

FDI Guide
India

Contact

Kosturi Ghosh

Trilegal, Bangalore

kosturi.ghosh@trilegal.com

Foreword: The inflow and outflow of foreign exchange into and from India is primarily governed by the Foreign Exchange Management Act 1999 (FEMA). The Foreign Exchange Management (Non-Debt Instruments) Rules 2019, and the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 (together, the ‘NDI Rules’), promulgated under FEMA, specifically govern, inter alia, foreign direct investment (FDI)¹ in Indian entities. The FEMA regime is primarily administered by the Reserve Bank of India (RBI). Further, the Department for Promotion of Industry and Internal Trade (DPIIT) under the Ministry of Commerce and Industry, Government of India publishes the Consolidated FDI Policy Circular. The extant policy is the Consolidated FDI Policy issued in October 2020, as amended (the ‘FDI Policy’).

The content of this guide is intended for informational purposes only and is not in the nature of a legal opinion. The information and views set out in this guide are based on applicable law as on the date hereof and are limited to the laws referred to herein. Other restrictions, legal requirements and compliance may be applicable to a given transaction, including under tax and antitrust laws. Readers are encouraged to seek appropriate legal advice prior to acting upon any of the information provided.

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1.	Principle	Describe if the FDI regime is built by exception to a principle of freedom of investment or whether restrictions to transferring funds to and from your country apply generally.	<p>Restrictions are generally applicable.</p> <ul style="list-style-type: none"> As per section 6 of FEMA, the inflow and outflow of foreign exchange is permitted for ‘capital account transactions’² (which includes FDI in Indian entities) that are permitted specifically by the RBI and Indian Government. The applicable principle is that while ‘capital account transactions’ are prohibited unless specifically permitted, ‘current account transactions’³ are permitted unless specifically prohibited (FEMA states that current account transactions are freely permitted subject to reasonable restrictions that may be imposed on the grounds of public interest).

1 The NDI Rules define ‘FDI’ to mean investment through equity instruments by a person resident outside India in an unlisted Indian company, or in ten per cent or more of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company.

2 A ‘capital account transaction’ is defined under FEMA to mean a transaction that alters the assets or liabilities, including contingent liabilities, outside India of *persons resident in India* or assets or liabilities in India of *persons resident outside India*. A ‘person resident in India’ is defined under FEMA to mean, inter alia, a person or body corporate incorporated or registered in India, and a ‘person resident outside India’ is any person who is not a ‘person resident in India’.

3 A ‘current account transaction’ is defined under FEMA to mean a transaction other than a capital account transaction.

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			<ul style="list-style-type: none"> Based on the above principle, the Indian Government and RBI have issued the NDI Rules and FDI Policy to govern, inter alia, FDI into Indian entities.
2.	Legal regime Authority(ies) in charge	Describe source(s). Name of authority in charge of applying the FDI rules (Minister/Agency/...).	Rules governing FDI in Indian entities are set out in FEMA, the NDI Rules and the FDI Policy. The FDI Policy sets out conditions on investment, entry routes for different sectors (ie, automatic or government approval), limits up to which investment is permitted in different sectors, eligible investment instruments and so on. Such policy conditions are enacted into law through the NDI Rules. For FDI that requires government approval (discussed in item 4 below), applications must be made to the DPIIT via its online portal. The DPIIT forwards the application to the relevant government department or ministry for approval based on the sector in which FDI is proposed (eg, an application for FDI in the broadcasting sector is forwarded to the Ministry of Information and Broadcasting).
3.	Transactions that may be subject to FDI <ul style="list-style-type: none"> Type Materiality thresholds Rights of evocation 	Describe the nature of the transactions that may be subject to FDI rules. In the case of share acquisition, specify if the FDI regime is triggered only beyond a certain threshold and, if so, describe such a threshold.	All ‘investment’ by persons resident outside India is subject to the NDI Rules. ‘Investment’ means to subscribe, acquire, hold or transfer any security or unit issued by a person resident in India. While all investment is generally subject to the NDI Rules and the conditions prescribed therein, there are specific thresholds prescribed for different sectors under the FDI Policy (and most sectors allow 100 per cent FDI, that is, investment up to 100 per cent in the issued and paid-up capital of the investee company or 100 per cent of the capital contribution in the case of a limited liability partnership (LLP) under the automatic route, ie, requiring no prior government approval). Sector-specific thresholds are prescribed based on the sensitivity of the sector. Thresholds prescribed under the NDI Rules and FDI Policy are generally of the following types: <ul style="list-style-type: none"> up to 100 per cent FDI allowed under the automatic route (tea, coffee and certain other plantations, manufacturing, insurance intermediaries, airports, etc) or government approval route (mining and mineral separation of titanium bearing minerals and ores; publishing or printing of scientific and technical magazines, specialty journals or periodicals; satellites – establishment and operation, etc); up to 74 per cent FDI allowed under the automatic route (pharmaceuticals – brownfield projects, defence, etc) or government approval route (private sector banking, publishing newspapers and periodicals dealing with news and current affairs, etc); up to 49 per cent FDI allowed under the automatic route (air transport services, private sector banking, commodity spot exchange, power exchanges, etc) or government approval

