

Doshi, Hetal; Udgata, Sankalp

## Research Report

# India's blueprint for tackling opportunistic acquisitions during COVID-19, with Chinese firms in mind

Columbia FDI Perspectives, No. 283

## Provided in Cooperation with:

Columbia Center on Sustainable Investment (CCSI) - A joint center of Columbia Law School and the Earth Institute, Columbia University

*Suggested Citation:* Doshi, Hetal; Udgata, Sankalp (2020) : India's blueprint for tackling opportunistic acquisitions during COVID-19, with Chinese firms in mind, Columbia FDI Perspectives, No. 283, Columbia University, Columbia Center on Sustainable Investment (CCSI), New York, NY

This Version is available at:

<https://hdl.handle.net/10419/254117>

## Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

## Terms of use:

*Documents in EconStor may be saved and copied for your personal and scholarly purposes.*

*You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.*

*If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.*



## **Columbia FDI Perspectives**

Perspectives on topical foreign direct investment issues

No. 283 July 27, 2020

Editor-in-Chief: Karl P. Sauvant ([Karl.Sauvant@law.columbia.edu](mailto:Karl.Sauvant@law.columbia.edu))

Managing Editor: Alexa Busser ([alexa.busser@columbia.edu](mailto:alexa.busser@columbia.edu))

### **India's blueprint for tackling opportunistic acquisitions during COVID-19, with Chinese firms in mind\***

by

Hetal Doshi and Sankalp Udgate \*\*

In April 2020, the Indian Department for Promotion of Industry and Internal Trade amended the Consolidated FDI Policy 2017 (revised FDI policy) with the objective to “curb opportunistic takeovers/acquisitions of Indian companies due to COVID-19.”<sup>1</sup> The new policy requires government approval for investments emanating from all seven countries bordering India. The new element is that similar restrictions previously applicable only to Bangladesh and Pakistan are extended to other neighboring countries, with China a particular target. The recent foreign portfolio investment by the People's Bank of China in India's Housing Development Finance Corp. Ltd. (which raised the Bank's stake in the Indian mortgage lender from 0.8% to 1.01%<sup>2</sup>) is speculated to be the reason behind the revised policy.

Certain critical aspects of India's revised FDI policy include:

*Blanket approval requirement.* The revised FDI policy applies to all foreign investments made by entities of bordering countries. There is no minimum percentage threshold in a company's capital, or any other similar requirement, at which a foreign investment falls under the revised policy.

This directly undermines the new policy's objective, as it even affects established or minority investments with no shift in control to foreign investors. A better method for implementing this particular clause is found in [Spain's guidelines](#) regarding FDI restrictions. These specifically mention that acquisitions of 10% or more or control of companies by foreign investors fall under the restrictions. This excludes minority investments where there is no change of control from the hassle of government approval while curbing hostile M&As.

*Applicability to all sectors.* The revised FDI policy is applicable to all sectors. Unlike other countries, India's policy is not limited only to certain critical sectors such as healthcare and defense. For instance, the recent European Commission [guidelines](#) regarding the implementation of stricter FDI screening mechanisms to protect sensitive assets from foreign

takeovers during the crisis is applicable only to such critical sectors as healthcare and research establishments. Applicability of the policy to all sectors might have a deterrent impact on FDI inflows. To fulfil its objective of safeguarding companies weakened due to COVID-19, the revised FDI policy should focus only on critical sectors affected severely by the pandemic or of national importance.

*Retrospective application of the policy.* The revised FDI policy is applicable to transfers of ownership of any “existing or future” FDI in an entity in India by firms located in bordering countries.<sup>3</sup> Such retrospective application of the policy may result in chaos for committed deals, where transaction documents have already been executed and large amounts of financial and human resources have already been utilized.

To avoid such difficulties, the government must set a cut-off date similar to that set by the [Australian government](#) to implement similar FDI policy to curb opportunistic M&As. This should specify that the amended rules will apply only to agreements and acquisitions that will not have been entered or completed until the specified cut-off date.

