



Telecom Regulatory Authority of India

**Recommendations On  
Foreign Investment Limits for Broadcasting Sector**

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Mahanagar Doorsanchar Bhawan

Jawahar Lal Nehru Marg

New Delhi- 110 002

## Preface

TRAI had given its recommendations on foreign investment in Broadcasting sector on April 26, 2008. Subsequently, Department of Industrial Policy & Promotion has modified the methodology of assessment of foreign investment in Indian Companies.

The Ministry of Information and Broadcasting has requested TRAI to review its earlier recommendations in light of recent changes in FDI policy. The Authority has gone through the due process of consultation with stakeholders in this regard.

The basic approach of the Authority in the matter has been to consider Broadcasting services in two broad groups - carriage services and content services. The reason for the differential treatment in respect of foreign investment limit between carriage services and content services is that the carriage services are in the nature of infrastructural services whereas content services, especially the news and current affairs services are considered more sensitive as the power of news content to influence public opinion may have a bearing on maintenance of public order, security of the State, and maintenance of communal harmony.

It is hoped that the present recommendations would further facilitate the investments for growth of Broadcasting sector.

**(Dr. J. S. Sarma)**  
Chairman, TRAI

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## Chapter 1. Introduction

- 1.1 The Telecom Regulatory Authority of India (TRAI) had given its recommendations on “Foreign investment limits of Broadcasting Sector “ on April 26, 2008 indicating the limits on foreign investment for the broadcasting sector and the calculation methodology. The broadcasting sector was divided in two broad groups - carriage and content services. This was done to maintain level playing field amongst similar services. It is technically feasible to provide broadcasting services through telecom networks as well as through broadcasting networks. The proportionate method as prescribed in Press Note 3 (2007) of Department of Industrial Policy & Promotion (DIPP) used in assessing the foreign investment in telecom was recommended for broadcasting sector also. Table-1 depicts the recommended limits of foreign investment at a glance.
- 1.2 In 2009 DIPP modified the methodology of assessment of foreign investment in Indian companies vide its Press Note Nos. 2 and 4 of 2009. In view of this, the Ministry of Information and Broadcasting vide reference no. D.O. No. 8/15/2007-BP&L dated September 30, 2009 made a reference to TRAI to revisit the recommendations on foreign investment in broadcasting sector dated April 26, 2008.
- 1.3 These DIPP Press Notes Series of 2009 introduced a new calculation methodology for assessment of foreign investment in Indian Companies. The earlier calculation methodology outlined in Press Note 3 of 2007 assessed the foreign investment in an Indian company by applying proportionate method of computation. However, the Press Note 2 and 4 of 2009 which have now been subsumed into Consolidated FDI Policy dated

- March 31, 2010 assess the foreign investment in an Indian company on the basis of ownership and control of the company.
- 1.4 Consequent to the receipt of the reference from the Ministry, TRAI held pre-consultation with the stakeholders. Taking into consideration the comments received from the stakeholders, the Authority issued a consultation paper, "Foreign Investment in Broadcasting Sector" on January 15, 2010 to obtain the detailed views of the stakeholders.
  - 1.5 The stakeholders have submitted comments and counter-comments on various issues relating to foreign investment in broadcasting sector with reference to Press Notes 2 and 4 of 2009. This was followed by an Open House Discussion on February 24, 2010 at New Delhi.
  - 1.6 Meanwhile, DIPP issued a Consolidated FDI policy on March 31, 2010. This policy consolidates and subsumes all Press Notes/Press Releases/Clarifications as on March 31, 2010. All earlier Press Notes/Press Releases/Clarifications on FDI issued by DIPP which were in force and effective as on March 31, 2010 stand rescinded as on March 31, 2010. In this policy, it has also been decided that a consolidated circular would be issued every six months to update the FDI policy. The policy clarifies that this is a consolidation/ compilation and comprehensive listing of most matters on FDI and is not intended to make changes in the extant regulations.
  - 1.7 The Authority held discussions with representatives of DIPP, Department of Economic Affairs and Ministry of External Affairs on the Consolidated FDI policy and the foreign investment in broadcasting sector. Taking into consideration various inputs and the comments of stakeholders submitted in response to the consultation paper and offered during the Open House

Discussions, the Authority issues its recommendations for foreign investment limits for broadcasting sector.

### **Industry Scenario**

- 1.8 The Indian Media and Entertainment industry has evolved significantly over the last few years and the pace of this evolution is only expected to increase going forward. The industry figures and projections, according to the Federation of Indian Chambers of Commerce and Industries (FICCI) - KPMG report, released in March 2010 are as follows:
  
- 1.9 The over-all Media and Entertainment (M&E) industry grew from Rs. 57,900 Crore in 2008 to Rs. 58,700 Crore in 2009, at a growth rate of 1.4%. This very modest growth of 1.4% in 2009 compared to 12% in 2008 was due to the world economic slowdown. However, it is poised for recovery in 2010 where the growth rate is expected to increase to 11.2 % in 2010. The CAGR from 2006 to 2009 is 10%, and the industry is expected to grow at a rate of 13% in the next five years. Television is the largest sector of the M&E industry, contributing 44% of the revenues in 2009. Its dominance is expected to continue increasing and reach about 48% of the total revenues in 2014. Television is expected to grow at a higher rate of 15% over the next five years compared to 9% growth in film and print sectors. The CAGR figures, current and projected growth of revenue, for TV and Radio segments are as follows

Segment	CAGR (2006-09)	2010 (Rs. In billion) Projected	2014 (Rs. In billion) Projected	CAGR (2009-14)
TV	12%	289	521	15%
Radio	9%	9	16	16%

- 1.10 According to Media Partners Asia Report 2009, the percentage of TV households in India with respect to the total number of households has increased from 46.9% in 2003 to 56.4% in 2008. As per the Report, there are about 500 million TV viewers and 129 million TV households. The total number of Cable and Satellite households has grown at a rate of 10%, from 86 million to 95 million, during the last one year. India today has a large broadcasting and distribution sector comprising around 500 TV channels, 100 Multi System Operators (MSO), around 7000 Independent Cable operators, around 60,000 Local Cable Operators (LCO), 7 DTH operators and several IPTV service providers.
- 1.11 The digital cable subscribers which were 2 million in 2008 have become 4 million in 2009. Similarly there has been significant growth in the DTH subscribers - from 11.1 million in Dec 2008 to 19.2 million in Dec 2009 and 21.3 million in March 2010. The key driver for the growth of TV industry would be expansion of digital delivery infrastructure.
- 1.12 The migration from the analogue cable network to digital network would involve upgradation of cable head-ends, upgradation of cable and supply of digital set top boxes (STB) at the subscriber premises. The cable networks across the country are in different stages of evolution. While some cable infrastructures require complete upgradation, certain others

are already upgraded and are capable of carrying digital signals. Similarly, there are variations in the cable head-ends also. Depending upon the size of the head-end, the industry estimates the cost of upgradation to vary from Rs. 1 crore to Rs. 5 crore per head-end. The cost of STB varies from Rs. 1500 for a vanilla box to Rs. 3000 for the one with advanced features like video recording etc. Larger volumes would reduce the cost of the STBs further. Even though there is consensus on the requirement of large capital for upgradation to digital and addressable network, during the consultation process widely varying estimates on the total capital requirement has been presented by the stakeholders. According to MSO Alliance, the total capital requirement for upgradation to digital cable network could be of the order of Rs. 40,000 crore.

- 1.13 In such a scenario, the foreign investment can be a source to supplement the capital requirement. As per Department of Industrial Promotion and Policy (DIPP)<sup>1</sup>, the statistics indicate that the foreign investment in the information and broadcasting sector (including print media) has been increasing gradually. During the period 2007 to early 2010, the share of foreign investment registered in this sector has increased from less than 1% of total foreign investment in India in 2007 to around 1.7 % in 2010. The inflow of foreign funds in the sector was around Rs. 3400 crore during April 2008 to March 2009. For the recent period, April 2009 to March 2010, the inflow of FDI into the sector stood at around Rs. 2100 crore. The figures indicate that so far the foreign investments were much more in the content services.

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<sup>1</sup> Source: 'FDI Statistics' available on <http://dipp.nic.in>

1.14 The key provisions of the FDI policy, relevant to Broadcasting sector, are highlighted in Chapter 2. The comments of the stakeholders, analysis and recommendations of the Authority are given in Chapter 3. A summary of recommendations of the Authority is given in Chapter 4. The relevant extracts of the Consolidated FDI policy 2010 are reproduced in Annexure-II for ready reference.