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			<p>route (terrestrial broadcasting FM, up-linking of news and current affairs television channels, and private security agencies); and</p> <ul style="list-style-type: none"> • up to 26 per cent FDI allowed under the government approval route (uploading news and current affairs through digital media). <p>FDI in certain sectors is allowed up to a certain threshold under the automatic route and FDI beyond such a threshold is allowed under the government approval route. For example, while 100 per cent FDI is allowed in brownfield pharmaceutical projects, up to 74 per cent is allowed under the automatic route and FDI of beyond 74 per cent requires government approval.</p> <p>Further, please note that under the FDI Policy and NDI Rules:</p> <ol style="list-style-type: none"> 1. Any entity which: (i) is based in a country that shares a land border with India, that is, Afghanistan, Bangladesh, Bhutan, China, Myanmar, Nepal, and Pakistan, ('FDI Restricted Countries'); or (ii) has a beneficial owner who is situated in or is a citizen of an FDI Restricted Country, can now invest in India only with prior approval of the Indian Government. 2. Transfer of ownership in any existing Indian entity or future FDI in an Indian entity, directly or indirectly resulting in a transfer of beneficial ownership involving entities/citizens of an FDI Restricted Country also require prior approval of the Indian Government. <p>Accordingly, if any FDI falls within the restriction set out above, directly or indirectly, such FDI requires prior government approval and no thresholds are applicable.</p>
		<p>Are indirect acquisitions of assets or shares in the jurisdiction subject to the relevant FDI rules (acquisitions in a parent company outside the jurisdiction)?</p> <p>Are share transfers involving a group company internal restructuring covered?</p> <p>Are greenfield investments covered?</p>	<p>Acquisitions of the foreign parent/holding company of an Indian investee company are not covered by the NDI Rules, unless such acquisitions trigger a requirement to obtain government approval for the investment in the Indian entity, for instance, if the transaction involves an entity or beneficial owner in an FDI Restricted Country.</p> <p>Regarding internal restructuring, the NDI Rules apply if the transferee is a person resident outside India, resulting in FDI in the Indian investee company. If the share transfer is between a resident and non-resident (although the transferee may be a resident), reporting obligations under the NDI Rules apply as well.</p> <p>Yes, the NDI Rules and FDI Policy are applicable to both greenfield investments and brownfield investments.</p>

