

FDI SHOWERS – WHEN IT RAINS, IT POURS

The Department of Industrial Policy and Promotion has, vide numerous press notes dated September 20, 2012, notified various reforms brought about by the Government in relation to foreign investment in the country. The reforms have been summarized below:

1. FDI in Single-brand product retail trade - *Press Note 4 (2012 Series)*

The conditions applicable to FDI, under the approval route, in single brand product retailing have been modified to provide more clarity. The conditions, *inter alia*, now specify the following:

- i. That only one non-resident entity (whether brand owner or otherwise) shall be permitted to undertake single brand product retailing in the country for the specific brand in respect of which approval has been sought. The non-resident entity shall undertake single brand product retail trading in the country through a legally tenable agreement (licensing/franchise/sub-license agreement) with the brand owner of such single brand product.
- ii. 30% of the value of the goods needs to be sourced from India, preferably from MSMEs, village and cottage industries, artisans, craftsmen, in all sectors. Details of this procurement requirement and the compliance procedure have been categorically laid down.
- iii. Retail trading in any form, by means of e-commerce, is not permissible, for companies with FDI, engaged in the activity of single brand retailing.

IndusLaw Quick-view: In spelling out “(whether brand owner or otherwise)”, the Department appears to have clarified that the investment may be through an investment vehicle which need not be the legal owner of the brand. This has brought much needed clarity after the recent rejection of the 'Massimo Dutti' FIPB application filed by the Inditex Group (which owns a portfolio of brands, including 'Zara', through various entities). The focus on making sure that the brand owner is involved clearly demonstrates India's continuing focus on intellectual property rights protection. However, the law does not appear to have anti-dumping elements that one would ordinarily have expected to be present. Making local sourcing from MSMEs a “preferable” option seems to be a climb down from previous policy pronouncements that had made such sourcing mandatory. The restriction on e-commerce seems to suggest that single-brand retailers cannot use a medium for sale of goods which is becoming very popular India wide. This stipulation also seems to suggest that it is only the brand owner engaged in single brand retail who cannot use e-commerce, which would add to the confusion caused by this regulation.

2. FDI in Multi-brand retail trading - Press Note 5 (2012 Series)

Up to 51% FDI has been permitted in multi-brand retail trading under the Government route, based on the following conditions:

- i. Fresh agricultural produce may be unbranded.
- ii. A minimum FDI amount of US\$100 million should be brought in by the foreign investor.
- iii. 50% of the total FDI brought in should be invested in back-end infrastructure within 3 years of the first tranche of the FDI.
- iv. At least 30% of the value of procurement of manufactured or processed products purchased shall be sourced from Indian 'small industries'.
- v. Retail sales outlets can be set up only in cities with a population exceeding 10 lakh as per 2011 Census.
- vi. Government will have the first right to procurement of agricultural products.
- vii. 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.

The Press note clarifies that the policy is an enabling policy only and the States and Union Territories have their discretion with regard to implementation of the policy. Therefore, retail sale outlets may be set up in those States/Union Territories which have agreed or agree in future to allow FDI in multi-brand product retail pursuant to this policy.

IndusLaw Quick-view: The regulation is not clear as to whether each foreign investor in a company should bring in USD 100 Million, or the foreign investors together can bring in USD 100 Million. Unlike single-brand retail, the local sourcing condition from 'small industries' is a mandatory condition. However, the law does not appear to have anti-dumping elements that one would ordinarily have expected to be present. The restriction on e-commerce seems to suggest that multi-brand retailers cannot use a medium for sale of goods which is becoming very popular India wide. This stipulation also seems to suggest that current investment structures popular in e-commerce may have limited longevity. Finally, the way in which the regulations provide that they are merely enabling and leave the implementation to the states may face a constitutional challenge. Legal challenge aside, such a stipulation seems to indicate political considerations will be key factors to the success of multi-brand retail and lop-sided development with state specific variations a distinct possibility.

3. Foreign Investment in civil aviation - Press Note 6 (2012 Series)

Foreign airlines have been permitted to invest in the share capital of the Indian companies operating scheduled and non-scheduled air transport services. Such permission has been granted for investment up to 49% (including both FDI and FII) of the paid-up share capital of such Indian companies, under the Government route, based on certain other conditions specified in this regard.

IndusLaw Quick-view: The attempt to open up the aviation sector and give domestic airlines a fillip is clear. The requirement of security clearances and technical equipment clearances is expected from a domestic security and self-sufficiency point of view. The investment into the companies themselves and subsuming FDI and FII investment within the limit of 49% does seem to be a way of keeping speculators away from companies seeking foreign

investment.

4. Foreign Investment in Broadcasting sector - Press Note 7 (2012 Series)

Foreign Investment in Teleports, DTH, Cable networks, Mobile TV, HITS has been raised to 74%, foreign investment up to 49% under the automatic route and beyond 49% and up to 74% under the Government route. The Press note provides that foreign investment includes FDI, FII, NRI, FCCBs, American and Global Depository Receipts and convertible preference shares held by foreign entities.

IndusLaw Quick-view: The Government is making sure to be very explicit that any form of foreign investment will be included in this limit, which is anyway subject to strict scrutiny by the regulator within this sector. Other provisions with respect to citizenship of key executives and security clearance continue to be in force.

5. Foreign investment in Power Exchanges - Press Note 8 (2012 Series)

Foreign investment up to 49% has been permitted in Power Exchanges registered under the Central Electricity Regulatory Commission (Power Market) Regulations, 2010. The FDI limit is up to 26% (Government route) and the FII limit up to 23% (automatic route). FII purchases are restricted only to the secondary market. Further, the regulations provide that no non-resident investor/entity, including persons acting in concert will hold more than 5% of the equity in these companies.

IndusLaw Quick-view: The Government appears to be trying to strike a balance between creating an environment for investment and balancing national security with the reform imperative. The impact of this press note is specific to foreign investment in Power Exchanges. Until this Press Note, FDI of 100% under the automatic route in the "power sector" was construed to be only a permission to invest in anything other than generation, transmission and distribution of electricity.



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