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I. Google fined USD 21 million for abusing its dominant position in India

The Competition Commission of India (**"CCI"**) in ***Matrimony.com Limited and Another v. Google LLC and Others*** (decided on February 8, 2018) imposed a penalty of $21 million on Google, Inc., Google India Private Limited and Google Ireland Limited (**"Google"**) for abusing its dominant position under the Competition Act, 2002 (**"the Act"**).

Facts

An information was filed to CCI by Matrimony.com Limited and Consumer Unity & Trust Society (**"the Informants"**) under the Act alleging that Google was running its core business of search and advertising in an unfair and discriminatory manner, causing harm to the advertisers and the consumers. Google provides a large number of vertical search services, including video (YouTube), news (Google News), maps (Google Maps), etc. It was averred that Google started mixing many of its vertical results into its organic search results. It was further pointed out that Google's own sites would appear prominently on the search results page irrespective of whether they were the most popular or relevant to the search and it would not place results from any other vertical search sites as prominently in its list of results. It was also alleged that Google was imposing conditions unfair and discriminatory to its advertisers and entering into restrictive agreements. These activities resulted in Google abusing its dominant position in the relevant market in India contravening the provisions of Section 4 of the Act. CCI directed the Directorate General (**"DG"**) to cause an investigation. Accordingly, investigation was conducted against Google and a report was filed before CCI. As a result of this, the issues that came before CCI for examination were:

Issue 1: What is the relevant market(s) in the present case?

Issue 2: Whether Google is dominant in the said relevant market(s)?

Issue 3: Whether Google has abused its dominant position under Section 4 of the Act?

Abuse of dominant position

'Dominant position' means a position of strength enjoyed by an enterprise in the relevant market in India which enables it to operate independently of competitive forces prevailing in the relevant market; or to affect its competitors or consumers or the relevant market in its favour. To analyse dominance, the factors are enumerated in Section 19(4) of the Act. Dominance per se does not constitute a legal wrong, however its abuse is prohibited under the Act. Abuse is stated to occur when an enterprise uses its dominant position in the relevant market in an exclusionary or/and exploitative manner. The Act gives an exhaustive list of practices that constitute abuse of dominant position and, therefore, are prohibited. Under Section 4 of the Act the following constitutes abuse of dominant position:

1. Directly or indirectly imposing unfair or discriminatory conditions or price (including predatory price) in purchase or sale of goods or service.
2. Limiting or restricting production of goods or provision of services or market.
3. Limiting or restricting technical or scientific development relating to goods or services to the prejudice of consumers.
4. Denying market access in any manner.
5. Entering into contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts (Imposition of supplementary obligations).
6. Using its dominant position in one relevant market to enter into, or protect, other relevant market.

Analysis

DG at the conclusion of its investigation has identified two relevant markets as per Sections 2(r), 2(s)and 2(t) read with Sections19(6) and 19(7) of the Act: market for online general web search services in India and market for online search advertising services in India. Based on the market share of Google, DG found Google to be a dominant enterprise in both the relevant markets. Further, DG submitted that Google biases its search results, imposes unfair conditions on its advertisers and its distribution and intermediation agreements restrict competition. The Informants agreed with the DG report stating that Google's search results were not strictly determined by relevance, it misleads users into believing that its results are driven purely by quality considerations. Further, most vertical search services depend on Google for their survival and Google's search biases threatens their very survival. Therefore it harms competition, reduces innovation, and impedes choice. The Informants alleged that the Google is guilty of unfair discrimination between third party ads and house ads by not disclosing adequate information to third party advertisers. Further, it imposes unfair condition on the trademark owners (particularly those who have

notified their trademarks to Google) by allowing their trademarks to be bid as keywords by third parties in online search advertising. It was also alleged that Google has two search distribution agreements with Apple (for its Safari browser) and Mozilla (for its Firefox browser) by which Google is set as the default option in case of web searches. This amounts to a denial of market access to competing search engines and therefore contravenes Section4(2)(c) of the Act. Google also offers online search and advertising services on other websites through intermediation agreements. There are clauses under these agreements that restrict the publishers from showing ads that are “same or substantially similar” to Google’s on the same site. This amounts to imposition of unfair conditions by Google on the publishers and results in abuse of dominant position.

