

# **MEDIA OWNERSHIP MONITOR INDIA**

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## **Legal Assessment**

Contextualization for the Media Ownership Monitor – India 2019

Authored by Nisha Bhambhani

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### Contact

Nafisa Hasanova  
Senior Project Manager RSF India  
[nh@reporter-ohne-grenzen.de](mailto:nh@reporter-ohne-grenzen.de)  
+32 488258553 (Belgium)  
+917303435774 (India)

Syed Nazakat  
Founder and Editor-in-Chief  
DataLEADS  
[editor.dataleads@gmail.com](mailto:editor.dataleads@gmail.com)  
+919818395504

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### Abbreviations

Advertising Standards Council of India	ASCI
Broadcasting Content Complaints Council	BCCC
Broadcast Research Council of India	BARC
Community Radio Stations	CRS
Competition Commission of India	CCI
Digital Platform Owners	DPOs
Directorate of Advertising and Visual Policy	DAVP
Direct To Home	DTH
Department of Space	DoS
Department of Revenue	DoR
Department of Telecommunications	DoT
Electronic Media Monitoring Centre	EMMC
First Come First Serve	FCFS
Foreign Direct Investment	FDI
General Sales Tax	GST
Head-End-in the Sky	HITS
Indian Broadcasting Foundation	IBF
Inter-Ministerial Committee	IMC
Internet Protocol Television	IPTV
Indian Readership Survey	IRS
Local Cable Operator	LCO
Ministry of Corporate Affairs	MCA
Ministry of Home Affairs	MHA
Ministry of Information & Broadcasting	MIB
Multi System Operator	MSO
National Frequency Allocation Plan	NFAP
National Company Law Appellate Tribunal	NCLAT
Net Neutrality	NN
News Broadcasting Standards Authority	NBSA
News Broadcasters Association	NBA
Network Operation & Control Centre	NOCC
Over-The-Top Services	OTT
Press Council of India	PCI
Registrar of Newspaper	RNI
Registrar of Companies	ROC
Securities and Exchange Board of India	SEBI
Telecom Regulatory Authority of India	TRAI
Telecom Service Providers	TSPs
Telecom Disputes Settlement and Appellate Tribunal	TDSAT
Television Audience Measurement	TAM
Traffic Management Practices	TMPs
Tax Deducted at Source	TDS
Television Rating Points System	TRPs
Wireless Coordination & Planning Wing	WPC

## Legislations

The Indian Telegraph Act, 1885

The Cable Television Networks (Regulation) Act, 1995 (CTN Act)

The Cable Television Networks Rules, 1994 (CTN Rules)

The Competition Act of India, 2002

The Indian Penal Code, 1860 (IPC)

The Information and Technology Act, 2000 (IT Act)

Right to Information Act, 2005 (RTI Act)

The Telecom Regulatory Authority of India Act, 1997 (TRAI Act)

The Prasar Bharati (Broadcasting Corporation of India) Act, 1990

## INTRODUCTION

The KPMG Report of September, 2018 estimated that the media industry in India was expected to reach USD 38.34 billion in the financial year 2023.<sup>1</sup>

The position in India in relation to media monopolies or media concentration has been summed up well in the article *Mapping the Power of Major Media Companies in India* where it was pointed out that since the media has always depended on advertising revenues rather than subscription revenues, it has resulted in the owners creating media properties favorable to the advertisers. The media which gets those maximum advertisements keeps creating more media properties leading to ownership concentration. It was also noted that an advertisement driven corporatized news media becomes the most important conduit of marketing information for products and services offered by a corporate group. Such media is no longer a neutral platform but an active agent and an extension of the industrial or political group thereby going against its role as the “fourth estate” and a guardian of democracy.<sup>2</sup>

It is imperative therefore to analyze if the present statutes and legislations that exist in India are sufficient to regulate ownership and control patterns of the media companies / enterprises / groups and to prevent monopolistic and oligopolistic tendencies in the media space.

## 1. Legal Framework

### 1.1 Laws preventing media concentration

The legislations/laws relating to media concentration, whether cross media ownership, vertical or horizontal integration, in India are fragmented. The terms aforementioned have no clear definitions in the existing legislations.

The legislations/regulations to prevent media concentration and monopolies can be found in Guidelines issued by MIB, Regulations of TRAI and the provisions of the Act of 2002.

Before elaborating on the laws which are meant for prevention of media concentration and monopolies, it is important to evaluate the relevance and importance of the concept of freedom of speech and expression that the media/press in India enjoys under the Constitution.

(a) At the helm of all legislations/laws which impact media concentration is the Constitution of India. It is the principle document on which all legislations are tested. The Constitution declares India to be a Sovereign, Socialist, Secular, Democratic, Republic. The Articles of the Constitution are an indicator that plurality and diversity must be maintained in all spheres of activity.

(b) The Constitution provides for “freedom of speech and expression” to its citizens under Article 19(1) (a) which freedom is the cornerstone of any democracy.

(c) Though the said Article does not specifically mention press/media, over the years the Supreme Court of India, being Apex Court, has interpreted and read the right of free speech as defined in the said Article to mean the right of free speech of the press/media as well. The ‘freedom of speech’ lies at the foundation of all democratic organizations and the fundamental right of the press/media to disseminate information has been clearly upheld by the Supreme Court of India in several cases like *Romesh Thappar Versus State of Madras*<sup>3</sup> and *Brij Bhushan Versus State of Delhi*<sup>4</sup>.

(d) The restrictions placed on the press/media are defined under Article 19 (2) which permits the State to make laws imposing reasonable restrictions on free speech where such law is in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

(e) Apart from the restrictions mentioned in the said Article, the media cannot be restrained from printing/broadcasting under any other head or for any other reason. The rights of the media in India are neither unlimited nor unrestricted and the media does not have any special status in respect of free speech in comparison to the citizens.

(f) The term “reasonable restriction” has not been specifically defined in the Constitution but has been interpreted by the Supreme Court in several cases.

(g) There have also been several instances when the State has tried to restrict the right of free speech through various legislations by way of striking down legislations by the Apex Court as unconstitutional. Some of the important cases, inter alia, in respect of such instances are *Sakal Papers (P) Ltd versus Union of India*<sup>5</sup>, *Bennett Coleman & Co. versus Union of India*<sup>6</sup>, *Tata Press Ltd Versus Mahanagar Telephone Nigam*<sup>7</sup>, *Hindustan Times Versus State of U.P. and Ors.*<sup>8</sup> etc. which cases not only recognized the right of the press/media to publish its views, the views of its journalists, the right to circulation in terms of the content and volume to be circulated but also recognized ‘commercial speech’ as part of the fundamental right of freedom of speech and expression of the press/media.

(h) The Supreme Court in *State of UP Versus Raj Narain & Ors*<sup>9</sup> also gave recognition to the “right of the public to receive information” as a part of the said Article and stated that right of the public to receive information was as critical and stood on the same pedestal as the media’s right to disseminate information. The judgement delivered on 9 February, 1995, by the Supreme Court in *The Secretary, Ministry of Information and Broadcasting Versus Cricket Association of Bengal*<sup>10</sup> observed that ‘airwaves or frequencies were a public property’ which

<sup>3</sup> AIR 1950 SC 594

<sup>4</sup> AIR 1950 SC 129

<sup>5</sup> AIR 1962 SC 305

<sup>6</sup> AIR 1973 SC 106

<sup>7</sup> AIR 1995 SC 2438

<sup>8</sup> 2003 (1) SC 591

<sup>9</sup> AIR 1975 SC 865

<sup>10</sup> 1995(2) SCC 161

<sup>1</sup><https://assets.kpmg/content/dam/kpmg/in/pdf/2018/09/Media-ecosystems-The-walls-fall-down.pdf>

<sup>2</sup>[http://www.academia.edu/37877812/Mapping\\_the\\_Power\\_of\\_Major\\_Media\\_Companies\\_in\\_India](http://www.academia.edu/37877812/Mapping_the_Power_of_Major_Media_Companies_in_India)

implied that the State could levy restrictions / conditions on the permissions / licenses granted to entities / companies / persons using such frequencies for broadcasting.

(i) Apart from the Constitution, there are other legislations/regulations/ guidelines/policies which attempt at preventing media concentration /monopolies. However, the concept of 'concentration' is largely understood in terms of the retaining and maintaining healthy competition between enterprises, companies and groups in the market.

The legislations/regulations/ guidelines/policies which impact media monopolies are:

- (i) DTH Guidelines issued by MIB;
- (ii) Guidelines for providing HITS broadcasting services issued by MIB;
- (iii) Guidelines for provisioning IPTV in India issued by MIB;
- (iv) The Telecom Regulatory Authority of India Act, 1997;
- (v) Regulations, Tariff Orders and Directions issued by regulator TRAI such as Interconnection Regulations, Quality of Service Regulations, Tariff Orders in pursuance of the TRAI Act;
- (vi) The Policy Guidelines on Expansion of FM Radio Broadcasting Services through Private Agencies (Phase-III) issued on 25<sup>th</sup> July, 2011;
- (vii) The Act of 2002;
- (viii) The Companies Act, 2013;
- (ix) The Income Tax Act, 1961;
- (x) The IPC;
- (xi) RTI Act;

### 1.2 Media included/excluded from regulation

Broadly print and electronic (television and radio) would be covered by the aforementioned legislations/ regulations / guidelines / policies since media monopolies are essentially understood in terms of the effect they have on competitive neutrality in the market. In line with such an aim, the National Competition Policy of the Government aims at removing anti competition outcomes of existing acts to establish a level playing field by providing "competitive neutrality" amongst all stakeholders.<sup>11</sup> Digital media is regulated by the IT Act, 2000 however its provisions do not deal with media monopolies.

### 1.3 Is the Legislation Sufficient?

India has multiple legislations, rules, regulations, guidelines and policies relating, so much so that it would appear that it is an 'over legislated' country. However, in the field of media monopolies/concentration, these very laws and regulations are largely incoherent, unsystematic, insufficient and largely ineffective.

(i) There have been several attempts in the past to bring in legislation to prevent media concentration.

(a) The Broadcasting Bill, 1997 and Broadcasting Services Regulation Bill, 2006, were proposed but never fructified into statutes/legislation. The Bill of 1996 proposed prohibition of cross media ownership, foreign ownership and proposed that no advertising agencies, political or

religious bodies and publicly funded bodies would be granted licences to own television channels. It also sought to establish the Broadcasting Authority of India. Similarly, the Bill of 2006 sought to establish an independent regulator and placed restrictions on accumulation of interest to prevent media consolidation and monopolies across different segments of the media.

(b) TRAI had given Recommendations in November, 2013 relating to Monopoly and Market dominance in Cable Services; however, MIB stated that these recommendations were not feasible, were impractical to implement and therefore referred the same issues to CCI for consideration.<sup>12</sup>

(c) TRAI had also released Recommendations on Media Ownership on 25<sup>th</sup> February 2009 and Recommendations on 'Issues Relating to Media Ownership' dated 12th August 2014. As of January, 2019, TRAI's recommendations relating to 'Issues Relating to Media Ownership' dated 12th August 2014, are under consideration by the IMC, which has been set up by the MIB, for examining the same. Two meetings of the IMC have been held on 23rd February 2018 and 28th March 2018.<sup>13</sup>

### 1.4 Definition of media concentration in the legislations

1. There is no specific definition of media concentration in the existing legislations in India nor is the term defined specifically in terms of audience share, circulation, turn-over/revenue, share capital or voting rights. Media concentration has only been defined and understood in terms of maintaining competitive neutrality and preventing adverse competition in the market. While the Act of 2002 deals with this aspect, the TRAI's Regulations and the MIB Guidelines essentially impact "vertical integration".

(i) The Act of 2002 endeavors to prevent adverse competition in the market and thereby impacts media concentration. The Act of 2002 applies to all spheres of activities of companies/entities, not specifically the media. The preamble of the Act of 2002 states that the Act aims at preventing practices that have an adverse effect on competition, to promote and sustain competition in markets, to protect the interests of the consumers and to ensure that trade is carried on by other participants in the markets in India.<sup>14</sup> Its provisions essentially aim at preventing anti-competitive agreements, abuse of Dominant position (both being ex-post) and the adverse effect that Combinations (mergers, acquisitions etc.) may have on the market.

