

FDI IN AVIATION, BROADCASTING AND POWER EXCHANGE SECTORS LIBERALISED

The Cabinet Committee on Economic Affairs ("CCEA"), the apex body for formulation of economic policies of the Government of India ("GoI") approved certain reform measures at its meeting on 14 September, 2012. These reform measures, *inter alia*, included liberalisation of the foreign direct investment policy in aviation, broadcasting and power exchange sectors. Subsequently, the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, GoI ("DIPP") gave final shape to the policy measures and revised the existing FDI policy.

I. POLICY AMENDMENT ON FDI IN THE CIVIL AVIATION SECTOR

In the regime that existed prior to the revision of the FDI policy, no foreign airline was permitted to participate in the equity of Indian companies operating air transport services. The DIPP issued press note 6 of the 2012 series ("**Press Note 6/2012**") on 20 September, 2012 permitting foreign airlines to invest up to 49% in the paid-up share capital of Indian companies operating scheduled and non-scheduled air transport services. Such investment would be subject to the conditions set out below.

1.1 Investment subject to Government approval

The investment would be subject to prior approval from the Foreign Investment Promotion Board ("**FIPB**"), i.e. the authority constituted to approve/reject FDI proposals.

1.2 Investment limit

The investment limit of 49% includes both FDI and investments from foreign institutional investors ("**FII**s").

1.3 Compliance with SEBI Regulations

The investments so made would need to comply with the relevant regulations of the Securities and Exchange Board of India ("**SEBI**") such as the Issue of Capital and Disclosure Requirements ("**ICDR**") Regulations, the Substantial Acquisition of Shares and Takeovers ("**SAST**") Regulations and other applicable rules and regulations as amended from time to time. Since a number of private airline companies are listed entities with existing FII investment, any potential acquisition of shares by non-resident airline company may have to be appropriately structured taking into account the potential open offer requirements of at least 25% shares and existing FII stake.

1.4 Scheduled Operator Permit only to a company

Under the Aircraft Rules, 1937 ("**Aircraft Rules**") prior permission of the Central Government is required for any person to operate any scheduled air transport service from, to, in, or across India ("**Scheduled Operator Permit**").

Press Note 6/2012 seems to introduce additional conditions for the grant of a Scheduled Operator Permit and specifies that the Scheduled Operator Permit can be granted only to a company:

- (a) that is registered and has its principal place of business within India;

- (b) the Chairman and at least two-thirds of the Directors of which are citizens of India; and
- (c) the 'substantial ownership' and 'effective control' of which is vested in Indian nationals.

1.5 Clearance

Press Note 6/2012 further clarifies all foreign nationals likely to be associated with Indian scheduled and non-scheduled air transport services, as a result of any proposed FDI, would have to be cleared from a security view point before deployment. Similarly, all technical equipment that might be imported into India, as a result of such investment, would require clearance from the Ministry of Civil Aviation.

II. POLICY AMENDMENT ON FDI IN THE BROADCASTING SECTOR

The GoI, through press note 7 of the 2012 series ("**Press Note 7/2012**"), has increased the foreign investment participation in companies engaged in providing certain broadcasting carriage services from 49% to 74%, whereby FDI of up to 49% has been permitted under the automatic route, i.e., without prior FIPB approval while FDI beyond 49% and up to 74% has been permitted under the Government route, i.e., with prior FIPB approval. The increased limits are applicable to the following broadcasting carriage services:

- (a) Teleports (setting up up-linking HUBs/Teleports);
- (b) Direct to Home ("**DTH**"); and
- (c) Cable Networks (Multiple System Operators ("**MSOs**") operating at the national, the State, or the district levels and undertaking upgradation of networks towards digitalization and addressability).

Press Note 7/2012 also recognises a new category of broadcasting carriage services, namely, Mobile TV, in which FDI of up to 74% is allowed. Of such 74%, 49% has been permitted under the automatic route and FDI beyond 49% and up to 74% will be subject to approval from the FIPB.

In addition to FDI, other forms of foreign investment such as foreign institutional investment, investment by Non-Resident Indians, etc. will be taken in to account for computation of the overall cap of 74% in this sector.

The cap on FDI in TV News Channels and FM Radio Channels remain unchanged and is still limited at 26%. Similarly, the FDI cap for Cable Networks not undertaking upgradation of networks towards digitalization and addressability has also not been altered and remains at 49%.

2.1 Requirements relating to Key Personnel

A majority of the Directors on the board of the company receiving such FDI ("**Ind Co**") will have to be Indian citizens and it's Chief Executive Officer ("**CEO**"), Chief Officer in-charge

of technical network operations and Chief Security Officer ("CSO") must be resident Indian citizens.

All key executives of an Ind Co, including the directors, CEO, CSO, etc. and shareholders who individually hold 10% or more paid-up capital in the Ind Co would require security clearance from the Ministry of Information & Broadcasting ("MIB"). Further, any appointment of such executives and any changes to the board of directors will need MIB permission.

The Ind Co would also have to obtain security clearance for all foreign personnel likely to be deployed for more than 60 days in a year prior to their deployment.

2.2 **Monitoring and Security**

An Ind Co would have to maintain a sufficient provision for continuous interception and monitoring of its broadcasting service.

An Ind Co must not import or utilise any equipment, which is identified as unlawful or may pose a threat to national security. The GoI and the MIB could temporarily suspend the license of an Ind Co in public interest, or for national security related reasons.

An Ind Co should also ensure that its broadcasting service installation does not become a safety hazard or violate any law or public policy in India.

III. **POLICY AMENDMENT ON FDI IN POWER EXCHANGES**

India's FDI policy previously allowed 100% FDI under the automatic route in the power sector (except atomic energy) i.e., generation, transmission, distribution of electricity, and power trading. However, the policy did not specifically permit FDI in power exchanges. The GoI has through press note 8 of the 2012 series ("**Press Note 8/2012**") permitted foreign investment of up to 49% in power exchanges. This measure is an extension of the GoI's conviction that, in view of the role played by power exchanges, induction of FDI is likely to aid the adoption of global practices by power exchanges, which, in turn, would boost their service standards.

3.1 **Individual FDI and FII investment limits**

FDI is permitted up to 26% and FII investment is permitted up to 23% of the paid-up capital of the company carrying out business of power exchange. Whilst FDI is permitted under the government approval route, FII does not require any prior permission but is only permitted through secondary market purchases.

3.2 **Non-residents not to hold more than 5%**

No non-resident investor or entity, including persons acting in concert, can hold more than 5% of equity in these companies.

3.3 **Compliance with other regulations**

The foreign investment must be in compliance with all other applicable laws, regulations and conditions, including those laid down by the SEBI.

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