Response of Discovery Communications India to the Consultation Paper No. 01 / 2013 dated 15th February, 2013 on Issues relating to Media Ownership ("Consultation Paper")

General Disqualifications

Q1: In your opinion, are there other entities, apart from entities such as political parties, religious bodies, Government or government aided bodies which have already been recommended by TRAI to be disqualified from entry into the broadcasting and distribution sectors, which should also be disqualified from entry into the media sector? Please elaborate your response with justifications.

Q2: Should the licensor, either *suo motu* or based on the recommendations of the regulator, be empowered to disqualify any entity from entering the media sector in public interest? For instance, should the licensor or the regulator be empowered to disqualify (or recommend for disqualification) a person who is subject to undue influence by a disqualified person.

We have no comments to offer with respect to question nos. 1 and 2.

There exist myriad regulations to govern potential breaches by political and religious bodies governmental aided bodies etc., which if effectively enforced would address TRAI's concerns.

Media Ownership/Control

Q3: Should ownership/ control of an entity over a media outlet be measured in terms of equity holding? If so, would a restriction on equity holding of 20% (as recommended by TRAI in its recommendations on Media Ownership

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dated 25th Feb 2009) be an appropriate threshold? Else, please suggest any other threshold value, with justification?

Q4: In case your response to Q3 is in the negative, what other measure(s) of ownership/ control should be used? Please support your view with a detailed methodology to measure ownership/ control over a media outlet.

TRAI's Consultation Paper suggests that the need to exercise control stems from the need to promote democratic diversity through plurality and diversity. That being so, any regulatory controls would focus on news and current affairs channels which are directly connected with the formation of public opinion on public order issues than general entertainment and factual channels.

It is our view that the media industry in India is sufficiently diverse and vibrant, even in the instance of news and current affairs, to sustain high levels of competition across India.

TRAI astutely observes in its Consultation Paper that:

- there are some 650 TV channels operating in India as of 20th December, 2012, of which 300 channels are of the news and current affairs genre.
- as at 31st March, 2011 there are 82,222 registered publications, of which 14,508 are newspapers.
- AIR operates around 237 radio stations, while 242 stations are operated by private players. This number is expected to go up to 839 stations, covering 294 cities and boosting regional growth.
- there is a paradigm shift in the manner in which content is prepared, carried and delivered. Traditional media and new digital media such as the internet are converging, and content is now being disseminated across new platforms and distribution media.

The avenues vide which one may reach a wider audience and access information have increased tremendously. This coupled with the exponentially increasing reach and

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impact of social media (Facebook, Twitter), means that individuals are able to express their own views and opinions, ensuring more than sufficient plurality, independence and diversity in news and views and TRAI's concern on plurality appears to be excessive. In a country such as India, where diversity of languages, religions, beliefs, viewpoints, cultures etc., is deeply entrenched, it seems near impossible for one or more media entities to be in a position to substantially influence viewpoints.

TRAI has overlooked the growing reach of foreign news channels / websites, and consequently, external, independent and politically uninfluenced viewpoints amongst Indian citizens.

TRAI has not made out a cogent case for control of entertainment channels. Infotainment / lifestyle channels such as those operated by Discovery Communications India networks pose no threat to viewers at large and should be outside the purview of any form of cross media regulation(s) that TRAI may seek to introduce, despite recommendations to the contrary.

TRAI needs to consider that the basic premise for the introduction of Cross Media restrictions in most countries was to prevent print / newspaper majors from controlling terrestrial television which has a huge reach. In India, no private player can operate terrestrial television, which is monopolized by Doordarshan. Hence, the reason why such restrictions were put in place by some countries is not even relevant in the Indian context.

