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Dr A. Didar Singh
Secretary General

April 25, 2013

Mr. Wasi Ahmad
Advisor (B&CS)
Telecom Regulatory Authority of India

Subject: FICCI's submissions of comments on TRAI's Consultation Paper on 'Issues relating to Media Ownership' dated 15th February 2013.

Dear Shri Ahmad,

We refer to your aforesaid Consultation Paper and would like to take this opportunity to commend the Authority for undertaking this much needed review of the various existing media ownership rules that govern the Media & Entertainment sector.

In this connection, we had sought the assistance of Mr. Vinod Dhall – Former CCI Chairman and an expert on competition related matters. His Firm M/S. Dhall Law Chambers has prepared the responses and provided the case studies to shed light on the issues identified in the said Consultation Paper.

While agreeing with most of the suggestions of the paper enclosed, FICCI is in disagreement with the recommendation of the paper that cross media ownership restrictions, if any, should be limited to the news and current affairs genres to ensure viewpoint plurality. **FICCI suggests that there should be no restrictions on cross media ownership, even in news and current affairs genres. Given the hyper competitive nature of the Indian media sector i.e. with over 800 plus operational channels in news, General Entertainment Channels, movies, sports, infotainment etc, more than 82000 registered publications at the national and regional levels, monopoly government radio and terrestrial TV broadcast, and the existing framework of the Competition Commission of India (CCI), there is no clear and present need for a review or analysis of erosion of viewpoint diversity or introduction of any media plurality rules.** There are enough provisions in the competition laws and the guidelines of TRAI to take care of the issues related to cross media ownership in the case of market failure.

1. While we discuss the role of cross media ownership and ensuring media plurality, we must appreciate that the Indian media industry is diversified enough to sustain forbearance in cross-media holding. There are 82,000+ newspapers, 800+ TV channels (300+ TV news channels) and 200+ radio stations. This is many, many times, more than the number of newspapers, TV and radio channels in any country in the world. We understand that the Indian market is heavily competitive. There are over 300 News and current affairs channels and most channels have viewer ships which range up to 15% of the total market. So, the existence of such a large number of players in the media and entertainment marketplace including news and current affairs genre will automatically ensure the viewpoint plurality without the existence of cross media ownership restrictions.

2. We agree with TRAI that plurality of opinions in the media is a valid concern and needs to be ensured in the country. However, we feel that given the plethora of media options already available all over the country, and the rapidly changing technology in the media industry (mainly through the spectacular growth in the internet and mobile penetration), there is already more than adequate viewpoint plurality available in the country. With the high growth rate of penetration of internet in India, the pattern of news consumption is undergoing a substantial change. In addition to the websites of big newspapers, consumers are exposed to a variety of blogs, discussion forums, and social media platforms. As a result, there is no need for a regulatory intervention on this subject.

3. With convergence becoming a huge reality the world over, the term 'cross-media' is steadily losing its relevance. Convergence, Internet and Mobile telephony brings the newspaper, TV and radio channel on a single screen, thus making the very concept of specific media markets/geographies irrelevant. It is also not possible for a single entity to dominate any given market based on market share in a given geography within a media segment.

4. In the developed world, the newspaper industry is already seeing a massive decline in readership and revenues, as the digital medium takes off. It is a matter of time before the same phenomenon replicates itself in India. Already with internet users exceeding 130 million, the newspaper industry is seeing a slowdown in its revenue growth. It is widely believed that in another few years, the newspaper industry will start to see more significant revenue erosion. As

that happens, newspaper profitability will take a hit. Newspaper companies will then have no option but to mark their presence in the digital world, as well as explore opportunities in other mediums like TV and radio. Keeping this reality in mind, there is absolutely no logic in contemplating bringing in cross media restriction at this point in time

5. The efficiencies gained from combined ownership in terms of economies of scale in news gathering and dissemination will allow media companies to compete better in today's changing marketplace. In fact, common ownership can increase viewpoint diversity, as owners of media companies seek to capture the greatest possible audience share by diversifying their news and public interest program offerings among co-owned properties in order to sustain consumer interest. In addition, the cost savings generated by common ownership allow stations to add local newscasts and other locally oriented programming.

6. It is also important to note that the Competition Act, 2002 and the CCI also can play a role in maintaining plurality of views in the media industry. To an extent the different media platforms within the news and current affairs genres can be considered as belonging to the same relevant market, viz the market for dissemination of news and views on current affairs. Thus, where a merger or amalgamation or acquisition falls within the jurisdiction of the CCI, the CCI can take care that the transaction does not lead to a high degree of market power in the said relevant market, and thereby the CCI would be taking care of the plurality concerns as well. The merger regulations and the prohibitions on anti-competitive agreements by the competition authority can prevent the lessening of competition in the media markets.

We trust that the Authority shall find our submissions useful in charting the future course for the sector in a manner that will enable growth, generate employment, further entrepreneurship and encourage innovation.

Regards,

Yours sincerely,

(A Didar Singh)

Enclosed – As Above

Comments on Telecom Regulatory Authority of India's Consultation Paper on Issues relating to Media Ownership

25 April 2013

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EXECUTIVE SUMMARY

The Telecom Regulatory Authority of India (TRAI) has put out for public comments consultation paper that deals with issues related to cross media holdings in the television, print and radio platforms and also with issues related to vertical integration in the broadcasting media (television and radio).

This document discusses our views and recommendations on the issues brought out by the consultation paper. The issues discussed in this document are as follows:

- Whether there is a need to have cross media ownership restrictions?
- Whether there is a need to have restrictions on vertical integration in the broadcasting media?
- Intertwined with the above main issues are ancillary issues relating to matters such as control, relevant market, market share and concentration.

<u>Cross media ownership restrictions</u>

- We believe that blanket restrictions on cross media ownership can have adverse effects on the commercial sustainability of individual media businesses and on the incentives for investment in the industry. TRAI is of the opinion that restriction on cross-media ownership is necessary to preserve viewpoint plurality in a democratic society. While agreeing with TRAI's general concern, we are of the view that restriction, if any is relevant only for the news and current affairs genres considering their effects on public opinion.

- The adverse effects on commercial sustainability and investment incentives could be particularly severe in local markets; this concern would be especially applicable in India in view of the known presence of several local and regional markets in news media, given the immensely diverse linguistic profile of the country.

- Any restriction on cross ownership from the point of view of plurality must be linked to the market power of an entity and its ability to influence views. This could possibly be done through an assessment of the Diversity Index. If the cross ownership by an entity results in the Diversity Index being less than a specified threshold, then there should not be plurality concerns.

- Cross media ownership can lead to certain business efficiencies such as economies of scale and scope in news gathering and dissemination which can reduce news costs, provide access to better news management and facilitate better access to news gathering, editing and disseminating technology.

- A diversified portfolio also enables the business entity to subsidize a poorly performing media platform using the profits from the more successful media platform.

- The technological changes across the media sector are blurring the boundaries between different platforms in the media sector, for example with the advent of the internet, there has been a convergence of offline and online media. Thus restrictions on cross media ownership become less effective and relevant.

- Cross-media ownership restrictions are being relaxed in mature jurisdictions like UK, Australia and US in the light of factors such as efficiency gains and technological developments.

Vertical integration

- TRAI apprehends that vertically integrated entities (if dominant and have cross-media ownership) may block content from their competitors which might further affect plurality adversely due to their deeper penetration.

- In our view, vertical integration is generally motivated by reduction in costs and other business efficiencies rather than increase in prices. Vertical integration results in economies of scale, scope and learning, which in turn results in reduction in costs.

- Vertical integration can also reduce transaction costs and promote investment in specific assets by mitigating more effectively the hold-up problem whereby opportunistic behaviour of the buyer or the seller to renegotiate terms of the investment gets eliminated.

- There is also strong empirical evidence from case laws and studies to suggest that vertical integration in the broadcasting industry can lead to increase in quality of service and reduction in costs.

- Competition concerns of vertical integration may be input or customer foreclosure where the merged entity stops supplying to competing downstream firms or downstream division of merged entity stops sourcing from independent upstream firms.

- In view of the widely acknowledged economic benefits of vertical integration, it is necessary for a regulatory authority to analyse the economic efficiencies created by the integration on the one hand and the anti-competitive effects caused on the other. This requires a case-to-case and thorough analysis of facts and circumstances. Further, the competition law is adequate to address any market failure.

- The Competition Commission (CCI) is empowered to *ex-ante* regulate all acquisitions, mergers and amalgamations across all sectors, which exceed the thresholds provided in the Competition Act, and it has the machinery to undertake the required inquiries and analysis. The CCI also has powers to conduct *ex-post* inquiries to prohibit any abuse of dominant position and any anti-competitive agreement that creates an appreciable adverse effect on competition. Thus regulation by the CCI of vertical integration cases in the broadcasting sector may be adequate to take care of anti-competitive concerns, if any.

- TRAI could engage with the CCI on the issue of assets and turnover thresholds for acquisitions, mergers and amalgamations taking place in the media and broadcasting sectors. In light of the amendments proposed in the Competition (Amendment) Bill, 2012, it would be possible for the Government to set different thresholds for different sectors of the economy.

- The Competition Act provides for mutual consultations between the CCI and statutory authorities (including TRAI) in matters where a competition issue may arise. The Competition (Amendment) Bill, 2012 proposes to make such mutual consultation mandatory, and the consulting authority would be required to pass a reasoned order taking into account the views of the consulted authority. This would ensure that TRAI's views are fully taken into account in all cases of combinations in the media sector, including the broadcasting sector. The Competition (Amendment) Bill, 2012, currently pending before Parliament, includes amendments to the Competition Act, 2002 that will mandate or allow the above.

- Further the Indian television industry is not susceptible to the negative effects of vertical integration because of the structure as well as the existing TRAI regulations which ensure there is no barrier to entry.

<u>Ancillary issues</u>

- An ancillary issue related to cross media holding and vertical integration is the concept of *control*. The *equity based* approach determines control based on substantial equity in an enterprise by means of which influence can be exercised, while the *decision making ability* approach involves the assessment of the likelihood of one entity significantly influencing another. The two approaches are not mutually *ex*clusive and there are cases that have considered both concepts to determine the exercise of decisive control.

- The two approaches are also reflected in the Competition Act, 2002 (Competition Act) and through cases decided by the CCI. The definition and principles embodied in the Competition Act should apply to the media sector as well.

- Another issue that arises is that of *relevant market* which needs to be defined both in terms of the relevant product and relevant geographic markets; both are embodied in the Competition Act. It is essentially the set of relevant products and relevant geographic areas that exercise some competitive constraints on enterprises.

- The underlying principles in the Competition Act for defining the relevant market is universally accepted based on the above broad criteria and therefore there need not be separate concepts for the media sector. The definitions embodied in the Competition Act should apply to the media sector as well.

- For the issue of *market share,* viewership and number of subscriptions would be the most appropriate measures for determining market shares in the television and newspaper media, respectively.

- Finally, the issue of market *concentration,* the HHI would be the most appropriate measure for measuring concentration within the same platform, and the Diversity Index would be appropriate for measuring concentration across media platforms.

INTRODUCTION

1. The Telecom Regulatory Authority of India (TRAI) has put out for public comments a consultation paper titled *"Consultation Paper on Issues relating to Media Ownership"* dated 15 February, 2013 (hereafter, consultation paper) that deals with issues related to cross media holdings in the television, print and radio platforms and also with issues related to vertical integration in the broadcasting media (television and radio). The consultation paper has been issued following a request from the Ministry of Information and Broadcasting (MIB) to TRAI to send its recommendations under Sections 11(1) (a) (ii) and (iv) of the TRAI Act, 1997. The MIB has asked TRAI to re-look the issue of vertical integration in the TV broadcasting and distribution areas and cross media holdings across the TV, Print and Radio platforms, and to suggest measures that can be put to address vertical integration in order to ensure fair growth of the broadcasting sector, and further to suggest measures with respect to cross-media ownership with an objective to ensure plurality of news and views and availability of quality services at reasonable prices to the consumers. This document discusses our views and recommendations on the issues brought out by the consultation paper.