(ii) Prior to the Act of 2002 being drafted, the legislation enforce in India was the Monopolies and Restrictive Trade Practices Act, 1969 which was also enacted to prevent monopolies from being formed. The 1969 Act was replaced as it was found to be archaic and superfluous in view of the growth of the economy.

<sup>12</sup>[https://main.traai.gov.in/sites/default/files/Recommendations\\_Cable\\_monopoly\\_final\\_261113%20\(1\).pdf](https://main.traai.gov.in/sites/default/files/Recommendations_Cable_monopoly_final_261113%20(1).pdf)

<sup>13</sup><https://www.televisionpost.com/mib-on-cross-media-restrictions-cable-monopoly-and-new-dth-guidelines/>

<sup>14</sup>[https://www.cci.gov.in/sites/default/files/cci\\_pdf/competitio nact2012.pdf](https://www.cci.gov.in/sites/default/files/cci_pdf/competitio nact2012.pdf) or the Bare Act titled The Competition Act, 2002.

<sup>11</sup> <http://pib.nic.in/newsite/PrintRelease.aspx?relid=79466>

(iii) MIB has issued guidelines relating to DTH, HITS and IPTV which impact media concentration particularly vertical integration but these guidelines do not define vertical integration.

(iv) The sectoral regulator, TRAI has issued its Regulations which promote the non-discriminatory and non-exclusive provisions of “must provide” and “must carry” among the broadcasters and DPOs respectively.

(v) The term ‘Control’ should be an important concept in relation to media concentration as control of one media company of another, whether by vertical integration or horizontal integration, would mean that content and editorial policies may be controlled. This term finds reference in the Act of 2002, in Section 5-control *includes controlling the affairs or management by one or more enterprises, either jointly or singly, over another group or enterprise; one or more groups, either jointly or singly, over another group or enterprise;* It also finds reference in the Companies Act, 2013 in Section 2(27) where it stated that “control” *shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.*

However, these definitions don’t necessarily translate into either defining media concentration or preventing it.

(vi) Family members are not included in any conflict of interest rules nor is their affiliation considered in the definition of ownership except to the extent that shareholding patterns, name of directors etc., are required to be disclosed by the legislations like the Companies Act, 2013 etc.

### 1.5 Legislation on Vertical Integration

On an overview of the Laws, Guidelines and Regulations issued by MIB and TRAI impacting vertical integration, it is clear that these laws do take into account single person / company or group attempting to “control” distribution / aggregation in the broadcasting / telecommunications sector.

(1) MIB has issued Guidelines relating to DTH, HITS and IPTV which impact media concentration particularly vertical integration. Permissions under the Uplinking and Downlinking Guidelines issued by MIB are mandatory for any TV channels signals to be carried over any platform.

Restrictions have been imposed by MIB on the licenses of DTH companies and HITS and IPTV companies wherein a cap of 20 percent has been imposed on broadcasters/cable network company’s stake in a DTH company and vice versa so as to take care of the concerns relating to national security, morality and

vertical monopoly in the distribution and broadcasting of television services.<sup>15</sup> The Guidelines state:

Broadcasting companies and/or cable network companies shall not be eligible to collectively own more than 20% of the total equity of Applicant Company at any time during the license period. Similarly, the Applicant Company cannot have more than 20% equity shares in broadcasting and/or cable Network Company.<sup>16</sup>

It has been stipulated that in events of national importance sharing of signals of important sporting events with the public broadcaster is mandatory. The Sports Broadcasting Signals (Mandatory sharing with Prasar Bharati Act), 2007.

Mandatory carriage of channels of public broadcaster and channels operated by or on behalf of Parliament is also stipulated.

In The Policy Guidelines on Expansion of FM Radio Broadcasting Services Through Private Agencies (Phase-III) issued on 25<sup>th</sup> July ,2011, <sup>17</sup> by MIB, the Companies who are disqualified, amongst other reasons, from applying for a permissions/or bidding are the Companies not incorporated in India, a Company controlled by or associated with a religious body; Company controlled by or associated with a political body; any Company which is functioning as an advertising agency or is an associate of an advertising agency or is controlled by an advertising agency or person associated with an advertising agency; subsidiary Company of any applicant in the same City; Holding Company of any applicant in the same City; Companies with the same management as that of an applicant in the same City; More than one Inter-Connected Undertaking in the same City; A Company that has been debarred from taking part in the bidding process or its holding Company or subsidiary or a Company with the same management or an interconnected undertaking .

Paragraph 7 of the Policy Guidelines lays down the restrictions in respect of multiple permissions that can be acquired in a city and states that every applicant shall be allowed to run not more than 40% of the total channels in a city subject to a minimum of three different operators in the city and further subject to the provisions contained in paragraph 8. Paragraph 8 of the Policy Guidelines state no entity shall hold permission for more than 15% of all channels allotted in the country excluding channels located in Jammu and Kashmir, North Eastern States and island territories. Only city wise limits as mentioned in paragraph 7 of the Policy Guidelines would apply to channels located in Jammu and Kashmir, North Eastern States and island territories.

<sup>15</sup><https://mib.gov.in/sites/default/files/GuidelinesforDTHServiceDated15.3.2001.pdf>

<sup>16</sup><https://mib.gov.in/sites/default/files/Detailsguidelinesupdated6.11.2007.pdf>

<sup>17</sup>[https://www.broadcastseva.gov.in/fm\\_Lading\\_Page/FM\\_Phase\\_III\\_Policy.pdf](https://www.broadcastseva.gov.in/fm_Lading_Page/FM_Phase_III_Policy.pdf)

(2) In so far as the regulator TRAI is concerned, it has issued several Regulations and Tariff Orders which impact vertical integration agreements;

Over a period of time TRAI brought out Regulations that dealt with ‘must provide’ signals on a non-discriminatory basis to various television platforms by every broadcaster and which prohibited distribution agreements between broadcasters and restricted broadcasters from entering into exclusive arrangements with distributors that prevented other distributors from obtaining television channels for distribution.

The ‘must carry’ provision was also imposed on the MSOs.

Regulations and Tariff Orders were issued which protected the consumer’s choice and ability to select the channels he/she wished to watch and which mandated that each MSO/DTH/IPTV/HITS operator providing broadcasting services to its subscribers using an addressable system must also offer all channels to consumers on *a-la-carte* basis.

TRAI Regulations promoted a non-discriminatory and non-exclusivity policy amongst stakeholders.

Finally, in 2017, to consolidate all its Regulations and Tariff Orders, TRAI brought out the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 and Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 which continued the non-discriminatory and non-exclusive provisions of “must carry” “must provide” and *ala carte* choices of channels given to the consumers. These Regulations and Tariff Orders were challenged in The Supreme Court and were upheld in the judgment of *Star India Private Ltd. Versus Department of Industrial Policy and Promotion and Ors.*<sup>18</sup>

The 2017 Regulations impact vertical integration agreements, thereby preventing the creation of a discriminatory environment for the consumers and indirectly preventing monopolies.<sup>19</sup>

## 1.6 Mergers and Acquisitions

There have been several mergers and acquisitions within the media companies in the last few years:<sup>20</sup>

### Consolidation and alliances

- In 2010, Sun Network and Network18 entered into a strategic alliance to form “Sun18 Media Services”. Sun18 distributed more than 30 channels across all

platforms in India via all networks including cable, DTH, IPTV and HITS.

- In 2011, Star Den Media Services Private Limited and Zee Turner Limited formed a 50:50 joint venture called “Pro Media Enterprise” to jointly aggregate and distribute television content.

### Intra-Group corporate re-structuring

- CCI approved the merger of Wireless Broadband Business Service (Delhi) Pvt. Ltd. (WBBS Delhi), Wireless Broadband Business Service (Kerala) Pvt. Ltd. (WBBS Kerala) and Wireless Broadband Business Service (Haryana) Pvt. Ltd. (WBBS Haryana) into Wireless Business Services Private Limited (WBSPL). 51 per cent and 49 per cent of equity shares in each of these parties are held by Qualcomm Incorporated and Bharati Airtel Limited respectively.

### Acquisitions

- CCI also approved the acquisition of 27.5 per cent equity shares of Living Media India Limited by IGH Holdings Private Limited. Living Media India Limited is a private company and is the holding company of India Today Group, which is involved in broadcasting through TV and radio, print media, publication and distribution of music etc. IGH is also a private limited company and is an investment company in Aditya Birla Group which has diversified business interests in various sectors including telecommunications; IT and IT enabled services etc.
- A notice was filed by Independent Media Trust relating to a series of inter-connected and inter-dependent acquisitions intended to acquire control over Network18 Group companies by Reliance Industries Limited. The Commission assessed the effect of the combination on the businesses for supply of television channels, event management services and broadband internet services using 4G technologies and content accessible through such services. It concluded that the Combination was not likely to give rise to any appreciable adverse effect on competition and the acquisition was cleared.
- “The CCI did conclude that RIL (Reliance India Limited) had acquired the target companies and indirect control over Network18 and TV18 but also said that the deal does not have an adverse impact on competition, since an ISP has open access, and Network18 group properties are available on the Internet, which can be accessed by consumers from ISPs other than Infotel as well.”<sup>21</sup>
- Disney first acquired a stake in UTV for 1.5 Crore in 2006 and by 2011 it had increased its stake in UTV to 50.44 percent leaving co-founder Ronnie Screwvala and three others holding only 19.82 percent stake in the company.

<sup>18</sup>2019(2) SCC 104

<sup>19</sup>[https://main.trai.gov.in/sites/default/files/Interconnection\\_Regulation\\_03\\_mar\\_2917.pdf](https://main.trai.gov.in/sites/default/files/Interconnection_Regulation_03_mar_2917.pdf)

<sup>20</sup><http://www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf>

<sup>21</sup><https://www.medianama.com/2014/05/223-how-reliance-industries-acquired-network18-a-detailed-timeline-of-events/>



above, the Recommendations of 2014 relating to Media Ownership have been referred to the IMC by MIB.<sup>28</sup>

Interestingly TRAI also made a relevant comment that the media cannot, and should not, be bracketed with general commodities and services. The market for ideas is very different from that for, say, shoes or biscuits. The media serves a higher purpose and needs separate consideration. The principles adopted in the competition law may not serve the special purpose of addressing the need for plurality of news and views. Thereby indirectly stating that media should not fall within the purview of the Act of 2002.

2. In view of TRAI's observations, it is clear that blind spots in the legislation relating to media concentration occur not only due a lack of specific definitions of the various terms, but also due to the various statutes and authorities that deal with different aspects of media monopolies/concentration which leads to different interpretations of the issues as well as jurisdictional issues/ conflicts between various authorities as in the case of TRAI and CCI. This conflict was evident and eventually resolved by the Supreme Court "CCI Versus Bharti Airtel limited & Ors."<sup>29</sup> wherein it was observed by the Court that *since the matter pertains to the telecom sector which is specifically regulated by the TRAI Act, balance is maintained by permitting TRAI in the first instance to deal with and decide the jurisdictional aspects which can be more competently handled by it. Once that exercise is done and there are findings returned by the TRAI which lead to the prima facie conclusion that the IDOs (Incumbent Dominant Operators) have indulged in anti-competitive practices, the CCI can be activated to investigate the matter going by the criteria laid down in the relevant provisions of the Competition Act and take it to its logical conclusion.*

3. It may be noted that essentially the conflicts arise in legislations or amongst authorities due to the fact media monopolies are gauged on the touchstone of competition. This concept is flawed as competition need not necessarily be able to ensure plurality of news or prevent media concentration.

