Foreign Direct Investment

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Foreign Investment and Laws which regulate it

Foreign Investment

Foreign Portfolio Investment (“**FPI**”)

Foreign Direct Investment (“**FDI**”)

Any Foreign Investment made in India is principally governed by the Foreign Exchange Management Act 1999 **(“FEMA”)** along with the rules, regulations and policies framed and amended from time to time. In this regards, regulations like the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 (“**TISPRO Regulations**”), the Securities Exchange Board of India (Foreign Portfolio Investors) Regulations 2019 **(“FPI Regulation”)** and the FDI Policy, 2017 issued by the Department for Promotion of Industry and Internal Trade must be adhered to.

Foreign Investment and Laws which regulate it

Regulation 2(xviii) of TISPRO Regulation s

Foreign investment is any investment made by a person resident outside India on a repatriable basis in capital instruments of an Indian company or to the capital of an LLP

Distinction between FPI and FDI as per Regulation 2(xvii) TISPRO Regulations

FDI is investment through capital instruments by a person resident outside India in an unlisted Indian company; or in *10 percent or more* of the post issue paid-up equity capital on a fully diluted basis of a listed Indian company	**FPI is any investment made by a person resident outside India through capital instruments where such investment is *less than 10 percent* of the post issue paid-up share capital on a fully diluted basis of a listed Indian company or less than 10 percent of the paid up value of each series of capital instruments of a listed Indian company**

What are the entry routes for FDI?

Automatic route

It is the route through which investment by a person outside India does not require prior approval of the Reserve Bank of India or the Government. Few examples of the sectors in which FDI through automatic route is allowed are manufacturing, asset reconstruction companies, industrial parks etc.

FDI can enter in India only through the following two routes :

Government route

As the name suggests investments through this route requires prior approval of the Government of India. It is applicable to investment in sectors which are not covered by the automatic route. Few examples of the sectors in which FDI through government route is allowed are broadcasting content services, satellite, print media etc.

What are the prohibited sectors ?

- Lottery Business including Government/ private lottery, online lotteries
- Gambling and betting including casinos
- Chit funds
- Nidhi company
- Trading in Transferable Development Rights (TDRs)
- Real Estate Business or Construction of Farm Houses (excluding development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014)
- Manufacturing of Cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes
- Activities/ sectors not open to private sector investment e.g. (I) Atomic energy and (II) Railway operations
- Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for lottery business, gambling and betting activities

SECTOR-WISE FDI EQUITY INFLOWS (TOP 15)

S. No	Sector	Amount of FDI Inflows		%age of Total Inflows
		(In Rs crore)	(In US$ million)	
1.	SERVICES SECTOR (Fin. Banking, Insurance, Non Fin/ Business, Outsourcing, R&D, Courier, Tech, Testing and Analysis, Other)	471,730.06	82,002.96	17.45
2.	COMPUTER SOFTWARE & HARDWARE	276,006.42	44,911.21	9.56
3.	TELECOMMUNICATION	219,188.59	37,270.95	7.93
4.	TRADING	176,004.68	27,594.95	5.87
5.	CONSTRUCTION DEVELOPMENT: Townships, housing, built-up infrastructure and construction – development projects	123,963.97	25,662.33	5.46
6.	AUTOMOBILE INDUSTRY	143,741.68	24,210.68	5.15
7.	CHEMICALS (OTHER THAN FERTILIZERS)	98,554.35	17,639.48	3.75
8.	CONSTRUCTION (INFRASTRUCTURE) ACTIVITIES	108,382.52	16,846.88	3.58
9.	DRUGS AND PHARMACEUTICALS	87,814.31	16,500.62	3.51
10.	HOTEL AND TOURISM	91,778.50	15,288.97	3.25
11.	POWER	82,650.58	14,987.93	3.19
12.	METALLURGICAL INDUSTRIES	74,595.40	13,401.78	2.85
13.	FOOD PROCESSING INDUSTRIES	6,811.45	9,980.75	2.12
14.	NON-CONVENTIONAL ENERGY	57,144.30	9,225.51	1.96
15.	INFORMATION & BROADCASTING (INCLUDING PRINT MEDIA)	55,361.25	9,208.14	1.96

The above data has been extracted from the Quarterly FDI fact sheet updated till March 2020, issued by the Department for Promotion of Industry and Internal Trade
https://dipp.gov.in/sites/default/files/FDI_Factsheet_March20_28May_2020.pdf

What are the instruments through which investment can be made?

