FDI in Digital Media

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A. Introduction

With increasing internet access available to the masses and the advent of online media sources, there has been a growing concern over the credibility of the information being touted as news. Accordingly, in a bid to regulate the digital media space, concerted attempts seem to have been made by the Indian government over the past year - be it the changes to India’s foreign direct investment policy or bringing news and current affairs content on online platforms under the administrative control of the Ministry of Information & Broadcasting (the MIB).

This note concentrates on the changes that have been brought about in India’s foreign direct investment policy (the FDI Policy), the potential impact it will have on the existing businesses and the issues that remain unanswered.

B. Background

Historically, the FDI Policy in relation to the media sector has been fairly uncontroversial and settled. Up until 2019, the media sector was broadly divided into two categories for the purposes of foreign investment: broadcasting content services and print media. Investment in both these categories falls under the government route (i.e. prior approval of the government is required to invest in these sectors) and whilst investment in news broadcast television companies is allowed up to 49 per cent., the print news media sector is subject to a lower cap of 26 per cent. The digital media sector did not find any mention in the FDI Policy (at least on paper) and consequently it was assumed that 100 per cent. foreign investment is allowed in this sector.

The first steps towards regulating investment in the digital media space can, however, be traced back to 2014, when pursuant to a foreign exchange filing made by News Laundry Media Private Limited (News Laundry) for the proposed acquisition of its shares by a Singapore entity, it was advised by the Reserve Bank of India to seek foreign investment approval from the government. The Foreign Investment
Promotion Board\(^2\) while granting approval to News Laundry pointed out that the business being carried out by News Laundry is in the nature of “digital printing” which is akin to print news media, in which sector foreign investment of only up to 26 per cent. is permitted with the prior approval of the government.

Whilst the case of News Laundry seemed to queer the pitch as far as digital media is concerned, news aggregator companies (which are simply engaged in the business of aggregating news and publishing it on their respective online platforms) were generally believed to be outside the purview of any foreign investment restrictions – or so the industry thought.

C. Recent changes to the FDI Policy

An announcement by the government in August 2019 permitting 26 per cent. FDI in digital news media companies under the government route was seen to be a further step being taken by the government in scrutiny of digital media. This announcement was operationalized by way of Press Note 4 of 2019 (dated 18 September 2019) which simply reiterated that foreign investment of up to 26 per cent. will be allowed in entities engaged in “uploading / streaming of news and current affairs through digital media” (the Press Note)\(^3\). The Press Note served as a watershed moment in the industry since the ambit of “digital media” would now need to be clarified once and for all.

A year and several industry representations later, the government issued a clarification on 16 October 2020 (the Clarification) which basically sets out the scope of applicability of the Press Note. According to the Clarification, the 26 per cent. cap will apply to the following categories of “Indian entities, registered or located in India”:

(a) digital media entities that upload / stream news content on websites, applications or other platforms (Digital Media Entities);

(b) news aggregators that use software or web applications to aggregate news content from various sources (such as websites, blogs, podcasts, video blogs, user submitted links etc.) in one location (News Aggregators); and

(c) news agencies which gather / write and distribute news content, directly or indirectly, to Digital Media Entities and / or News Aggregators (News Agencies).

Shortly after the Clarification, the MIB was identified as the sector within which online content providers (both news and non-news) would be regulated.\(^4\) The MIB, thereafter, issued a notice to all news websites / portals, news aggregators and news agencies to submit details such as the shareholding pattern, names and addresses of the shareholders, promoters and significant beneficial owners and last audited

\(^2\) The Foreign Investment Promotion Board acted as the single window clearance for applications under the foreign investment regime up until mid-2017. It was abolished in favour of an online portal for filing applications for foreign investment approvals, and the power to review and approve such applications has now been vested in individual administrative departments or ministries in charge of the sector in which the proposed investment is being made.

\(^3\) This change became effective on 5 December 2019 when the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 were amended.

\(^4\) This was implemented through the Government of India (Allocation of Business) Three Hundred and Fifty Seventh Amendment Rules, 2020 dated 9 November 2020.
balance sheet within a month from 16 November 2020 to the MIB. Further, the entities which had already received foreign investment in excess of 26 per cent. were given until 15 October 2021 to bring such investments within the 26 per cent. cap with the approval of the MIB.

Now whilst the Clarification served in providing these much-awaited details, these were not the responses that the industry was hoping for.

**D. Key issues**

*Located in India*

According to the Clarification, the investment restrictions will apply to Digital Media Entities, News Aggregators and News Agencies which are “registered or located in India”. It is not clear what is meant by entities located in India i.e. what kind of a presence will be required in India. Will a digital-only presence suffice or should there at least be a physical office (whether by way of location of servers, a branch office etc.) in India? In either case, given that there will not be an Indian investee entity for the Indian authorities to regulate in terms of inbound foreign investment, the intent of including location based criteria remains unclear.

*News Aggregators*

The inclusion of News Aggregators under the ambit of the Press Note by way of the Clarification has perhaps been the most unexpected move. As mentioned above, the term “news aggregators” has been defined to mean an entity which uses software or web applications to aggregate news content from various sources. These are, therefore, digital media companies which are engaged in news aggregation, which so far have been operating on the basis that they are eligible to receive up to 100 per cent. foreign investment. Some of the key issues which now arise are as follows:

(a) *News Aggregators registered in India:* News Aggregators which have been directly impacted by the Press Note are Indian start-ups which had of late witnessed a slew of foreign investments. It will be interesting to see how these companies effect a change in their shareholding pattern or restructure their operations over the next few months to comply with these investment restrictions.

