

TIMES NETWORK COMMENTS

ON

TRAI's PRE-CONSULTATION PAPER

ON

**INPUTS FOR FORMULATION OF
NATIONAL BROADCASTING POLICY**



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WITHOUT PREJUDICE

INTRODUCTION :

The Telecom Regulatory Authority of India (TRAI) received a reference from the Ministry of Information and Broadcasting (MIB) vide its letter dated 13 July 2023 regarding formulation of a National Broadcasting Policy and has sought TRAI's considered inputs under Section 11 of the TRAI Act, 1997 for formulation of National Broadcasting Policy. Accordingly, TRAI has sought inputs on the formulation of a National Broadcast Policy (NBP) and has floated a pre-consultation paper on the issue.

The policy aims to project India's diverse culture, rich heritage, and help in the transition to a digital and empowered economy. The scope of the policy is largely related to TV and radio broadcasting.

Specific comments and suggestions are sought on various aspects, including Public Service Broadcasting, Policy and Regulation, Promotion of Local Content, Piracy and Content Security, Technology Innovation & Standardization, Convergence, Specific Regulatory Authority for Broadcasting, Grievance Redressal, Role of Broadcasting during Disaster, Audience Measurement System, Social Goals, Environmental Responsibility, and the Animation, Visual Effects, Gaming, and Comics (AVGC) segment.

At the outset we feel that the need for formulating such policy is not specified by MIB or TRAI. Presently, there are sectoral laws and regulations which govern the different mediums of the broadcasting sector. Though the objectives of these mediums are dissemination of news, information, entertainment etc. however they differ widely in the way they are consumed by the people. Each medium has its own unique features and challenges and offers different experiences to the users.

The broadcasting sector is governed by service specific Act, Rules, Guidelines, TRAI's Regulatory framework etc. A common approach may not be suitable to all kinds of media. For example, while the stricter FDI norms may be required for print media, liberal FDI is allowed for the television media operating in the entertainment space. Similarly foreign ownership and control may be permitted in certain categories of

entertainment television broadcasting but may not be appropriate for the medium such as print or radio.

Different media sectors cannot be treated by same set of Rules and need separate individual regulations as exists presently.

TRAI has been entrusted with the task of regulation of television broadcasting services in the country from the year 2004. Over a period, TRAI in consultation with the various stakeholders have been formulating various Regulations for the carriage part of the broadcasting services viz Interconnection Regulations, Tariff Orders etc. There is elaborate Quality of Standards Regulations as well which has been prescribed by TRAI.

The Telecom Regulatory Authority of India (TRAI), w.e.f. 1st February, 2019 implemented the New Regulatory Framework consisting of following regulations governing the broadcasting and cable industry :-

The Telecommunications (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 ;

The Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 ; and

The Telecommunications (Broadcasting and Cable) Services Standards of Quality of Service and Consumer Protection (Addressable Systems) Regulations, 2017.

These regulations were made after comprehensive review of the erstwhile regulations and these regulations replaced the earlier regulations including various amendments to the regulations. These are collectively & commonly referred to as New Regulatory Framework/new regime/ NTO. These regulations introduced a retail regime based on MRP price declared by the broadcasters and the viewer chooses the offerings, whereas the distributors (DPOs) were assured of a fixed income in the form of NCF and got further fees and incentives for acting as the intermediaries. The regime also incorporated provisions of interconnection (including 'must provide' and 'must carry') between the service providers (broadcasters and distributors) on transparent and non-discriminatory terms etc.

There was a very long drawn process of due consultation prior to making these regulations and the views / counter views of the various stakeholders were considered while framing these regulations. The Regulations were also subject to

extensive legal challenge and the New Regulations were implemented with effect from 1st February 2019.

The NTO was subsequently amended in January 2020 and November 2022. Further, recently TRAI has issued another consultation paper to look into certain issues mainly related to distributors. Hence, TRAI has been regulating the carriage side of the broadcasting services. Similarly, TRAI also regulates and make recommendations with respect to the private radio services.

Hence, we feel that the **status quo should be maintained** as there is no need for a National Broadcasting Policy as existing separate regulations are fine and have stood test of time.

We offer below our comments on some specific issues concerning the broadcasting industry:

- 1) **Grievance Redressal Mechanism/ Self-Regulation**: The CP seeks comments on importance and modalities of a robust grievance redressal mechanism.

Self-regulation should be given the utmost importance and should be the norm and not the exception. It is important to establish the importance of self-regulation as a principle to regulate media. It is the accepted best practice throughout the world that the development of an independent broadcasting industry is of paramount importance.

