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India Update

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Quarterly newsletter highlighting and analyzing legal, regulatory and policy developments in Indian Jurisdiction

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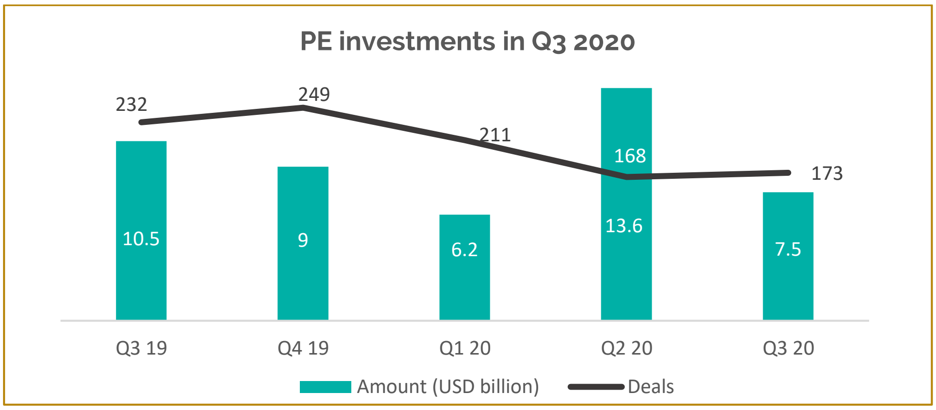
ACTIVITY ANALYSIS
HIGHLIGHTS FROM Q3 OF FY 2020-21

Private equity investments and exits

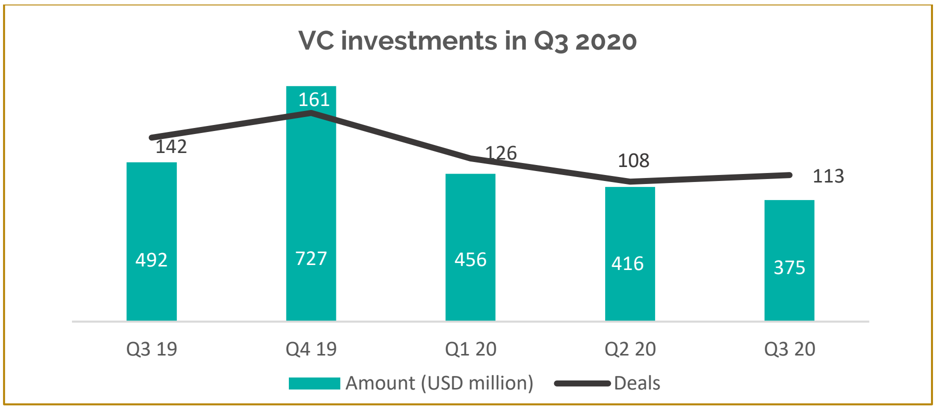
- Q3 2020 witnessed 173 Private equity (**PE**) investments worth USD 7.5 billion
  - The largest PE investment was announced by Silver Lake, KKR and General Atlantic's USD 2536 million investment in Reliance Retail Ventures
  - The second largest investment was the USD 414 million acquisition of publicly-listed pharmaceuticals company JB Chemicals & Pharmaceuticals Ltd by global PE investor KKR
  - The third largest investment was the purchase of ECL Finance's sticky corporate loans worth USD 401 million by US-based Farallon Capital and Singapore-based SSG Capital
- Funds with AIF vehicles participated in 75 investments representing 43% of overall investment worth USD 4.6 billion.
- 86 DPIIT registered start-ups raised PE funding worth USD 719 million.
- Q3 2020 saw 38 PE exits that harvested USD 1.6 billion. The largest exit was the USD 253 million part-exit by Blackstone from publicly-listed Essel Propack Ltd.
- India focused funds raised around USD 3.2 billion across 15 funds, an 85% increase (by value) compared to Q3 2019.



Source: IVCA Private Equity & Venture Capital Report, Jul-Sep 2020

Venture capital investments and exits

- Q3 2020 witnessed 113 VC investments worth USD 375 million.
  - The largest VC investment during the period was the USD 20 million investment in fintech startup UniOrbit Technologies by Accel India and Lightspeed Ventures
  - The second largest investment was the USD 16 million investments in online gaming platform WinZO led by Makers Fund, Courtside Ventures, Kalaari Capital and Bellerive Capital.
- Funds with AIF vehicles participated in 50 investments.
- 75 DPIIT registered startups raised VC funding worth USD 195 million.
- Q3 2020 saw 16 VC exits that harvested USD 358 million.



Source: IVCA Private Equity & Venture Capital Report, Jul-Sep 2020

10 TAKEAWAYS FROM
COMPANIES (AMENDMENT) ACT, 2020

Continuing with Government of India's recent spate of reforms meant to bolster economic activity and investment in the country, the Companies Amendment Bill, 2020 was introduced to amend the Companies Act, 2013 (**Act**) with the intent of improving the ease of doing business in India, de-criminalizing various minor offences and regulating producer companies, amongst other aspects. This Bill received the President's assent and was notified in the official gazette as the Companies (Amendment) Act, 2020 (**Amendment**) on September 28, 2020, and will come into effect on such date(s) as may be notified by the Central Government.

Key changes in this Amendment are enumerated here below:

- **De-criminalization of minor offences:** By way of the Amendment, imprisonment as a consequence of contravention of certain provisions of the Act has been done away with for over 46 offences under the Act, in addition to reducing, modifying and omitting the fines/penalties for these offences. By way of example, imprisonment has been removed as a punishment for contravention of provisions in relation to buyback of securities, disclosure of interest by directors, financial statements and Boards' report, formation of companies with charitable objects, disqualification of directors and constitution of audit, stakeholder relationship and nomination and remuneration committee. Similarly, penalties and fines have been omitted/modified/reduced for contravention of provisions in relation to filing of annual return with Registrar, variation of shareholder rights, transfer of securities, alteration of share capital and reduction of share capital, among others.
- **Definition of listed companies:** Prior to the Amendment, a company with 'any of its securities listed on a recognised stock exchange' was qualified as a listed company and resulted in such companies having to comply with the Securities Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (LODR) in addition to compliances under the Act. The Amendment, however, empowers the Central Government to exempt certain class of companies and securities (which are yet to be prescribed) from being considered as a listed company, in consultation with the Securities Exchange Board of India (SEBI). This exclusion of certain class of securities will ease the burden on companies from rigorous compliance and procedural requirements under the LODR and the Act.
- **Foreign listing:** Pursuant to the addition of a new sub-section to Section 23 of the Act, certain classes of public companies incorporated in India, as may be prescribed by the Central Government, are permitted to issue securities for listing on stock exchanges in permissible foreign jurisdiction, without requiring compulsory listing in India. The Central Government is also empowered to exempt such class pf public companies from complying with certain provisions of the Act, namely, provisions relating to private placement and public offer of securities, beneficial ownership, share capital and debentures or punishment for failure to distribute dividend, by way of issuing a notification, which has to be placed before both Houses of Parliament.
- **Periodic financial results:** Section 129A of the Amendment empowers the Central Government to require a certain class of unlisted public companies (which is yet to be prescribed) to prepare periodic financial results. Such periodic financial results are in addition to preparation of annual financial results prescribed under the Act and would need to be approved by the Board of Directors and audited (or subjected to a limited review) by the statutory auditors, in addition to filing periodic financial results with the Registrar. This requirement appears to have been introduced in alignment with similar provisions prescribed for listed companies under the LODR. Given that certain class of public companies will be permitted to list their securities in foreign jurisdictions, without listing on Indian stock exchanges, it is no surprise that the Amendment imposes an additional requirement on unlisted public companies to prepare periodic financial results thereby allowing the Central Government or the Ministry of Corporate Affairs (MCA) to keep a close watch on the functioning of such companies on a periodic basis and not just on an annual basis as per existing provisions of the Act.