### 1.8 Foreign Investments within the media business

As far as foreign investment in Indian media is concerned, the statutes/policies dealing with investments are the Indian Foreign Exchange Management Act, 2000, and the Foreign Direct Investment Policy effective from August, 2017 which provide for restrictions on foreign investment in various media sectors, as well as compliances to be undertaken when such investment is made. Foreign investment of up to 100% is permitted in the telecom. The FDI Policy contains the instructions and restrictions on investments made in the broadcasting sector, including in companies that undertake broadcasting carriage services (setting up

[https://main.traai.gov.in/sites/default/files/Recommendations\\_on\\_Media\\_Ownership.pdf](https://main.traai.gov.in/sites/default/files/Recommendations_on_Media_Ownership.pdf)

<sup>28</sup> ibid p.7

<sup>29</sup> 2019 (2) SCC 521

of teleports, DTH services, cable networks, mobile TV, HITS), and broadcasting content services (terrestrial broadcasting FM/FM radio, Uplinking of 'News & Current Affairs' TV Channels, and Uplinking of Non-'News & Current Affairs' TV Channels/Downlinking of TV Channels). However, there is no restriction mentioned as such on investment made in companies that undertake online distribution of audiovisual media, such as music/content streaming services.

Foreign investments are permitted in an Indian media company either after obtaining approval from the Indian Foreign Investment Promotion Board – (approval route) or freely (automatic route).<sup>30</sup>

(i) FDI up to 100% is permitted in DTH, HITS, Teleports, Cable Networks (MSOs and LCOs) and Mobile TV which are essentially broadcast carriage provider, through the automatic route.

(ii) In broadcasting content services foreign investment in uplinking news and current affairs channels has been raised from 26% to 49% though the permission of the Government is required.

(iii) FDI up to 100% is permitted in uplinking of non-news and current affairs channels without the permission of the Government through the automatic route.

(iv) Foreign investment in terrestrial FM radio has been restricted to 49% and permission of the Government is required.

(v) In downlinking television channels, 100 percent FDI has been permitted for all channels.

(vi) FDI in print media, newspapers and periodicals relating to news and current affairs is permitted up to the extent of 26% and the investment requires permission of the Government.

(vii) 100% FDI has been permitted in Indian entities publishing scientific/technical and specialty magazines/periodicals/ journal.<sup>31</sup>

(ix) MIB has permitted 49% FDI (direct and indirect) in FM Radio Terrestrial Broadcasting Services.

(x) FDI in both Film and the advertising Sectors is permissible up to 100% on the automatic route without any other conditions.

(ix) Furthermore the FDI Policy envisages 100% equity cap and automatic route where it pertains to E-commerce, which is defined to mean "buying and selling of goods and services including digital products over digital & electronic network" and Digital & electronic

<sup>30</sup>[https://dipp.gov.in/sites/default/files/CFPC\\_2017\\_FINAL\\_RELE\\_ASED\\_28.8.17.pdf](https://dipp.gov.in/sites/default/files/CFPC_2017_FINAL_RELE_ASED_28.8.17.pdf)

<sup>31</sup>[https://mib.gov.in/sites/default/files/Guidelines\\_for\\_Publication\\_of\\_Indian\\_edition\\_of\\_Specialty\\_Magazines.pdf](https://mib.gov.in/sites/default/files/Guidelines_for_Publication_of_Indian_edition_of_Specialty_Magazines.pdf)

network includes network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles.

## 2. Implementation-control and monitoring of media concentration

### 2.1 Bodies governing Media concentration

1. There are institutional systems in place to address 'media concentration' but only as understood in section 1 above.

The authorities/ institutions which issue implement and regulate the labyrinth of legislations/ regulations relating to media concentration are the MIB, TRAI and CCI.

2. While MIB has placed certain restrictions in the guidelines issued by it relating to vertical integration vis a vis content carriage platform like DTH, HITS, IPTV, broadcasting companies and in the Policy, guidelines issued by it relating to FM Radio/CRS etc., TRAI, the sectoral regulator has also issued regulations affecting vertical integration between the broadcasters and the DPOs. CCI, the market regulator on the other hand deals with abuse of Dominant position, Combinations (mergers, acquisitions amalgamations) and any other anti- competition agreement.

(a) MIB is the focal point with regard to all policy matters related to public and private broadcasting sectors, whether radio or television, and administering of the said broadcasting services and it monitors all content of the above sectors.

i) The MIB is functionally organized into three wings (i) Information Wing, (ii) Broadcasting Wing and (iii) Films Wing who execute the aforementioned functions of MIB.<sup>32</sup>

(ii) With respect to private Radio channels, FM channels or community radio, the content must adhere to the AIR Broadcast Code. For private radio channels, MIB issues the permissions/licenses and regulatory authority is the TRAI. The public broadcaster, Prasar Bharati is a statutory autonomous body established under the Prasar Bharati Act, 1990 which came into existence on 23th November, 1997. The objectives of public service broadcasting are achieved in terms of Prasar Bharati Act, 1990 through All India Radio and Doordarshan, which earlier were working as media units under the MIB and since the above said date became constituents of Prasar Bharati.<sup>33</sup> It would be interesting to note that All India Radio is in a dominant position when it comes to broadcasting news on radio channels as private FM channels are largely entertainment channels.

(iii) It is only in the case of CRS that there are laws dealing with ownership wherein the policy relating to CRS states the CRS should have an ownership and

management structure that is reflective of the community that the CRS seeks to serve.<sup>34</sup>

(b) While MIB grants permissions, licenses and monitors the content of the broadcasters, whether television or radio, it is TRAI, who is the regulatory authority for all telecommunication services. By an amendment made on 24th January 2000 to section 2 (1) (k) of the TRAI Act, 1997 'broadcasting services' were brought within the fold of telecommunication services.

(i) TRAI has both recommendatory functions and mandatory functions in terms of Section 11 (1) (a) and (b) of the TRAI Act, 1997 respectively. Some of the mandatory functions of the TRAI include ensuring compliance with the terms of license granted, ensuring technical compatibility and effective inter-connection between service providers, fixing terms and conditions of interconnectivity between service providers, regulating arrangements between service providers for sharing revenue, laying down local and long distance circuits of telecommunication between different service providers, maintaining register of the interconnect agreements, most importantly maintaining quality of service and ensuring effective compliance with universal service obligations.<sup>35</sup>

(c) The market regulator, CCI on the other hand operates in a different sphere and its decisions are largely ex-post. It is neither a body that grants licenses/ permissions nor is it a regulatory body. In fact, its focus is to promote competition in the market by keeping a vigil on anti-competitive transactions by enterprises and therefore it considers several factors and acts to prevent agreements that are anti-competitive and that affect market competition.<sup>36</sup>

The Act of 2002 defines Dominant position in terms of a position of strength enjoyed by an enterprise, in the relevant market in India, which enables it to operate independently of the competitive forces prevailing in the relevant market; or the effect on its competitors or consumers or the relevant market in its favor.<sup>37</sup>

CCI also evaluates appreciable adverse effect of Combinations on competition in the relevant market.<sup>38</sup> While the PCI is the statutory body which monitors print media under the Press Council Act, 1978, the governing statutory provisions do not relate to media monopolies nor does the PCI deal with the above.

(d) For regulating content, there are independent self-regulatory authorities like NBSA which regulates 24\*7 news channels in respect of members of NBA, BCCC for

<sup>34</sup><http://wdfindia.org/CRBGUIDELINES041206.pdf>

<sup>35</sup>[https://main.traai.gov.in/sites/default/files/The\\_TRAI\\_Act\\_1997.pdf](https://main.traai.gov.in/sites/default/files/The_TRAI_Act_1997.pdf)

<sup>36</sup>[https://www.cci.gov.in/sites/default/files/presentation\\_document/anti\\_peter\\_20090213111438.pdf?download=1](https://www.cci.gov.in/sites/default/files/presentation_document/anti_peter_20090213111438.pdf?download=1)

<sup>37</sup>[https://www.cci.gov.in/sites/default/files/advocacy\\_booklet\\_document/AOD.pdf](https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/AOD.pdf)

<sup>38</sup>[https://www.cci.gov.in/sites/default/files/advocacy\\_booklet\\_document/combination.pdf](https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/combination.pdf)

<sup>32</sup><https://mib.gov.in>.

<sup>33</sup> <http://prasarbharati.gov.in/>

regulating general entertainment channels for members of IBF and ASCI for regulating advertisements.

## 2.2 Jurisdiction of the Authorities

(a) On taking a conspectus of the above, it may be noted that MIB, TRAI and CCI are intended to operate in different areas and their powers are well defined under the CTN Act 1995, CTN Rules, 1994, Policy Guidelines for FM Radio and the TRAI Act, 1997 which relate to content and carriage respectively and in the case of CCI, it is governed by the provisions of the Act of 2002. While MIB issues permissions/licenses, TRAI is the sectoral regulator and issues recommendations on issues after taking into consideration inputs by stakeholders. CCI, the market regulator, on the other hand attempts to maintain healthy competition in the market by keeping a lookout for anti-competitive agreements, abuse of Dominant position and Combinations which have an adverse effect on the market.

(b) However over a period of time issues have arisen on overlapping jurisdiction between the telecommunication sectoral regulator, TRAI and market regulator, CCI with both laying claim to jurisdictional rights on competition related issues. CCI has previously alleged that the TRAI had overstepped its jurisdiction by examining aspects of dominance and predatory pricing as part of a consultation paper on tariffs.

However, the matter was settled by the Supreme Court in its judgement delivered on 5<sup>th</sup> December, 2018 titled "CCI Versus Bharti Airtel limited & Ors".<sup>39</sup>

## 2.3 Independence of the Authorities

The Statutes, which created bodies/authorities such as TRAI and CCI, endeavour to make these bodies independent and free from any intervention or interference, political or commercial. The appointments to these bodies are generally of persons with expertise in certain areas and there is a provision in the statutes to take care of the monetary requirements such as salaries and other expenses. Nonetheless the fact remains that the Central Government does play a role in the appointments, removal of some of the members and the budget allocations of these authorities. Therefore, absolute independence of the bodies is still debatable and ambiguous to that extent.

## 2.4 Appointment Procedures

(1) With respect to both the statutory bodies, the appointments are made by the Central Government.

(a) As per the TRAI Act, the appointments of the Chairperson and other members of the TRAI are from amongst persons who have special knowledge of, and professional experience in, telecommunication, industry, finance, accountancy, law, management or consumer affairs and they hold office for 3 years or till the age of 65 in case of a member and 70 in case of the Chairperson whichever is earlier. The TRAI (Amendment) Act, 2000 had led to reconstitution of the TRAI and it

presently consists of one Chairperson, two full-time members and two part-time members.<sup>40</sup>

(b) The Appellate Authority which deals with the challenges to the Regulations (apart from challenges to Regulations under Section 36 of the Act) and Tariff Orders of TRAI is TDSAT.

(c) The Act of 2002, states that the CCI would consist of a Chairperson and not less than two and not more than 6 members, all to be appointed by the Central Government in consultation with a Selection Committee which would also comprise of the Chief Justice or his nominee. The Act also states that the Chairperson and every other Member shall be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in, international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission.<sup>41</sup> The Chairperson/members can only be removed by the Central Government after a reference is made to the Supreme Court and an inquiry held by the Court.

(d) The appeal from the CCI's orders/decisions goes to the NCLAT constituted under the Companies Act, 2013.

(e) The IT Act, 2000 pertains to cyber laws and it came into existence recently in October, 2000. The main purpose of the Act was to provide legal recognition to certain standards prescribed for content accessible over the internet under the IT Rules 2011. An appeal lay from an adjudicating officer under the IT Act to the Cyber Appellate Tribunal. In 2017 the Cyber Appellate Tribunal was merged with TDSAT due to the in- effectual/non-functioning of the said body.