2. The consultation paper states that:

> *"In order to ensure media pluralism and counter the ills of monopolies, it is felt that reasonable restrictions need to be put in place on ownership in the media sector. The Media Ownership Rules should be so designed so as to strike a balance between ensuring a degree of plurality of media sources and content, and a level playing field for companies operating in the media sector on the one hand and providing freedom to companies to expand, innovate and invest on the other.*[1]

3. Clearly, there are two main issues that are to be examined: (i) whether there is a need to have cross media ownership restrictions, and (ii) whether there is a need to have restrictions on vertical integration in the broadcasting media. Intertwined with the two main issues are ancillary issues relating to matters such as control, relevant market, market share and concentration. The above issues are discussed in this paper as follows:

   3.1. Firstly, we discuss the role of cross media ownership restrictions in ensuring media plurality. We argue that while it may be justified to impose some restrictions, these have to be balanced against the adverse effects on the ability and incentives of companies to "expand, innovate and invest" as TRAI itself has stated in the consultation paper. Further, these restrictions, if any, should be the minimum required to achieve the object of plurality, and therefore blanket restrictions need to be avoided.

[1] Telecom Regulatory Authority of India. 15 February 2013. *Consultation Paper on Issues relating to Media Ownership.* p. 5

3.2. Secondly, we argue that vertical integration is not a media plurality issue; it is almost entirely a competition related matter and can be adequately addressed through proceedings before the CCI. In addition, there are extensive TRAI regulations that govern the interplay between broadcasters and distributors and limit the possibility of anti-competitive outcomes or harm to consumers than can occur post-integration.

3.3. Thirdly, we discuss the ancillary issues, these being control, relevant market, market share and concentration, and present a brief summary of the approaches in international jurisdictions and under Indian competition law.

CHAPTER 1
CROSS MEDIA OWNERSHIP RULES

4. TRAI's consultation paper expresses concern for ensuring viewpoint plurality in a democratic society. It notes:

> *"Viewpoint plurality contributes to a well functioning democratic society by making diverse viewpoints available to the citizens and consumers and by preventing any one media owner or voice to exert too much influence over public opinion."*
>
> *"Evidently, viewpoint plurality would not be possible if there is a presence of media dominance across various media segments viz, print, television and radio. Such a situation would be undesirable from the standpoint of viewpoint plurality and therefore many countries have laid down cross media ownership rules."*[2]

The consultation paper goes on to suggest that plurality of viewpoints is preserved if there are a large number of media owners and they present a wide range of viewpoints across different forms of media. TRAI therefore concludes that cross ownership restrictions will help in ensuring that there is no consolidation of viewpoints expressed in the media and consequently, no bias in media opinions.

5. We agree with TRAI that plurality of opinions in the media is a valid concern and needs to be addressed appropriately by the regulator. However, in contemplating restrictions on cross media ownership, which refers to a single business entity owning one or more media platforms (newspapers, television and radio), certain important considerations need to be kept in mind.

6. As TRAI itself has observed, cross media ownership rules need to strike a balance between ensuring plurality of opinions across different media platforms and providing adequate incentives to media firms to invest and innovate; such adverse effects may well be substantial even if unintended. These effects include a decline in investment and commercial sustainability of firms. They can also result in a decrease in incentives for innovation in the industry. Therefore, while contemplating restrictions on cross media ownership, it is important not to make the rules more restrictive than what is reasonably required to meet the purpose of viewpoint plurality, and thereby preserve the benefits of vertical integration.

[2] Telecom Regulatory Authority of India. 15 February 2013. *Consultation Paper on Issues relating to Media Ownership.* p. 48.

7. From the perspective of viewpoint plurality, the relevant genres, if any are only those of news and current affairs as these are the most relevant in considering their effects on public opinion in the sense that is being considered in the consultation paper.[3]

8. Finally, the media sector is dynamic and continuously evolving. Technological developments have been effecting changes that are not always foreseen including increasing convergence. This has led countries to periodically review and relax their cross media ownership rules.

Cross media ownership rules should not have blanket restrictions

9. While we appreciate TRAI's concern about the need to have cross media ownership rules, we believe that these rules should not be too restrictive. Blanket restrictions on cross media ownership can have adverse effects on individual media businesses and the overall media industry. These can result in a decline in investment in the industry and can reduce commercial sustainability of firms.

10. Cross media ownership may result in both lowering of costs and increase of revenues thus improving the commercial sustainability of the business entity. Costs can be reduced substantially in a cross media business entity through economies of scale and scope[4], for example through sharing of journalism resources (staff and content) across platforms. Media firms earn revenue from both subscriptions and advertising; cross media business owners can also get higher revenues through the sale of advertising packages across platforms. For example, in the case of the media conglomerate Time Warner, the merger of Time Inc.'s publishing business and Warner's film studio resulted in efficiency gains in the form of additional revenue from bundled advertising.[5] Pooling of resources also enables firms to produce high quality content since they are able to access higher quality sources of news and invest in better resources.

11. Similar conclusions regarding the benefits of cross media ownership have been reached by Ofcom in the UK:

- *"Economies of scale and scope in news gathering and dissemination which can reduce news costs as well as improve access to international news.*
- *Access to better news management (e.g. from overseas and other media) and superior talent (e.g. journalists and presenters).*
- *Improved access to news gathering, editing and disseminating technology.*[6]

[3] Note that with respect to radio broadcasting, it is only the public broadcaster that can provide news. This feature has been noted by TRAI.
[4] Economies of scale refer to reduction in costs that occur due to increased sale or production whereas economies of scope refer to gains that occur due to diversification of production activities in two or more products.
[5] http://www.nytimes.com/1990/12/31/business/the-media-business-time-warner-s-merger-payoff.html?pagewanted=all&src=pm
[6] Ofcom. 14 November 2006. *Review of media ownership rules.* p. 7.

12. In the United States, the FCC has also made *similar observations about the economic gains from cross media ownership:*

> *"[T]he opportunity for sharing news gathering resources and for realizing other efficiencies derived from economies of scale and scope may improve the ability of commonly owned media outlets to provide local news and information."*[7]

In fact, studies have shown that television stations that were owned by a business entity owning a newspaper in a local market offered more local news coverage and programming than the stations that were not cross-owned.[8]

13. Having a diversified portfolio also enables the business entity to subsidize a poorly performing media platform using the profits from the more successful media platform. For example, with the growth of TV, cable and internet and the resulting decline in newspaper subscriptions, the newspaper industry in most developed countries is struggling to survive. Declining subscriptions have resulted in advertisers moving away from newspapers to newer forms of media that get more "eyeballs". This may be an issue in India as well, if not now, then at least in the not too distant future. The Indian Readership Survey for 2012 Q3 highlighted that growth in print media consumption between the first and third quarters of 2012 was only 0.7 per cent as compared to the growth in media consumption on internet and cable and satellite, which were 28 per cent and 11 per cent respectively.[9] A business entity that owns both newspapers and TV, for example, is in a better position to manage and sustain the newspaper business than the one which has just the newspaper business. As a matter of fact, if a newspaper entity faces an economic viability issue on a standalone basis, but it could be prevented from failing if it were under common cross media ownership, this could well add to plurality rather than diminish plurality.

14. If firms do not diversify their portfolio by investing across platforms, they may not be commercially sustainable.[10] The sustainability of media firms, especially those operating in the local market has been a matter of concern in the UK.[11] Because local markets are small, they may be able to sustain only one commercial provider of news within a given media platform. Hence, other firms are either forced to exit the market or enter into other different media platforms. But if the latter option is not available on account of stringent cross media ownership restrictions, this may affect the commercial sustainability of media firms. This

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[7] Federal Communications Commission. 22 December 2011. *In the Matter of 2010 Quadrennial Regulatory Review –Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996.* Notice of proposed rulemaking. FCC 11-186. p. 31.

[8] Gregory Crawford. 23 July 2007. *Television station ownership structure and the quantity and quality of TV programming.* FCC. Media ownership Study No. 3.; Jeffrey Milyo. September 2007. *The effects of cross ownership on the local content and political slant of local television news.* FCC PUR 07000029.

[9] Indian Readership Survey. IRS 2012 Q3. Topline findings. Slide 2. Available at http://mruc.net/irs2012q3_topline_findings.pdf

[10] Ofcom. 19 June 2012. *Measuring media plurality: Ofcom's advice to the Secretary of State for culture, Olympics, media and sport.* pp. 39-40.

[11] Ofcom. 19 June 2012. *Measuring media plurality: Ofcom's advice to the Secretary of State for culture, Olympics, media and sport.* p. 39, http://www.americanprogress.org/issues/media/report/2007/01/30/2555/local-media-diversity-matters/

concern of commercial sustainability in local markets may be particularly applicable in India in view of the known presence of several local and regional markets in news media due especially to the immensely diverse linguistic profile of the country.

15. The concern for declining commercial sustainability at the local level, in developed countries, has been expressed especially in relation to local newspapers. It has been argued that newspapers have benefitted from being a part of the larger media conglomerate. This has allowed them to be commercially sustainable even at downtimes. In such situations, newspapers that are on the verge of failing can rely on their group's economic strength and survive in the local market. In fact, this can be done without compromising on diversity in editorial content.[12] Thus it is important to consider the counterfactual that is the situation that may prevail if the cross media ownership restrictions are imposed in which many entities on the press platform may close down, thereby reducing plurality, and consequently defeating the very purpose of the restrictions.

16. A reduction in profit decreases the incentive for media firms to invest which in turn leads to a reduction in innovation and creative programming. Media industry, in particular broadcasting, has high fixed costs in terms of production and distribution of content and low or zero marginal cost.[13] This is because serving an additional customer entails negligible costs once the content has been produced and the distribution network is set up. Therefore, without adequate returns on their high fixed investment, media firms do not have an incentive to innovate using better talent and equipment. And these investments are needed for quality journalism and programming. Adequate returns on investment are sometimes not available within a particular platform and therefore expansion across different platforms is necessary to secure returns and encourage innovation. As stated above, this is in line with TRAI's views expressed in the consultation paper that media ownership rules should strive to maintain a balance between ensuring the plurality of opinions on the one hand and providing freedom to companies to invest, expand, and innovate on the other hand.[14]

17. There are additional efficiency benefits of cross media ownership in terms of attracting foreign funding and foreign expertise in the media industry. If a foreign firm operating in one media platform acquires or merges with a domestic firm operating in another platform, there are significant benefits to the combining firms as well as to the industry. Improved access to overseas capital and better technical know-how and specialisation that are brought in by the foreign firm have a positive impact on domestic firms and domestic consumers. With this foreign investment, the domestic firm is better able to invest in delivering superior quality content.

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[12] European Newspapers Publishers' Association 1961-2011. October 2011. *Preserving plurality in a rapidly changing media market.*
[13] Joshua Gans. 4 May 1999. *Economic issues associated with the regulation of broadcasting in Australia.* A report for John Fairfax Holdings Ltd. p. 4.
[14] Ofcom. 14 November 2006. *Review of media ownership rules.* p. 7; Telecom Regulatory Authority of India. 15 February 2013. *Consultation Paper on Issues relating to Media Ownership.* p. 50.

18. Recognising the fact that extreme restrictions on cross media ownership hamper the incentives of firms to invest and innovate and consolidation of media outlets has several advantages, we believe that cross media rules should not be more restrictive than necessary to achieve the plurality goals.

19. Another important factor that cannot be overlooked is the technological changes sweeping across the media sector; this has in fact made many of the restrictions on cross media ownership less effective and relevant, and has necessitated the review and relaxation of such restrictions in many countries.

20. With the internet, there has been a convergence of offline and online media.[15] As a result of convergence, the established ways of distributing information have been losing importance as new ways of delivering information are coming into being. The traditional market lines between different forms of media are getting blurred.[16] One of the studies conducted by the Organisation for Economic Co-operation and Development (OECD) notes:

> "*The pressure of convergence brings into sharp focus the restrictions many OECD countries have placed in terms of cross-ownership and joint provision regulations imposed on the traditionally separate communication markets*."[17]

21. Worldwide, online media has gained importance over traditional forms of media. Globally, between 2010 and 2011, internet access and internet advertising have been the greatest contributors to the revenue generated in the media industry.[18] This has been true of India as well. For example, the segment of 'internet access' has recorded a growth of 57 per cent in revenues from 2010 to 2011 as compared to the overall growth in revenues of 17.5 per cent in the media industry.[19] The growth of the online media has led to changes in the pattern of news consumption as well. In addition to the websites of big newspapers, consumers are exposed to a variety of blogs, discussion forums, and social media platforms. This has resulted in diversity in information, commentary, analysis and opinion available to consumers. In this context, the Ofcom has remarked:

> "*One of the significant impacts of the increase in broadband use is that consumers have a wider choice of news content providers online*."[20]
>
> *"Within online, social media is becoming a valuable source for breaking news in its 'word-of-mouth' role, as many users learn of breaking news through friends' posts. It also offers a space for citizens to contribute to the story or debate with others*."[21]

[15] Mac Edge. 2008. *Cross Ownership.* The International encyclopedia of communication. p. 1081.
[16] Joshua Gans. 4 May 1999. *Economic issues associated with the regulation of broadcasting in Australia.* A report for John Fairfax Holdings Ltd.
[17] Organisation for Economic Co-operation and Development. 12 November 1998. *Cross-ownership and convergence: policy issues.* DSTI/ICCP/TISP(98)3/FINAL. p. 4.
[18] PricewaterhouseCoopers. October 2012. *India entertainment and media outlook 2012.* p. 15.
[19] PricewaterhouseCoopers. October 2012. *India entertainment and media outlook 2012.* p. 15.
[20] Ofcom. 31 July 2009. *Media ownership rules overview.* p. 23.

