

**FDI Companies and the Indian Company Law:
Regulations vs. Disclosures**

A Discussion Note

Foreign Investments Study Team

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Introduction

Just as the term MSME brings into vision an entrepreneur of small means, 'private company' also brings similar emotions about people with limited resources who pool funds from close circles of family, friends and acquaintances. It is, however, a fact that the private limited company form has been abused to an overwhelming extent to achieve various ends ranging from circumventing public policy provisions to benefit from them unduly. Dozens of private companies crop up every time a scam surfaces. Promoters of many large business houses deploy hundreds or may be even thousands of private companies in their group structures, the sole purpose of a majority of them being to support the structures rather than contributing directly to any economic activity. A report by the Institute for Studies in Industrial Development, a copy of which was presented to the then Additional Secretary of the Department of Company Affairs, highlighted this aspect way back in 1992¹. An article in the Department's journal *Company News & Notes* portrayed the developments in a concise manner and gave a few important features of the sector. It was observed that the (private) company proliferation over the years and especially after 1990 could be due to many reasons.

Each one [perpetrator] can have his own motive. ... it could be indulging in transactions with listed companies for personal benefit, insider trading, to capture or initiate a industry/service association, takeover of companies, claim tax advantages, defeat provisions of the Companies Act, improve the chances of allotment in public issues, offer quotations in tenders to satisfy the requirement of minimum numbers, as tools in money laundering, as a back up mechanism when some group companies get into tax troubles, to increase chances of land allotment in industrial estates, circumventing urban land ceiling, etc.²

** The note is an outcome of the ICSSR-sponsored ongoing research project India's Inward FDI Experience in the Post-liberalisation Period - With Emphasis on the Manufacturing Sector.

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¹ K.S. Chalapati Rao and K.V.K. Ranganathan, "Review of the Directory of Joint Stock companies in India 1990", Institute for Studies in Industrial Development, 1992.

² K.S. Chalapati Rao, "Indian Private Corporate Sector: Some Characteristics and Trends", *Company News & Notes*, Issue No. 2, Vol. 34, 1997, pp. 3-12. Also available at <http://isidev.nic.in/pdf/WP9702.PDF>

In the above context, the withdrawal of a number of exemptions available to such companies in the *Companies Act, 2013* is a welcome step. The private corporate sector has been, however, seeking to dilute the provisions of the Act. The draft notification of the Ministry of Corporate Affairs dated June 24, 2014 seeks to extend some exemptions to private companies.³ As if by coincidence, a day later a Circular of the Ministry clarified that there was no bar on subsidiaries of foreign companies registered in India registering/continuing as private companies.⁴ It is obvious that foreign investors, more often than not, would have very large resources -- multiple times than most largest Indian companies. A good number of the foreign investors would even be listed abroad. In the desire to lighten the regulatory burden for small entrepreneurs can one club them with local small entrepreneurs? Can't a distinction be made between procedures and public disclosures?

FDI Cos: Growing Importance & Receding Analysis

Following the onset of liberalization of the economy, many branches of the Indian industry and services have come to be dominated by FDI companies. Considerable proportion of these inflows came through the acquisition route. Existing domestically-owned companies or joint ventures, including listed ones, have thus become FDI companies. It is also a reality that practically no new FDI company is getting listed on the Indian stock exchanges. FERA was mainly responsible for the stock market listing of many of the older companies. On the other hand, many FDI companies which were listed earlier have got delisted and more may follow suit in the coming years and eventually qualify to be converted as private companies. Astrazeneca is on the way out. The recent attempts to hike foreign shares by Hindustan Unilever and GlaxoSmithKline may be a step in that direction. Prominent among the delisted ones are: Philips, Cadbury (now Mondelez), Sulzer, Tekronix, Alfa Laval, Atlas Copco and Wartsila. (Table-1) It is true that there will not be any interest of Indian investors in the operations of unlisted foreign companies. But shareholders are only a subset of the stakeholders in a corporate entity. Given the growing importance of foreign companies in the Indian economy and their leading place in many branches, lack of public information on their operations will hamper the assessment of their contribution to the economy in various respects - output, productivity, profitability, product dominance, exports, net foreign exchange earnings, indigenization of production, technology transfer, transfer pricing, employment, etc. It needs to be underlined that foreign investment is not always a win-win proposition and there are both benefits and costs to the host economy.

