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REVIEW ARTICLE

'FDI IN INDIAN MEDIA: ISSUES AND CHALLENGES'

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‘FDI in Indian Media: Issues and Challenges’

Advitya Khurana

Asst. Professor of Mass Communication & Journalism, Government P.G. College, Sector-1, Panchkula, E-mail: akbharteey@gmail.com

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INTRODUCTION

What is the role of media in today's India? It is the question which may have a number of answers. Whatever the answers, however, they are all of vital importance and anybody can guess it with ease. In India we have associated with media a large number of hopes, aspersions, apprehensions, liabilities, challenges. We cannot see the future without an active, fair and strengthened media. This, however, is not possible without putting in heavy investment in this industry. Taking in view the complexities and king of technologies that media involve, it has been recommended at times that the substantial growth cannot be achieved in media without foreign investments. On the other hand, there are people who have been opposing the move and raising the burning issues like national security and social responsibility etc. Therefore, the way of foreign investment has not been easy in Indian media industry. This paper intends to find out the developments on this issue.

Press Note No. 7 of 2008

According to Press Note No. 7 of 2008 dated June 16, 2008, issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, there are certain parameters concerning FDI in broadcasting and the media. These are briefly quoted below. Press Note No. 1 of 2009.

Press Note No. 1 of 2009 dated January 14, 2009, issued by the Ministry of Commerce and Industry, sets the scene for the latest position on FDI in the publication of facsimile editions of foreign newspapers and also with respect to the publication of Indian editions of foreign magazines dealing with news and current affairs. FDI up to 100 per cent is permitted with prior approval of the Government in publication of facsimile edition of foreign newspapers provided the FDI is by the owner of the original foreign newspaper(s) whose facsimile edition is proposed to be brought out in India. Publication of facsimile editions of foreign newspapers can be undertaken only by an entity incorporated or registered in India under the provisions of the Companies Act, 1956. Publication of facsimile editions of foreign newspapers would also be subject to the guidelines for publication of newspapers and periodicals dealing with news and current affairs and publication of facsimile editions of foreign newspapers issued by Ministry of Information & Broadcasting on March 31, 2006, as amended from time to time. Foreign investment, including FDI and investment by NRIs/PIOs/FII, up to 26 per cent, is permitted with prior approval of the Government. The expression, ‘magazine’, for the purpose of these guidelines, will be defined as a periodical publication, brought out on non-daily basis, containing public news or comments on public news. Foreign investment would also be subject to the guidelines for Publication of Indian editions of foreign magazines dealing with news and current affairs issued by the Ministry of Information & Broadcasting on December 4, 2008.

Guidelines for publication of Indian editions of foreign magazines

By virtue of the guidelines[2] for publication of Indian editions of foreign magazines dealing with news and current affairs, issued on December 4, 2008 by the Ministry of Information and Broadcasting of the Government of India, the latter has allowed the publication of Indian editions of foreign magazines publishing news and comments on public news i.e., periodicals falling in the news and current affairs category by Indian entity(ies), with or without foreign investment. Entities/publishers of such editions would be eligible for attracting 26 per cent foreign investment. The ceiling of total Foreign Direct Investment {which includes foreign direct investments by non-resident Indians (NRIs), Persons of Indian Origin (PIOs) and portfolio investments by recognized Foreign Institutional Investors (FIIs), together} is up to 26 per cent, as per the provisions of the FDI guidelines issued by the Ministry of Information & Broadcasting from time to time.

ELIGIBILITY:

Any Indian entity, with or without foreign investment, will be permitted to publish an Indian edition of a foreign magazine falling in the news and current affairs sector. Entities/publishers of such editions would be eligible for attracting 26 per cent foreign investment, as per FDI guidelines issued by this Ministry from time to time

Verification of title of the publication and its registration: The title of the magazine should be verified and subsequently registered by the Indian entities/publishers from the Registrar of Newspapers for India (RNI) under the Press and Registration of Books Act, 1867 and as per procedure in vogue. Basic conditions/obligations: The broad parameters for granting such permission are as under:

That the publisher/owner of the foreign magazine of which an Indian edition is proposed to be published should have sound credentials.

Permission to publish such editions would be granted only to those entities/publishers which are registered as an Indian company with the Registrar of Companies under the provisions of the Indian Companies Act, 1956.

The Indian companies would be allowed to enter into financial arrangements (such as royalty payment arrangements, etc.) with the owners of the foreign magazines subject to the rules and regulations of the Government of India issued on the matter from time to time.

At least 3/4th of the Directors on the Board of Directors of the applicant Indian company and all key executives and editorial staff should be resident Indians.

The applicant Indian company shall frame its Articles/Memorandum of Association to ensure compliance with the prescribed eligibility criteria.