(2) The aforementioned authorities are certainly not political in nature and are authorities created by the statutes, just as the Appellate Authorities such as the TDSAT and NCLAT are quasi-judicial bodies also created by a statute. However, there are certain limitations that both CCI and TRAI suffer from;

(i) The selection of the members of CCI is done by the Central Government in consultation with a Selection Committee; however, the Government still has an influence over the appointments. In the case of TRAI, the Central Government appoints the members. Therefore, the possibility of Government interference always remains and the probability of the Government appointing members empathetic to its policies is possible. Therefore complete independence of the bodies is ambiguous;

<sup>40</sup>[https://main.trai.gov.in/sites/default/files/The\\_TRAI\\_Act\\_1997.pdf](https://main.trai.gov.in/sites/default/files/The_TRAI_Act_1997.pdf)

<sup>41</sup>[https://www.cci.gov.in/sites/default/files/cci\\_pdf/competitio nact2012.pdf](https://www.cci.gov.in/sites/default/files/cci_pdf/competitio nact2012.pdf)

<sup>39</sup>Ibid p 10

(ii) Removal or suspension of the members can be done by the Government with consent from the Supreme Court in the case of CCI, which process is not easy. However, in the case of TRAI, under certain circumstances the members can be removed from office by the Central Government;

(iii) CCI is bound by directions on questions of policy, other than those relating to technical and administrative matters, as the Central Government may give in writing to it from time to time;

(iv) TRAI is bound by any directions issued by the Central Government in the interests of sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality and it is also bound by directions of the Central Government on questions of policy;

(v) CCI may be superseded by the Central Government for certain reasons as given in the Act, 2002 if the Government believes it is unable to discharge its functions or has defaulted in following the directions given by the Central Government etc;

(vi) The Central Government may, also exempt from the application of Act, 2002, any class of enterprises if such exemption is necessary in the interest of security of the State or public interest;

(vii) In the case of TRAI, it has been stated in the Act, itself that the recommendations of TRAI are not binding on the Central Government and therefore in spite of the issuing Recommendations in respect of Media Ownership in 2009 and 2014 and the Recommendations of 2013, these recommendations have not been accepted by the Central Government and are still lying in limbo;

(viii) The Budget is allocated by the Central Government to these authorities but the authorities are not consulted nor taken into confidence while allocating the budget;

(ix) The annual returns of both bodies/authorities have to be sent to the Central Government.

## 2.5 Budget allocations to the Authorities

The budgetary allocations for the aforementioned authorities can be seen on their websites in the annual reports which are published every year.<sup>42/43</sup> In fact, both TRAI and CCI depend on the Central Government for their budgetary finances.

The TRAI's and CCI's annual statements of accounts are subject to audit which is done with the help of Comptroller and Auditor General of India but the returns and statements are still to be furnished to the Central Government and both bodies are eventually accountable to the ministry for their activities.<sup>44</sup>

In the case of CCI and TRAI, there is financial dependence on the Central Government for budgetary allowances and the Central Government is not even mandated to consult these authorities prior to allocation of the funds;

Though the decision-making power exercised by CCI and TRAI are relatively free from government control however a natural outcome of financial dependence on the Central Government could serve as a hindrance in the independent functioning of these authorities.

## 2.6 Sanctioning Power of the Authorities

(i) While authorities like MIB do have the power to refuse to issue or renew permissions or take channels off air for a certain period, it usually does so only when the terms and conditions of the permission are violated or when the general terms and conditions of the Uplinking / Downlinking permissions are violated such as the Program and Advertising Code as prescribed by CTN Act, 1995/CTN Rules, 1994 or on grounds of public interest, national security etc. The other reasons for cancellation of permission have been where there is request for cancellation by channel owner as the channel has not gone on air/ when a channel is not granted permission due to denial of security clearance and/or for not submitting the required permissions. No permissions/licenses have been refused on the ground of media concentration or cross media ownership.

(ii) It is CCI that has the authority to modify, discontinue and not permit re-entering into anti-competitive agreement and to levy penalties in that respect.

(iii) The appellate mechanisms like the TDSAT or NCLAT are in place for filing appeals from the regulations/decisions of TRAI or CCI respectively are sufficient and adequate. Appeals lie from the judgements/orders of these Tribunals to The Supreme Court of India.

According to the law in India, the Central Government cannot overrule the regulations/decisions of these bodies or appellate authorities as they are statutory bodies and the final appeal from the judgements/orders of the appellate authorities lies to the Supreme Court. Though the Government has no role to play in respect of decisions or recommendations issued by CCI or TRAI respectively, however it may always neutralize or override the judgements/orders of the authorities by modifying the legislation through introducing a new legislation or amending the same. This procedure is not easy particularly as the subsequent legislation is also amenable to challenge.

## 2.7 Methods to assess media concentration

1. The methods to assess horizontal integration and vertical integration of companies are different for CCI, for MIB and TRAI. However, the following general

<sup>42</sup><https://main.tra.gov.in/about-us/annual-reports>

<sup>43</sup><https://www.cci.gov.in/annual-reports>

<sup>44</sup>[http://www.cuts-ccier.org/IICA/pdf/Country\\_Paper\\_India.pdf](http://www.cuts-ccier.org/IICA/pdf/Country_Paper_India.pdf)

considerations are taken in account while assessing the above integration:

- Percentage of paid up equity or any other financing or commercial arrangement that may give it management control over the financial, management or editorial policies;
- creation of barriers to new entrants in the market;
- driving existing competitors out of the market;
- foreclosure of competition by hindering entry into the market;
- accrual of benefits to consumers;
- improvements in production or distribution of goods or provision of services;
- promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services;
- relative shares in the market,
- reputation of the products or services;
- market share;
- size of enterprise;
- size and importance of competitors;
- economic power of the enterprise
- dependence; on consumers/audience
- vertical integration of the enterprises or sale or service network of such enterprises;
- monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
- entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- countervailing buying power;
- market structure and size of market;
- social obligations and social costs;
- relative advantage by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
- Predatory pricing of channels or bouquets of channels.

2. In the Act of 2002, the method to assess a horizontal integration would be any agreement which:

- directly or indirectly determines the purchase or sale prices;
- Limits or controls production, supply, markets, technical development, investment or provision of services;
- Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
- Directly or indirectly results in bid rigging or collusive bidding (effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding).

- In the Policy Guidelines of FM Radio, companies with the same management as that of an applicant in the same City; more than one Inter-Connected Undertaking in the same City are disqualified for applying for a permission;

3. Vertical Agreements would be assessed as:

(i) Tie-in arrangement (includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods);

(ii) Exclusive supply agreement (includes any agreement restricting in any matter the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person);

(iii) Exclusive distribution agreement (includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods);

(iv) Refusal to deal (includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought);

(v) Resale price maintenance (includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged).

The restrictions in the licenses issued to DTH, HITS and IPTV by MIB or the Policy Guidelines relating to FM Radio contemplate control by a single person, company, or group of key elements distribution process and forbid the same.<sup>45</sup> TRAI's Regulations also envisage non-discriminatory and non-exclusive agreements between key stakeholders in the television sector.

## 2.8 Public Accountability

The decisions / orders of CCI and recommendations of TRAI and the orders of the Appellate Authorities, NCLAT and TDSAT can be viewed by the public on their websites.

## 2.9 Government interference

As stated in paragraph 2.6, the Government cannot overrule the decisions of CCI and TRAI. However, it can introduce a new legislation to neutralize the effects of any Regulation or Order.<sup>46</sup>

## 2.10 Mergers, Acquisitions and Implementation

In the past five there been several mergers and acquisitions, though not all agreements relating to the

<sup>45</sup> Ibid p.6/7/8

<sup>46</sup> Ibid. p.19

above cases went before the CCI. As mentioned in paragraph 1.6 above, none of the mergers/ acquisitions relating to media was viewed by CCI as detrimental to market competition in the media space and therefore stood approved. The main challenges faced by the authorities in implementation of the legislations affecting media concentration is that the transactions of the various companies /enterprises are enmeshed in complex agreements and transactions which makes it difficult to decipher. Furthermore, since the legislations tend to overlap and the yardstick for measuring any monopoly is competition, both TRAI and CCI claim to have jurisdiction over some common matters.

### 2.11 Public Interest

The preamble of the TRAI Act and the Act of 2002 declares that the said statutes protect the interest of the consumers by striving to maintain healthy competition among the various companies, enterprises and groups. Neither body is considered political or technical. Therefore, it is presumed that both the bodies will act in the interests of the consumers/public, nevertheless in view of the appointment procedures, removal procedures and budgetary allocations, the bodies may not be totally independent of influence and there may be a possibility of consumer interest being compromised on occasion.<sup>47</sup>

In the matter of Jak Communications Pvt. Ltd. vs Sun Direct TV (P) Ltd. (Case 8/2009) and in Dish TV vs. Hathway and Others (case 78/2013), CCI delivered orders dated 39<sup>th</sup> August, 2011 and 6<sup>th</sup> May, 2014 respectively and held that the practice of predatory pricing by DTH was not anti-competitive vis a vis an MSO and allegations by MSOs that DTH collectively abuse dominant position in the TV distribution sector was held to be incorrect as the transaction was not held to be anti-competition.

The problem appears to be the fact that competition law exists to protect competition, and not plurality. Presence of competition in a media market does not necessarily ensure presence of plurality of media ownership. Competition law applies generically to all companies and does not specifically address the peculiar situation of media companies.<sup>48</sup> Competition law is not applicable in these cases because it seeks to prevent monopolies within a single market. By their very definition, cross-media ownership and vertical integration concern monopolies across multiple markets.<sup>49</sup>

In fact, in an article carried in the magazine Caravan, it was observed that some of the decisions taken by the Government in respect Data Plans in telecom sector were helping Reliance Jio monopolize the telecom sector.<sup>50</sup>The allegations/observations were denied.

<sup>47</sup>Ibid. pgs.17/18/19

<sup>48</sup><http://asu.thehoot.org/media-watch/law-and-policy/competition-vs-plurality-7718>

<sup>49</sup><https://scroll.in/article/694139/five-reasons-why-media-monopolies-flourish-in-india>

<sup>50</sup><https://caravanmagazine.in/reportage/government-helping-reliance-jio-monopolise-telecom>

## 3. Transparency of media ownership

### 3.1/2 Disclosures by media companies

With regard to disclosure of information and transparency regarding ownership, investment and revenue sources of media companies, the general law dealing with companies/enterprises is The Companies Act of 2013, SEBI Regulations and the Press and Registration of Books Act.1897.

1. The Companies Act, 2013 requires certain disclosures to be made by the companies, under its provisions which are mandatory:

(a) Section 92 of the said Act requires that every company prepare an annual return in a prescribed format disclosing its shares, debentures, other securities and shareholding pattern; details, as may be prescribed, in respect of shares held by or on behalf of the Foreign Institutional Investors indicating their names, addresses, countries of incorporation, registration and percentage of shareholding held by them;<sup>51</sup>

(b) Section 93 states that every listed company is required to file a return in the prescribed form with the ROC with respect to change in the number of shares held by promoters and top ten shareholders of such company, within fifteen days of such change;

(c) Section 129 requires a company to file financial statements which gives a true and fair view of the state of affairs of the company or companies, comply with the accounting standards notified under section 133 and the said statements have to be in the form or forms as may be provided for different class or classes of companies in Schedule III; the companies also are required to maintain a record of the shareholding pattern including the shareholding pattern for promoters/ promoter groups; Non Promoter-Non Public shareholder and a shareholding pattern of a Public shareholder.

(d) Section 137 requires that a copy of financial statement be filed with ROC including a consolidated financial statement, if any, along with all the documents which are required to be attached to such financial statements duly adopted at the annual general meeting of the company within thirty days of the date of annual general meeting in such manner, with such fees or additional fees as may be prescribed within the time specified under section 403.<sup>52</sup>

(e) Section 188 requires that vide resolution, the consent of the Board of Directors of a company needs to be taken in cases of a company entering into a contract or arrangement with a related party for, amongst other transactions, such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company. The conditions and exemptions are also detailed in the said provision. This provision applies to both private and public companies. The definition of related party can be found under

<sup>51</sup><http://www.mca.gov.in/SearchableActs/Section92.htm>

<sup>52</sup><http://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf>

Section 2(76) of the Companies Act, 2013 and it states a related party with reference to a company, means:

- a. director or a key managerial person or their relatives or
- b. a firm, private company in which the partner, director/ manager or his relative is a partner or
- c. a private company or a public company in which a director or manager is a director and holds along with his relatives, more than 2% of its paid-up share capital.

