India’s FDI Policy in Trading & Retailing Sector: An Insight

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India has developed very comprehensive and open policy towards Foreign Direct Investment (‘FDI’). Since the inception of economic reforms in early 1990s, substantive reforms have been initiated in the field of investment, trade, financial sector, exchange control simplification of procedure, enactment of competition and intellectual property rights, etc., Present India provides a liberal, attractive, and investor friendly investment climate.

The Ministry of Commerce and Industry, Government of India is the nodal agency for motoring and reviewing the FDI policy on continued basis and changes in sectoral policy/sectoral equity cap. The FDI policy is notified through Press Notes by the Secretariat for Industrial Assistance (SIA), Department of Industrial Policy and Promotion (DIPP)\(^1\).

The foreign investors are free to invest in India, except few sectors/activities\(^2\), where prior approval from the Reserve Bank of India (‘RBI’)\(^3\) or Foreign Investment Promotion Board (‘FIPB’)\(^4\) would be required.

India has taken liberal stand to the extent allowed FDI for cash and carry wholesale trading, B2B transactions, Single Brand product retailing, etc., FDI in retail trading except for Single Brand products, has been not allowed. Restricting FDI in retail is primary to protect India’s traditional unorganised retailing.

It will be prudent to look into Press Note 4 of 2006 issued by DIPP, which provide the sector specific guidelines for FDI with regard to the conduct of trading activities.

a. FDI up to 100% for cash and carry wholesale trading and export trading allowed under the automatic route.

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\(^1\) [http://dipp.nic.in/](http://dipp.nic.in/)

\(^2\) The followings activities/sectors requires prior approval of FIPB.

i. Manufacture of Cigars & Cigarettes of tobacco and manufactured tobacco substitutes;

ii. Manufacture of Electronic aerospace and defence equipments, all types;

iii. Manufacture of items exclusively reserved for Small Scale Sector with more than 24% FDI;

iv. Proposals in which the foreign collaborator has an existing financial / technical collaboration in India in the ‘same’ field; and

v. All proposals falling outside notified sectoral policy/caps.

\(^3\) [http://www.rbi.org.in/](http://www.rbi.org.in/)

\(^4\) The Foreign Investment Promotion Board is a special board set up by the Government of India as the exclusive agency dealing with matters relating to Foreign Direct Investment (‘FDI’) as well as promoting investment into India.
d. FDI up to 51 % with prior Government approval (i.e. FIPB) for retail trade of ‘Single Brand’ products, subject to Press Note 3 (2006 Series).

This is interesting to note that FDI Policy does not define the term ‘Retail Trading’ and ‘Cash and Carry Wholesale Trading’. There is also no guidance on how these terms have to be interpreted. In 2004, The High Court of Delhi discussed the meaning of trading, retail trading and cash and carry wholesale trading and have observed that it is a matter of policy interpretation as to whether trading by a foreign company of its own products will be construed as ‘Retail Trading’ or ‘Cash and Carry Wholesale Trading’. It was argued that concepts of retail and wholesale trade are totally different, especially as understood in India and has referred to Blacks Law Dictionary, a dictionary of legal terms that is widely accepted by Courts in India while interpreting legal terms, provides some guidance on the definition of the terms ‘retail’, ‘trade’ ‘trader’ ‘trading’ ‘retailer’ wholesaler’. The term ‘retail’ is defined as ‘A sale for final consumption in contrast to a sale for further sale or processing (i.e. wholesale). A sale to the ultimate consumer.’ The term ‘trade’ is defined as ‘The act or the business of buying and selling for money. Purchase and sale of goods and services between businesses, states or nations’. The term ‘trader’ is defined as ‘A merchant; retailer. One who makes it his business to buy merchandise, goods, or chattels to sell the same at a profit. One who sells goods substantially in the form in which they are bought; one who has not converted them into another form of property by his skill and labor.’ The term ‘trading’ is defined as ‘Engaging in trade; pursuing the business or occupation of a trade or of a trader’. The term ‘retailer’ is defined as ‘A person or entity engaged in the business of selling personal property to public or to consumers, as opposed to selling to those who intend to resell the items’. The term ‘wholesaler’ is defined as ‘one who buys large quantities of goods and resells them in smaller quantities to retailers or other merchants, who in turn sell to ultimate consumers.’

On a broad reading of the aforesaid terms, it is possible to assume that the concept of ‘retail trading’ relates to the purchase of goods by a person in order to sell the same to the ultimate consumer at a profit. Thus, self-consumption and quantity of goods can be important aspects. Here, the size of quantity would depend on nature of the product. This is distinct from the concept of distribution by a company, of its own products.

Finally, DIPP have confirmed the definition adopted by the World Trade Organisation (‘WTO’). Therefore, present position is quantity of sale is not detriment for wholesale trade, but it is the type of customer who determines whether the trade is wholesale or

5 Federation of Associations of Maharashtra and Ors. Vs. Union of India and Ors., 2005(79)DRJ426
6 http://www.wto.org/
retail. Further, it is apparent that industrial, commercial, institutional and professional business users are also considered wholesale customers, even if they are consumers. Concept of cash and carry in India, which is a modern concept of the traditional wholesale trade, is clearly opposed to retail. B2B sales are permissible and it is irrelevant whether the goods are sold to business customer, who conducts retail or to business customer conducting operations other than retail such as restaurant or a hotel. The concept of B2B sales form part of the wholesale trading and cannot be termed as retail trade. They are permitted according to the government of India’s own understanding of the matter of issue, which carries value and should be accepted.

Government of India should ask for information and inputs from stakeholders on impact of organised retailing on the unorganised sector. It may allow wholesale and retail markets to be modernised through public private partnership. The Competition Commission can be strengthened to check collusion and predatory pricing by big stores.