100 per cent identical content of the foreign magazine concerned would be allowed and the Indian publisher would be free to add local content and advertisements.

That permission may be granted for publication of only such magazines which are being published in the country of their origin with the approval of the regulatory authority of the respective Governments of those countries, in cases where such approvals are granted by the Governments.

That the proposed publication should have been published continuously for a period of at least 5 years, and the publication must have had a circulation of at least 10,000 paid copies in the last financial year in the country of its origin. The period of continuous publication and circulation must be certified by the respective Governmental authority of the country, and if there is no such Governmental authority regulating such matters, the certificate should be from respected and recognized agencies engaged in the business of certification.

Any Indian company publishing an Indian edition of foreign magazines in India shall be subject to all the relevant laws and guidelines applicable to Indian news magazines and their publishers.

The applicant entity shall make full disclosure at the time of application of the license agreement/financial arrangement with the foreign entity for publishing such Indian editions. Any subsequent change shall be disclosed to the Ministry of Information & Broadcasting within 15 days of such a change.

The applicant company shall inform the Ministry of Information & Broadcasting within 15 days of effecting any changes in the composition of resident Indian Directors or key executives and editorial staff. Such a change would be subject to post facto approval of the Ministry of Information & Broadcasting.

The applicant company shall be liable to intimate the names and details of any foreigners/NRIs/PIOs proposed to be employed/engaged in the Entity for more than 60 days in a year, either as 'consultant' or as regular employees or in any other capacity. The Entity shall be liable to dispense with the services of such persons if subsequently not found security cleared.

The applicant company shall obtain prior clearance from the Ministry of Information & Broadcasting of all persons not being resident Indians who are proposed to be inducted in the Board of Directors/Key Executives/Editorial Staff of the company.

The applicant company shall permit the Government agencies to inspect the facilities required for publishing Indian edition of foreign magazine, as and when required.

The Government of India, Ministry of Information & Broadcasting shall have the right to suspend/withdraw/cancel the permission of the company for a specified period or for whole time, if the conditions specified in the grant of permission is violated or in public interest or in the interest of national security. The company shall immediately comply with the directives issued in this regard.

The company shall stop publication of the Indian edition of the magazine whenever approval for such publication is suspended/withdrawn/cancelled by the Ministry of Information & Broadcasting.

The Ministry of Information & Broadcasting shall have the right to amend these Guidelines, as and when necessary.

Recommendations[3] of the TRAI on foreign investment limits for the broadcasting sector Commensurate with the development of FDI in terms of the policy of the Government of India, there have been rather interesting recommendations given by TRAI to the Government of India. A summary of these recommendations is quoted hereafter. References to the "Authority" in the Recommendations quoted hereafter mean TRAI.

Carriage Services

The Authority recommends hike in the limits of foreign investment for cable networks from 49 percent to 74 percent. The Authority reiterates its earlier recommendations that the total foreign investment including FDI for HITS[4] should be 74 per cent, as in case The Authority recommends that the total foreign investment including FDI for Teleport should be 74 percent, as in case of HITS. The Authority recommends that the total foreign investment including FDI for DTH should be 74 per cent, as in case of HITS and teleports. The Authority reiterates its earlier recommendations that the composite foreign investment limit, including FDI, should be 74 per cent for mobile television service.

Content Services

The Authority recommends that the status quo regarding foreign investment limits in the Down-linking guidelines should be maintained.
The Authority recommends that the status quo in regard to foreign investment limits for a non-news & current affairs TV channel in the Up-linking guidelines should continue.

The Authority recommends that the foreign investment limit for news & current affairs channels in the Up-linking guidelines may be increased from 26 percent to 49 percent.

The Authority recommends that the foreign investment limits for FM radio should be revised to 49 percent."

Other recommendations by TRAI in its report on foreign investment limits for the broadcasting sector The other important recommendations of TRAI are also set out hereafter.

"The Authority recommends that as laid down in Press Note No. 3 (2007 Series)[5] dated April 19, 2007 issued by the Department of Industrial Policy & Promotion, both direct and indirect foreign investment in the licensee company will be counted for the purpose of foreign investment ceiling. Foreign investment will include investment by Foreign Institutional Investors (FIIs), Non-resident Indians (NRIs), Foreign Currency Convertible Bonds (FCCBs), American Depository Receipts (ADRs), Global Depository Receipts (GDRs) and convertible preference shares held by foreign entity. Indirect foreign investment will mean foreign investment in the company/companies holding shares of the licensee company and their holding company/companies or legal entity (such as mutual funds, trusts) on proportionate basis. Shares of the licensee company held by Indian public sector banks and Indian public sector financial institutions will be treated as 'Indian holding'. In any case, the 'Indian' shareholding will not be less than 26 per cent.

