



INDIAN LEGAL AND BUSINESS UPDATE

OCTOBER 1-OCTOBER 31, 2009

1. Audio, web-conferencing to be opened to 100 percent FDI

The Government has decided to allow full foreign ownership of firms providing tele-conferencing and web-conferencing services, a sub sector in the country's booming telecom industry where foreign investors are allowed to hold only up to 74 percent stake in a telecom company. However, to invest in this segment, foreign investors will have to get permission from the Foreign Investment Promotion Board (FIPB) an inter ministerial body that clears cross border investment into India and the Ministry of Home Affairs (MHA) that deals with the country's internal security.

The decision was taken by key government departments handling economic affairs, industrial-policy-and-promotion and telecom. This clears the ambiguity in the Foreign Direct Investment (FDI) policy which was so far silent on the issue of foreign ownership limit in the business of providing audio and web conferencing services. The Government had to take a view on whether it falls under 'value added services' in the telecom industry, for which 74 percent FDI limit is allowed or in the 'other services' category, where full foreign ownership is allowed without any prior approval from FIPB. The Government decided to allow full foreign ownership with prior permission from FIPB and MHA.

2. FDI norms to cover Limited Liability Partnerships

The Government is working to bring Limited Liability Partnership (LLPs) within the scope of foreign direct investment guidelines, a move which will facilitate the inflow of overseas capital through a corporate structure that has just recently been allowed in India.

LLPs, which combine the features of partnerships and limited liability companies, are the preferred corporate structure for the services sector globally, particularly tax, accounting and law firms. The Ministry of Corporate Affairs, which administers the LLP Act that came into effect in April, and the Department of Industrial Policy and Promotion which administers FDI policy, are working to amend FDI guidelines. The change in rules is expected to happen in a few months. The LLP Act provides for cross border LLPs but the foreign investment policy, particularly the guidelines for calculating Foreign Direct Investment (FDI) in an Indian company, only covers companies at present. Bringing LLPs within the FDI ambit will facilitate the establishment of cross border LLPs through which

entrepreneurs in India can start business ventures with foreign investors. Since an LLP partner is not liable for the wrongdoing of other partners, entrepreneurs who do not know each other will be willing to come together and start a business.

3. Equal Opportunity Bill to be introduced in Parliament during winter session

A Bill that will seek diversity profiling of employees in public and private sector to help in better recruitment of disadvantaged people is to be introduced in Parliament during the coming winter session. The legislation that will recommend incentives and disincentives to employers based on information in their records and on their performance in the diversity index is in the final stages of preparation. The diversity index will show how far a company concerned, had gone about in providing affirmative action to the underprivileged sections as per EOC guidelines and its strengths and shortcomings in this respect. Diversity profiling will help the government ensure appropriate representation to all the disadvantaged religious and social groups in employment and education.

4. Government may delay GST roll-out.

Finance Minister Pranab Mukherjee has hinted at a delay in introducing the uniform goods and services tax (GST), a key element of indirect tax reform, from the scheduled date of April 1, 2010. This marks the first formal admission that the government's target date for GST may be postponed. Mukherjee will be meeting state finance ministers on November 10 to discuss the issue. States have expressed reservations about pushing through the new tax regime at meetings of the empowered committee of state finance ministers.

5. Norms eased for highway projects

The Government made it easier for builders to execute highway projects by relaxing the norms for public private partnerships (PPP) in the sector. The move is expected to speed up road development and create jobs for the poor. The committee has granted permission to relax the restrictions on cross holding between developers bidding for project by raising the limit to 25 percent from the current 5 percent. The committee also allowed the merger of the two components of viability gap funding (VGF) - equity grant and fund released by the Government - through the construction period. Now, VGF is given in two stages each worth 20 percent of the project cost.

The Government has also allowed developers to exit from projects once construction work is completed. This will enable a developer to sell the project to another, who would be responsible for managing the road project and collecting revenue. The changes in cross holding norm will allow a developer to bid for more than one project. Earlier, partners of a special purpose vehicle (SPV) were barred from bidding for a project in case of a common shareholder with more than 5 percent ownership through direct or indirect holding.

The move would speed up the pace of highway development in the country with more investors coming in. The government has set a target of constructing 7,000 km of road annually, or 20 km a day. It is planning to award contracts for nearly 12,000 km of highways in the next one year to private developers. The government has also cleared a proposal to set up an Empowered Group of Ministers (EGoM) to make necessary changes in the Model Concession Agreement (MCA) in case an interministerial panel fails to resolve an issue related to highway project.

6. Government to introduce governance code for unlisted companies

The Government is likely to put in place a governance code for unlisted companies to make this largely unregulated sector more accountable, as it puts into practice the lessons it learnt from the collapse of Satyam Computers, India's biggest corporate fraud till date. The measures planned by the Ministry of Corporate Affairs will be in line with the norms for listed companies laid down by the country's top market regulator, the Securities Exchange Board of India (SEBI). For listed firms, clause 49 of SEBI's listing agreement specifies corporate governance norms.

The new proposal is aimed at raising the accountability for unlisted firms, which in the absence of any specific governance code often breach corporate best practices till the time they are subjected to regulatory scrutiny. Unlisted firms are not required to follow SEBI norms or disclose financials since they have no public shareholding but they often raise capital from banks and public finance institutions, a reason why the government feels it is necessary to keep a tab on them.

The proposed compliance framework may require these firms to have independent directors on their boards, bring in compliance and proper disclosures regarding accounting policies, apart from having a clear cut whistle blower policy. As part of the proposal, the government may also ask professional institutes of chartered accountants and company secretaries to rate unlisted firms based on their evaluation. The Institute of Chartered Accountants of India (ICAI) is planning to set up a rating system for corporate governance for listed and well as unlisted entities.

7. End-use of initial public offers (IPOs) funds under lens

The Ministry of Corporate Affairs (MCA) has decided to conduct a quarterly scrutiny of the end-use of funds raised through initial public offers (IPO). To this end, the ministry has directed all Registrar of Companies (RoC) to coordinate with the stock exchanges to access the quarterly balance sheets of all companies that have come out with IPOs in the recent past. MCA will assess whether the utilisation of IPO money matches the description in the prospectus the company files.

This exercise forms part of a technical scrutiny mechanism that the ministry has worked out to detect non-compliance and non-disclosure by companies. The logic for this exercise is that shareholders are often the worst sufferers when a company goes bankrupt. This is because holders of debt instruments have the first right over the assets of the company concerned followed preferential shareholders. Ordinary shareholders come last in the pecking order. Currently, responsibility for monitoring the end-use of IPO proceeds is unclear since MCA and the Securities and Exchange Board of India (SEBI) share or conduct inspections individually depending on which

regulator finds anomalies in company performance. Now, the decision to conduct quarterly scrutiny establishes MCA as the sole regulatory authority for scrutiny of end-use of IPO proceeds, sources said.

8. Per second tariff to be compulsory: TRAI

The Telecom Regulatory Authority of India (TRAI) is planning to make one second pulse a mandatory tariff option for all operators, a move that will benefit consumers by potentially reducing call charges and adding transparency to their tariff plans.

The move will benefit consumers because it will reduce the “wastage” per call, which some telecom companies put at about 18 per cent. Currently, most telecom companies fix the minimum pulse rate at 60 seconds. “On average, consumers do not use 15 to 20 seconds of a call but pay for it because of the one minute pulse rate.