In fact, the importance of self-regulation has also been highlighted in the recommendations of the Nariman Committee wherein the Committee endorsed the need for the formation of effective institutional arrangements of self-regulation. The Hon'ble Supreme Court has elaborated on this in its judgment titled ***Destruction of Public & Private Properties v. State of A.P., (2009) 5 SCC 212***, wherein it emphasised on the role of media and the significance of Self-Regulation.

In the context of the Indian broadcasting industry, it is submitted that, at present, there is a sufficient broadcast regulatory framework to oversee the broadcasting

sector, which primarily consists of "statutory regulation" and "self-regulation", falling from the Cable Television Network Act, 1955 ("**CTN Act**"), the Rules framed thereunder, the Guidelines for Uplinking and Downlinking of Television Channels, 2022, as well as the NBDA Code of Ethics.

In fact, MIB in its counter affidavit filed in SLP (C) No. 17959 of 2023 titled "*News Broadcasters Association v. Union of India*" has also affirmed that there is no statutory vacuum, in so far as regulation of the broadcast of irresponsible reporting, and grievance redressal mechanism for the viewers is concerned, stating:

"(i) That there is no statutory vacuum, in so far as regulation of the broadcast of irresponsible reporting and grievance redressal mechanism for the viewers is concerned;..."

The recently formulated Cable Television Networks (Amendment) Rules, 2021 provide a comprehensive statutory three-tier grievance redressal mechanism for any individual who is aggrieved or affected by a broadcaster. As per the said amendment:

- a. At **Tier-1**, the broadcasters have a mechanism of internal regulation by way of appointment of a grievance officer, to receive the complaints and provide redressal.
- b. At **Tier -2** is the self-regulation by the self-regulating bodies of the broadcasters (the most prominent one being the NBDSA). At this level, the complainant can file an appeal against the decision or inaction of the grievance officer in resolving a complaint.
- c. Finally, **Tier-3**, comprises of an Inter-Ministerial Committee under the Oversight Mechanism which provides oversight either by taking *suo moto* cognizance or by hearing the appeals against the orders passed by the self-regulatory bodies.

Although the first two tiers of the present redressal system are effective and sufficient to ensure grievance redressal, the third – tier namely "*Oversight mechanism*" disrupts the flow of self-regulation and results in governmental intervention at the microscopic level.

In view of this, the said Amendment Rules, 2021 were challenged before the Hon'ble Kerala High Court in WP (C) No. 14239 OF 2021 titled "*The News Broadcasters Association & Ors vs Ministry of Information and Broadcasting, Union of India*". In the said Writ Petition, the Hon'ble Kerala High Court was pleased to pass the following interim order:

"In the light of the interim order passed by this Court in WP(C).No.13675 of 2021, there will an interim order directing the respondents to refrain from taking coercive action against the petitioners for not complying with Cable Television Networks Amendment Rules 2021 (Ext.P3) pending disposal of the writ".¹

The decisions made by the self-regulating authorities are borne out of the expertise of the experts in the field as well as the judicial prudence of the retired Supreme Court or High Court judges. Therefore, over-regulation of self-regulatory bodies by the Executive will result in the curbing of the independence of the self-regulatory bodies, which are indispensable to the development and growth of an independent broadcasting industry.

Thus, the present system of grievance redressal wherein the self-regulatory bodies adjudicate and deliver their decision on the complaints made by the viewers for the potential violation of the existing statutory mandates, is adequate and efficient. Moreover, to ensure further efficiency, these self-regulatory bodies also formulate their own Codes of Ethics and Conduct to ensure increased scrutiny and demonstratable standards to be followed by the broadcasters.

The self-regulatory bodies thus ensures that a robust and adequate grievance redressal mechanism exists alongside the statutory regime, to ensure compliance with the Programme Code and the Advertising Code.

Thus, there is a need to ensure and promote the self-regulatory mechanisms that the industry has proven to be effective over the years. The IT Act must be amended to remove the oversight mechanism as provided for under Tier III.

2) **Grant of Infrastructure Status to TV Broadcasting Industry**

The grant of Infrastructure Status has been a long-pending demand by the broadcast sector. The role of TV broadcast media in educating and informing the people is indisputable. The grant of Infrastructure status to the TV Broadcasting Industry will make easier credit facilities available at cheaper rates, grant of preferential tax rates etc. This will also benefit the viewers in terms of availing the high-quality content at affordable costs.

3) **Mandatory carriage of news channels**

The news channels must be mandatorily carried and be made available on the network of the distributors without any cost / carriage cost imposed upon the news broadcasters / news channels.

