Legal Framework for FDI in innovative Indian Industries

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> Foreign Direct Investment in Innovative Industries

> Cartel law, Joint Ventures

> Protecting Intellectual Property Rights

> Approval of Foreign Direct Investment (FDI) required?

- Sector specific regulation of FDI

- Automatic Route
  - Approval not required
  - Notification to the Reserve Bank of India (RBI) is required

- Government Approval
  - Approval by the Foreign Investment Promotion Board (FIPB) required
  - Four to six weeks have to be calculated for approval

- Consolidated FDI Policies will now be published annually
  - Consolidated FDI Policy Circular 2012 effective as of 10 April 2012
  - Consolidation of sector specific FDI requirements
  - Non-FDI specific approval requirements remain unaffected
  - No major changes in 2012

- FDI is not permitted inter alia in:
  - Multi-Brand-Retail
  - Lottery Business
  - Gambling and Betting
  - Manufacturing of certain tobacco products
  - Sectors not open to private sectors (e.g. atomic energy, railway transport)

- Review of FDI regulation for certain innovative sectors
  - Media
    - Government approval in general required
    - Various caps for subsectors
      - 26% Terrestrial Broadcasting
      - 49% Cable Networks
      - 26 % Print Media

- Civil Aviation
  - Airports: Greenfield, 100 % Automatic; existing projects up to 74 % automatic, beyond government approval required
  - Airlines: 49 % automatic

- Telecom Services
  - 74 % (automatic up to 49 %)
  - Further conditions apply (chief officer in charge for the network shall be a resident Indian citizen, routing traffic outside India may be restricted, officers dealing with lawful interception of messages shall be Indians, etc)

- E-Commerce activities
  - 100 % automatic
  - Exception to otherwise restricted FDI in the retail sector (only single brand retail possible)

- Pharmaceuticals
  - Greenfield 100 % Automatic
  - Existing Companies 100 % Government approval

> Competition Act 2002

- Applies to FDI in existing Indian companies via a merger or joint venture
- Applicable since 1 June 2011
- Mergers, joint ventures, etc, exceeding defined caps have to be notified
- Clearance if competition is not negatively affected
- Caps defined by value of assets or turnover
- For Indian mergers:
  - USD 1 billion turnover
  - USD 333 million assets
- Higher thresholds apply for international mergers or conglomerates
- Exemption if less than 15 % of the shares are acquired

> Protection of Intellectual Property Rights in India

- Enercon-case
- Compulsory License for Bayer's Nexavar

> Are Intellectual Property Rights in India protected?

- Patent Law (2005)
  - § Protection for 20 years
  - § Significant rise of applications: 4,284 (1999/2000) to 36.877 (2008/2009)
  - § Significant rise of registrations: 1.591 (2001/2002) to 18.161 (2008/2009)
- Trade Mark Act (1999)
  - § Protection for 10 years, can be renewed
  - § Significant rise of applications : 90.286 (2001/2002) to 130.172 (2008/2009)
  - § Significant rise of registrations : 6.204 (2001/2002) to 102.257 (2008/2009)
- Copyright Act (1999)

> Taylor Wessing Global Intellectual Property Index 2011

- Review on Protection of Intellectual property rights in 24 jurisdictions
- India ranked 24
- Rating of 537 point (Germany, ranked 1, Rating 751 points)
- Increased the rating by 16 points
- Frequently stated problems:
  - Backlog
  - Inconsistent and slow decisions
  - Slow court proceedings

> Consequences?

- Joint Venture agreements
  - Defining the goal
  - Limited and defined management rights
  - Exit-strategy

- Arbitration

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- **Litigation**
- **Commercial Agreements**

Philipp Behrendt is a member of the Commercial Agreements and Litigation & Dispute Resolution Practice Areas . He focuses on distribution law. In particular, he advises clients on questions of distribution law especially with regard to commercial agency, distributorship and franchise law as well as with regard to retail concepts such as shop-in-shop and concession agreements. Moreover, Philipp advises clients in relation to commercial agreements such as, supply and manufacturing agreements and general terms and conditions. Furthermore, he represents clients in product liability cases. Philipp represents clients in all German courts and supports clients in proceedings in foreign courts, in particular in the USA, in which he advises on strategic aspects of the litigation, coordinates teams of local counsels and assists in all further aspects, in particular relating to pre-trial discovery proceedings.

Philipp studied law at the universities of Bayreuth and Münster. In 1999 he passed his first state exam. In 2000, he studied in Sydney at the University of New South Wales and obtained a Masters degree. Philipp Behrendt passed the second state exam in November 2004 and has been working since then in our Hamburg office.

He is a member of the German-Indian-Lawyers-Association, the German Society for Distribution Law and the International Section of the German Lawyers Association.

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