RESPONSE TO THE TELECOM REGULATORY AUTHORITY OF INDIA'S CONSULTATION PAPERON*"ISSUES RELATING TO MEDIA OWNERSHIP"*

INTRODUCTION

a. The Competition law is being harmonized internationally and also India. The intent of the Competition law is to ensure fair competition in Indian market. In essence the Competition Act also aims at regulating combinations instead of either curbing or letting them loose. The Act primarily focuses on these three areas, including abuse of dominant position.The Competition Act, 2002" was promulgated with an "*object to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets*" which in true sense aims at bringing plurality at all levels including media industry. In view of the same there is no need to bring further regulation for controlling the media and curtailing the freedom it has, that too, without any reasonableness in the action.

b. Accumulation of interest in the media cannot be inferred to mean indulging in restrictive Trade Practice. Section 2(o) defines "restrictive trade practice" to mean a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular,--

(i) which tends to obstruct the flow of capital or resources into the stream of production, or

(ii) which tends to bring about manipulation of prices, or conditions of delivery or to effect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions."

c. In this regard, **The Supreme Court in TELCO's case [Tata Engineering and Locomotive Co. Ltd., Bombay v. Registrar, Restrictive Trade Agreement, New Delhi, (1977) 2 SCC 55],** held that every trade practice which is in restrain of trade is not necessarily a restrictive trade practice. The definition of restrictive trade practice given in Section 2(o) is a pragmatic and result-oriented definition. It defines "restrictive trade practice' to mean a trade practice which has or may have the effect of preventing, distorting or restricting competition, in any manner and in Clauses (i) and (ii), particularizes two specific instances of trade practices which fall within the category of restrictive trade practice. It is clear from the definition that it is only where a trade practice has the effect, actual and probable, of restricting, lessening or destroying competition that it is liable to be regarded as a restrictive trade practice. If a trade practice merely regulates and thereby promotes competition, it would not fall within the definition of restrictive trade practice, even though it may be to some extent, in restraint of trade. Whenever, therefore, a question arises before the Commission or the Court as to whether a certain trade practice is restrictive or not, it has to be decided not on any theoretical or a priori reasoning, but by inquiring whether the trade practice has or may have the effect of preventing, distorting or restricting competition. This inquiry obviously cannot be in vacuum but it must depend on the existing constellation of economic facts and circumstances relating to the particular trade. The peculiar facts and features of the trade would be very much relevant in determining whether a particular trade practice has the actual or probable effect of diminishing or preventing competition and in the absence of any material showing these facts or features, it is difficult to see how a decision can be reached by the Commission that the particular trade practice is a restrictive trade practice."

The new multimedia markets will be far more competitive than the traditional ones. As new technologies develop, even the most technologically advanced or financially endowed companies will be obliged to form alliances to produce multimedia product and services. It is unwarranted to restrict financially capable Companies from using newer technologies; this will not only hamper industrial development but shall also be detrimental towards the interest of the Consumer. Thus it will defeat the very object of the proposed cross media restriction. Moreover, the majority of India is still illiterate and only multi-media formats like TV and radio can supply them their basic needs of News & Entertainment.

The internet has already “fundamentally changed the landscape” for news provision

- It enables a multitude of services to reach consumers via both fixed and mobile networks to a range of devices – TVs, smart TVs, smartphones, laptops, desktops and tablets;
- It provides an alternative distribution network, enabling wider availability of services to consumers;
- It facilitates the development of new services such as catch-up TV, video on demand (rental and retail);
- It allows consumers to access content ‘any time and any place’;
- It facilitates competition from alternative media providers – either new entrants or entry into local media markets from established overseas providers; and
- It reduces the barriers to entry so established providers have to take into account the threat of potential entrants.

These are profound changes. In India in particular the rate of growth in internet-based services and the rate of change in the media landscape began accelerating rapidly in the last few years – rendering TRAI’s analysis and recommendations done in 2008 and 2009 already obsolete.

Freedom of expression and information is an essential element of democracy, and the right of access to modern means of communication is an inherent part of the guarantee of free expression. It is submitted that freedom of expression is best protected in an environment in which a wide variety of independent and autonomous media exist, alongside State-owned publishing/broadcasting media, permitting the expression of diverse opinions and ideas, free from the unnecessary control of government regulations.

