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Recent Trends: GOI permits foreign direct investment in single brand retail trading, multi brand retail trading, civil aviation, broadcasting and power exchanges in India

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The Government of India ("GOI") through the Ministry of Commerce & Industry has recently issued five press notes on September 20 2012 allowing the foreign direct investment ("FDI") in single brand retail trading, multi brand retail trading, civil aviation, broadcasting and power exchanges sectors in India. A bird's eye view of the recent press notes is elucidated below.

Single brand retail trading:

Vide press note no. 4 of 2012 on 20th September 2012 ("Press Note 4 of 2012")

100% FDI in single brand retail trading in India is now permissible through the approval route i.e. with the prior approval of the Department of Industrial Policy and Promotion ("DIPP") and the Foreign Investment Promotion Board ("FIPB") subject to compliance with the following conditions:

- Products to be sold should be of a "single brand" only and should be sold under the same brand internationally.
- Only one non-resident entity, whether owner of the brand or otherwise, shall be permitted to undertake single brand product retail trading in India, for the specific brand, through a legally tenable agreement, with the brand owner for undertaking single brand product retail trading in respect of the specific brand for which approval is being sought.
- In respect of proposals involving FDI beyond 51%, sourcing of 30% of the value of goods purchased, would be required to be done from within India, preferably from MSMEs, village and cottage industries, artisans and craftsmen, in all sectors.
- Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of single-brand retail trading.

The GOI has diluted its earlier policy on single brand retail trading that mandated sourcing of 30% from small industries/ villages and cottage industries, artisans and craftsmen to preference in sourcing. Whilst the intent of the GOI appears to

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SUPREME COURT BACKS THE RIGHT TO EDUCATION ACT

Your View

Please feel free to comment on this newsletter. You can send us an email at editor@hariani.co.in be avoidance of disadvantages to the small industries/ villages and cottage industries, artisans and craftsmen, this may still potentially be a hindrance for certain products which, because of their specialised nature require sourcing from abroad.

Multi brand retail trading:

Vide press note no. 5 of 2012 on 20th September 2012 ("Press Note 5 of 2012")

51% FDI in the multi-brand retail trading sector is now permitted through the approval route. The following conditions are noteworthy:

- Fresh agricultural produce may be unbranded.
- Minimum amount to be brought in as FDI by the foreign investor would be USD 100 million.
- At least 50 % of total FDI brought in shall be invested in 'back-end infrastructure' within three years of the first tranche of FDI. Back-end infrastructure as defined under the Press Note 5 of 2012 does not include expenditure on the land cost and rentals.
- At least 30% of the value of procurement of manufactured and processed products purchased is required to be sourced from small industries, which have a total investment in plant and machinery not exceeding USD 1 million.
- The foreign investor shall maintain the accounts duly certified by statutory auditors.
- GOI shall have the right of first refusal on the agricultural products.
- Press Note 5 of 2012 is an enabling policy only and the State Government/ Union Territories would be free to take their own decisions in regard to implementation of this policy.
- Companies engaged in multi brand retail trading are not allowed to participate in e-commerce retail trading.

It appears that the GOI has adopted a blended policy of caution and commitment towards foreign investors in this sector by adopting preconditions of minimum investment amount of USD 100 Million and the requirement of 50% of FDI invested in 'back-end infrastructure'. The specific exclusion of expenditure on the land cost and rentals from 'back-end infrastructure' indicates the GOI's intent to ensure a proactive role of the investors in system enhancement as against an idyllic capital contribution. Retention of the GOI's right of first refusal on agricultural produce ensures an indirect regulation mechanism of the agricultural sector. Finally, leaving the implementation in the hands of State Governments would only delay entry of FDI in this sector given the populist opposition in many states to the opening up of this sector to foreign entrants.

It remains to be seen how effective Press Note 5 of 2012 in attracting FDI towards multi brand retail with the aforesaid fundamental requirements.

Civil Aviation:

Vide press note no. 6 of 2012 on 20th September 2012 ("Press Note 6 of 2012")

Press Note 6 of 2012 contemplates FDI in the aviation sector under two categories i.e. by foreign airlines and those other than foreign airlines. The salient features of both categories are stated below.

