Corporate – Legal Milestones Financial Year 2020-21 and a Look Ahead

14 April 2021

This update covers:

1 The Year that Was

2020 was a year that witnessed global disruptions, economic downturn and volatility owing to the ongoing COVID-19 pandemic. In the wake of the pandemic, the Government of India undertook several regulatory and legal reforms with the aim of curtailing the economic slump and bolstering foreign investment, while simultaneously suppressing opportunistic takeovers/acquisitions of Indian companies.

The tone of the reforms initiated over the course of the year has been underscored by the concept of 'Atmanirbhar Bharat' (*self-reliant India*).

The year 2020 saw many procedural changes in response to COVID-19 pandemic and some key developments under the Foreign Direct Investment (FDI) Policy, Companies Act, 2013 and Foreign Contribution (Regulation) Act, 2010. This update summarizes some of these developments along with our expectations for the year ahead.

2 Major Developments in the Financial Year 2020-2021

2.1 Foreign Direct Investment Regime

- Press Note 3

The Department for Promotion of Industry and Internal Trade (DPIIT) issued Press Note 3 of 2020 on 18 April 2020 (Press Note 3 of 2020), imposing stricter norms on foreign investments in Indian companies from an investor based out of China and other bordering countries (i.e., Afghanistan, Bangladesh, Bhutan, Myanmar, Nepal, and Pakistan) (Restricted Country). Investments from Hong Kong and Taiwan are also covered by Press Note 3 of 2020.

Pursuant to this amendment, prior government approval will now be required for any foreign investment in or acquisition / transfer of an Indian company (directly or indirectly), where the acquirer or beneficial owner of such investment is based out of a Restricted Country. This is regardless of whether or not such investment falls in a sector under the ambit of approval route (i.e. requires prior government approval for FDI) or not under the FDI policy. Further, transfer of ownership of any existing or future FDI into an Indian entity (directly or indirectly), resulting in beneficial ownership by an entity, or a person who is situated in or is a citizen, of a Restricted Country now requires prior government approval.

Please *click here for a more detailed analysis.*

- Other FDI Related Changes
  - *Increase in FDI limit in the insurance sector:* The Insurance (Amendment) Act 2021 which received Presidential assent on 26 March 2021, amends the Insurance Act, 1938 to increase the FDI limit under the automatic route (i.e., without prior government approval) for the insurance sector from 49% to 74%. This amendment has been made effective from 1 April 2021.
  - *Further liberalization of FDI norms in the Indian defence sector:* The FDI limit under automatic route for the defence industry was increased from 49% to 74%. FDI beyond 74% is permitted under the approval route, provided that such investment is likely to result in access to modern technology. Further, infusion of fresh foreign investment (up to 49%) in a company not seeking an industrial license will now require government approval in the event such investment results in (a) change in the ownership pattern of the company; or (b) transfer of stake of an existing investor to a new foreign investor.

    Please *click here for a more detailed analysis.*
  - *FDI in news on digital media*: Pursuant to Press Note 4 of 2019 (PN 4 of 2019) and subsequent amendments (on 5 December 2019) to the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019 (NDI Rules), the government released guidelines on FDI in the news digital media sector. The amended NDI Rules provide that FDI in a company engaged in the business of '*uploading/ streaming of news & current affairs through digital media*' is permitted to accept foreign investment up to 26%, with government approval. Prior to this, FDI in digital media was unregulated, and the restriction on FDI in news was limited to 26% in print media and 49% in broadcasting content services

    However, PN 4 of 2019 and the amendments to the NDI rules gave rise to a few ambiguities on the scope of its restriction. Consequently, on 16 October 2020, the DPIIT issued a clarification regarding the categories of entities that would be subject to the FDI restriction, along with the time period for aligning their existing FDI limits to the 26% limit and obtaining government approval.

    Please click here for a more detailed analysis.
  - *Downstream investments made by Non-Resident Indians (NRIs):* Pursuant to Press Note 1 of 2021, investments by NRIs on a non-repatriation basis will be treated at par with the investments made by residents i.e., domestic investments. Further, such investments will be exempt for calculation of aggregate foreign indirect investment in an Indian investee entity.