An Indian company is permitted to receive foreign investment only by issuing capital instruments to the foreign investor. The capital instruments are as follows :

1.

- **Equity shares** - Issued by an Indian company, in accordance with the provisions of the Companies Act, 2013 and will include partly paid shares issued on or after July 8, 2014

2.

- **Preference shares** : Fully, compulsorily and mandatorily convertible preference shares can be issued by an Indian company.

What are the instruments through which investment can be made?

3.

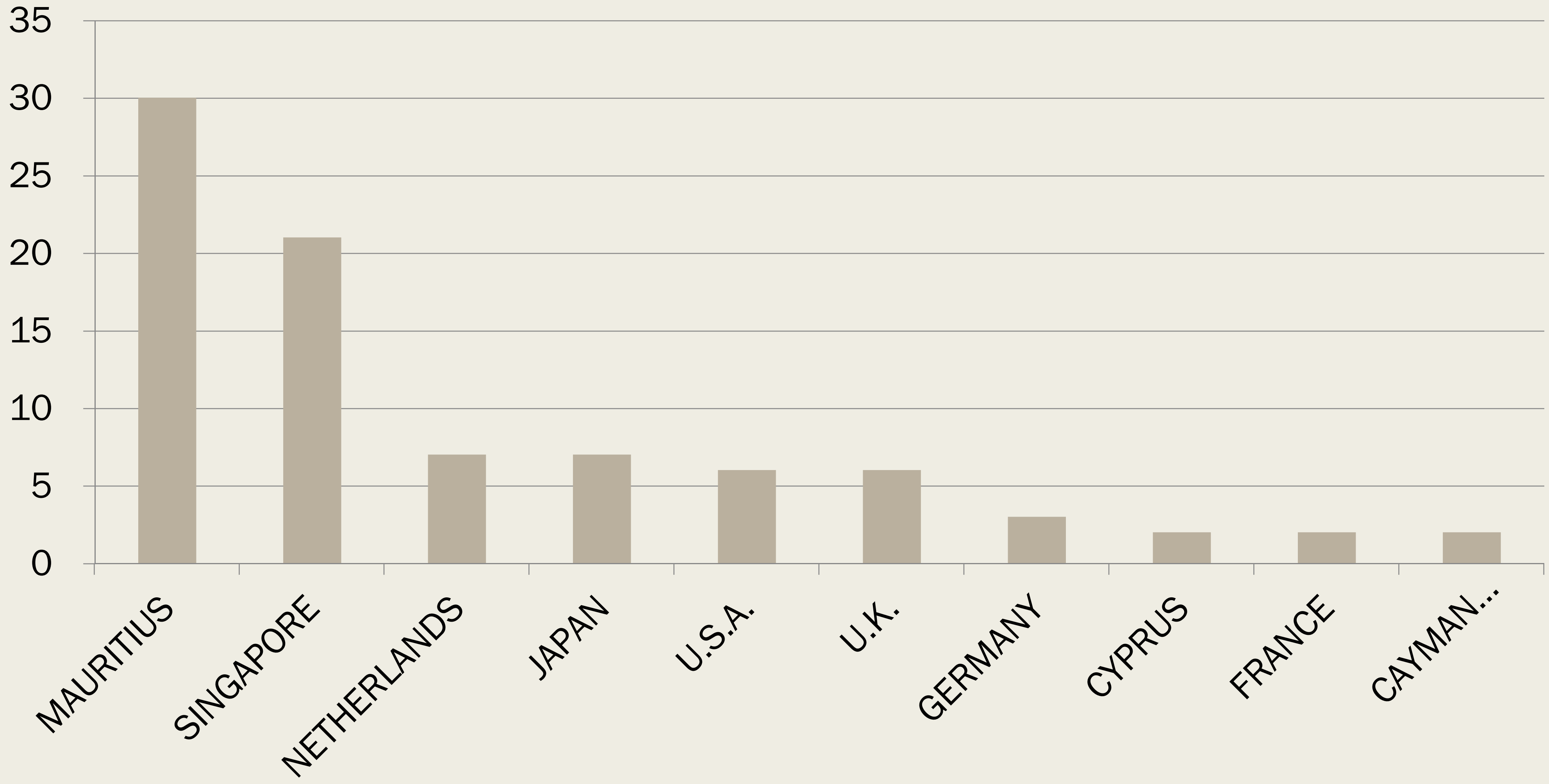
- **Debentures** : Fully, compulsorily and mandatorily convertible debentures can be issued by an Indian company.