We firmly believe that the Competition Act of India provides adequate safeguards for ensuring fair competition and restraining anti-competitive behaviour. The Competition Act adequately defines ownership and control, and further regulates mergers, amalgamations, acquisitions, etc. The authority set up under the Act, i.e. the Competition Commission of India (CCI) is already functional and is the appropriate authority to deal with such issues. There is no justification in creating parallel concepts of ownership or a structure which triggers review by yet another authority apart from the

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CCI. On the contrary, we are of the firm view that existing regulatory rules, including those laid down by the TRAI, should be substantially relaxed or streamlined. We also do not support sector specific regulations to regulate competition because it cannot auger well for investors to have to grapple with plurality of regulators addressing similar issues. Worldwide, the stage is set for regulators to streamline and simplify legal systems with a view to making them investor friendly – we urge TRAI not to take the step backward.

Media Ownership Rules

Q5: Should only news and current affairs genre or all genres be considered while devising ways and means to ensure viewpoint plurality? Please elaborate your response with justifications.

Q6: Which media amongst the following would be relevant for devising ways and means of ensuring viewpoint plurality? (i) Print media viz. Newspaper & magazine; (ii) Television; (iii) Radio; (iv) Online media; (v) All or some of the above

We maintain our position that there is no requirement to further regulate in the name of viewpoint plurality and diversity, given India's highly competitive news space, and the growing influence of internet.

We do not believe that non news and non-current affairs play a role in influencing public opinion on public order and national issues. TRAI should avoid tarring other non-news and non-current affairs genres with the same brush given the inherent differences in the roles played by these channels. Elsewhere in the world, regulators direct their on focus news and current affairs channels when considering cross media ownership.

The growing influence of online media substantially weakens any argument for putting in place controls over media ownership. TRAI has itself observed this in the

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Consultation Paper – *"Apparently, online media has the potential to make a strong positive contribution to plurality by way of making available diverse view points and thereby reducing the ability of any one voice to dominate."* TRAI has also noted that the internet users have shown a half yearly growth of 35%.

We have already witnessed recent mass movements, driven not by media houses, corporates or political parties, but individuals and their supporters who used the power of social media to stimulate the masses. Internet has given a voice to the common man and an open platform to express his views. This medium is continually and increasingly empowering democracy in the true sense. Contrary to TRAI's views, which in any case are unsubstantiated, there is enough and more viewpoint plurality on account of increasing reach and impact of online media.

TRAI should also take into account the impact of convergence of media. Newspapers, TV channels and radio stations are available over the internet including on mobile devices. Smart TV devices are able to access content through internet protocol. One can use the computer or a mobile device to watch videos, read news, listen to music, access live streams of channels, etc. This renders concept of cross media control near irrelevant.

Q7: Should the relevant markets be distinguished on the basis of languages spoken in them for evaluating concentration in media ownership? If your response is in the affirmative, which languages should be included in the present exercise?

Q8: If your response to Q7 is in the negative, what should be the alternative basis for distinguishing between various relevant markets?

"Language" is one of the factors to be considered by the CCI for determining the "relevant geographic market", which in turn is a relevant factor (along with "relevant product market") in determining whether a market constitutes a "relevant market". The Competition Act provides the CCI with authority to inquire if fair competition exists in a market and to check anti-competitive behaviour. It also requires the CCI to consider all relevant factors (including language) in determining the "relevant market".

Hence, there is already a structure in place to ensure fair competition in the market place. We reiterate that we do not support the concept of creating a parallel structure to regulate ownership.

In our view, these issues should best be left to be dealt with by the CCI under the Competition Act.

Q9: Which of the following metrics should be used to measure the level of consumption of media outlets in a relevant market? (i) Volume of consumption; (ii) Reach; (iii) Revenue; (iv) Any other. Please elaborate your response with justifications.

Q10: In case your response to Q9 is "Any other" metric, you may support your view with a fully developed methodology to measure the level of consumption of various media outlets using this metric.

The metrics to be used depends on the purpose for measuring consumption. If the purpose is to defend plurality then, revenue may not be the appropriate measure because there may not necessarily be a direct correlation between revenue and the ability to influence.

