FDI In Digital News: Killing It Softly With Words?

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Digital news media organisations were caught by surprise last week, thanks to a clarification by Ministry of Commerce on foreign direct investment policy in news and current affairs. These entities now have a year to comply with the latest diktat that spells out the scope of the FDI policy.

To recap, until August last year, there was no foreign direct investment policy for digital media. That changed when the government decided to permit 26% FDI under approval route for uploading/streaming of news and current affairs through digital media, on the lines of print media. Television news media on the other hand has a 49% FDI threshold.

At that time, the wording of the policy had raised many questions as to the scope of entities sought to be covered.

Friday's clarification by the Department for Promotion of Industry and Internal Trade has answered all these in the affirmative. It has said that the FDI cap will apply to all Indian entities, registered or located in India if they are:

- Uploading/streaming news and current affairs on websites, apps, other platforms.
- News agencies which gather, write and distribute/transmit news, directly or indirectly, to digital media entities and/or news aggregators.
- News aggregators which, using software/web applications, aggregate news content from various sources, such as news websites, blogs, podcasts, video blogs, in one location.

What that makes clear is this new FDI policy applies to

- Entities in India that upload or livestream news video content as well text-based news content.
- News aggregator platforms in India, that collate news stories based on subscriber preference, will have to abide by this policy.
- The 'news aggregator' definition may cover foreign-owned social media sites as well as search engines. The impact on them will depend on where specific operations are located.
  Foreign -owned news agencies that operate in India will also likely see a curtailment of the services they offer, again, depending on where their operations are located.

The Geography Angle

Implication-wise, the language—"registered or located in India"—lends itself to interpretations, Vivek Gupta, partner at KPMG, told BloombergQuint. It means that any entity which is incorporated in India will be covered but use of "or located" is where interpretation is involved, he said.

“The way I’m reading it is if an entity has a sales office in India but any of the three categories of activities, for instance uploading, is being carried out offshore, then the policy shouldn’t be applicable. Likewise, for an aggregator, where all the uploading or streaming is happening from outside India, that too won’t get covered since location isn’t India.”

Vivek Gupta, Partner and National Head - M&A/ PE Tax, KPMG

Atul Pandey, partner at Khaitan & Co. agreed with this view.

‘News Aggregator’ Includes Social Media/Search Engines?

The new FDI policy’s applicability to social media platforms and search engines would depend on the specific location of the ‘uploading’ or ‘streaming’ operation.

“It would appear to apply to Facebook, Google and Twitter, which have registered Indian entities. But if these registered entities are not carrying out any of the activities but the uploading/streaming is being done offshore, then the FDI policy won’t apply to them.”

Atul Pandey, Partner, Khaitan & Co.

So, an aggregator like Google news may not be impacted since the U.S. entity does that work but some of the Indian aggregator apps would be, a lawyer clarified requesting anonymity.

This means that entities who wish to avoid FDI policy implications could restructure and carry on uploading, streaming, aggregating etc from outside of India but that’s easier said than done, this lawyer added.

What About Foreign News Agencies?

Besides news aggregators, will agencies that gather news, such as BBC, Reuters, Bloomberg be impacted as well?

Not if they are set up as a branch office in India, Kakkar said without referring to any specific agency or brand.

“These requirements set out under FDI policy would not impose any additional obligations on news entities that are set up already as branch office in line with the existing Ministry of Broadcast and RBI guidelines for operation of foreign news agencies. “

Vaibhav Kakkar, Partner, L&L Partners

Impact On OTT Platforms?

If OTT platforms, with FDI higher than 26%, stream news or current affairs channels, they may not be impacted. This because it would be on the strength of an underlying permission of individual news channels to uplink, said lawyers. But those that carry proprietary current affairs programming will need to comply. For instance, can a video feature on Indian financial scamsters be categorised as current affairs?

A lawyer, requesting anonymity, said something like this can get tricky, while another added that programming like this will need to be labelled right and that it’ll be best to avoid tagging such content as current affairs.

Past Investments

The fate of existing investments isn’t clear.

Entities where the foreign investor is at less than 26%, the clarification doesn’t explicitly say that those will be grandfathered, Gupta said.

They won’t be and a post-facto approval will be required, Kakkar opined. ‘The clarification says "compliance with the FDI policy will be the responsibility of the investee company”. It’s a continuing investment position and will need government approval,’ he added.

But Pandey is hopeful existing investments won’t need approval.

"It's a grey area and will create a lot of confusion. Given it's not been specifically addressed, one can take the more beneficial interpretation."

Atul Pandey, Partner, Khaitan & Co.

Those Above 26%

What's abundantly clear is that entities where the foreign investor holds more than 26% will need to meet the cap within a year, Pratibha Jain, head of regulatory practice at Nishith Desai Associates pointed out. This will have an adverse impact on the foreign investors who may not immediately find buyers, she said.

"Finding a buyer and at the right price will be a challenge. It's a similar situation to when FDI in commodity exchanges was capped at 5% for individual foreign entities."

Pratibha Jain, Head - Regulatory Practice, Nishith Desai Associates

Some of them were not able to sell and they were in violation and had to compound, Jain said.

Finally, there are additional personnel-related conditions that the department has added. The chief executive officer and majority of board members in a digital news entity with foreign shareholding must be Indian citizens. Any foreign national likely to be appointed as an employee or consultant for more than 60 days will require security clearance. If it's denied, the foreign national's services would need to be terminated.

This will deter foreign investors from investing in this sector, Pandey said.

A combined reading of all the clarifications made one lawyer BloombergQuint spoke to "shudder", while another hummed Charles Fox's composition "strumming my pain with his fingers…killing me softly with his song" when asked for their immediate reaction. Both requested anonymity.

Note: The digital entities named in this story are purely for illustrative purposes and only cited to help readers understand the genre, platform being referred to. BloombergQuint is still in the process of reaching out to the individual entities to ascertain the legal implications for each of them. To be clear, the policy also applies to BloombergQuint and its parent entities.