TABLE-1

S.No.	Segment	Existing Limit	Recommendations as on April 26, 2008
1.	Teleport(Hub)	49%	74% ( 49% on automatic route)
2.	DTH	49%	74% ( 49% on automatic route)
3.	HITS	74% (49% on automatic route)	74% ( 49% on automatic route)
4.	Cable Network	49%	74% ( 49% on automatic route)
5.	FM Radio	20%	49%
6.	Downlinking of TV Channels	100%	Status Quo
7.	Uplinking of TV news Channels	26%	49%
8.	Uplinking of TV non-news Channels	100%	Status Quo
9.	Mobile TV	No Policy	74% ( 49% on automatic route)

## Chapter 2. Key Provisions of the Consolidated FDI Policy 2010

- 2.1 The objective of the Government is to promote foreign direct investment through a policy framework which is transparent, predictable, simple and clear and reduces regulatory burden. Department of Industrial Policy & Promotion (DIPP), Ministry of Commerce & Industry brings out the Press Notes and Circulars that prescribe the policy guidelines for foreign investment in different sectors of the Indian economy. A consolidated FDI Policy has recently been issued by the DIPP by Circular 1 of 2010 on March 31, 2010.
- 2.2 An important aspect of the FDI policy is the definition of the methodology that is to be applied in the calculation of total foreign investment in a company for the purpose of reckoning the FDI ceilings that have been laid down in various sectors. Investment in Indian companies can be made by non-resident as well as resident Indian entities. Any non-resident investment in an Indian company is direct foreign investment. However, investment in the resident Indian entities can again comprise of both resident and non-resident investment. Thus, the Indian company could have indirect foreign investment through its Indian investing companies. These indirect foreign investments could be cascaded investments coming down into the company through a multi-layered structure.
- 2.3 Prior to the issue of the Press Note 2 of 2009, the method of calculation of total foreign investment in the Indian company in telecom and broadcasting sectors was based on a principle of proportionate holdings. The calculation methodology for the telecom sector was laid down in

Press Note No. 3 of 2007 and that for the broadcasting sector was laid down in Press note 1 of 2006. As per this methodology, both direct and indirect foreign investment would be taken into account while calculating the total foreign investment, with foreign holding components, if any, in the equity of Indian shareholder companies of the Indian company being calculated on a pro rata basis to arrive at total foreign investment.

2.4 Since 2009, there is a change in the methodology of calculation of total foreign investment in the Indian company. While all investment directly made by a non-resident entity into the Indian company will be counted as foreign investment, in the counting of indirect foreign investment the principle to be adopted now is that of “ownership and control”. This change appears to have been made on the rationale that the proportionate method of calculation reflects the extent of economic ownership of assets, whereas the ownership and control method reflects the control structure of companies.

2.5 The provisions contained in the consolidated FDI Policy of 31.03.2010 relating to methodology of calculation of foreign investment are a restatement of the provisions of Press Notes 2, 3, and 4 of 2009. The Press Note 2 dated February 13, 2009 dealt with the methodology to be used for calculating the total foreign investment, both direct and indirect, in Indian companies. Now these provisions are contained in section 4.1.1 to 4.1.5 of the chapter 4 of the Consolidated FDI Policy. Similarly, the provisions of Press Note No. 3 of 2009 dated February 13, 2009 that dealt with the guidelines for transfer of ownership or control of Indian companies in sectors with caps from resident Indian citizens to non-resident entities are now contained in section 4.2.3. Press Note 4 of 2009 dated February 25, 2009 that provided clarificatory guidelines for downstream investment, now appears as section 4.6. The definitions that

were mentioned in these Press Notes are now compiled in Chapter 2 of the Consolidated FDI Policy. Relevant extracts of the consolidated policy have been reproduced in Annexure-II of this Review for ready reference.

2.6 As mentioned in para 3.3 above, the consolidated FDI policy of March 31, 2010 provides for a different method of calculating indirect foreign investment in an Indian company based on the principle of ownership and control. Foreign investment through the investing Indian company would not be considered for calculation of the indirect foreign investment in case of Indian companies which are 'owned and controlled' by resident Indian citizens and/or Indian Companies which are owned and controlled by resident Indian citizens.

2.7 For this purpose, an Indian company would be taken as being:

- “**owned**” by resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens, if more than 50% of the equity interest in it is beneficially owned by resident Indian citizens and Indian companies, which are owned and controlled ultimately by resident Indian citizens; and
- “**controlled**” by resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens, if the resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens, have the power to appoint a majority of its directors.

2.8 For cases where the above condition is not fulfilled or the investing Indian company is owned or controlled by 'non-resident entities', the entire investment by the investing company into the subject Indian Company would be considered as indirect foreign investment.

- 2.9 For the above purpose, an Indian company may be taken as being:
- “**owned**” by ‘non resident entities’, if more than 50% of the equity interest in it is beneficially owned by non-residents;
  - “**controlled**” by ‘non resident entities’, if non-residents have the power to appoint a majority of its directors.
- 2.10 There is an exception to the above rule. If any holding company has its fully owned subsidiary which in turn makes an investment in another company, then such an investment is treated at par with an investment made by the holding company. This is on the rationale that the downstream investment of a 100% owned subsidiary of the holding company is akin to an investment made by a holding company and the downstream investment in such cases should be a mirror image of the holding company. Thus, if a holding company has 75% foreign equity, then the investment made by its subsidiary in another company is taken as indirect foreign investment to the tune of 75%. The rest of the investment is treated as resident held equity.
- 2.11 The policy provides for a number of additional conditions by way of safeguards. One of the conditions is that the full details about the foreign investment including ownership details etc. in Indian company and information about the control of the company would be furnished by the company to the Government of India at the time of seeking approval.
- 2.12 Further, wherever Government approval is required and there are inter-se agreements between/ amongst share-holders which have an effect on the appointment of the Board of Directors or on the exercise of voting rights or of creating voting rights disproportionate to shareholding or any

- incidental matter thereof, such agreements will have to be informed to the approving authority. The approving authority will consider such inter-se agreements for determining ownership and control when considering the case for granting approval for foreign investment.
- 2.13 In all sectors attracting sectoral caps, the balance equity i.e. beyond the sectoral foreign investment cap, would specifically have to be beneficially owned by/ held with/ in the hands of resident Indian citizens and Indian companies, owned and controlled by resident Indian citizens.
- 2.14 In sectors where the sectoral cap is less than 49%, the company would need to be 'owned and controlled' by resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens. For this purpose, the equity held by the largest Indian shareholder would have to be at least 51% of the total equity, excluding the equity held by Public Sector Banks and Public Financial Institutions, as defined in Section 4A of the Companies Act, 1956.
- 2.15 The consolidated FDI policy of 31.03.2010 FDI policy also prescribes the guidelines for transfer of ownership or control of Indian companies in sectors with caps from resident Indian citizens to non-resident entities. (As mentioned in para 3.4 above, this was earlier the subject matter of Press Note 3 of 2009 and is now contained in the section 4.2.3 of the consolidated policy).
- 2.16 These guidelines apply to sectors having specific sectoral caps on foreign investment such as in broadcasting. Before these guidelines came into effect, the transfer of shares in an existing company was on the automatic route subject to the sectoral policy on FDI. In view of the concerns raised on recent acquisitions

of certain Indian companies by non-resident entities in sectors with caps, these guidelines mention that Government approval/ FIPB approval would be required in all cases where:

- i. An Indian company is being established with foreign investment and is owned by a non-resident entity or
- ii. An Indian company is being established with foreign investment and is controlled by a non-resident entity or
- iii. The control of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be / is being transferred/ passed on to a non-resident entity as a consequence of transfer of shares to non-resident entities through amalgamation, merger, acquisition etc. or
- iv. The ownership of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/ passed on to a non-resident entity as a consequence of transfer of shares to non-resident entities through amalgamation, merger, acquisition etc.

2.17 The consolidated FDI policy of 31.03.2010 also lays down the guiding principles for downstream investment by Indian companies 'owned' or 'controlled' by non-resident entities. (As mentioned in para 3.4 above, this was earlier contained in Press Note 4 of 2009 and is now incorporated in section 4.6 of the consolidated FDI policy). Downstream investment means indirect foreign investment by one Indian company into another Indian company by way of subscription or acquisition as per prevailing guidelines.