Certain regulators (such as Ofcom) have come to the view after extensive research that there is no easy answer and that things need to be considered in the round. We request TRAI to consider these observations, keeping in view the uniqueness of the Indian market place.

Further, in an era of convergence, where difference between media platforms is blurring, relying upon a single metric would be inappropriate.

Q11: Which of the following methods should be used for measuring concentration in any media segment of a relevant market? (i) C3; (ii) HHI; (iii) Any other

Q12: If your response to Q11 is "Any other" method, you may support your view with a fully developed methodology for measuring concentration in any media segment of a relevant market using this method.

In our view, the CCI is the appropriate body with the expertise to measure concentration. Hence, we suggest that TRAI should involve the CCI in coming to any conclusion in this matter.

Q13: Would Diversity Index be an appropriate measure for overall concentration (including within media and cross media) in a relevant market?

Q14: In case your response to Q13 is in the affirmative, how should the weights be assigned to the different media segments in a relevant market in order to calculate the Diversity Index Score of the relevant market?

We adopt CASBAA's views in regard to Q.13 and Q.14. CASBAA is of the view that a diversity index is a flawed measure that has ceased to be used internationally. It refers to the fact that the US FCC stopped relying on this measure 5 years ago. Regulators as Ofcom, after extensive research and consultations, came to the conclusion that one should not rely on a single measure, but rather on a basket of indicators along with other relevant factors.

TRAI itself notes that there is no consensus on the use of Diversity Index for measuring overall concentration in relevant markets.

Q15: Would it be appropriate to have a "1 out of 3 rule" i.e. to restrict any entity having ownership/control in an outlet of a media segment of a relevant market from acquiring or retaining ownership/control over outlets

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belonging to any other media segment? Please elaborate your response with justifications.

Q16: Alternatively, would it be appropriate to have a "2 out of 3 rule" or a "1 out of 2 rule"? In case you support the "1 out of 2 rule", which media segments should be considered for imposition of restriction? Please elaborate your response with justifications.

Q17: Would it be appropriate to restrict any entity having ownership/ control in a media segment of a relevant market with a market share of more than a threshold level (say 20%) in that media segment from acquiring or retaining ownership/ control in the other media segments of the relevant market? Please elaborate your response with justifications.

Q18: In case your response to Q17 is in the affirmative, what should be such threshold level of market share? Please elaborate your response with justifications.

We reiterate our position in our answers to Q1-4 that TRAI has not clearly stated its case for imposing cross media ownership regulations. In any event we do not believe that the concerns on plurality of media apply to non-news and non-current affairs content.

TRAI referred to some international examples of cross media ownership regulatory regimes (including in UK, USA, Australia, etc.), without connecting the dots between these examples and the peculiarities of the Indian market, and without considering the full impact of such regulations / restrictions had on these markets, and the potential impact of such regulations on the Indian market. India is a unique market with unique dynamics and should not ape any other market without due consideration of the after impact of any proposed action. There does not appear to be an international consensus on the correct approach and there does not appear to be a one size fits all solution.

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We urge TRAI to resist the temptation to rush into regulating in this area without duly considering and establishing the need for the same and also considering its after impact.

Q19: Would it be appropriate to lay down restrictions on cross media ownership only in those relevant markets where at least two media segments are highly concentrated using HHI as a tool to measure concentration? Please elaborate your response with justifications.

Q20: In case your response to Q19 is in the affirmative, please comment on the suitability of the following rules for cross media ownership:

(i) No restriction on cross media ownership is applied on any entity having ownership/ control in the media segments of such a relevant market in case its contribution to the HHI of not more than one concentrated media segment is above 1000. (For methodology of calculation please refer para 5.42)

(ii) In case an entity having ownership/ control in the media segments of such a relevant market contributes 1000 or more in the HHI of two or more concentrated media segments separately, the entity shall have to dilute its equity in its media outlet(s) in such a manner that its contribution in the HHI of not more than one concentrated media segment of that relevant market remains above 1000 within three years

Please refer to our comments in Q.13. Regulators have ceased using diversity indices or are moving away from them (e.g. the FCC). TRAI should resist using tools such as HHI or other diversity indices which are known to be inaccurate or which use carries high risks of market distortion.