The Freedom of expression applies not just to the content of the communication, but also to the manner of conveying information to the public and to the means of transmission or reception. This right to publish in this age of modernization can be extended to include various media other than print. Publication also includes broadcasting and electronic media. Therefore Cross-Media holding restrictions curtail this right of publication directly affecting the right of Freedom of Speech and expression. Furthermore the threat from other forms of media has grown alarmingly threatening to usurp the position of the one form of media if it is unable to have its presence in other form of media and it will be fatal for that media.

Any Cross-Media restriction would amount to curbing the freedom of expression which Press and Media has enjoyed and is entitled to. The freedom of Press or Media is actually part of the broader democratic right to freedom of expression through any medium. Further placing cross media restrictions only on media Companies wherein there is no such cross ownership restriction in any other industry in India will amount to discrimination and violation of fundamental rights granted under Constitution.

It is apprehended that vertical integration shall lead to monopoly and there is a need to lay down a clear cut approach towards cross media and ownership restrictions for the future growth of the Broadcasting sector. Such apprehensions are not well-founded as in India more than 450operational satellite TV channels are currently available which are not only held by different entities but the contents so generated are of different variety addressing different sections of the society.

The TRAI consultation paper places the issues related to media ownership squarely in the context of competition policy. It discusses questions related to horizontal integration and vertical integration in the broadcasting industry, and posits complex solutions including use of controversial (and outmoded) "diversity indexes" constructed according to mathematical theories aimed at assessing "concentration" in media industries.

It is strongly believe that an unbiased selection of proper policy responses requires Indian policymakers to proceed from an objective assessment of the real problems they are confronting, in light of the experience and understanding gleaned from approaches (failures and successes) overseas as well as the real nature of media markets as they are evolving today (and not years or decades ago).

Consideration of issues on media ownership should not be divorced from the specific conditions prevailing in media markets today. Decisions taken based on past conditions and past practices risk being completely inappropriate for the converged media economy that is rapidly developing throughout the world, and of course in India as well. While convergence is arguably at an early stage of development in India, there are indications that consumers are moving rapidly to embrace its benefits, as witnessed by the explosion in smartphone and table take-up and usage of online and social media.

TRAI Consultation paper seems to missing the objective of developing a regulatory regime that is sufficiently flexible and forward looking to harness future convergence developments.

Turning to the task of analysing and achieving policy objectives, then, it is observed that the approach embodied in the Consultation Paper to lack the necessary regulatory caution and analytical rigor. It does not set out a discussion of identified problems in media markets in India today nor make sufficiently explicit the policy objectives that need to be fulfilled; there is an absence of a problem statement. It thus follows that robust and objective evidence in support of the problem statement is also absent.

This is important because "Regulation is…an imperfect tool to mimic competitive forces or to achieve market outcomes that policy makers believe would not occur absent intervention. But regulation has its costs as well as benefits. There can be a danger that high costs are incurred if there is the application of inappropriate tools to solve specific problems and/or if 'old style' regulation is applied to markets subject to dynamic change owing to, for example, technology. Companies may relocate or suffer unsustainable business models. Investment may be chilled.

Consumers may be adversely affected: prices/ quality/ service range/ service availability may be negatively shaped by the regulations, thereby reducing consumer benefits.

TRAI Consultation paper does not consider the potential costs and benefits of the various possible approaches, including a "no change" scenario.

Media Ownership and Control

Among the most glaring problems with TRAI's overall approach to these competition policy problems is the duplication of regulation or lack of coordination with the economic regulation that is currently conducted by the Competition Commission of India (CCI).

TRAI's current proposals to create sector-specific competition regulation, are risky, misguided and unnecessary. Indian law gives the CCI ample authority over this sector (and all others) and no case has been made that the media sector requires additional competition constraints.

TRAI has already recommended specific measures to control ownership of certain media by political parties, religious groups, state governments, etc. With these in place, we do not see any justification for imposing sweeping media ownership controls a) across all media (including pure entertainment as well as news), nor b) affecting all non-sensitive potential owners as well as the above categories of sensitive ones.

The inherent challenges of measuring plurality are huge, complicating the task of achieving a balance that fulfils policy objectives while not restricting markets.

Misguided and ill-prepared attempts at ownership regulation can be bad for governments as well as for industry.