(f) The ROC operates under the MCA which is the body which deals with administration of companies and limited liabilities partnerships. The ROCs are operating in all major states and are tasked with the principal duty of registering both companies and LLPs across union territories and states.

The media companies must file their report annually with all the disclosures as mentioned above with the ROC.

2. The other entity which requires disclosures from companies in respect of ownership etc. is SEBI which also requires that as far as the reporting requirement is concerned for any listed companies, these companies must fulfill the requirements under the SEBI Continuous Disclosure Requirements for Listed Entities - Regulation 30 of Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 and Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Amendment Regulations, 2018. The Regulations of 2015 require that when agreements such as joint ventures are entered into, the names of parties, shareholding, whether the parties are related to the promoter /promoter group companies etc. must be disclosed. Annual reports are required to be filed with the exchanges as well.<sup>53</sup> A majority of Indian listed entities continue to be promoter driven, with significant shareholding held by promoter/promoter group. Accordingly, checks and balances on interactions and relationships between listed entities and the promoters/significant shareholders are crucial for good governance. Therefore, 2018 Amendments focuses on approval and disclosure of related party transactions including the materiality thresholds as well as remuneration policy for executive / non-executive directors. The amendment requires the "Related Party Disclosure" in the annual report, disclosures of transactions of the listed entity with any person or entity belonging to the promoter or promoter group which hold(s) 10% or more shareholding in the listed entity. This disclosure should also be in the format prescribed in the relevant accounting standards for annual results. The definition of "related party" has been modified to include any person or entity belonging to

the promoter or promoter group of the listed entity and holding 20% or more shareholding in the listed entity.<sup>54</sup>

3. More specifically, with regard to electronic media, all media companies are required to divulge the details of director, share of equity capital, shareholding pattern, foreign investment, source of funds by virtue of Policy Guidelines for Uplinking of television channels, 2011 in India' issued MIB. The Guidelines provide a format - FORM-1 for applicants to seek permission for Uplinking channels. The Uplinking guidelines also require all companies that uplink their channels to make full disclosure, at the time of application, of Shareholders Agreements, Loan Agreements and such other Agreements that are finalized or are proposed to be entered into. Any subsequent changes in these have to be disclosed to the MIB within 15 days of any changes having a bearing on the foregoing Agreements. The companies who uplink<sup>55</sup> and /or downlink<sup>56</sup> also have to file their audited returns annually and to give intimation to MIB if there is a change in the directorship, key executives or foreign direct investment in the company, within 15 days of such a change taking place.<sup>57</sup>

4. As far as Print media is concerned it is required to disclose its ownership patterns under Form IV to the RNI including name of owner, partners and shareholding pattern more than one percent of the total capital. However, the shareholders are not asked to disclose the percentage they own and whether there is any relationship between the various shareholders.<sup>58</sup>

5. It appears that the reporting requirements for public companies are more stringent as compared to the reporting requirements for private limited companies in so far as disclosures are concerned.<sup>59</sup>

6. Policy Guidelines relating to FM Radio require that an applicant has to disclose the (i) names of Directors with evidence of their commercial or managerial competence. (ii) directorship or other executive positions held by the Directors in other companies/organizations with details of such companies/organizations with documentary evidence to support their claim (iii) names of the key executives, i.e. Chief Executive Officer, and Heads of Finance, Marketing and Creative Departments, if any in position, with evidence of their professional qualifications and managerial competence.

<sup>54</sup>[https://www.ey.com/Publication/vwLUAssets/EY-sebi-listing-obligations-and-disclosure-requirements-amendment-regulations-2018/\\$File/EY-sebi-listing-obligations-and-disclosure-requirements-amendment-regulations-2018.pdf](https://www.ey.com/Publication/vwLUAssets/EY-sebi-listing-obligations-and-disclosure-requirements-amendment-regulations-2018/$File/EY-sebi-listing-obligations-and-disclosure-requirements-amendment-regulations-2018.pdf)

<sup>55</sup>[https://mib.gov.in/sites/default/files/FinalUplinkingGuidelines\\_05.12.2011.pdf](https://mib.gov.in/sites/default/files/FinalUplinkingGuidelines_05.12.2011.pdf)

<sup>56</sup>[https://mib.gov.in/sites/default/files/Downlinking\\_Guidelines\\_05.12.11.pdf](https://mib.gov.in/sites/default/files/Downlinking_Guidelines_05.12.11.pdf)

<sup>57</sup>[https://mib.gov.in/sites/default/files/Uplink\\_and\\_downlink\\_form\\_1%20%281%29.pdf](https://mib.gov.in/sites/default/files/Uplink_and_downlink_form_1%20%281%29.pdf)

<sup>58</sup>[http://rni.nic.in/proforma/pdf\\_file/form4.pdf](http://rni.nic.in/proforma/pdf_file/form4.pdf)

<sup>59</sup><https://scroll.in/article/694139/five-reasons-why-media-monopolies-flourish-in-india>

<sup>53</sup>[https://www.nseindia.com/content/equities/SEBI\\_Circ\\_09092015.pdf](https://www.nseindia.com/content/equities/SEBI_Circ_09092015.pdf)

Disclosure of Shareholders Agreements, Loan Agreements and such other Agreements that are finalized or are proposed to be entered into has to be made. Any subsequent changes in the above would be disclosed to the Ministry of Information and Broadcasting, within 15 days of any changes, having a bearing on the foregoing Agreements.

### 3.3 Information that is required to be disclosed

1. The information which is required to be disclosed by media companies apart from what is mentioned in 3.1/2 above are:

- details of directors
- share of equity capital
- shareholding pattern
- foreign investment, source of funds
- Shareholders Agreements,
- Loan Agreements
- Section 90 of the Companies Act, 2013 states that the companies are also required to maintain official record of persons holding beneficial shares in their respective entities and file a return with the ROC furnishing details of their significant beneficial owners.

There is no mandatory requirement to disclose the political affiliation of the owners or their family members. However, in the Policy Guidelines of FM Radio Broadcasting Services, 2011, a political party is disqualified from applying for a permission to operate a channel. If a family member is a director in the same company, then as per the Companies Act, 2013 and other legislations, the family member's name would be disclosed in the annual report though not as a family member but as a person who holds a particular position in the company.

The difficulty with non-disclosure of information in respect of political affiliations etc. tends to be that as political parties and persons with political affiliation own/control increasing sections of the media, the media is also seen as a political collaborator as well seeking to influence voters on the basis of allegiances of the owners and editors.<sup>60</sup>

Though there is no requirement to disclose any affiliations to a political party or its family members in any media company however in the self-regulatory guidelines of NBSA regarding Election Broadcasts, it has been stated in Guideline 2 that "News channels shall disclose any political affiliations, either towards a party or candidate..." whereby the public can gauge whether a particular news channel, if it discloses its political affiliation to a party, is either funded by the party or is essentially owned by such political party.<sup>61</sup>

2. TRAI in its Recommendations of 2014 on Media Ownership had stated that certain mandatory reporting

disclosures need to be made by media companies to the MIB and the TRAI on an annual basis:

- (i) Shareholding pattern of the entity;
- (ii) Foreign direct investment pattern of the entity;
- (iii) Interests, direct and indirect, of the entity in other entities engaged in media sector;
- (iv) Interests of Entities, direct and indirect, having shareholding beyond 5% in the media entity under consideration, in other media entities/companies;
- (v) Shareholders Agreements, Loan Agreements and any other contract/agreement;
- (vi) Details of Key executives and Board of Directors of the entity;
- (vii) Details of loans made by and to the entity;
- (viii) Subscription and Advertisement Revenue of the entity/ company;
- (ix) For all channels registered as news channels with MIB-Registered language(s) of operation, Actual language(s) of operation, time slots for news programs;
- (x) Advertising rates;
- (xi) Top ten advertisers for each media outlet of the entity;
- (xii) Income received in the form of shares or any other form for sale of ad space;
- (xiii) Income received in the form of cash or any other form for sale of news or editorial space;

(b) Disclosures to be mandatorily placed in the public domain are as follows:

(i) Any form of association, financial or otherwise, of the media entity with any other entity, affecting the content of the items being published/broadcast as news should be disclosed to the reader/viewer during the time of publishing/broadcasting the item.

(ii) All media entities must mandatorily disclose the list of all entities that control it and those that it controls, on all their media outlets. These disclosures must be displayed as a moving line of information at the bottom of the screen for television channels at hourly intervals, and in a prominent space in the newspaper, right below the title of the front page.<sup>62</sup> These Recommendations are pending.

### 3.4 Accessibility of Information

Under Section 94 Companies Act 2013, the ROC maintains a registry concerning companies which are registered with them and the ROC permits the general public to access this information on payment of a stipulated fee.<sup>63</sup>

Furthermore, the annual reports of all companies can also be accessed by the public on the site of the MCA,<sup>64</sup>

<sup>60</sup><http://asu.thehoo.org/resources/media-ownership/media-ownership-in-india-an-overview-6048>

<sup>61</sup>[http://www.nbanewdelhi.com/assets/uploads/pdf/12\\_Guidelines\\_for\\_Election\\_Broadcasts\\_3\\_3\\_14\\_E.pdf](http://www.nbanewdelhi.com/assets/uploads/pdf/12_Guidelines_for_Election_Broadcasts_3_3_14_E.pdf)

<sup>62</sup>[https://main.tra.gov.in/sites/default/files/Recommendations\\_on\\_Media\\_Ownership.pdf](https://main.tra.gov.in/sites/default/files/Recommendations_on_Media_Ownership.pdf)

<sup>63</sup>[http://www.mca.gov.in/Ministry/pdf/GuidelinesMCA\\_final\\_12\\_022018.pdf](http://www.mca.gov.in/Ministry/pdf/GuidelinesMCA_final_12_022018.pdf)

<sup>64</sup>[http://www.mca.gov.in/Ministry/pdf/AnnualReport2017\\_18\\_19022018.pdf](http://www.mca.gov.in/Ministry/pdf/AnnualReport2017_18_19022018.pdf)

just as the annual reports for the telecom sector is available on the website of DoT<sup>65</sup>.

The RTI Act applies to all “Public Authorities” and a person can make an application for information relating to any public authority. Public Authority is defined as “any authority or body or institution of self-government established or constituted— (a) by or under the Constitution; (b) by any other law made by Parliament; (c) by any other law made by State Legislature; (d) by notification issued or order made by the appropriate Government, and includes any— (i) body owned, controlled or substantially financed; (ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government.”<sup>66</sup> The Act would apply to public broadcaster, Prasar Bharati.

### 3.5 Monitoring and Regulation

- Under Section 92 of the Companies Act, 2013, non-filing of annual returns attracts penal and financial punishment. The other sections dealing with sanctions are Section 448 and 447 which prescribe the punishment for filing a false statement and fraud.
- Section 121 provides for financial punishments for failure to file the report by the listed companies on the annual general meeting in the prescribed manner as per the provisions of the Act.
- Section 128 provides for financial and penal consequences if the books of accounts, etc. are not maintained by the company.
- Sec 129 – Failure to comply with provisions relating to proper disclosure of financial statements attracts financial and penal punishment.
- Section 137 provides for financial and penal punishment in cases of failure to file the copy of the financial statements as provided by the Act.
- Section 184 requires a director to disclose his interest in any company/ies or body/ies and violation of the provision attracts penal and financial consequences as provided for by the Act.
- Section 188 provides for financial and penal punishment in cases of failure to adhere to the requirements of the section in respect of getting consent of the Board of the Company vide a resolution in cases of related party transactions.
- Violations of circulars and notifications of the SEBI invite financial consequences.

For the print media, the failure to provide information on ownership attracts penal penalties under the Press and Registration of Books Act, 1867.

MIB can cancel or refuse to renew permissions of the broadcasters/ radio channels if there is a violation of the conditions of the same.