³ http://mca.gov.in/Ministry/pdf/Draft_Notification_24062014_1.pdf

⁴ Ministry of Corporate Affairs, General Circular No. 23/2014 dated June 25, 2014. See also, http://articles.economicstimes.indiatimes.com/2014-06-26/news/50884694_1_subsidiaries-companies-act-corporate-affairs-ministry

Table-1
Illustrative List of Delisted FDI Companies

Alfa Laval (India) Ltd.
Atlas Copco (India) Ltd.
Avery India Ltd.
Bosch Chassis Systems India Ltd. (Kalyani Brakes Ltd)
Bosch Rexroth (India) Ltd.
BPB India Gypsum Ltd (India Gypsum Ltd)
Cabot India Ltd (United Carbon India Ltd)
Caterpillar Power India Pvt. Ltd (Hindustan Power Plus Ltd)
Denso India Ltd.
Eaton Fluid Power Ltd (Vickers Systems International Ltd)
Exedy India Ltd. (Ceekay Daikin Ltd)
FCI OEN Connectors Ltd.
Fairfield Atlas Ltd.
Fresenius Kabi Oncology Ltd. (Dabur Pharma Llttd)
GE Capital Transportation Financial Services Ltd.
GKN Driveline (India) Ltd.
Hitachi Consulting Software Services India Pvt Ltd (Sierra Optima Ltd)
Hoganas India Ltd.
ITW India Ltd. (ITW Signode India Ltd)
Igate Global Solutions Ltd.
Lotte India Corpn. Ltd.
Mather & Platt Pumps Ltd.
Micro Inks Ltd.(taken over by Huber group of Germany)
Mondelez India Foods Ltd. (Cadbury India Ltd)
Mylan Laboratories Ltd (Matrix Laboratories Ltd)
Nalco Water India Ltd (Ondeo Nalco India Ltd)
Otis Elevator Co. (India) Ltd.
Panasonic AVC Networks India Co. Ltd.
Philips Electronics India Ltd.
Ray Ban Sun Optics India Ltd.
Reckitt Benckiser (India) Ltd.
Sandvik Asia Pvt. Ltd.
Sulzer India Ltd.
Syngenta India Ltd.
Tektronix (India) Ltd.
Tudor India Ltd.
UTC Fire & Security India Ltd (Vijay Industries & Projects Ltd)
UTV Software Communications Ltd. (taken over by Walt Disney)
Wartsila India Ltd.
Yokogawa India Ltd.

It is the hard reality that India does not pay attention to the assessment of FDI commensurate with the efforts to attract it. As the Prime Minister's group put it

All announcements of successive Governments have been on the quantum of FDI received rather than on the quality of FDI. The benefits that accrued to the economy in terms of transfer of Technology, if any, is rarely highlighted *possibly because no such assessments have been made.*⁵ (emphasis added)

According to the recent "Census on Foreign Liabilities and Assets of Indian Companies", out of the 11,579 companies which reported inward direct investment, as many as 11,232 were unlisted.⁶ It is highly likely that most of them would have been incorporated as private companies. A few of the larger private FDI companies in various sectors (many of them leaders in their respective line of activity) and of different sizes of paid-up capital (PUC) are shown in Table-2. It is obvious that if all the exemptions on disclosures that are available to private companies are extended to FDI companies, critical information on major participants in very important segments of the economy would be out of public gaze.