2.18 The policy on downstream investment by Indian companies owned and controlled by non-resident entities includes the policy for (a) only operating companies (b) operating-cum-investing companies (c) only investing companies. Foreign investment in the first two types of companies would have to comply with the relevant sectoral conditions on entry route, conditionalities and caps. However, foreign investment in investing companies will require prior Government /FIPB approval, regardless of the amount or extent of foreign investment. For companies which do not have any operations and also do not have downstream investments, for foreign investment into such companies, Government/FIPB approval would be required, regardless of the amount of the foreign investment; subject further to the condition that as and when such accompany commences business or makes downstream investment, it will comply with all sectoral conditions regarding entry route, conditionalities and caps.

## Chapter 3. Review of Foreign Investment Limits

- 3.1 When TRAI gave its recommendation on foreign investment limits for broadcasting sector on April 26, 2008, the guidelines prescribed the proportional method of computation. DIPP in 2009 has revised the calculation methodology for foreign investment in an Indian company, guidelines for transfer of ownership and guidelines for downstream investment. A review of the earlier recommendations has been taken up in view of the revised guidelines issued by DIPP. Before taking up the review, it may be worthwhile to look at the April 2008 recommendations and the rationale in arriving at these recommendations.
- 3.2 TRAI recommendations dated April 26, 2008 specified limits for foreign investment in various services of the broadcasting sector. On the basis of the attributes of each of the services, these services have been grouped into two. The services such as teleports, DTH, HITS, Mobile TV, IPTV and Cable TV come under broadcasting carriage services. Television Broadcasting-Uplinking, Downlinking and FM Radio come under broadcasting content services.
- 3.3 The reason for the differential treatment in respect of foreign investment limit between carriage services and news based content services is that the carriage services are in the nature of infrastructural services whereas news based content services are considered sensitive as these influence the minds and opinions of people in a big way across all sections of society. The news and current affairs services can influence public opinion which may have a bearing on maintenance of public order, security of the State, and maintenance of communal harmony.

- 3.4 The Authority in its recommendations on foreign investment limits for broadcasting sector in April, 2008 had recommended a limit of 74% for carriage services. The rationale for this is brought out in the following paras.
- 3.5 Technically, it is possible for cable TV networks to provide voice telephony and broadband (including Internet). Similarly, the modern telecommunications networks are also capable of triple play, i.e. offering voice, video and data services and the terms and conditions of Unified Access Service License (UASL) agreement as well as of Cellular Mobile Telephone Service (CMTS) license agreement already permit the same. This is often referred to as convergence of broadcasting and telecom technologies with the consequential blurring of boundaries between these two technologies. The convergence of technologies in telecom and broadcasting sectors has made it possible to provide broadcasting carriage services using telecom networks as well as broadcasting networks. The foreign investment limit for the telecom sector is 74% since 2007.
- 3.6 The limit of 74% foreign investment in broadcast carriage services was recommended by the Authority in its recommendations on Head-end In The Sky (HITS) dated October 17, 2007. It has been recommended therein that the foreign investment including FDI for HITS should be 74%, as is in telecom sector, in view of convergence of technologies. Similar view was taken for other broadcasting carriage services such as DTH, teleport, IPTV, mobile TV and Cable services in recommendations dated April 26, 2008.
- 3.7 Further, in recommendations dated April 26, 2008, the Authority also recommended extension of conditions listed in sub paras 3.1.6 to 3.1.12 of the Uplinking Guidelines dated December 2, 2005 applicable to all carriage segments i.e. Cable TV, DTH, HITS, teleport, mobile TV etc. of the

broadcasting sector wherever the composite foreign investment limits have been recommended to be enhanced to 74%. The conditions are reproduced below:

“... ”

- 3.1.6 The applicant shall be required to intimate the names and details of all persons, not being resident Indians, who are proposed to be inducted in the Board of Directors of the company.
- 3.1.7 The company shall be liable to intimate the names and details of any foreigners/ NRIs to be employed/ engaged in the company either as Consultants (or in any other capacity) for more than 60 days in a year, or, as regular employees.
- 3.1.8 At least 3/4th of the Directors on the Board of Directors of the company and all key Executives and Editorial staff shall be resident Indians.
- 3.1.9 The representation on the Board of Directors of the company shall as far as possible be proportionate to the shareholding.
- 3.1.10 All appointments of key personnel (executive and editorial) shall be made by the applicant company without any reference on from any other company, Indian or foreign.
- 3.1.11 The applicant company must have complete management control, operational independence and control over its resources and assets and must have adequate financial strength for running a news and current affairs TV channel.
- 3.1.12 CEO of the applicant company, known by any designation, and/ or Head of the channel, shall be a resident Indian.

...”

- 3.8 The Authority also recommended that security related issues should be addressed in consultation with the concerned agencies. Accordingly, the Security Conditions as per earlier Press Note No. 3 (2007 Series) prevalent at that time were recommended by the Authority as a basis for formulating further guidelines/terms & conditions, wherever appropriate, for the broadcasting sector.
- 3.9 In the case of content services, the Authority recommended status-quo on the foreign investment limits prescribed in the downlinking guidelines and Non-News & Current affairs TV channels in the uplinking guidelines. In both these cases there are no restrictions on foreign ownership. In the case of News & Current Affairs channels ( uplinking guidelines) and FM Radio, the Authority recommended an increase of foreign investment limit from 26% to 49%, as it was felt that even 49% will not result in management control getting transferred to foreign entities. Also, in case of News and Current Affairs channels, uplinked from abroad, clause 2.4 and 2.5 of the downlinking guidelines stipulates the following:

“ ...

- 2.4 No News and Current Affairs channel shall be permitted to be downlinked if it does not meet the following additional conditions:
- 2.4.1 That it does not carry any advertisements aimed at Indian viewers;
- 2.4.2 That it is not designed specifically for Indian audiences;
- 2.4.3 That it is a standard international channel;

2.4.4 That it has been permitted to be telecast in the country of its uplinking by the regulatory authority of that country;

Provided that the Government may waive/modify the condition under clause 2.4.1 on a case-by-case basis.

2.5 For the purposes of these guidelines any channel, which has any element of news or current affairs in its programme content, will be deemed to be a news and current affairs channel.

..."

3.10 In view of the Consolidated FDI Policy that has come into effect since April 1, 2010 the Authority now reviews its recommendations dated April 26, 2008. As stated earlier, all earlier Press Notes have now been subsumed into the recent Consolidated FDI policy.

3.11 The recommendations dated April 26, 2008 were issued keeping in view the provisions of proportionate method prevalent at that time. The main issue in the consultation paper dated January 15, 2010 is to review the earlier recommendations in view of the provisions of the revised calculation methodology in the Consolidated FDI policy. The stakeholders have submitted their views on the issues posed by way of comments, counter-comments and participation in the Open House Discussion (OHD) held on February 24, 2010 at Delhi.

### **Comments of the stakeholders**

3.12 The comments of the stakeholders are summarized as follows.

On the issue of any change required in the recommended limits for carriage services, the stakeholders' have expressed divided opinions. It

has been stated by some stakeholders that as far as carriage services are concerned, the same should be treated at par with the telecom services on account of momentum towards converged service platforms. The idea conveyed is that the limit of 74% must be recommended for carriage services such as DTH, HITS, IPTV, Mobile TV, Teleports and cable services. In their opinion with this limit and following the new calculation methodology ensures level playing field and provides opportunity to induct better technology alongwith the foreign funds.

- 3.13 In a contrary view, it has been stated by some stakeholders that current provisions in the FDI policy indirectly allow foreign investments far more than the limits recommended by TRAI. In their opinion, this may be done by forming multiple layers of Indian holding companies for investment in a broadcasting entity. This is possible because current calculation method provides that the foreign investment through the investing Indian company would not be considered for calculation of the indirect foreign investment in case of Indian companies which are 'owned and controlled' by resident Indian citizens and/or Indian Companies .
- 3.14 Another argument against higher limit is that the present foreign investment in the broadcasting sector has not reached the thresholds prescribed in terms of specific limits on overall foreign investment permissible. Therefore, there is no case for a higher limit. It was also said that the capital required for broadcasting sector may be adequately available from domestic Indian financial markets. In their view, either the recommended limits for foreign investment should be brought down or broadcasting sector should be recommended for exemption from the current method of computation of foreign investment.