In response to these allegations Google argued that DG’s market definition for search is flawed because there is no relevant market for general search. Further, Google denied its dominance in the relevant market and contended that it faces substantial competitive constraints in each query category. Google contended that its search results are relevant and according to its quality standards. These search results are neither biased nor do they mislead user or harm competition. Google’s other competitors like Yahoo and Bing use similar technology for their search results. If Google ceased to use the technology it uses to develop the search results, it would be forced to retreat to pre-2000 levels of technology which would mean inferior services for Indian users compared to those offered in the rest of the world. In relation to unfair conditions being imposed on its advertisers, Google contended that it treats house ads like third-party ads and strictly prohibits operators of Google’s house ads accounts from accessing data or information that is not publicly available to all other advertisers. Further, Google stated that permitting advertisers to bid on trademarked keywords increases competition as it enhances user choice and enables Indian websites to compete against the trademark owner without violating the trademark law. With respect to the distribution agreements that restrict competition, Google alleged that agreements by which the Google search engine appears as a default setting does not deny market access to competitors. Defaults simply provide a convenient way for users to access a preferred search service. Users can easily switch away from the default if they so choose to. Finally, with respect to the intermediation agreements, Google stated that these agreements do not create exclusivity nor do they harm competition. Further, Google does not claim that the non-confusion clause in fact amounts to exclusivity. Google contended that it has never actually interpreted it in this way or that any publisher has ever felt bound by exclusivity.

Observations of CCI

CCI agreed with the submission of DG and held that market for online general web search services in India and market for online search advertising services in India to be two distinct relevant markets. CCI held that the technologies used by Google to obtain search results leads to an unfair diversion of traffic in favor of commercial units (sponsored search results). It has also allocated disproportionate real estate to the commercial units resulting in either pushing down or pushing out of third party verticals who were trying to gain market access. Consequently, users may have been devoid of additional choices of results and therefore, such conduct amounted to an unfair imposition upon the users availing search services. CCI did not agree with DG and the Informant on the issue of unfair

conditions on advertisers. CCI found that Google provides sufficient data to advertisers on the performance of their ads and does not discriminate in favor of house ads. It also opined that allowing trademarks to be bid as keywords is advantageous to competition as it is another way that competitors can target their ads to users who have mentioned a rival and is beneficial to consumers as it helps them in reviewing and locating a wide choice with respect to the products. Hence, Google was not found guilty of imposing unfair conditions on its advertisers.

In relation to Google's distribution agreements, CCI held that the findings of DG were based upon the supposition that through such agreements, Google has the "potential" to strengthen its market position to the exclusion of other search engines. However, these findings were unfounded and these agreements are neither exclusive nor had it been established that such arrangements denied market access to any of the competing search engines. Finally, with respect to the intermediation agreements, CCI held that by restricting publishers from partnering with competing search services, Google was denying its competitors access to the search business and further marginalizing competitors and endangering their viability while strengthening its own position. These restrictions amounted to a de-facto imposition of online search exclusivity which resulted in an abuse of its dominant position.

Decision

The CCI held that Google was guilty of abusing its dominant position in the market for online general web search and search advertising services in India by using its search designs to influence the search results in a discriminatory manner and entering into intermediation agreements that restrict competition. Google was also asked to cease activities that resulted in search biases, provide disclaimers in case of sponsored search results and not enforce the restrictive clauses in its intermediation agreements with its Indian partners.

VA View

This judgement by CCI, even though subject to appeal, has been welcomed by Indian vertical search engines as it shall be instrumental in creating a level playing field for the smaller competitors in the face of a tech giant stranglehold over local digital business. While the quantum of a $21 million fine imposed by CCI may be small for the global technology giant, the ruling has raised hopes for Indian digital startups that are feeling the heat from Google's dominance of online search.

This is the third international set-back for Google since 2017. In a similar case, the European Union's anti-trust regulators had fined Google to the tune of $2.7 billion in June 2017 for promoting its own products over others. Google had also, earlier in April 2017, settled an anti-trust matter in Russia out of court with a $7.5 million settlement amount. In the U.S. too, Google had narrowly escaped a lawsuit intended to be filed by the Federal Trade Commission in 2012 for unfair business practices by making a few changes to its policies. This competition law judgement sends an important message to the information technology oligarchs worldwide that India is likely to put up a worthy fight to safeguard the interests of its indigenous stakeholders.

II. NCLAT upheld the order of NCLT rejecting scheme of amalgamation for not serving the interest of stakeholders

The National Company Law Appellate Tribunal (**"the NCLAT"**) in ***Wiki Kids Limited and Others v. Regional Director, South East Region and Others*** (decided on December 21, 2017) rejected the scheme of amalgamation of two companies while holding that interest of stakeholders is not being served as envisaged in the scheme.