Table-2
Illustrative List of FDI Companies Incorporated in India as Private Companies

Name of the Company	Latest PUC (Rs. Cr.)
Abbott Healthcare Pvt Ltd	2.65
Acer (India) Pvt Ltd	7.88
Adidas (India) Marketing Pvt Ltd	467.77
Airbus (India) Operations Pvt Ltd	28.79
Alcatel-Lucent Technologies (India) Pvt Ltd	91.38
Allergan (India) Pvt Ltd	8.00
Amway (India) Enterprises Pvt Ltd	21.39
Avon Beauty Products (India) Pvt Ltd	354.84
Bacardi (India) Pvt Ltd	176.41
BAE Systems (India) Services Pvt Ltd	11.00
BASF Catalysts (India) Pvt Ltd	9.18
Bausch & Lomb Eyecare (India) Pvt Ltd	33.00
Baxter (India) Pvt Ltd	389.40
BBDO (India) Pvt Ltd	2.50
Bechtel (India) Pvt Ltd	21.68
Benetton (India) Pvt Ltd	290.00
BMW (India) Pvt Ltd	155.73
BNP Paribas Asset Management (India) Pvt Ltd	210.97
Boeing International Corporation (India) Pvt Ltd	9.61

⁵ National Manufacturing Competitiveness Council, *Report of the Prime Minister's Group: Measures for Ensuring Sustained Growth of the Indian Manufacturing Sector*, September 2008.

⁶ "Annual Census on Foreign Liabilities and Assets of Indian Companies: 2012-13", *RBI Monthly Bulletin*, February 2014, pp. 107-112.

Name of the Company	Latest PUC (Rs. Cr.)
Bombardier Transportation (India) Pvt Ltd	151.20
Bridgestone (India) Pvt Ltd	745.45
Bristol-Myers Squibb (India) Pvt Ltd	246.91
Bunge (India) Pvt Ltd	14.80
CAE (India) Pvt Ltd	48.49
Canon (India) Pvt Ltd	297.60
Capgemini (India) Pvt Ltd	7.37
Cargill (India) Pvt Ltd	3.50
Carlsberg (India) Pvt Ltd	79.37
Carrefour Wc & C (India) Pvt Ltd	520.32
Casio (India) Co Pvt Ltd	30.00
Cisco Systems Capital (India) Pvt Ltd	1,797.84
Citigroup Global Mkts (India) Pvt Ltd	230.00
Coca Cola (India) Pvt Ltd	199.70
Credit Suisse Securities (India) Pvt Ltd	221.48
Daikin Airconditioning (India) Pvt Ltd	802.92
Daimler Hero Commercial Vehicles Pvt Ltd	3,935.92
Danone (India) Pvt Ltd	214.67
De Beers (India) Pvt Ltd	1.01
Dell (India) Pvt Ltd	2.50
Delphi Automotive System Pvt Ltd	406.82
Dentsu Communications Pvt Ltd	5.93
DHL Express (India) Pvt Ltd	2.86
DHL Logistics Pvt Ltd	161.48
Diageo (India) Pvt Ltd	201.04
Dow Jones Consulting (India) Pvt Ltd	45.15
DSM Sinochem Pharmaceuticals (India) Pvt Ltd	160.30
DSP Blackrock Investment Managers Pvt Ltd	20.00
EADS (India) Pvt Ltd	20.00
Ebay (India) Pvt Ltd	86.97
Eisai Pharmatechnology & Mfg Pvt Ltd	270.40
Eli Lilly & Co (India) Pvt Ltd	22.93
Emerson Electric Co (India) Pvt Ltd	5.91
Ericsson (India) Pvt Ltd	72.50
Essilor (India) Pvt Ltd	375.00
Exxon Mobil Lubricants Pvt Ltd	86.40
Ford (India) Pvt Ltd	570.00
Fresenius Kabi (India) Pvt Ltd	153.38
Fujitsu (India) Pvt Ltd	23.00
General Atlantic Pvt Ltd	3.93
General Mills (India) Pvt Ltd	95.51
General Motors (India) Pvt Ltd	4,707.83
Gillette Products Pvt Ltd	50.81
Glencore Grain (India) Pvt Ltd	16.00