### 3.6 Transparency

All media companies do file their annual reports and disclose the information as required to by law, but the question remains whether the law requires them to disclose the complete and relevant data. The answer to the question is revealed in the fact that TRAI had suggested in its Recommendations on Media Ownership in 2014 that further “relevant disclosures” would enable and enhance genuine transparency in the sector.<sup>67</sup> In view of the above, it is to be noted that there is hardly any uniformity in the data/statistics or format in which the data is provided in the public domain by the various types of companies/entities. The requirements also vary under the different legislations. The quagmire of statistics leads to confusion and the important statistics gets drowned out. It is not easy to analyze such data let alone dissect the complex transactions relating to mergers, amalgamations and acquisitions to discover the pattern of shareholding or ownership.

A prime example of the above is the hugely complicated transaction of the acquisition of the Network 18 companies by Reliance Industries through the Independent Media Trust and then Network 18’s investment of crores to acquire stakes in Eenadu TV’s channels.

In the end one can only conclude that transparency exists only if the data is not lost in statics and mired in complicated legislation.

The situation is summed up well in the title of an article in Scroll which states that “*There no comprehensive framework of disclosure norms for media ownership*”. Since under the Companies Act, 2013 the data disclosed is based on different parameters and levels of aggregation making the data unusable for comparisons and studies regarding the extent and method of media monopolies and concentration.<sup>68</sup>

## 4. Other state influences on media organizations.

### 4.1 State taxes and impact

1. While the taxes levied on media companies appear no different from other companies, the major distinguishing feature is that in the broadcasting industry/media companies there are several stakeholders- Broadcasters, DPOs (MSOs. DTH, HITS, IPTV) and LCOs and therefore individual transactions amongst the stakeholders get taxed individually.

2. Under the pre-GST regime, there was dual levy of service tax at the rate of 15% and other taxes such as

<sup>65</sup><http://dot.gov.in/reports-statistic/2471>

<sup>66</sup><https://rti.gov.in/rti-act.pdf>

<sup>67</sup>Ibid p.26

<sup>68</sup> Ibid footnote 57

entertainment tax on broadcasting services (DTH/ cable TV services) and therefore the rates charged under the various heads were unduly high. The States were generating higher incomes from the entertainment industry by levying local tax and therefore the broadcasting industry was paying central and state taxes particularly as entertainment is a part of several transactions and services which were individually taxed.

3. The introduction of GST has resulted in a single levy at 18% thereby reducing tax burden and the tax regime for the entertainment/media industry has become simpler. With the roll out of GST it is also likely that compliance in the cable business would improve thereby improving average revenues per sector.

4. However certain concerns of the broadcasting industry remain:

(i) The tax treatment of foreign companies in the broadcasting sector in India has become one of the foremost factors deterring foreign investment in the country. There are several examples of this.

(ii) Secondly, the other disadvantage that media sector suffers from in respect of tax is that Industrial undertakings are eligible for benefit of carry forward and set off of losses in case of amalgamations, include undertakings providing telecommunication services, but undertakings in the Media & Entertainment sector are not eligible for this carry forward. With the convergence of telecommunication and Media & Entertainment sector on the horizon and the trend of consolidation being witnessed in the sector, extending this tax benefit to the Media & Entertainment sector would provide a boost to consolidation among media players and would keep their growth engine viable.<sup>69</sup>

(iii) Thirdly, while the Government has issued circulars to clarify TDS aspects in relation to payment to software production houses and advertising commission/discount given by broadcasters to advertising agencies but there still remains a lot of controversy over some other payments made by this industry.

(iv) Fourthly, payment of carriage fees by broadcasters to cable operators/multi-system operators is being treated by the tax department as fees for technical services, liable for TDS at 10 per cent and has therefore resulted to protracted litigation. A clarification to the effect that such payments are subject to TDS at the rate of 2 per cent, being towards 'work' relating to broadcasting, would help mitigate litigation on this issue.

(v) Furthermore, applicability of TDS on discount given to distributors on sale of set top boxes/recharge coupon vouchers for the DTH industry has been another area of long drawn controversy. The Government should put to rest this controversy by issuing a clarification that such discount is not in the nature of commission, and hence is not subject to TDS.

(vi) The retrospective amendment to the definition of 'royalty' which was introduced in 2012, though stated to be with a view to clarify the legislative intent, has effectively expanded the scope of royalty under the

Income-tax Act, 1961. Consequently, tax authorities are treating payments by broadcasters towards transponder hire charges to be payments for use of a 'process' (which is defined to include transmission by satellite, cable, etc.) or for use of equipment and hence, in the nature of 'royalty', which is liable to TDS at 10 per cent. Even where a foreign satellite company is governed by a tax treaty, tax authorities are importing the definition under the Income Tax Act into the treaty. This has resulted in foreign satellite companies passing on their tax costs to the Indian broadcasters. To curtail litigation and undue burden on the Indian broadcasters, the Government should clarify that payment to foreign broadcasters does not amount to royalty and thereby align India's position with the international position thereon.<sup>70</sup>

5. The taxation regime in India is complicated and difficult to fathom easily. Complicated legislations lead to multiple litigations.

## 4.2 Entry Barriers

The entry barriers for the media organizations are high due to investments and costs of infrastructure that are required to set up the media business.

According to the Policy guidelines for Uplinking channels:<sup>71</sup>

- The permissions for setting up teleports requires an initial investment of INR 3 crores and every additional teleport thereafter requires an additional investment of INR 1 crore;
- For starting a News and Current affairs channel, a company needs an initial investment of INR 20 crores for the first channel and INR 5 crores for any additional channel that is to be uplinked thereafter;
- For starting a non-news channels, a company needs an initial investment of INR 5 crores for the first channel and INR 2.5 crores for any additional channel thereafter;
- The list of permissions required and the process for uplinking a television channels is long, tedious and cumbersome. The authorities/ departments involved in the above process are: MIB; MHA; DoS; DoR; WPC; NOCC; DoT
- The process is a 2 stage one with MIB considering the inputs of MHA, DoS and DoR and then taking the decision to issue the letter of intent or permission for broadcasting services.
- Allocation of spectrum through auction or on a FCFS basis is a tedious process, whether for television or radio broadcast;
- To start a commercial radio station or CRS is monetarily very expensive.

<sup>69</sup><https://www.moneycontrol.com/news/business/media-entertainment-industry-key-tax-issues-and-expectations-from-budget-2018-2489881.html>

<sup>70</sup> Ibid footnote 67

<sup>71</sup><https://www.broadcastseva.gov.in/Landing%20Page%20Documents/Satellite%20TV%20Channels-2017-5-19/FinalUplinkingGuidelines05.12.2011.pdf>

- Pricing of frequencies can pose a problem for new entrants if the price is high;

These barriers are apart from the regular difficulties faced by any new entrant:

i) For a new entrant the competition in this sector/industry is prohibitive both in electronic and print media, particularly in regional print and electronic media;

(ii) In view of the competition, to get sufficient skilled employees, experts and access to the distribution platforms is a problem;

(iii) Cost of carriage of content, cost of coverage and competing for revenues for advertising may prove to be a serious deterrent for new entrants;

(iv) With advent of digital media, not only has the competition increased but the traditional media has to come up with innovative ideas constantly to attract more consumers and deliver relevant content and services that are profitable too.<sup>72</sup>

The regulator, TRAI had acknowledged in the Recommendations dated 26<sup>th</sup> February, 2018 on “Ease of Doing Business in the Broadcasting Sector”,<sup>73</sup> that process for acquiring licenses /permissions in the broadcasting sector were obsolete, inefficient and required re-engineering. It stated that in order to remove the entry barriers in the broadcasting sector it was important to lay down well-defined and transparent procedures, facilitate innovation, technology adoption in the sector and introduce investor friendly policies. At present there exist multiple levels clearances required from numerous departments within MIB.

### 4.3 Media concentration and Spectrum Allocation

Media concentration has played a role in spectrum allocation to the extent that high pricing of the frequencies ensures that the national/major competitors/companies win the bids in the auctioning of spectrum and thereby consolidating their foothold in the industry further. An example of the same is given below:

- (a) In Phase III of the auctioning of radio frequencies, the pricing was exorbitantly high and this deterred the new entrants from getting the necessary licenses.
- (b) In 2015, MIB received a total of 28 applications for the Phase III e-auctions; out of which there were about 13 new entrants. However, by the end of the bid (or auction) there were only five new entrants who acquired various frequencies, priced between INR 0.29 to INR 7.40 crores.

(c) Sarthak Films Pvt. Ltd, Odisha Television Ltd, Abhijit Realtors and Infraventures Pvt. Ltd, RenderLive Films and Entertainment Pvt. Ltd, and Abir Buildcon Pvt. Ltd, were the new entrants in the radio industry.

(d) Other new entrants like Shahi Shipping Limited, Pratidin FM Private Limited and AM Television Private Limited failed to enter the radio industry and the wait for acquiring the radio frequency ‘remains’ a struggle.

(e) Due pricing of frequencies and the inflated costs there were very few new entrants who managed to acquire the auctioned frequencies

(f) Though the large companies, or in other words, existing national level players, went on to bid in millions, most new entrants felt the impact of the inflated costs. Pratidin FM Private Limited, which is part of the Northeast-based Pratidin Group, was recently registered to run the radio business. Rishi Baruah, one of the promoters from Pratidin FM Pvt. Ltd. said, “We stopped at one point as our research proved that the market, we were looking at could not be profitable as the prices sky rocketed.”<sup>74</sup>

Media concentration plays a role in spectrum allocation especially in favor of conglomerates or large companies particularly in regional areas where certain channels already have market dominance.

### 4.4 Transparency in Spectrum Allocation

1. The decision-making process about allocation of frequencies between broadcasters has been not been very transparent, open or participatory, which is reflected in the judgement of the Supreme Court in the 2G spectrum case titled ‘A. Raja Versus Subramanian Swamy’.<sup>75</sup> The Supreme Court by the aforementioned judgement had cancelled the licenses on the grounds that the procedure adopted for allocation spectrum being FCFS was arbitrary and irregular. After examining the Government’s decisions, the Supreme Court stated the decisions were “arbitrary,” “unconstitutional,” and “illegal”. Analysts complained that billions in potential revenue were lost because 2G licenses were sold at below market prices.

The Apex Court also observed that that auction played a significant role in allocation of scarce resources and auctions have been found to be one of the best forms of achieving the twin objectives of economic efficiency and optimizing revenues recently. Competition is the key tool of achieving these objectives it observed. There are essentially two designs of commonly practiced auctions – a) the ascending auction, in which the price is raised successively until one bidder remains and b) sealed bid auction, in which the bidder independently submits a

<sup>72</sup><https://www.equitymaster.com/research-it/sector-info/media/Media-Sector-Analysis-Report.asp>

<sup>73</sup>[https://main.trai.gov.in/sites/default/files/Recommendation\\_EODB\\_26022018.pdf](https://main.trai.gov.in/sites/default/files/Recommendation_EODB_26022018.pdf)

<sup>74</sup><http://www.radioandmusic.com/biz/radio/private-fm-stations/151004-how-did-new-entrants-radio-industry-fare>

<sup>75</sup>A. Raja Versus Subramanian Swamy 2012 (9) SCC 257

single bid without seeing others' bids and the object is sold to the highest bid. Ascending auctions are likely to encourage collusive behaviour as well as deter entry.<sup>76</sup>

2. Pursuant thereto, the NFAP-2018 was framed which is available on the website of DoT<sup>77</sup> and it provides a broad regulatory framework, identifying which frequency bands are available for cellular mobile service, Wi-fi, sound and television broadcasting, radio navigation for aircrafts and ships, defence and security communications, disaster relief and emergency communications, satellite communications and satellite-broadcasting, and amateur services. NFAP-18, though governing the use of spectrum in India, does not by itself provide the right to use the spectrum.

3. The authorities dealing allocation of spectrum are DoT and WPC. Though DoT is a Central Government ministry and is assumed to be independent wing, but the possibility of political interference or interference by entities with commercial vested interest always lurks. Before any part of the spectrum is put to use in India, a license is required to be obtained from the WPC Wing, Ministry of Communications, unless such a requirement is exempted by the WPC Wing. In order to participate in auction, the participants have to comply with the terms and conditions of the Notice Inviting Applications issued by DoT in respect of different frequency bands.