- **Reduced timelines for rights issue:** Previously, as per the provisions of the Act, in case of a rights issue by a company, the offer period was required to remain open for a period of at least 15 days with an exemption granted to private companies for reduction in offer period subject to approval of 90% of its shareholders. The Amendment seeks to reduce the existing timeline of 15 days and empowers the Central Government to prescribe a timeframe of less than 15 days for the rights issue offer period. This will allow companies a quicker access to funds, without requiring the approval of majority shareholders.
- **Declaration of Beneficial Ownership:** As per the previous norms under the Act, persons holding beneficial interest in the shares of a company are required to submit declarations to this effect and the company is required to file returns with the Registrar intimating such beneficial ownership. The Amendment empowers the Central Government to exempt, unconditionally or subject to conditions, certain classes of person(s) from the aforesaid requirements if it is considered necessary to grant such exemption in the public interest.
- **Reduced timeframe for rectification of name and powers granted to the Central Government thereunder:** Prior to the Amendment, if the Central Government is of the opinion, on an application made to it by a registered proprietor of a trademark, that the name of a company is identical with or too closely resembles an existing trade mark, the company is required to change its name within a period of 6 months from date of directions issued by the Central Government in this regard. The Amendment now reduces this timeframe to 3 months. Additionally, Central Government is now empowered to allot a new name to the company (manner to be prescribed) if the company defaults in complying with directions issued by it and the Registrar is entitled to enter such new name in the Register of Companies in place of the old name and issue a fresh Certificate of Incorporation with the new name, which the company must use thereafter. However, none of the above changes restrict a company from subsequently changing its name, in accordance with the provisions laid down in the Act.
- **Corporate Social Responsibility (CSR):** Pursuant to the Amendment, companies that have spent an amount in excess of the requirements prescribed under the Act (i.e., at least 2% of the average net profits of the company made during the 3 immediately preceding financial years) are now permitted to set off such excess amount in succeeding financial years as may be prescribed by the Central Government. Further, companies that are not required to spend more than INR 50,00,000 towards CSR under the provisions of the Act, are now exempted from constituting a CSR Committee and the Board of Directors may discharge the functions of such Committee.
- **Exemption to NBFCs:** Under the Act, a banking company is exempted from filing the resolutions passed to grant loans or give guarantee or provide security in respect of loans in the ordinary course of its business, with the registrar. The Amendment extends such exemption to a registered non-banking finance company and a housing finance company.
- **Remuneration of Independent Directors:** Prior to the Amendment, in case of inadequate profits, only executive directors/manging director of a company were entitled to receive remuneration subject to limits prescribed in the Act. The Amendment seeks to align the aforesaid provisions to independent directors/non-executive directors to the effect that in case a company has no profits or its profits are inadequate, then non- executive directors, including an independent director, will be entitled to receive remuneration up to the extent permissible under the Act.

Conclusion

The benefits of amendments with to respect overseas listing, scope of listed companies, beneficial ownership and other aspects will be tested once the Central Government notifies and prescribes corresponding rules in this regard. Needless to state, de-criminalization of menial offences revolving around procedural requirements and having no negative impact on the public interest will definitely go a long way on easing the burden on corporates from being criminalized for offences that are a product of inadvertent lapses and minor non-compliances with no intent to defraud the authorities or the public at large. All in all, this is a welcome move towards India’s goal to improve the ease of doing business in the country.

SALIENT FEATURES OF THE NEW **LABOR CODES**

In order to simplify and consolidate the labor laws of India, the Government has introduced 4 labor codes (**Codes**) which subsume 29 labor laws. A similar consolidation of central labor laws in 4 broad categories was earlier recommended by the Second National Commission on Labor in 2002, which led to the Ministry of Labor and Employment introducing 4 codes in 2019 which regulate Wages (**Wages**), Industrial Relations (**IR**), Social Security (**SS**) and Occupational Safety, Health and Working Conditions (**OSH**). While the Code on Wages, 2019 was passed by the Parliament, in 2019, the three other Bills were referred to a Standing Committee on Labor. These three Bills were replaced by the government with updated versions on September 19, 2020 based on the committee's recommendations and were passed by the Union Legislature on September 23, 2020.

Common aspects across the four codes	
Definition of 'appropriate government'	▪ All 4 Codes specify that Central Government will act as appropriate government for any central Public Sector Undertaking (**PSU**), even if holding of Central Government in PSU becomes less than 50%. ▪ Establishments of railways, mines, oil fields, major ports, air transport services, telecommunication, banking, insurance companies, and any other 'controlled industries' as may be specified by Central Government, will be regulated by Central Government as appropriate government. ▪ All other establishments, including private establishments belonging to none of the above industries, will have the State Government as their appropriate government.
Delegated legislation	▪ The Codes delegate various essential aspects of lawmaking to the appropriate government through rulemaking, such as specifying safety standards under the OSH Code, or setting thresholds for the applicability of social security schemes under the Code on SS. Although the executive has been given wide-ranging rule making powers conventionally in labor law, the government may consider creating a balance so that it does not lead to excessive delegation.
Power to exempt establishments	▪ The Code on IR provides the appropriate government with the power to exempt any new industrial establishment or class of establishments from any or all of its provisions in 'public interest'. ▪ The OSH Code also provides the appropriate government with the power to exempt any establishment for a time period by notification. The OSH Code also empowers the State Government to exempt any new factory (or class of factories) from the Code in the interest of creating more economic activity and employment.
Inspectors-cum-Facilitators	▪ 'Inspectors-cum-Facilitators', a new authority established under the OSH, IR and SS Codes, have witnessed a transformation in terms of powers and responsibilities, as compared to their current equivalents, i.e. Labor Inspectors. The Inspectors-cum-Facilitators will be carrying out inspections as well as providing information to employers and employees pertaining to compliance. Inspections will be done based on a scheme decided by the appropriate government.
Dispute Resolution	▪ The IR and SS Codes provide that offences punishable with imprisonment up to one year or with fine are compoundable. Hence, in case of offences with fine, compounding is allowed for a sum of 50% of the maximum fine provided for the offence. ▪ The IR and OSH Codes, and partly the SS Code bar Civil Courts from hearing any matters arising out of the respective Codes.