Facts

Avantel Limited, a listed company held 99.9% (ninety nine point nine percent) of the paid up share capital of Wiki Kids Limited, an unlisted company (collectively **"the Appellants"**). Appellants proposed a scheme of amalgamation (**"Scheme"**) for amalgamation of Wiki Kids Limited into Avantel Limited and moved the Andhra Pradesh High Court seeking directions with respect to the meetings of the shareholders and creditors. As per directions of the Andhra Pradesh High Court, the Appellants convened a meeting and the Scheme was approved by majority shareholders. During this time, a notification was issued by Ministry of Corporate Affairs and the case stood transferred to National Company Law Tribunal, Hyderabad (**"the NCLT"**). The Appellants filed the second motion petitions with the NCLT and also filed no objection from Bombay Stock Exchange Limited, Securities and Exchange Board of India (**"SEBI"**), Registrar of Companies, Regional Director and Official Liquidator (collectively **"the Respondents"**). The NCLT after seeking clarifications from the parties and after perusing the records, rejected the Scheme by concluding that Scheme in question is beneficial only for common promoters of both the companies and public interest was not being served. The Appellants filed an appeal in the NCLAT against the order of the NCLT and following issue was framed for determination:

Issue: Whether order of the NCLT rejecting Scheme is maintainable?

Arguments

The Appellants argued that they complied with all the requirements/ directions pertaining to Scheme and there was no objection to the Scheme from any concerned authority or stake holders or general public at large. They submitted that the NCLT has completely overlooked the potential business model developed by Wiki Kids Limited, which is a transferee company in the instant case. The Appellants contended that the courts should not supplement its wisdom with the commercial wisdom of the stakeholders. The Registrar of Companies has not raised any objections to the Scheme as confirmed by the affidavit of Regional Director. Appellants relied on the judgment of Supreme Court in case of ***M/s Miheer H. Mafatlal v. Mafatlal Industries Limited*** (decided on September 11, 1996), which held that *"The Court acts like an umpire in a game of cricket who has to see that both the teams play their according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire."*

On behalf of the Respondents, Regional Director, South East Region while submitting that the share exchange ratio was arrived at on the basis of a valuation report issued by an expert and there was no cause for them to disbelieve the

premises on which the share exchange ratio was arrived, prayed that the order passed by the NCLT be expunged. Further, SEBI submitted that it is not the authority as per law to do valuation and therefore, the observation made in the impugned order passed by the NCLT is unwarranted. It further stated that it has no means to give its observation on movement of market price of the scrip and since no grievance or objection has been raised, it has no objection to the proposed Scheme. The Official Liquidator also submitted its report with the opinion that the affairs of the Wiki Kids Limited appear to have not been conducted in a manner prejudicial to the interest of the members or to public.

Observations of the NCLAT

The NCLAT admitted the fact that compliance under the law has been done and no objection certificate from the relevant authorities have been obtained. However, after examining the entire Scheme, it concluded that, the Scheme had been designed just to give benefit to promoters of both the companies whereas for other shareholders benefit depends on the future performance. The NCLAT examined the cases referred by the Appellants and distinguished them with the facts of the present case. The NCLAT observed that the NCLT has enough expertise to look into the scheme of amalgamation and it can also see whether it is not just and fair to all shareholders. It has a duty to act in public interest. In matter of the company, what needs to be seen is that the scheme of amalgamation is not only beneficial to a one group, but is in the best interest and protection of all the stakeholders. While examining the scheme of amalgamation, it is desirable for the tribunals not to look into mathematical details but to look broadly at the scheme of amalgamation. The NCLAT concluded that the Scheme was beneficial to promoters only and therefore the NCLT was justified in exercising its discretion to reject the amalgamation.

Decision

The NCLAT held that there is no infirmity in impugned order of the NCLT and therefore dismissed the appeal.

VA View

The nuance of this judgement lies in the distinction between the ‘public interest’ and the ‘interest of stakeholders’. The NCLAT made a deliberate attempt to disassociate with the term ‘public interest’ because it can be subject to wider interpretation and open a doorway to unnecessary objections to such scheme of amalgamation.