22. With the emergence of viewpoints in different formats through the online media, there has been a decreased reliance on the three traditional forms of media (newspapers, television and radio) for the consumption of news. Hence, there is little value in imposing severe cross ownership restrictions across the traditional media platforms; the increasing access to information through online media as compared to the traditional sources would likely further reinforce the rationale for relaxing any restrictions on cross media ownership from the plurality perspective.

23. It has been noted by Gans (1999)[22] that cross media ownership restrictions are particularly problematic in light of the rapid technological changes in the way information is being produced and distributed. These technological developments are resulting in economies of scale and scope that have not been seen so far. Media, information technology and telecommunication industries are becoming increasingly interlinked. Thus there has been "*increasing homogeneity of the inputs used for producing and distributing information based products and services and communication services.*" [23] Such supply side changes, for example use of the same network for delivering television programmes, communication and new products, result in important economies of scale. In addition, these technological changes also affect the upstream production of content resulting in economies of scope in cross media ownership. For example, television and newspapers can share the same source of information.

24. A review of cross media ownership rules across countries as set out by TRAI in the consultation paper highlights that there are only a few countries that have imposed blanket bans that prohibit ownership of more than one or two media platforms (for example, South Korea and Canada). Most countries have imposed more nuanced cross media restrictions on the basis of either market share or ownership control of a media organisation within a particular media platform. For instance, UK, Germany and Austria have restrictions based on market shares and South Africa and Cyprus have restrictions based on ownership control. Further, there are a few countries that have restrictions based on the number of players remaining in the market after a merger/acquisition across platforms (for example, US and Australia). Finally, there are some countries such as Bulgaria that do not have any cross media restrictions.

25. A recent study undertaken by the UNESCO Institute for Statistics[24] highlights that out of the 26 countries that were reviewed; only nine had anti-concentration rules on ownership both

[21] Ofcom. 19 June 2012. *Measuring media plurality: Ofcom's advice to the Secretary of State for culture, Olympics, media and sport*. p. 12.
[22] Joshua Gans. 4 May 1999. *Economic issues associated with the regulation of broadcasting in Australia.* A report for John Fairfax Holdings Ltd.
[23] Joshua Gans. 4 May 1999. *Economic issues associated with the regulation of broadcasting in Australia.* A report for John Fairfax Holdings Ltd. p. 7.
[24] UNESCO. 2012. *The media landscape in 28 countries. Results from a UIS pilot survey.* pp. 12-13.

within media and cross media. The same study reveals that the vast majority i.e. 65 per cent of the countries reviewed had no restrictions on cross ownership in media.

26. Further, several countries that have had cross media ownership restrictions in place have gradually relaxed these restrictions. This could be on account of a variety of factors, all of which are very pertinent and have been discussed above.

27. One possible explanation for the progressive relaxation of the cross media ownership rules could be a decline in the financial viability of media organisations in recent years, already discussed above. The UK Parliament, in its report titled "*The future of investigative journalism*", remarked:

> "*[D]eclining advertising revenues and competition from alternative free news sources has had a severe impact on the economic viability of the national press. It is crucial that the existing media ownership rules at a national level are examined to assess whether the correct balance is being struck between the need to protect the plurality of news ownership, essential in a democracy, and securing the financial viability of the industry. Any proposals to amend the cross-media ownership rules should form part of the Government's Communications review.*"[25]

28. In the UK, while the 1990 Broadcasting Act in the UK imposed several restrictions on ownership of newspaper and television broadcasting, some of these rules were relaxed in 1996. Seven years later, sweeping changes were made to media regulations in the Communications Act of 2003, including providing permission to own both national radio and television licenses.[26] Ofcom has periodically been reviewing the ownership rules in media in the UK. Following its recommendations, in 2009, the UK Government removed the local cross media ownership restrictions.[27] The national cross media ownership rules are currently under review by the UK Government. Thus, cross media ownership rules have been continuously evolving in the UK.

29. There are certain cross media ownership rules in the US. However, over the years these rules have been reviewed and progressively relaxed. Every four years, the FCC reviews the media regulations in the US.[28] In the 2002 review, the FCC eliminated the blanket ban on newspaper and broadcasting ownership that did not take into account either market size or the number players in the market. This was done in recognition of the fact that there are several efficiencies that result from cross media ownership. In the 2007 review, it further relaxed the

[25] Lords Select Committee-Communication. 16 February 2012. *The future of investigative journalism.* Chapter 4. Available at http://www.publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/256/25602.htm
[26] Ibid. pp.1080-1081.
[27] Ofcom. 22 November 2012. *Report to the Secretary of State (Culture, Media and Sport) on the operation of the media ownership rules listed under section 391 of the Communications Act 2003.* p. 4.
[28] Star Tribune. 13 January 2013. *Ease cross-media ownership rules.* Available at http://www.startribune.com/opinion/editorials/187379681.html

rules for cross media ownership. In its report released in December 2011[29], the FCC opined that prohibitions on cross ownership of newspapers and broadcasting are not desirable since they do not allow for the public interest benefits that result from cross media ownership. Hence, the FCC proposed further revisions in these cross media ownership rules. A stronger view was expressed in the case of cross ownership of radio and television broadcasting. The FCC commented that "*radio/television cross-ownership does not negatively impact the amount of local news available to consumers or the diversity of such programming*."[30]

30. Various other countries have also undertaken reforms in their cross media ownership rules. Australia, for instance, abolished restrictions on foreign ownership and permitted cross media ownership in 2007. This permission is subject to a 'diversity test' to ensure that there are a minimum of five media owners in metropolitan markets and four in regional markets.[31] According to newspapers, the Australian government is undertaking reviews in order to further ease these cross ownership restrictions.[32]

31. In India, TRAI's regulations on media ownership are being discussed at a time when consumers are exposed to a wide variety of media platforms. As has been reported earlier, media consumption on internet has been growing many times faster than through cable and satellite. Also, with the digitalisation drive in the country and the expected rise of broadband connectivity, the technological landscape in television broadcasting is also undergoing a major change. All these facts call for a prudent application of cross media ownership rules in India.

32. As regards cross media ownership restrictions, if any it is relevant to note that media content comprises of a variety of genres such as news and current affairs, sports, music, movies, general entertainment, etc. The fact that the objective of opinion plurality, in essence, only relates to news and current affairs has been noted in several countries. For example, the UK Office of Communications (Ofcom), the regulator for the UK communications industry, stated in its report on media plurality[33] that "*news and current affairs play the primary role in delivering the public policy goals*".[34] Ofcom has concluded that the role of the non-news genre is different from that of news[35] and that the "*review of plurality should be limited to news and current affairs*".[36] According to Ofcom, the terms 'news' and 'current affairs' refer to

[29] Federal Communications Commission. 22 December 2011. *In the Matter of 2010 Quadrennial Regulatory Review –Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996.* Notice of proposed rulemaking. FCC 11-186. p. 33.
[30] Federal Communications Commission. 22 December 2011. *In the Matter of 2010 Quadrennial Regulatory Review –Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996.* Notice of proposed rulemaking. FCC 11-186. p. 45.
[31] Mac Edge. 2008. Cross Ownership. The International encyclopedia of communication. p. 1080.
[32] Reuters. 30 April 2012. *Review urges new Australian media ownership laws.* Available at http://www.reuters.com/article/2012/04/30/australia-media-idUSL4E8FU3LU20120430; Naomi Woodley, ABC News. 30 April 2012. *Mixed response to media convergence review.* Available at http://www.abc.net.au/pm/content/2012/s3492233.htm
[33] Ofcom. 19 June 2012. *Measuring media plurality: Ofcom's advice to the Secretary of State for culture, Olympics, media and sport.*
[34] Ofcom. 19 June 2012. *Measuring media plurality: Ofcom's advice to the Secretary of State for culture, Olympics, media and sport.* p. 9.
[35] Ofcom. 29 June 2012. *Annex 7: Media plurality and news- a summary of contextual academic literature.* p. 3.
[36] Ofcom. 19 June 2012. *Measuring media plurality: Ofcom's advice to the Secretary of State for culture, Olympics, media and sport.* p. 1.

programmes and articles that inform the public and contribute to democracy through the reporting, commentary and discussion of various issues, irrespective of the media platform.[37]

33. Based on its compilation of the results of various studies on the role of news in relation to power and politics, Ofcom has concluded that news content, in newspapers, television, radio or any other platform, has the ability to affect audiences and their behaviour. The key effects include (i) the ability to influence the issues audiences think about in the short run (agenda-setting effect), (ii) the ability to influence the issues audiences are concerned about in the long run (news diffusion) and (iii) the ability to change what an individual believes in (persuasion).[38] These studies indicate that news media has had the effect of influencing electoral processes and election outcomes in several countries.[39] News media has also played a major role in the shaping of public policies through coverage of various domestic, foreign and social policy issues.[40] In view of the above, Ofcom has recommended that *"the scope of any plurality review should be limited to news and current affairs, but that these genres should be considered across television, radio, the press and online."*[41]

34. The UK Competition Commission in its review of the *Sky/ITV* merger[42] also expressed similar views. While discussing plurality, it stated:

> "*The parties overlap in a broad range of content, but news and current affairs 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. We therefore focused on national news and refer to the range of information and views communicated to audiences through the news as the 'plurality of news'.*"[43]

35. In the United States as well, the Federal Communications Commission (FCC) has focused on news for the purpose of media plurality:

> *"We believe that a key measure of how well the Commission's current rules promote our overall diversity goal is the availability of local news and information...*"[44]

[37] Katrien Lefever, Ellen Wauters, Peggy Valcke. June 2012. *Media pluralism in the EU-Comparative analysis of measurements systems in Europe and US-Part 1.* Steunpunt Media. p. 28.
[38] Ofcom. 29 June 2012. *Annex 7: Media plurality and news- a summary of contextual academic literature.* p. 9.
[39] Ibid. pp. 8-11.
[40] Ibid. pp. 12-13.
[41] Ofcom. 5 October 2012. *Measuring Media plurality: Supplementary advice to the Secretary of State for culture, media, sport and the Leveson Inquiry.* p. 2.
[42] Competition Commission, UK. 14 December 2007. *Acquisition by British Sky Broadcasting group plc of 17.9 per cent stake of the shares in ITV plc.* Report sent to Secretary of State (BERR).
[43] Competition Commission, UK. 14 December 2007. *Acquisition by British Sky Broadcasting group plc of 17.9 per cent stake of the shares in ITV plc.* Report sent to Secretary of State (BERR). p. 72. para 5.32.
[44] Federal Communications Commission. 22 December 2011. *In the Matter of 2010 Quadrennial Regulatory Review –Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996.* Notice of proposed rulemaking. FCC 11-186. p. 8.

36. From the above discussion, it is obvious that plurality concerns arise, if at all only with regard to news and current affairs content, and therefore cross media ownership rules, if any must be limited to news and current affairs only. It further follows that the restrictions should not extend to non-news and current affairs genres in any platform i.e. TV, radio or press, meaning that within a particular platform, for example in television, there should be no restriction on an entity owning a non-news and current affairs channel entering or having a foot print in news and current affairs so far as the plurality perspective is concerned.