Code on Wages, 2019

- **Applicability**
  - The Code seeks to regulate wage and bonus payments in all public and private enterprises belonging to the organized or unorganized sector.
  - The term 'Wages' includes salary, allowance, or any other component capable of being expressed in monetary terms.
  - The Central Government will make wage-related decisions for establishments operating under its authority, and for establishments in industries such as aviation, telecom, banking and insurance among others (State governments will make decisions for all other classes of establishments). The Code will have an overriding effect, notwithstanding any other law in force, award, agreement, settlement, or contract of service to the contrary.
- **Floor wage**
  - The Central Government will fix a floor wage, taking into account living standards of workers.
  - Floor wages can vary with geographical areas.
  - Minimum wages fixed by the Central or State governments for establishments falling under their jurisdiction must not be lower than such floor wage.
- **Fixing the minimum wage**
  - In line with the Minimum Wages Act, 1948, this Code prohibits employers from paying wages less than the fixed minimum wage to its employees.
  - The appropriate government, while fixing minimum wages, may take into account factors such as skill of workers and difficulty of work.
- **Overtime**
  - Employees would be entitled to 'overtime wages' which will be at least twice the normal rate of wages.
- **Payment of wages**
  - Wages can be paid in multiple modes such as coins, currency notes, cheque, bank account credit or electronic modes.
  - The employer must set a wage period as either daily, weekly, fortnightly or monthly.
- **Deductions**
  - Deductions (not exceeding 50% of the total wage) from an employee's wages may be made on grounds including fines, absence from duty, accommodation provided by employer or recovery of advances given to the employee, among others.
- **Determination of bonus**
  - Employees will be entitled to an annual bonus in case their wages do not exceed a specified monthly amount. Currently, under the Payment of Bonus Act, 1965, this amount is INR 21,000.
  - The annual minimum bonus will be at least 8.33% of the wages, or INR 100, whichever is higher.
  - If the allocable surplus exceeds the total minimum bonus payable to employees, a part of the gross profit must be distributed between the employees in proportion to their annual wages. An employee can receive a maximum bonus of 20% of their annual wages.
- **Gender discrimination**
  - In matters pertaining to wages and recruitment of employees for same or similar work, the Code on Wages prohibits gender discrimination.
- **Offences**
  - The Code lays down penalties for offences committed by an employer in contravention of any provisions of the Code.
  - Such penalties depend on the nature and gravity of such offence. The highest penalty prescribed is imprisonment for 3 months and/or a fine up to INR 1 Lakh.
  - The Inspector-cum-Facilitator is required to give employers who are first-time offenders an opportunity to comply with the provisions of the Code before initiating prosecution.

Occupational Safety, Health and Working Conditions Code, 2020

- **Definitions**
  - The definition 'Factory' has been expanded to 20 workers for premises where the process uses power and 40 workers where the process uses no power.
  - The provisions of the Code pertaining to contract labour would only apply to establishments involving 50 or more contract laborers.
- **Licenses and registration**
  - New Establishments covered by the Code must register themselves (within 60 days of the commencement of the Code) with the registering officers, appointed by the appropriate government.
  - Establishments already registered under any other Central Law would not be required to register again.
- **Duties of Employers**
  - Issuing appointment letters to employees
  - Ensuring a workplace that is free from hazards that may cause injury or disease
  - Providing periodical health examination to employees in notified establishments
  - Informing the relevant authorities in case an accident at the workplace leads to either death or serious bodily injury to an employee
  - There are other duties prescribed for employers in respect of mines, docks, factories, plantations and construction work which include instructing employees about safety protocols and provisioning for a risk-free work environment
- **Safety and welfare provisions**
  - The employer is mandated to provide a hygienic work environment along with adequate ventilation, sufficient space to avoid overcrowding, potable drinking water, arrangements for separate washrooms for male, female, and transgender workers, etc.
  - The Code also provides for a uniform threshold of welfare provisions for all establishments such as a canteen, crèche, first aid, welfare officer, etc.
- **Working hours**
  - The appropriate government is empowered to notify working hours for various classes of establishments and employees. For overtime, the prior consent of workers is required along with overtime wage.
  - Female workers may work past 7 pm and before 6 am only with their consent, as prescribed by the appropriate government.
- **Relevant authorities**
  - Inspectors-cum-Facilitators appointed by the appropriate government can inquire into accidents and conduct inspections. They have been given special powers in respect of factories, mines, dock-works and buildings or other construction works, prohibiting work in hazardous environment.
  - Safety committees may also be formed in certain establishments, and for certain classes of workers, by the appropriate government. These committees will aim to function as a liaison between employers and employees.
- **Leaves**
  - No worker in an establishment will be allowed to work for more than six days a week, except as provided for by the Code.
  - Every worker shall be entitled to one day of leave for every 20 days of work per calendar year.

Industrial Relations Code, 2020

- **Definitions**
  - The definition of 'worker' under the code is similar to (but not same as) the definition of 'workman' under the Industrial Disputes Act, 1947, with minor changes such as the exclusion of apprentices from the scope of the definition. A worker means 'any person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and includes working journalists'.
  - The term 'Industry' has been given a broader definition, including within its scope all systematic activities carried on by co-operation between employers and workers. Notable exclusions are charitable organizations, sovereign functions of the government, domestic service and other activities that may be notified by the Central Government.
  - A situation where 50% of more workers are on casual leave simultaneously, is said to fall within the scope of the term 'strike'.
  - The IR Code retains the definition of 'retrenchment', however, termination due to continued ill-health is no longer considered retrenchment.
  - A new concept of 'fixed term employment' has been introduced. It refers to workers that are hired for a fixed period but will enjoy the same benefits and entitlements as are available to permanent workers.
- **Negotiating Union/Council**
  - A Trade Union with at least 51% of the workers as members will be the sole negotiating union.
  - In case no Trade Union has at least 51% of workers as members, a negotiating council will be formed consisting of representatives of Trade Unions that contain at least 20% of workers as members.
  - For every 20% of total workers as members, one representative will be included.
- **Prior permission of appropriate government**
  - Prior permission of the government before closure, lay-off, or retrenchment now needs to be sought only by establishments with at least 300 workers, instead of 100 workers.
- **Worker re-skilling fund**
  - This is a new concept introduced under the IR Code, where a fund shall be created for contribution by the employer of an amount equal to fifteen days wages last drawn by the worker immediately before retrenchment, and contributions from other sources prescribed by the appropriate government.
  - The fund shall be utilized within 45 days of retrenchment, or as may be prescribed.
- **Model Standing Orders**
  - This provision will apply to establishments employing 300 or more workers. The Central Government will be drafting Model Standing Orders basis which the employers must prepare their own draft standing orders from the date of commencement of the IR Code.
  - Employers must consult the trade unions or negotiating union/council before submitting the standing orders to the certifying officer.
- **Dispute resolution mechanism**
  - The Code provides for Industrial Tribunals consisting of an administrative member and a judicial member.
  - Either party to a dispute can approach the Industrial Tribunal. However, only the Central Government can make a reference to the National Industrial Tribunal.

