

Telecom Hotline

November 14, 2005

PRESS NOTE NO. 5- FDI LIMIT IN TELECOM SECTOR INCREASED TO 74%

Subsequent to our iCe Hotline dated October 21, 2005 on the Foreign Direct Investment ("FDI") limit in telecom sector, the Department of Telecommunication ("DoT") has issued Press Note No.5 (2005 series) ("Notification") which has enhanced the FDI ceiling in telecom services (such as Basic, Cellular, Unified Access Services, National/International Long Distance, V-Sat, Public Mobile Radio Trunked Services ("PMRTS"), Global Mobile Personal Communications Services ("GMPCS") and other value-added services) ("Telecom Services"), from 49% to 74%. The Notification modifies the applicability of Press Note 15 (1998 series) and Press Note 2 (2000 series) to the telecom sector.

Following are the salient features of the Notification, in addition to those discussed in our **iCe Hotline dated October 21, 2005**:

INVESTMENT THROUGH AUTOMATIC ROUTE/ FIPB APPROVAL:

The Notification clarifies that FDI in Telecom Services up to 49% will continue to be on the automatic route. FDI shall be subject to the laws of India and not the laws of the foreign country/countries. Foreign Investment Promotion Board ("FIPB") approval shall be required for FDI in the licensee company ("Licensee Company") Indian promoters/investment companies including their holding companies if it has a bearing on the overall ceiling of 74%. While approving the investment proposals, the FIPB is required to ensure that the investment is not by unfriendly countries; however, the term "unfriendly country" has not been defined in the Notification. The conditions and restrictions specified in Para 1 of the Notification are made applicable to existing companies providing Telecom Services as well.

FOREIGN SUBSCRIBERS AND ROAMING AGREEMENTS:

The Licensee Company must provide traceable identity of their subscribers and in the event of providing service to roaming subscribers of a foreign companies, the Indian company must maintain traceable identity of such roaming subscribers from the foreign companies as a part of its roaming agreement. When the Licensee Company enters into roaming agreements with service providers outside India, it must provide to the concerned authority, on demand, the telephone numbers of the foreign subscribers using an Indian operator's network while roaming.

ENHANCED POWER OF THE LICENSOR:

The Department of Communications is required to enforce the conditions specified in the Notification by amendment of the licence. A non-obstante clause has to be included in the licence agreement which confers powers upon the licensor to cancel the licence under certain defined circumstances. The Licensee Company has to acknowledge compliance with the licence agreement as a part of its Memorandum of Association and Articles of Association. The DoT can exercise its discretion in restricting the Licensee Company from operating in any sensitive area if it threatens national security.

The Notification also seeks to enhance the level of privacy of voice and data as monitoring of voice and data is allowed only with prior authorization by the Union Home Secretary or the respective Home Secretaries of the States/Union Territories. To monitor traffic, the Licensee Company is expected to provide blind access to its network and other facilities as well as to its books of accounts to the security agencies.

The Notification also specifies that the licence will be deemed to be cancelled if the licence conditions envisaged in the Notification are not adhered to by the Licensee Company and the licensor is vested with the right to encash the performance bank guarantee(s).

This Notification, though a welcome change as far as further liberalizing the telecom sector is concerned, has not gone as far as it could have in breaking the shackles. National security concerns, though of great importance, have created hurdles which are visible in this Notification.

-Vikram K. Raj & Vivek Kathpalia

Source: <http://www.dot.gov.in/ip/fdi2005.pdf>

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