News and current affairs channels are very important for dissemination of news and information. They not only disseminate news, but also forms public opinion on various matters of national importance. Mostly, these news channels are free to air, and earn their revenues through advertisement and not through subscriptions. If these channels are not given the opportunity of reaching viewer's homes, they cannot survive. Though, the extant TRAI Regulations prescribe "Must Carry" conditions, but in practice, the situation is different. In spite of the regulatory framework, FTA news channels face in-numerous difficulties in carriage and placement of their channels on the distributors platforms and reaching the targeted viewers. The high cost of carriage fees and placement fees poses existential threat to such channels. Even very few news channels, which are pay charge a very nominal subscription amount.

Hence, with the development of compression technologies which enables enhancing the capacity of the distributor's network, mandatory placing of all FTA news channels on the distributor platform should not be difficult to achieve.

The distributors already get a fixed minimum NCF of Rs. 130/- which covers their cost of operations and a decent profit margin. Hence, it should be the duty of the DPO to upgrade the platform to carry all the channels which have received downlink license in the country. if all available FTA news channels were to mandatorily be placed on their network, it will not cause any harm to any stakeholders. The broadcaster's channels will be carried, the DPOs will offer more variety at to the

consumers for the cost which they pay towards NCF. The consumers will also be happy as they get value for money and able to watch the diverse and multiplicity of viewpoints by watching different news channels. There will be lesser cord-cutting by consumers.

To start with, the DPOs should be mandated to carry all news channels mandatorily followed by having a carrying capacity to carry all permitted TV channels whether FTA or pay.

4) Convergence of policy framework for broadcasting, IT and Telecom

It is our submission that the broadcasting sector, for one, must be continued to be governed by a separate policy/regulatory framework. With a proposed converged policy framework, there is (a) the risk of “false equivalence” being drawn between the sectors; and (b) the risk of regulation of certain sectors by people who are not competent, specialized, or focused enough to deal with sector-specific issues. Convergence is a technological construct and as such, it must not be misconstrued to converge the policy framework.

At the same time, it must be noted that with convergence of technologies, there is no concept of ‘geographical markets’. Hence, there should not be any attempts to impose horizontal cross media curbs using arguments of monitoring/controlling ‘concentration’, ‘market share’, etc.

Hence, no common policy which aims to converge the Broadcasting, IT and Telecom sectors should be proposed or introduced.

5) Broadcast sector not to be equated with telecom sector especially w.r.t. Licensing norms and spectrum allocation:

The broadcast sector should not have similar license terms akin to telecom sector and the distinction should continue to be maintained. The broadcast sector deserves separate and distinct treatment when it comes to spectrum assignment and the said Band must continue to be allocated on an administrative basis as against taking up any auction route.

Further, there is a need to extend vertical integration caps to Telecom Service Providers entering media to ensure level playing field

As the boundaries are blurring between the broadcasting and telecom sectors due to the advent of digital technologies, there is a need to revisit the governance structure to ensure orderly growth of broadband, broadcasting and the IT sector.

In light of the above fast evolving scenario, there is urgent need for a level playing field and to extend the 20% vertical integration equity cap** in broadcasting content/carriage to telcos as well, whereby a telecom operator would not be allowed to hold/own more than 20% of the total paid up equity in a content company and vice versa, and will also not be allowed to hold/own more than 20% of the total equity share in any other kind of media distribution platform like cable network companies and vice versa.

*** Policy Guidelines of DTH dated 15.3.2001*

Para 1.4 The Licensee shall not allow Broadcasting Companies and/or Cable Network Companies to collectively hold or own more than 20% of the total paid up equity in its company at any time during the License period. The Licensee shall submit the equity distribution of the Company in the prescribed proforma (Table I and II of Form-A) once within one month of start of every financial year. The Government will also be able to call for details of equity holding of Licensee company at such times as considered necessary.

Para 1.5 The Licensee company not to hold or own more than 20% equity share in a broadcasting and/or Cable Network Company. The Licensee shall submit the details of investment made by the Licensee company every year once within one month of start of that financial year. The Government. will also be able to call for details of investment made by the Licensee company in the equity of other companies at such times as considered necessary.