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Q21: Would it be appropriate to lay down the restrictions on cross media ownership only in highly concentrated relevant markets using Diversity Index Score as a tool to measure concentration? Please elaborate your response with justifications.

Q22: In case your response to Q21 is in the affirmative, please comment on the suitability of the following rules for cross media ownership in such relevant markets:

(i) No restriction on cross media ownership is applied on the entities contributing less than 1000 in the Diversity Index Score in such a relevant market.

(ii) In case any entity contributes 1000 or more in the Diversity Index Score of such a relevant market, the entity shall have to dilute its equity in the media outlets in such a manner that the contribution of the entity in the Diversity Index Score of the relevant market reduces below 1000 within three years.

Please refer to our response to Q Nos.19 and 20.

Q23: You may also suggest any other method for devising cross media ownership rules along with a detailed methodology.

TRAI should first establish the reason and necessity for cross media ownership regulations, before discussing methods. TRAI has not clearly defined the evils that the proposed regulations are intended to combat, nor has it fully considered the existing regulatory regime that could address those problems, more specifically the Competition Act. It has failed to consider the peculiarities of the Indian market and the potential impact of such regulations given the long lasting and undesired effects such regulations could have on investment in the media sector.

We also suggest that TRAI should involve the CCI before proceeding further.

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Q24: In case cross media ownership rules are laid down in the country, what should be the periodicity of review of such rules?

Q25: In case media ownership rules are laid down in the country, how much time should be given for complying with the prescribed rules to existing entities in the media sector, which are in breach of the rules? Please elaborate your response with justifications.

In response to Q.24 and 25, we ask that TRAI consider the issues and concerns we have raised throughout our responses to this consultation. The proposed ownership ban would inevitably lead to the 'break up' of companies and groups that exist today. In the absence of dire exception circumstances (which TRAI has not set out) TRAI should consider if this is the desired end which we dispute, given its retrospective effect.

If at the end of this exercise, a need is still felt to introduce cross media ownership rules, sufficient time should be given to existing entities to align their activities and structures in accordance with such rules. The exact quantum of time required will eventually depend upon the extent to which the cross media rules require such realignment by existing entities.

Mergers and Acquisitions

Q26: In your opinion, should additional restrictions be applied for M&A in media sector? Please elaborate your response with justifications.

Q27: In case your response to Q26 is in the affirmative, should such restrictions be in terms of minimum number of independent entities in the relevant market or maximum Diversity Index Score or any other method. Please elaborate your response with justifications.

We are of the firm view that the regulators in India should be looking at streamlining and simplifying the regulatory regimes across the different sectors, rather than complicating

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the legal structures. This is especially true for the media sector, which is already one of the most highly regulated industry in comparison with other countries.

The Competition Act already provides for a review by the CCI of mergers and acquisitions which result in certain defined thresholds being crossed. We do not see the need to introduce additional or sector specific restrictions which would create needless duplication. TRAI too has not presented any analysis setting out the need for such further restrictions in the Indian context.

Vertical Integration

Q28: Should any entity be allowed to have interest in both broadcasting and distribution companies/entities?

If "Yes", how would the issues that arise out of vertical integration be addressed?

If "No", whether a restriction on equity holding of 20% would be an adequate measure to determine „control" of an entity i.e. any entity which has been permitted/ licensed for television broadcasting or has more than 20% equity in a broadcasting company shall not have more than 20% equity in any Distributor (MSO/Cable operator, DTH operator, HITS operator, Mobile TV service provider) and vice-versa?

You are welcome to suggest any other measures to determine "control" and the limits thereof between the broadcasting and distribution entities.