Name of the Company	Latest PUC (Rs. Cr.)
Glencore (India) Pvt Ltd	8.02
Goldman Sachs (India) Securities Pvt Ltd	373.23
Haier Appliances (India) Pvt Ltd	103.51
Heidelberg (India) Pvt Ltd	19.00
Heinz (India) Pvt Ltd	10.42
Hewlett Packard Financial Services (India) Pvt Ltd	628.20
Hindustan Coca-Cola Holdings Pvt Ltd	6,379.05
Hindustan Coca-Cola Beverages Pvt Ltd	1,351.83
Hitachi (India) Pvt Ltd	34.40
Holcim (India) Pvt Ltd	5,690.39
Honda Motorcycle & Scooter (India) Pvt Ltd	310.00
Honeywell Turbo Technologies (India) Pvt Ltd	324.00
Hospira Healthcare Pvt Ltd	2.85
HSBC Electronic Data Processing (India) Pvt Ltd	355.47
HSBC Securities & Capital Markets (India) Pvt Ltd	495.11
Hyundai Construction Equipment (India) Pvt Ltd	311.85
IBM (India) Pvt Ltd	230.36
Itochu (India) Pvt Ltd	125.82
John Deere (India) Pvt Ltd	344.86
JP Morgan (India) Pvt Ltd	86.62
KFCH Restaurants Pvt Ltd (Kentucky Fried Chicken)	164.85
Kellogg (India) Pvt Ltd	75.80
Kimberly Clark Lever Pvt Ltd	79.40
Kone Elevator (India) Pvt Ltd	34.95
Lafarge (India) Pvt Ltd	456.41
Lafarge Aggregates & Concretes (India) Pvt Ltd	1,675.84
Lanxess (India) Pvt Ltd	741.52
Lenovo (India) Pvt Ltd	529.64
Levi Strauss (India) Pvt Ltd	37.56
LG Electronics (India) Pvt Ltd	113.13
LG Polymer (India) Pvt Ltd	126.33
Louis Dreyfus Commodities (India) Pvt Ltd	26.03
Marks & Spencer Reliance (India) Pvt Ltd	98.49
Mattel Toys (India) Pvt Ltd	143.67
McCain Foods (India) Pvt Ltd	481.58
McDonalds (India) Pvt Ltd	317.29
Mercedes Benz (India) Ltd	600.00
Metro Cash & Carry (India) Pvt Ltd	1,145.63
Michelin (India) Tamilnadu Tyres Pvt Ltd	2,102.28
Mitsubishi Electric (India) Pvt Ltd	180.00
Monsanto Holdings Pvt Ltd	346.11
Morgan Stanley (India) Capital Pvt Ltd	698.66
Morgan Stanley (India) Primary Dealer Pvt Ltd	297.60
NEC (India) Pvt Ltd	145.70