- 3.15 The views stated above were countered by some stakeholders. They argued that in a competitive scenario where capital is available from multiple sources including foreign sources, capital becomes available on favourable terms i.e. cost of capital becomes less. Regarding areas which require capital funds, upgradation of Cable TV service was repeatedly referred to by the stakeholders. They commented upon the quantum of capital requirement for achieving digitalisation of cable networks. The opinions also differ in this regard. In one view, the estimated fund requirement for this purpose at all India level was of the order of Rs. 15,000 crores. In another view, it was stated that there is a total fund requirement of Rs. 20,000 - 50,000 crores for digitalisation and addressability provisions.
- 3.16 One of the stakeholders also stated that there exists a condition for scrutiny of proposals of deploying foreign nationals in Indian based networks; however, this is not followed in practice. Another stakeholder stated that the current satellite based technologies such as DTH make it technically feasible to provide a content stream only for the targeted group. In such scenario, it is possible to disseminate any kind of program stream or data only to the chosen recipients. Such transmission and reception remains undetected for the want of appropriate monitoring mechanism. So there is a need for additional safeguards.
- 3.17 On the issue of change in the recommended limits for foreign investment in broadcast content services, the stakeholders' have limited opinions. The majority of stakeholders have shared the view that the news and current affairs based content is more sensitive as compared to carriage services. Television, a visual medium of distribution of content makes more impact on the society than the printed material. While a few stakeholders have recommended the foreign investment limit for news

and current affairs content be kept at 49% as previously recommended by TRAI, the others state that the limit should not be more than 26%.

- 3.18 Those who support limit of 49% in case of content services state that conditions in the uplinking guidelines provide adequate safeguards. In their opinion, induction of foreign funds would result in less dependence of news channels on sponsorships, thus resulting in more independent and investigative journalism. Those who support the existing limit i.e. 26% argue that as per current provisions, a holding company can have a much higher investment through indirect foreign investment without having an impact on sectoral FDI limits for subsidiary companies operating as media entity. The subsidiary then could further get direct foreign investment to actually result in concentration of foreign investment far more than the desired limit. In their opinion, such a situation makes an impact on the editorial board which is entrusted with control over the dissemination of content such as news and current affairs programs.
- 3.19 Further, the stakeholders raised the issue of reciprocal treatment to Indian broadcasting entities in other countries. It was stated that in some countries a differential policy on ownership of media sectors/ assets and services is prevalent. The domestic media entities are given protection in comparison to the foreign media entities. The norms of entry and operations in these countries only permit minority share holdings by foreign investing entities.
- 3.20 The stakeholders have expressed their differing views on the additional safeguards requirements. In one view, no more additional safeguards other than the prevalent are required. In another view, one of the stakeholders has stated that on account of vastness of our country, it may

be difficult to monitor content carried through broadcasting media, therefore, a restrictive policy in news based content services may continue. In addition, it has been stated that the monitoring mechanism needs to be strengthened.

### **Analysis of comments and Recommendations of the Authority**

- 3.21 Government of India has issued the guidelines for calculation of foreign investment through Consolidated FDI policy to bring in clarity, uniformity, consistency and homogeneity into the exact methodology of calculation across sectors/activities for all foreign investments in Indian companies.
- 3.22 As mentioned in chapter 2 according to the new FDI policy, the foreign investment through an Indian investing company owned and controlled by Indian citizen/companies would not be counted towards foreign investment. The details including definition for ownership and control have been provided in the FDI policy. The earlier policy considered only the economic ownership of assets whereas the new policy considers ownership and control. To this effect, there are additional conditions regarding submission of foreign investment details to the Government, consideration of inter-se agreements between shareholders by the approving authority and holding of equity beyond sectoral caps by Indian citizens/companies. Further, the policy specifies additional conditions for the information and broadcasting sector where the sectoral cap is less than 49%. In such cases the equity held by the largest Indian shareholder would have to be at least 51% of the total equity, excluding the equity held by Public Sector Banks and Public Financial Institutions.

- 3.23 Now we come to the foreign investment limit for broadcast carriage services i.e. DTH, Cable TV services, IPTV, Mobile TV, HITS and Teleport. Generally the stakeholders feel that broadcast carriage services should be treated at par with the telecom services in view of the convergence of technologies. In the telecom sector foreign investment limit was enhanced to 74% in 2007.
- 3.24 Regarding the argument that as per the new FDI policy it is possible to have foreign investments far more than the prescribed limits by forming multiple layers of Indian holding companies, as explained above the new policy is based on ownership and control and has other safeguards. Also as pointed out by some stakeholders, availability of funds from multiple sources will help in getting the funds at more competitive rates. There is substantial requirement of funds for migrating to digital and addressable environment. It is also possible that Foreign investment brings with it world class technology and international best practices.
- 3.25 The sensitive nature of the broadcasting sector is because of its contents. Presently there is no restriction on foreign ownership for uplinking of non-News and current affairs TV Channels. When there is no restriction of foreign investment on the non-News based content, putting a highly restrictive regime on broadcast carriage is not justified.
- 3.26 The Cable TV network is the backbone of TV distribution system in the country. The Cable TV distribution network has two parts, the Multi System Operator (MSO) and the Local Cable Operator (LCO). We have discussed about the substantial requirement of capital for upgrading to digital and addressable environment. The head-ends of the MSOs would have to be upgraded. The MSOs would be responsible for supply of set top boxes (STB) to the customer and maintaining the subscriber

management system (SMS). All these are highly capital intensive activities. So the Authority recommends that the foreign investment limit for MSOs who are taking up digitisation and addressability at national or regional level (having area of operations at least at State level) should be 74%. However, for MSOs who do not take up digitization with addressability, the FDI limit should continue at the existing level of 49%.

3.27 When compared to MSO who is a large entity, the LCO is a localised entity. As mentioned in chapter 1, the Cable networks across the country are in different stages of evolution towards digitisation. So the policy on foreign investment should be based on the present state of the cable network. The road map should protect the existing investments towards upgradation. In so far as the LCOs are considered they are mostly individuals or partnerships, where the requirement of foreign investment may not be an issue. Also the investment requirement of LCO is very much small as compared to broadcasters, MSOs, DTH operators etc. However, in case any LCO would like to have some foreign investment for upgrading/running its network, prescribing a FDI limit of 26% would take care of such situations. The Authority recommends that the foreign investment limit for LCO services should be 26%. In the Cable TV Networks (Regulation) Act, 1995 there is no separate definition for MSO. However, the Cable Television Networks Rules, 1994 (as amended) and the Regulations of TRAI, have definition for MSO. The Ministry of I & B may like to consider this definition for MSO in the policy guidelines.

3.28 Some stakeholders have expressed concerns, more from the security point of view, regarding possibility of broadcast carriage infrastructure being used as telecom infrastructure. The Authority acknowledges the concerns. In the case of telecom, when the foreign investment limit was raised from 49% to 74% certain security conditions were worked out by the

Department of Telecommunications in consultation with the security agencies of the Government and incorporated in the license agreement. The Authority in its earlier recommendations of April 2008 had also recommended that similar guidelines should be worked out for broadcasting sector. The Authority reiterates its earlier recommendation in this regard.

**3.29 The Authority recommends a limit of 74% for foreign investment for the broadcast carriage services i.e. DTH, IPTV, Mobile TV, HITS and Teleport with the following additional conditions:**

- i) The conditions listed in sub paragraphs 3.1.6 to 3.1.12 of the Uplinking Guidelines dated December 2, 2005 to be applicable to all the carriage segments of broadcasting sector.**
- ii) The relevant Security Conditions as per clause 5.38.2 of the new FDI policy, duly modified for broadcasting sector, to be worked out in consultation with the security agencies of the Government and incorporated in the permission/license.**

**3.30 The Authority recommends a limit of 74% for foreign investment in respect of MSOs operating at the National or State level and taking up digitisation with addressability. For other MSOs, the foreign investment limit would continue to be 49%. In both the cases, the conditions 3.29 (i) and 3.29 (ii) mentioned above would be applicable. (For this purpose, the MSO would be as defined in the Cable TV Network Rules, 1994 and TRAI Regulations)**

**3.31 The Authority recommends a limit of 26% for foreign investment for the LCOs.**

- 3.32 As far as broadcasting content services are concerned, the content service providers, in general, create and package content and sell it to the carriage service providers. Broadcasters fall in the category of content service providers. Private FM Radio services combine both content and carriage services as the service providers create their own content and also deliver the same to the listeners directly.
- 3.33 Under the Uplinking and Downlinking guidelines, no restrictions on foreign ownership have been placed for uplinking of a non-News and Current Affairs TV Channel and downlinking of a TV channel uplinked from abroad. The analysis of the issue and response of the stakeholders do not indicate any need for changing the provisions. Accordingly,
- 3.34 **The Authority recommends that status quo should be maintained regarding foreign investment limits (i.e. no restriction on foreign ownership) for uplinking of non-News and Current Affairs TV Channels and downlinking of TV channels uplinked from abroad.**
- 3.35 As discussed earlier the differential treatment between carriage and content services is considered necessary as news and current affairs based content services are much more sensitive as the power of news content to influence public opinion has a bearing on maintenance of public order, security of state and maintenance of communal harmony. The broadcast carriage services are in the nature of infrastructure services. So the Authority is of the view that the broadcast carriage services and broadcast content services should be treated distinctly.
- 3.36 The recommendation made by the Authority in April, 2008, for enhancement of the FDI limits in respect of News and Current Affairs Television Channels and FM Radio have also been reviewed in the light of the stakeholders' response.

