



**Response to the Telecom Regulatory Authority of India Consultation Paper on  
“Issues relating to Media Ownership”**

April 8, 2013

CASBAA (the Cable and Satellite Broadcasting Association of Asia) thanks the TRAI for the opportunity to address the issues in its Consultation Paper dated February 15, 2013 on the above topic. These are fundamentally important issues and decisions on them will affect the ability of the Indian media industries to grow and prosper, and of Indian consumers to reap maximum benefits in terms of choice and cost of services, for decades to come.

As the TRAI is aware, CASBAA is an international, non-profit, industry-based trade association dedicated to the promotion of multi-channel television via cable, satellite, broadband and wireless video networks across the Asia-Pacific region. Member organizations include some 130 Asia-focused companies building, operating, and providing content for pay-TV systems, and include operators of cable, satellite, mobile and IPTV systems, as well as content providers to India, the Asian region and the world. Members are present in 17 jurisdictions in the Asia-Pacific region, and have broad experience in building a dynamic industry to meet the rapidly-growing demands of the region's over 400 million pay-TV households.

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

Believing that proposals of such a technical nature and examples from international practice beyond Asia had best be addressed by experts with broad and deep knowledge and experience of

the practical application of the international handling of competition policy issues, we have engaged a specialist international consulting firm – FTI Consulting<sup>1</sup> – to contribute to the consultation by assessing the TRAI’s proposals and offering analysis and assessments based on current global thinking. We therefore quote liberally from FTI’s assessments and rely heavily on their acknowledged expertise; the complete FTI paper is attached as an integral part of this submission. Its data and assessment inform our own views, which can be found below. We note that the FTI report draws on the experience of multi-disciplinary experts covering areas such as economics, regulatory policy and law as well as industry-specific expertise in the media and telecommunications sector.

We note the constantly evolving nature of regulation internationally and in India in particular. Against this developing landscape, FTI and we urge caution to seek to ensure that any measures adopted by TRAI take account of and are coordinated with the activities of India’s competition authority, the CCI. As testimony to this proposition, we note that only days after FTI finalised its own paper, in a ‘stop press’ development on 4 April 2013, the CCI made amendments to its merger control procedures under the *Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011*. These amendments represent a clarification of areas of ambiguity and, in certain respects, a liberalisation of the Indian merger control regime by updating the categories of transaction that do not require notification and prior approval by the CCI. While the specific detail is beyond the scope of this submission, this development emphasises the need for TRAI to avoid any further or inconsistent regulation without proper consideration of the combined impact and interaction of India’s various competition rules.

The first part of this submission addresses the broad issues posed by the TRAI consultation paper concerning competition policy and media ownership, in light of trends in thinking among overseas experts. The second part provides answers to a number of the specific questions posed in the TRAI consultation paper. The first part is significantly more important than the second – unfortunately the TRAI paper does not set out a suitable conceptual framework for addressing competition and ownership issues, as rather than focusing on the key question of whether changes in Indian policy are warranted or desirable, and which changes might be in the country’s best interest, it jumps immediately to the mechanisms by which a change might be installed.

As will be seen from our comments below, we strongly believe that an unbiased selection of proper policy responses requires Indian policymakers to proceed from an objective assessment of the real problems they are confronting, in light of the experience and understanding gleaned from approaches (failures and successes) overseas as well as the real nature of media markets as they are evolving today (and not years or decades ago). Dialogue on ownership of media (and particularly news media) is frequently tinged with strong emotions. For our part, our desire is to

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<sup>1</sup> FTI consulting is a global business advisory firm that provides multidisciplinary solutions to complex challenges and opportunities. Through its Compass Lexecon subsidiary, FTI has provided expert advice and testimony in hundreds of complex antitrust matters, assisting with many of the highest-profile antitrust and M&A actions and transactions of the last 30 years. They apply cutting-edge industrial organization theory and use sophisticated economic and econometric analyses to analyze and explain the complex issues that define these engagements. Specifically, in the entertainment and media area, FTI and Compass Lexecon have extensive experience in analyzing for market players, regulators and courts actual and potential mergers and acquisitions, coordinated conduct, monopolization, exclusionary conduct, and rate determinations.

offer useful data and insights in a non-polemical manner, and thereby engage in a constructive dialogue. As will be seen, we do have major problems with the content of some of the proposals and the manner of their floating; but this does not detract in the least from our goal of objectively offering assistance to TRAI and Indian policymakers, to help achieve a positive outcome.

## **I. General Observations**

### **A. Convergence and the Media Industry**

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

FTI Consulting documents<sup>2</sup> a shift in cross-media news consumption patterns towards online, which is a highly plural environment. The internet has already “fundamentally changed the landscape” for news provision. With regard to the entire media services industry, FTI categorizes a number of other key effects<sup>3</sup>:

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

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

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<sup>2</sup> FTI Report (attached) at Section 5

<sup>3</sup> FTI Report at p. 76

Indeed, analysis of the consultation paper convinced the international experts at FTI that TRAI “does not appear to have considered the importance of developing a regulatory regime that is sufficiently flexible and forward looking to harness future convergence developments.”<sup>4</sup>

The implications of rapid change are that traditional plurality assessments are vastly more complicated, market definition is challenged and that business models are developing and changing, with new players entering various segments of the industry and existing players changing their fields of activity – increasing the risk that blunt regulatory interventions may chill investment and innovation.

FTI’s experts recommend a cautious approach, based on broad international experience: Policy makers and regulators should be cautious in applying old-style, static regulations to today’s markets absent empirical evidence that real problems exist today. “This is not to say that media plurality is not important–” wrote FTI, “it is. Rather, regulatory interventions should be made to address identified problems based on up-to-date empirical evidence.”<sup>5</sup>

#### B. The Issues At Hand and the Role of Regulation

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

This is important because “Regulation is...an imperfect tool to mimic competitive forces or to achieve market outcomes that policy makers believe would not occur absent intervention. But regulation has its costs as well as benefits. There can be a danger that high costs are incurred if there is the application of inappropriate tools to solve specific problems and/or if ‘old style’ regulation is applied to markets subject to dynamic change owing to, for example, technology. Companies may relocate or suffer unsustainable business models. Investment may be chilled. Consumers may be adversely affected: prices/ quality/ service range/ service availability may be negatively shaped by the regulations, thereby reducing consumer benefits.”<sup>6</sup>

FTI Consulting went on to note that the Consultation Paper also does not consider the potential costs and benefits of the various possible approaches, including a “no change” scenario. FTI believed this to be a “serious omission in TRAI’s approach.”<sup>7</sup>

We share those concerns, and we do not find the approach in this paper to represent an acceptable base for proceeding with a major regulatory intervention. TRAI has leapt with both feet into

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<sup>4</sup> FTI Report at page 18

<sup>5</sup> FTI Report at page 77

<sup>6</sup> FTI Report at page 15

<sup>7</sup> FTI Report at page 14

discussions of the details of proposed “solutions” – ones which would have profound effects for the entire media industry – without stating the problem or assessing the likely impact of any of the solutions.

The FTI Report at Section 2 includes more detailed discussion of general principles of competition regulation, as well as description of international experiences in the media industry.

### C. Media Ownership and Control

Among the most glaring problems with TRAI’s overall approach to these competition policy problems is the duplication of regulation or lack of coordination with the economic regulation that is currently conducted by the Competition Commission of India (CCI). FTI’s experts could not determine whether TRAI is proposing the concurrent application of competition law by itself and the CCI. “However, the proposals come very close to supplanting the role of CCI or at least confusing the roles of the two bodies.”<sup>8</sup>

The FTI report<sup>9</sup> describes the Indian model of competition regulation, and the changes being introduced to it. It notes that the Competition Act contemplates a synergistic relationship between the CCI and sector regulators, but that the lack of specific guidance concerning the relationship raises the question of potentially overlapping or duplicative regulation.

For international comparison, FTI surveys regulatory models used in major markets, with particular focus on the allocation of functions between competition and sector regulators. They conclude that there is no consensus about how to proceed in this area. That said, “concurrent application of competition law by competition and sector regulators is rare internationally. Overall, there is evidence of a move away from concurrent application of competition law and a consolidation of competition functions in the relevant competition authority.”<sup>10</sup>

TRAI offered comments on other-country policies, but FTI warns that “the (international) media regulatory landscape as it affects ownership and plurality is far more diverse and complex than the selected examples presented by TRAI.”<sup>11</sup> In each country, the regimes are born of a specific market, political and cultural context and “they should not be taken as a blueprint for export into a wholly different market environment where the local context is very different.”<sup>12</sup> Where regimes exist they have developed over a number of years, and have been implemented by regulators having specialized expertise including in competition laws, and a track record of dealing with similar issues.

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<sup>8</sup> FTI Report at page 29

<sup>9</sup> Page 25 et seq.

<sup>10</sup> FTI Report at page 29, with examples provided throughout Section 3 and case studies in Appendix 2

<sup>11</sup> FTI Report at page 38

<sup>12</sup> Ibid.

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

Protection of pluralism is a separate, but related issue. Pluralism is a special issue with respect to the news media, and measures to promote pluralism in news media have been undertaken by many (democratic) governments. FTI's assessment notes that competition tests and plurality tests seek to capture very similar and frequently overlapping issues. (This is not surprising since both place an importance on ensuring that markets are not controlled by a limited number of controllers.) For that reason, "the vast majority of (plurality) cases can be dealt with by robust application of competition law by a specialist (competition) regulator.....There may be cases where a pure competition test does not address the more complex – and inherently more difficult to define – concept of plurality. Such cases tend to be easily identifiable, such as cases where a controversial media owner seeks control of the press for political purposes or where religious viewpoints are marginalised."<sup>13</sup>

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

FTI, surveying experience around the world, warns that in the absence of adequate analysis of potential impacts of various policy choices, "there is a significant risk that India could embark on regulation that is not fit for purpose and based on outdated market research. Far from correcting a market failure that has not been demonstrated, the result could be significant damage to markets."

The inherent challenges of measuring plurality are huge, complicating the task of achieving a balance that fulfils policy objectives while not restricting markets. FTI observed that "where they exist, ownership restrictions tend to be simple and crude (albeit arbitrary)...complex measurement systems are not an observed trend.<sup>14</sup>" On balance, however, the experts conclude "there is much to be said for allowing CCI to get a track record of cases under its belt – and cases that have withstood judicial scrutiny where appropriate – before embarking on a more elaborate regime.<sup>15</sup>"

Finally, FTI warns of political ramifications of failure to give enough consideration to regulatory impacts; that in addition to the economic and administrative costs of such regulation, there are also potential political costs. Citing the UK's lengthy experience in developing and implementing regulatory structures to address plurality and a recent review of this area, as well as the political

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<sup>13</sup> FTI report at page 35

<sup>14</sup> FTI report at page 48

<sup>15</sup> Ibid.

disaster involving plurality (and other) issues only last month in Australia<sup>16</sup>, FTI warns that “recent attempts to incorporate plurality tests without a regulatory impact assessment and proper consultation with the industry have floundered.” Misguided and ill-prepared attempts at ownership regulation can be bad for governments as well as for industry.

#### D. Vertical Integration

FTI presents an analysis of the historical trend in development of academic assessments of the impact of vertical integration. They note that extension of the presence of a company across the value chain brings economic efficiencies (benefitting consumers), which have been increasingly recognized by international analysts<sup>17</sup>. However, such an extension can also present competition issues where the company possesses market power at one or more levels in the supply chain. International competition authorities have sought to balance the goals of economic efficiency and competition, using conditions where necessary to permit consolidation in the sector<sup>18</sup>.

FTI observes that rather than promoting a wise balance, TRAI’s view seems anchored in the period prior to 1970, when vertical integration and vertical mergers were seen very critically. Citing more recent research and opinion emphasizing gains in efficiency from vertical mergers, FTI concludes “From the point of view of economic theory, there is little support for TRAI’s view of vertical integration<sup>19</sup> ...We believe that the (TRAI) approach would benefit from the advances in economic thinking that have led to a more positive but still nuanced view of vertical integration.<sup>20</sup>”

FTI notes that current economic theory regards vertical integration as only one type of vertical restraint that can affect competition. Upstream firms can restrain competition through contractual commitments (e.g. to maintain prices downstream or to maintain exclusive distributorships) as well as by vertical investment. These various types of potential restraints should be considered together.

