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CLARIFICATION ON THE FDI POLICY FOR UPLOADING / STREAMING OF NEWS AND CURRENT AFFAIRS THROUGH DIGITAL MEDIA

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INTRODUCTION

The Department for Promotion of Industry and Internal Trade, Ministry of Commerce & Industry, Government of India (DPIIT) had, through the Press Note 4 of 2019 dated 18 September 2019 (PN4), introduced a foreign direct investment (FDI) regime for entities engaged in the news digital media sector. Accordingly, entities engaged in uploading / streaming of news and current affairs through digital media platforms were permitted to receive FDI up to 26% under the government approval route. The corresponding changes to give effect to the FDI regime under PN4 were made to the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (FEMA NDI Rules) on 5 December 2019.

However, the term 'digital media' was not defined wither under PN4 or in the FEMA NDI Rules. This had created a lot of confusion in the media industry as it was not clear whether digital news aggregators, which have direct relationships with online news publishers and stream news and current affairs on digital platforms, or other online intermediaries as well as applications that simply functioned as a technical conduit for 'uploading' and 'streaming' of news and current affairs by providing links to other news websites were covered within the ambit of the term 'digital media' or not.

Further, prior to the notification of PN4, there was no prescribed FDI limit in the digital media sector under the FDI policy and consequently there were a number of online media companies, web portals and content aggregators which had received FDI (and in some cases beyond 26%). However, PN4 did not provide any grace or sunset period within which digital media companies could restructure their shareholding in order to comply with the revised FDI norms.

In the absence of any clarity on these issues, a number of representations were made to the government by the digital media players to provide clarity on several aspects underlying the FDI regime in digital media sector as prescribed under the PN4. In response to these representations, DPIIT has, on 16 October 2020, issued a clarification that sheds light on various concerns/issues that were disquieting the digital media sector since the notification of PN4 (Clarification).

SUMMARY OF THE CLARIFICATION

- ***Ambit of PN4***: The Clarification states that the FDI restrictions as set out in PN4 shall apply to the following categories of companies in the digital media space, which are registered or located in India:

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

- ***Grace / sunset period***: The Clarification mentions that all the entities covered within the ambit of PN4 shall have a period of 1 (one) year from the date of issue of the Clarification to align their shareholding with the 26% FDI level under PN4 with governmental approval.

- ***Other restrictions***: The Clarification further confirms that the responsibility of complying with PN4 shall be on the investee company and sets out the following additional conditions that need to be adhered to by every digital media company that has received FDI:

  - *Board of directors*: The majority of the board of directors of the investee company should be Indian citizens;
  - *CEO*: The chief executive officer of the investee company should be an Indian citizen; and
  - *Security clearance*: The investee company is required to obtain security clearance of all foreign personnel likely to be deployed for more than 60 (sixty) 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 of the security clearance of any foreign personnel being denied or withdrawn for any reasons whatsoever, the investee entity needs to ensure that the concerned person resigns or his/her services are terminated forthwith after receiving such directives from the government.

COMMENTS

The Clarification brings an end to the ambiguity surrounding the ambit of PN4 and confirms the categories of entities operating in the digital media space which will have to adhere to the FDI restrictions. The scope of the applicability of PN4, which has now been amply clarified by the Government, is quite broad and extends to cover all news aggregators as well as news agencies which supply information to digital media firms and companies which upload news and current affairs on their websites, apps and other online platforms.

Additionally, all these digital media companies which have now been brought under the purview of PN4 will need to restructure their shareholding in compliance with PN4 and seek the approval of the government in respect of their existing FDI, within a period of 1 (one) year from 16 October 2020.

Further, while the government has allowed this grace period of 1 (one) year, it however needs to be seen how quickly the government would process/favourably respond to the approval applications from digital media companies with existing FDI. Where the approval is rejected, concerns/challenges could arise in relation to the return of the capital by the investee company to the foreign investor(s), particularly in cases where the investee company or the Indian promoters are under financial distress (on account of COVID-19) or where there are no potential third party buyers for a secondary sale and consequently expose the investee company or the Indian promoters to a potential litigation.

Separately, one of the key driving factors behind the introduction of FDI limit by the Government in this sector was to monitor the risk of latent foreign influence which seemed to stem from increased foreign participation (especially from China) in the the digital media space in India. The additional restrictions requiring the key management personnel of the investee entities to be Indian citizens along with the requirement for the security clearance of any foreign personnel who are sought to be associated with the digital media companies seem to be an extension of the foregoing intent/security concerns and are in line with the similar restrictions that are applicable to the Indian companies operating (with FDI) in the news broadcasting carriage services, print media and the radio broadcasting sectors.

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