*Further, the **Amendment** to the DTH Guidelines dt. 30.12.2020 imposes restriction on the a vertically integrated DTH as follows :*

Para 3.Vertically Integrated Entity: Reserving of operational channel capacity: A vertically integrated entity will not reserve more than 15% of the operational channel

capacity for its vertically integrated operator. The rest of the capacity is to be offered to the other broadcasters on a non-discriminatory basis'

The evolving/changing landscape:

- With the advent of OTT, telecom companies have been aggressive in pushing OTT content through their distribution chains, something which the TV sector has not been able to do due to instant regulations. Today, there are over 40 OTT platforms with 400 million customers; According to FICCI-EY Report 2021, digital subscriptions rose by 49% in 2020. Digital and OTT sectors registered a growth of 26%, the highest amongst other M&E segments. According to the PwC Report of Global Entertainment and Media Outlook 2020-2024, with a CAGR of 28.6%, India will be the fastest growing OTT market. It predicts 16% year-on-year decline in TV ad revenue and 59% year-on-year decline in box office revenue while predicting a 16.1% growth in digital newspaper and circulation revenue. The OTT players have been successful in controlling and influencing the entire media distribution chain, primarily due to (1) Lower service costs as compared to cable and satellite services; (2) Leveraging the distribution pipe provided by telecom players more effectively; (3) direct delivery of services to the consumers. On the other hand, broadcast companies incur high costs for distribution of their content through cable operators and DPOs.
- Apart from OTT, a few Indian telcos also own television broadcasting/content production companies, including news channels. Despite the telecom sector directly competing with media in terms of controlling the distribution of such content, unlike broadcasting, there are no restrictions or regulations imposed on telcos which own media content on multiple platforms like TV and Online. Telcos have also acquired cable and satellite service providers and have thus entered the media distribution space in addition to their ownership of content pumped out in different formats and platforms. **Hence, telcos are today one of the biggest distributors of content, data and information in every form which has become a major activity and source of revenue. Their ownership of content for different platforms as well as all parts of the broadcast media value chain from content to carriage, raises hard questions on both dominance as well as possible abuse of dominance.**

- The TV broadcast sector is facing the same and stiffer challenge from OTT players and does not have the liberty or the freedom under extant regulations to effectively deal with this challenge. Any horizontal integration restrictions would effectively deprive the broadcast sector from meeting even the OTT challenge even as telcos have been given a free hand to deal with OTT competition –apart from ensuring the demise of independent media distribution entities since telcos are allowed unrestricted ownership of any content and any distribution platforms, unlike the broadcast sector.
- Specifically in the distribution segment, there is lack of parity in the regulations and laws and is evident from the fact that telecom sector is not subject to regulations such as the Interconnect Regulations, Tariff Orders, etc., that broadcast media is currently subject to, nor is there any mention of the convergence threat that telecom brings with it while even owning broadcast media.
- It may also be not out of context here to mention that there are only a handful of players in the telecom sector and the public sector presence has been reduced to a great extent –and hence, this aspect is all the more cause for concern.
- **It is clear that telcos’ unrestricted transgression into the media content and distribution space has encouraged complete vertically integrated ownership where the entire chain of content creation and delivery/distribution across multiple platforms is controlled by the same entities using their own infrastructure and platforms. This aspect needs specific attention from the sector regulators (TRAI/ MIB/ MEITY) as it clearly poses a threat to a fair and level playing market for all constituents. There are no regulations at present to put a check on such vertical integration by telcos and it is vital that TRAI look at this challenge that poses a serious threat to the media broadcasting segment.**

The MIB and the TRAI, recognizing this issue, have already imposed certain restrictions on vertical integration. The DTH Guidelines restricts broadcasting companies and/or cable network companies to own more than 20% of the total equity of the DTH company and vice versa. Likewise, the HITS Guidelines restrict broadcasting companies and/or DTH companies to own more than 20% of the total equity of the HITS company and vice versa. **However, there are no such restrictions on telecom companies and in order to ensure level playing field, TRAI must recommend and ensure that no broadcasting company is permitted to hold/own more than 20% equity share in any distribution company (including cable, DTH, IPTV, HITS, telecom and internet companies), and vice-versa and that no telco can hold/own more than 20% in any broadcasting company whether content or carriage, and vice versa.**

While the aforesaid guidelines are already effective, what the TRAI may recommend is the much-needed clarification on the 20% shareholding concept i.e. that shareholding of 20% does not directly or indirectly indicate having “control” in an entity. While equity holding may be the most quantifiable means to measure control – however we are of the view that it is not possible to determine a minimum equity holding to determine ‘control’ of an entity. Our view emanates from the fact that even a shareholder who holds as less as 20% (say) may be in a position to influence the decisions of the entity if the entity is widely held.

There is a need to ensure restrictions imposed under the extant regulations apply to all service providers who are vertically integrated. For instance, the reserving of operational channel capacity of not more than 15% for a vertically integrated operator as recommended by the TRAI and prescribed by the MIB for DTH, similar threshold needs to be put in place for other distribution platforms.

In order to ensure a level playing field for all participants in a given media sector, it is imperative that specific and strict measures are put into place, in the absence of which vertically integrated groups/entities could dominate the market and render it uncompetitive, thus leaving the industry in bad health.

