
POSITION PAPER

EUAFSRT RECOMMENDATIONS WITH REGARD TO INDIAN LEGISLATION

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Recommendations for some of the key areas on which Indian regulators should focus in order to improve India-EU business relationship with regard to the financial services sector:

RULE OF LAW:

- The policy makers need to address problems and loopholes with regard to new reforms and **give primacy to the overarching principle of Rule of Law**. India lacks legal predictability. India needs to ensure that it not only eases its regulatory framework, but also ensure regulatory environment that upholds the rule of law and effective enforcement of contracts.
- **Recommendations:**
 - Revision of current judicial system in order to insure good enforcement procedures and reduce uncertainty of the parties: under existing judicial system appeals are preferred from arbitration, there is a huge backlog of cases, questionable technical capability of judges to hear complex financial and commercial disputes etc.
 - Solution: setting up special judicial forums, specifically designed to handle economic and commercial disputed. Creation of unified arbitration mechanism in India that would only cater to disputes in the financial services sector.
 - Omitting the arbitrary conduct by investigative agencies in high profile matters: investigative agencies have to respect the legal protection under attorney-client privilege.
 - Introducing code of conduct for the media, so cases such as failure of financial institutions can be handled with due care and diligence and be supplemented with an appropriate sense of social responsibility.

DATA PROTECTION AND PRIVACY:

- India needs a robust data privacy and protection law in place, which will also be respected by Indian companies. Personal Data Protection Bill raises serious concerns for European businesses active in India, as it mandates a form of data localisation. This represents a threat to European companies that sell goods and services in the region as it increases the cost of compliance, restricts companies' ability to utilize new technologies like data analytics, cloud and artificial intelligence, restricts data transfers, complicates commercial exchanges and creates an uneven playing field that benefits locally established companies over European ones. Notably it does so while threatening investment in the local data processing industry as it acts as a disincentive for international companies to process their data in that country.. By fragmenting the location of data it also makes it more difficult for firms to effectively secure that data. Lastly, it creates a fragmented data flow landscape that makes it considerably more difficult for firms to operate within. The fragmentation of data flows also

hampers efforts for law enforcement to fight financial crime as it limits the ability of financial institutions and corporates to share information that could lead to valuable insights on money laundering and fraud risks and the mitigation of potential financial crime threats.

- **Recommendations:**

- Indian government should modernize their data privacy frameworks that is balanced, flexible, globally interoperable, and ensures free movement of data while protecting consumers is central to India's digital transformation, the promotion of India's global competitiveness, and facilitates commercial and economic growth.
- The EU should request chapters on data flows in the free trade agreement with India that outlines commitments to ensure the free flow of data and prevent the implementation data localisation requirements. The EU should encourage the Indian government to follow Europe's example with regards to legitimate interest exemptions to ensure clarity for the financial sector when conducting customer due diligence.

CHALLENGES FOR FOREIGN BANKS IN INDIA:

- One of the challenges for foreign banks entering into India is the universal banking model, whereby any bank must roll-out full-fledged banking services in India even if they are looking to offer specialised banking services. This forces foreign banks to diversify into businesses that they may have no experience or expertise in.
- **Recommendations:**
 - The Indian economy should move to enabling banks, find their specific realm of influence and mainly provide services in their chosen areas. Recognising this and the fact that allowing foreign banks to only deal in sophisticated financial services where their expertise lies, it would be prudent to liberalise the stringent regulatory norms vis-a-vis foreign banks.
 - Relaxing priority sector lending norms applicable to foreign banks.
 - Reserve Bank of India (RBI) to consider reintroducing export finance as eligible for meeting priority sector lending, or remove the obligation to purchase certificates in lieu of meeting the priority sector lending targets.
 - Recognising that one size does not fit all when setting priority sector lending targets and accordingly limiting the applicability of the priority sector lending norms for foreign banks.
 - Removing the mandatory requirement of opening up foreign bank branches in unbanked areas, depending on the business proposal/ focus of the bank.