In the instant case, the NCLAT while holding that the NCLT has duty to act in public interest, clarified that the scheme of amalgamation should not only benefit the promoters, but serve the interest of all stakeholders. This judgment will serve as a precedent in laying down the principle that even though all the requirements or directions pertaining to a scheme of amalgamation including approval of the shareholders and creditors, are complied with and no objection has been obtained by the concerned regulatory authorities, it would not mean that such a scheme shall be considered to be in the interest of all stakeholders. The judgment also is a departure from the earlier judgments on the issue, wherein it was held that the court is not competent to question the decision of majority shareholders in approving the scheme, and therefore, expands the scope of judicial scrutiny.

III. Arbitration Act cannot be circumvented by filing an appeal under Commercial Courts Act

In ***Kandla Export Corporation and Another v. M/s. OCI Corporation and Another*** (decided on February 7, 2018) the Supreme Court held that an appeal, not maintainable under Section 50 of the Arbitration and Conciliation Act, 1996 (**"the Arbitration Act"**) cannot be maintainable under Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 (**"the Commercial Courts Act"**).

Facts

As a result of an international commercial arbitration, a foreign award was passed against Kandla Export Corporation and Another (**"the Appellants"**). An execution petition was filed by M/s. OCI Corporation and Another (**"the Respondents"**) in District Court, Gandhidham, Kutch (Gujarat), to enforce the foreign award under the Arbitration Act. The execution petition was then transferred before the Commercial Division of the High Court of Gujarat (**"the High Court"**). The Appellants filed objections against the said execution petition. The High Court dismissed such objections and allowed the execution petition. Aggrieved by this dismissal, the Appellants filed an appeal under the Commercial Courts Act, which was dismissed by the High Court, stating that the Commercial Courts Act did not provide any additional right of appeal which is not otherwise available to the Appellants under the Arbitration Act. Aggrieved by the decision of the High Court, the Appellants preferred an appeal before the Supreme Court. The question that came before the Supreme Court for examination was as follows:

Issue: Whether an appeal, not maintainable under Section 50 of the Arbitration Act, is maintainable under Section 13(1) of the Commercial Courts Act?

Relevant provisions

In order to appreciate the depth of the arguments extended by the both parties, the relevant provisions of the Arbitration Act and the Commercial Courts Act have been reproduced hereunder:

Section 50(1) of the Arbitration Act:

> *"An appeal shall lie from the order refusing to-*
>
> *(a) refer the parties to arbitration under Section 45;*
>
> *(b) enforce a foreign award under Section 48;*
>
> *to the court authorised by law to hear appeals from such order."*

Section 13(1) of the Commercial Courts Act:

> *"Any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of judgment or order, as the case may be:*

Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 as amended by this Act and Section 37 of the Arbitration and Conciliation Act, 1996."

Arguments

The Appellants argued that Section 13 of the Commercial Courts Act provides an appeal to any person aggrieved by the decision of a Commercial Division of a High Court, and it is clear that the wide language of Section 13(1) of the Commercial Courts Act would confer a right of appeal, notwithstanding anything contained in Section 50 of the Arbitration Act. Further, it was argued that Section 13(1) of the Commercial Courts Act should be read with Section 21 of the Commercial Courts Act, which provides that the provisions of the Commercial Courts Act shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force (**"the non-obstante clause"**) and therefore, the appeal should be allowed. Further, it was also argued that Section 37 of the Arbitration Act, which is expressly mentioned in the proviso to Section 13(1) of the Commercial Courts Act, provides for matters under which an appeal can be filed and specifically states that an appeal cannot be filed in any other matter. Such language is absent from Section 50 of the Arbitration Act. Therefore, it cannot be construed that no appeal is maintainable under Section 50 of the Arbitration Act in the present case.

The Respondents submitted that Section 11 of the Commercial Courts Act, provides that the Commercial Courts shall not entertain any proceedings for which the jurisdiction of the civil court is barred under any other law. This makes it clear that the non-obstante clause contained in Section 21 of the Commercial Courts Act has to give way to Section 11 of the Commercial Courts Act. Since Section 50 of the Arbitration Act impliedly bars appeals against an application allowing execution of a foreign award, Section 13 of the Commercial Courts Act cannot allow the appeal in this instance. Further, the Respondents strongly relied on the Supreme Court judgement in ***Fuerst Day Lawson Limited v. Jindal Exports Limited*** (decided on July 8, 2011), under which it was held that the Arbitration Act is a self-contained Code on all matters pertaining to arbitration which would exclude the applicability of a general law contained in Section 13 of the Commercial Courts Act. The Respondents also argued that an additional appeal would vitiate the object of both Acts, which is to speedily resolve commercial disputes. Therefore, the plea to allow the appeal should be dismissed.

