FORESIGHT 2021

LEGAL CHANGES AND TRENDS TO LOOK FORWARD TO IN 2021

COVID-19 has disrupted the world at large. While there have been obvious tragic health consequences, this pandemic has also taken its toll on the global economy. Most fiscal measures announced by world governments have been in response to this 'black swan' event. As the country grapples with a technical recession stemming from this pandemic, the Indian government too, has on its part, announced several reforms. Ongoing geopolitical tensions with neighbouring states have also influenced and expedited many of these decisions. While the jury is out on the cogency of these measures, we, at Khaitan & Co have attempted to give readers a glimpse into what 2021 might herald as we return to normalcy, gradually yet steadily. Our views are based on trends and developments and we caveat that our "predictions" may not necessarily come true. But we hope it serves as something to mull over for corporates planning their India play in the coming year.

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FDI Screening Regime / Ban on Chinese Investments – Nationalism or Protectionism?

The Indian Government took nationalist measures against Chinese interests throughout 2020 as a geopolitical reaction to border tensions. These included (i) mandatory government approvals for all FDIs coming from entities incorporated in countries sharing a "land border" with India (including China and by extension Hongkong, Taiwan and Macau), (ii) bans on the use and download of over 200 Chinese mobile applications, and (iii) restricted Chinese involvement in public procurement citing "national security" concerns. As it stands currently, all investments (whether direct or indirect) from entities which have Chinese/Taiwanese/Hong Kong/Macau (or other border nation) beneficial ownership, irrespective of the percentage or quantum of investment, will require prior government approval.

In our view, the restrictions imposed by the government are retaliatory measures to put economic pressure on China and is likely to fall away or be withdrawn as soon as the border tensions between India and China are resolved. If recent news reports are to be believed, the Indian Government is apparently proposing to set up an inter-ministerial panel to consider and expedite approvals in cases where acquirers have minor investments from entities situated in China, Hong Kong, and entities from other border countries. Further, the government recently notified certain changes to the FDI regime granting relaxations to investments from Multilateral Banks (e.g. the Asian Development Bank) or Funds (e.g. the IMF) on complying with the mandatory approval requirements.

While the relaxation will only benefit a limited set of investments, this is a positive development which seems to indicate a thawing in the government's rigid stance vis-à-vis Chinese investments. We could expect the Government to come out with clarifications (on thresholds for 'beneficial ownership') on the Press Note and may be even establish a fast-track approval mechanism for such investments in the first half of 2021, particularly by relaxing the stringent security clearance measures.

Public M&A

Public M&A has been exceptionally active over the last year, and its bull run appears far from over. Volatile markets have presented investors and promoters an excellent opportunity to acquire or further consolidate holdings in quality listed stock. SEBI appears well poised to support investment activity and render greater regulatory clarity to the listed space including changes to the delisting and promoter re-classification regimes. To this end, SEBI has recently published discussion papers to seek public comments on proposed regulatory changes.

- Take Private / Delisting: SEBI is expected to bring about much needed clarity to certain aspects of the take private / delisting process of Indian listed companies – key changes include: (a) defining the role of independent directors (IDs) in the take private process by, amongst other things, requiring IDs to provide reasoned recommendations on the delisting proposal; (b) clarity on determination of book value which is pertinent for the counter offer process; and (c) streamlining timelines and reducing procedural inefficiencies in implementing such transactions. Such revisions are expected to provide a clearer roadmap to acquisition under the take private route.

- Promoter re-classification: SEBI is expected to grant certain relaxations with respect to the process of promoter re-classification – key revisions include: (a) ability of promoters / members of promoter group holding up to 15% (compared to the current threshold of 10%) to re-classify as public; (b) reduction in the overall reclassification timeline (by almost 2 months); and (c) automatic re-classification (based on adequate disclosures) as part of a tender offer process. Re-classification of promoter shareholding has emerged as an important aspect of control transactions involving listed companies, and the proposed changes would substantially streamline the entire process and increase deal efficiency.

- Other relaxations: SEBI may also continue to grant for a limited period: (a) existing relaxations on pricing guidelines to support fresh infusion of capital in listed companies; (b) flexibility in launching a voluntary open offer despite having recently disposed shares in the listed company (this is typically not permitted); and (c) relaxations from various procedural compliances such as only electronic submissions / publication of notices or announcements required under securities regulations.

Insurance

The insurance sector is at the cusp of significant regulatory changes in 2021. Some of major expected changes have been set out below:

- *FDI liberalization*: The ever-elusive liberalization of foreign investment limits from 49% to 74% is the most awaited regulatory change for 2021. While foreign investment limits for insurance intermediaries were increased to 100% in 2020, the conditions imposed on foreign capital was a spoiler and there was lukewarm response to the increase, despite this being an eagerly awaited change.

