



EXTERNAL COMMERCIAL BORROWINGS (“ECB”) FOR SPECTRUM IN THE TELECOMMUNICATION SECTOR

December 2009

The Reserve Bank of India issued an A. P. (DIR Series) Circular No 19 dated December 9, 2009 and made certain changes in the ECB policy for the telecommunication sector. As per the present policy, payment for obtaining license/permit for 3G spectrum is considered an eligible end-use for the purpose of ECB under the automatic route. It has now been decided to permit with immediate effect the eligible borrowers in the telecommunication sector to avail ECB for the purpose of payment for spectrum allocation as well. However, the other aspects of ECB policy such as USD 500 million limit per company per financial year under the automatic route, eligible borrower, recognized lender, end-use, average maturity period, prepayment, refinancing of existing ECB, reporting arrangements and terms and conditions stipulated in the previous A. P. (DIR Series) Circulars shall remain unchanged.

PSA View – The allocation of spectrum has long been pending and all the major players have been anxiously wanting for a speedy address to the spectrum allocation. Though the hindrances have not been cleared completely, the allocation is planned for January 2010. The permission to bring in money from outside through ECB under automatic route for spectrum will be a great solace to the companies as the spectrum will involve great money and companies will want to have greater amount at their expense.

Liberalization of Foreign Technology Agreement Policy

Department of Industrial Policy and Promotion (“DIPP”) issued a notification making the foreign technology agreement policy more liberal. The policy of the government of India (“GOI”) so far on the payment of royalties under foreign technology collaboration provided for automatic approval for foreign technology transfers involving payment of lumpsum fee of US\$ 2 million and payment of royalty of 5% on domestic sales and 8% on exports. Additionally, where there was no technology transfer involved, royalty up to 2% for exports and 1% for domestic sales was allowed under automatic route on use of trademarks and brand names of the foreign collaborator. Technology transfers involving payments above these limits required prior approval of the GOI. The new policy with immediate effect will now permit the payments for royalty, lumpsum fee for transfer of technology and payments for use of trademark/brand name on the automatic route i.e., without any approval of the GOI. All payments will be subject to the Foreign Exchange Management (Current Account Transaction) Rules, 2000. Also, a suitable post-reporting system for technology transfer/collaborations and use of trademark/brand name will be notified by the GOI separately.

PSA View –



with and no prior approval of the Project Approval Board (DIPP, Ministry of Commerce & Industry, GOI), required for any limit for the payment of fees for the transfer of technology to India. Unrestricted foreign collaboration agreements in the field of technology will provide easy access to the latest technology from all over the world benefiting the development of India's indigenous technology industry. The deregulation notification also clears the way for any green company collaborations in India.

3G spectrum only for three private players

On December 18, 2009, a panel of Empowered Group of Ministers ("**EGoM**") discussed the proposal to auction only three slots (from the previous four) for private players in the forthcoming 3G auctions. According to the Department of Telecommunications ("DoT"), one of the prime reasons for this reduction is the failure of the Ministry of Defence to vacate additional spectrum. A decision by the EGoM will decide how many slots would be open for private players in the auction of 3G spectrum. Further, newspaper reports also speculate that 3G spectrum may initially be allotted to one player and subsequently to other players, as and when spectrum is made available.

PSA View – Reduction in the number of slots for private players will certainly impact the auction and one can expect a steep rise in the bid prices. With Mobile Number Portability ("**MNP**") – a process through which customers can retain their existing number but change their service provider, being introduced in 2010, mobile operators will be striving hard to procure 3G airwaves and not lose customers through MNP. With regard to allocation of spectrum to a single player at first, DoT should ensure that all winning operators are given a level playing field, especially with regard to 3G airwaves since very limited players will have spectrum allocated to them. Allocating 3G spectrum to one successful bidder without allocating it to other successful bidders may even invoke provisions of the Competition Act, 2002 ("Act"). Section 3 of the Act provides that if any enterprise enters in an agreement which causes or likely to cause (clearly, the scope is vast) considerable adverse effect on competition in India, such agreement will be void. Therefore, it is important that DoT ensures that the process of allocating spectrum does not in any way detrimentally impact competition amongst the successful bidders.

Guidelines for Headend-in-the-Sky ("HITS") broadcasting service introduced

With the anticipation to increase cable television penetration into rural India, GOI gave its nod to the HITS policy on November 12, 2009, and the Ministry of Information and Broadcasting ("**MIB**") vide order dated November 26, 2009 released guidelines for the operation and functioning of HITS service. HITS is a multichannel downlinking and distribution of television programme in C-Band or Ku Band (*which, till now, was only reserved for Direct-to-Home "**DTH**" providers*) where all pay channels can be downlinked at a central facility, encrypted and then uplinked to a satellite. These channels are then again downlinked using a single satellite antenna, transmodulated and finally sent to the subscribers. The HITS operator also has the option of contracting with different broadcasters for buying content. Once the broadcaster uplinks the channels, Multi-System Operators ("**MSO**") and Local Cable Operators ("LCO") can downlink them using a dish antenna and distribute the channels to the subscribers. A company providing HITS services can receive foreign direct investment up to 74%, and any investment beyond 49% will require prior approval of the Foreign Investment Promotion Board.



HITS is certainly a positive step for the outreach of digital content media to the masses and will
competition amongst DTH providers and cable operators, thereby benefiting the ultimate subs

with better digital quality and a wider choice of channels. The policy governing HITS is progressive since it can transmit a number of channels from different broadcasters through a satellite to MSOs and LCOs, who can then take the channels to the masses. Unlike DTH, which is a direct-to-consumer model, HITS is a direct-to-operator model, and hence, can bridge the digital gap between rural and urban India.

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