2.2 Foreign Contributions (Regulation) Amendment Act, 2020

The Foreign Contribution (Regulation) Act, 2010 (FCRA) which regulates the flow and utilisation of foreign donations and contributions was amended with effect from 29 September 2020 through the Foreign Contribution (Regulation) Amendment Act, 2020 (FCRA Amendment Act). Some key changes introduced are:

- Absolute prohibition on further transfers of foreign contributions received by eligible recipients under the FCRA to any third party/person. Previously, transfer of foreign contribution received by eligible recipients to third parties was permissible subject to receipt of adequate approval from the Central government or such other relevant authority.
- Reduction in the percentage of foreign contributions that can be utilised to defray administrative expenses from 50% to 20%.
- Enhancement of the period of suspension of registration by the Central government for up to 360 days (instead of 180 days) pending an inquiry for cancellation of the FCRA registration.
- Introduction of a provision allowing the government to prevent a person from utilising foreign contribution while an inquiry is pending.
- 'Public servants' (*defined under the Indian Penal Code*) have been brought under the ambit of persons who are restricted from receiving foreign contributions.
- Receipt of foreign contribution in the first instance through an account designated as an 'FCRA account' opened with a branch of the State Bank of India, New Delhi. No funds other than the foreign contribution should be received or deposited in this account.

While the amendment was enacted with the objective of enhancing transparency and accountability in the receipt and utilisation of foreign contributions, the purpose of some of the amendments is unclear and does not seem aligned with the stated objective.

Please click here for a more detailed analysis.

2.3 Startup-India Seed Fund Scheme (SISFS)

The SISFS will come into effect on and from 1 April 2021 and will be in force for a period of four years. The objective of the scheme is to provide financial assistance to start-ups recognised by DPIIT for facilitating proof of concept, prototype development, product trials, market entry and commercialisation. The corpus amassed for doling out financial assistance is to the tune of INR 945 crores, which will be disbursed through selected incubators across India.

2.4 Companies Act, 2013 - 2020 Amendments

- To improve the ease of doing business in India, various amendments have been made to the existing legal provisions of the Companies Act, 2013 (Act) through the Companies (Amendment) Act, 2020 (Companies Amendment Act).

  Some key changes introduced are:

  - *De-criminalisation of minor offences* - The Companies Amendment Act decriminalises 46 offences under the Act and provides leniency in relation to minor offences. For instance, imprisonment has been removed as a punishment for contraventions pertaining to buyback of securities, disclosure of interest by directors. Fines/penalties for procedural lapses such as filing of annual return with the registrar, variation of shareholder rights, transfer of securities, alteration, and reduction of share capital amongst others have been reduced.

Further, the MCA through press release dated 3 February 2021 has decided to decriminalise certain compoundable offences under the LLP Act 2008. In this regard, 12 compoundable offences are to be decriminalised and one provision (i.e., Section 73) entailing criminal liability is to be omitted. The de-criminalised offences would be then dealt within an in-house adjudication framework.

- *Remuneration of independent or non-executive directors in case of no/inadequate profits* - In addition to executive directors, now an independent director is also eligible to receive remuneration, even if a company has no profits or inadequate profits in accordance with Schedule V of the Act.
- *Listing on foreign exchanges* - The amendment allows a class of public companies to list certain class of securities on stock exchanges in permissible foreign jurisdictions. It also empowers the Central government to exempt any class or classes of public companies from the application of certain provisions such as issuance and allotment of securities, beneficial ownership, failure to distribute dividends, etc.
- *Corporate Social Responsibility (CSR)* - The amendment allows companies that spend in excess of the CSR requirements to set off such excess in the succeeding financial years. Further, companies obligated to spend less than INR 50,00,000 as part of the CSR requirements are now exempted from constituting a CSR committee. Additionally, administrative overheads are capped at 5% of the total CSR expenditure of the company for any given financial year.

Further, CSR funds may now be spent for carrying out awareness campaigns/programmes or public outreach campaigns on COVID-19 vaccination programme (i.e., such expenditure shall be deemed as an eligible CSR activity under Schedule VII of the Act).