- *Shareholding of banks in insurers*: Another significant regulatory change is expected to be on account of RBI's guidance on para banking activities by banks. The report of RBI's internal working group to review ownership guidelines and corporate structures of private sector banks has made a proposal to cap the shareholding of private sector banks in insurers at 20%. The regulatory framework may enable the promoter's non-operating financial holding company to hold a higher stake in the insurer. RBI appears to be steering the balance sheets of banks away from significant exposures to non-core businesses such as insurance. Depending on the final form of the regulations, there may be implications for many existing insurers and their holding structures.

- *Conflict of interest*: With health insurance and general insurance being recognized as distinct categories of insurance, the possibility of the same promoter group having general and health insurers under its fold arises. In the past, the Insurance Regulatory and Development Authority of India (IRDAI) (the apex regulatory body) had issued an exposure draft on the conflict of interest arising out of the appointment of common directors between insurers, insurers and insurance intermediaries and common promoters of health and general insurers. The IRDAI may look to formalize its expectations on these issues and specify its expectations in the form of regulations.

- *Corporate agents and open architecture*: The IRDAI has been heavily emphasizing open architecture for corporate agents, such that corporate agents are not acting on an exclusive basis for a few insurers. While the regulations already require insurers to not compel, and corporate agents to not promise, to distribute products of a particular insurer, regulations do not mandatorily require corporate agents to tie up with more than one insurer. The IRDAI may mandate all corporate agents to distribute products of at least two insurers, to further strengthen the open architecture regime.

Corporate Governance

The year 2020 continued to witness new incidents of corporate fraud that primarily occurred due to a failure in corporate governance. Incidents of fraud and failure in corporate governance were discovered in companies at the global level (e.g. Wirecard and Luckin Coffee). India too has seen its fair share of corporate frauds that have occurred as a result of governance breakdown (e.g. IL&FS, Dewan Housing Finance, Punjab National Bank and Yes Bank). In order to curb further frauds and increase the robustness of corporate governance to prevent such frauds, we are likely to see some updates to the current corporate governance framework. Our key expectations are set out below:

- *Increased scrutiny from regulators*: Regulators in India such as the SEBI, RBI, MCA, and enforcement authorities like the Directorate of Enforcement are likely to take a lead in enforcing regulations for implementing a robust governance framework. SEBI has already published a "*Consultation Paper on the Applicability and Role of the Risk Management Committee*" on 10 November 2020. It seeks to extend the requirement of having a risk management committee from the top 500 listed companies to the top 1000 listed companies. It also prescribes the role of the risk management committee in greater detail.

- *Greater onus on board, audit committee, and risk management committees*: The board of directors, audit committee, and risk management committee play an important role in preventing fraud. However, due to lack of technical expertise, despite the best intentions, the directors may fail to discover instances of fraud. A risk management committee is formed to oversee the risk framework of the company. After the collapse of IL&FS in 2019, it was revealed that the company's risk management committee was non-functional. To prevent this in the future, SEBI's new consultation paper of 10 November 2020 seeks to expand the role of the risk management committees.

- *The enhanced role of auditors*: The audit committee and the auditors (both external and internal) help in discovering fraud within a company. Going forward, they may expand the process to gather the information that will help to identify misstatements due to fraud. This would also mean that the auditors would not over-rely on management representations and approach the audit with more scepticism and care.

- *Proxy advisors*: Minority shareholders are not well-informed about the impact of their vote on the operations of the company, managerial affairs, etc. As a result, proxy advisors have gained prominence as they provide analysis and voting recommendations. Perhaps, proxy advisers would need to focus on broader governance issues and not only on advice that relates to specific voting-related issues. SEBI currently regulates proxy advisors under the SEBI (Research Analysts) Regulations 2014. We expect to see some guidance for proxy advisors regarding (i) the procedure to be followed by the proxy advisors, and (ii) the grievance resolution mechanism between listed entities and proxy advisors.

Foreign Contributions

Since taking over the reins, the NDA Government has been on a spree to ensure greater transparency and effective monitoring of the inflow and utilization of foreign contribution. The Ministry of Home Affairs (MHA) is unlikely to discourage foreign contribution as it will adversely impact not for profit organisations (NGOs) doing important and meaningful work in India. In view of its ongoing efforts to ensure transparency in foreign inflows, we expect the following measures/changes:

- *One designated bank account for receiving foreign contributions*: With effect from 1 April 2021, FCRA registered NGOs will be able to receive foreign contributions only in an account designated as the 'FCRA Account' which has to be opened with a specified State Bank of India (SBI) branch at New Delhi. This measure is to centralise the inflow and routing of foreign contributions to ensure easy supervision and monitoring of foreign contributions by the central government.