Name of the Company	Latest PUC (Rs. Cr.)
Nestle R&D Centre (India) Pvt Ltd	210.14
New Holland Fiat (India) Pvt	1,248.55
Nielsen (India) Pvt Ltd	20.82
Nike (India) Pvt Ltd	8.68
Nissan Motor (India) Pvt Ltd	1,030.00
Nokia (India) Pvt Ltd	35.58
Nokia Siemens Networks (India) Pvt Ltd	12.43
Nomura Financial Advisory & Securities (India) Pvt Ltd	309.61
Novartis Healthcare Pvt Ltd	6.00
Novell Software Development (India) Pvt Ltd	20.00
Novo Nordisk (India) Pvt Ltd	26.50
Oriflame (India) Pvt Ltd	79.90
Osram (India) Pvt Ltd	131.53
Panasonic (India) Pvt Ltd	773.80
Pepsi Foods Pvt Ltd	185.41
Pepesico (India) Holdings Pvt Ltd	3,694.99
Perfetti Van Melle (India) Pvt Ltd	57.83
Perrigo API (India) Pvt Ltd	43.07
Posco (India) Pvt Ltd	765.00
Posco Maharashtra Steels Pvt Ltd	1,500.76
Puma Sports (India) Pvt Ltd	110.38
Renault Nissan Automotive (India) Pvt Ltd	4,001.72
Samsonite South Asia Pvt Ltd	35.49
Samsung (India) Electronics Pvt Ltd	216.79
Sandvik Asia Pvt Ltd	119.62
Sanofi Pasteur (India) Pvt Ltd	15.28
Schindler (India) Pvt Ltd	121.79
Schneider Electric (India) Pvt Ltd	701.36
Shell (India) Markets Pvt Ltd	2290.68
Siemens Corporate Finance Pvt Ltd	313.41
Skoda Auto (India) Pvt Ltd	235.40
Solvay Specialities (India) Pvt Ltd	325.00
Sony (India) Pvt Ltd	62.36
Sumitomo Corporation (India) Pvt Ltd	37.66
Swarovski (India) Pvt Ltd	74.14
Swatch Group (India) Pvt Ltd	328.00
Tevapharm (India) Pvt Ltd	111.44
Thermax Babcock & Wilcox Energy Solution Pvt Ltd	313.98
Thomson Reuters (India) Pvt Ltd	57.24
Thyssenkrupp Electrical Steel (India) Pvt Ltd	314.93
Thyssenkrupp Elevator (India) Pvt Ltd	130.16
TNT (India) Pvt Ltd	207.89
Toshiba (India) Pvt Ltd	34.27
Total Oil (India) Pvt Ltd	27.18

Name of the Company	Latest PUC (Rs. Cr.)
Toyota Kirloskar Motor Pvt Ltd	700.00
Turner International (India) Pvt Ltd	25.01
Unilever Industries Pvt Ltd	40.00
UPS Jetair Express Pvt Ltd	21.00
Volvo Buses (India) Pvt Ltd	38.86
Wal-Mart (India) Pvt Ltd	1,225.27
Warburg Pincus (India) Pvt Ltd	5.33
Wrigley (India) Pvt Ltd	114.40
Yahoo Software Development (India) Pvt Ltd	65.45
Yamaha Motor (India) Pvt Ltd	705.60
Yum Restaurants (India) Pvt Ltd	253.51
Zoetis Pharmaceutical Research Pvt Ltd (earlier Pfizer Pharmaceutical (India) Pvt Ltd)	507.73

Source: Ministry of Corporate Affairs.

Unfortunately, official agencies have failed to provide useful analysis on the functioning of the Indian corporate sector. In fact, the situation has gone from bad to worse. There was a time when the Research & Statistics Division of the then Ministry of Law, Justice and Company Affairs used to bring out Factsheets on Foreign Branches, Indian Subsidiaries of Foreign Companies, Large Non-Government Companies, etc. on a regular basis. A couple of CDs were also brought out giving some basic information on a large number of companies. These are no longer being continued. On the other hand, the studies on finances of different sets of companies including FDI Companies by RBI are becoming increasingly perfunctory. RBI's coverage is also woefully inadequate. When efforts are being made to streamline corporate data and its filing, it is puzzling as to why initiatives to improve the analysis are missing.

Further, there are a number of problems with the way data are being uploaded to the MCA website. It appears that there is no close scrutiny as to the contents of the filings. Conversion from XBRL to pdf is yet another issue. Also, the Director's Report should be self-contained. It should not refer to any other place in the document or schedule or notes. This is more relevant now in the context of the new Act demanding enhanced disclosures in the Board's Report. The contents should be defined precisely otherwise companies can interpret the provisions differently making cross-company comparisons meaningless. For instance, foreign exchange utilization should cover the details of all forms of outgo instead of merely the imports. ISID faculty was also associated with a background paper for the National Statistical Commission.⁷ The Commission adopted the proposed Balance

⁷ K.S. Chalapati Rao and Nagesh Kumar, "A Reform of the Corporate Sector Statistics: Some Suggestions", A Note Submitted to the National Statistical Commission, December 6, 2000. Available at <http://isidev.nic.in/pdf/WP0002.pdf>.

