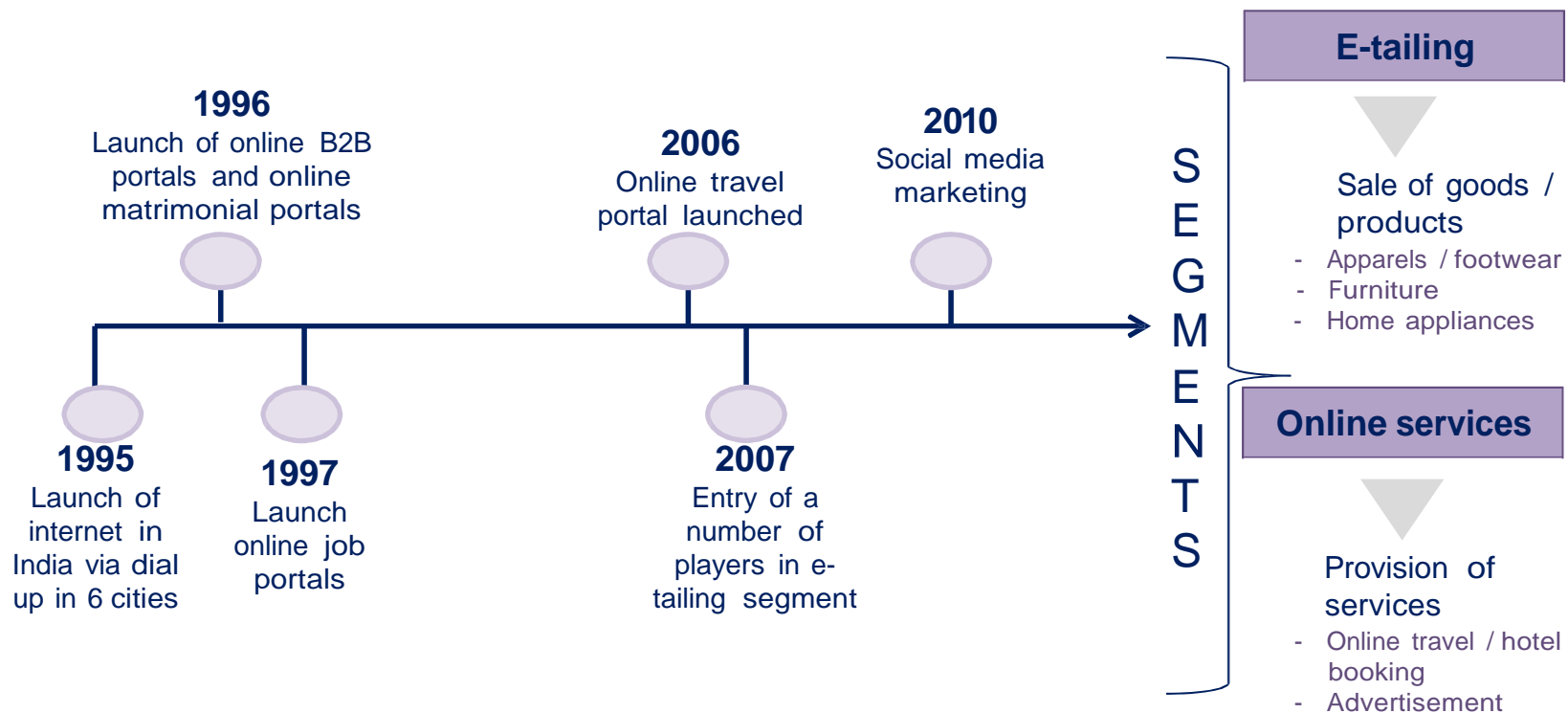
- Exchange of goods or services for money via electronic network, computer or smartphones;
- An e-commerce transaction is classified by two key elements:
 - **Usage of technology and electronic platforms** to carry out transactions of buying and selling of goods and services
 - **Usage of online payments mechanism** such as credit/ debit cards, online banking etc. Alternatively, other forms of payments such as cash-on-delivery are also accepted

Multiple definitions on 'e-commerce' under different legislations (Annexure 1)