4.

- **Share Warrants :** Issued by an Indian Company on or after July 8, 2014 in accordance with the Regulations issued by Securities and Exchange Board of India (SEBI) in this regard.

- The most common form of FDI is through issue/ transfer of equity shares. Irrespective of the mode of investment, the FDI investment has to be in compliance with the sectoral caps as specified under the TISPRO Regulations.

Share of top investing countries FDI equity inflows (in %)



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Amendment to FDI during COVID 19

- In the current scenario of lockdown caused by COVID 19, to curb opportunist investment by neighbouring countries the Department for Promotion of Industry and Internal Trade of the Ministry of Industry and Commerce vide a Press Note No.3 (2020 Series) dated April 17, 2020 amended the FDI Policy.

- As per the Press Note prior approval of the Government shall be required in case of any investment by an entity which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country.

- Further, where transfer of ownership of existing or future FDI of an Indian entity, directly or indirectly results in beneficial ownership falling within the persons stated above then such subsequent change in beneficial ownership will also require Government approval.

Downstream Investment and the necessity to comply with sectoral caps prescribed for FDI

- Downstream investment is investment made by an Indian entity which has total foreign investment in it or an Investment Vehicle in the capital instruments or the capital, as the case may be, of another Indian entity.

- If the investor company has total foreign investment in it and is not owned and not controlled by resident Indian citizens or is owned or controlled by persons resident outside India then such investment shall be “Indirect Foreign Investment” for the investee company.

- Investment received by way of Indirect Foreign Investment also has to comply with the sectoral caps as specified under the TISPRO Regulations

Issuance of capital instruments and reporting of FDI

- The capital instruments shall be issued to the person resident outside India making such investment within sixty days from the date of receipt of the consideration.

- Receipt of FDI has to be reported to the Reserve Bank of India through the Single Master Form.

- If an Indian Company issues capital instruments to a person resident outside India and such issue amounts to FDI then such issue shall be reported through Foreign Currency – Gross Provisional Return (FC-GPR) in the Single Master Form not later than thirty (30) days from the date of issue of the capital instruments.

- Transfer of capital instruments between a person resident outside India holding capital instruments in an Indian Company on a repatriable basis and person resident outside India holding capital instruments on a non-repatriable basis; and between a person resident outside India holding capital instruments in an Indian Company on a repatriable basis and a person resident in India has to be reported through Foreign Currency- Transfer of Shares (FC-TRS)

Delay in Reporting

- In case of any delay in reporting the FDI within the stipulated time, the person or entity responsible for filing the reports shall be liable for payment of late submission fee ("**LSF**")
- The payment of LSF is an option for regularising reporting delays without undergoing the compounding procedure.
- The amount of LSF shall be as per the following matrix:

Amount involved in reporting (in Rs.)	LSF as % of the amount involved *	Maximum amount of LSF applicable
Up to 10 million	0.05 %	Rs.1 million or 300% of the amount involved, whichever is lower
More than 10 million	0.15%	Rs.10 million or 300% of the amount involved, whichever is lower
*The % of LSF will be doubled every twelve months The floor (minimum applicable amount) for LSF will be Rs.100		

Delay in Reporting

- Another option available for regularising reporting delays is undergoing the compounding procedure as provided under Section 15 of FEMA read with the master direction issued by RBI for reporting under FEMA.

Important links referred:

- http://legislative.gov.in/sites/default/files/A1999-42_0.pdf
- https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11161&Mode=0
- https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11200&Mode=0
- https://rbidocs.rbi.org.in/rdocs/content/pdfs/13MDR291215.pdf
- https://dipp.gov.in/sites/default/files/FDI_Factsheet_March20_28May_2020.pdf