Social Security Code, 2020

- **Employee Provident Fund (EPF)**
  - The provident fund and pension scheme will apply to all establishments employing 10 or 20 employees, and to any other class of establishments as may be notified by the government.
- **Employees State Insurance (ESI)**
  - The ESI Scheme will apply to establishments employing 10 or more employees.
  - In case of a pandemic, epidemic or a national disaster, the Central Government can make changes to the employer's or the employee's contribution under Employees State Insurance for up to three months.
  - If the employer fails to pay ESI contributions, the ESIC may pay the benefits to the employee and recover it from the employer the capitalized value of the benefit, including the contribution amount, interest and damages, as an arrear of land revenue or otherwise.
- **Registration**
  - Every new establishment to which the Code applies is required to register.
  - Establishments already registered under any other Central Law would not be required to register again.
  - Aadhaar-based registration is mandated for all categories of workers.
- **Gratuity**
  - Fixed-term employees (i.e. employed for a fixed duration) will be entitled to pro-rated gratuity based on the term of their contract.
  - The threshold period of such an employment will also be a continuous working period of 5 years, as is the case for other categories of employees.
- **Maternity benefit**
  - In addition to maternity benefit in terms of paid leaves, every woman is entitled to medical bonus of up to INR 3,500 (if pre-natal confinement and post-natal care is not provided by employer).
- **Unorganized workers**
  - The Code makes an attempt at bringing within its fold the unorganized sector of the economy. For instance, the Code allows schemes for unorganized workers to be funded by a company's CSR fund.
  - The Code empowers the Central Government to frame social security schemes for unorganized workers, gig workers (workers outside the traditional employer-employee relationship) and online platform workers (those who access organizations or individuals through an online platform and provide services or solve specific problems.)
- **Offences and penalties**
  - The Code prescribes a five-year limitation period for initiating inquiries for payment of dues under EPF and ESI schemes.

RESTRICTIONS IN BIDDING PROCESS FOR **PUBLIC PROCUREMENT CONTRACTS**

Department of Economic Affairs (**DEA**) on July 23, 2020 issued an office memorandum amending Rule 144 of General Financial Rules, 2017 (**GFR**) by inserting a new sub-Rule (xi) under Rule 144. The new sub-Rule (xi) empowers DEA to impose restrictions, including prior registration and screening requirements, in relation to procurement from bidders from certain countries on grounds of defence or national security of India. No procurements shall be made in violation of any restrictions that may be imposed by DEA in this regard.

In exercise of its powers under Rule 144 (xi), DEA has, on July 23, 2020 issued an order imposing restrictions on bidding process in procurement of goods, services (including consultancy and non-consultancy services) or works (including turnkey projects) in India (**Order**). A brief summary of the Order (including restrictions thereunder) have been set out below in greater detail.

Registration of bidders

Pursuant to the Order, any bidder from a country that shares a land border with India should register itself with Competent Authority, being DPIIT, in order to be eligible to bid in procurement of goods, services (including consultancy and non-consultancy services) or works (including turnkey projects) in India. The process for registration and guidelines in relation to composition of committee of DPIIT in this regard has been prescribed in this Order.

For purposes of this Order, 'bidder from a country that shares land border with India' shall mean following:

- An entity incorporated, established or registered in such country
- Subsidiary of an entity set out above
- An entity substantially controlled through entities incorporated, established or registered in such a country
- An entity whose beneficial owner is situated in such country
- An Indian (or other) agent of such entity
- A natural person who is citizen of such country
- A consortium or JV where a member thereof falls under any of the above categories

Beneficial Owner for the purposes of (iv) above shall be:

- **In case of LLP:** Natural person(s) who, whether acting alone or together, or through one or more judicial person(s), has a controlling ownership interest/entitlement of more than 25% of shares/capital/profits
- **In case of a partnership firm:** Natural person(s) who, whether acting alone or together, or through one or more judicial person(s) has ownership or entitlement to more than 15% of capital/profits of such partnership
- **In case of an unincorporated association or body of individuals:** Natural person(s) who, whether acting alone or together, or through one or more judicial person(s), who has ownership of entitlement to more than 15% of the property/capital/profits of such association or body of individuals
- **In case of a trust:** Identification of author of trust, trustee, beneficiaries with 15% or more interest in trust and any other natural person exercising ultimate effective control over trust through a chain of control or ownership

Where no natural person(s) is identified, beneficial owner shall be relevant natural person who holds position of a senior managing official.

Such registration of the bidder with DPIIT shall be valid at the time of submission and acceptance of bids. In relation to supply (other than by way of tenders), such registration should be valid at the time of placement of order. If registration is valid at the time of acceptance/placement of order, then such registration shall not be a necessary pre-requisite at time of execution of contracts.

In all tender documents (including sub-contracting, and tenders in transitional cases), bidder shall submit a certificate in prescribed form, to the effect that it is in compliance with provisions of this Order. The tender or sub-contract shall be liable to be immediately terminated if certificate submitted by a qualified/accepted bidder is found to be false.

In tenders issued after July 23, 2020, restrictions imposed under this Order (including aforesaid registration) shall be a pre-requisite to be an eligible bidder and shall be incorporated as conditions in such tenders.

Exemption from registration

Bidders from a country that shares a land border with India shall be exempted from requirement of registration in following circumstances:

- Orders that have already been placed or contracts that have been concluded and a letter of award/ acceptance (**LoA**) has been issued, on or before July 23, 2020
- Procurement of medical supplies directly related to containment of Covid-19, till December 31, 2020
- Procurements made through GeM or small procurements made without knowing country of bidder
- Procurement by Indian missions and by offices of Government agencies/undertakings located outside India

Further, the Order shall not be applicable to bidders from those countries (even if they share a land border with India) to which Government of India has extended a line of credit or in which Government of India is engaged in development projects.

Transitional tenders

Tenders that have not been concluded or in cases where no LoA has been awarded, the restrictions set out above shall be applicable, in the following manner:

- For tenders that have not been opened until July 23, 2020 or in cases where evaluation of technical bid has not been completed or qualification of tenderees are not evaluated and unqualified bidders are not excluded (**First Exclusionary Qualificatory Stage**), no contracts shall be placed in contravention of restrictions imposed above and any tenders received from such countries shall be deemed to be in non-compliance of this Order
- For tenders that have crossed First Exclusionary Qualificatory Stage as on date of this Order, and qualified bidders include bidders from countries specified above, entire tender process shall be considered as *de novo*

Sub-contracting in works contract

Works contracts (including turnkey contracts) shall not be sub-contracted to a contractor after July 23, 2020, in contravention of conditions mentioned above. 'Contractor from a country that shares a land border with India' shall have same meaning as ascribed to a 'bidder from a country that shares land border with India' set out above. Needless to state, any sub-contracts awarded before date of this Order shall not be subject to aforesaid condition.