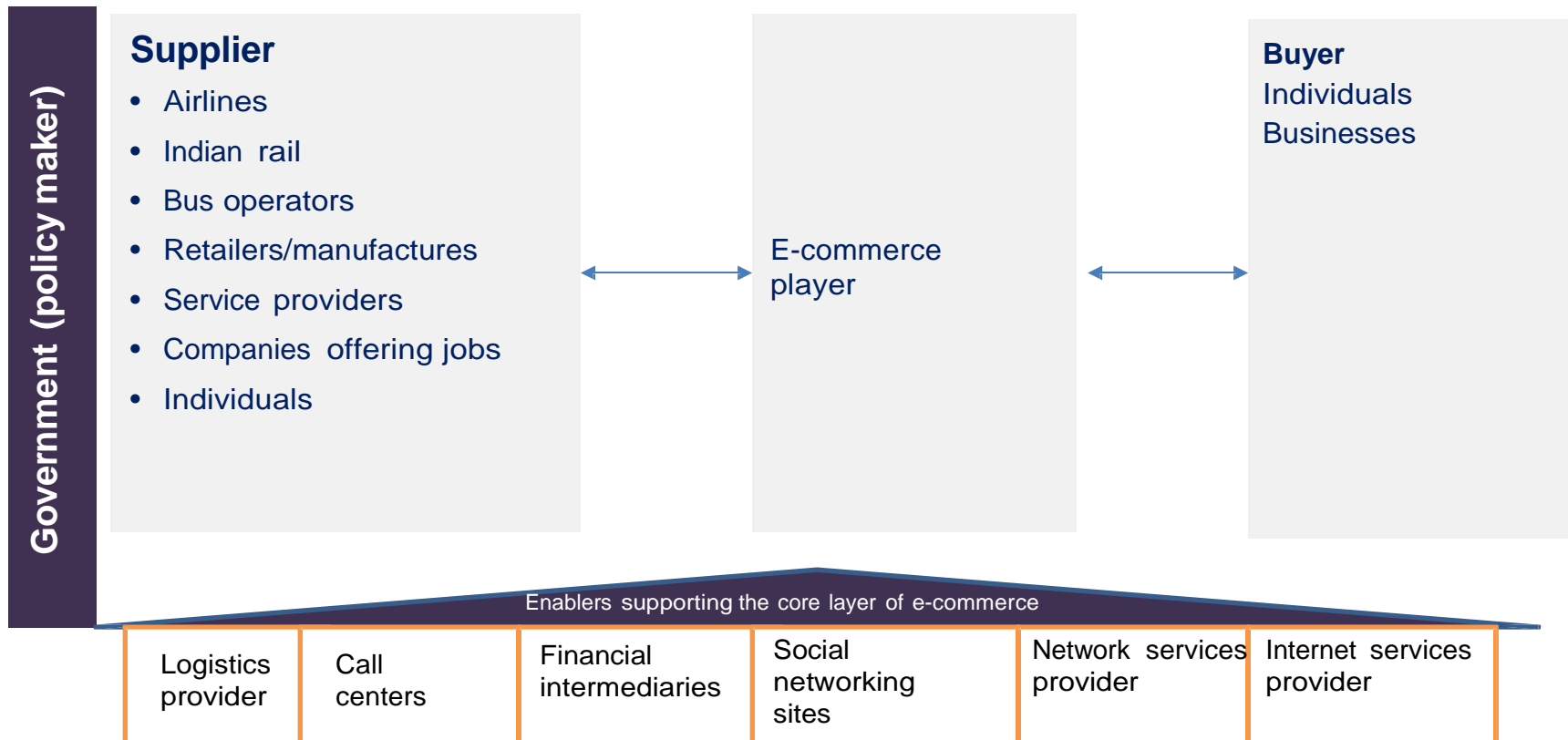
Evolution of e-commerce in India

Over the years, e-commerce has strengthened its footprint in India



E-commerce a game changer and future of "Digital India"

E-commerce - key stakeholders



Drivers for growth of e-commerce

Government initiatives

- Vision of Digital India, Startup India
- Promotion of 'Cashless Economy'
- Allocating USD 1.55bn for 'BharatNet Project'*
- Investment in 'Marketplace in E-commerce' under auto route
- RBI and National Payment Corporation of India launched Unified Payment Interface



Other factors

- Increased awareness of using the internet
- E-tailing or online shopping now only a click away, saves travel cost and time
- Discounts / freebies an important factor contributing growth

Government's initiatives complimented with marketing strategies has encouraged digital shopping

** Announced during Union Budget 2017-18*

Regulations that may apply to an 'E-commerce Entity'

Regulatory

- Foreign Direct Investment Policy
- Foreign Exchange Management Act, 1999
- Companies Act, 2013
- Payment and Settlement Act, 2007
- Regulations prescribed by the relevant ministry/state regulations