Sheet Abstract & Company's General Profile in the recommendations (given at Annexure 12.3 of the Commission's Report).⁸ It would be a good idea to incorporate such an Abstract, which is suitably modified to the changed circumstances, as a part of the Director's Report.

There is a need to involve public organisations in the analysis of corporate data. Pertinently, the MCA admitted its inability to get all the balance sheets examined by the ROCs. It explained that:

Balance sheets of all the companies who carry out the filing are available for public inspection on the portal of this Ministry... The underlying idea behind the filing of balance sheets and other documents which require similar filings is to publicly disclose information which reflects various aspects of the working of a company so that the company's public accountability is maintained. It is neither intended nor feasible for the Registrars to scrutinize or verify the contents of filing except on a random basis.⁹

Disclosure is only a necessary condition for securing public accountability. Unless the information is analysed, it is as good as non-existent. To facilitate such analysis, the government should provide access to the filings to recognized/accredited public organisations on special terms and conditions. Encouraging such bodies is all the more necessary because official agencies, even with the best of intentions, for instance, will be constrained to make realistic assumptions. The present practice of payment for viewing individual company filings which limits the access to three hours is proving to be cumbersome and frustrating especially with the Ministry's website often playing truant and titles of many submissions not conveying the contents of the filings.

In general, the following points may also be considered.

- Online filings should be meaningful and amenable to time series comparisons for a company and across different companies. At present a lot of relevant information is provided in text format and thus is not amenable for quick and easy access. Exemptions from disclosures should be exceptions rather than rule.
- Related party transactions should be disclosed in such a manner that facilitates the assessment of arm's length relationship.
- Each company should declare its ultimate beneficiary interests along with the annual return and accounts, at the end of the year and changes during the period. Names of the companies should be prominently displayed outside the registered offices.
- MCA21 software should facilitate cross-referencing of name changes, mergers & amalgamations, shifting of registered offices and directors' historical affiliations.
- Companies other than those registered with SEBI as stock market intermediaries should declare their investments not only at the end of the financial year but also when changes/new investments occur.

⁸ http://mospi.nic.in/Mospi_New/upload/ax1203.htm

⁹ Ministry of Corporate Affairs, General Circular No. 37/2012 dated November 6, 2012.

By way of Summing Up

In the new regime, private corporate sector has been given the lead role. Therefore, it is all the more imperative that its functioning should be understood in as much detail as possible to plan for the future and to take up course corrections. Company level data have definite advantages over the Annual Survey of Industries not only because they provide many qualitative and quantitative dimensions to the operations of industrial enterprises, they also go beyond the industrial sector and thus help understand the state of affairs of many services and primary sectors as well. In the absence of detailed information and the official agencies retracting further, proper understanding of the Indian corporate sector and consequently, various segments of the economy will become not only difficult but also impossible. Such an environment is ripe for those who wish to mould public policy/opinion to their advantage.

Needless to say, the operation of FDI affiliates in the country is not of exclusive preserve of the foreign shareholders. It is a major public policy concern. The uniform exemption/protection provided to private limited companies in case of Profit & Loss account seriously hampers sectoral studies and meaningful comparisons of FDI companies with domestic ones. Categorisation of FDI companies as private companies for purposes of disclosure, therefore, needs to be reviewed urgently. The disclosures should be uniformly applicable to all companies above a certain threshold defined in terms of PUC, assets or turnover irrespective of their incorporation under the *Companies Act*. Foreign branches, holding companies, ULL Cos and LLPs having commercial operations should also be made to file online submissions. There is a need to make a clear distinction between disclosures and procedures. There can be exemptions from procedures given the special attributes of private companies but a similar treatment should not be extended to them uniformly in respect of disclosures. The Rules and Guidelines under the *Companies Act, 2013* may, therefore, be framed suitably.