37. It is also important to note that the Competition Act and the CCI also play a role in maintaining plurality of views in the media industry. To an extent the different media platforms within the news and current affairs genres can be considered as belonging to the same relevant market, viz the market for dissemination of news and views on current affairs. Thus, where a merger or amalgamation or acquisition falls within the jurisdiction of the CCI, the CCI can take care that the transaction does not lead to a high degree of market power in the said relevant market, and thereby the CCI would be taking care of the plurality concerns as well. As has been noted by the Ofcom, the merger regulations and the prohibitions on anti-competitive agreements by the competition authority can prevent the lessening of competition in the media markets.[45]

38. In the section relating to vertical integration, we have suggested closer coordination between the CCI and TRAI in assessing cases of vertical mergers by the CCI. The same suggestions would apply to cross media ownership cases as well when these are considered by the CCI under the Competition Act.

Recommendations

39. Taking a lesson from international precedents, and acknowledging TRAI's proposal to have cross media ownership rules, we conclude that while some form of regulation of cross media ownership is necessary in order to maintain plurality of viewpoints, the restrictions should not be such that they remove incentives for media firms to invest and grow. We recommend the following:

    39.1. There should not be any blanket ban on cross ownership across media platforms because extreme restrictions have adverse effects on business incentives of firms and deprive consumers of the efficiency benefits that can occur.

    39.2. Cross media rules, if any should only be restricted to news and current affairs genres across all platforms in the media industry since these are the relevant genres from a plurality perspective.

[45] Ofcom. 14 November 2006. *Review of media ownership rules.* p. 6.

39.3. Any restriction on cross ownership from the point of view of plurality must be linked to the market power of an entity and its ability to influence views. This could possibly be done through an assessment of the Diversity Index. If the cross ownership by an entity results in the Diversity Index being less than a specified threshold, then there should not be plurality concerns.

39.4. To the extent that different media platforms within news and current affairs genres can be considered as belonging to the same relevant market, the Competition Act and the CCI can take care of plurality concerns.

CHAPTER 2
VERTICAL INTEGRATION

40. In regard to vertical integration, the consultation paper states that:

> *"... Vertical integration penetrates the market beyond a certain level, the vertically integrated entities may even block content from their competitors which might further affect the plurality adversely, more so, if they hold dominant positions and have cross media holding"*

41. The consultation paper does not explain how vertical integration can raise plurality concerns. It is common knowledge that the motivation behind the consideration of restrictions on vertical integration has evolved largely on the basis of competition specific arguments, and that is how vertical integration has been analysed and regulated in almost all jurisdictions. This is also the basis on which the MIB in its letter dated 16 May 2012 has referred the matter to TRAI and asked for its recommendations; the MIB letter specifically makes it clear that the matter of vertical integration involves competition issues:

> "*This type of vertical integration [between broadcasting companies and distribution platforms] can seriously affect competition and promote monopolistic practices. Therefore, there is a need to address such vertical integration. TRAI may suggest measures that can be put in place to address vertical integration in order to ensure fair growth of the broadcasting sector*"[46]

42. As a matter of fact even TRAI, in an earlier recommendation paper, recognised that there is limited overlap in concerns arising out of cross media ownership and vertical integration:

> "*Thus it is observed that among the issues under consideration the issue of diversity and plurality are more relevant in cases of cross media ownership i.e. horizontal integration whereas competition issues become more relevant in 'vertical integration'.*"[47]

43. Therefore, it is important to note that the objectives sought to be achieved by regulating vertical integration and cross media ownership are inherently different. Regulation of the former seeks to preserve efficiency, competitiveness and consumer welfare with little impact on plurality; whereas regulation of the latter is with the view to maintain plurality and diversity of views in a democracy. Therefore, economic efficiency and consumer welfare, rather than plurality and other socio-political goals, are the principal concern in regulating vertical

[46]Telecom Regulatory Authority of India. 15 February 2013. *Consultation Paper on Issues relating to Media Ownership*. Annexure-I MIB reference dated 16 May 2012 (Letter by MIB to TRAI).
[47]Telecom Regulatory Authority of India.25 February 2009. *Recommendations on Media Ownership* p.39.

integration. On the other hand, regulation of cross media ownership arises mainly from socio-political concerns seeking to maintain plurality of views in a democracy.

Benefits of vertical integration

44. Generally, vertical integration is motivated by a desire to reduce costs, rather than increase the prices of the parties' products. As such vertical integration enables the parties to achieve efficiencies i.e. supply same amount at lower prices or increase output at the same cost. In general, efficiencies can arise because of enhanced coordination made possible by the vertical integration allows for: (i) production efficiencies and savings; (ii) internalization of vertical externalities and alignment of incentives; (iii) transaction cost savings, including mitigating opportunistic behaviour; and (iv) pricing efficiency.

Production Efficiencies and Cost Savings

45. Vertical integration results in production efficiencies and cost savings due to the enhanced coordination between the two integrating entities. Riordan and Salop (1995, pp. 523-524) point to other potential efficiencies from coordination in both design and production made possible by a vertical integration, including lower costs, higher quality, shorter lead times, improved quality control, reduced costs of inventory, optimized production runs etc. The combined entity would benefit from economies of scale, scope and learning in production and distribution which make it efficient for a firm to produce a range of products.

Vertical Externalities

46. Externalities arise when the actions of one entity directly affect the welfare of another entity. The entities might be an upstream and downstream firm, two downstream firms that both retail the products of the same manufacturers, or two manufacturers. Vertical merger results in enhanced coordination which in turn leads to (i) alignment of incentives within the vertical structure; (ii) prevention of free-riding; and (iii) efficient quality certification, creation, and maintenance.[48]

47. The potential alignment of incentive effects is most clearly explained in the case of a merger between a retailer and a manufacturer where there is customer exclusivity. The incentives by the retailer to invest in sales will not be "fragmented" across the products of different manufacturers when there is customer exclusivity. Furthermore, integration means that the manufacturer can share information regarding market conditions and its promotional plans/activities with its retailer and be less concerned that it will be leaked intentionally, or inadvertently, to a competing manufacturer.

[48] Jeffrey R. Church. *The Impact of Vertical and Conglomerate Mergers on Competition*. Brussels: European Commission, 2004.

48. Further, in the absence of a vertical integration between a manufacturer and its retailer, the incentive for the manufacturer to invest in the retailer and its product are reduced because of potential free-riding (benefiting from an activity without bearing any of the costs) by other manufacturers. Instances of free-riding that can be eliminated through exclusivity following a merger include:

    48.1. free-riding by rivals on demand created through investments in product quality and promotion. In this case the investment by the manufacturer creates demand for the product category, which its rivals attempt to capitalize on by providing financial inducements (such as higher margins) to retailers to switch customers.[49]

    48.2. free-riding by rivals on product innovation and design. This case is possible when design and innovation are not completely protected by intellectual property rights. If rivals can easily copy and sell imitations, there will again be an incentive for them to induce retailers to switch customers to their (lower) priced imitations.[50]

    48.3. free-riding by rivals on investments in retailers. A manufacturer will have less of an incentive to make investments in its retailer network if the benefits of those investments are not specific to it. For instance, investments by the manufacturer in the sales force of the retailer (through technical education and training) or store fixtures likely benefit its rivals.[51]

49. The last vertical externality is quality assurance. Vertical integration avoids disputes and disagreements over which component/service is to blame when the system does not function at all, or below its capabilities. Joint provision of service insures that firms are able to develop and maintain reputations for quality. Moreover, joint provision may be a mechanism that allows a firm to signal that its system is high quality. It can offer one component (typically the one that is more durable) at a low price to signal high quality, since the only way it will be able to recoup its initial losses on the durable component is through its sales and margins on other components, sales which will only be realized if quality is high.[52]

Transaction Costs and the Holdup Problem

50. Vertical integration can reduce transaction costs and promote investment in specific assets by mitigating more effectively the hold-up problem. The hold-up problem involves opportunistic behaviour by a buyer (lower price) or seller (higher price) who attempt to renegotiate the terms of trade after investment in the asset. For instance, a buyer may agree to buy from

[49] Jeffrey R. Church. *The Impact of Vertical and Conglomerate Mergers on Competition*. Brussels: European Commission, 2004.
[50] Jeffrey R. Church. *The Impact of Vertical and Conglomerate Mergers on Competition*. Brussels: European Commission, 2004
[51] Jeffrey R. Church. *The Impact of Vertical and Conglomerate Mergers on Competition*. Brussels: European Commission, 2004.
[52] Jeffrey R. Church. *The Impact of Vertical and Conglomerate Mergers on Competition*. Brussels: European Commission, 2004.

seller a commodity/services at a certain price. The seller may have to invest in certain assets and put in place infrastructure to be able to supply such commodities/services. Anticipating that the buyer may take advantage of the change in the seller's incentives post investment, the seller will be reluctant to make the required investment. If the transaction costs associated with eliminating the risk of hold up through private contracts are too large, then one alternative is vertical integration as in such a scenario interest of both parties will be aligned.

Pricing efficiency

51. Vertical integration can result in elimination of exercise of market power at successive stages of the value chain. This is referred to as "double marginalization" i.e. when a downstream firm marks up over their marginal cost, which because of market power upstream exceeds the marginal cost of the upstream producer. Hence there is a mark up on a mark up or double marginalization. A vertical integration in these circumstances would eliminate the wholesale market transaction and one of the mark ups, reducing the marginal cost downstream, resulting in both a lower price downstream and increased profits. As an illustration, when firms at two different production stages exercise market power at the same time earn profit margins at both stages independently, in such a case, the total market output will be lower, and the price paid by consumers will be higher, than if there a consolidated margin earned by a vertically integrated player at only one stage. Therefore, merger between firms at different stages of the value chain would result in an increase in output, and a reduction in the price of the final goods.

Benefits of vertical integration in the broadcasting sector

52. The above discussion shows the benefits that can accrue to the consumer through vertical integration that are widely recognised. Specifically, for the broadcasting sector, there is empirical evidence to prove that vertical integration in the broadcasting industry results in an increase in quality of service and reduction in costs.

53. **Ayako Suzuki**[53](2008) in his study on the acquisition of Turner Broadcasting by Time Warner[54] differentiates anticompetitive foreclosure from efficiency in vertically integrated cable TV markets. The paper analyses effects of the acquisition of Turner Broadcasting System by Time Warner in 1995 and shows strong evidence of efficiency. The merger allowed Suzuki to examine markets served by the cable systems owned by Time Warner both before and then a few years after it became vertically integrated by buying CNN, Headline News, Turner Network Television, WTBS, Turner Movie Classics, and the Cartoon Channel. The comparison shows that the areas served by Time Warner systems improved with respect to price and quality, with consumers appearing to benefit from vertical integration.

[53] Ayako Suzuki, *Vertical Integration in the U.S. Cable Industry*, The Institute of Social and Economic Research, Osaka University (Nov. 2006).
[54] *Time Warner Inc., Turner Broadcasting System Inc. et al v. FTC*, Docket no.: C-3709

54. **Chipty** (2001)[55] examines the effect of vertical integration between programming and distribution in the cable industry. The analysis suggests that vertical integration in the industry is likely to benefit consumers because of the associated efficiency gains.[56] The benefits include the elimination of double marginalisation, internalisation of the choice of product mix (contributes to better product offerings) and reduction in transaction costs.[57]

55. **Hazlett** (2007)[58] notes that vertical integration in the cable television industry has the potential to increase investment and innovation in the industry. It is essential that the dynamic effect of vertical integration is taken into account as limits on vertical integration can result in perverse outcomes. This is because it will reduce the incentives on the part of cable operators to invest in infrastructure and accordingly limit opportunities for independent programmers. The study notes that:

> "*When cable TV systems invest in program networks they simultaneously invest in complementary assets, seeking to connect a virtuous circle. Better content improves the value of distribution conduits, just as improved transport facilities make cable programming more valuable. Hence, if cable operators see profits available from creating new programming, they enjoy incentives to build additional capacity (adding channel slots to cable infrastructure) in order to realize those returns. Given economies of scale and scope in capacity upgrades, an operator expanding its distribution network for some of its own programming can simultaneously add capacity to deliver much more.*"[59]

Competition law oversight of vertical mergers in other jurisdictions

56. Globally, vertical mergers and relationships are regulated under the competition law framework. It is clear from the above discussion that vertical mergers have substantial benefits in terms of strategic and efficiency effects leading to enhanced consumer welfare that are well recognised and documented. However, in certain circumstances, vertical mergers may enable enterprises to create barriers to entry, foreclose competitors and in turn, affect consumer choices. Thus, assessing the welfare effects of integration requires weighing the relative importance of the various effects[60]. Therefore, it is necessary for a regulatory authority to analyse the economic efficiencies / pro-competitive effects created by the integration on the one hand and the harm / anti-competitive effects caused on the other. This requires a case-to-case and thorough analysis of facts and circumstances of each vertical integration. Hence, a

[55]TasneemChipty. June 2001. *Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry*. The American Economic Review, Vol. 91, No. 3. p. 430.
[56]Tasneem Chipty. June 2001. *Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry*. The American Economic Review, Vol. 91, No. 3. p. 428.
[57]TasneemChipty. June 2001. *Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry*. The American Economic Review, Vol. 91, No. 3. p. 428.
[58] Thomas W. Hazlett. 19 October 2007. *Vertical Integration in Cable Television:The FCC Evidence*.p. 6.
[59] Thomas W. Hazlett. 19 October 2007. *Vertical Integration in Cable Television:The FCC Evidence*.
[60] TasneemChipty. June 2001. *Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry*. The American Economic Review, Vol. 91, No. 3. p. 428.