Observations of the Court

The Court relied on the judgement quoted by the Respondents to arrive to its conclusion. In ***Fuerst Day Lawson Limited v. Jindal Exports Limited*** (supra), the question that arose before the Supreme Court was whether an order, though not appealable under Section 50 of the Arbitration Act would, be subject to appeal under the Letters Patent of the High Court. In this case the Supreme Court held that the specific law on arbitration would prevail over the general law under the Letters Patent of the High Court.

Further, dealing with the contention that Section 37 of the Arbitration Act specifically provides that matters not mentioned therein cannot be appealed, however, the same is absent under Section 50 of the Arbitration Act, the

Court held that Sections 37 and 50 of the Arbitration Act are not comparable because they belong to two different statutory schemes. Section 37 belongs to Part I of the Arbitration Act that concerns law relating to domestic arbitration and international commercial arbitration. Section 50 on the other hand is in Part II of the Arbitration Act which is concerned only with the enforcement of foreign awards. Therefore, just because Section 50 of the Arbitration Act does not explicitly state that matters not mentioned therein cannot be appealed does not mean they are appealable.

The Court concluded by holding that in all arbitration cases of enforcement of foreign awards, it is Section 50 of the Arbitration Act alone that provides an appeal. Having provided for an appeal, the forum of appeal is left “to the Court authorized by law to hear appeals from such orders”. Section 50 of the Arbitration Act properly read would, therefore, mean that if an appeal lies under the said provision, then alone would Section 13(1) of the Commercial Courts Act be attracted as laying down the forum which will hear and decide such an appeal. Furthermore, Section 21of the Commercial Courts Act would only apply if Section 13(1) of the Commercial Courts Act were to apply in the first place. The Court also evaluated the legislative intent behind both the Acts which, as the Respondents rightly stated, was speedy resolution of disputes between parties. An additional appeal only extends the process of dispute resolution and should be avoided in this instance.

Decision

The Court held that an appeal which is not maintainable under Section 50 of the Arbitration Act would not be maintainable under Section 13(1) of the Commercial Courts Act as well.

VA View

The Supreme Court has previously upheld the internationally recognized principle of *generalia specialibus non derogant* (specific prevails over general) on several occasions. Apart from the judgements of the Courts as cited in this case, even in ***Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department*** (decided on April 3, 2008), the Supreme Court while evaluating the interplay between the Limitation Act, 1963 and the Arbitration Act has stated that limitation period specifically prescribed in the Arbitration Act would prevail over the general limitation period prescribed in the Limitation Act, 1963. This judgement cements the jurisprudence in this regard while also developing some jurisprudence on the relatively less explored Commercial Courts Act. Since its inception, a handful of judgements have been passed analysing the scope of the Commercial Courts Act. In cases relating to the arbitration, now it is clear that the Commercial Courts Act has to be referred only to determine the forum of appeal and not the principal right of appeal.

IV. Government approves major changes in Foreign Direct Investment (FDI) policy on various sectors

In order to further liberalise foreign investments in India, the Government of India has brought major changes in the Foreign Direct Investment Policy, 2017 (**"FDI Policy"**) by releasing Press Note 1 (2018 Series) (**"Press Note"**) on January 23, 2018. The amendments mentioned in the Press Note will take effect from the date of notification under the Foreign Exchange Management Act. Pursuant to the Press Note, following amendments are made in the FDI Policy:

Single Brand Retail Trading ("SBRT"): Earlier foreign investment cap of 49% (forty nine percent) under automatic route and foreign investment beyond 49% (forty nine percent) and up to 100% (one hundred percent) through government approval route in SBRT has now been amended to permit 100% (one hundred percent) FDI under automatic route. Further, the investors had to locally source 30% (thirty percent) of purchases from India. This requirement has been relaxed in a way that SBRT entity is now permitted to set off its incremental sourcing of goods from India for global operations during initial 5 (five) years and after that, SBRT entity will be required to meet the 30% (thirty percent) sourcing norms directly towards its India's operation, on an annual basis. The incremental sourcing has been defined to mean increase in terms of value of such global sourcing from India for that single brand in a particular financial year from India over the preceding financial year, by the non-resident entities undertaking SBRT, either directly or through their group companies. The non-resident entity(ies) can undertake SBRT in India for the specific brand, either directly by the brand owner or through a legally tenable agreement executed between the Indian entity undertaking SBRT and the brand owner.