Tax

- Income-tax Act, 1961
 - Withholding tax on payments to vendors
 - Capital v Revenue
 - Carry forward of business losses
 - Valuation and transfer pricing implications
- Double taxation avoidance agreement
- Good and Services Tax

Technology and data protection

- Information Technology Act, 2000
- Information Technology (Intermediaries Guidelines) Rules, 2011
- Consumer Protection Act, 1986

Legal

- Indian Contract Act, 1872
- Indian Copyright Act, 1957
- The Patents Act, 1970
- Labor laws



- **Laws regulating 'e-commerce' in India are evolving and need clarity**
- **Draft policy to regulate e-commerce in the pipeline (refer Annexure 2)**
- **Draft of the Personal Data Protection Bill, 2018 has been released by Justice B.N. Srikrishna**

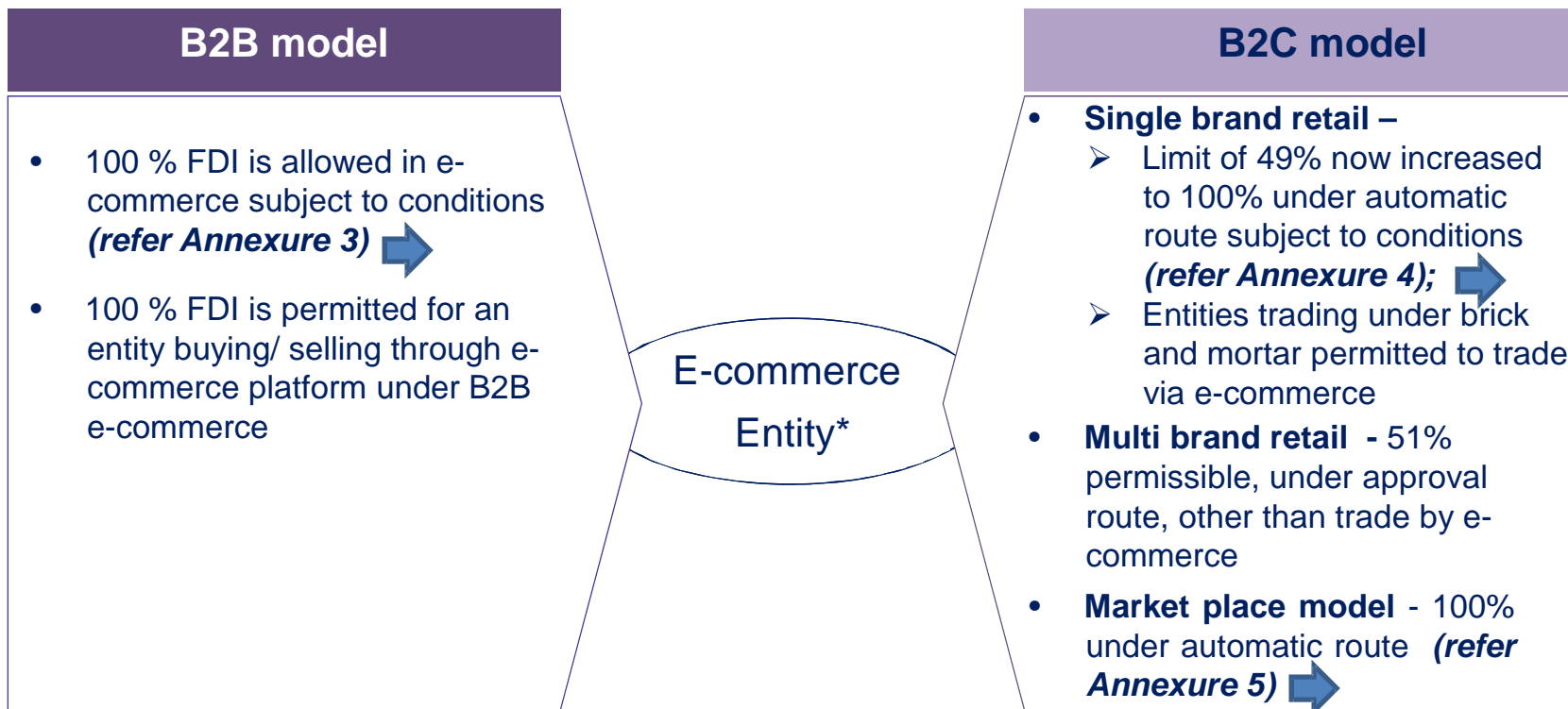


Different business models

	B2B <i>(business to business)</i>	B2C <i>(business to consumer)</i>	C2C <i>(consumer to consumer)</i>
Transacting parties	<ul style="list-style-type: none"> • Businesses transacts with each other for buying/selling products and services 	<ul style="list-style-type: none"> • Businesses directly transact with consumers to sell their products and services 	<ul style="list-style-type: none"> • Transaction between two consumers facilitated
Sector	<ul style="list-style-type: none"> • Logistics • Classifieds/ advertisement 	<ul style="list-style-type: none"> • Travel / hotel booking • Wholesale / retail trade • Social networking • Music streaming 	<ul style="list-style-type: none"> • Used cars • Immovable properties • Electronics/ appliances
