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Legal experts highlight way ahead for e-commerce companies

Some lawyers who work closely with e-commerce companies said one option is to move court to get their existing business structures such as joint ventures excluded from the new policy

Mugdha Variyar | ETtech | December 28, 2018, 06:43 IST

As [e-commerce](#) companies evaluate the implications of the new policy on [FDI in e-commerce](#), legal experts said there are a few steps that they can take to ensure their business models are not hit badly.

Some [lawyers](#) who work closely with e-commerce companies said one option



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is to move court to get their existing business structures such as joint ventures excluded from the new policy. They may also tie up with wholesalers across different jurisdictions to sell goods to vendors on similar terms to work around restrictions on exercising ownership or control of inventory.

With just about a month left for the new norms to come into force, e-commerce companies are doubling down to evaluate the various possibilities and have recalled employees in their public affairs and legal teams from their New Year holidays to work on the issue. Walmart's global teams are evaluating the policy. The new policy hits Amazon and Flipkart more severely because their group entities control much of the inventory sold on the platform.

It is likely that e-commerce marketplace companies and sellers on these platforms, which might have equity participation from the marketplace companies, may take the position that the existing business structures are excluded because the policy requirements do not seem to have a retrospective effect, said Abhishek Sanyal, an associate partner at Economic Laws Practice.

“They may seek appropriate clarification on the ambiguity regarding ‘equity participation’ to ensure exclusion of indirect investments in downstream entities of Indian owned-and-controlled JVs. Lastly, companies may attempt to secure relief using court’s intervention against the reasonableness of the 25% restriction on sale by domestic sellers through any single e-commerce platform,” Sanyal added.

However, some industry members doubted if the exclusion will be allowed because there is no explicit mention of it in the policy.

E-commerce companies are also likely to partner with independent wholesalers, with the revised policy stating that they cannot exercise ownership or control over inventory and that a vendor cannot make more than 25% of its purchases from the marketplace entity or group companies.

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This puts a question mark on entities such as Cloudfair, Appario, RetailNet and others that are partly owned or controlled by Amazon and Flipkart, as well as large sellers on these platforms, which have been sourcing mainly from the wholesale arms of these companies.

“One approach would be for e-commerce entities to work with wholesalers who can sell goods to vendors on beneficial terms. The key issue is how the e-commerce company and its group will structure transactions with such wholesalers and fund working capital requirements,” said Archana Tewary, a partner at J Sagar Associates.

Rajiv Chugh, national leader for policy advisory and specialty services at EY India, said that the “time has come (for e-commerce players) to look at franchise channels rather than equity investments to do business in India.”

Companies are also likely to go through industry associations to liaise with the government, experts said, as they have done in the past.

Several industry members believe that unless the government effectively implements the policy, e-commerce companies are likely to find ways to circumvent the new norms.

Following the introduction of Press Note 3 in 2016, which restricted a single vendor’s sales to 25% of the total on an online platform, e-commerce companies circumvented the rule by setting up new seller entities or identifying a few entities to ensure control over inventory.

“The new policy will be effective only if the government has the intention of ensuring that companies comply with it. If not, then loopholes will continue to be exploited,” said Kumar Rajagopalan, head of the Retailers Association of India.

“Unless the policy is followed by a will to enforce, we don’t see much changing in the industry,” said Sanjay Sethi, CEO of ShopClues. “If this policy is enforced properly, then we will have a much more even playing field in the industry and money and resources


being spent on building the e-commerce infra rather than giving the cocaine of discounts to the customer that other players can't match," he added.

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