Indeed, India’s competition law and its sectoral regulation already embody effective constraints against vertical restraints that have an appreciable adverse effect on competition. The Competition Act provides that vertical agreements (including resale price agreements, exclusive distribution agreements, refusal to deal, etc.) are subjected to a rule-of-reason-type analysis, with potential action by the CCI. Competition authorities have access to a broad range of remedies which can be applied when mergers in the media and communications sector are judged to pose vertical concerns. (See list on FTI Report, page 60.)

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<sup>16</sup> The Australian government’s proposed media reforms comprised four bills affecting media ownership and regulation of media professions, incorporating a controversial plurality test. They were vociferously criticized as having not been properly prepared, nor subjected to proper consultation with industry and the Opposition. They had to be withdrawn at the last minute, with political repercussions for the government.

<sup>17</sup> See, for example, the EU “Guidelines on the assessment of non-horizontal mergers”, cited in FTI Report, Page 51.

<sup>18</sup> FTI Report, page 49

<sup>19</sup> FTI Report, page 56

<sup>20</sup> FTI Report, page 51

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

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

India has effective policies in place against vertical restraints that affect competition; India has much stronger-than-usual constraints on distribution of television programming. With cable digitisation and opening the sector to increased foreign investment, India is setting the stage for a technological and commercial leap forward of the television distribution industry. India needs the efficiencies and economic benefits to consumers that can flow from vertical investments. We do not believe TRAI has presented a case for additional general restraints against vertical integration in the media industry and we urge that these proposals be withdrawn.

## II. Specific Answers to TRAI Consultation Questions

### General Disqualifications

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

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

**Q2: Should the licensor, either *suo motu* or based on the recommendations of the regulator, be empowered to disqualify any entity from entering the media sector in public interest? For instance, should the licensor or the regulator be empowered to disqualify (or**



**recommend for disqualification) a person who is subject to undue influence by a disqualified person.**

See Question 1 above.

Media Ownership/Control

**Q3: Should ownership/ control of an entity over a media outlet be measured in terms of equity holding? If so, would a restriction on equity holding of 20% (as recommended by TRAI in its recommendations on Media Ownership dated 25th Feb 2009) be an appropriate threshold? Else, please suggest any other threshold value, with justification?**

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

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

Thus, in seeking to control ownership TRAI is using it as a proxy for viewpoints because owners of media outlets are assumed to be in a position to influence what is said and how it is said. FTI Consulting cautions that this is an imperfect proxy and suggests that construction of rigid media control rules based on that proxy should be avoided<sup>21</sup>. Ofcom, in its consultation on measuring plurality was warned that "public policy should proceed with great caution in this area."

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

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

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<sup>21</sup> FTI Report, pages 2-3

To introduce a further and different concept of ownership and to trigger review by an authority other than the CCI on that basis would be a retrograde step at a time when India is seeking to streamline its regulatory rules. (FTI observes that allowing exemptions from merger review only where the acquisition is less than a 25 per cent interest is still a very strict standard by most international benchmarks<sup>22</sup>.)

Media Ownership Rules

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

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

We do not take a position on whether constraints on control of news and current affairs media outlets are necessary to ensure plurality, noting that Indian law already enshrines a number of specific provisions affecting news and current affairs outlets in contra-distinction from other types of media.

However, we do wish to observe that no cogent argument has been made as to why other, “entertainment” genres should be subjected to such constraints. Sports channels, or cooking channels, or kids’ channels, or fashion channels, or general entertainment channels are simply not key to “the media’s place in a healthy democracy” which TRAI has said it wishes to support.<sup>23</sup>

Internationally, there are examples of regulatory controls focused on news and current affairs; these are the genres most closely connected with the formation of public opinion about issues of national significance through the communication of a range of information and views. FTI International’s report to us observes that after 7 months of public consultation and study, the UK Ofcom concluded in 2012 that news and current affairs are the only genres relevant in assessments of media plurality.<sup>24</sup>

FTI also notes that there is no international consensus on how to incorporate other ways of influencing viewpoints beyond news and current affairs, and that even with respect to those genres, before regulatory action is taken media plurality concerns should be supported by robust empirical evidence.

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

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<sup>22</sup> FTI Report at p. 2

<sup>23</sup> Consultation Paper at p. 43

<sup>24</sup> FTI Report at p 7

provision. As the FTI report makes very clear, use of the internet in India is now growing more rapidly than in other major global markets and this trend is expected to continue.

FTI also notes that the effect that the internet has had on both provision and consumption of news challenges the traditional approach of assessing media plurality, and they go on to question whether such an approach remains valid.<sup>25</sup> They recommend that policy makers should regulate for the dynamic future, and not for a static past:

“Policy makers need to be mindful of interventions that may possibly chill investment and innovation. This is not to say that media plurality is not important – it is – rather, that regulatory interventions should be made to address identified problems based on up-to-date empirical evidence....Markets are dynamic and subject to much uncertainty in respect of future technological developments. Policy makers and regulators should be cautious in applying old-style, static regulations to today’s markets absent empirical evidence that real problems exist today.”<sup>26</sup>

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

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

CASBAA has no comment to make on language issues.

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

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

As discussed extensively in the FTI report, there are very large inherent difficulties in defining, measuring and assessing media plurality.<sup>27</sup> We share FTI’s belief that Ofcom’s experience and conclusion (after 7 months of extensive research) that there is no easy answer and that things need to be considered in the round are strong pointers to regulators everywhere<sup>28</sup>.

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<sup>25</sup> FTI Report at p. 77

<sup>26</sup> FTI Report at p. 77

<sup>27</sup> FTI Report at page 31 et seq, and appendix 2

<sup>28</sup> FTI Report at p. 4

All of the metrics may be relevant to measuring media consumption in a relevant market. FTI points out (and we agree) that the most appropriate metrics depend on the specific purpose of measuring consumption<sup>29</sup>. If the purpose is to assess plurality then revenue is unlikely to be an appropriate measure as the relationship between revenue and the ability to exert influence is less direct than the relationship between revenue and economic power.

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

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

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

The concentration measures proposed by TRAI<sup>30</sup> impart a significant bias to the assessment in that when someone is deemed to control an entity, then the whole market share of that entity would be attributed to the firm “controlling” it. In an industry with significant minority shareholdings, this is likely to lead to an exaggeration of the market shares of those companies that have many minority shareholdings and therefore is likely to exaggerate concentration.<sup>31</sup>

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

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

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

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<sup>29</sup> FTI report at p. 4

<sup>30</sup> Consultation Paper at p. 58

<sup>31</sup> See FTI Report at p. 3

A diversity index is a flawed measure that is not recommended internationally. Even proponents of such an index have moved away from them as additional news media options become available, because the challenge of adding up consumption of TV radio, newspaper and online news is fraught with huge difficulties. FTI's report analyses the development of these ideas; the consultants note that the US FCC, which attempted to use such a measure in the past, moved away from it five years ago, stating for example in 2008 that the index "is an inaccurate tool for measuring diversity."<sup>32</sup> The FCC paper wrote "...there are too many qualitative and quantitative variables in evaluating different markets and combinations to reduce the task at hand to a precise mathematical formula."

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

This is an area where it is important to proceed carefully, and in full knowledge of the likely costs and benefits of intervention. Our views parallel the submission of the UK Secretary of State for Culture, Media and Sport, who submitted to Ofcom that "...it is essential that (plurality rules) be proportionate and do not unnecessarily restrict growth and innovation... The maintenance of plurality is still vital but, as more and more services become available on different platforms, concerns over ownership have diminished to some extent and greater liberalisation has been permitted."<sup>33</sup>

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

**Q15: Would it be appropriate to have a "1 out of 3 rule" i.e. to restrict any entity having ownership/control in an outlet of a media segment of a relevant market from acquiring or retaining ownership/control over outlets belonging to any other media segment? Please elaborate your response with justifications.**

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

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

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

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<sup>32</sup> See FCC 2008, quoted in FTI Report at p. 5

<sup>33</sup> FTI Report at p. 5

We do not believe that ownership in any media segment should result in a mechanical bar to ownership in other segments. The expert consultants, and we, believe it is important, as Ofcom stated, that media plurality measures be based on a full market assessment “in the round” and not applied on a mechanistic basis. Such restrictions would risk stifling investment and diversity (see below) at a time when the media sector is vibrant and changing, particularly as a result of the internet.

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

With respect to international examples: the consultation paper attempts to draw on international examples to buttress support for selection of simplistic ownership control measures. We asked FTI, which has acknowledged expertise in international media regimes, to comment upon the international examples. Those experts observed that “while it might be tempting to adopt certain tenets of international regulation, there is a real imperative to avoid “copy-cat” regulation which has been shown to be sub-optimal elsewhere and where viable and less costly alternatives exist.”

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

- There is broad international support for pluralism in the media but no consensus or even omnipresent mechanism by which this is to be achieved.
- Some countries, particularly in Europe, opt for sector neutral application of competition law and merger control (e.g. Finland, Sweden) – i.e. the media sector is subject to competition law like any other sector and there are no sector-specific ownership controls.
- There are trends towards relaxation of ownership controls (e.g. UK, Netherlands).
- Countries that have a long history of media ownership controls continue to skirmish over the appropriate means of control. The UK public interest test has been criticised as

unworkable and overly subjective. In the US, courts, regulators, politicians and business continue to disagree on the right form of media ownership rules.

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

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

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

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

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

- (i) No restriction on cross media ownership is applied on any entity having ownership/ control in the media segments of such a relevant market in case its contribution to the HHI of not more than one concentrated media segment is above 1000. (For methodology of calculation please refer para 5.42)**
- (ii) In case an entity having ownership/ control in the media segments of such a relevant market contributes 1000 or more in the HHI of two or more concentrated media segments separately, the entity shall have to dilute its equity in its media outlet(s) in such a manner that its contribution in the HHI of not more than one concentrated media segment of that relevant market remains above 1000 within three years**

Please see response to question 13 above. Diversity indexes are falling out of favour internationally, and respected regulators which once used them (e.g. the FCC) are moving away from them. TRAI should not attempt to rely on tools which are known to be inaccurate and whose

use carries high risks of distorting markets. Use of the HHI or other diversity indexes are a highly risky, and therefore a bad, idea.

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

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

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

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

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

Where cross-media regulation has been imposed internationally, it has tended to be limited to the terrestrial broadcasting sector where the state has decided the number of operators based on analogue spectrum constraints. The position in India is fundamentally different, where there is no licensing of private terrestrial broadcasters. Any risk of a private company using or leveraging its privileged status as a licensed terrestrial broadcaster into other segments of the media is not present.

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

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

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

Applying any new ownership ban to existing entities is tantamount to the 'break up' of companies and groups that exist today. This is by definition a grave policy choice that governments undertake only in exceptional circumstances. Such a move would violate the principle that rules and



regulations that have retrospective effect should be introduced in exceptional circumstances only and on the basis of identified policy. TRAI has not yet advanced a case that the exceptional circumstances exist, nor justified serious departures from good administrative practice in terms of any violation of established Indian policy goals.

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

Similarly, there is no robust and objective analysis of the likely impact of various regulatory approaches; this lack was a particular concern to FTI<sup>34</sup>.