Revenue	<ul style="list-style-type: none"> • Subscription income for package of services • Income from listing fees 	<ul style="list-style-type: none"> • Commission from vendors • Payment gateway charges • Logistics charge 	<ul style="list-style-type: none"> • Advertisement income from featured packages
Prominent players	<ul style="list-style-type: none"> • Indiamart • Amazon Business 	<ul style="list-style-type: none"> • Bigbasket.com • MakeMy Trip • Amazon 	<ul style="list-style-type: none"> • Quikr

FDI in e-commerce entity

FDI/FEMA recent developments



* E-commerce entity

- A company incorporated under the Companies Act 1956 or the Companies Act 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

FDI in e-commerce entity (conditions) - for marketplace

FDI/FEMA recent developments

Permissible Activities

- Enter into transactions with sellers registered on its platform on B2B basis
- Provide support services to sellers in respect of warehousing, logistics, order fulfillment, call center, payment collection and other services
- Provide name, address and other contact details of the seller on the website
- Payments for sale may be facilitated in conformity with the guidelines of the RBI
- Comply with guidelines on Cash & Carry Wholesale trading in case of B2B e-commerce activities

Prohibited Activities

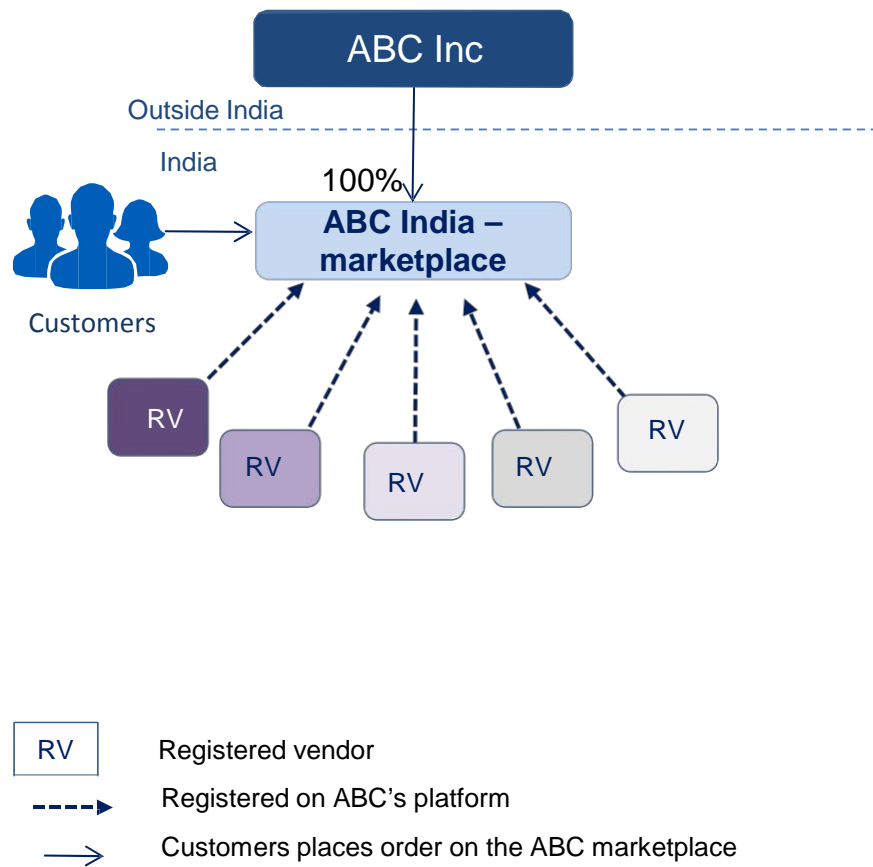
- **Exercise ownership over the inventory i.e. goods purported to be sold**
- Sell more than 25% of the sales value on financial year basis on its marketplace from one vendor or their group companies
- Directly or indirectly influence the sale price of goods or services and maintain level playing field
- Post sales, warranty/ guarantee, delivery of goods to the customers and customer satisfaction. This will be responsibility of the seller