Civil Aviation: Earlier, the foreign airlines were allowed to invest in the capital of Indian companies operating scheduled and non-scheduled air transport services up to the extent of 49% (forty nine percent) of their paid up share capital, except in M/s. Air India Limited. This exception has now been removed and direct/ indirect foreign investment up to 49% (forty nine percent) under government route is permitted in M/s. Air India Limited subject to the condition that substantial ownership and effective control shall continue to vest with the Indian nationals.

Real Estate Construction Development: 100% (one hundred percent) foreign investment under automatic route is permitted in real estate construction development sector. However, real estate business is prohibited under the present regime. With a view to liberalise the foreign investment in broking services, the Press Note has now clarified that real estate broking service will not amount to real estate business, and therefore, 100% (one hundred percent) FDI is allowed in real estate broking service under automatic route.

Power Exchanges: Under the earlier FDI regime for Power Exchanges, Financial Institutional Investors (FIIs) and Foreign Portfolio Investors (FPIs) were restricted to secondary markets only. This restriction has now been done away with by the Press Note to boost foreign investment by FIIs/FPIs in Power Exchanges through primary market.

Pharmaceutical: Earlier FDI regime on pharmaceuticals sector, inter alia, provided that definition of medical device as contained in the FDI Policy would be subject to amendment in the Drugs and Cosmetics Act, 1940. Now, the Press Note has amended this definition and as the definition is complete in itself, it is not subject to Drugs and Cosmetics Act, 1940.

Audit of investee company: With regard to the appointment of auditors in the Indian investee company, there is no provision in the FDI Policy. The Press Note provides that if the foreign investor wishes to specify a particular auditor/ audit firm having international network for the investee company, then audit of such investee companies should be carried out as joint audit and one of the auditors should not be part of the same network.

Other approval requirements: As per the earlier FDI Policy, foreign investment into an Indian company engaged only in the activity of investing in the capital of other Indian companies/ LLPs and in the Core Investing Companies (CICs) was allowed under the government approval route. In order to align the FDI Policy on these sectors with FDI Policy provisions on Other Financial Services and to permit the FDI in investing companies whose activities are regulated by any financial sector regulator, under automatic route, the government has now permitted 100% (one hundred percent) foreign investment into registered Non-Banking Financial Companies (NBFC) under the automatic route. Foreign investment in CICs is permitted under government approval route. If the activities of the said investing companies are not regulated by any financial sector regulator or where only part is regulated or where there is doubt regarding the regulatory oversight, foreign investment up to 100% (one hundred percent) will continue to be allowed under government approval route, subject to conditions specified by the government.

Earlier the issue of equity shares against non-cash consideration like import of capital goods/ machinery/ equipments (excluding second-hand machinery) and pre-operative/ pre-incorporation expenses (including payments of rent, etc.) could be done only under the government route. Now as per the Press Note, it can be done under automatic route subject to compliance with the conditions and the procedure as specified.

FDI proposals from countries of concern: The extant FDI Policy provides that the applications involving foreign investments under the automatic route, requiring security clearance with respect to the countries of concern (including Pakistan and Bangladesh) had to be processed by Ministry of Home Affairs. With regard to the Press Note amendment in this provision, now the application will be processed by Department of Industrial Policy and Promotion (DIPP). However, the applications involving foreign investments under the government approval route, requiring security clearance with respect to countries of concern, will be processed by the Nodal Administrative Department/ Ministry.

VA View

The amendments introduced in the FDI Policy are certainly a welcome step by the government. The amendments will certainly liberalize and simplify the FDI Policy and will provide ease of doing business in the country. In turn, it will lead to larger investment inflows which will contribute to growth of income and employment in the country. It is interesting to note that while liberalizing the FDI Policy, the government has quietly slipped in a swadeshi move by mandating that overseas auditors will have to undertake joint audit, if an international investor insists on audit by a global firm, or its Indian affiliate. Presently, the foreign firms control a majority of the audit work in listed entities as well as large unlisted Indian companies, causing a lot of heartburn to Indian firms. This move will benefit Indian firms, which have been complaining of being left out.

However, it is to be noted that the said amendments will take effect only from the date of FEMA notification. Hence, until the amendments are reflected in the provisions of Foreign Exchange Management (Transfer and Issue of Securities to Persons Resident Outside India) Regulations, 2017, the existing FDI regime will prevail.

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