

Technology Law Analysis

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INDIAN FINTECHS TO GO GLOBAL: NEW PAYMENT OPPORTUNITIES FOR CROSS BORDER E-COMMERCE

- The Reserve Bank of India ("RBI") has allowed non-bank entities to facilitate cross-border payments for import/export of goods and services under a single authorization framework.
- Payments for cross-border import of goods and services (and not just software) are now permitted.
- Existing payment gateways facilitating cross border payments and authorized collection agents may now require a license from the RBI.
- Registration and reporting requirements under Indian anti-money laundering laws.

BACKGROUND

1. The RBI has introduced a new authorization framework for Indian entities seeking to aggregate cross-border payments by issuing Regulations for Payment Aggregator – Cross Border on October 31, 2023¹ ("PA-CB Guidelines"). These PA-CB Guidelines are applicable to entities involved in processing / settlement of cross-border payment transactions for import and export of goods and services.
2. Previously, the RBI had developed a framework through circulars in 2010², 2011³, 2013⁴ and 2015⁵ allowing Online Payment Gateway Service Providers ("OPGSPs") to enter into standing arrangements with Authorised Dealer ("AD") Banks. Through such arrangements, OPGSPs were allowed to facilitate cross-border transactions for import of goods and software and export of goods and services, subject to monetary and other restrictions. Importantly, the role of OPGSPs did not extend to actual processing or settlement of funds which was handled by AD Banks.
3. In April 2022, the RBI had issued a draft circular on processing and settlement of small value Export and Import related payments facilitated by Online Export-Import Facilitators (OEIFs) which are intended to replace the OPGSP regulations.⁶ Although, this circular has not been implemented as law.
4. Cross-border payments have also been subject to increased regulatory scrutiny in recent times:
 1. In July 2023, the Delhi High Court had ruled that an entity operating as an OPGSP would also be subject to reporting requirements under India's anti-money laundering law i.e., the *Prevention of Money Laundering Act, 2002* ("PMLA")⁷.
 2. The recent amendments to the RBI Master Direction -Know Your Customer (KYC), 2016 ("KYC Master Direction") in October 2023 requires regulated entities to undertake diligence measures and meticulous monitoring to identify accounts facilitating illegal cross-border transactions and report suspicious transactions to the Financial Intelligence Unit – India ("FIU-IND")⁸.
 3. The RBI also issues an alert list of entities which are neither authorized to deal in forex under the *Foreign Exchange Management Act, 1999*⁹. The Directorate of Enforcement also has conducted investigations on networks facilitating illegal cross-border exchange¹⁰.

THE FRAMEWORK

The PA-CB Guidelines provide for eligibility criteria, authorization process, permitted accounts and other conditions for banks and non-banking entities facilitating cross-border payments for import and export of permissible goods and services. Some important conditions for non-bank entities are detailed below.

- Authorization:
 - **Current PA-CBs:** Any entity currently operating as a PA-CB must apply for authorization by April 30, 2024. These PA-CBs must register with the FIU-IND to apply for such authorization. Further, such PA-CBs must ensure adherence to the RBI Guidelines on Regulation of Payment Aggregators and Payment Gateways dated March 17, 2020¹¹ ("PA Guidelines") on governance, merchant on-boarding, customer grievance redressal and dispute management framework, baseline technology recommendations, security, fraud prevention and risk management framework within 3 months from the date of issuance of the PA-CB Guidelines (i.e., January 31, 2024).
 - **Current Payment Aggregators ("PAs"):** PAs which are currently authorized or have their authorization applications pending should first inform the RBI within 60 days of the issuance of the PA-CB Guidelines

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whether they have existing PA-CB operations and whether they would continue with it. If yes, PAs would need to seek approval of the RBI.

