

Technology Law Analysis

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BOOST TO INDIA'S SPACE POTENTIAL: INDIA LIBERALIZES FOREIGN DIRECT INVESTMENT - PART II

- FDI Space Policy notified on March 05, 2024, but formal enforcement is still awaited.
- Explanation and clarity to several terms / categories in the space sector.
- Power to provide additional norms / guidelines retained with Department of Space.
- Treatment and grandfathering of previous investments remain unanswered.

INTRODUCTION

The Union Cabinet had proposed amendments to the Foreign Direct Investment ("FDI") policy liberalizing the foreign investment in the space sector ("FDI Space Policy") by way of a press release dated February 21, 2024 ("Cabinet Press Release")¹. The Ministry of Commerce and Industry has now notified the said amendments to the FDI Space Policy on March 05, 2024² ("MCI Notification"). However, the same is not enforceable as a law as the formal enforcement is still awaited.

The Cabinet Press Release provided a generic framework of the proposed FDI norms in the space sector, and the MCI Notification attempts to pen down definitions / explanations for the terms used in the Cabinet Press Release, thus limiting the scope of ambiguity and industry interpretations.

The amended regime will come into force only upon notification of the amendments to Schedule I of Foreign Exchange Management Act (Non-Debt Instrument) Rules, 2019 ("NDI Rules"). The MCI Notification provides the language which will be inserted into the NDI Rules, and also provides much needed clarity to the stakeholders / industry players before the regime actually comes into force.

For our detailed analysis of the Cabinet Press Release, please visit [here](#).

FDI Space Policy - Thresholds

The thresholds for permissible FDI in each sector / activity within the space sector notified via the MCI Notification³ are:

S.no.	Activity	FDI Thresholds
1.	Category 1 (i) Satellites-manufacturing & operation; (ii) Satellite data products; (iii) Ground segment & User segment	Up to 74% under automatic route & beyond 74% (up to 100%) under government route
2.	Category 2 (i) Launch vehicles and associated systems or subsystems; (ii) Creation of spaceports for launching and receiving spacecraft	Up to 49% under automatic route & beyond 49% (up to 100%) under government route
3.	Category 3 Manufacturing of components and systems/ sub-systems for satellites, ground segment and user segment	Up to 100% under automatic route

BREAKING DOWN THE FDI SPACE POLICY

(i) Requirement to comply with sectoral guidelines:

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The MCI Notification clarifies that entities in any of the above sectors will be subject to sectoral guidelines which may be issued by the Department of Space. Even though the government intends to reduce overall regulatory control in the sector, given the sensitivity involved, they seem to believe that it is pertinent that the Department of Space retains power to provide additional compliance requirements for foreign investments wherever required.⁴

(ii) Clarity on the term "Satellites-manufacturing & operation"⁵

The MCI Notification has provided explanation of the term "satellites – manufacturing & operation", which means end-to-end manufacturing and supply of satellite and/or payload, establishing the satellite systems including control of in-orbit operations of the satellite & payloads.

In layman terms, a satellite encompasses the entirety of a spacecraft designed to orbit the Earth. In contrast, the payload refers to the specialized equipment carried onboard the satellite to fulfill its designated mission objective. This equipment could encompass scientific instruments, communication devices, or any other apparatus crucial for the mission's success.

The MCI Notification explicitly clarifies inclusion of payloads. However, it does not explicitly mention inclusion of manufacturing and operation of spacecrafts (which sometimes may not be categorized as satellites).

(iii) Definition of "Satellite data products"⁶

Upon publication of Cabinet Press Release, the industry stakeholders questioned the rationale for bringing "Satellite data products" under the purview of space sector, when these can be more appropriately regulated under the Geospatial Guidelines, 2021 ("Geospatial Guidelines"). While the rationale is still not clear, MCI Notification has provided a definition of the "Satellite data products" as reception, generation or dissemination of earth observation/remote sensing satellite data and data products including Application Interfaces (API). However, the proposed FDI norms for "Satellite data products" may still conflict with the 100% FDI under the automatic route permitted under the Geospatial Guidelines for select category of data products which could also include terrestrial satellite data.