Vertical Integration

India's competition law and its sectoral regulation already embody effective constraints against vertical restraints that have an appreciable adverse effect on competition. The Competition Act provides that vertical agreements (including resale price agreements, exclusive distribution agreements, refusal to deal, etc.) are subjected to a rule-of-reason-type analysis, with potential action by the CCI. Competition authorities have access to a broad range of remedies which can be applied when mergers in the media and communications sector are judged to pose vertical concerns.

In the media sector, TRAI has already put in place substantial actions against presumed vertical restraints, including the "must-provide" requirement (which bans exclusive distribution agreements between broadcasters and distributors) and various price control measures. India in that respect already goes far beyond almost all international comparators in acting against perceived vertical restraints in the television business.

The sector-specific controls on ownership cannot be divorced from the controls that apply in the mainstream merger control regime applying to the sector. Mainstream merger control has built within it key determinants of what amounts to "ownership" and what amounts to a relevant change in control. In this respect, India is no different in that it already has an established merger control system, enforced by the CCI under the Competition Act. Any additional or different importation of concepts of ownership or control, for the purposes of regulating a particular sector must not be undertaken without careful identification of why the sector presents specific challenges which are not addressed by the standard rules. Any departure from the standard rules should be justified by a cost benefit analysis and, in particular, the need to ensure proportionality and avoid inefficiency, duplication and inconsistency."

India has effective policies in place against vertical restraints that affect competition; India has much stronger-than-usual constraints on distribution of television programming. With cable digitisation and opening the sector to increased foreign investment, India is setting the stage for a technological and commercial leap forward of the television distribution industry. India needs the efficiencies and economic benefits to consumers that can flow from vertical investments.

TRAI has not presented a case for additional general restraints against vertical integration in the media industry and thereby it is urged that these proposals be withdrawn.

SPECIFIC ANSWERS TO TRAI CONSULTATION QUESTIONS

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.

The basis of the broadcasting industry – or any industry based on the creation and distribution of audio-visual material – is enactment and effective enforcement of policies to require respect for intellectual property. In all the markets where it is active, it is mostly observed companies or entities which – on a *prima facie* basis – have repeatedly violated intellectual property rights should be denied operating licenses in the broadcasting and distribution sectors. We recommend incorporating such a prohibition on entry into India's legal framework as well.

Q2: Should the licensor, either *suomotu* 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.

See Question 1 above.

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 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.

It is pertinent to mention that TRAI has laid out questions about measurement of ownership and control without specifying the reason it wishes to control ownership. The consultation paper seems to posit that the goal is to buttress the media's role in democratic debate: "They provide the range of voices and opinions that informs the public, influences opinion, and supports political debate. Regulation to ensure a plurality of media ownership (sic) is therefore particularly aimed at ensuring a diversity of news provision."

Beyond the question of media plurality, the consultation paper refers to economies of scale and potential creation of competition constraints. We note that Indian law already provides ample definitions of ownership and control. Like many international comparators, India already controls mergers, amalgamations and acquisitions of control which meet specified turnover or asset-based thresholds. The regime also extends to the acquisition of a material but minority interest. Among categories of transactions which were judged not to raise competition problems and therefore do not need to be notified are acquisitions of interests of less than 25 percent, solely for investment purposes.

We see no justification for departing from the approach already enshrined in Indian competition law and merger control for determining when the acquisition of less than a 100 percent interest in a company should be subject to regulatory review by the appropriate body – in this case the competition authority (CCI).

To introduce a further and different concept of ownership and to trigger review by an authority other than the CCI on that basis would be a retrograde step at a time when India is seeking to streamline its regulatory rules. (It should be noted that allowing exemptions from merger review only where the acquisition is less than a 25 per cent interest is still a very strict standard by most international benchmarks.)

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

Indian law already enshrines a number of specific provisions affecting news and current affairs outlets in contra-distinction from other types of media.

No cogent argument has been made as to why other, "entertainment" genres should be subjected to such constraints. Sports channels, or cooking channels, or kids' channels, or fashion channels, or general entertainment channels are simply not key to "the media's place in a healthy democracy" which TRAI has said it wishes to support.

Internationally, there are examples of regulatory controls focused on news and current affairs; these are the genres most closely connected with the formation of public opinion about issues of national significance through the communication of a range of information and views.

Furthermore, specifically with respect to the news and current affairs genre, we warn that policymaking is particularly difficult at a time when the burgeoning availability of online news and commentary (both written and audio-visual) has substantially changed the landscape for news provision.