- 3.37 The News and Current Affairs TV channels are no different than the print media in so far as dissemination of information and views are concerned. In fact, the visual impact of the TV channels coupled with almost instant reach to the masses far exceeds the impact of the print media in influencing public opinion.
- 3.38 It is also very difficult to monitor such type of content over numerous TV channels, in different languages, across India on continuous basis. In such a scenario, there is a need to maintain sectoral limit on uplinking of news and current affairs channels. Having regard to this, the earlier recommendation of the Authority recommending enhancement of the FDI ceiling from 26% to 49 % needs review. Since the foreign investment in the comparable sector i.e. print media, having an element of news and current affairs, is allowed up to the level of 26% equity, the same should be the limit for News and Current Affairs TV Channels in the uplinking guidelines.
- 3.39 In case of FM radio services, the Authority feels that it is more localised in nature, both in terms of content and reach. Moreover, the investment required to create the infrastructure and the content is much less when compared to television sector. FM Radio and News and Current Affairs Channels are of similar nature from the sensitivity point of view and so there is no justification to have different foreign investment limits for these services. Equal limits will bring the sectoral FDI cap in News and Current Affairs Channels and FM Radio in line with the FDI cap allowed for the print media.
- 3.40 The Authority recommends a limit of 26% for foreign investment for News and Current Affairs TV Channels in the uplinking guidelines and FM Radio.**

- 3.41 Having discussed the limits for foreign investment in broadcasting sector it is important to look at the procedure for approval for foreign investments in the Indian companies. The two options are, approval through automatic route or with prior approval of FIPB. It may not be investor friendly if very small foreign investors are asked to go through detailed approval procedure of FIPB. This brings to the issue of quantifying small investments. Any investment of 26% or more can give the investor some say in the management of the company. The actual say or control in the company would depend upon the quantum of investment. It is only prudent that such investments have the approval of the Government through the approval procedure of FIPB.
- 3.42 **The Authority recommends that all foreign investment in broadcasting sector below the level of 26% should be allowed on the automatic route. The foreign investment of 26% and above should only be with prior approval of FIPB.**

## Chapter 4. Summary of Recommendations

**4.1 The Authority recommends a limit of 74% for foreign investment for the broadcast carriage services i.e. DTH, IPTV, Mobile TV, HITS and Teleport with the following additional conditions:**

- i) The conditions listed in sub paragraphs 3.1.6 to 3.1.12 of the Uplinking Guidelines dated December 2, 2005 to be applicable to all the carriage segments of broadcasting sector.**
- ii) The relevant Security Conditions as per clause 5.38.2 of the new FDI policy, duly modified for broadcasting sector, to be worked out in consultation with the security agencies of the Government and incorporated in the permission/license.**

**(Paragraph 3.29)**

**4.2 The Authority recommends a limit of 74% for foreign investment in respect of MSOs operating at the National or State level and taking up digitisation with addressability. For other MSOs, the foreign investment limit would continue to be 49%. In both the cases, the conditions (i) and (ii) mentioned above would be applicable. (For this purpose, the MSO would be as defined in the Cable TV Network Rules, 1994 and TRAI Regulations)**

**(Paragraph 3.30)**

**4.3 The Authority recommends a limit of 26% for foreign investment for the LCOs.**

**(Paragraph 3.31)**

**4.4 The Authority recommends that status quo should be maintained regarding foreign investment limits (i.e. no restriction on foreign ownership) for uplinking of non-News and Current Affairs TV**

**Channels and downlinking of TV channels uplinked from abroad.**

**(Paragraph 3.34)**

**4.5 The Authority recommends a limit of 26% for foreign investment for News and Current Affairs TV Channels in the uplinking guidelines and FM Radio. (Paragraph 3.40)**

**4.6 The Authority recommends that all foreign investment in broadcasting sector below the level of 26% should be allowed on the automatic route. The foreign investment of 26% and above should only be with prior approval of FIPB. (Paragraph 3.42)**

**TABLE-2: FDI limits in the Broadcasting Sector-Recommendations at a glance**

S.No.	Segment	Existing Limit	Recommendations
1.	Teleport(Hub)	49%	74% *
2.	DTH	49%	74% *
3.	HITS	74% (49% on automatic route)	74% *
4 (a)	Cable Networks-MSOs operating at National or State level	49%	74% * provided they undertake upgradation of networks towards digitalisation with addressability
4 (b)	Other MSOs	49%	Status Quo*
5.	Cable Networks- Local Cable Operators	49%	26% *
6.	FM Radio	20%	26% *
7.	Downlinking of TV Channels	100%	Status Quo *
8.	Uplinking of TV News & Current Affairs Channels	26%	Status Quo *
9.	Uplinking of TV Non-News & Current Affairs Channels	100%	Status Quo *
10.	Mobile TV	No Policy	74% *

\* FDI below 26% is recommended through automatic route.

ANNEXURE-I

**Reference from Ministry of Information and Broadcasting**

रघु मेनन  
सचिव  
RAGHU MENON  
SECRETARY  
Tel. : 011-23082639  
Fax. : 011-23082613



भारत सरकार  
सूचना और प्रसारण मंत्रालय  
नई दिल्ली-110115  
GOVERNMENT OF INDIA  
MINISTRY OF INFORMATION & BROADCASTING  
NEW DELHI-110115

D.O.No.8/15/2007-BP&L

30<sup>th</sup> September, 2009

*Dear Shri Sarma,*

On a reference made by this Ministry vide D.O. letter of even number dated 11.12.2007, the Telecom Regulatory Authority of India submitted its recommendations on foreign investment limits for various subsectors within the Broadcasting sector to the Government on 26<sup>th</sup> April, 2008. The recommendations are under consideration of the Ministry.

2. Department of Industrial Policy and Promotion has recently issued Press Note (Press Note No.2 & 4 of 2009 Series) about calculation of total foreign investment i.e. direct and indirect foreign investment in Indian companies. In view of these Press Notes, TRAI may like to revisit its recommendations dated 26.4.2008 on FDI in broadcasting sector.

3. I will be grateful if we are kindly informed about the action proposed to be taken in this regard.

*With kind regards,*

Yours sincerely,

*Raghu Menon*  
(Raghu Menon)

**Consolidated FDI Policy**

**Government of India**

**Ministry of Commerce & Industry**

**Department of Industrial Policy & Promotion**

**(FC Section)**

**CIRCULAR 1 OF 2010**

**SUBJECT: CONSOLIDATED FDI POLICY.**

The “Consolidated FDI Policy” is attached.

2. This circular will take effect from April 1, 2010.

(Gopal Krishna)

Joint Secretary to the Government of India

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D/o IPP F. No. 5(14)/2009-FC Dated 31.03.2010

Copy forwarded to:

1. Press Information Officer, Press Information Bureau- for giving wide publicity to the above circular.
2. BE Section for uploading the circular on DIPP's website.
3. Department of Economic Affairs, Ministry of Finance, New Delhi
4. Reserve Bank of India, Mumbai.

# **CHAPTER 1: INTENT AND OBJECTIVE**

## **1.1 INTENT AND OBJECTIVE**

1.1.1 ‘Investment’ is usually understood as financial contribution to the equity capital of an enterprise or purchase of shares in the enterprise. ‘Foreign investment’ is investment in an enterprise by a Non-Resident irrespective of whether this involves new equity capital or re-investment of earnings. Foreign investment is of two kinds – (i) Foreign Direct Investment (FDI) and (ii) Foreign Portfolio Investment.