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		<p>Does the FDI Authority (or another type of governmental authority) have a power of evocation/ex officio/call-in powers? If so, please describe.</p>	<p>Yes, the RBI is the statutory administrator of the NDI Rules, and is entitled to interpret and issue such directions, circulars, instructions and clarifications, as it may deem necessary, for effective implementation of the provisions of the NDI Rules.</p> <p>While some of the powers and functions of the RBI have been delegated to authorised dealer banks, that is, banks that have been authorised to deal in foreign exchange by the RBI, through which foreign payments and transactions need to be routed, authorised dealer banks are governed by the instructions and directions issued by the RBI from time to time. Authorised dealer banks are entitled to require further documents or evidence in order to verify that transactions reported with them have been in compliance with the requirements set out in the NDI Rules and FDI Policy.</p> <p>The Directorate of Enforcement (established under FEMA) and its officers have the powers to investigate any contravention of FEMA. These officers have been conferred with powers of summons, search, seizure and so on, similar to officers empowered under Indian tax law to investigate contraventions of tax laws.</p>
4.	<p>Sectors falling under the FDI scope</p>	<p>Describe the economic sectors for which the FDI regime will apply. If relevant, explain for each sector the level of flexibility that the authority may apply (or not) in evaluating whether FDI rules should apply.</p> <p>Are there sector-specific stricter limits on foreign investment that will apply, such as a lower threshold of investment by foreign interests or sectors for which no foreign investment is possible? If yes, which sectors (eg, nuclear energy/agriculture)?</p>	<p>As mentioned above, all FDI in Indian entities are subject to the NDI Rules and FDI Policy. That said, different sectors have different limits for FDI (ie, the percentage of paid-up capital up to which FDI is allowed), different entry routes (ie, automatic route and government approval route) and often associated conditions (eg, FDI in the trading sector is subject to certain domestic sourcing requirements).</p> <p>To illustrate this, while FDI in single-brand retail trading is allowed up to 100 per cent under the automatic route, several conditions, such as local sourcing norms and the requirement to open a bricks-and-mortar store within two years of starting online retail, apply. Similarly, in defence, while 100 per cent FDI is allowed in the sector, FDI of more than 74 per cent requires government approval wherever it is likely to result in access to modern technology or for other reasons to be recorded.</p> <p>The NDI Rules and FDI Policy prescribe the conditions referred to above mainly for 18 sectors. If the NDI Rules and FDI Policy do not prescribe any conditions specifically for any sector, 100 per cent FDI under the automatic route is allowed for such a sector.</p> <p>The thresholds and conditions for different sectors are prescribed based on such sector's sensitivity. Certain sectors are subject to stricter regulation and lower limits on FDI, such as digital media news outlets (26 per cent through the government route), and mining and mineral separation of titanium bearing minerals and ores (100 per cent through the government route).</p> <p>Certain sectors are prohibited for FDI, such as atomic energy, real estate business, lottery business and manufacturing tobacco products.</p>

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			The Indian Government has implemented a code-based system called the National Industrial Classification (NIC), which classifies all economic activities and assigns them codes. As the filings under FEMA require the NIC code of the sector in which the investee company is engaged in to be specified, it is important to ascertain and specify the code correctly.
5.	Qualified investors	Describe the main characteristics of investors that fall under the FDI regime and if there are nuances depending on their origin (eg, EU v not EU).	<p>For the purposes of the NDI Rules, any person who is not a ‘person resident in India’ is considered a ‘person resident outside India’ and any investment from such a person is subject to the NDI Rules and FDI Policy. A ‘person resident in India’ is:</p> <ol style="list-style-type: none"> 1. an individual residing in India for more than 182 days during the course of the preceding financial year (April–March), subject to limited exceptions (eg, an individual who has gone outside India for taking up employment outside India); 2. any person or body corporate registered or incorporated in India; 3. an office, branch or agency in India owned or controlled by a person resident outside India; or 4. an office, branch or agency outside India owned or controlled by a person resident in India. <p>Note that where an Indian entity is not ‘owned’⁴ and not ‘controlled’⁵ by resident Indian citizens, any investment made by such an entity in another Indian entity is also considered downstream foreign investment and governed by the NDI Rules and FDI Policy.</p> <p>Further, there are specific restrictions on transactions involving an entity or beneficial owner located in an FDI Restricted Country, as discussed above.</p>
6.	Procedure 6.1 Before or post-closing filing		If any proposed transaction falls under the government approval route as per the NDI Rules and FDI Policy, such approval has to be obtained prior to the completion of the investment in the target Indian entity. If the proposed transaction falls under the automatic route, while the requirements under the NDI Rules and FDI Policy continue to apply (eg, pricing guidelines for share transfers and issuances to non-residents), the investment is required to be reported to the authorities only as a post-closing action, that is, after the investment is complete.