Sale of Services through e-commerce permitted under automatic route, subject to FDI policy and other laws/regulations applicable to the service sector



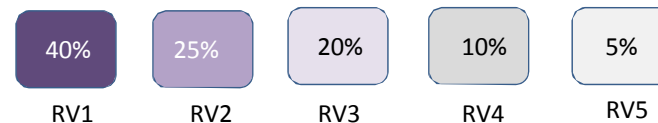
Case studies

Case study 1 - Marketplace model



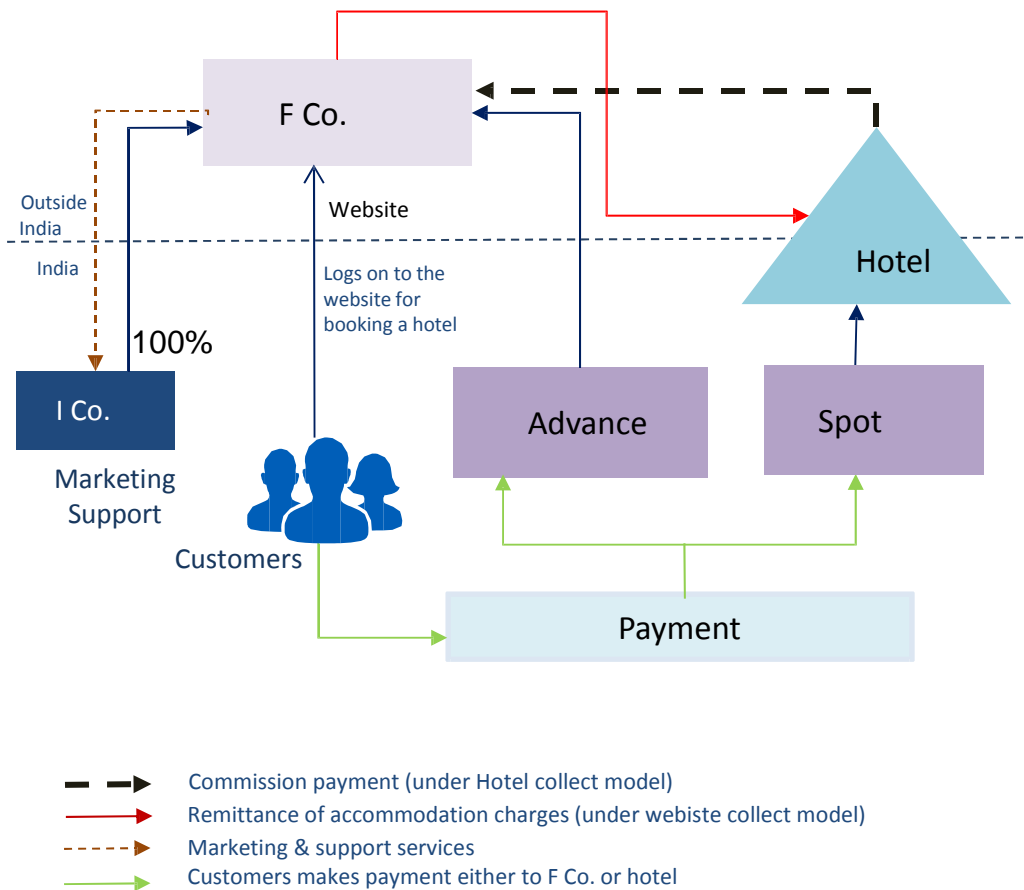
Mechanics

- ABC India is wholly owned subsidiary of ABC Inc
- ABC India is operating a marketplace and several vendors have entered into contracts with ABC India who list their products on ABC's marketplace
- ABC India's marketplace platform is used by the registered vendors to sell their products to customers
- Summary of sales affected by the registered vendors using ABC India's platform during FY 2017-18 is as under:



Whether ABC India is compliant with the FDI regulations?