1.1.2 International Monetary Fund (IMF) and Organization for Economic Cooperation and Development(OECD) define FDI similarly as a category of cross border investment made by a resident in one economy (the direct investor) with the objective of establishing a ‘lasting interest’ in an enterprise (the direct investment enterprise) that is resident in an economy other than that of the direct investor. The motivation of the direct investor is a strategic long term relationship with the direct investment enterprise to ensure the significant degree of influence by the direct investor in the management of the direct investment enterprise. Direct investment allows the direct investor to gain access to the direct investment enterprise which it might otherwise be unable to do. The objectives of direct investment are different from those of portfolio investment whereby investors do not generally expect to influence the management of the enterprise. In the Indian context, FDI is defined in Para 2.1.12 of this Circular.

1.1.3 It is the policy of the Government of India to attract and promote productive FDI from nonresidents in activities which significantly contribute to industrialization and socio-economic development. FDI supplements the domestic capital and technology.

1.1.4 **The Legal basis:** Foreign Direct Investment by non-resident in resident entities through transfer or issue of security to person resident outside India is a 'Capital account transaction' and Government of India and Reserve Bank of India regulate this under the FEMA, 1999 and its various regulations. Keeping in view the current requirements, the Government from time to time comes up with new regulations and amendments/changes in the existing ones through order/allied rules, Press Notes, etc. The Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce & Industry, Government of India makes policy pronouncements on FDI through Press Notes/ Press Releases which are notified by the Reserve Bank of India as amendment to notification No. FEMA 20/2000-RB dated May 3, 2000. These notifications take effect from the date of issue of Press Notes/ Press Releases. The procedural instructions are issued by the Reserve Bank of India vide A.P.Dir. (series) Circulars. The regulatory framework over a period of time thus consists of Acts, Regulations, Press Notes, Press Releases, Clarifications, etc.

1.1.5 This circular consolidates into one document all the prior policies/regulations on FDI which are contained in FEMA, 1999, RBI Regulations under FEMA, 1999 and Press Notes/Press Releases/Clarifications issued by DIPP and reflects the current 'policy framework' on FDI. It is clarified that this is a consolidation/compilation and comprehensive listing of most matters on FDI and is not intended to make changes in the extant regulations. This Consolidation deals comprehensively with all aspects of FDI Policy which are covered under the various Press Notes/Press Releases/ Clarifications issued by DIPP.

1.1.6 It has been decided that from now onwards a consolidated circular would be issued every six months to update the FDI policy. This consolidated circular will, therefore, be superseded by a circular to be issued on September 30, 2010.

1.1.7 All earlier Press Notes/Press Releases/Clarifications on FDI issued by DIPP which were in force and effective as on March 31, 2010 stand rescinded as on March 31, 2010.

The present circular consolidates and subsumes all such/these Press Notes/Press Releases/Clarifications as on March 31,2010.

1.1.8 Notwithstanding the rescission of earlier Press Notes/Press Releases/Clarifications, anything done or any action taken or purported to have been done or taken under the rescinded Press Notes/Press Releases/Clarifications prior to March 31, 2010 shall, in so far as it is not inconsistent with those Press Notes/Press Releases/Clarifications, be deemed to have been done or taken under the corresponding provisions of this circular and shall be valid and effective.

1.1.9 It is the intent and objective of the Government to promote foreign direct investment through a policy framework which is transparent, predictable, simple and clear and reduces regulatory burden. The system of periodic consolidation and updation is introduced as an investor friendly measure. While this circular consolidates FDI Policy Framework, the legal edifice is built on notifications issued by RBI under FEMA. Therefore, any changes notified by RBI from time to time would have to be complied with and where there is a need / scope of interpretation, the relevant FEMA notification will prevail.

1.1.10 This circular will take effect from April 1, 2010.

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## **CHAPTER 4: CALCULATION, ENTRY ROUTE, CAPS, ENTRY**

### **CONDITIONS, ETC. OF INVESTMENT**

#### **4.1 CALCULATION OF TOTAL FOREIGN INVESTMENT I.E. DIRECT AND INDIRECT FOREIGN INVESTMENT IN INDIAN COMPANIES.**

4.1.1 Investment in Indian companies can be made both by non-resident as well as resident Indian entities. Any non-resident investment in an Indian company is direct foreign investment. Investment by resident Indian entities could again comprise of both resident and non-resident investment. Thus, such an Indian company would have indirect foreign investment if the Indian investing company has foreign investment in it. The indirect investment can also be a cascading investment i.e. through multi-layered structure.

4.1.2 For the purpose of computation of indirect Foreign investment, Foreign Investment in Indian company shall include all types of foreign investments i.e. FDI; investment by FIIs(holding as on March 31); NRIs; ADRs; GDRs; Foreign Currency Convertible Bonds (FCCB); fully, compulsorily and mandatorily convertible preference shares and fully, compulsorily and mandatorily convertible Debentures regardless of whether the said investments have been made under Schedule 1, 2, 3 and 6 of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations.

**4.1.3 Guidelines for calculation of total foreign investment i.e. direct and indirect foreign investment in an Indian company.**

(i) **Counting the Direct Foreign Investment:** All investment directly by a non-resident entity into the Indian company would be counted towards foreign investment.

(ii) **Counting of indirect foreign Investment:**

(a) The foreign investment through the investing Indian company would not be considered for calculation of the indirect foreign investment in case of Indian companies which are 'owned **and** controlled' by resident Indian citizens and/or Indian Companies which are owned and controlled by resident Indian citizens.

(b) For cases where condition (a) above is not satisfied or if the investing company is owned **or** controlled by 'non resident entities', the entire investment by the investing company into the subject Indian Company would be considered as indirect foreign investment, Provided that, as an exception, the indirect foreign investment in only the 100% owned subsidiaries of operating-cum-investing/investing companies, will be limited to the foreign investment in the operating-cum-investing/ investing company. This exception is made since the downstream investment of a 100% owned subsidiary of the holding company is akin to investment made by the holding company and the downstream investment should be a mirror image of the holding company. This exception, however, is strictly for those cases where the entire capital of the downstream subsidiary is owned by the holding company.

### **Illustration**

To illustrate, if the indirect foreign investment is being calculated for Company X which has investment through an investing Company Y having foreign investment, the following would be the method of calculation:

(A) where Company Y has foreign investment less than 50%- Company X would not be taken as having any indirect foreign investment through Company Y.

(B) where Company Y has foreign investment of say 75% and:

(I) invests 26% in Company X, the entire 26% investment by Company Y would be treated as indirect foreign investment in Company X;

(II) Invests 80% in Company X, the indirect foreign investment in Company X would be taken as 80%;

(III) where Company X is a wholly owned subsidiary of Company Y (i.e. Company Y owns 100% shares of Company X), then only 75% would be treated as indirect foreign equity and the balance 25% would be treated as resident held equity. The indirect foreign equity in Company X would be computed in the ratio of 75: 25 in the total investment of Company Y in Company X.

(iii) The total foreign investment would be the sum total of direct and indirect foreign investment.

(iv) The above methodology of calculation would apply at every stage of investment in Indian Companies and thus to each and every Indian Company.

**(v) Additional conditions:**

(a) The full details about the foreign investment including ownership details etc. in Indian company(s) and information about the control of the company(s) would be furnished by the Company(s) to the Government of India at the time of seeking approval.

(b) In any sector/activity, where Government approval is required for foreign investment and in cases where there are any *inter-se* agreements between/amongst share-holders which have an effect on the appointment of the Board of Directors or on the exercise of voting rights or of creating voting rights disproportionate to shareholding or any

incidental matter thereof, such agreements will have to be informed to the approving authority. The approving authority will consider such *inter-se* agreements for determining ownership and control when considering the case for granting approval for foreign investment.

(c) In all sectors attracting sectoral caps, the balance equity i.e. beyond the sectoral foreign investment cap, would specifically be beneficially owned by/held with/in the hands of resident Indian citizens and Indian companies, owned and controlled by resident Indian citizens.

(d) In the I& B and Defence sectors where the sectoral cap is less than 49%, the company would need to be ‘owned **and** controlled’ by resident Indian citizens and Indian companies, which are owned and controlled by resident Indian citizens.