4. India's past experience with spectrum auction has often revealed that the focus of the Government has been overwhelmingly on short run revenue maximization. This has been at the expense of long run healthy growth of the sector and possibly also long run revenue maximization for the Government through higher tax earnings from a thriving telecom sector. Exorbitant reservation prices for spectrum raises the fixed cost for firms and together with high levels of competition in the sector necessarily impacts consumer surplus adversely in the long run. It therefore resulted in low innovation within the sector and eventually poor quality of service.

5. The above observations were made in a study done by the Centre for Technology, Brookings wherein it was pointed out by the Analysts that "spectrum cost in India is one of the highest in the world."<sup>78</sup> Another problem observed with regard to spectrum was the inflexible and fragmented use. Since then, there is near consensus among economists and policymakers in India that auctions are a superior mechanism for allocating spectrum. Given the twin objectives of spectrum auctions - efficient allocation of spectrum to the best use and maximize Government revenue - it is critical that auctions are designed appropriately. The fundamental process of auction is one of price discovery. However, the Government auction raised prices to unreasonable levels and forced telecom companies to take on high debt levels.

<sup>76</sup>[https://main.trai.gov.in/sites/default/files/CUTS\\_plimanry.pdf](https://main.trai.gov.in/sites/default/files/CUTS_plimanry.pdf)

<sup>77</sup><http://wpc.dot.gov.in/WriteReadData/userfiles/NFAP%202018.pdf>

<sup>78</sup> <https://www.brookings.edu/wp-content/uploads/2017/05/spectrum-policy-in-india8515.pdf>

6. Presently however it may be noted that DoT is considering not auctioning spectrum in E and V bands and is planning to allocate these airwaves so that operators can use it to upgrade capacity on their networks, given the surge in data consumption.<sup>79</sup> This strategy implies that spectrum has to be issued only through FCFS basis as network installed by the first operator has to be protected in case of interference.<sup>80</sup> The spectrum allocation for 5G trial network is also under consideration.

#### 4.5 Distribution of State Advertising

1. The Government advertising in India is managed by the DAVP which is the nodal agency to undertake multi-media advertising and publicity for various Ministries and Departments of Government of India. The policy and mission is stated on DAVP's website.<sup>81</sup> However the basis on which DAVP has distributed state advertisements to newspapers or recently to the electronic media/radio has not been transparent nor is its policy or practice fair.

2. DAVP is the largest advertiser particularly in print media. The policy for empanelment of private C&S TV channels and fixation of rates for Government advertisements was last modified in 2017<sup>82</sup> and for print in 2016.<sup>83</sup> For Radio, the policy guidelines for empanelment for FM Radio Stations and fixation of rates for Government advertisement were modified in 2016<sup>84</sup>.

(i) The Government advertisement rates for Radio and Television are distributed according to the reach of the channels and that is gauged by the data brought out by BARC and IRS which determines the audience watching or hearing the channels.

(ii) However, there are several problems with distributing advertisements based on BARC data such as the sample panels installed are not sufficient, panels can still be tampered with, niche channels data remains inaccurate, news channels data is also not accurate and rural/urban data is inaccurate.

(iii) In respect of Print media, the recent DAVP policy was modified 2016 which introduced a new marking system for newspapers to incentivize newspapers that have better professional standing. These newspapers now have to get their circulation verified by Audit Bureau of Circulation or RNI. The policy has classified Newspaper/Journals into three categories namely Small,

<sup>79</sup><https://www.livemint.com/Industry/TYhSyudzRVf69px5KeKuWN/DoT-seen-allocating-spectrum-in-E-V-bands-without-auction.html>

<sup>80</sup><https://thewire.in/business/modi-govt-to-allocate-valuable-spectrum-on-first-come-first-serve-basis>

<sup>81</sup><http://www.davp.nic.in/>

<sup>82</sup>[http://davp.nic.in/writereaddata/announce/TV%20Amendment\\_31\\_8\\_2017.pdf](http://davp.nic.in/writereaddata/announce/TV%20Amendment_31_8_2017.pdf)

<sup>83</sup>[http://www.davp.nic.in/Newspaper\\_Advertisement\\_Policy.html](http://www.davp.nic.in/Newspaper_Advertisement_Policy.html)

<sup>84</sup><http://davp.nic.in/writereaddata/announce/Adv6131282016.pdf>

Medium and Big. The policy also specifies that approximately 30% of the advertisements should be in English language, 35% in Hindi and 35% in regional and other languages like Bodo, Dogri, Garhwali, Kashmiri, Khasi, Konkani, Maithili, Manipuri, Mizo, Nepali, Rajasthani, Sanskrit, Santhali, Sindhi, Urdu and Tribal languages.

(iv) The structure of payment for the advertisements released by the DAVP is ascertained by a Rate Structure Committee.

(v) However, in the past, the practice of distributing advertisements by DAVP in respect of print media was stated to be inefficient and biased. According to a Report in *The Hindu* dated 28/05/2015:<sup>85</sup>

- There was corruption in regard to selection of newspapers/periodicals to release advertisements;
- DAVP had not taken advantage of the technology to deal with the explosive growth of newspapers;
- Hardly any of the newspapers submitted the required annual statement;
- Only 40% newspapers got into privileged DAVP list of advertisers;
- The system of selection of newspapers was tardy and outdated;
- The fixation of price was irrational and therefore kept several newspapers away from getting the advertisements;
- The system was bureaucratic;
- With the dearth of quality small papers and shortage of quality manpower at DAVP to assess their content, the 15 per cent meant for small papers ended up reaching the corrupt few that were politically well-connected or through corrupt deals;
- Only large newspapers with deep pockets were able to manipulate DAVP to get advertisements;
- The rates at which advertisements were given to small newspapers and large newspapers were bizarre and biased towards the newspaper with larger circulation. While large newspapers had their own properties acquired at historical costs, small papers often had to incur much higher cost on infrastructure. Finance costs from banks and other sources formed a fraction of those available for large papers;
- Small papers found the rate offered by DAVP so unviable that they kept away from DAVP.
- The mortality rate of small and specialized publications was high;
- Since competition for advertisements had increased with the entry of electronic and digital media, large English newspapers became predominantly and increasingly dependent on advertisements. It was an unequal competition for small publications with meagre resources to compete with these to garner advertisements;

- Most of the large newspapers continue to belong to large industrial houses. Post-liberalization, the nexus between media moguls and politicians thickened. Many media houses have expanded into other businesses like power, coal, and liquor. The cover-jacket advertisements published by large newspapers offered handsome discounts in rates; some even offered equity deals to entice small businesses to large scale advertising.
- Effective lobbying by large newspapers helped them get a splurge of advertisements on special occasions like elections or anniversaries of governance at the Centre and states.

(vi) In a matter before the CCI titled 'Advertising Agencies Guild Vs DAVP & MIB' case No. 21/2012, CCI held the allegations of the Petitioner that DAVP was in a dominant position and was abusing its dominance was not established and therefore dismissed the case against DAVP. Therefore DAVP's status as a 'nodal' agency for government advertisements remains.

(vii) There are several problems faced by the private television channels in respect of the rates of advertisements issued by DAVP. In its 2017 Policy, the DAVP rates for advertising were very low, while five-time bands were given but no dispersion percentage was specified. The other problematic points appeared to be that BARC's data used for the news genre, whether rural or urban did not give the complete picture nor the reach, payments by DAVP took a long time to clear and pendency of payment was enormous.<sup>86</sup>

3. In fact as of January 2019, DAVP increased its Government advertisement rates by 11% vis a vis private satellite television channels and such advertisements continue to be distributed amongst channels based on their reach and TV ratings as determined by BARC, the only agency dealing with television ratings for private news and general entertainment channels. Rates for news and general entertainment channels are be different.<sup>87</sup> The rates for print media were also increased by 25%. It remains to be seen whether the distribution of state advertising to the media becomes fair and transparent with an increase in DAVP's rates of advertising and changes made in the Policies.

#### 4.6. Monitoring of State Advertising

The Government has machinery in place to check the existence, periodicity and circulation of the DAVP advertisements and therefore it would not be a difficult task to check the existence of a publication, its regularity, content and its print. It is also mandatory to send copies of every issue to designated central libraries and the RNI. However, the question remains if such checks and monitoring is conducted on a regular basis?

<sup>86</sup>[http://www.nbanewdelhi.com/assets/uploads/pdf/10TH\\_AR\\_2016-17.pdf](http://www.nbanewdelhi.com/assets/uploads/pdf/10TH_AR_2016-17.pdf)

<sup>87</sup><https://theprint.in/india/governance/modi-govt-hikes-ad-rates-for-private-channels-looks-to-boost-tv-presence-ahead-of-polls/183351/>

<sup>85</sup><http://www.industrialeconomist.com/page.php?page=80&cid=1053>

The citizen charter in the DAVP has established a Grievance Redressal mechanism if a person is not satisfied with the DAVP's services. The nodal officer is responsible for implementation and monitoring of Citizens' Charter and the norms/standards of service delivery. He is also the designated Public Grievance Officer at the Directorate level. If a person is unsatisfied by the response received by the Public Grievance Officer, the person can complain the Grievance Officer at MIB.

#### 4.7 Laws interfering with media business

The restrictions mentioned in the Constitution under Article 19(2) being *security of the State, friendly relations with foreign States, public order, decency and morality, contempt of court, defamation, incitement to an offence, and sovereignty and integrity of India* are the only restrictions on the media's free speech rights and all legislations have to be tested on this foundation.

1. However several such legislations have either been framed or have been retained with amendments from the colonial era which affect free speech of media /business:

- The Official Secrets Act. 1923 relating to national security.
- Section 66 A of the IT Act, 2000 which was struck down by the Supreme Court in the case of Shreya Singhal Vs Union of India<sup>88</sup> as it stated that any person sending by means of a computer resource or a communication device any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages would be punished. The Apex Court found the Section relating to restrictions on online speech, unconstitutional on grounds of violating the freedom of speech guaranteed under Article 19(1) (a). The Court further held that the Section was not saved by virtue of being 'reasonable restrictions' on the freedom of speech under Article 19(2).

However even subsequent to the above judgment, there have been several cases where people were arrested<sup>89</sup> by the police on ground that their posts online were allegedly violative of the said section.<sup>90</sup>

2. Between 14<sup>th</sup> and 15<sup>th</sup> February, 2013 the DoT issued five separate orders to internet service providers, blocking access to no fewer than 164 Uniform Resource Locators or web addresses where specific content is hosted. All five were issued in seemingly unquestioning and unreserved compliance with *ex parte* orders emanating from courts. No reasons were given, though

<sup>88</sup> AIR 2015 SC 1523

<sup>89</sup> [https://www.huffingtonpost.in/2018/10/15/the-supreme-court-struck-down-section-66a-of-the-it-act-in-2015-why-are-cops-still-using-it-to-make-arrests\\_a\\_23561703/](https://www.huffingtonpost.in/2018/10/15/the-supreme-court-struck-down-section-66a-of-the-it-act-in-2015-why-are-cops-still-using-it-to-make-arrests_a_23561703/)

<sup>90</sup> [https://www.business-standard.com/article/current-affairs/police-using-section-66a-of-it-act-to-make-arrests-despite-sc-s-ruling-118120300067\\_1.html](https://www.business-standard.com/article/current-affairs/police-using-section-66a-of-it-act-to-make-arrests-despite-sc-s-ruling-118120300067_1.html)

as things transpired, these were not very difficult to figure out.<sup>91</sup>

- Section 499 and 500 of the IPC deals with criminal defamation and the punishment. Though the validity of the aforesaid provisions has been upheld by the Supreme Court of India in Subramanian Swamy Vs Union of India & Ors,<sup>92</sup> there are many instances where these provisions have been misused to harass the media or journalists when the article published is not laudatory of the person/organization.
- The intention of filing a case under such a provision is to ensure that the publication withdraws the article or apologizes for having published it. Once such provisions of the IPC are invoked it can have a "chilling effect" on the media and its journalists since the matters concern criminal law and result in punitive /penal punishments.
- Civil Defamation suits and the exorbitant damages prayed for against the media are also tools used to harass the media to withdraw or apologize for its publications. If the damages sought are large, it could force a beleaguered media company to settle the matter instead of going through a lengthy and expensive litigative process.