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

### Mergers and Acquisitions

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

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

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

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

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<sup>34</sup> FTI Report at p. 1

Vertical Integration

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

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

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

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

We strongly agree with FTI that “any outright restriction on an entity having ownership or control in a media segment from retaining or acquiring ownership or control over an entity in another media segment would be a highly unusual, disproportionate and dangerous regulatory intervention. Whether such a situation is automatically anticompetitive or poses threats to plurality or other public interests has not been developed by TRAI itself, by economic theory nor by international regulatory best practices.”<sup>35</sup>

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

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

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<sup>35</sup> FTI Report at p. 10

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

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

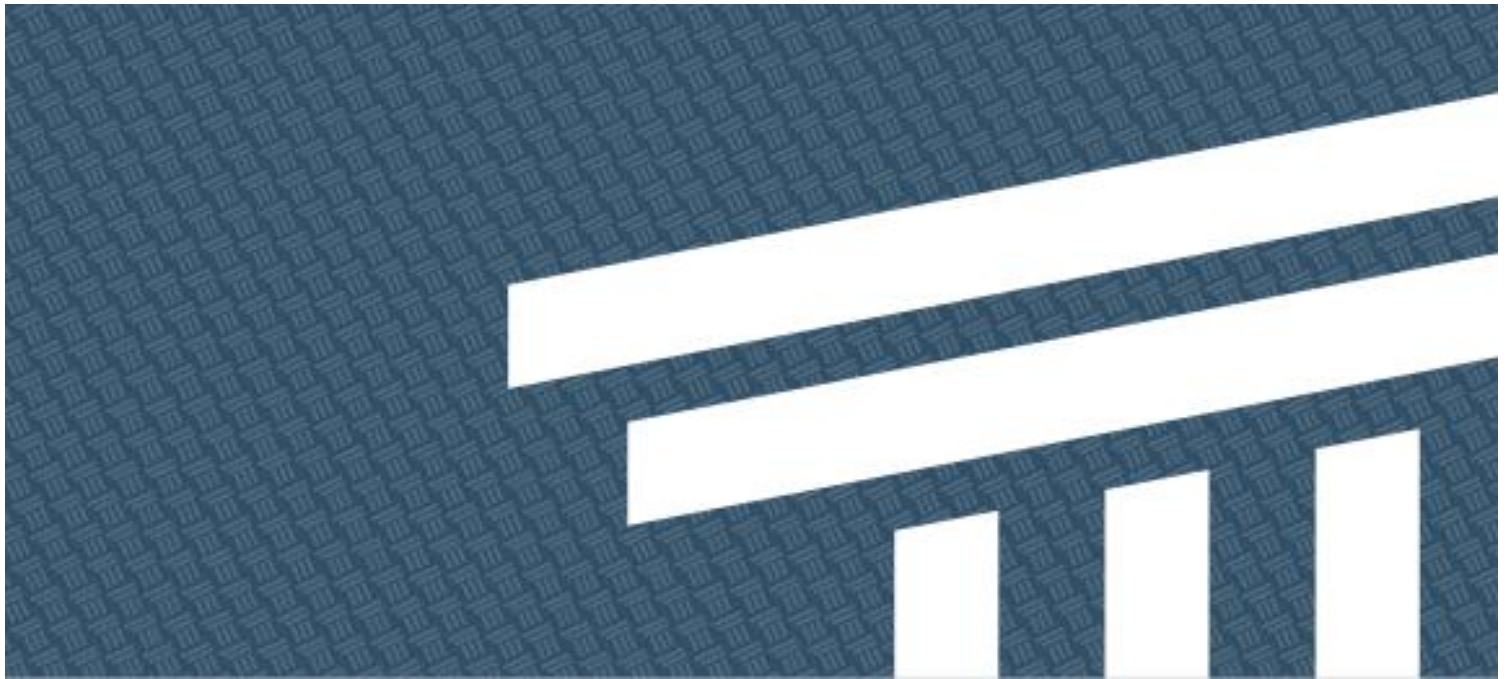
#### Mandatory Disclosures

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

**Q30: What should be the periodicity of such disclosures?**

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

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



# Issues relating to media ownership: TRAI's consultation paper

A report for CASBAA

26 March 2013



**F T I**<sup>TM</sup>  
CONSULTING

CRITICAL THINKING  
AT THE CRITICAL TIME<sup>TM</sup>

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Alison also assessed the sufficiency of media plurality pre- and post-transaction in support of a major proposed media transaction. The report was provided to Ofcom and the Secretary of State for Culture, Media and Sport in response to the Business Secretary's request for a Public Interest Test. Additionally Alison compiled a number of specific media metrics as input to a submission to DG Competition during its assessment of the same transaction.

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## Roadmap

### Context

This report has been prepared for CASBAA in support of its response to the TRAI consultation paper on media ownership. Based on the research and assessment we conducted, below we provide a summary of our responses to a number of questions asked by TRAI in its consultation paper. We provide cross-references to supporting material in the main body of the report.

### Preamble

TRAI poses a number of detailed questions largely covering possible methods to regulate media ownership. TRAI has not, however, set out a discussion of identified problems in media markets in India today and/or made sufficiently explicit the policy objectives that need to be fulfilled: there is an absence of a problem statement. It thus follows that robust and objective evidence in support of the problem statement is also absent. Moreover, TRAI does not appear to have considered the costs and benefits of the various interventions it is considering. These are serious omissions of TRAI's paper, as is the fact that while TRAI acknowledges convergence, it does not discuss its implications for technology, networks, services and, fundamentally, regulation.

Further, we observe that TRAI has not conducted a Regulatory Impact Assessment for its proposed regulation. Recent attempts to incorporate plurality tests without a Regulatory Impact Assessment and proper consultation with industry have floundered. The month of March 2013 saw the release – and 11th hour withdrawal – of hotly contested reforms to Australian media regulation. Serious reservations were expressed about the content of the bills, and that they were presented without proper consultation with industry and the Opposition. The political repercussions of the aborted proposals are only just being felt. This recent experience, at the very least, should urge caution to newer regulators such as TRAI in implementing radical reforms without an assessment of underlying regulatory failure and the appropriateness of the proposed regime for the specific market.

In what follows, we are not advocating a perfect regime. Rather, we are steering a path towards a realistic and efficient approach at this delicate time of regulation and markets in transition. At this stage prudence would suggest the adoption of a cautious approach towards intervention to allow media markets to continue the transformation to digital and for competition law to bed down, noting that the latter goes a long way to promoting plurality.

### Response to specific TRAI questions

In what follows we provide direct answers to selected specific questions posed by TRAI, those most pertinent to the areas covered in our report. In so doing, however, we do not depart from our overall premise that: intervention should be based on an identified set of problems; selected regulatory options and a Regulatory Impact Assessment that demonstrates that the outcome of the intervention is superior to the status quo. As we continue to state throughout this report, TRAI does not appear to have adopted such an approach and instead has leapt straight to possible 'solutions'.

**Q3: Should ownership/ control of an entity over a media outlet be measured in terms of equity holding? If so, would a restriction on equity holding of 20% (as recommended by TRAI in its recommendations on Media Ownership dated 25th Feb 2009) be an appropriate threshold? Else, please suggest any other threshold value, with justification?**

As with many international merger control regimes, Indian merger control already captures, as of 1 June 2011, mergers, amalgamations and acquisitions of (joint or sole) control, which are referred to collectively as 'combinations' and which meet the specified turnover or asset-based thresholds. The regime also extends to the acquisition of a material but minority interest.

Certain categories of transactions which do not tend to raise competition problems do not need to be notified. These include wholly internal corporate reorganisations and the acquisition of an interest of less than 25 per cent, solely for investment purposes.

The 25 per cent interest is determined in terms of shares or voting rights. In other words, Indian merger control already has a 'bright line' easy to measure threshold for determining those transactions which should not be subject to regulatory review by using the proxy of equity/ voting rights.

It should be noted that this 25 per cent threshold was itself increased from 15 per cent following the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations 2012 of 23 February 2012. The overall aim was to bring greater clarity and generally reduce the burdens of regulatory compliance.

Furthermore, under Indian competition law the concept of a "group" embodies elements of voting rights, board representation and control over management. Specifically, "group" means two or more enterprises which, directly or indirectly, are in a position to: (i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or (ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise. The concept of a group permeates the question of which entities in a corporate structure are relevant when determining antitrust liability and calculating turnover / assets for merger control purposes. Underlying this concept is the principle of control or influence over the strategic affairs of a company. However, in this area there are also further reforms proposed under the Competition Amendment Bill of 7 December 2012 which will increase the equity/ voting rights criterion to 50 per cent. See further Q26 below.

In these circumstances, there is no reason to depart from the approach adopted under Indian competition law and merger control for determining when the acquisition of less than a 100 per cent interest in a company should be subject to regulatory review; in this case by the appropriate body – the competition authority (CCI). To introduce a further and different concept of ownership and to trigger review by an authority other than the CCI on that basis would be a retrograde step at a time when India is seeking to streamline its regulatory rules. It should be noted that allowing exemptions from merger review where the acquisition is less than a 25 per cent interest is still a strict standard by most international benchmarks. Therefore, following the approach of the CCI should not be equated with making regulation lighter.

We note additionally an important conceptual issue: ownership is used as a proxy for viewpoints because owners of media outlets are assumed to be in a position to influence what is said and how it is said. However, one Canadian commentator, Kenneth Goldstein points out that the proxy is just that and therefore imperfect:

*“Given the imperfect nature of the proxy, we conclude that public policy should proceed with great caution in this area. As a corollary, we suggest that we should avoid the construction of rigid rules or strict guidelines in this area, because those rules or guidelines would be, by definition, based on that imperfect proxy.”*

(See: <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/responses/kenneth-goldstein.pdf>)

*See Section 3 for supporting material*

**Q11: Which of the following methods should be used for measuring concentration in any media segment of a relevant market?**

**(i)C3**

**(ii)HHI**

**(iii)Any other**

In our view there is a bias in the concentration measures in that when someone is deemed to control an entity, then the whole market share of that entity would be attributed to the firm “controlling” it. (5.41 TRAI consultation paper) In an industry with significant minority shareholdings, this is likely to lead to an exaggeration of the market shares of those companies that have many minority shareholdings and therefore is likely to exaggerate concentration. Rather than the simple method outlined in 5.41, there are other methods available to take into account minority shareholdings. A standard article on this is S. Salop and D. O’Brien, “Competitive Effects of Partial Ownership: Financial Interest and Corporate Control”, 67 Antitrust Law Journal, pp. 559-614 (2000).

The basic idea of the article is to consider the dispersion of owners within each firm and the dispersion of ownership by an owner across different firms. For example, if firm A has concentrated ownership and firm B acquires a minority ownership share in firm A which does not allow to control it, then there is little influence of firm B on firm A’s strategic decisions. The Salop / Brian concentration index would not increase much. On the other hand, if firm A had dispersed ownership and firm B acquired the same stake, the influence of firm B on firm A’s actions would be stronger and therefore the Salop / Brian index would increase more. Such an idea and refinement of concentration indices appears reasonable and less distortive than what is suggested by TRAI.

We observe that India’s CCI has expertise in concentration measures. Consultation with CCI in respect of concentration metrics is therefore advisable. We are not aware of any arguments that suggest a departure from standard competition tools in media markets is warranted

*See Section 3 for supporting material*

**Q9: Which of the following metrics should be used to measure the level of consumption of media outlets in a relevant market?**

**(i) Volume of consumption**

**(ii) Reach**

**(iii) Revenue**

**(iv) Any other**

**Please elaborate your response with justifications.**

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

Relevant consumption metrics include reach, share (of viewing/listening etc.) and multi-sourcing. Relevant consumption metrics should be considered across media i.e. television, radio, the press and online.

Such metrics should not be considered in isolation. Rather, they should be considered within a broader framework that includes an assessment of availability, the supply-side (or provision), and impact (which tends to be very difficult to measure).

Other factors should also be taken into account. These include external factors such as rules on impartiality and internal factors such as governance.

Following an extensive programme of research (see our response to Q 13), the communications regulator in the UK concluded that:

*the features of a plural news market would include many or all of the following: a diverse range of independent news voices; high overall reach and consumption with consumers actively multi-sourcing; sufficiently low barriers to entry and competition to spur innovation; economic sustainability and no single organisation accounting for too large a share of the market.*

*It may also be possible to develop a view as to what levels of the key consumption metrics provide an indication of a potential plurality concern, so that these levels are taken into consideration within a plurality review, without being regarded as absolute limits.*

Ofcom also stated:

*Given the dynamic nature of the news market, the metrics framework itself should be assessed during each review to ensure its continuing efficacy and relevance.*

(See: <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf>)

Moreover, we emphasise, as discussed in this report, the inherent difficulties in defining, measuring and assessing media plurality. That Ofcom concluded after 7 months of extensive research that there is no easy answer and that things need to be considered in the round is a strong pointer to regulators everywhere. (See also our response to Q13.)