It is recommend that policy makers should regulate for the dynamic future, and not for a static past:

"Policy makers need to be mindful of interventions that may possibly chill investment and innovation. This is not to say that media plurality is not important – it is – rather, that regulatory interventions should be made to address identified problems based on up-to-date empirical evidence....Markets are dynamic and subject to much uncertainty in respect of future technological developments. Policy makers and regulators should be cautious in applying old-style, static regulations to today's markets absent empirical evidence that real problems exist today."

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?

India is not a land of one language. India has 15 official languages with hundreds of dialects, as we move from one region to another. Print media has a reach of over 200 million people, compared to terrestrial TV's 400 million and 220 million for cable & satellite TV. No satellite TV channel in India commands an audience share greater than 10 per cent, let alone the 39 per cent threshold prescribed in US legislation.

Indian media market is the classic example of **Perfect Competition**be it print, television and the news paper industry. There are currently over 60,000 registered newspapers, more than (as per Ministry of Information & Broadcasting website) 825 private satellite television channels permitted license, (Additionally also given to understand that approximately more than 100 TV channels are awaiting license from MIB) and over 300 private radio stations on air. Almost half of these private TV channels are available to every Indian today and this number excludes the thousands of local cable channels owned and operated by local cable operators in every nook and corner of India. Such a situation is unparalleled in any geography anywhere in the world, and hence no cross-media restrictions anywhere in the world can be applied to such a situation of extreme Media competition.

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.

All of the metrics may be relevant to measuring media consumption in a relevant market. The most appropriate metrics depend on the specific purpose of measuring consumption. If the purpose is to assess plurality then revenue is unlikely to be an appropriate measure as the relationship between revenue and the ability to exert influence is less direct than the relationship between revenue and economic power.

Relevant consumption metrics include reach, share (of viewing/listening etc.) and multi-sourcing. Relevant consumption metrics should be considered across media i.e. television, radio, the press and online. Such metrics should not be considered in isolation. Rather, they should be considered within a broader framework that includes an assessment of availability, the supply-side (or provision), and impact (which tends to be very difficult to measure). Other factors should also be taken into account. These include external factors such as rules on impartiality and internal factors such as governance.

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.

The concentration measures proposed by TRAI impart a significant bias to the assessment in that when someone is deemed to control an entity, then the whole market share of that entity would be attributed to the firm "controlling" it. In an industry with significant minority shareholdings, this is likely to lead to an exaggeration of the market shares of those companies that have many minority shareholdings and therefore is likely to exaggerate concentration.

It is variably observed that India's CCI has expertise in assessing concentration. Consultation with the CCI in respect of concentration metrics is therefore advisable. TRAI should not proceed unilaterally on this matter; neither we nor the expert consultants are aware of any arguments that suggest a departure from standard competition tools in media markets is warranted.

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?

A diversity index is a flawed measure that is not recommended internationally. Even proponents of such an index have moved away from them as additional news media options become available, because the challenge of adding up consumption of TV radio, newspaper and online news is fraught with huge difficulties. The US FCC, which attempted to use such a measure in the past, moved away from it five years ago, stating for example in 2008 that the index "is an inaccurate tool for measuring diversity." The FCC paper wrote "…there are too many qualitative and quantitative variables in evaluating diferent markets and combinations to reduce the task at hand to a precise mathematical formula."

In the UK, Ofcom conducted an extensive consultation involving written submissions, a review of academic literature, academic seminars, international benchmarking, extensive consumer research, and an in-depth study of the provision of news. At the conclusion of that detailed process, Ofcom concluded that a single measure could not be relied on and decided that a basket of indicators should be considered along with other relevant factors.

This is an area where it is important to proceed carefully, and in full knowledge of the likely costs and benefits of intervention.
It is essential that (plurality rules) be proportionate and do not unnecessarily restrict growth and innovation. The maintenance of plurality is still vital but, as more and more services become available on different platforms, concerns over ownership have diminished to some extent and greater liberalisation has been permitted.

We therefore suggest that TRAI drop further consideration of a "diversity index."

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 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 strong contrawith the belief that ownership in any media segment should result in a mechanical bar to ownership in other segments. It is important, as Ofcom stated, that media plurality measures be based on a full market assessment "in the round" and not applied on a mechanistic basis. Such restrictions would risk stifling investment and diversity (see below) at a time when the media sector is vibrant and changing, particularly as a result of the internet.