- *Stricter compliance requirements and monitoring*: In line with the recent changes to the reporting framework (like introduction of annual return, changes to the governing board, etc.), the Government may introduce more stringent reporting requirements to ensure transparency.

- *More supervisory powers to the Government*: The MHA may be entrusted with more supervisory power to review operations of NGOs and initiate disciplinary actions against non-complaint NGOs.

Capital Markets / Direct Offshore Listing

One of the most significant regulatory developments that we expect in 2021 is the establishment of a framework for the overseas direct listing of Indian companies. At present, the Indian government has, pursuant to a recent amendment to the (Indian) Companies Act 2013, included an enabling provision allowing for public companies in India to get listed overseas. However, we believe that further regulatory changes are required and, accordingly, anticipate further changes to relevant Indian laws to facilitate overseas listing. This, we expect, would be through the introduction of a separate regulatory framework.

While the various regulatory bodies, including the Securities and Exchange Board of India (SEBI) and the Reserve Bank of India (RBI) are yet to provide any guidance on this matter, some aspects that we expect the overseas direct listing framework to address include:

- Specific eligibility criteria for the overseas listing of companies;

- Jurisdictions where Indian companies may be permitted to get listed;

- Extent of the share capital that would be allowed to be listed;

- Applicability of Indian exchange control laws, including questions such as the permissibility of residents to actively trade in overseas listed shares and procedure to remittance and receipt of funds, pricing of off-market transactions in such shares, and the applicability of sectoral caps on foreign investments;

- Tax considerations, such as the applicability of securities transaction tax, capital gains tax, and dividend distribution tax, for shares listed overseas; and

- Other aspects, such as dissemination of information and related concerns, particularly for companies that are not concurrently listed in India.

Once operationalised, we expect significant interest from Indian companies, particularly start-ups, in listing overseas, since it offers, among others, the benefits of increased visibility and grants access to investor bases with a greater understanding of, and appetite for, niche businesses.

Employment and Labour

Year 2021 is likely to usher in a new labour law regime that would see as many as 29 Central labour laws being consolidated into four labour codes viz. Code on Wages 2019, Code on Social Security 2020, Industrial Relations Code 2020 and Occupational Safety, Health and Working Conditions Code 2020. The first few months of 2021 may witness the Central Government continuing to work with states to build an appropriate implementation framework in the form of rules and schemes, and this may soon be followed by the Central Government enforcing some or all of the provisions of the four codes along with applicable central rules and schemes. Tentative roadmap in terms of timeline as projected by the Central Government for implementation of the four codes is April 2021.

The said consolidation exercise does bring with it certain changes in the existing labour law regime. With digitization of procedures relating to registration and intimations as well as deemed registrations, there may be a positive impact on the ease of commencing business as well as the ease of doing business – areas where India has a long way to go in the international landscape. Similarly, the substitution of inspector raj with facilitation process, whereby an employer would be given an opportunity to rectify any non-compliance, heralds a change in the approach of the government to one where roving inquiries and unwarranted harassment at the hands of local officials could be limited. Similarly, higher thresholds for application of stringent requirements relating to termination of employment, closure and lay-off would ensure that government's intervention in crucial business decisions is limited to establishments with a larger workforce.

Having said that, employers may have to gear up for a relook at their work arrangements. Fixed-term employments will see an important change in that employees engaged for a specified duration will also enjoy tenure based benefits similar to permanent workforce (albeit on a pro-rated basis). Engagement of contract labour in an establishment's core activities would be barred except in certain situations. Employees engaged for sales promotion and inter-state migrant workers will have certain additional entitlements. On the cost front, employers may see some impact on their expenses towards social security contributions, gratuity and severance compensation as these computations may have to be calculated on at least 50% of the total remuneration paid to an employee besides formulation of additional schemes and funds for gig workers and reskilling fund for regular workers.

Overall, several matters have been left to the Central and the state governments to prescribe by way of rules and schemes. The upcoming year would, therefore, be an interesting period to look forward to.

Data Privacy

In the coming year, rapid developments are expected in the data privacy and data protection legal regime in the country. The Joint Parliamentary Committee is expected to present its report on the *Personal Data Protection Bill 2019* (PDP Bill) before the Indian Parliament. This will be the starting point of the passage of PDP Bill in the Parliament. The PDP Bill is modelled around the EU General Data Protection Regulation (GDPR) and is expected to be a pathbreaking development for India. The PDP Bill includes aspects relating to rights of individuals (termed as data principals), aspects of cross border data flow, grievance redressal, setting up of a dedicated data protection authority, etc.