Case study 2 - Hotel booking portal



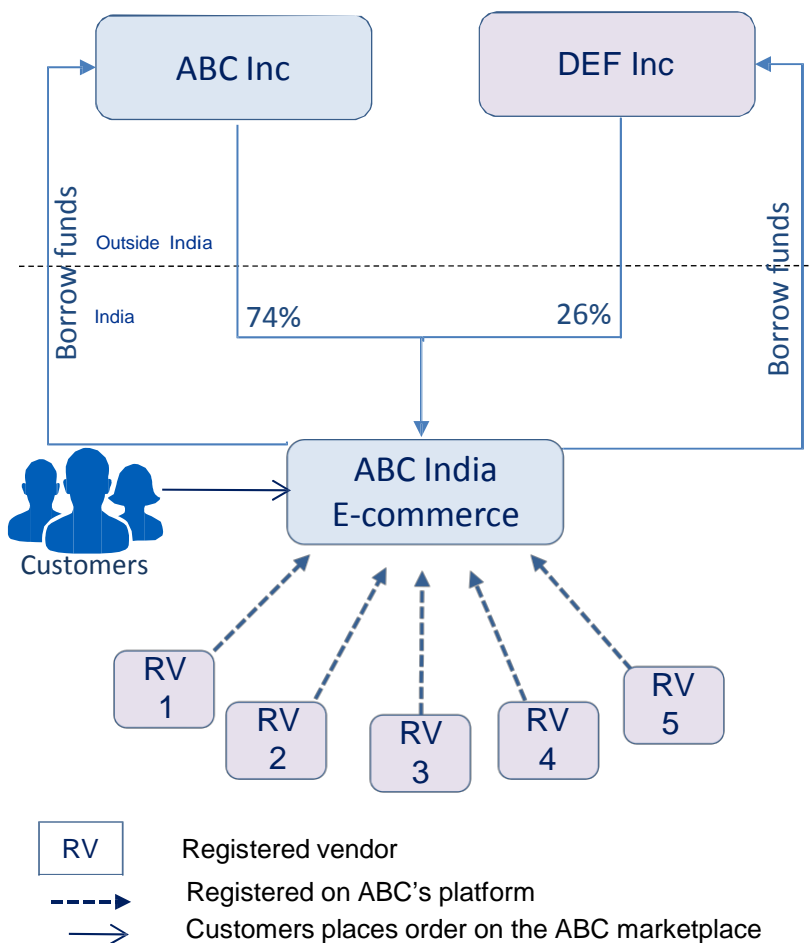
Mechanics

- F Co. owns a hotel booking portal which is registered outside India
- I Co a wholly owned subsidiary of Co in India provides marketing and support services to F Co
- A customer logs to F Co's website for booking a hotel
- Customer has two options to make payment i.e advance or on the spot
- Advance payment is collected in F.Co's bank account outside India, while under the spot payment option the payment is directly made to the hotel
- F Co is entitled to commission on every hotel booking made by the customer using it's portal

Whether the above model of F Co. is compliant with foreign exchange regulations?



Case study 3 - Debt funding for an e-commerce entity



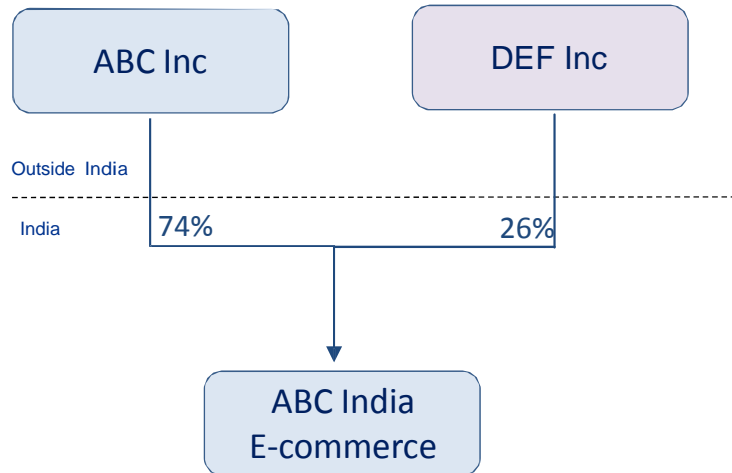
Mechanics

- ABC India is a e-commerce entity
- It is jointly owned by ABC Inc (74%) and DEF Inc (26%)
- ABC India's marketplace platform is used by the registered vendors to sell their products to customers;
- ABC in order to expand it's business is considering to borrow external commercial loan from it's equity shareholders (i.e either ABC Inc or DEF Inc)