(A) For this purpose, the equity held by the largest Indian shareholder would have to be at least 51% of the total equity, excluding the equity held by Public Sector Banks and Public Financial Institutions, as defined in Section 4A of the Companies Act, 1956. The term ‘largest Indian shareholder’, used in this clause, will include any or a combination of the following:

(I) In the case of an individual shareholder,

(aa) The individual shareholder,

(bb) A relative of the shareholder within the meaning of Section 6 of the Companies Act, 1956.

(cc) A company/ group of companies in which the individual shareholder/HUF to which he belongs has management and controlling interest.

(II) In the case of an Indian company,

(aa) The Indian company

(bb) A group of Indian companies under the same management and ownership control.

(B) For the purpose of this Clause, “Indian company” shall be a company which must have a resident Indian or a relative as defined under Section 6 of the Companies Act, 1956/ HUF, either singly or in combination holding at least 51% of the shares.

(C) Provided that, in case of a combination of all or any of the entities mentioned in Sub-Clauses (i) and (ii) of clause 4.1.3(v)(d)(1) above, each of the parties shall have entered into a legally binding agreement to act as a single unit in managing the matters of the applicant company.

(e) If a declaration is made by persons as per section 187C of the Indian Companies Act about a beneficial interest being held by a non resident entity, then even though the investment may be made by a resident Indian citizen, the same shall be counted as foreign investment.

4.1.4 The above mentioned policy and the methodology would be applicable for determining the total foreign investment in all sectors, excepting in sectors where it is governed specifically under any statutes or rules there under. The above methodology of determining direct and indirect foreign investment therefore does not apply to the Insurance Sector which will continue to be governed by the relevant Regulation.

4.1.5 Any foreign investment already made in accordance with the guidelines in existence prior to February 13, 2009(date of issue of Press Note 2 of 2009) would not require any modification to conform to these guidelines. All other investments, past and future, would come under the ambit of these new guidelines.

#### **4.2.3 Guidelines for transfer of ownership or control of Indian companies in sectors with caps from resident Indian citizens to non-resident entities in sectors with caps:**

In sectors with caps, including *inter-alia* defence production, air transport services, ground handling services, asset reconstruction companies, private sector banking, broadcasting, commodity exchanges, credit information companies, insurance, print media, telecommunications and satellites, Government approval/FIPB approval would be required in all cases where:

(i) An Indian company is being established with foreign investment and is owned by a non-resident entity or

(ii) An Indian company is being established with foreign investment and is controlled by a nonresident entity or

(iii) The control of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/passed on to a non-resident entity as a consequence of transfer of shares and/or fresh issue of shares to non-resident entities through amalgamation, merger/demerger, acquisition etc. or

(iv) The ownership of an existing Indian company, currently owned or controlled by resident Indian citizens and Indian companies, which are owned or controlled by resident Indian citizens, will be/is being transferred/passed on to a non-resident entity as a consequence of transfer of shares and/or fresh issue of shares to non-resident entities through amalgamation, merger/demerger, acquisition etc.

(v) It is clarified that these guidelines will not apply for sectors/activities where there are no foreign investment caps, that is, 100% foreign investment is permitted under the automatic route.

(vi) It is also clarified that Foreign investment shall include all types of foreign investments i.e. FDI, investment by FIIs, NRIs, ADRs, GDRs, Foreign Currency Convertible Bonds (FCCB) and fully, mandatorily & compulsorily convertible preference shares/debentures, regardless of whether the said investments have been made under

Schedule 1, 2, 3 and 6 of FEMA (Transfer or Issue of Security by Persons Resident Outside India) Regulations.

...

#### **4.5 OTHER CONDITIONS ON INVESTMENT BESIDES ENTRY CONDITIONS**

4.5.1 Besides the entry conditions on foreign investment, the investment/investors need to confirm to all relevant sectoral laws, regulations, rules etc.

4.5.2 The national security/internal security related conditions as contained in relevant statutes will also have to be complied with.

4.5.3 The State Governments/Union Territories have regulations in relations to the subjects in their legislative domain. These conditions also have to be met/complied with.

#### **4.6 DOWNSTREAM INVESTMENT BY INDIAN COMPANIES**

4.6.1 The Policy for downstream investment by Indian companies seeks to lay down and clarify about compliance with the Foreign investment norms on entry route, conditionalities and sectoral caps. The ‘guiding principle’ is that downstream investment by companies ‘owned’ or ‘controlled’ by non resident entities would require to follow the same norms as a direct foreign investment i.e. only as much can be done by way of indirect foreign investment through downstream investment in Para 4.1 as can be done through direct foreign investment and what can be done directly can be done indirectly under same norms.

4.6.2 The Guidelines for calculation of total foreign investment, both direct and indirect in an Indian company, at every stage of investment, including downstream investment, have been detailed in Para 4.1 which enables determination of total foreign investment in any/all Indian Companies.

4.6.3 For the purpose of this chapter,

(i) 'Operating Company' is an Indian company which is undertaking operations in various economic activities and sectors.

(ii) 'Downstream investment' means indirect foreign investment by one Indian company into another Indian company by way of subscription or acquisition in terms of Para 4.1. Para 4.1.3 provides the guidelines for calculation of indirect foreign investment with conditions specified in para 4.1.3 (v)

(iv) 'Foreign Investment' would have the same meaning as in Para 4.1

**4.6.4 Guidelines for downstream investment by Investing Indian Companies 'owned or controlled by non resident entities' as per Para 4.1:**

(i) The Policy on downstream investment comprises policy for (a) only operating companies (b) operating-cum-investing companies (c) only investing companies as below:

(ii) Only operating companies: Foreign investment in such companies would have to comply with the relevant sectoral conditions on entry route, conditionalities and caps with regard to the sectors in which such companies are operating.

(iii) Operating-cum-investing companies: Foreign investment into such companies would have to comply with the relevant sectoral conditions on entry route, conditionalities and caps with regard to the sectors in which such companies are operating. Further, the subject Indian companies into which downstream investments are made by such companies would have to comply with the relevant sectoral conditions on entry route, conditionalities and caps in regard of the sector in which the subject Indian companies are operating.

(iv) Investing companies: Foreign Investment in Investing Companies will require the prior Government/FIPB approval, regardless of the amount or extent of foreign investment. The Indian companies into which downstream investments are made by such investing companies would have to comply with the relevant sectoral conditions on entry route, conditionalities and caps in regard of the sector in which the subject Indian companies are operating.

4.6.5 For infusion of foreign investment into such companies which do not have any operations and also do not have any downstream investments, Government/FIPB approval would be required, regardless of the amount or extent of foreign investment. Further, as and when such company commences business(s) or makes downstream investment it will have to comply with the relevant sectoral conditions on entry route, conditionalities and caps.

4.6.6. For Operating-cum- investing companies and investing companies (Para 4.6.4) and for companies as per para 4.6.5 above, downstream investments can be made subject to the following conditions:

(i) Such company is to notify SIA, DIPP and FIPB of its downstream investment within 30 days of such investment even if capital instruments have not been allotted along with the modality of investment in new/existing ventures (with/without expansion programme);

(ii) downstream investment by way of induction of foreign equity in an existing Indian Company to be duly supported by a resolution of the Board of Directors supporting the said induction as also a shareholders Agreement if any;

(iii) issue/transfer/pricing/valuation of shares shall be in accordance with applicable SEBI/RBI guidelines;

(iv) For the purpose of downstream investment, the operating cum investing companies and the investing companies would have to bring in requisite funds from abroad and not leverage funds from domestic market for such investments. This would, however, not preclude downstream operating companies to raise debt in the domestic market.

# CHAPTER 5: POLICY ON ROUTE, CAPS AND ENTRY

## CONDITIONS

### ...5.19 Broadcasting

5.19.1 **Terrestrial Broadcasting FM (FM Radio):** Foreign investment, including FDI, NRI and PIO investments and portfolio investments are permitted up to 20% equity for FM Radio's Broadcasting Services with prior approval of the Government subject to such terms and conditions as specified from time to time by Ministry of Information and Broadcasting for grant of permission for setting up of FM Radio Stations.

5.19.2 **Cable Network:** Foreign investment, including FDI, NRI and PIO investments and portfolio investments are permitted up to 49% for Cable Networks under Government route subject to Cable Television Network Rules, 1994 and other conditions as specified from time to time by Ministry of Information and Broadcasting.