Another development to watch out for is the *Health Data Management Policy* (Policy), a draft of which was released for comments from stakeholders in August 2020. The Policy aims to create a framework for the secure processing of personal and sensitive personal data of individuals. It is applicable to the entities involved in the National Digital Health Mission (NDHM) and the partners/persons who are a part of the National Digital Health ecosystem. It will be interesting to see how the Policy develops, given the amount of overlap in subject matter with the PDP Bill.

A major development may also be expected in relation to the Report by the Committee of Experts under the Chairmanship of Kris Gopalakrishnan on the draft *Non-Personal Data Governance Framework* (Framework) which was released in July 2020. It attempts to create a framework for governing regulatory aspects of non-personal data in India for the first time. The Framework proposes categorization of non-personal data and provides for concepts relating to the use and monetization of the same. The Framework considers data as an economic resource and sets out ways to govern it for social and public interest. The public consultation on the Framework is complete and further progress in this regard could take place in 2021.

Given the overdrive on regulating technology, developments in the spheres of data reliant technologies such as artificial intelligence, blockchain, Internet of Things (IoT), etc may also be on the horizon in 2021.

Telecommunication, Media & Technology

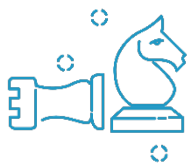
2020 was a landmark year for the Telecommunication, Media and Technology sector and the trend is expected to continue in 2021 as well. Set out below are some of the regulatory changes expected in 2021:

- *Filling the gaps in the OSP framework*: Recently, the Government significantly overhauled the regulatory regime for the outsourcing sector. As a result, the erstwhile requirement to obtain a registration certificate has been done away with and several other dispensations have been granted to entities that will be categorized as 'other service providers'. The framework is expected to be streamlined further as clarifications on aspects relating to mode of connectivity for employees of outsourcing industry working from home, use of cloud infrastructure by such entities, etc. are expected to be issued by the Government in the near future. As cloud-based services have become ubiquitous and inevitable in today's era, the Government is also expected to provide clarity on this issue.

- *Framework for cloud service providers*: Importantly, the Government has concluded its recommendations around a regulatory framework for cloud service providers (CSPs) in India and it is expected that the light touch framework governing CSPs is likely to see the light of day in 2021. Moreover, convergence of cloud and communications services has led to several countries modifying their telecom regulations to support development of these services and India is expected to follow suit as without these technologies, remote working during the COVID-19 pandemic would have been a tall order.

- *Expected reforms in the telecom licensing framework*: In line with objectives of the National Digital Communications Policy 2018, it is expected that there will be reforms in the telecom regulatory regime to promote investments in the sector. Under the current regime, infrastructure, network and service layers are not segregated vis-à-vis the licensing framework although the infrastructure layer is regulated distinctly to a limited extent. The Government is working towards unbundling of different layers to create independent service providers for each of the service layers. Enabling a parallel regime for each service layer along with some incentives for investors is likely to help the telecommunications sector in the coming year.

- *Regulations for online streaming platforms (OTT)*: The Government's recent decision to regulate online streaming platforms has taken stakeholders by surprise and developments on this front may also follow. Mainly, the Government is expected to regulate OTT platforms on content related aspects; however, it is to be seen whether the Government will prescribe specific rules for OTT platforms or require them to adopt a code of conduct outlined by the Government.



Competition Law

We anticipate a few inter-connected and significant developments in the world of Indian competition law in 2021 starting with the long-pending, the Competition (Amendment) Bill 2020 (Competition Bill), which promises several changes.

On enforcement, the Competition Bill proposes the introduction of two internationally recognised dispute resolution mechanisms; namely, settlements and commitments. Both mechanisms provide for an avenue to apply for the closure of proceedings, prior to the Competition Commission of India's (CCI) conclusion of findings.

On merger control, a size of transaction-based standard to ensnare digital economy transactions may become a reality. The Competition Bill also advances a radical structural change to the administrative functioning of the CCI. It proposes the constitution of a "Governing Body" comprising members of the executive, to strengthen oversight over the CCI's functioning.

The digital economy will be of special interest. While 2019 and 2020 witnessed several investigations against significant digital market players such as investigations against cab-aggregators, online travel agencies, players in the online smartphone and digital payments space, among many others. In 2021, we anticipate the effects of the CCI's focus on the digital space and significant jurisprudential developments.