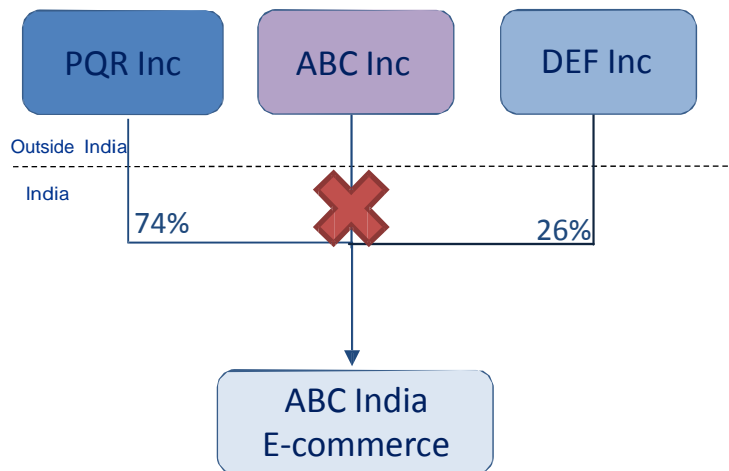
Is ABC India eligible to borrow funds from it's shareholders?

Case study 4 - Transfer of shares from NR to NR

Current Structure



Proposed Structure



Mechanics

- ABC India is a e-commerce entity
- It is jointly owned by ABC Inc (74%) and DEF Inc (26%)
- ABC India's marketplace platform is used by the registered vendors to sell their products to customers
- ABC Inc sells the shares of ABC India to another non resident namely PQR Inc

Whether the shares of I Co can be transferred from ABC Inc to PQR Inc?



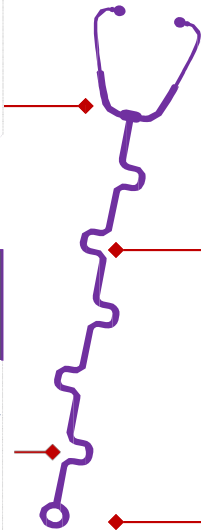


Annexures

Annexure 1 - Multiple definitions under various legislations

Goods and Services Tax
Supply of goods or services or both including digital products over digital or electronic network

Organization for Economic Co-operation and Development (OECD)
The sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or service do not have to be conducted online.



Department of Industrial Policy and Promotion
Buying and selling of goods and services including digital products over digital & electronic network (including network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles etc.)

Ministry of Electronics & Information Technology
A type of business model, or segment of a larger business model, that enables a firm or individual to conduct business over an electronic network, typically the internet



Annexure 2 –National E-commerce policy, key proposals

To restrict retail trade strategies that influence sales prices

India owned and India controlled marketplaces to hold inventory provided the goods are 100 percent produced in India – up to 49 % FDI allowed

Sunset clause for allowing deep discounts by e-commerce players

Single legislation for e-commerce regulation including special wing to be set up by Enforcement Directorate

More control to Indian promoters with minority stakes

Personal/community data collected to be stored in India

Promote use of RuPay card



Annexure 3 - B2B, conditions

- a) *Requisite licenses/ registration/ permits, as specified under the relevant Acts*
 - b) *Except in cases of sales to Government, sales made by the wholesaler shall be considered as 'cash and carry wholesale trading/ wholesale trading' with valid business customers, only when WT is made to the following entities:*
 - i. *Entities holding sales tax/ VAT registration/ service tax/ excise duty/Goods and Services Tax (GST) registration; or*
 - ii. *Entities holding trade licenses i.e. a license/ registration certificate/ membership certificate/ registration under Shops and Establishment Act;*
 - iii. *Entities holding permits/ license etc. for undertaking retail from Government Authorities/ Local Self Government Bodies; or*
 - iv. *Institutions having certificate of incorporation or registration as a society or registration as public trust for their self-consumption.*
- Note: An Entity, to whom WT is made, may fulfil any one of the 4 conditions at (b)(i) to (iv) above.**
- c) *Full records indicating all the details of such sales like name of entity, kind of entity, registration/ license/ permit etc. number, amount of sale etc. should be maintained on a day to day basis.*
 - d) **WT of goods shall be permitted among companies of the same group. However, such WT to group companies taken together shall not exceed 25 percent of the total turnover of the wholesale venture.**
 - e) *WT can be undertaken as per normal business practice, including extending credit facilities subject to applicable regulations.*
 - f) *A wholesale/ cash and carry trader can undertake single brand retail trading, subject to the conditions mentioned in para 15.3. An entity undertaking wholesale/ cash and carry as well as retail business will be mandated to maintain separate books of accounts for these two arms of the business and duly audited by the statutory auditors. Conditions under these Regulations for wholesale/ cash and carry business and for retail business have to be separately complied with by the respective business arms.*

