Regulatory Hotline

November 26, 2014

PRIVATE AND FOREIGN INVESTMENT IN RAILWAYS ON TRACK

- Guidelines for private and foreign investment in railways;
- Approval requirements laid down;
- Specific activities and projects identified for investment.

INTRODUCTION

The Indian Railways is one of the largest railway networks of the world. The railway sector is largely cash starved and has seen a surplus only to the extent of INR 3783 crores in the financial year 2013-14.[1] It seems that the cash strapped Indian railways can finally heave a sigh of relief. The Government has decided to open the heavily guarded gates of the Indian railways sector to private and foreign participation. This will definitely give the much needed impetus to the struggling sector which has awaited private capital for several decades.

Since the 1980s, several projects, both in the central level and the state level await funds to see the light of the day. In November, 2012, the Cabinet Committee on Infrastructure approved a proposal from the Ministry of Railways ("**MoR**") for a policy framework for private participation in rail connectivity and capacity augmentation projects (the "**Participative Policy**"). The Participative Policy is available here. This policy was an attempt to attract private investment in rail infrastructure and lays down 5 models for investment:

- Non-Government Railway ("**NGR**"). This model is used for the development of first and last mile connectivity projects of the rail transportation chain for goods traffic, for example, for ports and mines The project is generally owned and funded by the private developer (who will also acquire land for the project), and the Indian Railways ("**IR**") will not participate in funding. The IR will pay the developer a user fee for use of the railway line.
- Joint Venture with equity participation by Railways ("**JV**"). This model is to be used for operationally necessary and bankable / profitable projects for new line and gauge conversion. The project development will be done by the IR which will hold a minimum of 26% of the equity of the JV.
- BOT (Build Operate Transfer). This model is to be used for long rail corridors, which could be gauge conversion projects, dedicated freight corridors, etc. The private developer is selected through a bidding process, and will design, build, finance and maintain the railway line and transfer the railway line at the end of the concession period.
- Capacity augmentation through funding by customers. If a customer benefits from any capacity augmentation and is willing to fund the project, then this model is applied. The IR develops, builds, operates and maintains the project using customer funds, and the customer receives freight rebates on freight volumes every year until the money invested is recovered with interest.
- Annuity. This model is to be used when it is not possible to obtain funding from private players. While the formulation of the project, land acquisition etc. would be done by the IR, only the financing and construction is required to be done by the private player. The private player would be paid an annuity which is determined by competitive bidding.

While there is significant involvement by the IR in the JV model, the NGR model is one which requires nil (or minimal) involvement by the government. The NGR model seeks to develop rail connectivity solely on private participation. It is to be used for connectivity projects to ports, mines, logistic parks etc. Under the BOT model, the investor is selected through a bidding process and awarded the contract while land would be acquired by the IR at its own cost.

With the Participative Policy in place, the Government had on August 22, 2014 permitted private investment in railways up to 100% in certain specified sectors including: suburban corridor projects through Public Private Partnership ("**PPP**"), high speed train projects, mass rapid transport systems etc. Consequently the Department of Industrial Policy and Promotion ("**DIPP**") by way of a notification dated August 27, 2014 had amended the FDI policy to permit FDI in railways up to 100%. Please refer to our hotline '*Emerging India: Railways and Defence open to foreign investment*' for further details. However, the notification was subject to the sectoral guidelines issued by the MoR.

GUIDELINES FOR INVESTMENT

The MoR has in November 2014 issued the sectoral guidelines for domestic / foreign direct investment in railways These guidelines also set out conditions and approvals for private participation in the railway sector.

When the MoR wishes to involve a private player in setting up a railway project, it conducts a bidding process to select the private player to whom the project must be awarded. Usually the bidding process involves two stages, the

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bid stage when the MoR issues a Request for Qualification ("**RFQ**") based on which the applications are made and the Request for Proposal ("**RFP**") stage based on which the shortlisted applicants make their proposals. Both the RFQ and the RFP are informative documents.[2] The bidding process is not required to be followed for projects pertaining to building rail connectivity through NGR, JV and customer funding models of the Participative Policy. The guidelines also propose that the Railway Board will grant 'in-principle approval' for all projects of rail connectivity under the NGR and JV models. The project developer / JV will submit the Project Feasibility Report along with Bankability Report based on which the final approval will be given.