Our trend analysis suggests that hot topics will include issues concerning platform neutrality, exclusivity arrangements, and interoperability concerns.

Whilst everyone would be happy to bid a goodbye to 2020, certain legacy is inevitable – COVID-19 would likely jumpstart a renewed interest in the pharmaceutical sector. Unlike foreign jurisdictions, the Indian competition regulator is yet to investigate the infamous "pay-for-delay" settlement. The CCI is likely to dive deep into practices of pharmaceutical patent holders which limit / restrict the market for generics. Is there a vaccine against that?

Direct Tax – Dispute Resolution Mechanisms

Some notable measures in the realm of dispute resolution mechanisms in the Direct Tax arena are outlined below:

Faceless Tax Appeals Scheme

a) Under the recently introduced Faceless Appeals Scheme, there is no natural means for a taxpayer to seek *personal hearing* in connection with its case. Under this scheme, a taxpayer's request for personal hearing (an electronic hearing through video conferencing) is only possible subject to the approval of the Chief Commissioner or Director General of Income-tax and only if it is covered within certain (yet to be) prescribed circumstances. This will severely impact the ability of taxpayers to effectively represent their appeals before the Commissioner (Appeals).

b) A writ petition challenging legal tenability of this aspect is pending before Delhi High Court.

c) Lack of personal hearing is a serious handicap, especially in complex cases like cross border taxation, interpretation of tax treaties (permanent establishment, royalties, etc) where it becomes critical to have face-to-face interaction in order to impress important aspects upon the tax authorities.

d) In the absence of a personal hearing, one can expect increased litigation and cases being remanded back to the lower tax authorities by the courts for fresh consideration.

Challenge to 'deemed fair valuation' rules for various assets

a) Taxation on transfer of assets like land, building, shares, securities (which form part of all M&A transactions) is subjected to a minimum fair market value test (section 50CA, section 56(2)(x) and related rules), whereby such fair market value is deemed to be the transaction value for both the seller and the buyer. Thus, transacting below fair market value attracts full taxation for both the transacting parties.

b) The constitutionality of these provisions have been challenged before the Bombay High Court. As these widely worded provisions apply to most share deals, it will be interesting to see how the Court interprets the same.

Taxability of indirect transfer under the India-Singapore Tax Treaty

a) In a high stakes matter involving PE fund major Tiger Global, the Authority for Advance Rulings (AAR) rejected an advance ruling application concerning indirect transfer provisions on the ground that the transactions of Mauritius based companies were designed for avoidance of tax. In doing so, the AAR disregarded the Mauritius holding structure and held that the 'head and brain' of Mauritius entities was in the USA. Interestingly, the AAR also opined that since the sale involved shares of a Singapore company by the Mauritius companies, the benefit provided under India-Mauritius Tax Treaty will not be available as the intention of that Tax Treaty was to exempt investments by Mauritius companies in Indian companies, whereas in the instant case, the investment was in a Singapore entity deriving substantial value from India.

b) As this case has reached the doors of the Delhi High Court – the entire PE industry is keen to see how this matter develops further.

While the Indian Government's approach towards a dispute-light tax administration needs to be appreciated in light of the tax dispute settlement scheme (Vivad Se Vishwas scheme), one hopes that several pertinent issues relating to tax disputes and its related administration (including the above) receive equal attention from the tax administration on an ongoing basis.

Direct Tax – Legislation Changes

- *Digital economy taxation – further guidance awaited*: While the search for global consensus on taxation of digital economy continues, in 2020, India took further strides in legislating on the digital economy taxation front. In 2020, India expanded the scope of 'Equalisation Levy' (EL) to bring non-residents into the EL net by requiring them to pay EL on 'e-commerce supply or services' provided to Indian residents as well as non-residents (in certain cases). Having said that, one can say that the widely worded law has left several questions unanswered, leaving scores of foreign companies confused. For example, a room in a foreign hotel may be booked online by accessing the hotel's website from India, but the hotel facility is (clearly) provided offline. In such cases, it becomes important to understand whether the entire tariff can be subject to EL (instead of mere facilitation charges / commission of the hotel/e-commerce intermediary). Further, several intra-group provision of services can also fall within the wide wording of EL.

  One can expect a detailed guidance from the tax department to iron out such basic issue about EL.

  Interestingly, while the income-tax law provides that payments covered by EL (2%) would not attract income-tax (10%), due to the rate arbitrage, certain sections of the tax department have expressed a view that in such cases, income-tax will prevail over EL. A legislative amendment can be expected in this regard.