Mechanistic ownership constraints can be damaging to diversity. It is observe that if there is un-met demand for news and information, then content providers without existing news channels would be the most obvious entrants since there are significant economies of scope in the production of news programs when other programs are already produced. Economies of scope are likely to be strong when content providers are vertically integrated with broadcasters. From a competition point of view, non-news channels and broadcasters, as potential entrants, provide a competitive constraint on news channels and broadcasters. It would seem that this concept also carries over to plurality: if existing news channels leave a void, for example by not covering local news, then non-news content providers and broadcasters are the most likely to fill that gap."

With respect to international examples: the consultation paper attempts to draw on international examples to buttress support for selection of simplistic ownership control measures. For International observation Quoted in the TRAI Consultation Papers , we view that while it might be tempting to adopt certain tenets of international regulation, there is a real imperative to avoid "copy-cat" regulation which has been shown to be sub-optimal elsewhere and where viable and less costly alternatives exist."

TRAI's selection of international regimes which have imposed restrictions on media ownership provides no answer to the question of whether such limits are appropriate for India at the current time. Our own review has sought to place the international experience in a proper policy, historical, cultural and socio-economic context, without being exhaustive. It is observed that the following are pertinent to the determination of the appropriateness or otherwise of specific controls on media ownership in India:

- There is broad international support for pluralism in the media but no consensus or even omnipresent mechanism by which this is to be achieved.

- Some countries, particularly in Europe, opt for sector neutral application of competition law and merger control (e.g. Finland, Sweden).

- There are trends towards relaxation of ownership controls (e.g. Spain, Netherlands).

- Countries that have a long history of media ownership controls continue to skirmish over the appropriate means of control. The UK public interest test has been criticised as unworkable and overly subjective. In the US, courts, regulators, politicians and business continue to disagree on the right form of media ownership rules.

- Of those countries that adopt hard caps on ownership, many of the measures are the product of political wrangling, either motivated to preserve the status quo which entrenches particular interests or to prevent a particular controversial media owner from gaining too much power (e.g. France, Italy, and UK)."

Thus, there is no international consensus for sector-specific regulation of media ownership. Countries are going in different directions, and the rise of online media is inducing some to relax previous "analogue era" regulations. TRAI's presentation of international examples – in some cases based on outdated rules that have already been abandoned or relaxed, and in others on rules adopted to suit specific national political needs such as entrenching (or conversely barring) particular interests – does not provide a useful guide for India's decisions in this area.

India should chart its own way, and part of that process needs to involve a realistic assessment of the problem and a comparison of the risks and benefits of ownership tests versus other alternatives. The Indian regulatory system already contains a number of relevant alternatives, including competition law, merger control and licensing which places stipulations on media owners (e.g. "must provide.")

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)**
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> **(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 see response to question 13 above. Diversity indexes are falling out of favour internationally, and respected regulators which once used them (e.g. the FCC) are moving away from them. TRAI should not attempt to rely on tools which are known to be inaccurate and whose use carries high risks of distorting markets. Use of the HHI or other diversity indexes are a highly risky, and therefore bad, idea.

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.**

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

Where cross-media regulation has been imposed internationally, it has tended to be limited to the terrestrial broadcasting sector where the state decides the number of operators. The position in India is fundamentally different, where there is no licensing of private terrestrial broadcasters. Any risk of a private broadcaster using or leveraging its broadcasting presence into other segments of the media is not present.

As with other consultation questions on media ownership TRAI has leapt to the question of method without addressing the logically prior question of appropriateness. Cross-media ownership controls are unnecessary in India in the absence of demonstrable risk that any media owner's control of a particular segment presents concerns of spillover effects into other segments of the media. Even where such risk is present, the prohibition of abuse of dominance under section 4 of the Competition Act would apply to any anticompetitive leveraging of market power.

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.

We find the approach embodied in the Consultation Paper to lack the necessary regulatory caution and analytical rigor. It does not set out a discussion of identified problems in media markets in India today nor make sufficiently explicit the policy objectives that need to be fulfilled; there is an absence of a problem statement.

Similarly, there is no robust and objective analysis of the likely impact of various regulatory approaches.

We therefore urge that TRAI focus on presenting a coherent vision of the identified problems, the policy objectives to be fulfilled, and an analysis of possible alternatives before leaping to details of the rules.

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.