"*one size fits all*" approach while regulating vertical integration would be counter-productive and stifle investment and competition in the market; and in turn would adversely affect consumer choice.

57. Even though vertical mergers/ integrations are less likely to create harm to competitors and consumers, competition authorities in many jurisdictions including the EU[61] and the US have identified possible ways in which vertical integration may significantly impede effective competition, (i.e.) through:

    57.1. input or customer foreclosure[62], and

    57.2. coordinated effects.

58. The US Department of Justice, Merger Guidelines (1982) articulated following theories of harm to competition and consumer welfare from vertical integration:

    58.1. raising rivals' costs and two level entry;

    58.2. facilitating collusion by making it easier to monitor prices or by eliminating a disruptive buyer.

59. The Canadian Merger Enforcement Guidelines 2004 outlines two ways in which a vertical merger may give rise to potential competitive harm:

    59.1. through increased entry barriers attributable to simultaneous or two-tiered entry, and

    59.2. through facilitation of coordinated behaviour.

60. In the light of the evident benefits of a vertical merger, most competition authorities, including those in the EU and US, employ a rule of reason approach (effects based) for assessment of vertical mergers instead of following a *per se* approach (form based). There is consensus among competition authorities that vertical mergers are less likely to raise competition concerns than horizontal mergers.[63]

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[61] Commission Notice, Guidelines on the assessment of non-horizontal mergers under the council regulation on the control of concentrations between undertakings.

[62] Input Foreclosure - Raising rivals' cost or input foreclosure occurs when the merged entity either stops supplying to competing downstream player or does so at higher prices, which results in an increase in the price of the upstream input post merger, thereby raising the costs of competing downstream players. The hypothesis is that the merged firm has an incentive to change the behaviour of the upstream division post merger because it will internalise the effect on the downstream process when setting its optimal price in the market for input, which means that there is an additional benefit from raising its input price: higher downstream profits for itself but higher costs for the downstream competitor.

Customer foreclosure occurs when, post merger, the downstream division of the merged firm no longer sources supply from independent upstream firms. If this decrease in demand leads to reduced sales and increased costs for the upstream rivals, then the resulting exit or reduced competitive vigour will relax the competitive constraint on the upstream division of the merged integrated firm, leading to greater market power upstream and higher input prices.

[63] See Non-Horizontal Merger Guidelines issued by the U.S. Department of Justice available at http://www.justice.gov/atr/public/guidelines/2614.htm

"*Non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers.*"[64]

61. The EC guidelines titled '*Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings'* (EC guidelines) prescribe a three step process for the assessment of vertical mergers.[65] The three steps discussed in the guidelines are as follows:[66]

    61.1. "*First, whether the merged entity would have, post-merger, the ability to substantially foreclose access to inputs?*"As discussed above, this step involves the assessment of whether the merged firm has significant market power in either of the two markets such that it can induce foreclosure.[67]

    61.2. "*Second, whether it would have the incentive to do so?*" This step evaluates whether a foreclosure strategy would be profitable considering only the static responses of rivals and consumers.

    61.3. "*Third, whether a foreclosure strategy would have a significant detrimental effect on competition downstream?*" This step is the most important as this determines the overall impact on competition. This step entails the assessment of the potential dynamic responses of the competitor firms. Factors such as buyer power, likelihood of entry and the impact of efficiencies are examined to determine the long run impact of the merger on competition. Merely proving the existence of harm to competitors is not sufficient to deter a merger. Instead, it needs to be shown that there will be harm to competition. This can take the form of increased prices, reduced quality or reduced choices that are available to consumers.

62. The guidelines further note that "*in practice, these factors are often examined together since they are closely intertwined*".[68] It is evident that the approach followed in the EU is based on a rule of reason analysis.

63. The guidelines issued by the US Department of Justice (US guidelines) do not contain a step by step analysis like the EU. However, they reflect the same approach.[69] The US guidelines mention the factors that the agency will consider for the assessment of vertical mergers.

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[64]Official Journal of the European Union.October 2010*Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings.*
[65]Official Journal of the European Union. October 2010.*Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings.*
[66]Official Journal of the European Union. October 2010.*Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings.*par.32.
[67]The guidelines state that a non-horizontal merger is unlikely to be anti-competitive if the merged firm has market share of less than 30 per cent in each market and post-merger HHI is below 2000.[67]However, it cannot be presumed that a non-horizontal merger that exceeds this threshold will necessarily give rise to competitive concerns.
[68]Official Journal of the European Union.October 2010, *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings.*
[69] See Non-Horizontal Merger Guidelines issued by the U.S. Department of Justice available at http://www.justice.gov/atr/public/guidelines/2614.htm

These factors include market concentration, conditions of entry, advantages possessed by the merger in comparison to other firms, etc. In addition, the US guidelines list three conditions that are necessary, but not sufficient, for vertical mergers to result in competition concerns:

> *"First, the degree of vertical integration between the two markets must be so extensive that entrants to one market (the "primary market") also would have to enter the other market (the "secondary market") simultaneously.*
>
> *Second, the requirement of entry at the secondary level must make entry at the primary level significantly more difficult and less likely to occur. Finally, the structure and other characteristics of the primary market must be otherwise so conducive to non-competitive performance that the increased difficulty of entry is likely to affect its performance.*"[70]

64. In both the jurisdictions, substantial emphasis is placed on consideration of efficiencies. The EC guidelines note that "*the effect on competition needs to be assessed in light of efficiencies substantiated by the merging parties.*"[71] In addition, these guidelines also note the specific sources of efficiencies in relation to vertical mergers: removal of double marginalisation, expansion in output, better coordination resulting in savings on inventory costs, etc.[72]It follows that a case by case approach based on individual assessment of market conditions is being followed for assessment of vertical mergers. Vertical integration is likely to lead to generation of efficiencies, and therefore, restricting vertical integration will have the effect of denying consumers these potential advantages. It may stifle the incentives of firms to invest and innovate, and thereby, create outcomes detrimental to consumers. This implies that *per se* restrictions that restrict vertical integration altogether can have adverse outcomes for the consumers and hence are not desirable.

Why there is no need for a separate "ex-ante" regulation

65. In chapter 3 of the consultation paper, TRAI has reviewed international practices in the media industry on cross media ownership rules and restrictions.[73] It is interesting to note that while the consultation paper enumerates the restrictions stipulated by authorities in other jurisdictions on cross-media holdings, TRAI's research does not reveal the presence of any regulations in any jurisdiction that restrict vertical integration within the media sector. This again shows that other countries have not considered it necessary to stipulate per se restrictions on vertical mergers in the broadcasting media, much less impose a blanket ban on the same. On the other hand, authorities in other countries analyse vertical integration in the

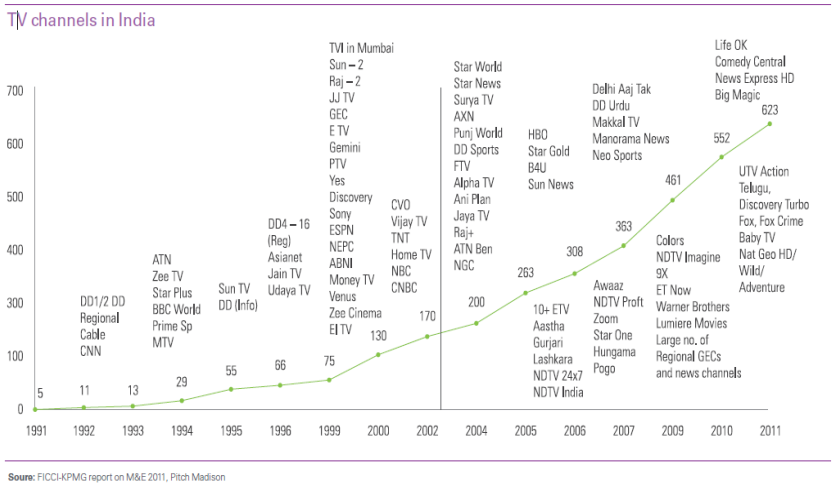
[70] See Non-Horizontal Merger Guidelines issued by the U.S. Department of Justice available at http://www.justice.gov/atr/public/guidelines/2614.htm
[71]Official Journal of the European Union. October 2010. *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*.para.52.
[72]Official Journal of the European Union.Oct., 2010, *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*.pars.54-57.
[73]Telecom Regulatory Authority of India. 15 February 2013. *Consultation Paper on Issues relating to Media Ownership*.

media sector on a case by case basis by applying the rule of reason approach, no different in fact from vertical mergers in most other sectors.

66. In the light of the above observations, there is no reason to conclude that the approach should be any different for India. A blanket ban on vertical integration in the broadcasting industry would not be justified. The correct approach to deal with vertical integration would be on a case by case analysis based on the rule of reason. This is more so since, as we will see below, TRAI regulations that are in place already effectively prevent any misuse of market power. We also go on to show that the CCI has, under the Competition Act, been keeping oversight on mergers and acquisitions, including vertical integration cases, in the broadcasting sector, with the view to maintain competition in the markets, and while doing so has taken cognizance of the effects of TRAI's regulations in preventing or punishing misuse of market power, if any. We demonstrate the reasons as to why the Indian television industry is not susceptible to the negative effects of vertical integration because of structure as well as the existing TRAI regulations.

No barriers to entry

67. The broadcasting market in India is extremely dynamic, and it has witnessed a strong growth in the number of broadcasters and the channels being offered to the public. There are virtually no barriers to entry. According to the FICCI-KPMG Report 2012, the number of channels has grown from 170 in 2002 to 623 in 2012.

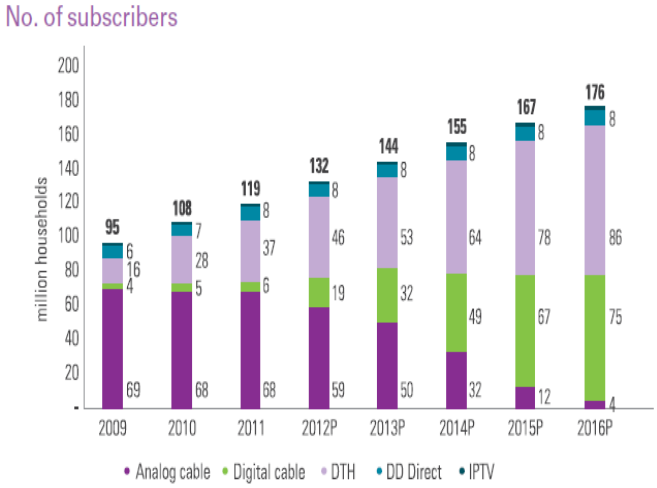


68. The number of channels has further risen rapidly to 828 as on 20 March 2013. This shows that it is unlikely that vertically integrated players have in any manner been able to foreclose independent rivals from accessing consumers (viewers and subscribers). For example, if there was any such foreclosure by vertically integrated players, it may not have been possible for new channels like Colors to enter the Hindi GEC genre and garner substantial viewership in competition with channels owned by a vertically integrated player like Zee. Another example is that of ETV, which is a leader in Telugu GEC segment competing with the

channels of other vertically integrated players like Zee and Sun. Therefore, it is clear that currently there are no barriers to entry or foreclosure in the broadcasting industry.

Structural change in the market

69. The TV broadcasting and distribution market in India is in the process of a virtual transformation to Digital Addressable System (DAS) mandated by the Government. Starting with the metros and larger towns (already covered) the digitisation is to be extended in stages to the entire country by 2016. TRAI's DAS Regulations would be applicable in all areas where digitisation has been undertaken and all cable operators are legally obliged to transmit only digital signals. Therefore, the channels subscribed by a customer can be received through a set top box equipped with conditional access card and a subscriber management system (SMS). This translates into better access and quality of service to the consumers with higher number of channels, customized tariff and other value added services.



