



Law and policy update

Restricting foreign investment in India – The Sino-Indian context | April 21, 2020

Through Press Note 3/2020 issued on April 17, 2020, Government of India announced the requirement for prior approval for all foreign investment coming in from countries that share an international border with India, which includes China as well as Afghanistan, Bangladesh, Bhutan, Myanmar, Nepal and Pakistan. Even though this move ostensibly mirrors similar requirements enacted by Australia and many European nations, including the US which had brought about a few changes late last year, this notification surprised both the domestic industry as well as Chinese investors, who have lately emerged as an active and critical source of capital for India Inc.

This embargo on investment from select countries comes in the wake of tumbling valuations of domestic businesses as a consequence of the Covid-19 lockdown and attendant disruption of economic activity. While the move raised immediate concerns in both China and India, it is critical to understand that the notification does not per se prohibit incoming investments from such countries, however, it adds the requirement of a prior government approval, which can typically add 6 weeks' processing time to the original investment transaction timeline.

In the Sino-Indian context, the notification leaves several aspects unclear, which can have a significant impact on investment transactions and timelines. As the government works to clarify some of these grey areas, a few suggestions which we aim to shortly send out in our communicate to the government, to optimally filter inbound investment, are as follows:

- Allow investments without pre-approval requirement subject to clearly articulated thresholds such as:
 - Enterprise value of the investee company
 - Maximum stake or quantum in the capital of an Indian company
 - Minority investments as against majority control or ownership situations
- Distinguish between greenfield and brownfield investment, since the former are fairly benign in nature and do not include takeover of an existing entity
- Specify whether the embargo applies to any single currency coming in from China
- Clarify whether the restrictions will apply to investments made or capital brought in through other routes like Venture Capital (which could be a multinational investment with Chinese elements), Foreign Portfolio Investment, Alternate Investment Funds etc., including situations wherein a fund manager is based out of China or an investment is routed through China whereas the ultimate beneficial owner is based outside of China
- Define 'beneficial ownership' in the context of evaluating any potential investment for approval requirement

Various industry bodies have already begun reaching out to the Government of India seeking further clarity and requesting for exceptions. It is expected that the government may come out with certain clarification on these aspects soon.

New Delhi

81/1 Adchini
Sri Aurobindo Marg
New Delhi – 110 017

Phone: (+91) (11) 6638 7000

Email: newdelhi@hsalegal.com

Mumbai

Construction House, 5th Floor
Ballard Estate
Mumbai – 400 001

Phone: (+91) (22) 4340 0400

Email: mumbai@hsalegal.com

Bengaluru

Aswan, Ground Floor, 15/6
Primrose Road
Bengaluru – 560 001

Phone: (+91) (80) 4631 7000

Email: bengaluru@hsalegal.com

Kolkata

No. 14 S/P, Block C,
Chowringhee Mansions
Kolkata – 700 016

Phone: (+91) (80) 4631 7000

Email: kolkata@hsalegal.com