Source: Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017



Annexure 4- Single brand retail trading, conditions

- *Products to be sold should be of a 'Single Brand' only*
- *Products should be sold under the same brand internationally i.e. products should be sold under the same brand in one or more countries other than India*
- *'Single Brand' product-retail trading would cover only products which are branded during manufacturing*
- *A person resident outside India, whether owner of the brand or otherwise, shall be permitted to undertake 'single brand' product retail trading in the country for the specific brand, either directly by the brand owner or through a legally tenable agreement executed between the Indian entity undertaking single brand retail trading and the brand owner*
- *In respect of proposals involving foreign investment beyond 51 percent, sourcing of 30 percent of the value of goods purchased, will be done from India, preferably from MSMEs, village and cottage industries, artisans and craftsmen, in all sectors. The quantum of domestic sourcing will be self-certified by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts which the company will be required to maintain. The procurement requirement is to be met in the first instance as an average of five years total value of goods purchased beginning 1st April of the year of the commencement of the business i.e opening of the first store. Thereafter it shall be met on an annual basis. For the purpose of ascertaining the sourcing requirement, the relevant entity would be the company, incorporated in India, which is the recipient of foreign investment for the purpose of carrying out single brand product retail trading*
- ***Subject to the conditions mentioned in this Para, a single brand retail trading entity operating through brick and mortar stores, is permitted to undertake retail trading through e-commerce***
- *Single brand retail trading entity shall be permitted to set off its incremental sourcing of goods from India for global operations during initial 5 years, beginning 1st April of the year of the opening of first store, against the mandatory sourcing requirement of 30% of purchases from India. For this purpose, incremental sourcing shall mean the increase in terms of value of such global sourcing from India for that single brand (in INR terms) in a particular financial year from India over the preceding financial year, by the non-resident entities undertaking single brand retail trading, either directly or through their group companies. After completion of this 5 years period, the SBRT entity shall be required to meet the 30% sourcing norms directly towards its India's operation, on an annual basis*

Source: Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017



Annexure 5 - Marketplace and Inventory model

Market Place Model

Providing of an information technology platform by an e-commerce entity on a digital & electronic network to act as a facilitator between buyer and seller

Inventory based model

An e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly



Annexure 6 – Collection and payment mechanism by F.Co

Bank account maintained by the Indian entity

- Non resident company (i.e F.Co), under the extant FDI regulations, is not allowed to receive money outside India
- F. Co may consider appointing its marketing support entity as its limited collection agent after obtaining prior approval from the RBI

OR

Opening Non Resident Ordinary Rupee Account Scheme ('NRO') in India

- F.Co may consider opening a NRO account with the authorized dealer in India
- Permissible credits to NRO account include legitimate dues payable to F.Co in India or any inward remittances from outside India and transfers from other NRO accounts;
- Further, permissible debits to NRO account include local disbursements, remittances of current income abroad.
- Apart from these, balance in the NRO account cannot be repatriated abroad except by Non Resident Indians and Persons of Indian Origin upto USD 1 million



Annexure 7 - ECB in e-commerce sector

The FAQ on ECB framework as updated on 14 August 2018 clears doubt on e-commerce companies availing ECB, the relevant question is reproduced below;

“12. Is a Limited Liability Partnership (LLP) or Partnership firm or Proprietary concern eligible to raise ECB?”

*No, entities which are not covered within the provisions contained in Master Direction stated above [like companies doing trading business (whether online or otherwise), companies involve in activities like tourism, beauty parlour / beauty clinics, entertainment business, retail sales, **e-commerce companies**, etc., on any other activity not covered within these provisions] are not eligible to raise ECB.”*

As per the clarification given above, e-commerce companies are not eligible to raise ECB.



Annexure 8 - Transfer of Indian shares from NR to NR

- *The said transfer between two non-resident is permissible subject to compliance with the pricing guidelines prescribed; i.e.*
 - the price worked out in accordance with the relevant Securities and Exchange Board of India guidelines in case of a listed Indian company or in case of a company going through a delisting process as per the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009;*
 - the valuation of capital instruments done as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant or a Securities and Exchange Board of India registered Merchant Banker or a practicing Cost Accountant, in case of an unlisted Indian Company.*
- *Related filings to be adhered to*

Source: Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017





Thank You

Neetu Vinayek