The Authority recommends that for carriage segments (cable TV, DTH, HITS, teleport, mobile TV etc.) of broadcasting sector, foreign investment up to 49 per cent should be on the automatic route. Foreign investment in the licensee company/Indian promoters/investment companies, including their holding companies, will require approval of the Foreign Investment Promotion Board (FIPB), if it has a bearing on the overall ceiling of 74 per cent. While approving the investment proposals, FIPB will take note that investment is not coming from countries of concern and/or unfriendly entities.

The Authority recommends that FIPB approval would be required for foreign investment in content segments of broadcasting sector.

The Authority recommends that the methodology used in telecom sector for calculation of foreign investments (as outlined in Press Note No. 3 (2007 Series) dated April 19, 2007, issued by SIA (FC Division) of the Department of Industrial Policy & Promotion (Ministry of Commerce & Industry), Government of India should be adopted for the broadcasting sector.

The Authority recommends that the conditions listed in sub paras 3.1.6 to 3.1.12 of the Up-linking Guidelines dated December 2, 2005 be made applicable to all the carriage segments of broadcasting sector also where the composite foreign investment limits have been recommended to be enhanced to 74 per cent.

The Authority recommends that security related issues should be addressed in consultation with the concerned agencies. For this purpose, the Authority recommends that the Government should consider Press Note No. 3 (2007 Series) dated April 19, 2007, from the Department of Industrial Policy & Promotion relating to the telecom sector as a basis for formulating further guidelines/terms and conditions, wherever appropriate for the broadcasting sector."

Now, a 74% uniform cap for non-news media (carriage services) and a 26% cap for news media (content) apply. Also, up to 49% FDI in the carriage service providers (like multi-system operators or MSOs, DTH broadcasters, headend-in-the sky or HITS operators, and providers of mobile TV, satellite teleport and IPTV services) will be automatically allowed. But any FDI above 49% will need Foreign Investment Promotion Board's nod. FE was the first to report this in February.

So far, the FDI caps in media range from 26% to 100% with variable caps of 49% to 74% for carriage service providers. Also, currently there are FDI caps within the permissible foreign investment norms for cable and DTH companies.

Recommendations of TRAI on media ownership[6]

The Ministry of Information and Broadcasting [MIB] had sought TRAI's recommendations in May 2008 on the need for cross-media and ownership restrictions in India for radio, broadcasting and print medias. It was clarified by the MIB that looking at the increasing trend of the print media entering into broadcasting sector, to examine the issue in its entirety, TRAI in the present context should also include print media while examining the need for any cross media restrictions vis-à-vis broadcast media.

According to the press release issued by TRAI on February 25, 2009, media ownership is a subject of intense debate and Government review in both developed and developing countries around the world. Many of the developed democracies like USA, UK, Canada, Australia and France have restrictions on common and cross-media ownership. Many of these countries have recently reviewed the media ownership rules and have taken a decision to continue with the restrictions.

The press release further states that keeping in line with its consultative approach, TRAI had undertaken the public consultation process by issuing a consultation paper on September 23, 2008, on the various underlying issues relating to media ownership in India, such as, cross-media ownership across different segments of media viz. print/television/radio (horizontal integration), cross-holding restrictions to prevent consolidation including 'vertical integration' within a media segment, limits on number of licenses held by an entity, market share in the city/state/country combined across media segments and cross-control/ownership across telecom and media segments. Thirty-five stakeholders have offered written comments on the consultation paper, which are available on TRAI's website (www.trai.gov.in).An open house discussion was held at New Delhi on December 2, 2008.

According to the press release, TRAI considered various points of view based on the submissions it received during the process of consultation. Considering the international scenario, stakeholders' comments, the present economic scenario, the distinct features of the Indian scenario and other relevant factors, TRAI has formed a view that it is better to put timely safeguards, rather than looking for corrective measures which become difficult for the industry to align with in future. Appropriate positive safeguards need to be put in place to ensure that plurality and diversity of views are maintained. A supportive regulatory environment and well-defined safeguards put in place at this stage of development will facilitate the orderly growth of the industry. The original rationale for these safeguards is to guarantee a multiplicity of voices and prevent concentrations of power, which are vital for matured democracy.

The press release also comments on the current global financial crisis which has its impact on the Indian media industry, particularly the print media. There are reports on diminishing advertisement revenues and employee layoffs. In such a scenario, while all the steps are being taken to help the media industry get through the situation and reduce the impact of the slowdown, it is essential that none of the safeguards should have an adverse impact on the sector. The safeguards should be seen as a part of clear and transparent regulatory framework which will enable the existing media owners and the potential investors to take appropriate decisions, thereby helping the long term growth of the sector. The rationale for these safeguards is to guarantee multiplicity of voices and prevent concentrations of power, which are vital for mature democracy. TRAI is committed towards positive growth of this important sector.