Source: Indian Media and Entertainment Industry Report, *FICCI-KPMG, 2012, p. 19.*

70. The above figure shows the projected change in the subscriber share of various television platforms upon the implementation of mandatory digitization. As seen from the above figure, there is a projected increase in the subscriber base of digital cable and DTH viz-a-viz analog cable. The implementation of DAS regulations would increase the carriage capacity and increase the number of channels viewed by the consumer, which will in turn increase competition between broadcasters for providing innovative and interesting programmes to garner viewership. On the other hand, these regulations have increased the cost of operating for the broadcasters and distributors. In particular, MSOs and LCOs will have to heavily invest in switching to digital transmission systems by upgrading their equipments. It is pertinent to note that most of the MSOs and LCOs are small players without the financial wherewithal to make such heavy investments. Therefore, a blanket restriction on vertical integration would adversely affect the possibility of the upstream players investing in the downstream players to implement the mandatory migration to digital transmission.

71. Further, the implementation of the DAS Regulations would change the dynamics of the broadcasting industry, whereby the broadcasters would get their due share of subscription revenues, distributors would be able to carry more channels, which will in turn increase their revenues and customers would get better access and quality services.

Competition law adequate to address market failures

72. It is pertinent to note that the Competition Act prescribes for detailed process for ex-ante regulation of Combinations (including vertical integration) and ex-post investigation of cartels and abuse of dominant position. The CCI is empowered to regulate all Combinations in the television broadcasting and distribution sector. The CCI has carried out in-depth economic analysis of various transactions in the broadcasting sector e.g. Disney's acquisition of UTV, RIL Independent Media Trust's acquisition of Network 18, Newscorp's acquisition of 50 % equity interest in sports broadcaster ESS, and Disney's acquisition of 26% equity interest in Lotus JV with the TV18 group. Further, the CCI has efficiently carried out ex-post investigation of alleged cartel and abuse of dominant position relating to content procurement, aggregation, cable distribution, and DTH services businesses. In all these case, the CCI has, after in-depth analysis, passed appropriate orders and imposed penalties or other remedies. Therefore, imposition of any additional *ex-ante* regulation relating to vertical integration would create ambiguity and uncertainty, and adversely affect the healthy growth of the sector.

Regulation of vertical integration under the Competition Act

73. It should be noted that the Competition Act has been enacted for:

> "….*establishment of a commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and ensure freedom of trade carried on by other participants in the market….*"

74. In pursuit of the above objective, the Competition Act empowers the CCI to prevent anti-competitive agreements and abuse of dominant position (on an *ex-post* basis) and regulate combinations (on an *ex-ant*e basis). The Competition Act sets out in detail the process to be followed and the factors to be considered by the CCI while carrying out *ex-ante* analysis of combinations and *ex-post* investigation of cartel and abuse of dominance matters. The CCI can undertake an inquiry into any matter on the basis of information (complaint) filed before it or a reference made to it by the Government or a statutory authority (like TRAI). In the case of combinations, the Competition Act stipulates mandatory notification to the CCI. In order to carry out the above mandate, the CCI has been provided a full-fledged investigation wing headed by a Director General, who is required to assist the CCI in its work. The CCI as well as the Director General have economic, legal, financial and other experts to carry out holistic

and detailed investigation/analysis. The CCI has also been empowered to engage experts to aid it in any inquiry. In the case of combinations, the CCI has a special Combinations Division to undertake the inquiry; it can also utilise the services of the Director General if it so desires.

75. Enterprises generally merge due to the anticipated financial gains which can result in pro-competitive /beneficial effects or in anti-competitive / harmful effects. The anti-competitive effects arise from the ability of the merged enterprise to exercise market power – the power to raise prices or restrict output and thereby adversely affecting the consumers. Globally, competition authorities and courts have developed and refined certain criteria to determine the competitive impact of a transaction. This process involves identifying the relevant product and relevant geographic markets, assessing market concentration resulting from the said merger and determining the likely competitive effect (both pro-competitive and anti-competitive) of the transaction on the said relevant market.

76. The Competition Act mandates the CCI to regulate all combinations, that is mergers, amalgamations and acquisitions that exceed the financial thresholds provided in the Competition Act, and not exempted by the CCI's Combination Regulations or the notifications issued by the Government. According to section 6(2) of the Competition Act, parties to the transaction are required to notify within 30 days from a) the date of signing the binding documents in case of acquisitions; or b) the date of board approval of the enterprises involved in the merger or amalgamation.

77. The Competition Act provides that the relevant market comprises of the relevant product market and the relevant geographic market. These terms have also been defined in Sections 2(t) & 2(s) of the Competition Act, which are as follows:

Section 2 (t): "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the customer, by reason of characteristics of the product or services , their prices and intended use;"

Section 2 (s): "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from conditions prevailing in the neighbouring areas;"

78. Going further into the area of the relevant market, the Competition Act also specifies in Sections 19(7) & 19(6) the factors for determining the relevant product market and the relevant geographic market respectively, and it lays down that the CCI shall have regard to all or any of those factors while determining these markets. The factors provided under Sections 19(7) & 19(6) are as follows:
Section 19 (7):

Relevant Product Market:

a) *Physical characteristics or end-use of goods;*

b) *Price of goods and service;*

c) *Consumer preference;*

d) *Exclusion of in-house production;*

e) *Existence of specialised producers;*

f) *Classification of industrial products.*

Section 19 (6):

Relevant Geographic Market:

a) *Regulatory trade barriers;*

b) *Local specification requirements;*

c) *National procurement policies;*

d) *Adequate distribution facilities;*

e) *Transport costs;*

f) *Language;*

g) *Consumer preferences;*

h) *Need for sure or regular supplies or rapid after sales services.*

79. After defining the relevant market, the CCI in required to consider all or any of the factors listed under section 20(4) lists while determining the competitive effect of the said transaction on the relevant market.

a) *Actual and potential level of competition through imports in the market;*

b) *Extent of barriers to entry into the market;*

c) *Level of concentration in the market;*

d) *Degree of countervailing power in the market;*

e) *likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;*

f) *extent of effective competition likely to sustain in a market;*

g) *extent to which substitutes are available or are likely to be available in the market;*

h) *market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;*

i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

j) nature and extent of vertical integration in the market;

k) possibility of a failing business;

l) nature and extent of innovation;

m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

80. It is pertinent to note that the merger regulation enshrined in the Competition Act is applicable to Combinations taking place in all sectors including media. These provisions provide the CCI with the ability to address all the concerns that have been raised by TRAI in the consultation paper. For instance, TRAI is concerned that vertical integration can lead to higher prices, blocking of competition, greater entry barriers, lower innovation or deterioration of the quality of service.[74] TRAI could engage with the Government and the CCI on the issue of thresholds specifically for the media sector. The Competition Amendment Bill, 2012, under Section 5(A) of the bill, proposes to allow the central government, in consultation with the CCI, to have sector specific thresholds.[75]

81. The sector regulator and the competition authority have complementary expertise that can be combined to improve the overall outcomes. This practice prevails in several countries. For instance, the French competition authority deals with the competition related issues in the country while the sector regulator provides the technical inputs to the competition authority in merger and acquisition cases.[76] A similar model can be adopted by TRAI and the CCI to ensure efficient regulation of vertical integration in the broadcasting media. The Competition Act (under Section 21 and 21A) enables (and, by implication, encourages) mutual consultation between the CCI and statutory authorities (including TRAI) on matters that involves competition issues. The Competition Amendment Bill, 2012, under Section 21A of the Bill, proposes to make it mandatory that such mutual consultation should be undertaken where a competition issues arises, and after obtaining the views of the CCI / statutory authority, pass a reasoned order in the case.

82. It is pertinent to note that the CCI has investigated various cases relating to different segments of the media and entertainment business such as broadcasting services, Direct–to-Home services, cable services and aggregation services. Given below is a summary of some of the important cases dealt with by the CCI:

[74]Telecom Regulatory Authority of India. 15 February 2013. *Consultation Paper on Issues relating to Media Ownership*. p. 67, para 6.2.
[75]See Competition Amendment Bill, 2012, as introduced in Lok Sabha. Bill No. 136 of 2012.
[76]Administrative Staff College of India. 2009. *A study on cross media ownership in India.*

Sr. No.	Name of case, and relevant provision of the Competition Act	Remarks
1	Acquisition by The Walt Disney Company (Southeast Asia) Pte. Limited of UTV Software Communications Limited; a combination case involving *ex-ante* assessment	Markets analysed – a) broadcasting of television channels; b) motion pictures; c) interactive media and related services. The CCI held that "*each of these markets were characterised by factors such as the presence of a large number of players (intense competition), availability of ample choice to the customers, demand driven nature of the business, relative ease of entry and exit, lower possibility of any coordinated or exclusionary behaviour, regulatory oversight and future growth potential.*" (The "regulatory oversight" mentioned by the CCI refers to regulation by TRAI.)
2	Acquisition by Independent Media Trust of NW18: A combination case involving *ex-ante* assessment	Markets analysed – a) broadcasting of television channels; b) event management services; c) Web portals The CCI "*observed that the business of supply of television channels in India is featured by the presence of significant number of broadcasters operating across various genres targeting national and regional audience/viewership.* *"It is apparent from the above that new television channels can be started with ease in India with sufficient scope for innovation and competition, both in terms of technology and content."*
3	Acquisition by STAR-ATC (a Newscorp group entity) of 50% stake held by Disney group in sports broadcaster, ESS; a combination case involving *ex-ante* assessment	Markets analysed – a) broadcasting of television channels; b) web portals. The CCI observed that *"It is further observed that the broadcasting sector in India is regulated by the Telecom Regulatory Authority of India(TRAI), which has framed various regulations which, inter-alia, make it obligatory for a broadcaster to provide signals of television channels on a non-discriminatory basis*

		to every DTH operator /MSO and not enter into exclusive agreements with any MSO/distributor....." *The TRAI regulations were analysed by CCI before deciding on the effect of a particular transaction on the market.*
4	Fastway Transmission Private Limited; a case of abuse of dominance; ex- post investigation	The CCI found the group of cable operators to be dominant in the market for cable television services in Punjab and Chandigarh. Further, it found that the disruption of transmission of the news channel operated by the informant could not be justified by shortage of spectrum or popularity of the channel. The CCI concluded that this conduct by the group of cable operators resulted in harm to the news channel and also led to the denial of services to viewers.

Current regulatory position and commercial realities in India

83. TRAI's regulations closely regulate the broadcasting sector; these also ensure a level playing field and a competitive environment preventing discrimination, denial of access, and exclusive agreements. Besides the nature of the broadcasting industry and the incentives structure are such that it makes no commercial sense to deny access to customers or competitors.

84. The table below explains the regulatory position and commercial realities in India that make foreclosure or creation of barriers to entry unlikely.

	Possible Theory of Harm	**TRAI's Regulations and commercial realities that prevent the harm**
Potential Risks at the Wholesale Broadcasting Level		
	Customer foreclosure - restriction on competitors to access the downstream distribution market as a result of vertical integration	• Commercially unviable for any downstream distribution player to only carry its own channels. The subscribers would want channels telecasted by other broadcasters; this would adversely affect the distribution business of the vertically integrated player.

		• "***Must carry***" in DAS areas (eventually to be implemented across the nation)[77]
	Broadcaster having access to sensitive information regarding its competitors at the downstream level.	• Prices at wholesale and retail level are regulated by TRAI for both cable and DTH; • All commercially sensitive information relating to the price and number of subscribers are submitted to TRAI; • Aggregators and broadcasters publish the rate cards on their websites;
Potential Risks at the Downstream Distribution Level		
	Exclusivity or input foreclosure – post-merger, when the downstream player only carries the channels of the merged entity	• TRAI mandates "must provide" and "non-discriminate" obligations on the broadcasters; further, price is regulated both at the wholesale and retail levels; • Exclusivity is commercially unviable as it would affect the overall viewership of the broadcaster's channels, which in turn will affect its subscription as well as advertisement revenues.