Applicability of this Order

The applicability of this Order shall extend to:

- All autonomous bodies
- Public sector banks and financial institutions
- Central public sector enterprises, subject to orders from DEA
- Procurement in public private partnership projects receiving financial support from Government or public sector enterprises
- Union Territories, National Capital Territory of Delhi and all agencies/undertakings thereof

This Order seeks to curb the participation of a bidder from countries that share land borders with India (namely, Pakistan, Afghanistan, China, Nepal, Bhutan etc), without having a valid registration with competent authority in India. This move by DEA appears to be in alignment with similar amendments effected in FDI policy of India.

PROPOSED CHANGES

COMPETITION ACT

In order to examine whether the Competition Act, 2020 (**Act**) is in consonance with the current market trend, the Competition Law Review Committee (**Committee**) was created in 2018. The Committee was established with the aim of suggesting any changes in the current regime taking into account the market trends, best international practices, other governmental policies and regulatory mechanisms that overlap the Competition Act, and any other related competition issues. The Competition (Amendment) Bill, 2020 (**Bill**) was then drafted based on the recommendations of the Committee. The key changes proposed are as follows:

- **Establishment of a governing body:** The Committee recognized that the functions performed by the Competition Commission of India (**CCI**) are diverse. Thus, the Bill introduced the establishment of a governing body, that will consist of ex officio members and part-time members. The rationale behind the introduction of the governing body is to reduce the burden on the CCI, as this governing body will be responsible for carrying out all the quasi-legislative functions and policy decisions.
- **Amalgamation of the office of Director General:** The Bill aims to amalgamate the office of Director General (**DG**) constituted under Section 16 of the Act, as an investigative branch of the CCI.
- **Recognition of settlement or consent orders:** The Bill introduces provisions that recognize the settlement or consent orders, in case of antitrust proceedings. The Bill proposes the introduction of certain provisions that permit an investigated party to offer a settlement or voluntarily undertake certain commitments concerning an anticompetitive vertical agreement or abuse of dominance proceeding. The Bill under these provisions envisions the mechanism to be adopted to permit such commitment or settlement mechanism. The purpose of the adoption of such orders was to enable the CCI to resolve antitrust cases faster, which would, in turn, aid the businesses to avoid lengthy investigation procedure and uncertainty.
- **Clear standards of 'material influence':** The definition of 'control' under the Act did not define the minimum standards required to establish such control, therefore the CCI would use the ability to exercise 'decisive influence' and 'material influence'. The Bill proposes to recognize the standards of 'material influence'. This can bring consistency and certainty in the decisions and can also ensure that many transactions are scrutinized while an investment-friendly economy is sustained.

- **Changes to combinations regulations:** The Bill proposes many changes with regard to the regulations of combinations. Some of these are certain specific grounds that would constitute combination as per the Act and the parties involved in such a transaction would be under a duty to inform CCI before the execution of any such agreement. The Bill introduces the power of the central government in consultation with CCI to identify any other ground which would constitute a combination. The Bill further states that this power would also include the power to delist any ground which would otherwise constitute combination. This leads to an increase in the jurisdictional threshold of CCI, which would lead to including several digital transactions that were currently out of the scope of scrutiny of CCI.
- **Statutory recognition of the green channel process:** The Bill also proposes to recognize the green channel process statutorily. The rationale behind the introduction of such a process is to enable fast-paced regulatory approvals for a vast majority of mergers and acquisitions that may have no major concerns regarding appreciable adverse effects on competition. The goal is to move towards a disclosure-based regime with severe consequences for not providing accurate or complete information. The power of the green channel will also extend to authorize resolutions arrived at in an insolvency resolution process under the IBC.
- **Reduction in time limit for preliminary opinions:** The Bill also lessens the time within which the CCI has to issue its preliminary opinion on whether a combination would have an adverse effect on competition, from 30 working days to 20 calendar days. Such timelines may help ease the burden on the parties involved in the transactions.
- **Inclusion of digital markets in the scope of the Act:** The Bill aims at expanding the scope of the Act to include within its scope the digital markets through express inclusion of hub and spoke arrangement and buyer's cartel. The Committee recognized the strategies used by the companies to escape inquiry under the Act and also considered the orders issued by the CCI in Hyundai Motors case and Uber case, and suggested that the element of 'knowledge' or 'intention' should not be considered under such agreements.
- **Broadened scope of Section 3 of the Act:** The Bill seeks to broaden the scope of section 3 of the Act. It currently restricts the scope of the section to horizontal or vertical agreement leading to an adverse effect on competition. The Bill intends to include other agreements as well, taking into account the decision in *Ramakant Kini v. Dr. L.H. Hiranandani Hospital* and to expand the scope of the provision to include agreement entered in the digital market.
- **Penal powers to DG and CCI:** The principal Act did not grant any penal powers to the DG or the CCI, whereas the Bill intends to introduce a wide range of powers to the DG as well as the CCI. The Bill proposes a provision under which any person who fails to produce any documents, information or record; did not appear before the DG or fail to answer any question by the DG and/or fails to sign the note of cross-examination, shall be punishable with imprisonment of term extending up to six months or fine up to one crore rupees.
- **Increased penalty on individuals in cartels:** The Bill also introduces the highest cap of penalty as 10% of the income of the individual in the preceding three years, in case of the formation of cartels.

THE CONSUMER PROTECTION
(E-COMMERCE) RULES, 2020

Ministry of Consumer Affairs, Food and Public Distribution notified the provisions of the Consumer Protection (E-Commerce) Rules, 2020 (**Rules**) vide notification dated July 23, 2020 under Consumer Protection Act, 2019 (**Act**). The intention of notifying the Rules is to complement the Act by regulating all e-commerce transactions and activities. The primary objective of the Rules is to regulate all e-commerce entities and lay down duties and liabilities of e-commerce entities, marketplace e-commerce entities and sellers selling goods and services on such marketplaces.

- **Applicability**

  The Rules apply to all e-commerce transactions involving goods and services (including digital products), all types of e-commerce models (including marketplace, inventory, single brand retail, multi-channel single brand retail models). The Rules also extend to e-commerce entities that are not established in India, but systematically offers goods and services to consumers in India.

