

FDI in News on Digital Media

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1 Background

The Government had released guidelines on foreign direct investment (FDI) in digital media through Press Note 4 of 2019 (**Press Note 4**) issued by Department for Promotion of Industry and Internal Trade (DPIIT), which was later formally notified under the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019 (**NDI Rules**). As per this notification, the NDI Rules provide that FDI in a company engaged in the business of *'uploading/streaming of news & current affairs through digital media'* is permitted up to 26%, with Government approval. Prior to this, FDI in digital media was unregulated, and the restriction on FDI in news was limited to 26% in print media and 49% in broadcasting content services. The rationale for the Government's restriction on digital media appears to be to regulate foreign influence in all forms of news media, and to regulate digital media in the same manner as print media. Notably, this restriction was introduced in the section that governs FDI in broadcasting content services, and does not apply to broadcasting carriage services which is permitted up to a 100% under the automatic route.

However, certain aspects of Press Note 4 and the NDI Rules were ambiguous, leading to uncertainty amongst industry players on the scope of the restriction. For instance, the NDI Rules did not define the terms *'uploading'* or *'streaming'* and it was unclear whether news aggregators that hosted links to various news sources would also be covered, even if they were not involved in the creation of news content. There was also ambiguity as to what constituted *'news and current affairs'*, and whether this would be restricted to information of a specific

The Government has clarified the scope of FDI restriction in relation to entities that upload or stream news and current affairs through digital media. The restriction covers within its ambit entities that create news content as well as those that provide access to news content created by third parties.

nature such as politics or the economy, or whether it would cover any and all information dissemination which could result in the restriction applying to a broad range of content.

On 16 October 2020, the Government issued a clarification in relation to the FDI restriction in digital media (**Clarification**), listing out the types of entities that would be subject to this FDI restriction.

2 The Clarification

2.1 Categories of Entities

The 26% FDI cap applies to the following categories of Indian entities which are registered or located in India:

- a. Digital media entity streaming/uploading news and current affairs on websites, apps or other platforms;
- b. News agency which gathers, writes and distributes/transmits news, directly or indirectly, to digital media entities and/or news aggregators; and
- c. News aggregator, being an entity which, using software or web application, aggregates news content from various sources, such as news websites, blogs, podcasts, video blogs, user submitted links, etc. in one location.

2.2 Additional Conditions

The Clarification provides that the entities must additionally adhere to the following conditions:

- a. The majority of directors on the board, as well as the Chief Executive Officer, must be Indian citizens;
- b. Security clearance is required for any foreign personnel engaged by the entity for more than 60 days, and the appointment and deployment of such persons is subject to this security clearance. This includes personnel who may be engaged as employees, contractors, consultants, or in any other capacity.

2.3 Time period for compliance

The entities covered must align their FDI to the 26% limit and obtain government approval within one year from the date of the Clarification, i.e. before 16 October 2021. The process for obtaining government approval for those having existing FDI has not been specified.

2.4 Responsibility for compliance

The Clarification reiterates that compliance with the FDI restriction and conditions will be the responsibility of the investee entity.

2.5 Analysis

The first two categories in the Clarification seem to cover entities which create news and current affairs related content and distribute it through digital media. The inclusion of such entities is in line with the Government's intention to regulate content creation, similar to their approach to print media. Notably, the additional restrictions on the nationality of key managerial personnel and security clearance for foreign personnel are also in line with similar restrictions placed on entities with FDI in print media and broadcasting sectors.

Further, while the first category of entities directly relates to uploading/streaming activities and appears to have been covered under Press Note 4, the second category i.e. news agencies which transmit news to other entities, is likely to include several types of entities, including Indian bureaus of international news organisations. The Clarification includes any '*indirect*' transmission of news, and therefore appears to include

news agencies which may not even be involved in the uploading/streaming of news. However, several foreign news agencies have set up their Indian bureaus as branch offices under the relevant guidelines issued by the Reserve Bank of India, and such entities are unlikely to fall within the purview of the FDI restriction.

The inclusion of news aggregators expands the scope of the restriction and could result in it applying to entities that may not have been covered when the restriction was originally introduced. News aggregators have been defined as entities which use a software or web application to aggregate news from sources, such as other news websites, blogs, podcasts, video blogs and user submitted links, in one location. Through the introduction of news aggregators, the government appears to have broadened the scope of the restriction beyond content services. This categorisation includes within its ambit platforms that merely provide access to news that is made available on third party platforms. There is no clarity on whether the term news aggregators is restricted to entities who disseminate news as a primary function and it therefore appears that all entities who publish or disseminate news would be covered, even if their news aggregation function is an ancillary function. Further, the Clarification does not address the ambiguous nature of the term '*news and current affairs*', and this may specifically impact social media platforms which typically host a variety of content.

3 Conclusion

The Clarification provides much needed answers to some aspects of Press Note 4, and it is clear that the intention of the Government is to regulate a wide range of entities through this restriction. In particular, it is possible that all entities that provide news aggregation services, even as one amongst several offerings on their platform, could get covered under this restriction. As a result of the Clarification, such entities will now either have to bring existing FDI down to 26% and obtain government approval for existing investments or explore other options in relation to their news related functions. This may see several Indian entities having to restructure and carve out their news related businesses to entities that do not have any FDI investors. Indian entities that are Indian owned and controlled but have received FDI, could potentially transfer this business to a subsidiary without triggering the above FDI approval requirements. Other entities may choose to house their news businesses in overseas subsidiaries or group companies, by having their applications/websites hosted by such foreign entities.

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