

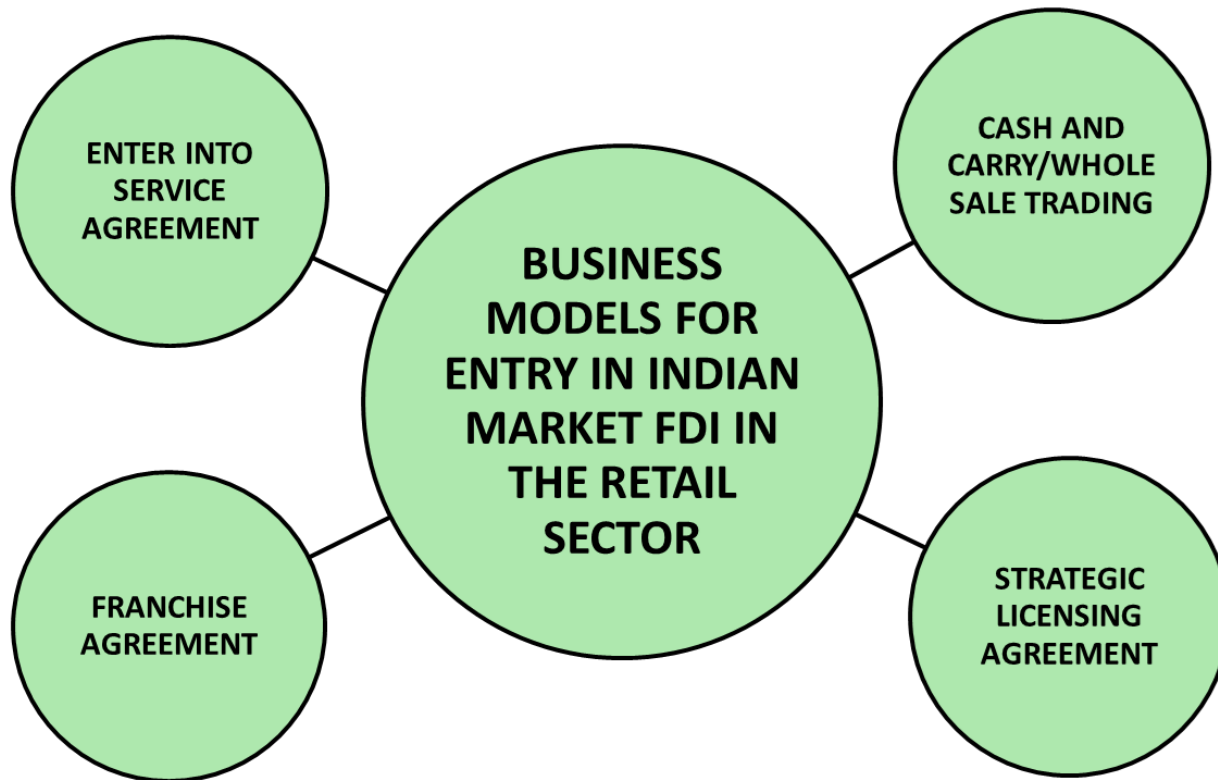
LEX FAVIOS

ADVOCATES & SOLICITORS

FOREIGN DIRECT INVESTMENT ISSUES RELATING TO
RETAIL SECTOR



BUSINESS MODELS



- **Enter into Service Agreement:** A foreign entity can enter into a service agreement with any Indian retail service provider to make an entry in India's retail space.
- **Franchise Agreement:** This is the most preferred entry route by multinational retailers. A foreign entity can enter into a master franchise agreement or regional franchise agreement to enter Indian retail market.
- **Cash and Carry/Wholesale Trading:** Metro AG of Germany was the first significant global player to enter India through this route. Walmart, the world's largest retailer, entered the Indian market through this route in a joint venture with India's Bharti group.
- **Strategic Licensing Agreement:** In this model, the foreign entity can enter into a licensing agreement with a domestic retailer. However, single brand retailing and multi brand retailing are also an option to enter Indian markets, though these routes are not preferred as it takes some time to get government approval.

WHOLESALE TRADING

As per the Consolidated Foreign Direct Investment Policy, 2017 – Foreign Direct Investment (**FDI**) is 100 % allowed under the automatic route, hence no government approval is required in this case.

Cash & Carry Wholesale trading, means sale of goods/merchandise to retailers, industrial, commercial, institutional or other professional business users or to other wholesalers and related subordinated service providers. Wholesale trading would, accordingly, imply sales for the purpose of trade, business and profession, as opposed to sales for the purpose of personal consumption.

The yardstick to determine whether the sale is wholesale or not would be the type of customers to whom the sale is made and not the size and volume of sales. Wholesale trading would include resale, processing and thereafter sale, bulk imports with export/ex-bonded warehouse business sales and B2B e-Commerce.

CONDITIONS FOR WHOLESALE TRADING

- Requisite licenses/registration/ permits, as specified under the relevant Acts/Regulations/Rules/Orders of the State Government/Government Body/Government Authority/Local Self-Government Body under that State Government should be obtained;
- Except in case of sales to Government, sales made by the wholesaler would be considered as 'cash & carry wholesale trading/wholesale trading' with valid business customers, only when WT are made to the following entities:
 - Entities holding sales tax/ VAT registration/service tax/excise duty registration; or
 - Institutions having certificate of incorporation or registration as a society or registration as public trust for their self-consumption; or

- Entities holding trade licenses i.e. a license/registration certificate/membership certificate/registration under Shops and Establishment Act, issued by a Government Authority/Government Body/Local Self-Government Authority, reflecting that the entity/person holding the license/ registration certificate/ membership certificate, as the case may be, is itself/ himself/herself engaged in a business involving commercial activity; or
- Entities holding permits/license etc. for undertaking retail trade (like tehbazari and similar license for hawkers) from Government Authorities/Local Self Government Bodies.
- Institutions having certificate of incorporation or registration as a society or registration as public trust for their self consumption.