- **Duties/liabilities of E-commerce entities**

  An e-commerce entity is defined as any person who owns, operates, or manages digital or electronic facility or platform for electronic commerce, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity. An e-commerce entity should be registered as a company in India; or registered as a foreign company under the Companies Act, 2013; or an office, branch, or agency outside India owned or controlled by a person resident in India (as per Section 2(v)(iii) of FEMA. E-commerce entities are required to fulfil certain duties, as provided in Rule 4, which inter alia include the following:

  - **Nodal officer:** Every e-commerce entity is required to appoint a nodal person of contact or an alternate senior designated officer, who is an Indian resident, to ensure compliance with the Act and Rules.
  - **Display of information:** Every e-commerce entity should, on its platform, display in a clear and accessible manner its legal name, address of its headquarters and branch offices, name and details of its website and contact details of the customer care and grievance officer.
  - **Grievance redressal mechanism:** Every e-commerce entity is required to establish an adequate grievance redressal mechanism and appoint a grievance officer, who shall acknowledge all consumer complaints within 48 hours of receipt and redress consumer complaints within 1 month from the date of receipt thereof.
  - **Restrictions:** E-commerce entities are prohibited from:
    - Adoption of unfair trade practice, whether in course of business or otherwise
    - Levying cancellation charges on consumers after confirming purchase, unless similar charges are borne by the entity itself, if they cancel orders unilaterally
    - Manipulating the price of the goods or services offered on its platform so as to gain unreasonable profit by imposing any unjustified price on consumers
    - Discriminating between consumers of the same class or make any arbitrary classification of consumers which affects their rights under the Act
    - Recording the consent of its consumers for purchase of goods/services on its platform by automatically including these in the form of pre-ticked boxes

- **Liabilities of marketplace e-commerce entities**

  Marketplace e-commerce entity means an e-commerce entity which provides an information technology platform on a digital or electronic network to facilitate transactions between buyers and sellers. Such entities can reap the benefits of being an intermediary and avail exemptions granted to intermediaries from being liable in certain cases, by complying with the provisions of Section 79 of the Information Technology Act, 2000 and the Information Technology (Intermediary Guidelines) Rules, 2011. Pursuant to Rule 5, marketplace e-commerce entities shall:

  - Obtain an undertaking from its sellers to the effect that the descriptions, images, and other content pertaining to goods or services on their platform are accurate and corresponds directly with the appearance, nature, quality, purpose and other general features of such good or service
  - Display on its platform, in a clear and accessible manner:

    - Details of the sellers
    - Ticket number for consumer complaints enabling consumers to track the status of such complaints
    - Information on refunds, returns, exchanges, warranty and guarantee, delivery and shipment, modes of payment, and grievance redressal mechanism
    - Information on secured payment methods, applicable fees and charges, procedure to cancel payments, charge back options and contact information of the payment service provider
    - Parameters used to determine the ranking of the goods or sellers on is platform
    - Information required to be provided by the sellers as specified in Duties of sellers
  - Take reasonable efforts to maintain a record of relevant information on the identification of all sellers who have repeatedly offered goods or services that have previously been removed or access to which has previously been disabled under the Copyright Act, 1957 (14 of 1957), the Trade Marks Act, 1999 (47 of 1999) or the Information Technology Act, 2000 (21 of 2000).

- **Liabilities of inventory e-commerce entities**

  An inventory e-commerce entity means an e-commerce entity which owns the inventory of goods or services and sells such goods or services directly to the consumers, including single brand retailers and multi-channel single brand retailers. Inventory e-commerce entities are subject to similar duties as that of sellers on marketplaces as set out above under duties of sellers. Additionally, an inventory e-commerce entity which explicitly or implicitly vouches for the authenticity of the goods or services sold by it, or guarantees that such goods or services are authentic, shall bear appropriate liability in any action related to the authenticity of such good or service.

- **Duties and liabilities of sellers**

  As per Rule 6, sellers on marketplaces shall:

  - Not adopt any unfair trade practices
  - Not falsely represent themselves as consumers and post reviews or misrepresent the quality or features of any goods and services
  - Not refuse to take back goods, or withdraw or discontinue services purchased or agreed to be purchased, or refuse to refund consideration, if paid, in case the goods and services are defective in any manner or if the goods are delivered late (except on account of force majeure events)
  - Execute a prior written contract with the e-commerce entity before transacting on its platform
  - Appoint a grievance officer and establish a grievance redressal mechanism
  - Ensure that advertisements are consistent with actual characteristics of goods and services being sold
  - Provide to the e-commerce entity (to be displayed on its platform and website):
    - All contractual information to be disclosed by law
    - Total price of the goods and services, including a break-up of all compulsory and voluntary charges
    - All mandatory notices and information provided by applicable laws
    - Expiry date of the goods and details of guarantees and warranties, wherever applicable
    - All relevant details of the goods including country of origin
    - Name and contact details of the grievance officer
    - Details in relation to the import of goods, guarantee related to the authenticity of the import
    - Accurate details on terms of exchange, returns, shipment, refund and delivery of goods and services

Conclusion

The Rules aim to create a more robust and stringent framework for protection of consumer rights and interest of all stakeholders by regulating the activities of e-commerce entities. While the recognition of e-commerce entities and marketplace entities is a step forward, there are some provisions that require further clarity and reconsideration. Under the Rules, an e-commerce entity could be an office, branch or agency outside India owned or controlled by a person resident in India (as per Section 2(v)(iii) of FEMA), the said section in FEMA is worded differently and provides for an office, branch or agency in India owned or controlled by a person resident outside India. Further, the deliberate exclusion of a limited liability partnership from the definition and meaning of an e-commerce entity definitely raises questions on whether a limited liability partnership duly registered in India can operate an e-commerce platform or marketplace. It is also pertinent to note that these Rules have introduced various changes in the working and compliance requirements of e-commerce entities and imposed liabilities and duties on sellers on the marketplace, but there is no framework/timeline provided for existing e-commerce entities to adequately ensure compliance with the prescribed requirements.

THIRD AMENDMENT TO FEMA NDI RULES

The FEMA (Non-Debt Instrument) Rules, 2019 (**NDI Rules**), notified by the Central Government on October 17, 2019, were recently amended further. The Ministry of Finance issued the NDI (Third Amendment) Rules, 2020 (**Third Amendment**) vide its notification dated July 27, 2020. At the outset, third amendment seeks to bring about two major changes in NDI Rules, namely granting powers to the Reserve Bank of India (**RBI**) to administer the NDI Rules and to issue directions or circulars, as it may deem necessary, in this regard and amendment in the entry route and other conditions in relation to air transport services. The major changes have been enlisted below:

- **Powers granted to the RBI**
  - **Insertion of rule 2A:** Under the NDI Rules, the powers granted to the RBI was exercisable in consultation with the Central Government. Under the Third Amendment, by way of insertion of rule 2A, the RBI has been granted exclusive powers to administer the NDI Rules and to interpret and issue directions, circulars, instructions or clarifications, as it may deem fit, for effective implementation of the provisions of the NDI Rules.
  - **Amendment to rule 3 and rule 4:** In alignment with the insertion of rule 2A, consequent changes have been made in rules 3 and 4 of the NDI Rules, whereby the RBI may, on an application made to it, permit a person resident outside India to make any investment in India subject to such conditions as may be considered necessary; and an Indian entity or an investment vehicle, or a venture capital fund or a firm or an association of persons or a proprietary concern to receive any investment in India from a person resident outside India or to record such investment subject to such conditions as may be considered necessary, without consultation with Central Government.
- **FDI in air transport services**
  - **Removal of dispensation for OCIs:** Under Schedule I of the NDI Rules, FDI by NRIs and OCIs in scheduled air transport service/domestic scheduled passenger airline and regional air transport service was allowed under the automatic route up to 100%. However, the Third Amendment seeks to remove the dispensation provided to OCIs, in this regard. Currently, under the Third Amendment, S. No. 9.3 of Schedule I provides that only foreign direct investment by NRIs in scheduled air transport service/domestic scheduled passenger airline and regional air transport service, shall be allowed under the automatic route up to 100%. Further, 'Air Operator Certificate' (as opposed to Scheduled Operators' Permit under the NDI Rules) to operate scheduled air transport services (including domestic scheduled passenger airline or regional air transport service) shall be granted to such company or a body corporate which is registered and has its principal place of business within India; whose chairman and at least 2/3rd of its directors are Indian citizens; and whose substantial ownership and effective control is vested in Indian nationals.