Competition concerns raised in media merger in the EU/US

85. The main concern of the competition authorities in relation media mergers is to ensure access to the content or access to those crucial facilities allowing new entrants to establish themselves in these markets. In order to ensure access to new entrants and preserve competition in the relevant market, competition authorities in certain complex combinations wherein the combining parties enjoy high market share in their relevant markets, take commitments and also prescribe structural modifications. The table below analyses media cases in the EU and the US, wherein the authorities have raised competition concerns and the parties have provided commitments to allay such competition risks.

86. In a recent study undertaken by the Organisation for Economic Co-operation and Development (OECD)[78], it was found that the prohibitions on mergers in the television broadcasting have been rare. In addition, it was found that the competition authorities have imposed commitments in cases where there could have been a concern about foreclosure:

[77] The TDSAT has vide order dated 19 October 2012 set aside the TRAI direction that required carrying capacity of 500 channels.
[78] Organisation for Economic Co-operation and Development. 19 February 2013. *Competition issues in Television and Broadcasting*.

"*It appears that nowadays merger transactions in the television broadcasting market are rarely prohibited. Increasingly often competition authorities clear merger transactions, even if they create a "near-monopoly" position, focusing instead their efforts on the imposition of appropriate commitments and ex post control of the market. For example, in 2006 the Spanish competition authority cleared the merger between Audiovisual Sport (AVS) and the biggest player in the Spanish pay-TV market, Sogecable SA, only on the condition that AVS would guarantee third party access to football content on fair, transparent and non-discriminatory basis.*"[79]

S. No.	Media cases in the EU and US	Competition concerns raised / remedies ordered	Reasons as to why the same risk is not applicable / relevant in the Indian context
1	**Newcorp/ Telepiù**	• The EC was concerned that the merger between Newscorp and Telepiu (an Italian Pay TV company) might have created a quasi-monopoly in the Italian pay-TV market; • Remedy in this case - access to content via a reduction in the duration of **exclusivity agreements** with premium content providers and the establishment of a sub-licensing scheme through a wholesale offer; and access to infrastructure, i.e**. access to the satellite platform for pay-TV distribution as well as to the technical services associated with pay-TV.**	• TRAI regulations mandate "must provide" and "non-discriminate" obligations on the broadcasters; • Commercially unviable: exclusivity would affect circulation/ viewership of the upstream player and in turn would affect the subscription as well as advertisement revenues of upstream player; • TRAI requires DTHOs to provide Basic Service Tier – in which it is mandatory to provide 5 channels from every genre; • Pricing of television channels regulated by TRAI both at the wholesale and retail levels.
2	**Vivendi/**	• This was an acquisition by French	• TRAI regulations mandate

[79]See Organisation for Economic Co-operation and Development. 19 February 2013.*Competition issues in Television and Broadcasting*.

	Seagram/ Canal Plus/ Vizzavi (EU	telecommunications and media company Vivendi and its subsidiary Canal+ of Canada's Seagram whose interests range in music, films and drinks; • The EC found that the transaction significantly affected three markets, namely, pay-TV, the emerging pan-European market for portals and the emerging market for online music; • With respect to the pay-TV market, the Commission found that, because of Canal+'s likely exclusive access to the premium films produced and co-produced by Universal, Europe's largest pay-TV operator might have strengthened its dominant position in a number of countries; • Remedy in this case - access to music content on a non-discriminatory basis and access to Universal's film production.	"must provide" and "non-discriminate" obligations on the broadcasters;
3	**TCI/ Liberty Media Corp (US)**	• TCI was the largest MSO and Liberty had an interest in cable systems; both had significant interest in video programming services. The threat posed by this merger was that by increasing vertical integration between MSOs and video programming providers, this merger may substantially lessen competition between other cable systems and current and emerging competitors to cable systems by making it more difficult to obtain popular programming; • Remedy in this case - the consent judgment mandated by the FTC required <u>open access</u> to prevent such foreclosure.	• TRAI regulations mandate "must provide" and "non-discriminate" obligations on the broadcasters; • Commercially unviable: exclusivity would affect circulation/ viewership of the upstream player and in turn would affect the subscription as well as advertisement revenues of upstream player;
4	**AOL/ Time Warner (US)**	• This merger sought to combine Time Warner, the world's largest media company and AOL, the world's leading	• TRAI regulations mandate "must provide" and "non-discriminate" obligations on the broadcasters;

		provider of online access and related services; • FTC found the possibility of harm to competition by vertical foreclosure in three product markets: residential broadband internet hardware connection service; broadband ISP service; and interactive TV service. • Remedy in this case - the FTC required AOL to agree to guarantees of open access and prohibited AOL/ Time Warner from discriminating against interactive television services provided by other companies.	• Commercially unviable: exclusivity would affect circulation/ viewership of the upstream player and in turn would affect the subscription as well as advertisement revenues of upstream player;
5	**Time Warner/ Turner Broadcasting (US)**	• TCI, a third entity, owned a large share of Turner Broadcasting and this combination would have resulted in TCI owning a significant percentage of Time Warner, the second largest cable system after TCI. In addition, the three companies were also significant providers of video programming services; • FTC concerns: - Time Warner could unilaterally raise prices for its own programming, as well as for programming offered by Turner. - Given TCI's ownership interest in Time Warner and its complementary long-term contractual obligations to carry Turner programming, the deal could undermine the incentives of TCI, the nation's number one cable operator, to run better or less expensive programming competitive with that offered by Time Warner, thereby augmenting Time Warner's programming market power even further.	• TRAI regulations mandate "must provide" and "non-discriminate" obligations on the broadcasters; • Commercially unviable: exclusivity would affect circulation/ viewership of the upstream player and in turn would affect the subscription as well as advertisement revenues of upstream player; • TRAI requires DTHOs to provide Basic Service Tier – in which it is mandatory to provide 5 channels from every genre; • Pricing of television channels regulated by TRAI both at the wholesale and retail levels.

		- it could lead to higher cable service prices for consumers, and reduce the programming choices available to them and that the acquisition could block future entry into all-news networks; • Remedy in this case – the consent decree prohibited Time Warner from discriminating against providers of programming services in its cable operations and competing multi-channel distribution services in its programming service business and required Time Warner cable operations to carry all-news networks to compete with Turner Broadcasting.	

Recommendations

In light of the above analysis and observations, we submit the following recommendations:

No blanket restriction on vertical integration

87. Vertical integration brings numerous benefits by way of economic efficiencies and consumer welfare, which are widely accepted. Generally, vertical integration has very little anti-competitive effects compared to other forms of mergers. In the broadcasting sector, there is empirical evidence to demonstrate the benefits of vertical integration. However, in certain circumstances, vertical integration can give rise to competition concerns. Thus authorities in most jurisdictions do not impose any blanket ban on vertical integration in the broadcasting sector; on the other hand, they analyse individual transactions case by case based on the rule of reason.

88. There is no reason to have a different approach to vertical integration in the broadcasting sector in India. As a matter of fact, the prevailing nature of the broadcasting industry and the incentives structure combined with TRAI's regulations ensure a competitive field preventing any misuse of market power leading to foreclosure or denial of access in the broadcasting industry. TRAI's regulations provide for "*must carry*"[80], "*must provide*", *"non-exclusivity"* and "*non-discriminatory treatment*", as well as bouquet and a-la-carte price regulations. Thus,

[80] The TDSAT has vide order dated 19 October 2012 set aside the TRAI direction that required carrying capacity of 500 channels.

there is no ground to impose any form of blanket ban on vertical integration in the broadcasting industry.

Regulation of vertical integration by the CCI under the Competition Act is adequate

89. The CCI is empowered to *ex-ante* regulate all acquisitions, mergers and amalgamations across all sectors, which exceed the thresholds provided in the Competition Act, that is those that fall in the definition of a combination. The CCI has the machinery to undertake the required inquiries and analysis. The CCI is adequately equipped to analyse vertical integrations taking place in the broadcasting sector as well; it has already done so in a number of merger cases in the broadcasting sector, and has taken cognizance of the effectiveness of TRAI's regulations in the broadcasting industry. The CCI also has powers to conduct *ex-post* inquiries to prohibit any abuse of dominant position and any anti-competitive agreement that creates an appreciable adverse effect on competition; the CCI has carried out such inquiries in the broadcasting sector and passed appropriate orders in such cases.

Threshold for broadcasting and media integration

90. TRAI could consider engaging with the Government and the CCI on the issue of thresholds for acquisitions, mergers and amalgamations taking place in the media and broadcasting sectors. In light of the amendments proposed in the Competition (Amendment) Bill, 2012, it would be possible for the Government to set different thresholds for different sectors in the economy.

Mandatory consultation between the CCI and TRAI

91. The Competition Act provides for mutual consultations between the CCI and statutory authorities (including TRAI) in matters where a competition issue may arise. The Competition (Amendment) Bill, 2012 proposes to make such mutual consultation mandatory, and consulting authority would be required to pass a reasoned order taking into account the views of the consulted authority. This would ensure that TRAI's views are fully taken into account in all cases of combinations in the media sector, including the broadcasting sector.

92. The Competition (Amendment) Bill, 2012, currently pending before Parliament, includes amendments to the Competition Act that will mandate or allow the above.

In Sections 21 and 21A of the Competition Act that relate to *inter se* consultation between the CCI and sector regulators, the following amendments have been proposed:

In section 21 of the principal Act, in sub-section (1),—

(a) for the words "is raised by any party", the word "arises" shall be substituted;

(b) for the words "authority may", the words "authority shall" shall be substituted;

(c) the proviso shall be omitted.

In section 21A of the principal Act, in sub-section (1),—

(a) for the words "is raised by any party", the word "arises" shall be substituted;

(b) for the words "this Act", the words "any Act" shall be substituted;

(c) for the words "Commission may", the words "Commission shall" shall be substituted;

(d) the proviso shall be omitted.

Similarly, the following changes have been proposed to allow Government to set different thresholds for different sectors of the economy:

6. After section 5 of the principal Act, the following section shall be inserted, namely:—

"5A. Notwithstanding anything in section 5, the Central Government may, in consultation with the Commission, by notification, specify different values of assets and turnover for any class or classes of enterprise for the purpose of section 5."

93. It would be seen from the above that with the amendments proposed in the Competition (Amendment) Bill, 2012, the mandated consultation between the CCI and sector regulators (like TRAI) and the provision for separate thresholds for combinations in different sectors would enable the mergers in the media sector, both vertical integration cases and cross-media holdings, to be effectively reviewed under the Competition Act by the CCI with the view to prevent any misuse of market power by combined entity.

CHAPTER 3
ANCILLARY ISSUES

94. When considering restrictions on media ownership highlighted in the consultation paper, certain ancillary issues inevitably arise as these are intertwined with the issue of ownership and market power. These have been raised in the consultation paper as well. These issues relate to the following:

- How to define control
- How to define the relevant market
- How to determine market shares in the relevant market.
- How to measure levels of concentration in the relevant market.

The above issues are analysed below.

Concept of Control

95. The concept of 'control' is central to the formulation of a policy on restrictions on media ownership, both cross media and vertical integration. The concept of control has been analysed extensively in competition law across various jurisdictions, and certain broad principles have emerged. There seem to be two principal ways of determining when 'control' is exerted over an enterprise.