We also note that online, which provides access to a wide range, variety and multitude of voices, adds a new dimension to both competition and plurality assessments by blurring market boundaries and increasing media plurality/access to all genres and formats of content.

See Section 3 and Appendix 2 for supporting material

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

A diversity index is not recommended. In particular, identifying a definitive way to measure cross-media plurality remains tricky; there is no acceptable cross-media 'exchange rate'. This boils down to the fact that 'impact' or 'influence' is almost impossible to assess. Thus trying to add up the consumption of TV, radio, newspaper and online news is fraught with difficulties. Thus a diversity index is a flawed measure because it is not possible to identify appropriate weights for each medium.

Moreover, notwithstanding the inherent flaws of a diversity index, an index per se rapidly becomes a threshold for intervention. This may quickly become outdated and/or does not take into account other relevant factors such as regulation, broadcasting codes and internal plurality measures.

A review of media plurality overseas case studies concluded that:

*"Measuring media concentration has always been a difficult task and results were never satisfactory. The convergence of media, telecommunications and information technologies adds a new dimension to this problem as it results in changing market structures, exacerbating among other things the handling of cross-ownership and market definitions, and in claims for a greater emphasis on empirical evidence."*

The study is highly critical, stating that none of the approaches reviewed are reliable or objective, and, importantly that there is a:

*"lack of sound empirical proof of whether they achieve what they are supposed to."*

Moreover, the author relays how in the US the FCC moved away from its diversity index following a review in 2006:

*[it] "is an inaccurate tool for measuring diversity" (FCC, 2008: 12). [In the future it will] "not employ any single metric, such as the Diversity Index, because ... there are too many qualitative and quantitative variables in evaluating different markets and combinations to reduce the task at hand to a precise mathematical formula." (FCC, 2008: 43).*

*(See: Natasha Just (2009) "Measuring media concentration and diversity instruments in Europe and the US", DOI: 10.1177/0163443708098248, Media Culture Society 2009; 31; 97)*

The UK plurality regime has been subject to much criticism and the UK government instructed the UK communications regulator, Ofcom, to assess the regime. Ofcom spent some 7 months on a public consultation on how to measure plurality. The consultation involved stakeholder engagement (including written submissions), academic seminars, international benchmarking, extensive consumer research, an in-depth study of the provision of news and a review of the

academic literature.

(See: <http://stakeholders.ofcom.org.uk/consultations/measuring-plurality/?a=0>)

The extensive research programme provides a number of important observations for TRAI:

- measurement – inherent measurement challenges are noted and Ofcom puts forward a range of measures to consider ‘in the round’, agreeing that ‘impact’ is difficult to measure. *i.e. a basket of indicators should be considered along with other relevant factors.*
- online news media – these are endorsed as clear contributors to media plurality. *i.e. online news media should be included in a plurality review.*
- triggers – Ofcom suggests a periodic review approach (every 4-5 years). *i.e. reliance on discretionary interventions is dismissed.*
- setting limits on news share – no – concerns to be addressed within periodic review. *i.e. setting limits on market share is inflexible and inadvisable.*

This latter point is important, while a share limit would provide the clarity of a simple binary rule; this leaves no flexibility to take account of the broader context. Ofcom stated that:

*“this creates a risk that it is not possible to address issues of commercial sustainability and innovation in an appropriate manner.”*

In essence there are inherent problems in devising a ‘gold standard’ plurality regime. One important finding of this study is that there is no international consensus on how best to define and measure plurality.

It is also worth replicating some comments made in a submission by the UK’s Secretary of State for Culture, Media and Sport:

*“... any rules inevitably act as a potential constraint on that market so it is essential that they be proportionate and do not unnecessarily restrict growth and innovation... The maintenance of plurality is still vital but, as more and more services become available on different platforms, concerns over ownership have diminished to some extent and greater liberalisation has been permitted.”*

(See: [http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/DCMS-submission\\_Narrative-on-media-ownership.pdf](http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/DCMS-submission_Narrative-on-media-ownership.pdf))

At this stage of market developments in India, the implementation of any new regime should be founded on the basis of identified problems, appropriate instruments selected and the costs and benefits of the regime made explicit. In any case, as we demonstrate throughout this report, the competition regime goes a long way towards promoting plurality.

*See Sections 2, 3 and Appendix 2 for supporting material.*

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

If TRAI can demonstrate that there is a concern in India regarding the plurality of viewpoints then news and current affairs are the most obvious genres to consider. As we emphasise, TRAI has not conducted such an assessment. 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. Moreover, on the supply side, news provision is better defined and a reasonable indicator of content relevant to the formation of public opinion than other genres.

In the UK, for example, there have been two cases where the regulatory authorities have assessed potential changes in media plurality following a merger: in both cases the genres identified (by the Competition Commission and by Ofcom) were news and current affairs.

Ofcom subsequently concluded in 2012 that news and current affairs are the only genres relevant in assessments of media plurality. This conclusion was reached following an extensive 7 month public consultation. The two main rationales given were:

*“Practically, the genre of news and current affairs is readily categorised on television and online audience measurement systems. The term is also easily understood by respondents in consumer research. Even if one could measure other genres to the same degree, we believe it would be less proportionate to do so. The issues of practicality and proportionality are of particular significance given the increasingly important role of online, and the potential inclusion of online in any review of plurality.”*

(See: <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf>)

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

An obligation to provide news broadcasts (TV and radio) can be included in licence conditions and regulated via broadcasting codes (e.g. to meet accuracy and due impartiality rules).

We note also that there is no consensus at this stage internationally on how to incorporate other ways of influencing the viewpoint 'agenda' beyond news and current affairs. Media plurality concerns, if they exist, should be identified on the basis of news and current affairs alone. Demonstration of such concerns would need to be supported by robust empirical evidence.

*See Section 3 and Appendix 2 for supporting material*

**Q15: Would it be appropriate to have a “1 out of 3 rule” i.e. to restrict any entity having ownership/control in an outlet of a media segment of a relevant market from acquiring or retaining ownership/control over outlets belonging to any other media segment? Please elaborate your response with justifications.**

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

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

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

- There is broad international support for pluralism in the media but no consensus or even omnipresent mechanism by which this is to be achieved.
- Some countries, particularly in Europe opt for sector neutral application of competition law and merger control (e.g. Finland, Sweden).
- There are trends towards relaxation of ownership controls (e.g. Spain, Netherlands).
- Countries that have a long history of media ownership controls continue to skirmish over the appropriate means of control. The UK public interest test has been criticised as unworkable and overly subjective. In the US, courts, regulators, politicians and business continue to disagree on the right form of media ownership rules.
- Of those countries that adopt hard caps on ownership, many of the measures are the product of political wrangling, either motivated to preserve the status quo which entrenches particular interests or to prevent a particular controversial media owner from gaining too much power (e.g. France, Italy, and UK).

The implications of this 'standing back from the detail' are that India has an opportunity to chart its own way in this area. While it might be tempting to adopt certain tenets of international regulation, there is a real imperative to avoid 'copy-cat' regulation which has been shown to be sub-optimal elsewhere and where viable and less costly alternatives exists.

The risks of precipitous and ill-conceived regulation include stifling diversity and investment at a time when the media sector is vibrant and changing, particularly as a result of the internet. The risks are amplified in India which does not yet have comparable institutional infrastructure to support implementation of rules of the type proposed.

Alternatives to ownership tests already exist in the Indian regulatory system. These include competition law, merger control and licensing which can place stipulations on media owners to conduct their business in a manner that respects diversity and impartiality.

*See Section 3 for supporting material.*



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

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

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

We note also an important conceptual issue: ownership is used as a proxy for viewpoints because owners of media outlets are assumed to be in a position to influence what is said and how it is said. However, one Canadian commentator, Kenneth Goldstein points out that the proxy is just that and therefore imperfect:

*“Given the imperfect nature of the proxy, we conclude that public policy should proceed with great caution in this area. As a corollary, we suggest that we should avoid the construction of rigid rules or strict guidelines in this area, because those rules or guidelines would be, by definition, based on that imperfect proxy.”*

(See: <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/responses/kenneth-goldstein.pdf>)

See Section 3 for supporting material.

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

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

Against this background, the introduction by TRAI of different standards of review of M&A in the media sector risks being unnecessary and duplicative. This is a critical time for the future of media regulation in India. Proper and appropriately targeted enforcement of competition law and merger control by a specialist authority – in this case the CCI – can go a long way to addressing issues of media diversity. If further controls are required in the future, they should only be introduced through an open and transparent process, in consultation with the CCI and other stakeholders and consistent with a well-defined policy. No such policy has been put forward to justify why the extensive existing and proposed pro-competition powers at the

disposal of India's competition authority are not suitable to preserve and encourage competition and media diversity.

See Section 3 for supporting material.

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

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

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

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

Any outright restriction on an entity having ownership or control in a media segment from retaining or acquiring ownership or control over an entity in another media segment would be a highly unusual, disproportionate and dangerous regulatory intervention.

Whether such a situation is automatically anticompetitive or poses threats to plurality or other public interests has not been developed by TRAI itself, by economic theory nor by international regulatory best practices. Quite the contrary, the media sector or any segment of it is not a monopoly utility where control of key infrastructure or rights should be regulated even in the absence of any demonstrable harm. In contrast, vertical integration in the media sector has been shown to have efficiency-enhancing effects.

In the first instance, vertical cross-ownership must raise less plurality issues than horizontal cross-ownership since the number of plurality channels is unaffected. Any threat from vertical integration to plurality would be better shown for each case specifically, since a whole number of factors would need to be considered to determine incentives to foreclose plurality. Factors are, for example, capacity of content delivery, utilisation of content delivery, competitive and plurality situations in the upstream and downstream markets, size of the downstream market, relative market power of upstream and downstream firms vis-à-vis each other, substitution to other content distribution channels which are not in the same relevant market. A simple rule would block too many benign cases of vertical integration (it would have a large 'Type I' error of finding a problem when there is not one), and would prevent substantial cost savings from being materialised that are likely to be passed on to consumers. It would also cement company's business strategies at a time of media convergence when agility is required.

The extension of an entity's presence across the value chain in the media sector should be assessed on a case-by-case basis avoiding a 'knee jerk' regulatory regime that is likely to constrain efficiency-enhancing growth and innovation.

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

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

*See Section 4 for supporting material.*

## 1 Introduction

### Purpose and scope

- 1.1 This report has been prepared by FTI Consulting LLP (“FTI Consulting”) in connection with a study on issues relating to media ownership in response to the Telecom Regulatory Authority of India’s (“TRAI”) consultation paper.
- 1.2 The following areas are included in the scope of our work:<sup>1</sup>
- Achieving policy objectives – a consideration of the rationale for regulation (why, what, how and who) and the need to ensure policy objectives are identified early and targeted with appropriate instruments, using methods that minimise secondary effects; the effect of convergence on policy objectives and regulatory approaches; trends in regulatory approaches (e.g. technology neutrality, ex ante vs. ex-post interventions) (Section 2);
  - Media ownership and control - a discussion of possible high-level models to regulate the media, citing international examples and the pros and cons of the various approaches (Section 3);
  - Vertical integration - an outline of the economics of vertical integration (costs and benefits), citing examples to demonstrate the approaches of regulatory and competition authorities (including ex-ante vs. ex-post approaches) (Section 4); and
  - The effect of the internet - an assessment of the effects of the internet on media consumption and distribution. The internet widens the distribution, service delivery and availability of media for consumers across all genres. We also provide a case study on news consumption and provision: the internet lowers barriers to entry, widens the market for ‘news’ and increases plurality. (Section 5).
- 1.3 The focus of our assessment has relied on examples from the European Union and Member States and the US.

### Preparation and use of this report

- 1.4 The information presented in this report has not been subject to independent audit or verification by FTI Consulting. Our comments on jurisdictions beyond the UK and EU are based on our in-house knowledge of the local regimes at the time of

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<sup>1</sup> We note that the TRAI consultation paper considers a much wider range of issues but our remit was to focus on the areas as per the above.

writing and without further review by local practitioners. We observe the dynamic nature of media regulation which forms the subject-matter of our report. While we have endeavoured to capture the most up to date regulatory and policy positions, we recognise the evolving nature of this area. We reserve the right to reconsider any opinions in this report in light of additional information that may be made available to us in the future.