- **Going forward:** Any PA that intends to operate as a PA-CB or vice versa must obtain RBI approval before undertaking such activity.
- **Imports:**
 - Payments towards imports are to be made to the PA-CB's domestic escrow account, transferred to an Import Collection Account held with an AD category-1 scheduled commercial bank and ultimately sent to the foreign merchant.
 - PA-CBs are responsible for undertaking customer due diligence as per the KYC Master Direction of any offshore e-commerce marketplace, offshore PAs or offshore merchants directly onboarded.
- **Exports:**
 - Payments towards exports must be made to an Export Collection Account created separately for each currency with an AD category-1 scheduled commercial bank, and then settled to the account of the merchant in India.
 - PA-CBs are responsible for undertaking customer due diligence as per the KYC Master Direction of its Indian merchants who are directly onboarded, domestic e-commerce marketplaces or entities providing domestic PA services.
- **Other Conditions:**
 - PA-CBs facilitating either import and export transactions or both should ensure to not to facilitate payments for restricted / prohibited goods and services i.e., those not permissible under the prevailing Foreign Trade Policy¹².
 - PA-CBs facilitating both import and export transactions should maintain separate collection accounts for such imports and exports, and also maintain a separate escrow account for domestic PA activity (if applicable).
 - Net worth requirements for eligibility of applicants are similar to those prescribed under the PA Guidelines.
 - Since PA-CBs maintain import and export collection accounts with AD banks, they are deemed as "designated payment systems"¹³ which allows the RBI to prescribe maintenance of liquid assets as against the amounts collected from PA-CBs in future.
 - PA-CBs facilitating import transactions should also undertake due diligence of the buyer if the value per unit of goods/services imported is more than INR 2,50,000.
 - Other conditions from the PA Guidelines apply *mutatis mutandis* to PA-CBs.

KEY TAKEAWAYS

1. **Non-bank entities permitted:** Cross-border commerce payments for e-commerce transactions were largely within the domain of AD banks. Fintechs were permitted to the limited extent of providing payment gateway services in the form of OPGSPs. However, these PA-CB Guidelines now open up opportunities for non-bank entities to provide such cross-border payment services for e-commerce transactions. Existing PAs too may find it a lesser leap to expand by providing PA-CB services and offer more expansive service bundles to their clients/merchants.
2. **Status of current cross-border payment facilitators:** Before the issuance of the PA-CB Guidelines, non-bank entities such as OPGSPs and collection agents performed a front-facing role with the customers/merchants and relied on the infrastructure of AD Banks in the background. However, such entities may now have to get licensed as PA-CBs to continue being the front-facing service providers for facilitating cross-border e-commerce payments.
3. **Liberalization of payments for import of services:** The existing OPGSP regulations did not allow OPGSPs to facilitate import of services except software. However, the PA-CB Guidelines allow transactions for import / export of all goods and services, subject to compliance of law. This is a welcome move for foreign merchants as they may be able to offer digital services to Indian consumers without actually setting up a physical presence in India.
4. **Registration with the FIU-IND:** Entities which are currently undertaking cross-border e-commerce payments such as OPGSPs and collection agents may need to register with the FIU-IND before seeking RBI approval for continuation of services. Other entities, once approved by the RBI to undertake PA-CB activity, may also be required to register with the FIU-IND.
5. **Operational complexities:** The PA-CB Guidelines adopt conditions of the PA Guidelines *mutatis mutandis*. However, implementation of certain conditions under the PA Guidelines such as settlement timelines and other mechanisms such as chargebacks, reversals, etc. should be evaluated for practical feasibility considering complexities of the underlying banking infrastructure for cross-border payments.

– Purushotham Kittane and Huzefa Tavawalla

You can direct your queries or comments to the authors.

¹Available at <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12561&Mode=0> (last accessed November 4, 2023).

²Please see <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=6107&Mode=0> (last accessed November 4, 2023).

³Please see <https://rbi.org.in/scripts/NotificationUser.aspx?Id=6762&Mode=0> (last accessed November 4, 2023).

⁴Please see <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=8030&Mode=0> (last accessed November 4, 2023).

⁵Please see <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=10037&Mode=0> (last accessed November 4, 2023).

⁶Available at https://www.rbi.org.in/scripts/bs_viewcontent.aspx?Id=4118 (last accessed November 4, 2023).

⁷W.P. (C) 138 of 2021. Please see our analysis of the judgment available at <https://nishithdesai.com/SectionCategory/33/Research-and-Articles/12/57/Hotline/10740/2.html> (last accessed November 4, 2023).

⁸Please see <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12549&Mode=0> (last accessed November 4, 2023).

⁹Available at https://rbi.org.in/scripts/bs_viewcontent.aspx?Id=4235 (last accessed November 4, 2023).

¹⁰Please see https://enforcementdirectorate.gov.in/sites/default/files/latestnews/Press%20Release-searches%20on%2019.06.2023_0.pdf (last accessed November 4, 2023).

¹¹Available at <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=11822&Mode=0> (last accessed November 4, 2023).

¹²The *Foreign Trade (Development & Regulation) Act, 1992* empowers the central government to notify a Foreign Trade Policy that applies to imports and exports of goods and services. The Foreign Trade Policy is updated from time to time and the current one i.e. the Foreign Trade Policy 2023 is effective from April 1, 2023. Please see <https://www.dgft.gov.in/CP/> (last accessed November 4, 2023).

¹³As per section 23A of the *Payments and Settlement Systems Act, 2007*.

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