4 ‘Own’ means, for the purposes of the NDI Rules, a beneficial holding of more than 50 per cent of the equity instruments of a company, or in the case of an LLP, a contribution of more than 50 per cent in its capital and having majority profit share.

5 ‘Control’ means, for the purposes of the NDI Rules, the right to appoint the majority the directors or to control the management or policy decisions, including by virtue of their shareholding or management rights, or shareholders agreement or voting agreement, and for the purpose of the LLP, the right to appoint the majority of designated partners, where such designated partners, with specific exclusion to others, have control of all the policies of the LLP.

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			Note that reporting obligations and other restrictions, limitations and conditions under the NDI Rules and FDI Policy apply to both government route and automatic route investment.
	6.2 In the case of pre-closing filing	Mandatory/optional filing	<p>If any proposed transaction falls under the government approval route as per the NDI Rules and FDI Policy, <i>it is mandatory</i> to obtain such approval prior to the completion of the investment. In such cases, obtaining such approval should therefore be a condition precedent to the completion of the transaction.</p> <p>Whether the proposed transaction falls under the automatic route or government route, post-closing reporting to the authorities is <i>mandatory</i>.</p>
	6.3 In the case of post-closing, what are the powers of the authority?		<p>In the case of a transaction requiring government approval, pre-filing the application for approval and obtaining approval is mandatory prior to the closing of the transaction.</p> <p>In the case of a transaction that falls under the automatic route, or even a transaction requiring government approval that has been approved, the authorities can impose the prescribed penalty in the case in which they conclude that there has occurred a contravention of the NDI Rules or FEMA (the penalty can be up to three times the amount involved in the contravention).</p>
	6.4 Advance ruling	Explain if it is possible to obtain a pre-ruling from the authority as to whether the transaction falls under the FDI rules and, as the case may be, describe the process to be followed.	<p>As mentioned above, the NDI Rules apply to all FDI.</p> <p>The NDI Rules and FDI Policy do not contemplate any procedure to obtain an advanced ruling on whether any FDI proposal requires government approval (or is subject to any other condition under the NDI Rules). However, if such a need arises, the parties may approach the RBI through their authorised dealer bank to informally obtain an opinion from the RBI on such matters prior to proceeding with the proposed transaction. Most authorised dealer banks tend to adopt a conservative reading of the requirements under the NDI Rules and FDI Policy, and may insist on an application being made for approval if there is a doubt on the applicability of the sectoral conditions or NDI Rules.</p>
	6.5 Timing of various steps Filing	How much lead time is required?	<p>FDI proposals that require government approval in accordance with the NDI Rules and FDI Policy need to be submitted online with the DPIIT through the Foreign Investment Facilitation Portal, along with the necessary supporting documents. The DPIIT then forwards the application to the relevant government department or ministry for approval based on the sector in which FDI is proposed and other factors (the ‘Competent Authority’).</p> <p>As per the Standard Operating Procedure for Processing FDI Proposals that has been published by the DPIIT (SOP), the cumulative time period provided for the processing of an FDI proposal is 12 weeks (subject to other factors impacting this timeline, as discussed below). However, in practice,</p>