(b) *Global News Aggregators:* Global players like Google News, Yahoo News etc. may also need to reassess their operations in India to ensure that they do not trip up on these foreign investment restrictions. Whilst a number of these entities do have subsidiaries in India, it is quite possible that the actual aggregation / uploading / streaming of news is not happening in India but overseas through the parent entity and therefore, the Press Note may not have an impact on these entities.

(c) *Social media platforms:* Another notable (but perhaps unintended?) issue that the Clarification has raised is the applicability of the Press Note to social media platforms. Behemoths like Facebook and Twitter provide a platform to its users (which includes news agencies) to share all kinds of content online, including links to news and current affairs, which are then generally tagged and automatically aggregated on
the platform. The Clarification does not make any distinction between entities which disseminate news as a primary function and those for which aggregation may be an ancillary / incidental function. Further, since the definition of News Aggregators includes aggregation of news content from “user submitted links”, technically speaking such social media entities may fall under the ambit of this Press Note. Given that the intention behind these rules is also rooted in the endeavour to curb fake news and propaganda, query whether a better way of implementing this could have been to amend the “safe harbour” rules applicable to intermediaries – which has in fact been on the anvil for over two years now.\(^5\) Interestingly, the Broadcast Engineering Consultants India Limited, a public sector enterprise under the MIB had floated a tender in May 2020 for empanelment of agencies to provide solutions and services related to “fact verification and disinformation detection” on social media platforms.

**Digital Media Entities and News Agencies**

With the inclusion of Digital Media Entities and News Agencies, all the traditional media houses disseminating news through online medium such as Times of India, NDTV, Hindustan Times etc. as well as online news websites like News Laundry, VCCircle etc. will fall under these new roles. Whilst the traditional media houses are already regulated owing to their presence in the broadcasting and print media sector, the online news portals will now need to comply with the foreign investment restrictions. In fact, it is being reported that on account of this restriction, Mosaic Media Ventures Pvt. Ltd. which runs websites like VCCircle and TechCircle and is owned by News Corp is now being sold to HT Media. Ambiguity also arises in relation to applicability of these rules to foreign news organizations such as Bloomberg, Reuters etc. which may or may not have a physical presence in India. A case in point seems to be that of HuffPost India, which was shut down on 24 November 2020 seemingly owing to the foreign investment restrictions.\(^6\) However, according to the website’s editor-in-chief, their data “is being migrated and should be back soon”. The question that, therefore, arises is whether the Indian edition of HuffPost can directly be run from overseas as a venture of the parent entity and if so, is the Press Note acting as a perverse incentive for these companies to relocate outside India?

**Over-the-top (OTT) platforms**

Potential impact of the above regulatory developments on operators of OTT platforms such as Hotstar, which host news content being broadcasted over various TV channels as well as documentaries on current issues is again unclear. Whilst this may not be the intent, the language used in the Clarification is quite broad and vague.

**E. Other Compliances**

In addition to the foreign investment restrictions, the relevant entities are now

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\(^5\) The draft Information Technology (Intermediary Guidelines (Amendment) Rules were released in 2018 and they primarily seek to increase due diligence standards intermediaries must comply with to avail safe harbour protection.

\(^6\) HuffPost was sold to Buzzfeed recently and according to reports, India was kept out of this transaction due to regulatory reasons.
also required to adhere to the following conditions:

(a) the majority of the directors on the investee company’s board, and the chief executive officer of such company will have to be Indian citizens; and

(b) the entity shall be required to obtain a security clearance in respect of all foreign personnel likely to be deployed for more than 60 days in a year by way of appointment, contract or consultancy or in any other capacity for functioning of the entity prior to their deployment. In the event the government denies or withdraws security clearance, the investee entity will be required to ensure that the concerned person resigns or his/her services are terminated forthwith after receiving such directives from the government.

Press reports suggest that the above conditions (which are applicable to the traditional broadcasting sector) have now been applied to digital media in the “national interest” primarily to check fake news and propaganda, and foreign influence and interference in India’s domestic affairs.

F. Way forward

Given the restrictions imposed by the Press Note, the impacted entities can either dilute their foreign shareholding or will now have to look towards alternate structures to invite foreign investment. Diluting foreign shareholding is likely to be challenging in these times as third party Indian buyers / investors may be difficult to find. There are also concerns about such an exercise in dilution being viewed as a “fire sale” thereby adversely impacting valuation.

G. Conclusion

Under the garb of “clarifying” the rules and “permitting” FDI, these new rules are nothing but a belated attempt by the government to regulate an industry that was seen to be attracting overseas capital and providing an independent voice in the cacophony of personalities, views and opinions that go for news in modern day India. Whilst similar initiatives by the government in connection with the e-commerce sector do also provide an example of Indian regulation trying to keep up with technological advances, the critical difference between the two sectors seems to be that whilst the government is trying to buffer Indian companies against the onslaught of international competition in e-commerce, in the case of digital media its rising importance in the “fourth estate” seems to have made it a victim of its own success.

This material is for general information only and is not intended to provide legal advice.

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