(iv) Launch Vehicles and Associates Systems or Sub-systems⁷

This category has been explained to include a vehicle and its stages or components that is designed to operate in or place spacecraft with payloads or persons, in a suborbital trajectory, earth orbit or outer space.

A launch vehicle is crucial for deploying satellites and other payloads into space. They require their own dedicated infrastructure and support systems during the launch process, such as facilities equipped with launch pads, fueling systems, and launch control centers, tracking, monitoring and controlling facilities.

Post release of Cabinet Press Release, the industry had doubts vis-a-vis treatment of infrastructure and support systems for Launch Vehicles and their sub-components. With the explanation provided, it seems all that these will be covered under Category 2 i.e., under the 49% automatic route, and beyond 49% percent under the government route category.

(v) Manufacturing of Components and Systems/Subsystems for Satellites, ground segment and user segment⁸

This category comprises the manufacturing and supply of the electrical, electronic and mechanical components systems/ subsystems for satellites, ground segment and user segment. Any investments in activities under this category will be covered under Category 3, i.e., under the 100% automatic route.

The explanations provided for this category and "Satellites – Manufacturing & Operation" i.e., Category 1 seems mildly repetitive to the extent both includes satellite systems. The legislative intent seems to be those non-sensitive systems (which are electrical, electronic and mechanical in nature) are intended to be included in Category 3, whereas more sensitive and larger systems are intended to be included in Category 1.

(vi) Overlapping activities

In case an entity is engaged in activities belonging to two different categories – say:

- it manufactures both, components for satellites (which falls under Category 3 i.e., 100% automatic route) and components for launch vehicles (which falls under Category 2 i.e. upto 49% automatic route, and beyond 49% under the government route);
- an entity which manufactures both, satellites (which falls under Category 1 i.e., upto 74% automatic route, and beyond 74% under the government route) and launch vehicles (which falls under Category 2 i.e., upto 49% automatic route, and beyond 49% under the government route),

then it will need to restrict its foreign investments to a stricter category threshold i.e. Category 2. Alternatively, such an entity may consider demerging and operating the business under two separate legal entities.

In India, it is also typical for companies to have a broad and all-encompassing explanation of its "business activity" under its charter documents. Space companies should carefully review their charter documents to see if any of the activities mentioned therein falls beyond their actual scope of work and particularly if the activities mentioned therein overlap with stricter category given under the new FDI regime. In such a case, the entities may consider amending their charter documents as well.

(vii) Grandfathering Existing Investments

The existing FDI policy did not include space sector related activities (other than satellites-establishment and operation) such as launch vehicle business, ground segment, user segment, sub-component / sub-systems manufacturing, data products etc.

Various stakeholders argued that since the existing FDI policy did not specify certain activities such as launch vehicles, data sets, manufacturing of space systems / components etc. under the head of "satellites-establishment and operation", foreign investments in such cases should be permitted up to 100% under the automatic route. This

was based on the interpretation under the FDI policy that sectors / activities not specifically listed or prohibited, are permissible for foreign investment up to 100% under the automatic route, subject to sectoral conditionalities. Relying on the same, foreign investors made investments in space start-ups whose activities were not explicitly listed or regulated under the current FDI regime without obtaining government approval.

Some stakeholders interpreted "satellites" very broadly and took a more conservative view that all space related activities required government approval. Similarly, there were overlaps in activities / interpretation of the FDI policy under the sectors of defence, telecom and manufacturing.

The space liberalization norms under the proposed FDI Space Policy may have actually de-liberalized this sector for certain companies who received investments in allied space activities based on the understanding that sectors / activities not specifically listed or prohibited, should be eligible for foreign investments up to 100% under the automatic route. In such cases where the investment thresholds under the proposed FDI Space Policy may be breached, it would be interesting to see the government's approach including granting approvals on a post-facto basis.

