Review of Foreign Direct Investment (FDI) policy

Non-residents based out of countries which share land borders with India can invest in India only under the Government route

With a view to curb opportunistic takeovers or acquisitions of Indian companies (given the current COVID-19 pandemic), the Government of India has announced the following major decisions vide Press Note 3 dated April 17, 2020:

(a) As per the Press Note, any non-resident of a country which shares its land borders[1] with India can invest in India only under the Government route. This also includes investments whose beneficial owner is situated in or is a citizen of such country which shares its land borders with India.

This would mean that any investments coming into India from such countries[1] (whether directly or indirectly) would need prior approval of the Government.

(b) The Press Note also states that any transfer of existing or future FDI in Indian entities which results in ownership (immediate or beneficial) being transferred to non-residents who are situated in or are citizens of aforesaid countries[1] would also require a prior approval of the Government.

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[1] Countries sharing land borders with India are Bangladesh, China, Pakistan, Nepal, Myanmar, Bhutan and Afghanistan

Dhruva Comments

This is a significant development as all future FDI (whether direct or indirect) from neighbouring countries (including China) would henceforth require a prior approval of the Government. The Press Note currently covers only FDI from these countries and it would be interesting to see whether the policy action would cover other routes of investments available for investors of these countries, for instance the Foreign Portfolio Investment (FPI) route. Further, no de minimis limit is provided and even minority investments from such countries (including share transfers to investors in such countries) would require a prior approval from the Government.

The term “beneficial owner” has not defined in the Press Note. An issue may arise as to whether one has to consider the immediate or the ultimate beneficial ownership of investors proposing to invest in Indian entities. While there is sufficient jurisprudence on the term “beneficial owner” in the context of international tax laws, the said interpretation may not be relevant, considering the context of the Press Note. Hence, where the immediate or the ultimate beneficial investor is from a country covered in the Press Note, it may be advisable to act with caution before any investment decisions are taken and in appropriate cases, obtain due clarification from the Indian Government.

Consequential changes in KYC norms (to include details of beneficial ownership) as well as the reporting forms such as FC-GPR, FC-TRS, etc can be expected.

The policy would take effect from the date of notification in the official Gazette, which is awaited.

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