Summary of recommendations of TRAI concerning media ownership:
These are the recommendations of TRAI with regard to media ownership:

1. Cross-media control/ownership (horizontal integration): -

- There is no emerging threat of market failure.
- Necessary safeguards should be put in place to ensure that plurality and diversity of views are maintained. A detailed market study and analysis should be carried out by the Ministry of Information & broadcasting (MIB) for identifying/determining the safeguards. The results of such analysis may be put in public domain and discussed before finalizing the safeguards.

2. Vertical integration:

- The broadcaster should not have any control in the distribution and vice-versa.
- Any entity having more than 20 per cent equity participation in a broadcasting company cannot have more than 20 per cent equity in a distributor (MSO/Cable, DTH, HITS, Mobile TV) and vice- versa.
- The existing broadcasters who have control in distribution (MSO/Cable/DTH) to be given sufficient time of three years for restructuring.

3. Limits on number of licenses by a single entity:

- The current restrictions, policies and TRAI recommendations on these are adequate for the time being.

4. Concentration of control/ownership across media:

- After working out the required safeguards for horizontal and vertical integration, the merger and acquisition guidelines for the sector may be issued to prevent media concentration and creation of significant market power.

5. Cross control/ownership across telecom and media companies:

- No restriction should be imposed on cross control/ownership across telecom and media segments separately, at this point of time. The issue could be reviewed after two years.

Supreme Court of India on the media and the freedom of speech and expression:

In a leading decision of the Supreme Court of India, i.e. Secretary, Ministry of Information and Broadcasting vs. the Cricket Association of Bengal,[7] the highest court in India has examined the role of the media and has also commented on the relevance of Article 19 of the Constitution of India in the following terms:

"43. We may now summarize the law on the freedom of speech and expression under Article 19(1) (a) as restricted by Article 19(2). The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfillment. It enables people to contribute to debates on social and moral issues. It is the best way to find truest model of anything, since it is only throughout that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavors of all sorts. The right to communicate, therefore, includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech etc. That is why freedom of speech and expression includes freedom of the press. The freedom of the press in terms includes right to circulate and also to determine the volume of such circulation. This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach.

44. This fundamental right can be limited only by reasonable restrictions under a law made for the purposes mentioned in Article 19(2) of the Constitution.

45. The burden is on the authority to justify the restrictions. Public order is not the same thing as public safety and hence no restrictions can be placed on the right to freedom of speech and expression on the ground that public safety is endangered. Unlike in the American Constitution, limitations on fundamental rights are specifically spelt out under Article 19(2) of our Constitution. Hence no restrictions can be placed on the right to freedom of speech and expression on grounds other than those specified under Article 19(2).

46. What distinguishes the electronic media like the television from the print media or other media is that it has both audio and visual appeal and has a more pervasive presence. It has a greater impact on the minds of the viewers and is also more readily accessible to all including children at home. Unlike the print media, however, there is a built-in limitation on the use of electronic media because the airwaves are a public property and hence are owned or controlled by the Government or a central national authority or they are not available on account of the scarcity, costs and competition."

CONCLUSION

Undoubtedly, India has a regulated policy on FDI in the media with checks and balances existing in this delicate and sensitive area of FDI. It is evident from an examination of this complex subject that the Fourth Estate is in an ironical sense circumscribed by continuing restrictions in FDI. Obviously, the Government of India has its own compulsions and necessities in continuing the retention of these limits in FDI in the media.

However, keeping in view out national aspirations, we have to look further to have large scale investment in media sector. We also need to grow up to have an intervention and monitoring capabilities to safeguard our national interests. A much needs to be done to have this investment flow in the developmental activities. And, what we should undertake for the pursuit is to consider 100 percent FDI in educational communication-digital or analogue.

REFERENCES:

1. No. 14/4/2008-Press [Part 1] dated December *4, 2008*

2. *April 26, 2008: for the complete text of the recommendations, please see http://www.trai.gov.in/WriteReadData/trai/*

upload/Recommendations/89/recom26apr08.pdf

3. *HITS means Headend in the Sky*

4. *Press Note 3 of 2007 deals with the revised guidelines pertaining to the enhancement of the Foreign Direct Investment ceiling from 49 per cent to 74 per cent in the Telecom Sector*

5. *February 25, 2009; for the complete text of the recommendations, please see:http://www.trai.gov.in/WriteReadData/trai/upload/Recommendations/109/recom25feb09.pdf*

6. *1995 2 SCC 161*

7. *1889 to 1974: American journalist*