(i) 55 cases were filed by Jayalalitha government against the media.<sup>93</sup>

(ii) Apparently 125 cases were filed by the Tamilnadu Government against the Hindu newspaper.<sup>94</sup>

(iii) 28 Defamation cases filed by the Anil Ambani group against the media.<sup>95</sup>

An attempt to decriminalize defamation has been made in 2016 with the introduction of the Bill - The Protection of Speech and Reputation Bill, 2016.<sup>96</sup>

- Section 294 IPC (punishment for obscene acts or words in public);
- Section 153 (A) IPC (promoting enmity between different groups) IPC;

<sup>91</sup><https://www.epw.in/journal/2013/09/web-exclusives/quashing-dissent-where-national-security-and-commercial-media>

<sup>92</sup> 2016 (7) SCC 221

<sup>93</sup><https://www.thenewsminute.com/article/jaya-govt-filed-213-defamation-complaints-5-years-here-are-some-strangest-cases-48362>

<sup>94</sup><https://www.thebetterindia.com/162334/criminal-defamation-india-news/>

<sup>95</sup><https://scroll.in/article/903119/anil-ambanis-defamation-blitz-28-cases-filed-by-reliance-group-in-ahmedabad-courts-this-year>

<sup>96</sup><http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/3100.pdf>  
<http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/3100.pdf>

- Section 67 of the IT Act which speaks of publishing or transmitting material in electronic form which is obscene;
- Section 69 of the IT Act permits the Government to issue directions for interception or monitoring or decryption of any information through any computer resource and such directions can be issued under circumstances such as to protect the sovereignty or integrity of India etc. In fact, the permissions issued to the broadcasters for uplinking their channels also state that broadcasters will be held liable if their telecasts violate the Programme Code of the CTN Act, 1995 and CTN Rules 1994. Some terms in the Programme Code are liable to subjective interpretation.
- The offence of Sedition, in India, is defined under Section 124-A of the IPC as, “whoever by words either spoken or written, or by signs, or by visible representation or otherwise brings into hatred or contempt or excite or attempts to excite disaffection towards the Government established by law in India shall be punished”. This archaic piece of legislation can be and is being misused against the media journalists.

One such example is Mr. Kamal Shukla; a journalist was charged under the said provision with sedition for his posts on Facebook on the investigations in the case of Late Justice Loya’s mysterious death.<sup>97</sup> In another case students of JNU were charged with sedition for allegedly shouting anti-India slogans.

The Central Board of Film Certification (CBFC) the regulatory film body of India, regularly orders directors to remove anything it deems offensive, including sex, nudity, violence or subjects considered politically subversive.

3. On a practical level, whether media companies are victimized or not under various legislations including for violation of the provisions of the Income Tax Act, SEBI Act, and Banking Regulations etc. could also depend on who are the owners/promoters of the said companies and their leanings.

4. While the editorial independences are guaranteed by Article 19(1) (a) of the Constitution which gives the media the fundamental right to free speech and expression, the Press Council Act states that one of the important functions of the Press Council is to help newspapers and news agencies to maintain their independence. Nevertheless, as already stated above, if media organizations are owned by largely by corporate entities /conglomerates (which is a concept still undefined in the Acts of 2002 and 2013) and these companies have an agenda, political, business or otherwise, the editorial independence would get compromised. The editorial independence would also

<sup>97</sup><https://scroll.in/article/877838/who-is-anti-national-the-bastar-journalist-charged-with-sedition-raises-important-questions>

depend on policies of the company which owns the media and the Editor in charge.

An institution is only as effective as the person heading it.

#### 4.8 Modifications in Law

The modifications in law in respect of distribution of state advertising,<sup>98</sup> process of spectrum allocation<sup>99</sup> and taxes for media outlets have been mentioned hereinabove.

### 5. Net Neutrality (NN)

#### 5.1 Laws relating to NN

1. In India there is no specific legislation, Statutes or Acts governing Net Neutrality. DoT approved a regulatory framework on Net Neutrality on 31<sup>st</sup> July, 2018 in which it stated that the ‘Government is committed to the fundamental principles and concepts of Net Neutrality i.e. keep the Internet accessible and available to all without discrimination.’

*Internet Access Services, therefore, needs to be governed by a principle that restricts any form of discrimination, restriction or interference in the treatment of content, including practices like blocking, degrading, slowing down or granting preferential speeds or treatment to any content. To ensure that the regulatory framework on Net Neutrality adheres to the fundamental principles and concepts of Net Neutrality, the policy directives on Net Neutrality have been issued.*<sup>100</sup>

2. In fact on 3<sup>rd</sup> March, 2016, DoT requested TRAI to provide its recommendations on the subject of net neutrality, in accordance with the provisions of Section 11(1) (a) of the TRAI Act, 1997. Subsequently, TRAI provided to DoT its Recommendations on 'Net Neutrality'<sup>101</sup> dated 2nd November, 2017<sup>102</sup>, which were accepted by DoT when it issued its policy on Net Neutrality. DoT amended license rules by incorporating clauses related to net neutrality which bars service providers from discriminating against internet content and services by blocking, throttling or granting preferential higher speeds.

3. On 8<sup>th</sup> February, 2016, TRAI released its regulations "Prohibition of Discriminatory Tariffs for Data Services, Regulations, 2016"<sup>103</sup> which, inter alia, prohibited any service provider from offering or charging discriminatory tariffs for data services on the basis of content. It stated:

- No service provider shall offer or charge discriminatory tariffs for data services on the basis of content.

<sup>98</sup> Ibid p. 33

<sup>99</sup> Ibid p.33

<sup>100</sup><http://dot.gov.in/net-neutrality>

<sup>101</sup>[http://main.traai.gov.in/sites/default/files/Recommendations\\_NN\\_2017\\_11\\_28.pdf](http://main.traai.gov.in/sites/default/files/Recommendations_NN_2017_11_28.pdf)

<sup>102</sup>[https://main.traai.gov.in/sites/default/files/PR\\_No.100of2017.pdf](https://main.traai.gov.in/sites/default/files/PR_No.100of2017.pdf)

<sup>103</sup>[https://main.traai.gov.in/sites/default/files/Regulation\\_Data\\_Service.pdf](https://main.traai.gov.in/sites/default/files/Regulation_Data_Service.pdf)

- No service provider shall enter into any arrangement, agreement or contract, by whatever name called, with any person, natural or legal, that has the effect of discriminatory tariffs for data services being offered or charged by the service provider for the purpose of evading the prohibition in this regulation.

## 5.2 Laws & Authorities dealing with NN

In India, issues of licensing and allocation of spectrum are dealt with by DoT while regulatory aspects are dealt with by TRAI. Therefore, at present the Regulations of TRAI and the Policy of DoT essentially cover the concept of Net Neutrality. TRAI is an independent regulator in the telecom sector, which mainly regulates TSPs and their licensing conditions, etc.

### 5.3 Definition of NN

Network neutrality is best defined as a network design principle. The term “net neutrality” was coined to represent the idea that “a maximally useful public information network aspires to treat all content, sites and platforms equally”<sup>104</sup>. In India the IT Act governs the cyber space. In 2015, TRAI the regulatory Authority in its Consultation Paper on “Regulatory Framework for Over-the-top (OTT) services” defined Net Neutrality to mean that TSPs must treat all internet traffic on an equal basis, no matter its type or origin of content or means used to transmit packets.<sup>105</sup>

### 5.4 Implementation of NN

The various authorities will probably legislate in the near future respect on Net Neutrality taking into account the interests of the various stakeholders.

1. As stated above, Net Neutrality is being regulated by the TRAI through its Regulations of 2016 “Prohibition of Discriminatory Tariffs for Data Services, Regulations, 2016” and by DoT by its Regulatory Framework on Net Neutrality issued on 31<sup>st</sup> July, 2018.

In the said regulatory framework, DoT is to be the monitoring and enforcement institution to ensure net neutrality.

In fact, DoT has also made it clear that violation of the condition of net neutrality will be considered a violation of the license conditions issued to telecommunications operators.

Net neutrality applies to four different kinds of stakeholders in the internet:

(i) the consumers of any internet service, (ii) TSPs or Internet Service Providers/ISPs, (iii) the OTT service providers (those who provide internet access services such as websites and applications), and (iv) the Government, who may regulate and define relationships between these players.

The exceptions that DoT has carved out in the Policy relating to Net Neutrality are:

- (i) Internet of Things (IoT) services which are critical
- (ii) Specialized services

<sup>104</sup>[http://www.timwu.org/network\\_neutrality.html](http://www.timwu.org/network_neutrality.html)

<sup>105</sup><https://main.traai.gov.in/sites/default/files/OTT-CP-27032015.pdf>

These above terms would be defined in future by DoT in consultation with other stakeholders. DoT stated that subsequently TRAI would issue detailed guidelines on the rules that exempt content delivery networks that don’t use public internet from restrictions on non-discriminatory treatment. A committee in consultation with TRAI would also frame Traffic Management Practices for telecom operators to adopt for ensuring quality of services, security of networks, emergency services, implementation of court orders and Government directions as long as they are transparent and the impact on users is declared.

India’s Net Neutrality rules state that telecom and internet service providers should be barred from signing agreements that can lead to discriminatory treatment based on, content, sender, protocols or even equipment.<sup>106/107</sup>

2. The said exemptions<sup>108</sup> are expected to benefit the big integrated carriers like Airtel and Jio versus connectivity providers since integrated carriers already have a strong presence in the content platforms.<sup>109</sup> This observation will have to be assessed in the near future. There have been reports of violations of the Net Neutrality policy<sup>110</sup>. Complaints show blocking of proxy and concentration of Virtual Private Networks by some telecom operators has been reported. At present though the laws regulating Net Neutrality appear to be sufficient in view of the fact that to concept is relatively new to India.

However, the policies of Net Neutrality may need modifications in the future if the legislations/regulations do not result in the existence of multiple companies/players in the market particularly in the telecom and broadcasting sector. If the number of telecom / broadcasting companies operating in the market shrinks, in that eventuality, with monopolies and concentration on the rise, net neutrality will not endure.

## Conclusion

Legislation on Media Concentration at present lacks uniformity, consistency and effectiveness. Since it is understood only in terms of “competition” it will invariably be insufficient /incapable of preventing media monopolies. Since media plays a unique role and has a major influence in shaping views and opinions, as pointed out by TRAI, media should not be considered a

<sup>106</sup>[https://economictimes.indiatimes.com/articleshow/65296830.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/articleshow/65296830.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

<sup>107</sup>[https://www.business-standard.com/article/companies/dot-amends-licences-of-telcos-to-incorporate-net-neutrality-rules-118080700357\\_1.html](https://www.business-standard.com/article/companies/dot-amends-licences-of-telcos-to-incorporate-net-neutrality-rules-118080700357_1.html)

<sup>108</sup><https://www.bloomberquint.com/law-and-policy/telecom-regulator-releases-suggestions-to-protect-net-neutrality>

<sup>109</sup>[https://economictimes.indiatimes.com/articleshow/65296830.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/articleshow/65296830.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

<sup>110</sup><https://internetfreedom.in/more-than-100-people-report-violations-of-net-neutrality-all-over-india-we-need-enforcement-action/>

'general commodity' prevalent in the market. Therefore, any attempt to maintain the plurality of the media should not be determined by competition related law. If media concentration is to be prevented, specific laws relating to the same will have to be legislated.

Accordingly, there has to be a single authority dealing with legislations relating to media concentration for such legislations to be effective.

The provisions of certain Acts will also need to be reviewed such as the Companies Act, 2013 in order that the companies / enterprise / groups are prevented from entering into complex transactions to camouflage the actual holdings/influence and control that a company has once it enters into a merger, or acquires another entity. This is particularly crucial in the media sector for the reasons stated in this paper.

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