- 1.5 We understand that this report may be made available to TRAI. It has been prepared solely for use in this matter. This report should not be used, reproduced or circulated for any other purpose, in whole or in part, without our prior written consent. FTI Consulting accepts no responsibility to third parties for breaches of this obligation nor for any opinions expressed or information included within this report.

#### **Our approach**

- 1.6 Our approach was desk-based and we principally conducted our work between 01 March 2013 and 08 March 2013, on a 'best endeavours' basis.

#### **Sources of information**

- 1.7 In compiling this report we drew on information from a wide range of sources including competition authority, regulatory authority and government policy papers, academic publications and competition cases. Sources are referenced throughout the report.

#### **Content of this report**

- 1.8 The remainder of this report, structured as per the description in Section 1.2, provides evidence to support the answers to TRAI's questions set out in the previous section and has the following appendices attached:
- Appendix 1 contains additional material relevant to our discussion of achieving policy objectives.
  - Appendix 2 contains additional material relevant to our discussion of media ownership and control and summarises the media ownership and merger control rules (if any) applying in the media and communications sector in the countries within our study.
  - Appendix 3 provides a number of metrics relevant to access to the internet and online user behaviour in India.

## 2 Achieving policy objectives

### Introduction

- 2.1 In this section we consider the rationale for regulation (why, what, how and who) and the need to ensure policy objectives are identified clearly and targeted with appropriate instruments. We outline: that policy goals should be achieved using methods that minimise secondary effects; the effect of convergence on policy objectives and regulatory approaches; and trends in regulatory approaches (e.g. technology neutrality, ex ante vs. ex-post interventions).
- 2.2 Based on the advice of the Ministry of Information & Broadcasting (“MIB”) with support from a study conducted by the Administrative Staff College of India (“ASCI”), TRAI is consulting on, amongst other matters, the type of media ownership regime that India should adopt. Such a regime may restrict ownership within media (‘mono-media’), across media (‘cross-media’), and, building on restrictions already in place, along the value chain (‘vertical integration’). In its consultation, TRAI has already gone some way in providing possible options for the way forward. These include regimes such as ‘one out-of-three’, ‘two out-of-three’ and media concentration measures such as a diversity index.
- 2.3 We observe that the paper does not consider the potential costs and benefits of the various possible approaches (which should, but does not, include a ‘do nothing’ scenario) on consumers, media companies, market structures and future investment. This is an unusual approach – we would expect any proposals for new interventions to have undergone a robust analytical assessment prior to them being tabled as regulatory options for consideration. This is a serious omission in TRAI’s approach. In particular, TRAI has not conducted a Regulatory Impact Assessment demonstrating that departure from the status quo would produce benefits that outweigh the potential harm that is likely to result from ill-targeted regulation of the type proposed.
- 2.4 Moreover, while the consultation paper refers to convergence, it does not consider the implications of convergence for regulating today. As we stress later in this section, this oversight is fundamental. Convergence has significant implications for both future regulation and for during the transition period as technology, companies and services undergo digital transformation, i.e. now. Old style regulation suited to old style markets is no longer appropriate. Indeed, the application of such regulation may stifle investment and innovation.
- 2.5 The European Commission, for example, published its Green Paper on the implications of convergence some 17 years ago, in 1996. Internationally regulators continue to address convergence challenges and common themes include: technological neutrality; balancing flexibility and legal certainty, necessity and proportionality. Globally, policy makers have paid extensive attention to convergence implications over a considerable period of time.

- 2.6 As we go on to emphasise, as a bare minimum, regulators should acknowledge that convergence implies that they should be cautious when intervening.
- 2.7 Moreover the internet is a convergent environment; distinctions between various media and telecoms services and networks become blurred. Online is also a truly cross-media environment. This environment poses specific challenges to regulators in respect of a number of key areas – what and how to regulate, how to define and measure markets, and also how to define and measure plurality.
- 2.8 Regulation is in any case an imperfect tool to mimic competitive forces or to achieve market outcomes that policy makers believe would not occur absent intervention. But regulation has its costs as well as benefits. There can be a danger that high costs are incurred if there is the application of inappropriate tools to solve specific problems and/or if ‘old style’ regulation is applied to markets subject to dynamic change owing to, for example, technology. Companies may relocate or suffer unsustainable business models. Investment may be chilled. Consumers may be adversely affected: prices/ quality/ service range/ service availability may be negatively shaped by the regulations, thereby reducing consumer benefits.

#### **Guiding principles**

- 2.9 In developing a new regulatory regime, policy makers need to be cognisant of a few general principles. Questions to consider include:
- Why regulate? – what are the objectives of the intervention?
  - What to regulate? – which services/areas of activity should be regulated?
  - How to regulate? – through what instruments? and
  - Who should regulate and who should be regulated? – what are the institutional aspects?
- 2.10 When designing new regulatory regimes, underlying principles, while obvious once stated, should include:

- Define public policy objectives clearly – distinguishing economic efficiency areas vs. public interest areas, even if one is at the cost of the other;
- Identify the policy instruments available and the potential economic effects (including enforcement costs) of each;
- Identify why the market left to itself and/or current regulatory tools are unlikely to lead to the achievement of the objective. Sufficient analysis is required to justify intervention; and
- Choose the most appropriate form of regulatory intervention – the best instrument targeted to the problems identified, assessing the potential economic effects and identify whether there could be unintended consequences.

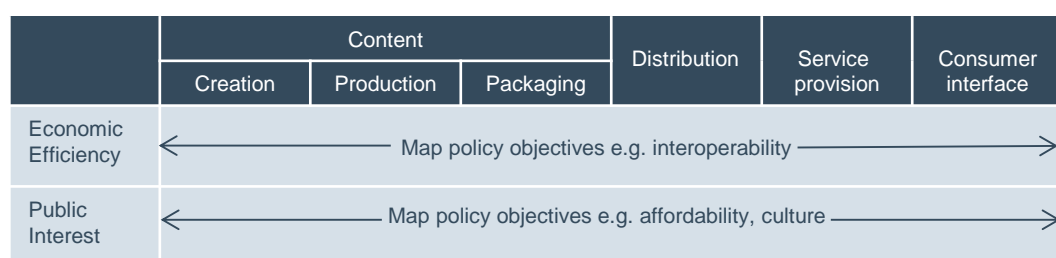
2.11 Generally, well-targeted policies will:

- Address the specific problem of concern;
- Lead to small secondary economic effects, and
- Have low enforcement/compliance effects.

2.12 In contrast, poorly directed policies tend to create substantial economic distortions (not related directly to their primary purpose – unintended consequences) and/or tend to be costly to enforce.

2.13 In reaching definitive policy proposals therefore, the why, what, how and who questions should be asked at each stage along the media value chain, supported by analysis of the segments in respect of both economic efficiency and public interest objectives. We provide a summary in Figure 2-1:.

**Figure 2-1: Policy objectives and the media value chain**



Source: see <http://origin.fticonsulting.co.uk/global2/media/collateral/united-states/strictly-media-policy.pdf>

2.14 The distinction between economic efficiency objectives and public interest objectives is fundamental and they may require different approaches. The regulatory approach to the former should be based purely on economic analysis whereas the latter tends to involve more subjective assessments, even though economic considerations should play an important role, especially the need to make them explicit and to minimise secondary effects.



- 2.15 Such an exercise will make more explicit TRAI's policy objectives and how best they may be achieved. Issues in respect of proposals such as vertical integration caps may then be made transparent and assessed appropriately. The same may be said for the proposed media and cross-media rules more generally. As the UK's government department responsible for media (the Department for Culture Media and Sport, "DCMS") stated in its submission to the Leveson Inquiry:<sup>2</sup>

*"... any [media ownership] rules inevitably act as a potential constraint on that market so it is essential that they be proportionate and do not unnecessarily restrict growth and innovation."*<sup>3</sup>

- 2.16 It is important to reference the extensive research programme that the UK communications regulator, (the Office for Communications, "Ofcom"), undertook in respect of media plurality as it demonstrates that there are significant challenges and no easy answers in respect of media plurality. Ofcom spent some 7 months on a public consultation on how to measure plurality. The consultation involved stakeholder engagement (including written submissions), academic seminars, international benchmarking, extensive consumer research, an in-depth study of the provision of news and a review of the academic literature.

- 2.17 Ofcom concluded that assessments of media plurality should not be boiled down to simple market share measures and that:

*"The literature suggests that qualitative factors, including the type of ownership, should also be considered when thinking about plurality. Some writers in this area, including Barnett, have suggested that regulation to promote quality journalism (a form of positive content regulation), rather than a focus on media ownership rules, may be a way to secure outcomes in the public interest."*<sup>4</sup>

- 2.18 TRAI's starting point in contrast appears to be based on the premise that a wholesale implementation of a new media ownership regulatory regime is required and the decisions to be made relate to method or implementation – whether there should be a diversity index approach or a 'one out of three' regime. TRAI does not appear to have considered where the problems lie, what its objectives are and what the costs and benefits of the alternative approaches are.

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<sup>2</sup> A judicial public inquiry into the culture, practices and ethics of the British press.

<sup>3</sup> [http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/DCMS-submission\\_Narrative-on-media-ownership.pdf](http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/DCMS-submission_Narrative-on-media-ownership.pdf)

<sup>4</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/Annex7.pdf>

- 2.19 Moreover, TRAI does not appear to have considered the importance of developing a regulatory regime that is sufficiently flexible and forward looking to harness future ‘convergence’ developments.
- 2.20 Convergence is essentially the coming together of audiovisual and telecommunications, facilitated by technology. It can occur at a number of levels – at the industrial level (e.g. a telco acquiring a broadcaster), in services (e.g. internet protocol TV, “IPTV”), in networks, and in devices.
- 2.21 While convergence is arguably at an early stage of development in India, there are indications that a small number of consumers are embracing its benefits – as witnessed by the explosion in smartphone and tablet take-up and usage of online and social media. We provide some illustrations of the trends in Section 5 of this report.
- 2.22 Any regulations imposed on the sector need to take into account possible future technological developments. India will not want to lag behind its BRIC (“Brazil, Russia, India and China”) counterparts owing to the application of ‘old style’ regulation to ‘new style’ companies/markets. Traditional companies will require a regime that gives them the room to invest and to leverage the opportunities of digital transformation. India will want the proportion of digital ‘have nots’ to decline, not increase.
- 2.23 We next consider the instruments of competition and regulatory policy.

#### **Instruments of competition and regulatory policy – mapping out the landscape**

- 2.24 Over 100 countries now have some form of competition law which applies to all sectors of the economy. The position in the media sector is more complex, where competition law and sector regulation may often apply on the same facts.
- 2.25 Our comparative study seeks to identify international best practices that emerge in the regulatory regimes of countries which already exhibit some market, legal and institutional similarities with India (although not necessarily all of these and to the same degree). We focus on comparisons with countries that have already developed experience in developing regulatory regimes in the media sector.
- 2.26 We note that India’s own competition law provides an important backdrop against which our findings should be assessed. India’s modern competition law is contained in the Competition Act and is enforced by the Competition Commission of India (“CCI”). The Competition Act contains many features which resemble EU competition law (and, to a lesser extent, US antitrust law). We therefore profile the EU model as a principal benchmark comparator.
- 2.27 Within the EU, we also examine the position in selected Member States with a focus on the UK with which India shares a common history and since many building blocks of Indian law and procedure are based on English law. We supplement this with comparative vignettes from other key antitrust jurisdictions, including the US. We

emphasise in so doing that despite the historical and economic similarities in the relevant markets, TRAI should be slow to emulate particular practices unless particular approaches are appropriate for India now and against a coherent policy on what it is desired to achieve.

- 2.28 To set the scene for what follows, below we identify the key instruments of competition and regulatory policy that we consider in this report.