- **Changes in other conditions for investment in air transport services:** FDI in air transport services is subject to other specific conditions prescribed in this regard. The Third Amendment seeks to introduce certain changes in S. No. 9.5 of Schedule I of the NDI Rules, which include the following:
  - **Amendments to 9.5 (c):** Conditions subject to which foreign airlines shall 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 has been amended to include limit of 49% shall include the FDI and FII/FPI investment, the investments made hereunder shall be in compliance with relevant regulations of the Securities and Exchange Board of India (**SEBI**), such as the Issue of Capital and Disclosure Requirements (**ICDR**) Regulations/Substantial Acquisition of Shares and Takeovers (**SAST**) Regulations, as well as other applicable rules and regulations and removal of grant of Scheduled Operators' Permit. However, NRIs, who are Indian Nationals shall not be subject to the limit of aforesaid limit of 49%, in which case foreign investments shall be permitted up to 100% under the automatic route.
  - **Amendments to 9.5 (d):** Prior to the third amendment, foreign investments in M/s Air India Ltd, including that of foreign airlines were not permitted beyond 49% (directly or indirectly). However, under the Third Amendment, the aforesaid restriction of 49% shall not be applicable in case of any foreign investments by NRIs who Indian Nationals are, in which case, foreign investments shall be permitted up to 100% under the automatic route.
  - **Insertion of 9.5 (e):** FDI in Civil Aviation shall be subject to the provisions of the Aircraft Rules, 1937, as amended from time to time.
  - **Other changes:** Any investment by foreign airlines in companies operating in air transport services, including in M/s Air India Ltd, shall be subject to the following:
    - Such investment shall be in the equity of companies operating cargo airlines, helicopter and seaplane services, as per the limits and entry routes prescribed
    - **Conditions specified in 9.5(c):** FDI limits specified in Sr. No. 9.2 (Airports) and 9.3 (Air Transport Services) of the NDI Rules (as amended from time to time, including the Third Amendment) shall be applicable in cases where there is no investment by a foreign airline.

The Third Amendment aims to clearly shift the powers from the Central Government to the RBI to administer the NDI Rules and issue directions and circulars to give effect to the NDI rules. It also restricts the foreign investment by OCIs in air transport services in India up to 49% of their paid up capital and provide clarity on the relevant SEBI regulations to be complied with, in respect of foreign investment in air transport services and combine foreign investments by FII/FPI and FDI to 49% in scheduled and non-scheduled air transport services in India.

FAIR PRACTICES CODE FOR

ASSET RECONSTRUCTION COMPANIES

Reserve Bank of India (**RBI**) introduced a Fair Practices Code for the Asset Reconstruction Companies (**ARCs**). The salient features of the Code are as under:

- ARCs have been advised to put in place Fair Practices Code (**FPC**) duly approved by board. FPC issued by RBI prescribes minimum regulatory expectations but the ARCs' boards are free to enhance its scope and coverage.
- ARCs would have to follow a transparent and non-discriminatory practice in acquisition of assets.
- To enhance transparency in process of sale of secured assets, invitation for participation in auction would have to be publicly solicited to enable participation of as many prospective buyers as possible. The terms and conditions of such sale may be decided in wider consultation with investors in security receipts as per SARFAESI Act, 2002. It is interesting to note that this Code also provides that the spirit of Section 29A of IBC may be followed while dealing with prospective buyers.
- ARCs would release all securities on repayment of dues or realization of outstanding amount, subject to any other rights or lien for any other claim which they may have against the borrower. If such right of set off is to be exercised, the borrower has to be given notice about the same.
- ARCs would have to put in place Board approved policy on management fee, expenses and incentives, if any claimed from trusts under their management. The said policy has to be transparent and ensure that management fee is reasonable and proportionate to financial transactions.
- ARCs intending to outsource will have to put in place a comprehensive outsourcing policy approved by their board, incorporating criteria for selection of such activities, service providers, delegation of authority depending on risks and systems to monitor and review the operations of these activities and service providers. ARCs would ensure that the outsourcing arrangements neither diminish its ability to fulfil its obligations to customers and RBI nor impede supervision by RBI. If outsourced agency is owned/controlled by a director of ARC, same may be disclosed.
- In relation to matters of recovery of loan or outstanding amounts, the ARCs would not resort to harassment of the debtor. Further, ARCs would ensure that their agents are properly trained to handle their responsibilities with utmost care and sensitivity, particularly with regards to aspects such as hours of calling, privacy of customer information etc. The ARCs have to ensure that their recovery agents do not adopt uncivilized, unlawful and questionable behavior or recovery process.
- ARCs would have to constitute grievance redressal machinery within the organization. The name and contact number of the designated grievance redressal officer needs to be mentioned in the communication with borrowers. The designated grievance redressal officer would ensure that the grievances are redressed promptly. ARCs grievance redressal machinery would also deal with issues relating to services provided by outsourced agency and recovery agents, if any.
- ARCs shall keep the information that they acquire in the course of their business, strictly confidential and shall not disclose it to anyone, including companies forming part of the group except under following circumstances:
  - Required by law
  - Duty towards public to reveal information
  - Borrower's permission
- Compliance with the Fair Practices Code would be subject to periodic review by the Board.

RBI'S ONE-TIME LOAN RECAST

FOR INDIA INC

Reserve Bank of India (**RBI**) vide notification dated August 6, 2020, on Resolution Framework for Covid-19 related Stress (**Resolution Framework**) has provided a window under the RBI (Prudential Framework for Resolution of Stressed Assets) Directions 2019, dated June 7, 2019 (**Prudential Framework**) to enable lenders to implement a resolution plan (**RP**) in respect of eligible borrowers, without a change in ownership, while classifying such exposures as standard assets subject to specified conditions. The resolution window facility is available only to the Covid-19 related stressed assets.