FDI by foreign airlines

- Foreign airlines are allowed to invest in the capital of Indian companies operating scheduled and non-scheduled air transport services up to the limit of 49% of their paid up capital through the approval route. The 49% limit will subsume FDI and foreign institutional investors ("FII") investment.
- 100% FDI is allowed in Helicopter services/ seaplane services requiring DGCA approval under automatic route.

FDI by investor other than foreign airlines

- 49% FDI is allowed in scheduled air transport service/ domestic scheduled passenger airline sector under the automatic route. 100% FDI is allowed in the same sector by Non Resident Indians under the automatic route.
- 74% FDI is allowed in non-scheduled air transport service sector in India out of which 49% FDI is allowed under the automatic route and beyond 49% up to 74 % FDI is allowed under the approval route. 100% FDI is allowed in the same sector by Non Resident Indians under automatic route.
- 100% FDI is allowed in Helicopter services/ seaplane services requiring DGCA approval under automatic route.

A scheduled operator's permit would be granted only to companies registered and having a place of business in India, the chairman and 2/3rd of the directors of which are citizens of India and substantial ownership and effective control of which is vested with Indian nationals. All technical equipment that might be imported into India as a result of FDI shall require clearance from relevant authorities in the Ministry of Civil Aviation. The foreign airlines are allowed to participate in the equity of companies operating Cargo airlines, helicopter and seaplane services, as per the limits and entry routes mentioned above. This policy does not apply to the GOI owned Air India.

Opening up of FDI in the aviation sector may turn out to be a saviour for struggling private airline operators. However, given the pre mandated requirements of the chairman and 2/3rd of the directors having Indian citizenship may not be viewed favourably by potential investors. Exemption of Air India from the provisions of Press Note 6 of 2012 is perhaps indicative of the GOI wanting to adopt a separate policy for bailing out the troubled national carrier.

Broadcasting:

Vide press note no. 7 of 2012 on 20th September 2012 ("Press Note 7 of 2012")

Foreign investment ("FI") in the following sectors in relation to broadcasting is now available:

Sr. No.	Sector	% of FI Cap	Entry Route
1	Broadcasting		
1.1	Broadcasting Carriage Services		
	(1) Teleports (setting up of up- linking HUBs/Teleports); (2) Direct to Home		Automatic route up to

1.1.1	(DTH); (3) Cable Networks (Multi System operators (MSOs) operating at National or State or District level and undertaking upgradation of networks towards digitalization and addressability); (4) Mobile TV; (5) Headend-in-the Sky Broadcasting Service (HITS)	74%	49%. Government of India approval route beyond 49% and up to 74%.
1.1.2	Cable Networks (Other MSOs not undertaking upgradation of networks towards digitalization and addressability and Local Cable Operators (LCOs)	49%	Automatic route
2.1	Broadcasting Content Services		
2.1.1	Terrestrial Broadcasting FM (FM Radio), subject to such terms and conditions, as specified from time to time, by Ministry of Information & Broadcasting, for grant of permission for setting up of FM Radio stations	26%	Government of India approval route
2.2.2	Up-linking of 'News & Current Affairs' TV Channels	26%	Government of India approval route
2.2.3	Up-linking of Non-'News & Current Affairs' TV Channels/ Down-linking of TV Channels	100%	Government of India approval route

The FI in companies engaged in the business of aforesaid sectors in India also includes FDI, investments by FII, Non Resident Indians, Foreign Currency Convertible Bonds, American Depository Receipts, Global Depository Receipts and convertible preference shares held by foreign entities. The Press Note 7 of 2012 refers to various other conditions as set out in detail therein.

Power exchanges:

Vide press note no. 8 of 2012 on 20th September 2012 ("Press Note 8 of 2012")

49% (FDI & FII) in power exchanges registered under the Central Electricity Regulatory Commission (Power Market) Regulations 2010 subject to an FDI limit of 26 per cent and an FII limit of 23 per cent of the paid-up capital is now permissible. FII investments would be permitted under the automatic route and FDI would be permitted under the approval route. FII purchases shall be restricted to secondary market only. No non-resident investor/ entity, including persons acting in concert, may hold more than 5% of the equity in these companies.

The Reserve Bank of India has also issued a Circular No. 32 dated 21 September 2012 stating that foreign direct investment policy of GOI has been amended as per aforesaid press notes.

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