5.19.3 **Direct -to-Home:** Foreign investment, including FDI, NRI and PIO investments and portfolio investments are permitted up to 49% for Direct to Home under Government route. Within the limit of 49%, FDI will not exceed 20%. This will be subject to such guidelines/terms and conditions as specified from time to time by Ministry of Information and Broadcasting.

#### 5.19.4 **Headend-In-The-Sky (HITS) Broadcasting Service:**

(i) Headend-in-the-Sky (HITS) Broadcasting Service refers to the multichannel downlinking and distribution of television programme in C-Band or Ku Band wherein all the pay channels are downlinked at a central facility (Hub/teleport) and again uplinked to a satellite after encryption of channel. At the cable headend these encrypted pay channels are downlinked using a single satellite antenna, transmodulated and sent to the subscribers by using a land based transmission system comprising of infrastructure of cable/optical fibres network.

(ii) The total direct and indirect foreign investment including portfolio and foreign direct investment in HITS shall not exceed 74%. FDI upto 49% would be on automatic route and beyond that under government route.

(iii) This will be subject to such guidelines/terms and conditions as specified from time to time by Ministry of Information and Broadcasting.

#### **5.19.4 Setting up hardware facilities such as up-linking, HUB etc.**

(i) FDI policy in the Up-linking of TV Channels is as under:

a) Foreign investment of FDI and FII up to 49% would be permitted under the Government route for setting up Up-linking HUB/ Teleports;

b) FDI up to 100% would be allowed under the Government route for Up linking a Non-News & Current Affairs TV Channel;

c) Foreign investment of FDI and FII up to 26% would be permitted under the Government route for Up-linking a News & Current Affairs TV Channel subject to the condition that the portfolio investment from FII/ NRI shall not be “persons acting in concert” with FDI investors, as defined in the SEBI(Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

(ii) The above will be further subject to the condition that the Company permitted to uplink the channel shall certify the continued compliance of this requirement through the Company Secretary at the end of each financial year.

(iii) FDI for Up-linking TV Channels will be subject to compliance with the Up-linking Policy notified by the Ministry of Information & Broadcasting from time to time.

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### **5.38 Telecommunication**

5.38.1 **Telecom services:** Foreign Direct Investment limit in telecom services is 74 percent subject to the following conditions:

(i) This is applicable in case of Basic, Cellular, Unified Access Services, National/ International Long Distance, V-Sat, Public Mobile Radio Trunked Services (PMRTS), Global Mobile Personal Communications Services (GMPCS) and other value added Services.

(ii) Both direct and indirect foreign investment in the licensee company shall be counted for the purpose of FDI ceiling. Foreign Investment shall 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. In any case, the 'Indian' shareholding will not be less than 26 percent.

(iii) FDI up to 49 percent is on the automatic route and beyond that on the Government route. FDI in the licensee company/Indian promoters/investment companies including their holding companies shall require approval of the Foreign Investment Promotion Board (FIPB) if it has a bearing on the overall ceiling of 74 percent. While approving the investment proposals, FIPB shall take note that investment is not coming from countries of concern and/or unfriendly entities.

(iv) The investment approval by FIPB shall envisage the conditionality that Company would adhere to licence Agreement.

(v) FDI shall be subject to laws of India and not the laws of the foreign country/countries.

#### 5.38.2 Security Conditions:

(i) The Chief Officer In-charge of technical network operations and the Chief Security Officer should be a resident Indian citizen.

(ii) Details of infrastructure/network diagram (technical details of the network) could be provided on a need basis only to telecom equipment suppliers/manufacturers and the affiliate/parents of the licensee company. Clearance from the licensor (Department of Telecommunications) would be required if such information is to be provided to anybody else.

(iii) For security reasons, domestic traffic of such entities as may be identified /specified by the licensor shall not be hauled/routed to any place outside India.

(iv) The licensee company shall take adequate and timely measures to ensure that the information transacted through a network by the subscribers is secure and protected.

(v) The officers/officials of the licensee companies dealing with the lawful interception of messages will be resident Indian citizens.

(vi) The majority Directors on the Board of the company shall be Indian citizens.

(vii) The positions of the Chairman, Managing Director, Chief Executive Officer (CEO) and/or Chief Financial Officer (CFO), if held by foreign nationals, would require to be security vetted by Ministry of Home Affairs (MHA). Security vetting shall be required periodically on yearly basis. In case something adverse is found during the security vetting, the direction of MHA shall be binding on the licensee.

(viii) The Company shall not transfer the following to any person/place outside India:-

(a) Any accounting information relating to subscriber (except for international roaming/ billing) (Note: it does not restrict a statutorily required disclosure of financial nature) ; and

(b) User information (except pertaining to foreign subscribers using Indian Operator's network while roaming).

(ix) The Company must provide traceable identity of their subscribers. However, in case of providing service to roaming subscriber of foreign Companies, the Indian Company shall endeavour to obtain traceable identity of roaming subscribers from the foreign company as a part of its roaming agreement.

(x) On request of the licensor or any other agency authorised by the licensor, the telecom service provider should be able to provide the geographical location of any subscriber (BTS location) at a given point of time.

(xi) The Remote Access (RA) to Network would be provided only to approved location(s) abroad through approved location(s) in India. The approval for location(s) would be given by the Licensor (DOT) in consultation with the Security Agencies (IB).

(xii) Under no circumstances, should any RA to the suppliers/manufacturers and affiliate(s) be enabled to access Lawful Interception System(LIS), Lawful Interception Monitoring(LIM), Call contents of the traffic and any such sensitive sector/data, which the licensor may notify from time to time.

(xiii) The licensee company is not allowed to use remote access facility for monitoring of content.

(xiv) Suitable technical device should be made available at Indian end to the designated security agency/licensor in which a mirror image of the remote access information is available on line for monitoring purposes.

(xv) Complete audit trail of the remote access activities pertaining to the network operated in India should be maintained for a period of six months and provided on request to the licensor or any other agency authorised by the licensor.

(xvi) The telecom service providers should ensure that necessary provision (hardware/software) is available in their equipment for doing the Lawful interception and monitoring from a centralized location.

(xvii) The telecom service providers should familiarize/train Vigilance Technical Monitoring (VTM)/security agency officers/officials in respect of relevant operations/features of their systems.

(xviii) It shall be open to the licensor to restrict the Licensee Company from operating in any sensitive area from the National Security angle.

(xix) In order to maintain the privacy of voice and data, monitoring shall only be upon authorisation by the Union Home Secretary or Home Secretaries of the States/Union Territories.

(xx) For monitoring traffic, the licensee company shall provide access of their network and other facilities as well as to books of accounts to the security agencies.

(xxi) The aforesaid Security Conditions shall be applicable to all the licensee companies operating telecom services covered under this circular irrespective of the level of FDI.

(xxii) Other Service Providers (OSPs), providing services like Call Centres, Business Process Outsourcing (BPO), tele-marketing, tele-education, etc, and are registered with DoT as OSP. Such OSPs operate the service using the telecom infrastructure provided by licensed telecom service providers and 100% FDI is permitted for OSPs. As the security conditions are applicable to all licensed telecom service providers, the security conditions mentioned above shall not be separately enforced on OSPs.

5.38.3 The conditions at para 5.39.2 above shall also be applicable to the companies operating telecom service(s) with the FDI cap of 49%.

5.38.4 All the telecom service providers shall submit a compliance report on the aforesaid conditions to the licensor on 1<sup>st</sup> day of July and January on six monthly basis.

5.38.5 (i) FDI upto 74% is allowed in following activities

(a) ISP with gateways

(b) ISP's not providing gateways i.e without gate-ways (both for satellite and marine cables) Note: The new guidelines of August 24, 2007 Department of Telecommunications provide for new ISP licenses with FDI upto 74%.

(c) Radio paging

(d) End-to-End bandwidth

(ii) FDI upto 49% would be allowed under the automatic route and above that under the Government route.

(iii) This will be subject to licensing and security requirements notified by the Department of Telecommunications.

5.38.6 (i) FDI upto 100% is allowed for the following activities

(a) Infrastructure provider providing dark fibre, right of way, duct space, tower

(IP Category I)

(b) Electronic Mail

(c) Voice Mail

(ii) The investment upto 49% is under the automatic route and beyond 49% under the Government route.

(iii) This will be subject to the condition that such companies will divest 26% of their equity in favour of Indian public in 5 years, if these companies are listed in other parts of the world.

(iv) This will be subject to licensing and security requirements notified by the Department of Telecommunications.