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			<p>as the authorities have the right to request corrections, clarifications, further documentation and so on, the processing may take longer. Typically, if there are no major gaps in the application and supporting documents, and if the target sector does not require any special consideration (eg, defence), the timeline for approval is around 16 weeks. The timing of the application may also impact the timeline for approval.</p> <p>While the SOP does not specifically allow for meetings with officials, it is possible to informally schedule monthly meetings to discuss the status of the application, provide clarifications, etc.</p>
	(i) Review by the authority	Specify the timing available to the authority; indicate if the timeframe is mandatory or not and describe what other flexibility may exist de facto or <i>de jure</i> .	<p>For FDI proposals requiring government approval, the Competent Authority has up to 12 weeks cumulatively (ie, accounting for initial scrutiny, circulation to other ministries and the RBI for comments, etc) to either reject or approve the FDI proposal. The DPIIT is provided with an additional time of two weeks for the consideration of proposals that have been rejected or where additional conditions are proposed to be imposed by the Competent Authority.</p> <p>While these timelines are mandatory, note that the timelines exclude the time taken by applicants to remove deficiencies in the proposals/supplying additional information as may be required by the Competent Authority.</p>
	(ii) Negotiation with the authority	Describe how to handle the relationship with the authority, including when approval is subject to commitments from, or conditions imposed on, the investor.	<p>The SOP does not specifically allow for any form of formal meetings with the DPIIT or Competent Authority in connection with an FDI proposal. The process is completely online (however, the Competent Authority may request the applicant to submit a physical copy of the application).</p> <p>However, it is possible to schedule informal meetings with officials to explain the proposal, the benefits of FDI in the target sector and so on.</p>
		Are there any guidelines issued by the authority?	Yes, to a limited extent. The SOP prescribes the procedure for making an application for approval of an FDI proposal, and also simultaneously provides guidance to government authorities on the procedure to be followed by them in processing such applications.
	(iii) Information needed for filing	What information about the investor is required? Are there any thresholds for the identity and nationality of minority passive shareholders? Information on other FDI approvals by other authorities?	<p>The following information/documents about the investor and investee company are required to be submitted as part of an application for approval of an FDI proposal:</p> <ul style="list-style-type: none"> • names and addresses, and certificates of incorporation; • charter/constitutional documents (memorandum and articles of association, etc); • board resolutions authorising the investment;

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			<ul style="list-style-type: none"> • audited financial statements for the previous financial year; • details of ownership and control, including details of significant beneficial owners (ie, persons holding ten per cent or more of the paid-up capital of the investor); • diagrammatic representation of the flow and funds from the original investor to the investee company and pre and post shareholding pattern of the investee company; • affidavit stating that all information provided in hard copy and online are the same and correct; • signed executed copy(ies) of the investment agreement/joint venture agreement/shareholder agreement/share transfer agreement/technology transfer/trademark/brand assignment agreement (as applicable) in the case in which there are existing ventures; • in cases of investment by entities that themselves are pooled investment funds, details such as the names and addresses of promoters, investment managers and trustees, as well as all the sponsors of the investment fund; • copies of past approvals received, if any, and if connected to the current FDI proposal; and • other information or documents as may be required (eg, security clearance from the Ministry of Home Affairs) or requested by the Competent Authority.
	(iv) Final decision	Indicate if the final decision is to be issued within a set timeframe and what are the consequences if the authority does not issue a decision within the set timeframe.	The SOP does not prescribe any specific consequence if an FDI proposal application is not approved or rejected within the stipulated timeline. While the proposal is not deemed to be rejected, there is no automatic approval either on the lapse of the stipulated timeline.
	Conditionality of approval (i) Type of conditions or commitments	Describe the type of conditions or commitments to which FDI approval may be subject. Specify their usual duration. Specify what powers the authority may exercise to control/monitor the satisfaction of such conditions/commitments.	Conditions that the Competent Authority may impose (in addition to the conditions that are generally applicable to FDI under the NDI Rules) are typically sector dependent. For example, an FDI proposal in the mining sector may be subject to specific conditions that the Ministry of Mining may impose on the applicant, including requiring the applicant to implement pollution control measures. Typical conditions that are imposed by the Competent Authority include the following: <ol style="list-style-type: none"> 1. There would be no need to obtain prior approval of the Competent Authority for an increase in the amount of foreign equity, provided there is no change in the percentage of