(viii) Some Other Definitions / Explanations:

- Ground Segment means supply of satellite transmit/receive earth stations including earth observation data receive station, gateway, teleports, satellite Telemetry, Tracking and Command (TTC) station, Satellite Control Centre (SCC), etc. Any investments in ground segment will be covered under Category 1 i.e., up to 74% automatic route, and beyond 74% under the government route category.⁹
- User Segment means supply of user ground terminals for communicating with the satellite, which are not covered under the ground segment. Any investments in User Segment will be covered under Category 1, and will be treated alike Ground Segment only.¹⁰
- Creation of Spaceports for launching and receiving Spacecraft means a spaceport (also referred as launch site) can be regarded as the base from which spacecraft are launched, and consisting of facilities involving devices for transportation to, from and via outer space. Any investments in activities under this category will be covered under Category 2 i.e., up to 49% automatic route, and beyond 49% under the government route category.¹¹

(ix) Focus on Upstream space sector:

Globally, space sector activities are primarily divided in three segments:

- Upstream sector (*i.e., development and operation of space assets such as satellites, launch vehicles and spaceports*).
- Downstream sector (*i.e., application of data received from space by utilizing space assets to solve day-to-day problems such as earth observation, satellite communications, navigation, commercial broadband, disaster management, civil aviation, etc.*)
- Auxiliary activities (*i.e. other sectoral activities which revolve around or are closely connected to space activities such as space insurance, space education, etc.*)

The new FDI regime seems to focus more on upstream activities. Upstream ventures typically struggle to attract funding primarily due to its capital-intensive nature and longer payback periods. The new FDI regime aims to improve financial access for such upstream ventures. The development of downstream sector and auxiliary sector substantially depends on growth of upstream space sector.¹²

(x) Predictions regarding inclusion of Satellite Broadband Services

The terms used in Category 1 i.e., 'Satellites-manufacturing & operation', 'Satellite data products' and 'Ground & User Segment' along with their explanations has kicked in additional contemplations amongst the stakeholders. The industry is predicting that since the explanation of these terms do not specifically cover 'satellite broadband services', government might classify these under the Telecom sector, allowing 100% FDI under the automatic route for global satellite broadband players. However, this view may still evolve basis industry feedback / representations.¹³

CONCLUSION

While FDI liberalization in the space sector is a positive move, the evolving space sector demands continuous monitoring and adjustments from the government to ensure responsible growth. The government seems to be adding more and more clarity with each of its press release / notification for the stakeholders. This transparency, coupled with future clarity, paves the way for exciting advancements in Indian space exploration and in turn, encourage more foreign investments in the country.

– Palomita Sharma, Ayushi Pandey and Huzefa Tavawalla

You can direct your queries or comments to the authors.

¹Press Release, Ministry of Commerce & Industry, available at <https://pib.gov.in/PressReleasePage.aspx?PRID=2007876>

²Notification, Ministry of Commerce & Industry, available at <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2011523>

³Para 5.2.12.1 – 5.2.12.3 of the FDI Policy

⁴5.2.12.4 of the FDI Policy

⁵5.2.12.5 (1) of the FDI Policy

⁶5.2.12.5 (2) of the FDI Policy

⁷5.2.12.5 (4) of the FDI Policy

⁸5.2.12.5 (6) of the FDI Policy

⁹5.2.12.5 (3)(a) of the FDI Policy

¹⁰5.2.12.5 (3)(b) of the FDI Policy

¹¹5.2.12.5 (5) of the FDI Policy

¹²Available at <https://www.firstpost.com/opinion/how-private-sector-can-propel-a-new-wave-of-space-revolution-in-india-13746934.html#:~:text=How%20private%20sector%20can%20propel%20a%20new%20wave%20of%20space%20revolution%20in%20India,-Ashwin%20Prasad%20March&text=The%20Government%20of%20India%20amended,government%20that%20begin%20in%202020>

¹³Available at <https://telecom.economictimes.indiatimes.com/news/govt-to-treat-satellite-broadband-as-telecom-service-allow-100-fdi-via-automatic-route/108253436>

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