95.1. *The 'equity based' approach*. Having substantial equity in an enterprise is an obvious way by which influence can be exercised. This approach involves the determination of a threshold level of equity ownership, exceeding which an entity can be said to control another. This threshold level may vary across jurisdictions. For example, according to Ofcom, a person holding more than 50 per cent equity of, or having more than 50 per cent of the voting share in a television, radio or newspaper company would be considered to have control over that company.[81] On the other hand, the TRAI consultation paper in this regard observes that:

> "*Effectively, TRAI had maintained that any entity owning more than 20% of the paid-in-equity of a broadcasting company/distributor company should be regarded as exercising control over that company. The same definition*

[81] Office of Communications, 27 April 2006. *Ofcom guidance on the definition of control of media companies*. p. 3.

may also be extended for the business entities to measure control in cross media situations."[82]

95.2. *The 'decision making ability' approach*. This approach involves the assessment of the likelihood of one entity significantly influencing another. Ofcom allows for such an approach by defining '*de facto control*' as a scenario where a person who does not have a majority stake in a company can "*in most cases or in significant respects*" ensure that the affairs of the company are conducted in accordance to his wishes.[83] TRAI has taken a similar stance in its report, having stated that:

"*The control rights of ownership could also be defined in terms of an owner's ability to influence the way in which the undertaking is run as against the cash-flow rights of ownership represented by equity holding. In some countries, ownership of / control over a media outlet is measured by the number of directors represented on the board of the undertaking.*"[84]

96. The use of the 'decision making ability' approach does not necessarily exclude the use of the 'equity based' approach, as equity holdings may be one criterion to establish a firm's ability to exercise decisive influence. For example, in the *BskyB/Virgin Media Television (2010)*[85] merger, the OFT followed a combination of the two approaches discussed above and considered the importance of both, equity stakes and representation on the board, to ascertain the influence wielded by Sky. It noted that:

"*Sky has a number of equity stakes in joint venture (JV) basic pay TV channels. Sky has argued that these JV stakes should not be attributed to Sky in the OFT's analysis since each JV has its own management team responsible for day-to-day operation and editorial control. However, the OFT notes that Sky's equity stakes are between 25 to 50 per cent, and that it is also represented by directors on the various boards. Given that this level of shareholding (combined with board representation) would typically be sufficient for the OFT to consider that Sky could have <u>'material influence'</u> on the JVs, the OFT has taken a cautious approach and has also included the JV stakes in its calculations of Sky's market shares.*"[86] (emphasis added)

97. Similarly, keeping in mind the complementarity of equity share and voting power, Ofcom has envisaged a scenario, termed '*control arrangement*', in which a person entitled to 50 per cent equity share in a company has an arrangement with another party in the company regarding

[82] Telecom Regulatory Authority of India. 15 February 2013. *Consultation Paper on Issues relating to Media Ownership*. p. 47.
[83] Office of Communications, 27 April 2006. *Ofcom guidance on the definition of control of media companies*. p. 3.
[84] Telecom Regulatory Authority of India. 15 February 2013. *Consultation Paper on Issues relating to Media Ownership*. p. 47.
[85] *BSkyB/Virgin Media Television,* Case No.: ME/4568/10, OFT, decided on 14 September 2010.
[86] *BSkyB/Virgin Media Television,* Case No.: ME/4568/10, OFT, decided on 14 September 2010. p. 8.

how either of them would exercise their voting power.[87] That person would be said to have control of the radio, television or newspaper company involved.

98. The above approaches are also reflected in the treatment of "control" in the Competition Act. Section 5 of the Competition Act states that:

> "*'control' includes controlling the affairs or management by-*
>
> *- one or more enterprises, either jointly or singly, over another enterprise or group;*
>
> *- one or more groups, either jointly or singly, over another group or enterprise*"

99. While the above definition of control in the Competition Act is somewhat circular in nature, for a full understanding of control, it needs to be read along with the definition of 'group', also found in the Explanation (b) to Section 5 of the Competition Act:

> "*'group' means two or more enterprises which, directly or indirectly, are in a position to-*
>
> *- exercise twenty-six per cent or more of the voting rights in the other enterprise; or*
>
> *- appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or*
>
> *- control the management or affairs of the other enterprise*"

100. Through a notification, the Government has effectively raised the figure of 26% in the first criterion above to 50%[88].

101. The above provisions in the Competition Act, considered together, imply that 'control' can be inferred either on the basis of shareholding of 50% or more, or on the basis of the ability to appoint at least half the directors, or on the basis of other means to exercise control. For example, control could be exercised even without majority shareholding through a shareholders' agreement or other contractual agreement.

102. The CCI has had to resolve the issue of control in a number of cases. In the combination of Independent Media Trust, RB Mediasoft Private Limited and others, the CCI defined control as "*the ability to exercise decisive influence over the management and affairs*"[89] of an enterprise, and has thus implicitly adopted the 'decision making ability' approach. The CCI has also considered other factors while examining the issue of 'control'. Such factors include contractual obligations (in the combination of Century Tokyo Leasing Corporation and Tata

[87] Office of Communications, 27 April 2006. *Ofcom guidance on the definition of control of media companies*. p. 3.
[88] Ministry of Corporate Affairs notification no. 481 (E) dated 4 March 2011
[89] *Independent Media Trust/RB Mediasoft Private Limited and others,* Combination Registration No.: C-2012/03/47, CCI, decided on 28 May 2012. p. 4.

Capital Financial Services Limited[90]), and shareholder rights (in the combination of Multi Screen Holding Limited and SPE Mauritius Investments Limited[91]).

103. Since 'control' has been defined as above in the Competition Act, and on this basis is being analysed by the CCI, which is also in accordance with globally accepted principles, it seems there is no need to have a separate definition of control in the media sector and the definition and principles embodied in the Competition Act should be allowed to prevail in the media sector as well.

Relevant Market

104. Before a market share can be determined or market power analysed, it is necessary to define the relevant market to which the matter relates as a first step. The relevant market can be defined as "*the set of products (and geographical areas) that exercise some competitive constraint on each other.*"[92] Thus while defining the relevant market one should pay due consideration to both, the relevant product market as well as the relevant geographic market, as the purpose of the market definition exercise is to identify the set of actual and potential competitors that impose a competitive constraint on one another. In some circumstances, markets may also be defined in terms of the customer groups that are serviced. This approach is captured in the Competition Act. It states that:

> *"Section 2*
>
> *(r) "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;*
>
> *(s) "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;*
>
> *(t) "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;"*

[90] *Century Tokyo Leasing Corp /Tata Capital Financial Services Ltd.,* Combination Registration No.: C-2012/09/78, CCI, decided on 4 October 2012.
[91] *Multi Screen Media Pvt. Ltd./SPE Mauritius Holdings Ltd.,* Combination Registration No.: C-2012/06/63, CCI, decided on 9 August 2012.
[92] Motta, M. (2004) "*Competition Policy: Theory and Practice*", Cambridge University Press. p. 102.

105. *Relevant product market.* Defining the relevant product market involves identifying products that are ready substitutes. For this purpose, the Competition Act prescribes certain factors that have to be duly considered in Section 19(5) of the Act:

"*(a) physical characteristics or end-use of goods;*

(b) price of goods or service;

(c) consumer preferences;

(d) exclusion of in-house production;

(e) existence of specialised producers;

(f) classification of industrial products."

106. *Relevant geographic market.* Defining the relevant geographic market involves identifying the geographic reach of the set of products identified as ready substitutes while defining the product market, i.e., identifying the geographic area in which these products exercise a competitive constraint on each other. Section 19(5) of the Competition Act lays down the following factors that should be duly considered while determining the relevant geographic market:

"*(a) regulatory trade barriers;*

(b) local specification requirements;

(c) national procurement policies;

(d) adequate distribution facilities;

(e) transport costs;

(f) language;

(g) consumer preferences;

(h) need for secure or regular supplies or rapid after-sales service"

107. Once again it would be seen that the relevant market as well as its components viz the relevant geographic market and the relevant product market are well defined in the Competition Act. Besides reflecting universally applied concepts, these concepts are being actively used by the CCI in its proceedings. Thus there may not be any need to develop separate concepts for the media sector.

108. It is pertinent to note that if different definitions are used by the CCI on the one hand and MIB/TRAI on the other hand within the same country it could generate confusion amongst the enterprises and also lead to different treatment by the two authorities in regard to the same set of facts. In a situation where the same transaction is being considered by both the authorities, viz CCI and TRAI / MIB, this could result in different treatment and lead to different

conclusions. Such lack of clarity or differential treatment could be harmful from the regulatory perspective.

Market Share

109. A number of different variables can be used to measure the level of consumption of a media outlet to determine its market share. These variables include, *inter alia,* viewership and number of subscriptions, which in our opinion are the appropriate measures for determining market shares in the television and newspaper media respectively.

Concentration

110. With regards to the issue of concentration in the media industry, TRAI in its consultation paper has noted that:

> "*Empirical evidence suggests that concentration in media markets – fewer independent owners of media outlets – has a negative effect on diversity. The economic interests of media owners influence their advertising, programming choices, and how they provide access to information*."[93]

111. The consultation paper mentions three measures to determine concentration:

111.1. **C3**: It is the sum of the three largest market shares.

111.2. **Herfindahl-Hirschman Index**: The Herfindahl-Hirschman Index (HHI) is calculated by summing the squares of the market shares of each enterprise in the market. The US Department of Justice and the Federal Trade Commission generally classify a market to be highly concentrated if the HHI is greater than 2500, moderately concentrated when the HHI is between 1500-2500, and not concentrated when the HHI is below 1500.[94] Applying HHI to measure concentration across media platforms would be challenging however, as this measure works best "*in well-defined markets with clear boundaries and a consistent set of products.*"[95] Thus for measuring concentration in a particular segment of the market for news and current affairs viz, TV or radio or newspapers the HHI Index seems to be a good proposition.

111.3. **Diversity Index**: The Diversity Index, a variant of the HHI, was designed by the Federal Communications Commission (FCC) to assess overall concentration in the cross media market and help recommend new cross-media ownership rules in 2003. It is calculated by summing the squares of the '*weighed ownership shares'* (defined

[93] Telecom Regulatory Authority of India. 15 February 2013. *Consultation Paper on Issues relating to Media Ownership*. p. 43.
[94] US Department of Justice, and the Federal Trade Commission. 19 August 2010. *Horizontal Merger Guidelines*. p.19; HHI Below 1500: Less concentrated, Between 1500 to 2500: Moderately concentrated.
[95] Ofcom. 19 June 2012. *Measuring media plurality: Ofcom's advice to the Secretary of State for culture, Olympics, media and sport*. p. 20.

as the sum of the 'weighed market share'[96] of an entity in all media segments) for all entities in the media market. No consensus on using this index to measure concentration has been reached so far.[97] The regulations proposed by the FCC in 2003 were challenged in the court of Appeal, 3rd Circuit. The court questioned, with regard to the calculation of the Diversity Index, (i) the large weight that the FCC had given to the Internet as a media outlet, (ii) the FCC's assumption that all outlets of the same media type had the same market share, and (iii) inconsistency in deriving cross-media limits from the Diversity Index; and as a result asked the FCC to justify or modify its cross-media limits.[98]

It must be noted, however, that the court did not disagree with the Diversity Index in principle. The court stated that it did not object to the Commission's use of the HHI as a starting point for measuring diversity.[99] Additionally, it can also be argued that if the FCC was concerned only with diversity and not influence (where individual market shares matter), then taking all entities of a common media type to have the same market share was not an irrational assumption.[100]

Thus we believe that, if applied correctly, the Diversity Index can be used to measure the overall concentration in the media market for news and current affairs. However, we recommend that the threshold limits outlined for the HHI in the '*Horizontal Merger Guidelines*'[101] should apply to the Diversity Index as well, because the Diversity Index in effect measures the HHI for the entire media market in news and current affairs. Hence the overall media market should be considered as not concentrated for a Diversity Index score of less than 1500, moderately concentrated for scores between 1500 and 2500, and highly concentrated only for a score of over 2500. Use of the Diversity Index for cross media concentration and of the HHI Index for concentration within a segment would be consistent with each other.

Recommendations

112. Keeping in mind the above discussion about the ancillary issues, we recommend as follows:

112.1. For definition of control, the definition and principles embodied in the Competition Act should be allowed to prevail in the media sector as well.

[96] The TRAI consultation paper defines weighted market share of an enterprise in a media segment as the product of the market share of the enterprise in the same media segment, and the share of that particular media segment in the overall media market.
[97] Telecom Regulatory Authority of India. 15 February 2013. *Consultation Paper on Issues relating to Media Ownership*. p. 60.
[98] *Prometheus Radio Project vs. Federal Communications Commission: United States of America,* Order No.: 373 F. 3d 372, Court of Appeals, 3rd Circuit, decision of 2004.. p. 58.
[99] *Prometheus Radio Project vs. Federal Communications Commission: United States of America,* Order No.: 373 F. 3d 372, Court of Appeals, 3rd Circuit, decision of 2004.. p. 58.
[100] Rachael Craufurd Smith and Damian Tambini. 2012. *Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenges*. Journal of Media Law. p. 61.
[101] US Department of Justice, and the Federal Trade Commission. 19 August 2010. *Horizontal Merger Guidelines*. p.19.

112.2. For definition of the relevant market, that comprises of the relevant product market and the relevant geographic market, the definitions embodied in the Competition Act should be allowed to prevail in the media sector as well.

112.3. For determining the market share, viewership and number of subscriptions, in our opinion, would be the most appropriate measures for determining market shares in the television and newspaper media respectively.

112.4. As measures of concentration, the HHI would be the most appropriate measure for measuring concentration within the same platform, and the Diversity Index would be appropriate for measuring concentration across media platforms.