CHALLENGES FOR FOREIGN INSURERS IN INDIA:

India maintains a 49% FDI cap on insurance companies and associated “ownership and control” regulations that limit the voice of foreign partners in the management of insurance JVs. In early 2015, after more than a decade of consideration by numerous Indian Governments, the Indian Parliament increased the FDI cap on foreign investment in the insurance sector from 26% to 49%. Unfortunately, guidelines released by the Insurance Regulatory and Development Authority of India (IRDAI) to implement the Insurance Act unexpectedly interpreted the statutory definition of “ownership and control” of a jointly-held company to remain with Indian residents or Indian companies. Even worse, the guidelines apply retroactively to all existing joint ventures.

- **Recommendations:**

- The Government of India should remove the FDI cap on insurance, or increase it to 51% at a minimum.
- In the interim, the Indian insurance authorities should amend the regulations associated with “ownership and control” to allow joint ventures to structure their management arrangements in the way that best suits the investors, including allowing greater say for foreign investors in JV governance.

India maintains a mandatory preference for Indian reinsurers, which at the point only applies to the state-owned reinsurer GIC Re. The IRDAI elected to favor GIC Re by changing previously released draft regulations to insert a right of first preference for the GIC over other reinsurers, including U.S. companies that establish branches in India. The order of preference distorts competition, thereby suppressing demand for reinsurance and therefore capacity and innovation in the insurance industry in India, harming the development of the insurance industry in India. There is resulting concentration of risk in India, a country prone to natural disasters. The order of preference is not consistent with worldwide best practices, as well. While the authorities have signaled that they will remove the preference for life reinsurance, they have indicated that they will retain the preference on non-life reinsurance.

- **Recommendations:**

- IRDAI should remove the mandatory preference to GIC Re for all lines of reinsurance, which it can do through a revision of regulation.

“FIT AND PROPER” CRITERIA:

- Numerous regulations leave the definitions of ‘fit and proper’ criteria ambiguous and with much scope for subjective discretion of the regulator

- **Recommendations:**

- RBI to consider supplementing the “fit and proper” criteria to provide greater clarity and inclusion;

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- Specifying objective guidelines as to how the regulators should assess each of these criteria; and
 - Making the process (including due diligence and assessment) time-bound.

MARKET ENTRY:

- In the financial services sector, a prospective entrant has to obtain various critical approvals from different regulatory authorities like RBI, IRDA, SEBI, etc. In addition to that, lack of clarity on the respective timelines within which one can expect these approvals can become the first barrier to entry to any business. Prescribed time-frames for the approvals are not strictly adhered to. In addition, applicants sometimes do not receive feedback on the status of their applications. In cases of rejection, the rationale for rejection is not specified and applicants may be further burdened by last minute requests for additional information and documents that do not find a mention in the underlying regulations.
- Several approvals are required for opening business in India and these are issued by various regulators. For example, basic licenses required for day to day operations such as local commercial establishment registrations, taxation related registrations, company related enrolments and land approvals. These licenses and approvals are issued by different authorities and departments, who issue such approvals on varying timelines, which in turn results in commercial delays.
- One of the factors which has forced foreign investors, especially private equity/venture capital investors to re-think their investment strategy in India is the practice of categorizing such investors as 'promoters' of the investee company.
- The establishment of GIFT City, India's first International Financial Services Centre (IFSC) has helped the country to attract global financial service business. IFSCs are seen as vehicles for economic development and induce foreign investments. In order to achieve their objectives, it is crucial that the regulatory framework for IFSCs are coherent and thoroughly articulated to promote the ease of doing business.
- **Recommendations:**
 - Processing applications within definitive time-frame. Periodical updates, including reasons which might delay the approval process must be communicated to the applicant.
 - Putting in place a transparent, non-arbitrary, competent and unified appeal mechanism for hearing appeals from various departments of the Reserve Bank of India (RBI). The scope and powers of the appellate authority / body shall be well defined to ensure it has the requisite capacity to pass orders and executive decisions. The decision of the appellate authority / body shall be appealable to the Supreme Court.
 - Setting up of a single window / portal wherein potential investors can obtain clearances from multiple authorities such as RBI, Securities and Exchange Board of

India (SEBI), relevant state and central government authorities through a single omnibus application, within prescribed timelines.