### Competition law

- 2.29 Competition laws contain two basic types of rules:

- prohibitions on restrictive agreements.<sup>5</sup>
- prohibitions on the abuse of a dominant position.<sup>6</sup>

- 2.30 We focus on the second type of prohibition: abuse of dominance. The reason for this focus is its more immediate relevance to competition in the media sector where competition law has been applied to address issues such as access to content, access to infrastructure etc., which typically involve unilateral conduct rather than anticompetitive agreements.

### Sector regulation

- 2.31 It is a feature of the media sector that companies operating in the sector may be subject to additional sector-specific rules by a specialist regulator. Even where sector-specific rules do not apply or sector approvals are not required, the sector regulator may liaise closely with the competition regulator in considering which rules or a combination of them are best suited to address a particular issue.

- 2.32 The EU electronic communications sector is subject to supra-national regulation under an umbrella structure known as the “EU Regulatory Framework” which is implemented in the national laws of the EU Member States. The EU Regulatory Framework dates back to 2002 and the latest set of significant amendments, adopted in 2009, took effect on 26 May 2011.

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<sup>5</sup> The EU prohibition on restrictive agreements is contained in Article 101 of the TFEU and national law equivalents (including Chapter I of the Competition Act 1998 in the UK). The counterpart prohibition in Indian law is contained in section 3 of the Competition Act. The most serious form of anticompetitive agreements is a cartel to fix prices or share markets or customers.

<sup>6</sup> The EU prohibition on abuse of dominance is contained in Article 102 TFEU and national law equivalents (including Chapter II of the Competition Act 1998 in the UK). The counterpart prohibition in Indian law is contained in section 4 of the Competition Act. Typical types of behaviour that have been sanctioned as an abuse of dominance include: pricing abuses (excessive pricing, predatory pricing, margin squeeze and discriminatory pricing); and non-price abuses (e.g. refusal to supply, refusal to licence, abusive litigation).

- 2.33 The EU Regulatory Framework is predicated on the following principles of “good governance”:
- basing regulation on clearly defined policy objectives;
  - proportionate and ‘light-handed’ regulation, so that ex ante regulation is limited to the minimum necessary (e.g. ex ante obligations are reserved to those operators who are found to enjoy Significant Market Power or “SMP”);
  - technological neutrality;
  - balancing flexibility and legal certainty;
  - harmonisation of national regulatory regimes; and
  - periodic review of the EU Regulatory Framework.

#### **Merger control**

- 2.34 Merger control refers to the procedure of reviewing mergers and acquisitions (or “concentrations”) under competition law. Typically, parties involved in a concentration that meets the relevant thresholds (which may be turnover, asset or market share based) are required to notify their transaction to a specialist authority for approval.
- 2.35 India’s mandatory merger control system became effective on 1 June 2011. Already the CCI has built up experience in this area. We consider the role of merger control when discussing media ownership rules, protection of plurality and vertical integration.

#### **Convergence**

- 2.36 Convergence has become a familiar phrase or even ‘buzz word’ to describe the changes that have occurred in the media and communications industries. In order to frame the discussion that follows, it is helpful to describe two parameters of convergence that are instructive when considering the competition and policy implications of convergence – technical convergence and economic convergence.
- 2.37 We described technical convergence in Section 2.20 – convergence blurs the lines between traditional audiovisual and telecommunications services, networks and devices.
- 2.38 In respect of its economic effects, while the characteristics of the ‘end-point’ of convergence (if it exists) is unknown, we are able to set out a number of implications of convergence, they include:

- A transition from scarcity in distribution to abundance;
- Increased use of distribution networks; and
- New and potentially complex industry structures may emerge.

2.39 Moreover, it is unclear as to whether the ‘end-point’ will be economically efficient or socially desirable.<sup>7</sup> However, as set out in a report that underpinned the European Commission’s Convergence Green Paper, there are a number of potential economic implications of convergence.<sup>8</sup> These are summarised in Figure 2-2:.

**Figure 2-2: Economic implications of convergence**

| From scarcity to abundance             | Use of networks        | Market structure       |
|--|------------------------|------------------------|
| Additional expenditure on new services | Economies of scale     | Vertical integration   |
| Expansion in range of services         | Economies of scope     | Horizontal integration |
| New types of transactions              | Lower prices           | First mover advantages |
| From public good towards private good  | Competing technologies |                        |
| New bundling/unbundling possibilities  |                        |                        |
| New revenue and pricing models         |                        |                        |
| Cross-border service provision         |                        |                        |

Source: KPMG report *ibid*

2.40 Thus in today’s dynamic market, the traditional lines between formerly discrete sectors of the media or communications markets are no longer sustainable as rigid demarcations. Telecoms providers are entering the broadcasting arena; device manufacturers are entering the media sector; application providers are entering related markets (e.g. Microsoft); social networks have revolutionised the way in which content is distributed and consumed (e.g. Facebook); and search engines are transforming their businesses to become multi-platform media companies (e.g. Google).

2.41 In a paper discussed at the OECD’s 2013 Global Forum on Competition, Mr Allan Fels commented on the market uncertainties presented by convergence and their implications for the design of regulatory policy. The first uncertainty is demand uncertainty which has become apparent in markets in which online services are supplied. A second source of uncertainty concerns new technologies, where technology risks have increased. Third, despite notable success stories, uncertainty remains as to whether and, if so what, a profitable business model for a particular

<sup>7</sup> This does not imply however that unduly restrictive regulation should be applied today.

<sup>8</sup> “The public policy implications of the convergence of audiovisual and telecommunications,” a study by KPMG for DGXIII, European Commission.

service might be. Finally, uncertainty arises as to the potential sources of competitive products.

- 2.42 When commenting on the policy implications of convergence, Mr. Fels is cognisant of the need to be vigilant to the potential for competitive harm, while recognising the dangers of inappropriate (over or under zealous) regulation:

*“48. In combination, these four types of uncertainty flowing from convergence generate significant market uncertainty. Furthermore, the above discussion underlines the deep uncertainty that exists about where profit opportunities lie in the emerging, but as yet poorly understood, markets. A heavy investor in the wrong parts of the industry may find its asset is used, but the real profits accrue to a supplier somewhere else in the production chain.*

[ ]

*56.... However, technological change is also reducing the entry barriers into the production of content and expanding the range of transmission options—both of which should serve to reduce competition concerns. At the same time, **the speed and unpredictability of technological change makes it vital competition authorities recognise the risks of ‘getting it wrong’: in the sense of mistaking transient commercial success for market power; or, conversely, in over-estimating the corrective efficacy of entry and of new competition.** Striking the balance between these errors will undoubtedly be challenging for competition regulators, and at times frustrating for market participants, in developed and developing countries alike.” (emphasis added).<sup>9</sup>*

- 2.43 From a regulatory perspective, the technological and economic phenomena of convergence point to a more integrated approach to media policy. This does not necessarily require a uniform approach to regulation of all sectors as there should be scope for variations where appropriate. However, it does require a coordination of regulatory functions and rules.

#### **‘Technology neutral’**

- 2.44 In the EU, economic policy in the telecoms and media sectors is based upon liberalisation of national markets. The telecoms and media sectors are subject to different regulation.

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<sup>9</sup> “Competition issues in television and broadcasting”, Contribution from Mr. Allan Fels (DAF/COMP/GF (2013)6).

- 2.45 However, convergence of the sectors has also led to a degree of convergence in regulation, with EU policy being technologically neutral for the 'electronic communications' sector. Accordingly, the EU Regulatory Framework does not use specific, different legal definitions for 'telecoms', 'media' or 'IT' and covers the conveyance of signals (of all types, including voice and data) by electronic communications networks (of all types, including fixed and wireless networks, the PSTN, IP data networks, cable networks and radio and television broadcast networks).
- 2.46 The concept of technological neutrality has at least two implications for the design of regulatory regimes. First, the concept of the media should not depend on any specific form of platform or means of transmission. Second, the rights and obligations that apply to media enterprises should apply regardless of the underlying technology that they use, provided that they conform to the technology neutral definition.

#### **Regulation: sector-specific vs. competition law**

##### ***Ex ante vs. ex post distinction***

- 2.47 In general, a number of key distinctions have been identified as demarcating the line between sector regulation and competition law which tend to correspond, broadly, to the 'ex ante' and 'ex post' labels.
- 2.48 To frame the discussion which follows (and to reveal the over-simplification) it is useful to start with a few key distinctions as defining the boundaries between sector regulation and competition law.
- Sector regulation is generally 'ex ante' enabling 'regulators' to control the activities of natural or unnatural monopolies. Once markets have been opened up to competition, market forces come into play. It is maintained that competition law can then be applied to intervene if – and only if - there have been observable restrictions on competition or evidence of likely violations of law ('ex post').
  - Sector regulators tend to have more of an on-going relationship with regulated companies and benefit from a stream of information on the sector derived from carrying out their on-going supervisory functions. On this view, competition authorities rely generally on complaints and obtain information in the context of specific enforcement actions.
  - Sector regulators impose and monitor detailed behavioural remedies. Competition authorities, if the distinction is maintained, typically elect for structural-based remedies addressing specific activities.

- Sector regulators have a broad range of policy objectives. These may include industrial policy objectives as well as consumer welfare objectives. Competition authorities have a narrower remit, typically to promote consumer welfare or total welfare.

- 2.49 As will be apparent from the analysis which follows, the above distinctions should not be taken as polar extremes in demarcating how sector regulation and competition operate or interact. Rather, the 'ex ante' and 'ex post' distinctions are relevant to our study of how sector regulation and competition can combine in India to achieve the optimum balance between preventing the creation or entrenchment of market power and not undermining companies' incentives to invest and innovate.
- 2.50 First, some sort of temporary market power may be needed to achieve efficiencies connected with investment and innovation. Second, it is apparent that markets may not always be left to their own to address the challenges presented by technological development if consumers find it costly to switch to new products and services.
- 2.51 This situation may give rise to complex balancing that does not always have a clear-cut policy solution. The implication is that it is vital that regulators limit themselves to intervention 'ex ante' only where this is demonstrated to be necessary to prevent the foreclosure of entry, competition and innovation.

### EU experience

- 2.52 Competition law plays a complementary role to sector-specific regulation, particularly in the telecoms sector. The relationship between regulation and competition law was explained by Commissioner Joaquín Almunia in 2010:

*“The telecommunications sector is a great example of regulation and competition working hand in hand. It is typically the sort of industry where ex ante regulation has been a necessary complement to competition enforcement, because there are enduring economic bottlenecks, namely non-replicable legacy facilities. So regulation of access to networks has been necessary to allow market entry.*

*But regulation is being progressively phased out, as competition in the market develops, ultimately, electronic communications will be governed by competition law only. Under the current EU Regulatory Framework for electronic communications, regulation is the exception rather than the rule. The Commission, alongside national regulatory authorities, has a role to play in ensuring that **regulation is imposed only where it is necessary.**”*  
(emphasis added.)<sup>10</sup>

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<sup>10</sup> Joaquín Almunia, 'Competition v Regulation: where do the roles of sector specific and competition regulators begin and end', Brussels, 23 March 2010.



## Allocation of competences between sector regulator and competition authority

### Regulatory “models”

- 2.53 An important issue raised by regulatory policy-makers relates to the allocation of functions between regulators. At least the following models present themselves:
- Separate: Separate competition authority and sector regulator applying competition law and sector regulation respectively (e.g. India).
  - Combined: Consolidated regulatory authority applying competition law and sector regulation (e.g. proposal to create Comision Nacional de la Competencia y los Mercados in Spain).
  - Concurrency: Separate competition and regulatory authority applying competition law and sector regulation respectively; sector regulator has power to apply competition law in its sector (e.g. UK).