*Business impact.* Since China is the fastest-growing FDI source in Indian start-ups, requiring prior approval for investments from Chinese firms will make struggling start-ups wary of Chinese capital. China accounts for nearly 20% of all investments in Indian start-ups (primarily in tech start-ups), investing US\$2 billion in 2018 and US\$4 billion in 2019.<sup>4</sup> Losing these investments will have an impact disproportionate to its value, given the deepening penetration of technology in every sector in India.<sup>5</sup> Thus, given the uncertainties of a strict compliance process and intervention by India’s government, the start-up industry is set to experience a substantial drop, taking the country’s already weak GDP with it. The government should introduce a shorter and fixed approval timeline, especially for start-ups, to ensure timely investments.

*Beneficial ownership test.* The revised policy impacts more than bordering countries, as it provides that, in the event of the transfer of ownership of any existing or future FDI in an entity in India, directly or indirectly, resulting in beneficial ownership falling within the restriction, such subsequent change in beneficial ownership will also require government approval. However, the new policy does not define the terms “beneficial owner” or “beneficial ownership.” Rule 2(1)(e) of [the Companies \(Significant Beneficial Owners\) Rules, 2018](#) defines “significant beneficial owner” but it differs from the definition of “beneficial owner” under the [Reserve Bank of India \(Know Your Customer \(KYC\)\) Directions, 2016](#). This needs clarification.

It remains to be seen whether these restrictions will continue after the pandemic, and what the possible outcomes will be of this strict FDI regime. Its objective to protect companies weakened by the pandemic or the resulting lockdown is understandable. But there are ambiguities in the new policy that must be clarified.

---

**\* The *Columbia FDI Perspectives* are a forum for public debate. The views expressed by the author(s) do not reflect the opinions of CCSI or Columbia University or our partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

**\*\*** Hetal Doshi (hetaldoshi.hvd@gmail.com) is a law student at the National University of Study and Research in Law (NUSRL), Ranchi, India; Sankalp Udgata (sankalp.udgata123@gmail.com) is a law student at the National University of Study and Research in Law (NUSRL), Ranchi, India. The authors wish to thank Ravi Kant, Premila Nazareth and an anonymous reviewer for their helpful peer reviews.

<sup>1</sup> [Ministry of Commerce and Industry, \*Press Note 3 \(2020 Series\): FDI Policy\*, Apr. 17, 2020.](#)

<sup>2</sup> [Sajeet Manhat, "China's central bank hikes stake in HDFC to more than 1%," \*Bloomberg Quint\*, Apr. 20, 2020.](#)

<sup>3</sup> *Ibid.*, p. 2.

<sup>4</sup> ["With \\$4 billion Chinese investment, desi start-ups wary of FDI-policy tweak," \*Times of India\*, Apr. 19, 2020.](#)

<sup>5</sup> [Amit Bhandari, "China's strategic tech depth in India," \*Gateway House\*, Nov. 14, 2019.](#)

*The material in this Perspective may be reprinted if accompanied by the following acknowledgment: "Hetal Doshi and Sankalp Udgata 'India's blueprint for tackling opportunistic acquisitions during COVID-19, with Chinese firms in mind,' Columbia FDI Perspectives, No. 283, July 27, 2020. Reprinted with permission from the Columbia Center on Sustainable Investment ([www.ccsi.columbia.edu](http://www.ccsi.columbia.edu)). " A copy should kindly be sent to the Columbia Center on Sustainable Investment at [ccsi@law.columbia.edu](mailto:ccsi@law.columbia.edu).*

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Alexa Busser, [alexa.busser@columbia.edu](mailto:alexa.busser@columbia.edu).

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at <http://www.ccsi.columbia.edu>.

### **Most recent *Columbia FDI Perspectives***

- No. 282, Anna de Luca and Angelica Bonfanti, 'Investment and human rights: Is there an elephant in the room?,' July 13, 2020
- No. 281, Giorgio Sacerdoti, 'Is USMCA really "the new gold standard" of investment protection?,' June 29, 2020
- No. 280, Catharine Titi, 'The nationality of the international judge: Policy options for the Multilateral Investment Court,' June 15, 2020
- No. 279, Hania Kronfol, 'Leveraging corporate tax incentives to attract FDI: design and implementation considerations,' June 1, 2020
- No. 278, Karl P. Sauvart, 'A G20 Facility to rekindle FDI flows,' May 18, 2020

**All previous *FDI Perspectives* are available at <http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>.**