6) **Ease of Doing Business (EODB):**

There should be continued focus on EODB in the broadcasting sector wherein self-certification should be the norm and the intimations should suffice from a regulatory point of view.

7) **Opening up of terrestrial broadcasting to private sector:**

The terrestrial broadcasting should be opened to the private sector so that they can operate the ground based channels.

8) The Issue of public service broadcasting in India

Without prejudice to the legal challenge, it is submitted that the present mandate under Clause 35 of the Guidelines for Uplinking and Downlinking of Television Channels, 2022, regarding Public Service Broadcasting should be withdrawn by MIB since by seeking to impose obligations upon broadcasters in respect of the content, it is effectively seeking to regulate content on ground of “public interest” which is impermissible in law.

The mandatory obligations upon the broadcasters to telecast content under several heads in respect of obligation of public service broadcasting and the compliance thereunder is onerous, oppressive and violative of the free speech rights of the media. Further, the contents of the clause does not fall within any of the restrictions under Article 19(2) since the terms “national importance and social significance” do not fall under any of the categories of restrictions which is permissible in law. That while exempting sports channels, devotional, spiritual channels and yoga channels from compliance, the provision is discriminatory, does not satisfy the test of intelligible differentia and is violative of Article 14.

Pertinently, "News and Current Affairs" channels, in any event, telecast topics of public importance including on subject matters mentioned in Clause 35 such as, education and spread of literacy; agriculture and rural development; health and family welfare; science and technology; welfare of women; welfare of the weaker sections of the society; protection of environment and of cultural heritage, national integration, run various televised marathons, donation drives, special campaigns on various social issues from time-to-time which subject matters are "public interest". The channels also carry other news and stories of public interest pertaining to gender, right to privacy, right to livelihood, sports, and content on a whole gamut of other issues relevant to the country, society and the public. As the very purpose of news and current affairs channel is to convey news and views of public interest and public importance. Therefore, prescribing PSB obligation on news broadcasters is utterly irrational, arbitrary and amounts to treating unequals equally.

9) The 5 strike Rule

The 5 strike rule as provided in the Uplinking and Downlinking Guidelines 2022 should be withdrawn. As stated earlier, the broadcasting sector should be subject to self-regulation and there should not be direct or indirect fetters in the freedom of speech and expression of media entities.

10) The issue of Separate Regulatory Authority for Broadcasting

The mandate of regulating the Broadcasting sector lies with the Ministry of Information & Broadcasting (“**MIB**”). This is evident from the Government of India (Allocation of Business) Rules, 1961.² As per the said Rules, the MIB is concerned with all matters relating to “broadcasting policy and administration”, inasmuch as it includes:

“1. All matters relating to radio and television broadcasting within the Union including regulation of the use of All India Radio and Doordarshan by recognised national and regional political parties during elections to the Lok Sabha and State Assemblies and procedure to be followed by the official electronic media during periods of national mourning on the demise of a high dignitary.

2. The enunciation and implementation of the law relating to radio and television broadcasting in India by private Indian companies or Indian nationals

....

3. Cable Television Networks (Regulation) Act, 1995 (7 of 1995)” (emphasis supplied)

Further, TRAI has been set up under the TRAI Act, 1997 and has been entrusted with the functions to ensure technical compatibility and effective interconnection between different service providers, fix the terms and conditions of the interconnectivity between the service providers, and regulate arrangement amongst

service providers for sharing their revenue derived from telecommunication services. The Central Government notified the broadcasting and cable services to be telecommunication services in the year 2004. In discharge of the said functions, TRAI has notified regulatory framework for interconnection between service providers of the broadcasting sector from time to time.

It is submitted that as per the CTN Act, and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Ministry of Information and Broadcasting is the nodal ministry that regulates/grants permissions to the broadcasting sector in India. We firmly believe that MIB must continue to play the role of the broadcasting regulator/licensor in India with TRAI being carriage regulator and there is no immediate or even long-term need to appoint a specific regulator for broadcasting.

Conclusion:

1. There is no need for introducing National Broadcasting Policy as there are well settled Acts, Rules, Regulations, Guidelines, Self-Regulating Codes already in place and which have stood the test of time.
 2. There is no need to set up a separate Regulatory Body for the broadcasting sector.
 3. There does, however, exist a need to extend the 20% vertical integration ownership rule present in broadcasting, to telcos owning content and vice versa, as well as to telcos owning any part of the media distribution value chain.
 4. There should be continued focus on ease of doing business and the specific issues concerning journalistic freedom should be addressed.
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