### Indian experience

- 2.54 The jurisdiction of the CCI under the Competition Act must be distinguished from that of the sector regulators. The Competition Act is designed to promote competition in all sectors of the economy through its system of effectively prescribing what companies should not do, i.e. engage in certain pricing behaviour, cartels, collusion etc. The sector regulators provide a framework which companies in the sector are obliged to follow regarding tariffs, industry standards, entry conditions and service obligations.
- 2.55 The Competition Act contemplates a synergised relationship between the CCI and the sector regulators in that:
- the CCI can make a reference to a statutory authority if, in the course of a proceeding before the CCI, an issue is raised by any party (if any decision which such statutory authority has taken, or proposes to take, is or would be, contrary to any of the provisions of the Competition Act), and if the implementation is entrusted to a statutory authority;
  - where, in the course of a proceeding before any statutory authority, an issue is raised by any party that any decision which such statutory authority has taken or proposes to take, is or would be, contrary to any of the provisions of the Competition Act, then such statutory authority can make a reference in respect of such issue to the CCI; and
  - the CCI can make a *suo moto* reference to, or receive a *suo moto* reference from, a statutory authority.
- 2.56 However, there is as yet no specific guidance concerning the relationship between the CCI and the sector regulators, which has raised a question of potentially overlapping or duplicative regulation.

- 2.57 The end of 2012 saw developments towards amendments to Indian competition law. The Lok Sabha (the lower house of the Indian Parliament) passed the Competition (Amendment) Bill, 2012 (the “Competition Amendment Bill”) on December 7, 2012. Before this becomes law, it needs to be passed by the Rajya Sabha (the upper house of the Indian Parliament). It must then be notified by the Government. The exact timing of implementation of the Competition Amendment Bill is unclear, although there is momentum to push ahead the sweeping changes to the existing Competition Act which is entering its fifth year of implementation.
- 2.58 There are two of the legislative proposals which are of note when considering the balance of powers between the CCI and TRAI.
- 2.59 First, a new provision will be introduced to give the Central Government the power to specify different values of assets and turnover for any class of enterprises for merger control purposes. This would give the Government a power to introduce specific merger thresholds by market sector such as the media sector.
- 2.60 Second, there will be a provision for mandatory references of issues by statutory authorities (including sector regulators) to the CCI and from the CCI to the statutory authorities. Currently, such references between the CCI and statutory authorities occur on a discretionary basis as described above. This should allow for a more streamlined approach to dealing with competition issues in regulated sectors such as the media.

#### *UK experience*

- 2.61 Companies operating in the regulated industries in the UK will be familiar with the “concurrent” application of competition by the competition authority – currently the Office of Fair Trading (“OFT”) – and the various sector regulators. The sector regulators for these purposes include Ofcom.
- 2.62 The sector regulators share, broadly, the same powers as the OFT to enforce UK and EU competition law in their respective sectors.
- 2.63 When concurrency was introduced, arguments were made both for and against the system. In favour of concurrency it was argued that: (i) sector regulators had developed specialist expertise and knowledge of their sectors that could be applied effectively in competition cases; (ii) there was overlap between the sector licensing regimes and competition law; (iii) concurrency would encourage sector regulators to move away from reliance on ex ante regulation to using ex post competition law.
- 2.64 Against concurrency it was argued that: (i) concurrency is rare in other jurisdictions including in the EU; (ii) the sector regulators lacked expertise in EU competition law analysis and investigations experience; (iii) there would be less efficient use of regulatory resources given the number of bodies that could potentially apply competition powers; (iv) there was a risk of inconsistency in decision making; (v) there

was a risk of “double jeopardy” where companies operating in more than one sector might face multiple investigations.

- 2.65 Over the years, various bodies have put forward suggestions as to how the perceived difficulties with the current concurrency regime might be addressed.
- 2.66 The UK government has recently proposed a new provision which would allow the Secretary of State (“SoS”) by order to remove from a sector regulator all or any of their concurrent competition powers discussed above.

#### **Control of market power**

- 2.67 Control of market power in the communications and media sector has been a focus of regulators internationally. A variety of regulatory tools have been deployed, ranging from enforcement of the competition law rules on abuse of dominance, sector-specific regulation and market wide investigations.
- 2.68 To illustrate some prevailing themes, we contrast in Appendix 1 the approach of the EU and UK authorities in the telecoms and broadcasting sectors respectively.
- 2.69 The EU experience of competition law enforcement in the telecoms sector must be considered in its market and historical context. In the early years, competition law enforcement of the EU prohibition on abuse of dominance was directed towards curbing the market power of former state monopolies which, by virtue of their incumbent positions and control of infrastructure actually or potentially had the ability and incentive to restrict new entry. The pattern of enforcement today is still influenced by this background and is aimed at addressing observable abuses of market power. It will be recalled that Indian competition law has the very same powers of intervention through section 4 of the Competition Act should there be concerns that any communications (or media) operator is abusing market power.
- 2.70 The UK experience of sector and market regulation in the broadcasting sector illustrates how the UK has sought to address concerns that markets may not be working as well as they might but where there has been no evidence of a violation of competition law. In such a situation the need to encourage innovation and keep markets contestable remains considerable. Two case studies in Appendix 1 illustrate the potential for ‘getting it wrong’. First, the UK’s attempts to impose intrusive sector specific regulation in the form of a wholesale must-offer obligation on BSkyB in respect of its sports channels did not survive a judicial challenge. Second, after a two year long market investigation before the UK Competition Commission (“CC”), it was

decided that there was no adverse effect on competition (“AEC”) in relation to the supply and distribution of pay TV movie content.<sup>11</sup>

- 2.71 Thus the implication for TRAI as it contemplates charting a new path in media and communications regulation should be one of caution. Like the UK and EU India has a modern competition law and a specialist regulator that is charged with competition law enforcement. This does not necessarily mean that enforcement policy should be more lenient. Rather it should preserve the flexibility to adapt to the particular challenges of media and communications markets where the blunt instrument of rigid ex ante controls in the absence of observable harm risks being counterproductive.

### Conclusions and implications for policy

- 2.72 A number of implications for design of policy and regulatory interventions emerge:
- Costs and benefits: Regulation is an imperfect tool to mimic competitive forces or to achieve market outcomes that policy makers believe would not occur absent intervention. But regulation has its costs as well as benefits. There can be a danger that high costs are incurred if there is the application of inappropriate tools to solve specific problems and/or if ‘old style’ regulation is applied to markets subject to dynamic change owing to, for example, technology. Companies may relocate or suffer unsustainable business models. Investment may be chilled. Consumers may be adversely affected: prices/ quality/ service range/ service availability may be negatively shaped by the regulations, thereby reducing consumer benefits. In particular, TRAI has not conducted a Regulatory Impact Assessment demonstrating that departure from the status quo would produce benefits that outweigh the potential harm that is likely to result from ill-targeted regulation of the type proposed.
  - Regulatory best practices: Despite differences in policy towards the regulation of the media and communications sectors internationally, there are some prevailing themes. These include: technological neutrality; balancing flexibility and legal certainty, necessity and proportionality.

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<sup>11</sup> During a period of 10 months, the CC reversed its preliminary decision that BskyB was having an AEC to the conclusion that BskyB did not have such an advantage over its rivals when competing for pay-TV subscribers as to harm competition. The CC noted the increasing trend of audiovisual content being delivered over the internet, and that it had increased competition and consumer choice. The ultimate conclusion reached by the CC demonstrates the reluctance of a regulatory authority to impose remedies in a rapidly changing and uncertain market place.

- Allocation of regulatory functions: A major concern with TRAI's proposals is the duplication of regulation or a lack of coordination with the economic regulation that is currently conducted by the CCI. It is not clear that TRAI is proposing the concurrent application of competition law by itself and the CCI. However, the proposals come very close to supplanting the role of CCI or at least confusing the roles of the two bodies. In any event, concurrent application of competition law by competition and sector regulators is rare internationally. Overall, there is evidence of a move away from concurrent application of competition law and a consolidation of competition functions in the relevant competition authority (e.g. United Kingdom). India adopts the 'separate' but synergistic model where CCI is exclusively responsible for competition law enforcement. At the very least, this focuses attention on the application of competition law by specialist authorities. At the same time, it does not mean that TRAI experience of the media and communications sector cannot be deployed to good effect in working with CCI to apply competition law in a measured way to secure a healthy and vibrant market in India.
- Risk of errors: The intervention by sector regulators or competition regulators in cases where there is no violation of competition law but concerns arise from the organic growth of the company is highly controversial. These cases are inherently fact-intensive and the scope for error or "getting it wrong" must not be underestimated. Too precipitous an intervention and there is a risk in implementing over-corrective measures. Conversely, the countervailing threat of new entry must be credible. A competition authority like CCI is best-equipped to address such issues, benefiting, where appropriate from the information and insights which may be more readily available to TRAI as a sector authority but where the CCI takes the final decision on whether or how to use its competition law powers.

2.73 When designing new regulatory regimes, underlying principles, while obvious once stated, should include:

- Achieving public policy objectives: objectives should be clearly defined, distinguishing economic efficiency areas vs. public interest areas, even if one is at the cost of the other. The policy instruments available should be identified along with the potential economic effects (including enforcement costs) of each. **Sufficient analysis is required to justify intervention; and the most appropriate form of regulatory intervention selected, to minimise unintended consequences.**

- **Convergence:** Despite convergence, there remains fragmentation in the approaches adopted by regulators towards intervention in telecoms and other sectors. However, issues of access, network neutrality, non-discrimination and protection of intellectual property rights (“IPR”) are recurrent themes. These are issues that are familiar to competition authorities. Moreover, technological changes may break down these demarcations further. However the real challenge that convergence poses is increased uncertainty in respect of the speed of technical change and its effects in the short and longer runs. **Regulators/competition authorities run the risk of ‘getting it wrong’ either by applying old style/stringent regulations and/or mistaking transitory profitability for abuse. A cautious and flexible approach is required. The application of old style regulations to such evolving markets is not recommended; it may stifle investment and innovation. Regulation should be flexible enough to take account of the evolving market dynamic and be informed by the best assessment of how markets are likely to evolve. TRAI’s proposed intervention does not even come close to this dynamic approach since it is predicated on an assessment which is four years out of date. It does not take account of the increased diversity and competition currently prevailing and likely to develop in India over the next 3 to 5 years and beyond.**
- **Evolving markets:** There may be gaps in competition law in that it is unable to address market failings which may not be attributable to an infringement of competition law or breach of sector regulatory law by any company. The UK has sought to address this through the market investigations regime but this is a lengthy and resource- intensive process. The outcome may be a clean bill of health but only after a detailed inquiry and years after the initial concerns were raised. For example, the recent UK BSkyB case involving movies on pay TV has highlighted that the way in which retail pay TV services is provided is evolving, which can alter the incentive and ability of a firm to exercise market power. India does not have such a market investigations regime but even where it operates in the UK we detect a level of regulatory forbearance in the media sector.

### 3 Media ownership and control

#### Introduction

- 3.1 This section examines structural regulation of the media and the regulatory policy instruments that can be used to address the twin challenges of (1) concentration in the media; and (2) the need to safeguard plurality.
- 3.2 This section provides:
- an appraisal of the relationship between competition and pluralism and how these goals interact;
  - a survey of the main regulatory mechanisms that have been deployed internationally to regulate market structure in the media sector, whether through any one or all of a combination of direct controls on media ownership (including ownership caps), competition review in merger control or sector-specific tests designed to address plurality; and
  - observations of the emerging features of regulatory architecture with a view to identifying their implications for design of optimal regulatory instruments.
- 3.3 Appendix 2 summarises the media ownership and merger control rules (if any) applying in the media and communications sector in the countries within our study. The focus is on media ownership rules based on shareholding and interest and not on nationality (i.e. foreign ownership). The latter presupposes a policy decision has been taken to limit foreign ownership. In view of the scope of the Consultation Paper we consider this to be beyond our frame of reference for this study.

#### Protecting competitiveness and pluralism

##### *What is pluralism or plurality?*

- 3.4 The Consultation Paper places pluralism as an important goal, noting in the first paragraph that “media pluralism is a cornerstone of democracy and this fact should be reflected in the plurality of independent and autonomous media and in diversity of media content”.<sup>12</sup>
- 3.5 The Consultation Paper sets as a goal the design of rules to balance pluralism and competitiveness:

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<sup>12</sup> Consultation Paper, Introduction, paragraph (i).

*“In order to ensure media pluralism and counter the ills of monopolies, it is felt that reasonable restrictions need 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”.*<sup>13</sup>

3.6 These goals are congruent with the aims of most modern democracies, although there are differences in the approaches that have been adopted to seek to achieve these ends.