  Notably, India also deferred the applicability of concept of taxable business presence (Significant Economic Presence or SEP) under the income-tax law to 1 April 2021. This is another important aspect which foreign businesses (especially from non-treaty countries) need to examine.

- *Tax residency for individuals*: Residency under Indian tax law is based on the number of days an individual stays in India during a particular financial year (in addition to certain criteria upto ten preceding years). Notably, with the onset of the Covid-19 pandemic, the Indian government was swift to recognise and provide relief to the tax residency related conditions for stranded individuals for the year ended 31 March 2020. While the Indian government also stated that suitable relief would be provided for the year ending 31 March 2021, no such relief has been announced so far.

  It is expected that the relief relating to tax residency related conditions would be announced in the upcoming 2021 Budget. Given that international flight operations in the Indian context have not yet completely normalised, one hopes that adequate relief is provided to stranded individuals for the year ending 31 March 2021 as well. The relief may be in the form of exemption for stay for a part of the year (say upto July/September) for all stranded individuals.

- *Permanent Establishment for MNCs*: Another clarification which is expected (perhaps globally) is as to whether for MNCs which have allowed working from their employees home country perhaps indefinitely due to the ongoing COVID pandemic, would there be a permanent establishment created in each such home country and such MNC has to pay taxes in each such country where the employee is situated. This is a burning and real issue which needs immediate clarification.

Indirect Taxes and Foreign Trade Policy

From an indirect taxes standpoint, the majority of 2020 was spent firefighting pandemic induced issues and in ensuring that trade remained unaffected due to the functional issues presented by the COVID 19 pandemic. While the measures remained largely reactive, with the slowdown in the backdrop, we can expect the better part of 2021 to go in trade facilitation measures without any large policy changes and continuation of stop-gap arrangements.

On the regulatory front, the decision of the Dispute Settlement Board, at the World Trade Organization (WTO), against the exemption and scrip-based incentive schemes available to exporters from India has expedited India's shift from the traditionally followed export encouragement schemes to a more WTO compliant structure. As a consequence, the Ministry of Commerce has announced the introduction of the Remission of Duties and Taxes on Exported Products Scheme (RODTEP) from the 01 January 2021 and scale up the Production Linked Incentive Scheme (PLI) to 13 industries and also withdraw the Merchandise Exports from India Scheme (MEIS). Although the other schemes challenged before the Dispute Settlement Board have not been withdrawn / or amended, the withdrawal of MEIS and the projected structure of RODTEP, shows India's commitment to abide by the WTO structure.

The key highlights of the two schemes are as follows:

RODTEP: The aim of RODTEP is to provide benefits to exporters with respect to taxes, duties and levies which are neither reimbursed nor exempted under any export incentive schemes. Specifically, RODTEP aims to compensate for taxes on fuel used for transportation and power generation, electricity duty, stamp duty and the embedded GST cost in procurements. The scheme seeks to provide the compensation through a percentage of the value of the Free-on-Board value of exports in the form of transferable duty credits or electronic scrips. The percentage of incentive available is expected to vary across products and will be determined by a technical committee.

The intention of the government is to replace the MEIS with RODTEP in a phased manner. In the first phase, the government is prioritizing three sectors – readymade garments, iron and steel products, automobile and automobile components.

PLI: Different ministries of the Central Government have issued production-linked incentive (PLI) schemes along with guidelines with respect to the financial incentives sought to be provided for production of the specific products. The financial incentive is directly dependent upon the incremental sales of manufactured goods made in comparison to the base year. Effectively, through the PLI schemes, India intends to make the domestic market competitive, attract investment, create economies of scale and enhance exports. The complete list of industries for which PLI shall be available is as follows:

SECTOR	IMPLEMENTING MINISTRIES
Mobile manufacturing and specified electronic components	Ministry of Electronics & Information Technology
Critical key starting materials / drug intermediaries and active pharmaceutical ingredients	Department of Pharmaceuticals
Pharmaceuticals drugs	
Manufacturing of medical devices	
Advance chemistry and cell (ACC) battery	NITI Aayog and Department of Heavy Industries
Electronic / technology products	Ministry of Electronics and Information Technology
Automobiles and components thereof	Department of Heavy Industries
Telecom and networking products	Department of Telecom
Textile products (MMF segment and technical textiles	Ministry of Textiles
Food products	Ministry of Food Processing Industries
High efficiency solar PV modules	Ministry of New and Renewable Energy

SECTOR	IMPLEMENTING MINISTRIES
White goods (AC's & LED)	Department for Promotion of Industry and Internal Trade
Speciality steel	Ministry of Steel

Although making predictions in terms of changes in the indirect tax regime has traditionally proved to be hard, we hope to see more changes being rolled out in support of the agricultural sector, core industries, along with scaling up of indigenous production of electronic items including medical equipment with a special focus on start-ups so the Make in India vision runs full steam ahead. We do not expect any clarity on whether petroleum goods (currently taxed by the states) will be absorbed within the GST regime in light of the ongoing issue concerning the distribution of GST Compensation Cess to the state governments. In a nutshell, while the budget was always perceived to be the gamechanger in the years gone by, with the introduction of GST, it no longer remains so. We have seen a more robust and action oriented approach to the legislative and regulatory changes in the past year and hope that this approach gathers more steam in the year to come.