The amendment also pares down the list of 'CSR' activities by excluding the following activities from its ambit – (a) activities undertaken in normal course of business, (b) any activities undertaken by the company outside India except for training of Indian sports personnel representing any state at a national level or India at the international level, (c) contribution of any amount directly or indirectly to any political party under Section 182 of the Act, (d) activities benefitting employees of the company, (e) activities supported by the companies on a sponsorship basis for deriving marketing benefits for its products or services, and (f) activities carried out for the fulfilment of any statutory obligation.

- COVID related relaxations - MCA introduced a number of COVID related relaxations to reduce the compliance burden of the companies, for instance, (i) timeline for holding EGMs and passing ordinary/special resolutions through video conferencing has been extended to 30 June 2021, (ii) the applicability of the Companies (Auditor's Report) Order 2020, has been extended from FY 2020-2021 to FY 2021-2022, and (iii) timelines for annual return filings were extended.
- The Companies (Compromises, Arrangement and Amalgamations) Amendment Rules, 2021 (Companies Amendment Rules)*:* The Companies Amendment Rules, 2021 which came into effect from 1 February 2021 allows 'start-up companies' (i.e., a private company or a limited liability partnership incorporated not more than ten years ago, having turnover of not more than INR 100 crores, etc.) to enter into a fast track scheme of merger or amalgamation between (a) two or more start-up companies; or (b) one or more start-up company with one or more small company. Previously, the legal provisions for executing fast track mergers and amalgamations were applicable solely for 'small companies'.

2.5 MSME Reform Measures

In line with the government's focus on 'Atmanirbhar Bharat', an upward revision in the classification of MSMEs has been approved along with inclusion of an additional turnover threshold.

An enterprise qualifies as a micro, small or a medium enterprise depending upon the amount of investment made with respect to (i) plant and machinery in case it undertakes manufacturing; or (ii) equipment in case it provides services. In addition to this existing investment conditionality, a new criterion for turnover has been introduced. Further, the prescribed investment thresholds for being included within the definition of MSME have also been increased. Additionally, the distinction between manufacturing and services industries has been done away with.

The table below shows a comparison of the previous position against the new categorisation.

Category	Previous Categorisation		New Categorisation	
	Capital/Investment		Capital/ Investment *(both plant and machinery and equipment)*	Turnover *(both plant and machinery and equipment)*
	Manufacturing *(investment towards plant and machinery)*	Services *(investment in equipment)*		
Micro	Upto INR 25 lakhs	Upto INR 10 lakhs	Less than INR 1 crore	Less than INR 5 crores
Small	Above INR 25 lakhs and upto INR 5 crores	Above INR 10 lakhs and upto INR 2 crores	Less than INR 10 crores	Less than INR 50 crores
Medium	Above INR 5 crores and upto INR 10 crores	Above INR 2 crores and upto INR 10 crores	Less than INR 50 crores	Less than INR 250 crores

In light of the COVID-19 pandemic, the minimum threshold to initiate corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016 was increased from INR one lakh to INR one crore, to benefit MSMEs under financial distress. Further, to protect the MSME sector and give a boost to Indian manufacturing and services industries, global tenders have been disallowed in government procurement tenders.

Please click here for a more detailed analysis.

2.6 Consumer Protection (E-Commerce) Rules, 2020

The Ministry of Consumer Affairs notified the Consumer Protection (E- Commerce Rules), 2020 (E- Commerce Rules) to regulate the marketing, sale and purchase of goods and services online. The E-Commerce Rules apply to all goods and services sold over a digital or electronic network and includes inventory and marketplace models within its ambit. It primarily governs B2C or consumer purchases and users (who are not just consumers) of e-commerce platforms. It imposes specific duties on all e-commerce entities along with additional obligations and liabilities specific to marketplace sellers and marketplace and inventory entities.

Please click here for a more detailed analysis.

3 Looking Ahead

Keeping in line with the government's mission of bolstering the Indian economy on the lines of 'Atmanirbharta' (self-reliance) and the continued impact of the COVID-19 pandemic, we anticipate further amelioratory legal reforms to streamline and boost the Indian economy in 2021. Additionally, we expect the Indian government to issue clarifications and guidance on the implications of Press Note 3 of 2020, which is presently creating uncertainty.

For a round -up of some of the key legal developments in the financial year 2020-2021 across other practices and a brief insight on what to expect in the year ahead, please read our practice-wise updates, which can be accessed here.