Key terms of the Resolution Framework

- **Eligibility of borrowers**

  The following categories of borrowers are covered under the Resolution Framework:

  - For resolution of stress in Personal Loans: Individual borrowers accounts which were classified as standard but not in default for more than 30 days with the lending institution as on March 1, 2020.
  - For resolution of other exposures: Borrower accounts which were classified as standard but not in default for more than 30 days with any lending institution as on March 1, 2020.
  - Following categories of borrowers/credit facilities shall not be eligible for a RP under the Resolution Framework:
    - MSME borrowers whose aggregate exposure to lending institutions collectively, is INR 25 crore or less as on March 1, 2020
    - Farm credit as listed in Paragraph 6.1 of master direction FIDD.CO.Plan.1/04.09.01/2016-17 dated July 7, 2016 (as updated) or other relevant instructions as applicable to a specific category of lending institutions
    - Loans to primary agricultural credit societies, farmers' service societies, and large-sized Adivasi multi-purpose societies for on-lending to agriculture
    - Exposures of lending institutions to financial service providers
    - Exposures of lending institutions to central and state governments; local government bodies (eg. municipal corporations); and, body corporates established by an act of parliament or state legislature
    - Exposures of housing finance companies where the account has been rescheduled

- **Implementation of RP – Personal loans**
  - The RP under the Resolution Framework may be invoked latest by December 31, 2020, and must be implemented within 90 days from the date of invocation
  - The RP may include rescheduling of payments, conversion of any interest accrued or to be accrued into another credit facility, or granting of moratorium based on the assessment of income streams of the borrower subject to a maximum of 2 years
  - The RP shall be deemed to be implemented only if
    - All the required documents have been executed between the lender and the borrower, in consonance with the RP
    - The changes in the terms and conditions of the loans are duly reflected in the books of the lender
    - The borrower is not in default with the lender as per the revised terms

- **Implementation of the RP – Other exposures**
  - The RP under the Resolution Framework may be invoked latest by December 31, 2020, and must be implemented within 180 days from the date of invocation
  - In case multiple lenders are involved, approval of 75% of the lenders by value and 60% of the lenders by number must have been obtained
  - Inter Creditor Agreement (**ICA**) shall be required to be executed by all lending institutions within 30 days from the date of invocation

- The RP may involve any action/plan/reorganization including but not limited to regularization of the account by payment of all over dues by the borrower entity, sale of the exposures to other entities/investors, change in ownership and restructuring, conversion of a portion of the debt into equity or other marketable, non-convertible debt securities except the compromise settlements which shall continue to be governed by the provisions of the Prudential Framework
- The RP may also include sanctioning of additional credit facilities to address the financial stress of the borrower on account of Covid-19 even if there is no renegotiation of existing debt
- Prior to the implementation of the RP, it shall be vetted by the expert committee where the aggregate exposure of the lending institutions at the time of invocation of the resolution process is INR 1500 crore and above
- The RPs must be independently rated where the aggregate exposure is INR 100 crore or above, by at least 1 credit rating agency authorized by RBI under the Prudential Framework
- In the accounts involving consortium or multiple banking arrangements, the RP shall also provide all the receipts of the borrower, all repayments by the borrower including the additional disbursements as part of the RP by the lending institutions and shall be routed through an escrow account maintained with one of the leading institutions

▪ **Asset classification and provisioning**

- In case a RP is implemented, the asset classification of loan accounts classified as standard may be retained as such upon implementation, whereas the accounts which may have slipped into Non-performing Asset (NPA) between invocation and implementation may be upgraded as standard as on the date of implementation of the RP
- In respect of personal loans, the lending institutions shall keep provision from the date of implementation, which is higher of the provision held as per the master circular - Prudential norms on income recognition, asset classification and provisioning pertaining to advances bearing DBR.No.BP.BC.2/21.04.048/2015-16 dated July 1, 2015, as amended from time to time (**IRAC Norms**) before implementation or 10% of the renegotiated debt exposure of the lending institution post-implementation
- The lending institutions which has signed the ICA within 30 days of invocation shall keep provision from the date of implementation, which is higher of the provision held as per the IRAC Norms immediately before implementation or 10% of the total debt held by the ICA signatories post-implementation of the RP
- The lending institutions which did not sign the ICA within 30 days of invocation shall keep the provision of 20% of the debt in their books or the provision required as per the extant IRAC Norms, whichever is higher
- If the RP is not implemented within 180 days from invocation, provisions as per the Prudential Framework shall be required to be maintained

▪ **Post implementation performance**

- In the case of personal loans, the asset classification after the implementation of the RP shall be governed by the IRAC Norms or other relevant instructions as applicable to the specific category of lending institutions
- For other exposures, any default by the borrower with any of the ICA signatory during the monitoring period (as defined in Resolution Framework) shall trigger a review period of 30 days. Further, if the default persists after the end of the review period, the asset classification of the borrower with all the lending institutions (including who did not sign the ICA) shall be downgraded to NPA from the date of implementation of the RP or the date from which the borrower had been classified as NPA before the implementation of the RP, whichever is earlier

▪ **Disclosure requirements**

- Quarterly, half-yearly and annual disclosures in the financial statements (as the case may be) shall be made by the lenders in the prescribed format till all exposures on which RP was implemented are either fully extinguished or completely slips into NPA, whichever is earlier
- Further, the credit reporting of borrowers where the RP is implemented shall be done as 'restructured' if the RP involves renegotiations

74% FDI UNDER AUTOMATIC ROUTE IN DEFENCE SECTOR

As per the Foreign Direct Investment (**FDI**) policy, 100% overseas investments are permitted in defence industry. Earlier, up to 49% was permitted under automatic route, while beyond that government approval was required. However, government has now permitted FDI of up to 74% under automatic route in defence sector with a view to attract overseas investors.

Press Note 4 (2020 series) dated September 17, 2020 has been released by Government in this regard. The pertinent aspects are as follows:

- FDI up to 74% under automatic route will be permitted for companies seeking new industrial licences.
- Infusion of fresh investment up to 49% in a company not seeking industrial licence or which already has government approval for FDI in defence, shall require 'mandatory' submission of a declaration with defence ministry in case change in equity/shareholding pattern or transfer of stake by existing investor to new foreign investor for FDI up to 49%, within thirty days of such change. Proposal for raising FDI beyond 49% from such companies will require government approval.
- License applications will be considered and given by Department for Promotion of Industry and Internal Trade, Ministry of Commerce & Industry (**DPIIT**) in consultation with Ministry of Defence (**MoD**) and Ministry of External Affairs.
- Foreign investments in defence sector would be subject to scrutiny on grounds of national security and that government reserves the right to review any foreign investment in the sector that affects or may affect national security. This review is subject to security clearance by Ministry of Home Affairs and as per guidelines of MoD.
- The Government has retained the condition that investee company should be structured to be self-sufficient in areas of product design and development. The Note states that investee/joint venture company along with the manufacturing facility, should also have maintenance and life cycle support facility of the product being manufactured in India.
- The decision of Government will take effect from date of FEMA notification.

With this increase in FDI limit in this sector, India can expect to see some positive FDI inflow which will provide momentum to the Government's 'Make in India' scheme. While such investments will continue to be scrutinized on grounds of national security and Government has reserved its right to review any FDI in the defence sector that affects or may affect national security, increase in the foreign ownership limits to 74% would enable foreign players to gain controlling stake in companies, which is critical to them for being liable for the quality and performance of the product. The earlier FDI framework capped FDI under the automatic route at 49%, resulting in reluctance from OEMs to transfer critical proprietary technologies to the holding company, due to negligible control. This concern has now been addressed since foreign shareholders can now own up to 74% stake in a company, thereby allowing for greater protection against further transfer of such technology licensed to Indian companies.

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