The guidelines lay down the following approvals that would be required for private / foreign direct investment on a case to case basis:

- The MoR may verify the antecedents of the private players, including their financial standing and credentials in the railway sector.
- **Projects involving carriage of passengers**: A safety certification from central government or its authorized entity is required.
- **Operating rolling stock:** Inspection and safety certification should be done by MoR or its authorized entity.
- **PPP projects**: The PPP cell[3] will assess the technical and financial viability of the proposal if felt necessary. The PPP cell is an expert advisory and internal consultancy group within the Railway Board for all matters that involve public private partnership.
- **Approval of the Ministry of Finance (Department of Economic Affairs) and Cabinet Committee on Economic Affairs ("CCEA")**: If the project requires funding under the Viability Gap Funding Scheme ("**VGF Scheme"**), the approval of the Ministry of Finance (Department of Economic Affairs) would be taken. The VGF Scheme is a separate policy of the Government of India and is an attempt by the Government to share the burden of the cost of the project to attract investment in infrastructure projects in which the financial returns may not be adequate. A one-time grant is provided by the government under the VGF Scheme.[4] In some cases when the capital cost of the project or underlying value of the asset is more than INR 1,000,000,000 (Rupees Thousand Million only), approval of the Public Private Partnership Approval Committee which has been set up by the CCEA would be required.
- Proposals involving foreign direct investment above 49% in sensitive areas (border areas) from a security point of view would be required to be brought before the Cabinet Committee on Security ("**CCS**") by the MoR.
- FDI is not permitted in rail operation except wherever it has been expressly permitted under these guidelines.

The guidelines specifically state that it does not override other laws / regulations / rules issued by the governmental departments unless expressly mentioned.

PERMITTED PROJECTS / ACTIVITIES

Unlike the earlier notification which only listed out the areas in which investment will be permitted, the present notification clarifies the activity in each such area in which investment will be allowed. Private / foreign Investment is permitted up to 100% in suburban corridor projects, high speed train projects, dedicated freight lines, rolling stock including train sets and locomotives or coach manufacturing and maintenance facilities, railway electrification, signaling system, freight terminals / logistics parks, passenger terminals, railway technical training institutes, testing and facilities laboratories, concessioning of standalone passenger corridors (branch lines, hill railways etc.), non-conventional sources of energy, technological solutions for level crossings, mechanized laundry, rolling stock procurement and bio-toilets.

The guidelines issued by the MoR also specify the model/route for investment in each of these activities, i.e. whether PPP/JV/NGR/BOT/Annuity, and various other conditions that need to be satisfied. For instance, suburban corridor projects will be under the PPP route only, high speed train projects appear to be under the NGR model as well as the PPP model, dedicated freight lines will be under the NGR model, etc. For full details please refer to the notification issued by the MoR available here.

The guidelines have also identified specific projects for domestic / foreign direct investment worth about INR 90,000 crores. However these projects will be implemented only if they are found to be financially viable and bankable as per the VGF policy of the Ministry of Finance. Most of these projects are to be developed on a BOT/ Annuity model or under cooperation between governments.

CONCLUSION

The present guidelines are largely based on the Participative Policy issued by the MoR. They aim to streamline the approvals required separately for each model under the Participative Policy. Definitely a welcome change, these guidelines will harbinger the participation of private and foreign players in the railways sector in India and go a long way to improve the infrastructure and connectivity in the sector which connects millions in the country.

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You can direct your queries or comments to the authors

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[1] http://www.indianrailways.gov.in/railwayboard/uploads/directorate/finance_budget/2014-15_Final/English%20-%20Railway%20Budget%20Speech%202014-15.pdf

[2] http://www.indianrailways.gov.in/railwayboard/uploads/directorate/mech_engg_pu/downloads/RFQ_DLMW_Marhowra_Document_060513.pdf

[3] http://www.indianrailways.gov.in/railwayboard/uploads/directorate/secretary_branches/pdf/om/Public_Private_Partnership_PPP_Cell.pdf

[4] http://www.pppshipping.nic.in/MenuLinks/FAQ.aspx

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