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			<p>foreign/non-resident Indian (NRI) equity already approved and the total foreign equity is up to a specified amount (in INR).</p> <ol style="list-style-type: none"> 2. Adequate steps shall be taken to the satisfaction of the Government to prevent air, water and soil pollution. 3. The claiming of any tax relief under the Income-tax Act 1961 or the relevant tax treaty is examined independently by the tax authorities to determine the eligibility and extent of such relief and the approval of the Competent Authority by itself does not amount to any recognition of eligibility for giving such relief. 4. Approval by the Competent Authority by itself does not provide any immunity from tax investigations to determine whether specific or general anti-avoidance rules apply. <p>If FDI is proposed in the defence sector, the Competent Authority may scrutinise the proposal on grounds of national security and impose such conditions as are necessary to protect national security.</p>
	(ii) Level of discretionary power of the authority	Indicate if it exists and, if so, describe exceptional circumstances that have led to the use of such discretionary power.	The DPIIT and Competent Authority have discretionary power to either approve, with or without conditions, or reject any FDI proposal. The RBI also has the power to (upon an application made to it and for sufficient reasons) permit a person resident outside India to make any investment in India subject to such conditions as may be considered necessary.
	(iii) Risk of veto	Describe a topical case. Statistics	Following the Covid-19 pandemic and the additional restrictions placed by the government on investment from FDI Restricted Countries, we are given to understand (based on informal information) that several applications for FDI from Chinese investors were put on hold for a lengthy period and, to date, only a limited number of such applications have been approved.
	(iv) Role of other national authorities	Indicate if other authorities or administrations (eg, Army or Defence Minister) can get involved and, if so, how (by the authority or otherwise) and how much influence it may exercise.	<p>While the relevant ministry or government department, that is, the Competent Authority, processes an FDI proposal application, proposals for foreign investment as set out below, additionally require security clearance from the Ministry of Home Affairs:</p> <ol style="list-style-type: none"> 1. investment in broadcasting, telecoms, satellites – establishment and operation, private security agencies, defence, civil aviation, and mining and mineral separation of titanium bearing minerals and ores, its value addition and integrated activities; and 2. transactions involving an entity or beneficial owner located in an FDI Restricted Country (as discussed above).

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	Sanctions	Describe the type of sanctions that may be imposed by the authority in the case of:	If there is a contravention of any of the conditions of either the NDI Rules or any approval granted by the authorities for FDI, a penalty of up to three times the sum involved in the contravention may be imposed.
		<ul style="list-style-type: none"> • breach of conditions and/or commitments attached to the approval; and 	
		<ul style="list-style-type: none"> • investment carried out without prior approval. 	<p>If any FDI requiring government approval as per the NDI Rules is completed without obtaining such prior approval, a penalty of up to three times the sum involved in the contravention may be imposed. The adjudicating authority may, in addition to the penalty, require that the securities in which the contravening FDI has been made be confiscated by the government.</p> <p>The parties involved may also be required to, based on the sensitivity of the sector, either: (1) undertake a divestment of the FDI made; or (2) make an application seeking post facto approval for the investment (and compound the contravention by paying the penalty imposed).</p>
	Covid – special regime	<ul style="list-style-type: none"> • Please describe specific rules applicable as a result of the Covid-19 pandemic. 	<p>To curb opportunistic takeovers/acquisitions of Indian companies due to the Covid-19 pandemic, Press Note No 3 (2020 Series) dated 17 April 2020 (‘PN3’) was issued. As per PN3, an entity, resident or citizen of an FDI Restricted Country can invest only under the government route. Further, 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 such a restriction, such subsequent change in beneficial ownership also requires government approval.</p>