- 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;
- WT of goods would be permitted among companies of the same group. However, such WT to group companies taken together should not exceed 25% of the total turnover of the wholesale venture;
- WT can be undertaken as per normal business practice, including extending credit facilities subject to applicable regulations;
- 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 of the FDI policy for wholesale/cash and carry business and for retail business have to be separately complied with by the respective business arms.

E-COMMERCE ACTIVITIES

- As per the Consolidated Foreign Direct Investment Policy, 2017 – Foreign Direct Investment (FDI) is 100 % allowed under the automatic route, hence no government approval is required in this case.
- Subject to provisions of FDI Policy, e-commerce entities would engage only in Business to Business (B2B) e-commerce and not in Business to Consumer (B2C) e-commerce.
- 100% FDI under automatic route is permitted in marketplace model of e-commerce
- FDI is not permitted in inventory based model of e-commerce.

DEFINITIONS

- **E-commerce-** E-commerce means buying and selling of goods and services including digital products over digital & electronic network.
- **E-commerce entity-** E-commerce entity means 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.
- **Inventory based model of e-commerce-** Inventory based model of e-commerce means an e-commerce activity where inventory of goods and services is owned by e-commerce entity and is sold to the consumers directly.
- **Marketplace based model of e-commerce-** Marketplace based model of e-commerce means 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.

CONDITIONS FOR E-COMMERCE

- Digital & electronic network will include network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles etc.
- Marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on B2B basis.
- E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfillment, call centre, payment collection and other services.
- 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.

- An e-commerce entity will not permit more than 25% of the sales affected through its marketplace from one vendor or their group companies.
- In marketplace model goods/services made available for sale electronically on website should clearly provide name, address and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller.
- In marketplace model, payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines of the Reserve Bank of India.
- In marketplace model, any warrantee/ guarantee of goods and services sold will be responsibility of the seller.
- E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field.

SINGLE BRAND RETAIL

As per the Consolidated Foreign Direct Investment Policy 2017, Foreign Direct Investment(FDI) is 100% allowed. However, FDI is permissible up to 49% under automatic route and beyond 49% government approval is required.

Foreign Investment in Single Brand product retail trading is aimed at attracting investments in production and marketing, improving the availability of such goods for the consumer, encouraging increased sourcing of goods from India, and enhancing competitiveness of Indian enterprises through access to global designs, technologies and management practices.

CONDITIONS FOR SINGLE BRAND RETAIL

- 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;
- 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;

- A non-resident entity or entities, whether owner of the brand or otherwise, shall be permitted to undertake 'single brand' product retail trading in the country for the specific brand, directly or through a legally tenable agreement with the brand owner for undertaking single brand product retail trading. The onus for ensuring compliance with this condition will rest with the Indian entity carrying out single-brand product retail trading in India.;
- In respect of proposals involving foreign investment **beyond 51%**, sourcing of 30% of the value of goods purchased, will be done from India, preferably from Medium Small and Medium Enterprises, village and cottage industries, artisans and craftsmen, in all sectors;
- Application seeking permission of the Government for FDI exceeding 49% in a company which proposes to undertake single brand retail trading in India would be made to the Secretariat for Industrial Assistance (SIA) in the Department of Industrial Policy & Promotion;
- Applications would be processed in the Department of Industrial Policy & Promotion, to determine whether the proposed investment satisfies the notified guidelines, before being considered by the FIPB for Government approval.

MULTI – BRAND RETAIL AND CONDITONS

FDI in multi brand retail sector is allowed up to **51%** under the government route.

- Fresh agricultural produce, including fruits, vegetables, flowers, grains, pulses, fresh poultry, fishery and meat products, may be unbranded;
- Minimum amount to be brought in, as FDI, by the foreign investor, would be US \$ 100 million;
- At least 50% of total FDI brought in the first tranche of US \$ 100 million, shall be invested in 'back-end infrastructure' within three years, where 'back-end infrastructure' will include capital expenditure on all activities, excluding that on front-end units; for instance, back-end infrastructure will include investment made towards processing, manufacturing, distribution, design improvement etc.

- At least 30% of the value of procurement of manufactured/processed products purchased shall be sourced from Indian micro, small and medium industries, which have a total investment in plant & machinery not exceeding US \$ 2.00 million;
- This valuation refers to the value at the time of installation, without providing for depreciation. The 'small industry' status would be reckoned only at the time of first engagement with the retailer, and such industry shall continue to qualify as a 'small industry' for this purpose, even if it outgrows the said investment of US \$ 2.00 million during the course of its relationship with the said retailer;
- Retail sales outlets may be set up only in cities with a population of more than 10 lakh as per 2011 Census or any other cities as per the decision of the respective State Governments, and may also cover an area of 10 kms around the municipal/urban agglomeration limits of such cities; retail locations will be restricted to conforming areas as per the Master/Zonal Plans of the concerned cities and provision will be made for requisite facilities such as transport connectivity and parking.

- Government will have the first right to procurement of agricultural products.
- Retail sales outlets may be set up in those States/Union Territories which have agreed, or agree in future, to allow FDI in MBRT under FDI policy. The establishment of the retail sales outlets will be in compliance of applicable State/Union Territory laws/ regulations, such as the Shops and Establishments Act etc.
- Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of multi-brand retail trading.

PROPOSED STRUCTURE

- Set up an entity in India for cash and carry wholesale trading, wherein you form an entity in India and this company can import the products for multiple brands, handle marketing, warehousing and sale on bulk basis.
- For the retail sale it can tie up with third parties or appoint Franchisee in India.

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THANK YOU