We do not support blanket restrictions on entities from having ownership interest in broadcasting and distribution entities. The assumption that vertical integration would automatically lead to anti-competitive behaviour is unsubstantiated. Vertical integration has certain obvious benefits like economies of scale, cost reduction, better service to

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the end consumer, etc. The assumption that vertical integration automatically results in anti-competitive behaviour is not correct.

We are not in favor of anticipatory approach to imposing restrictions on vertical integration in the media sector, given the number of benefits that vertical integration bring forth. A vertically integrated entity is not automatically motivated to distort competition in the market. TRAI too has not made out a case that such a situation inherently breeds anti-competitive behavior. A simplistic, ex-ante approach to this issue, which imposes an outright restriction on the ability of an entity to acquire interest in an upstream or downstream business which has a natural and linear relationship with the existing business, is avoidable. This may adversely affect integrations which actually bring about efficiencies in operations and result in savings in costs which are likely to be passed on the end consumers in a competitive market like India.

Whether or not vertical integration of an entity across media segments results in distorting competition should be assessed on a case by case basis, depending on the particular circumstances of the case. A number of factors including the nature of the market, number of players, capacity constraints, nature and strength of competition, etc. need to be considered before arriving at a definite conclusion. TRAI must appreciate and consider the negative effects of any pre-emptive regulation on the ability of media entities to be flexible in their strategies. Also, with convergence of technologies and platforms being the order of the day, it is essential for media entities to be able to take full advantage of these technologies.

Presently, vertical ownership restriction is applicable to DTH licensees. TRAI has recommended similar restrictions for Mobile TV and HITS, which have not been implemented till yet. In our view, such pre-emptive restrictions should be relaxed. In case of Cable, TRAI should focus on implementing digitization at full steam and ensuring that capacity constraints are minimized. The concept of "must carry" has been incorporated to a certain extent in the interconnection regulations related to digital cable. TRAI should seek to strengthen implementation of this condition. Once capacity

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increases, with the "must carry" provision, most of TRAI's concerns related to negative effects of vertical integration on competition (eg., denial of bandwidth) will automatically be non-issues. In any case, there is sufficient competition at all levels of the content supplier and distribution chain to ensure that the interest of end consumers is protected. Hence, any regulation that automatically restricts a broadcaster from taking advantage of natural synergies and cost savings that accrue with holding an interest in distribution of its content, which advantages get passed on the end consumer, will be regressive step.

We would stress on the point that the Competition Act provides adequate safeguards in case an enterprise is found to be indulging in anti-competitive behaviour. The Competition Act *inter-alia* provides the CCI the power to regulate / take corrective steps in case it comes across agreements amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including tie-in arrangement, exclusive supply / distribution agreement, refusal to deal, resale price maintenance, etc., which cause or are likely to cause an appreciable adverse effect on competition in India. The Competition Act also provides for safeguards and corrective steps in case an entity abuses its dominant position in a manner which distorts competition. The CCI has the power in such instances to order discontinuation of the abuse of dominant position, discontinue impugned agreements, impose penalties, modify agreements or even order division of an enterprise enjoying dominant position.

It is important to note that the Competition Act does not prohibit an entity from being in a dominant position, but it is the abuse of such position (which has to be established after a proper inquiry) which makes the CCI step in. In that sense, it is opposite to the anticipatory, pre-emptive approach being looked at by TRAI, which would be retrograde step.

The CCI also has powers to investigate mergers and acquisitions with the perspective of their effect on market competition and order appropriate remedial steps where

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needed. This ensures that remedies are prescribed only where there is an ill, and that the benefits of vertical integration are not lost.

Mandatory Disclosures

Q29: What additional parameters, other than those listed in para 7.10 (i), could be relevant with respect to mandatory disclosures for effective monitoring and compliance of media ownership rules?

Q30: What should be the periodicity of such disclosures?

Q31: Should the disclosures made by the media entities be made available in the public domain?

TRAI has not made out a considered case for cross media ownership regulations. Accordingly, these questions does not require an answer.

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