Disputes Resolution

A number of landmark judgments are expected to be pronounced

- In 2020, remote or online hearings were the norm in most courts and Tribunals in India. This was out of compulsion due to the prevailing circumstances. Having experienced the benefits of remote hearing, there is a strong likelihood that this temporary arrangement will be integrated into our justice delivery system, in some form, to supplement the prevailing system of physical hearings.

- *Enforcing investment awards in India*: In *Union of India v. Vodafone Group plc* [CS(OS) 383/2017 & I.A.No.9460/2017], the Delhi High Court held that the Arbitration and Conciliation Act 1996 (Arbitration Act) does not apply to disputes arising out of international investment agreements (IIAs). This was based on the Court's finding that investment arbitration disputes are not commercial in nature. It is likely that this question, i.e. the applicability of the Arbitration Act to investment disputes, will be determined and settled by the Supreme Court in 2021.

- *Constitutionality of amendment*: On 4 November 2020, the President of India promulgated the Arbitration and Conciliation (Amendment) Ordinance 2020 (2020 Ordinance). Pursuant to the amended Section 36, where the Court is satisfied that a prima facie case of fraud or corruption is made out, the Court *shall* unconditionally stay the arbitral award pending disposal of the challenge under Section 34 of the award. It is likely that the constitutionality of this amendment will be challenged before the Supreme Court on grounds of being manifestly arbitrary.

- *Notification of 2019 Amendments*: Several provisions of the Arbitration and Conciliation (Amendment) Act 2019 are yet to be notified (2019 Amendments). Sections 1, 4 to 9, 11 to 13, and 15 of the 2019 Amendments were brought into force with effect from 30 August 2019. It is likely that the remaining provisions of the 2019 Amendments will be notified and brought into force in 2021.

- *Establishment of the Arbitration Council of India*: In furtherance of the 2019 Amendments, it is likely that the Arbitration Council of India will be set up.

- *Seat and Venue*: In *BGS SGS Soma JV v. NHPC Ltd.*, 2019 SCC OnLine SC 1585 (BGS Soma), the Supreme Court had arguably settled the eternal 'seat v venue' debate. Unless the parties have demonstrably intended otherwise, it was held that any reference to a 'venue' in a domestic arbitration will be tantamount to a choice of the juridical seat of arbitration. However, soon thereafter in *Mankastu Impex Pvt. Ltd. v. Airvisual Ltd., 2020 SCC OnLine SC 301*, the Supreme Court has deviated from its rationale in *BGS Soma*. It is expected, therefore, that this issue may be referred to, and be determined by, a larger bench of the Supreme Court.

White Collar Crime

- *Overall Perspective*: We have seen an uptick in the number of white collar crime related enquiries during the last quarter of 2020 and we expect that trend to carry into 2021. A large reason for this is the lack of enforcement activity shown by most regulatory authorities (including the police, the Enforcement Directorate, the Serious Fraud Investigation Office and others) during 2020. With economic activity having resumed and the Government under pressure to make up for lost time, we expect regulatory authorities to be focused on prosecution in the coming year. The lack of routinely expected oversight of actions over 2020 may have led to some lapses in the controls maintained by the organizations, thereby giving occasion to instances of fraud. Additionally, the pressure that organizations in certain sectors (manufacturing, agriculture, retail etc.) would have had to sustain their businesses and maintain profitability may also have led to an increase in instances of falsification of records.

  Another expectation is that the actions of US subsidiaries in India are also likely to be examined in more detail by the US Department of Justice (DOJ). During the last 4 years, prosecutions of white collar crimes in the US have fallen and it is expected that the DOJ under the incoming Biden administration may look to ramp up prosecutions instead. Given that there have been numerous instances of US companies being held liable for violations of the FCPA on account of the conduct of their Indian subsidiaries, we expect such businesses to come under greater scrutiny and therefore for such companies to bolster their internal regulations and training programmes.

