

## Master Press Note could clarify India's FDI policy

By Sawant Singh  
and Arun Madhu,  
Phoenix Legal



PHOENIX LEGAL

### New Delhi

G/F, 15 Birbal Road,  
Jangpura Extension  
New Delhi - 110 014, India  
Tel +91 11 4376 1100-06  
Fax: +91 11 4376 1107  
Email: delhi@phoenixlegal.in

### Mumbai

First Floor, CS-242,  
Mathuradas Mill Compound,  
NM Joshi Marg, Lower Parel  
Mumbai - 400 013, India  
Tel: +91 22 4340 8500  
Fax: +91 22 4340 8501  
Email: mumbai@phoenixlegal.in

While most of the world was preparing for the holiday season, the Department of Industrial Policy and Promotion (DIPP), without much notice and publicity, released a draft Master Press Note on foreign direct investment in India late on 24 December 2009. The Master Press Note was open to comments from the public until 31 January. While not intended as an in-depth analysis, our column this month takes a look at this policy initiative and what it seeks to achieve.

The Master Press Note, for the first time, seeks to crystallize and set out in writing the concept of foreign direct investment (FDI) as the government views it. So far, this has been the subject of divergent interpretation consisting of press notes, circulars and notifications, transactional experience, views expressed at meetings, letters, approvals and rejections to concerned parties, etc.

As recorded in the Master Press Note, the government believes that FDI necessarily possesses, among others, the following characteristics: (i) a "lasting interest" in the company; (ii) a strategic relationship with the company; and (iii) a say in the management of the company.

While providing some insight, this definition, understandably, rekindles the debate as to whether purely financial investments and private equity transactions should be brought under a separate regime as the intention of such investors is not always to obtain a "lasting interest" in a company or enter into a strategic relationship with the company; management control is typically an optional matter. Although the Master Press Note makes a reference to foreign portfolio investment, it does not define this in any manner.

While this legislative exercise appears to have been undertaken in order to simplify and make the existing foreign investment regulatory framework in India unambiguous, the end result is a far cry

from what must have been intended. There are several anomalies in the new document. For example, in one instance, it states that an effort has been made to consolidate all existing regulations and in the event that something has been left out inadvertently, the existing regulations should be referred to wherever they may be located before going on to state that all existing press notes issued by the DIPP on FDI in India stand rescinded!

Portions of the document also appear to be a mere consolidation of other regulations be it past press notes issued by the DIPP, or exchange control regulations issued by the Reserve Bank of India (RBI). This exercise does not appear to have been undertaken qualitatively.

While one hopes that the drafting inconsistencies are removed following conceptual clarity, if they persist, the Master Press Note is likely to fail to achieve its mandate of making the FDI regime in India clear.

Despite its flaws, the Master Press Note is a laudable step by the government. Having welcomed comments from the public, the government has allowed for an opportunity to iron out the note's creases. However, the Master Press Note, in its final form has the potential to be the platform that seeks to sort out the plethora of contradictions that have crept into India's existing foreign investment policy.

Depending on the policy orientation of the government, it can rescind or modify archaic provisions such as Press Note 1 (2005) (which is a hangover from an era prior to the liberalized policy regime and would be an excellent starting point), set out a new regime for private equity investors separate from the existing foreign venture capital investor and further clarify concepts relating to foreign investment in India, such as foreign portfolio investments (at the time of going to press the government set up a working group on "foreign investments in India" which was

to specifically explore this issue), etc.

The Master Press Note in its current state runs the risk of being a missed opportunity to rectify the existing dichotomies in India's FDI policy. The DIPP was likely to be inundated with comments from the public on the Master Press Note by the end of January. One certainly hopes that the process is not rendered meaningless and inconsequential by virtue of the DIPP not paying heed to these comments.

The objective and purpose of the Master Press Note in its current form is also in question given the existence of the RBI's master circular on foreign investment in India, which is typically issued in July every year and virtually covers the same aspects as those intended by the Master Press Note.

However, the fact that India's policy-makers are aware that the duplicity of regulations is causing confusion and that a comprehensive and clear policy document is the need of the hour is encouraging. The DIPP still has the ability to undertake a fruitful exercise as the Master Press Note is still in draft form.

As the Master Press Note is set to be released only in April this year the DIPP has sufficient time to take comments into account before giving the Master Press Note its final form. Perhaps the focus could be for the DIPP to restrict the Master Press Note to items which have historically been in the DIPP's domain and to let the RBI manage the exchange control implications of foreign investment regulations. Maybe this is also the time for the DIPP to seize the opportunity to bring about qualitative changes to the FDI regime in general and sector specific policies as well.

*Sawant Singh is a partner and Arun Madhu an associate at Phoenix Legal in Mumbai. They can be reached at sawant.singh@phoenixlegal.in and arun.madhu@phoenixlegal.in.*