The Indian competition law enforcement regime is already equipped to review acquisitions of a minority interest, in this case by the CCI using a competition-based assessment. The Indian merger control regime is itself undergoing proposed changes along with the overall competition regime pursuant to the Competition Amendment Bill of 7 December 2012. This review process also contemplates the ability for Indian merger control to incorporate sector-specific tests should they be deemed appropriate at a future date.

Against this background, the introduction by TRAI of different standards of review of M&A in the media sector would be unnecessary and duplicative. This is a critical time for the future of media regulation in India. Proper and appropriately targeted enforcement of competition law and merger control by a specialist authority – in this case the CCI – should be the tool to address issues of media diversity. If further controls are required in the future, they should only be introduced through an open and transparent process, in consultation with the CCI and other stakeholders and consistent with a well-defined policy. No such policy has been put forward to justify why the extensive existing and proposed pro-competition powers at the disposal of India's competition authority are not suitable to preserve and encourage competition and media diversity.

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.

Any outright restriction on an entity having ownership or control in a media segment from retaining or acquiring ownership or control over an entity in another media segment would be a highly unusual, disproportionate and dangerous regulatory intervention. Whether such a situation is automatically anticompetitive or poses threats to plurality or other public interests has not been developed by TRAI itself, by economic theory nor by international regulatory best practices.

Quite the contrary, the media sector or any segment of it is not a monopoly utility where control of key infrastructure or rights should be regulated even in the absence of any demonstrable harm. In contrast, vertical integration in the media sector has been shown to have efficiency-enhancing effects. In the first instance, vertical cross-ownership must raise less plurality issues than horizontal cross-ownership since the number of plurality channels is unaffected. Any threat from vertical integration to plurality would be better shown for each case specifically, since a whole number of factors would need to be considered to determine incentives to foreclose plurality. Factors are, for example, capacity of content delivery, utilisation of content delivery, competitive and plurality situations in the upstream and downstream markets, size of the downstream market, relative market power of upstream and downstream firms vis-à-vis each other, substitution to other content distribution channels which are not in the same relevant market.

A simple rule would block too many benign cases of vertical integration (it would have a large ‘Type I’ error of finding a problem when there is not one), and would prevent substantial cost savings from being materialised that are likely to be passed on to consumers. It would also cement companies’ business strategies at a time of media convergence when agility is required. The extension of an entity’s presence across the value chain in the media sector should be assessed on a case-by-case basis avoiding a ‘knee jerk’ regulatory regime that is likely to constrain efficiency-enhancing growth and innovation.

Where vertical integration occurs through organic growth, Indian competition law provides checks and balances to ensure that markets and choices are not foreclosed. Even in the absence of market power, Indian competition law prohibits vertical restraints including resale price maintenance, tie-ins, exclusivity etc. where they produce an adverse effect on competition in India. Where an entity occupies a dominant position in a particular media market, the Indian competition law prohibition on abuse of dominance operates as a check on any abuse of market power as a result of unilateral practices such as a refusal to supply, or unfair or discriminatory pricing. The CCI has extensive powers to intervene and, unusually, the power to order structural separation of an entity that has committed an abuse of a dominant position. In view of such a draconian power under competition law, it is clear that India already has wide and intrusive regulatory tools to address any concerns arising from abuse of market power arising in a vertical context.

The Government, had imposed a cap of 20 percent 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.

The market has changed significantly since then – media sector is fast developing and has intense competition in each segment. Variety of content is available for the consumer and consumer can make a choice.

The current restrictions have become archaic and do not serve the purpose as in the current scenario the platform has to cater to the viewer's choice to make its platform popular. Thus the concerns that the government had from a regulatory point of view when the DTH guidelines were drafted do not hold in today's circumstances.

Where vertical integration occurs as a result of merger or acquisition, again, Indian competition law is equipped to analyse the effects of vertical integration and, where necessary, impose appropriate remedies to ensure that competition remains effective remains post-merger. International merger control experience has shown that potential competition concerns arising from vertical mergers can be addressed through a combination of structural and behavioural remedies including obligations to grant access to content or infrastructure. This ensures that the efficiencies of beneficial vertical integration are not lost, while safeguarding freedom of choice for the ultimate beneficiary of regulatory and competition policy – the consumer.

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?
In light of our belief that TRAI has not demonstrated the need for imposition of sector-specific media ownership rules, we have no comment to offer on these questions.