- *Regulatory Changes*: The SEBI has made recent amendments to the SEBI (LODR) Regulations, 2015 to provide for disclosures to be made by a listed company to stock exchanges in case any forensic audit (regardless of terminology) being initiated against such a company. The disclosures include the reasons for the initiation of the audit as well as the final report that is submitted along with comments from the management. This change is sure to make listed companies more circumspect in their dealings as such disclosures, even if not substantial, could result in the markets looking at such companies unfavourably. The industry has also been awaiting the framing of guidelines by the Central Government under the provisions of the Prevention of Corruption Act, 1988 (POCA) that commercial organizations (including companies and other body corporates) are expected to put in place so that they may be able to build in safeguards to prevent their officials from falling afoul of the provisions of the POCA and to mitigate any liability for their local management.

  Before the COVID-19 pandemic hit India hard, proposals were underway to restructure the SFIO to boost their strength so that they could take on more cases. While this proposal has been on the back burner for most of 2020, we expect some renewed interest in this proposal in the coming year.

Insolvency & Bankruptcy

India went into the pandemic on the back of a credit and consumer crisis and high non-performing asset (NPA) levels. The pandemic has had a telling economic impact. Regulators have granted payment deferments and pauses on NPA classifications to tide over the pandemic. This has "*kicked the can down the road*" and we are at that cross roads now with the next few quarters likely to see record restructurings. We expect the following in the new year:

- *Front loading "pre-packs"*: The Indian government may implement a pre-pack regime in India with a modified "Section 29A" (i.e. the section restricting connected party sales). It is likely that a failure of a pre-pack will trigger corporate insolvency where "connected persons" are not eligible to participate. Therefore, while a pre-pack regime gives debtors a shot at restructuring, failure will turn over control to creditors.

- *Buyer beware*: There have been several instances of "white knights", who submitted restructuring proposals, withdrawing their commitments on grounds of Covid. We expect Indian bankruptcy courts to not allow such withdrawals easily.

- *Easy come easy go?*: India's foreign exchange policy does not permit distressed capital and private credit to easily come into and easily leave India. There is a need to revisit this in a balanced and fair manner. The RBI has floated discussion papers to allow for foreign capital to directly buy distressed paper in India. SEBI has also tried to make it easier to trade listed distressed debt. We expect that the Indian government to make it easier for private credit to buy and sell distressed loans.

Foreign Investment Regulations

India, despite the Covid-19 pandemic and recession, has continued to attract foreign investments. Policies in furtherance of ease of doing business and continued reforms has been a major enabler for drawing foreign investments in the country. Considering this, we expect following measures:

- *Ease of compliance*: The Government is expected to continue a slew of reforms to attract more FDI. To this effect, the Government may ease procedural and compliance requirements, we have already seen de minis thresholds being prescribed for certain compliances. Further, there could be easing of conditionalities (in the labour, manufacturing, approvals for procuring land, equipment, tax-breaks) for pitching India as a supply chain market alternative to existing competing jurisdictions.

- *Sectoral reforms*: The Government may open up new sectors for FDI, increase existing FDI limits, relax sectoral conditionalities, etc to diversify investing focus from sectors like services, IT, telecommunications, trading etc. The Government may initiate reforms in manufacturing sector to project India as a global and low cost manufacturing.

- *Faster and transparent Government approval process*: The Government has recently released more comprehensive version of 'standard operating procedures' (SOPs) for granting FDI approvals. The Government is expected to work more on this aspect and release SOPs for various departments which will consider and review proposals for foreign investment in India. This will ensure transparency in the working of the concerned department and inspire investor confidence.

Intellectual Property

The (Indian) Copyright Act 1957 is likely to get amended soon, as comments have been sought from stakeholders by the Government of India. Some of the expected changes may include provisions to deal with: internet broadcasting, multiple registrations of copyright societies, restrictions on organisations dealing on the lines of copyright societies (without being registered as a copyright society), distribution of royalties, change in the thresholds for originality of copyright work to be protected under the said Act, fair use provisions, and classification of offences for copyright infringement. The present provisions are not sufficient to cover new technologies and the ambiguities which have come to the forefront due to the evolving jurisprudence.

Further, there is a possibility of the (Indian) Designs Act 2000 being amended to cover newer forms of designs such as Graphical User Interface etc. This should come in light of India agreeing to align with the Locarno Classification.

Conclusion

2021 will be an interesting year, indeed. As India, and the world at large, come out of their respective lockdowns gradually, the economy should see a fillip. But this fillip will be influenced and contoured largely by some, if not all, of these possible developments. The more important ones to look out for are:

For any queries or further information, please reach out to us.

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