- Introducing a formal scheme / process for providing informal guidance and interpretation to the RBI and Insurance Regulatory and Development Authority of India (IRDA) regulations, in a time bound manner.
- Allowing financial investors/ venture capital investors to invest in financial services companies without getting classified as promoters of such companies in instances where such entities do not hold a 'controlling stake' in Indian Companies and implementing a uniform framework for determination of 'control' by a person on a financial services company, pursuant to consultations with market players.
- Permitting intermediaries that are permitted to be established in International Financial Services Centre to invest in a broader range of instruments, providing certain tax clarifications, and relaxing the strict requirements specified in the Securities and Exchange Board of India (Alternative Investment Funds) Regulations, 2012, etc.

INSOLVENCY:

- Insolvency and Bankruptcy Code, 2016 remains a work in progress
- **Recommendations:**
 - The definition of 'resolution plan' should be amended to envisage a slump sale of business.
 - Provision should be made to enable the resolution professional to deal with those claims and liabilities which haven't been raised or lodged.
 - MAT should not be charged on the notional profit included in the books of the corporate debtor as a consequence of a waiver of principle or the interest payment on an existing debt.
 - The bias towards strategic investors should be removed for the purposes of bid evaluation.
 - Clarity is needed on the requirements to be complied with for the de-listing of an entity acquired by way of an approved 'resolution plan'.
 - Provision should be made for a common 'resolution plan' with respect to multiple entities falling within the same group

MINORITY INVESTORS

Strengthening corporate governance in financial services:

- The framework needs to be further strengthened, particularly in relation to the role of the board, the chairman and managing director.
- **Recommendations:**

- While underlining the importance of the board of directors, the norms for its constitution for listed companies could be applied also to privately held entities, and this would also strengthen transparency. Furthermore, there is the need to increase the frequency of the board's meetings, in order to cover also issues related to the company's management and corporate governance.
- India needs to introduce stricter rules concerning disclosure and a central reporting system that could be used by companies in case of an adverse event.
- To further strengthen the corporate governance framework, guidelines on Stewardship and Shareholder Engagement should be developed. These could be drawn upon the IRDA Guidelines issued in 2017 for insurers.

Interpretation of "Control" by various financial regulators:

- Discussions continue around the definition of "control" under several Indian legislations, and the various definitions are very wide and subjective. In order to increase the certainty around the trigger points, there is the necessity to have a clearer and common definition of control for the various legislations. This would also contribute to increase the confidence of foreign investors.
- **Recommendation:**
 - In order to develop a common framework for the definition of control, policy makers need to carry out discussions and consultations with market players. Within this process, the adoption of strict numerical thresholds or the identification of certain nature rights should be avoided.

TAX:

- India should develop an effective resolution mechanism for tax-related issues, including a transparent mode of settling tax disputes amicably and align the tax rates applicable to domestic and foreign banks in order to encourage foreign banks to bring more capital into the country.
- The implementation of the Goods and Services Tax (GST) has led to several challenges faced by the financial services industry, including an increase of the cost on account of compliances and technology-related issues. Considering the basic operating structure of banks in India, a facility for centralised registration at head office state should be considered.

Recommendations:

- Aligning tax rates applicable to foreign banks with those applicable to Indian banks and companies.
- Centralised GST registration for banks in India.
- Implementing tax reforms in order to encourage fund management from India.

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- Standardizing tax mark-up in relation to services outsourced to Indian BPO's/back offices.
 - Rationalisation of tax regime for Alternative Investment Fund (AIF)

The EU-Asia Financial Services Roundtable promotes a shared understanding of the regulatory issues faced by financial markets participants in Europe and Asia, while also shaping the EU-Asian regulatory and policy discussions. Its members are Afore Consulting, AIG, DTCC, HSBC, IHS Markit, London Stock Exchange, Moneygram, Moody's, Nex, Refinitiv, Standard Chartered.

It supports regulators in developing an appropriate and balanced regulatory framework that enables long-term growth in both Europe and Asia, whilst identifying areas where regulation impedes the international flow of capital or creates unnecessary barriers to doing business. It supports the development of regulatory best practice, and a level playing field in financial services regulation in Europe and Asia, whilst promoting open and stable financial markets.