

*De Jure*

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FOREIGN DIRECT INVESTMENT IN LIMITED LIABILITY  
PARTNERSHIP



**Rajani Associates**

simple solutions

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## BACKGROUND

- The concept of LLP has existed in many countries like the United Kingdom, the United States of America, Australia, Singapore, various Gulf countries and the same was introduced in India in the year 2008 with the publication of the LLP Act, effective March 31, 2009
- The popularity of LLP in India has grown significantly since then. LLP is an alternative corporate business form having all the advantages of a private limited company, such as limited liability along with certain additional benefits and the flexibility of a partnership thus creating a hybrid between a company and partnership.
- The LLP Act allows not only Indian nationals and body corporate, but also foreign nationals and companies incorporated outside India as well as foreign LLPs to become partners in LLP. While the LLP Act permitted this foreign participation, the same was not, until recently, supported by the foreign exchange Laws of India

## INTRODUCTION OF FDI IN LLP

- Two years post the notification of the LLP Act, the Government of India, by a Press Note issued in April 2011, did take a very precautionary approach by allowing FDI in LLP subject to certain conditions. Although the Press Note was issued in April 2011 seeking to amend the FDI Policy, it was only after three years, in March 2014, that RBI amended the relevant FEM TISPRO Regulations to incorporate provisions relating to foreign participation in LLP.
  - Since March 2014, FDI was permitted under approval route in sectors where 100% FDI was allowed under the automatic route In simple words, while a foreign investor could then invest in an Indian company under automatic route, for a similar investment in an LLP, the foreign investor required FIPB permission.
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## LIBERALISATION OF THE FDI POLICY

- With a view to boost foreign investment and easing, rationalising and simplifying the process of doing business in India, the Government has on November 10, 2015, with its Press Note No. 12, brought significant reforms in the FDI Policy.
- Amongst one of these many reforms, 100% FDI is now permitted under automatic route in LLPs operating in sectors/ activities where, in turn, 100% FDI is permitted under the automatic route. Furthermore no FDI-linked performance conditions are imposed. Similarly, LLPs receiving FDI are now permitted to make downstream investments in another LLP or company in sectors in which 100% FDI is allowed under the automatic approval route.
- In addition to a positive permit allowing FDI in LLPs there has also been a lift of the earlier restrictions on LLPs having foreign participation such as restriction of availing ECBs, accepting investment by FPI or FVCI, making investment in agriculture/plantation activity, print media or real estate business, having designated partners being appointed by companies registered in India.



## EXTENSION OF THE DEFINITIONS OF THE KEY TERMS

- The November 2015 Press Note now also extends the already prevailing concept of 'control' and 'ownership' in case of companies to LLPs. This is a prudent step to dispel any doubts that may arise later.
  - While the term 'control' with respect to a company is defined as the right to appoint majority of its directors or to control the management or policy decisions of the company; the term 'control' for the purpose of LLP has been defined as the right to appoint majority of the designated partners of the LLP who in turn have control over all the policies of the LLP.
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- Similarly, while a company is considered as 'owned' by resident Indian citizen if more than 50% of the capital is beneficially owned by resident Indian citizen(s) and/or Indian companies; an LLP is to be considered as 'owned' by Indian citizen if more than 50% of the investment in such LLP is contributed by resident Indian citizens and they have majority of the profit share in such LLP



## OUR VIEW

- Though we are of the view that the amendment to the FDI Policy could have been done earlier, liberalization of the FDI Policy with respect to the LLP is a welcome move as it will provide foreign investors an alternate form of doing business in India. The LLP will entitle foreign investors to benefit with inherent flexibility and tax efficient structures.
  - The aforesaid reform with other advantages i.e. simple tax structure, flexible statutory reporting, lesser compliance requirements will boost the opportunities for investors, joint ventures and wholly-owned subsidiaries to form LLPs, specifically in the infrastructure sector, where most of projects till date are executed in form of unincorporated joint ventures.
- Going forward, an LLP where the liability of the partner is limited to his agreed contribution may be preferred over traditional partnership firms where every partner is liable, jointly with all the other partners and also severally for all acts of the firm done while he is a partner. Further, no partner of an LLP is liable on account of the independent or un-authorized acts of other partners, thus allowing individual partners to be shielded from joint liability created by another partner's wrongful acts or misconduct.
  - As for taxation, while LLP may be subject to taxation as a partnership firm, including, AMT (quite similar to MAT applicable to companies under certain circumstances), income distributed by the LLP will not be subject to dividend distribution tax, which is applicable to companies.
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- Thus we can conclude that an LLP can be a great alternative for start-ups since the November 2015 Press Note has now brought the structure of LLP at par with the companies, i.e. the benefits (and restrictions) as are available to companies are now available to LLP and it will be an ideal platform for start-ups as well as foreign companies proposing to set up a wholly owned subsidiary more so where there may not be manufacturing activities in India.
  - Corresponding amendments to the ECB regulations and other inbound regulations issued under Foreign Exchange Management Act, 1999 are now awaited to give a holistic effect to the relaxations and changes made applicable to LLPs.

## ABBREVIATIONS USED

AMT.....	Alternate Minimum Tax
ECB.....	External Commercial Borrowings
FDI.....	Foreign Direct Investment
FPI.....	Foreign Portfolio Investor
FIPB.....	Foreign Investment Promotion Board
FVCI.....	Foreign Venture Capital Investors
FEM TISPRO Regulations	Foreign Exchange Management (Transfer or Issue of Security by Person Resident Outside India) Regulations, 2000
MAT.....	Minimum Alternative Tax
LLP Act.....	Limited Liability Partnership Act, 2008

### **Contributed by:**

Prem Rajani: [prem@rajaniassociates.net](mailto:prem@rajaniassociates.net)  
Purvi Kapadia: [purvi@rajaniassociates.net](mailto:purvi@rajaniassociates.net)  
Jessica Katyal: [jkatyal@rajaniassociates.net](mailto:jkatyal@rajaniassociates.net)

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## CONTACT US

# Rajani Associates

Simple Solutions

<b>Address:</b>	Krishna Chambers 59 New Marine Lines Churchgate Mumbai 400020 Maharashtra, India
<b>Telephone:</b>	(+91-22) 40961000
<b>Facsimile:</b>	(+91-22) 40961010
<b>Email:</b>	info@rajaniassociates.net
<b>Website:</b>	www.rajaniassociates.net

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