3.7 When the UK sought to develop its own laws in this area the relevant Government minister said in 2003 that:

*“[media] plurality is important for a healthy and informed democratic society. The underlying principle is that it would be dangerous for any person to control too much of the media because of his or her ability to influence opinions and set the political agenda”.*<sup>14</sup>

3.8 The test is expressed in the UK Communications Act 2003 as:

*“the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience”.*

3.9 As noted in Section 2, Ofcom conducted a significant research study and extensive stakeholder consultation on plurality matters between November 2011 and June 2012, following the request by the SoS in October 2011 Ofcom states that:

*“We have defined plurality as a) ensuring there is a diversity of viewpoints available and consumed across and within media enterprises and b) preventing any one media owner or voice having too much influence over public opinion and the political agenda.”*<sup>15</sup>

3.10 To set the context for what follows, we define pluralism as a situation where no single voice/viewpoint can control the news agenda, restrict ideas or debate or allow government, or indeed other players, to escape scrutiny.

3.11 Another relevant distinction is between external plurality (achieving plurality through a number of media outlets) and internal plurality (ensuring content diversity through a single supplier). Both these mechanisms for contributing to plurality are accepted, for

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<sup>13</sup> Consultation Paper, Introduction, paragraph (v).

<sup>14</sup> Lord McIntosh of Haringey (Parliamentary Under Secretary, DCMS) 2 July 2003, Hansard.

<sup>15</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement/statement.pdf>



example, in the UK. In the context of BSkyB's proposed acquisition of a 17.9 per cent interest in ITV, the UK CC thought "that it was appropriate to distinguish between the range of information and views that are provided across separate independent media groups (external plurality) and the range that are provided within individual media groups (internal plurality)".<sup>16</sup>

- 3.12 Finally, we distinguish between "plurality" (the fact of there being many) and "pluralism" (the policy goal or doctrine).

#### Relationship between pluralism and competition law

- 3.13 Pluralism is designed to capture issues other than those that are covered by competition inquiries into market concentration. The analysis has to encompass also the capacity of an entity to unacceptably influence public debate quite separately from any competition issues.

- 3.14 UK guidance on this issue explains how pluralism and competition are distinct but they can inform one another:

*"[The plurality test] is not intended to replicate or import aspects of the substantial lessening of competition test that applies in relation to mergers raising competition concerns. This test will be applied separately by the competition authorities, where appropriate. An example of concerns regarding the impact of consolidation on the need for a plurality of views in newspapers in the UK can be seen in the (then Monopoly and Mergers Commission's) MMC's report on the proposed acquisition by Daily Mail & General Trust of Nottingham Evening Post. In that case, the MMC concluded that the increase in regional concentration of ownership could be expected to pose a risk to the maintenance of diversity of opinion in the region and would in turn jeopardize accurate presentation of news and free expression of opinion" (emphasis added)<sup>17</sup>*

- 3.15 Contrasting the different analytical inquiries that are involved in a plurality and competition assessment it is noted that:

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<sup>16</sup> Acquisition by British Sky Broadcasting Group PLC of 17.9 per cent of the shares in ITV PLC, Report sent to the Secretary of State 14 December 2007 ("BSkyB/ITV"), Executive Summary, paragraph 30.

<sup>17</sup> Guidance on the operation of the public interest merger provisions relating to newspapers and other media mergers, Guidance Document, May 2004 (DTI Plurality Guidance), paragraph 5.15.

***“These media public interest considerations invoked by the Secretary of State are distinct from the competition-based test applied by the competition authorities. The aim of this competition analysis is to prevent a level of concentration of ownership which could give rise to a substantial lessening of competition. However, there is a recognisable overlap between this competition assessment and at least the first of the broadcasting and cross-media public interest considerations, which posits the need for there to be a sufficient plurality of persons controlling media enterprises.”*** (emphasis added)<sup>18</sup>

- 3.16 However, it can be that interventions that are aimed at safeguarding competition can also promote pluralism:

***“Although she will remain conscious of the distinctions between the competition and the public interest regimes, the Secretary of State anticipates that in some cases she may take the view that action to safeguard competition in a market will by itself be likely to provide a sufficient plurality of control”.*** (emphasis added)<sup>19</sup>

- 3.17 The government department responsible for media in the UK, the DCMS provided the following in its submission to the Leveson Inquiry:

***“Policy and legislation has been designed overall to achieve a range of different media “voices” which enable consumers to have access to a range of views which help them actively participate in the democratic process in the widest sense. ... While imperfect, ownership restrictions act as an effective “proxy” for media plurality.”***<sup>20</sup>

- 3.18 We note here an important conceptual issue: ownership is used as a proxy for viewpoints because owners of media outlets are assumed to be in a position to influence what is said and how it is said. However, one Canadian commentator, Kenneth Goldstein, points out that the proxy is just that and therefore imperfect:

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<sup>18</sup> DTI Plurality Guidance, paragraph 7.3.

<sup>19</sup> DTI Plurality Guidance, paragraph 7.4.

<sup>20</sup> [http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/DCMS-submission\\_Narrative-on-media-ownership.pdf](http://www.levesoninquiry.org.uk/wp-content/uploads/2012/07/DCMS-submission_Narrative-on-media-ownership.pdf)

*“Given the imperfect nature of the proxy, we conclude that public policy should proceed with great caution in this area. As a corollary, we suggest that we should avoid the construction of rigid rules or strict guidelines in this area, because those rules or guidelines would be, by definition, based on that imperfect proxy.”<sup>21</sup>*

- 3.19 The case studies in Appendix 2 illustrate the proposition that plurality and competition are different but regulatory interventions designed to protect competition can contribute to pluralism. However, since pluralism is not predicated on the presence of market power in an economic sense, there can be plurality issues even where competition law issues do not arise.

#### ***Conclusions on competition and plurality tests***

- 3.20 The implications of the above assessment when considering the relationship between competition and plurality tests are the following.
- 3.21 First, competition tests and plurality tests seek to capture very similar and frequently overlapping issues. This is not surprising since both places an importance on ensuring that markets are not controlled by a limited number of controllers.
- 3.22 Second, there may be cases where a pure competition test does not address the more complex – and inherently more difficult to define – concept of plurality. Such cases tend to be easily identifiable such as cases where a controversial media owner seeks control of the press for political purposes or where religious viewpoints are marginalised.
- 3.23 Third, the vast majority of cases can be dealt with by robust application of competition law by a specialist regulator. If – and only if – further issues are identified, targeted rules can be developed on a case by case basis such controls on political parties controlling a television station.
- 3.24 Finally, the experience in the UK which has an elaborate media plurality regime bears out the above. In the decade since the current regime was put into operation, only two cases have raised plurality “issues” such as to warrant a further inquiry. Critically there has been no final determination in a case involving only plurality issues. Neither of these cases provides support for export of the same or a similar plurality regime into another jurisdiction and certainly not without a Regulatory Impact Assessment being conducted:

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<sup>21</sup> See: <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/responses/kenneth-goldstein.pdf>

- In BSkyB/ ITV, BSkyB had acquired material influence over ITV, an important UK broadcast news provider. Even in those circumstances the CC concluded that sufficient plurality remained for each major audience in the UK, both for a TV audience and a cross-media audience (taking into account the readership of News International's newspapers). As TRAI will be well aware, BSkyB was required to divest its shareholding in ITV to below 7.5 per cent, for reasons connected with competition and not media plurality.
- The second case involved News Corp's proposed acquisition of the shares in BSkyB that it did not already own. This was a highly unusual case which is unlikely to have international counterparts. As TRAI will be aware, the case did not reach a final decision by the SoS so provides no definitive support for the efficacy or otherwise of plurality controls. Quite the contrary, the case contributed to a wholesale review of whether the existing media plurality test in the UK was workable in practice.

3.25 The upshot is that for the rare cases that raise genuine plurality issues alone, experienced regulators internationally have not yet found effective and workable tools to address this discrete issue. There is no 'tried and trusted' approach that commands universal support and developed regimes have been subject to criticism and as being prone to political interference.

### **Comparative survey of regulatory models**

#### ***Methodology***

- 3.26 We examined the regulatory models that countries have adopted to seek to address concentration in the media and to promote pluralism.
- 3.27 Our survey is descriptive and selective, focusing on a sample of regulatory regimes which exhibit a range of features, political and cultural contexts and at varying stages in their evolution.

#### ***Countries surveyed***

- 3.28 Countries included in this section include: Belgium, Denmark, European Union, Finland, France, Germany, Greece, Italy, Netherlands, Spain, Sweden, UK, and USA. Our review is based on the law, regulation and policy in the countries profiled at the time of our report. Our examination is not intended to be an exhaustive commentary on the particular regimes; rather we illustrate key themes and supplemented through the use of case study examples or 'vignettes'.
- 3.29 We note for comparative purposes that the European regulatory regime reflects a multi-layered system and division of competencies between the EU and the 27 Member States. Sector-neutral merger control applies at EU level where "concentrations with a Union dimension" (i.e. large cross-border transactions meeting certain thresholds) are generally reviewed exclusively by the European Commission

under European Merger Regulation (“EUMR”). The substantive test for clearance is a competition test. However, the EUMR also contains mechanisms for the reallocation of jurisdiction between the European Commission and the national authorities to review mergers including on grounds of “legitimate interest”. The concept of legitimate interest covers plurality of the media.

- 3.30 The EU-wide system is also complemented by the national merger control systems in the EU which apply where the EUMR thresholds are not satisfied and all of which have different tests for intervention.
- 3.31 The structure is also complicated by a patchwork of different national regulatory regimes including sector-specific controls and regulators (whether at national, regional or local level as the case may be). The result is a multi-faceted allocation of competencies within the EU.
- 3.32 A similar plethora of controls is present to a lesser extent in the US. There are multiple federal (national), state and local government agencies potentially involved. The basic sector-specific framework is the Communications Act of 1934. The national regulator, the Federal Communications Commission (“FCC”) regulates interstate and international telecommunications, non-military uses of radio frequency spectrum, over-the-air broadcast television and radio, and certain aspects of cable television content, but generally not internet backbone networks or peering arrangements. State and territorial public utilities commissions regulate intrastate telecommunications services. The Federal Trade Commission (“FTC”) regulates trade practices, marketing, privacy, and data protection in the communications sector, except for common-carrier services.

### Regime type

- 3.33 The regulatory regimes differ in the extent to which they employ one or a combination of (1) regulation of ownership including cross-ownership through cross-ownership restrictions; (2) mainstream merger control using a competition-based substantive assessment; and (3) modification of merger control or cross-ownership rules to address plurality.
- 3.34 Although the regimes differ and are influenced by cultural and political perspectives, some common features emerge in terms of the regulatory models that can be identified. These range in their complexity and media-specificity (Model A = least media-specific and simplest; Model C = highly media-specific and complex).<sup>22</sup> We summarise these regime models in Figure 3-1. We adopt our categorisation based on the features that the country regulation displays as a whole and not on its application within a particular segment of the media (e.g. newspapers).
- 3.35 It should be noted that within the broad “models” particular regimes may differ, sometimes markedly, in terms of the approaches adopted. For example, within Model

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<sup>22</sup> A similar categorisation is identified in “*The regulatory quest for independent media*”, July 2012 (Mediadem).

But we discern a variety of approaches towards ownership caps restrictions (whether in the form of hard caps based on market share, audience share or some other metric). Within Model C the manner in which countries apply a modified substantive approach to seek to capture plurality issues can range from a competition law proxy in terms of market share (Greece) to a more targeted qualitative approach (UK).

**Figure 3-1: Regime models**

|                |  |
|----------------|--|
| <b>Model A</b> | <b>No media ownership rules and sole application of competition rules in merger control</b>  |
| <b>Model B</b> | <b>Media ownership rules and sole application of competition rules in merger control</b>     |
| <b>Model C</b> | <b>Media ownership rules and modified application of competition rules in merger control</b> |

*Source: Consultant analysis*

3.36 In presenting these models three overriding themes emerge:

- First, the media regulatory landscape as it affects ownership and plurality is far more diverse and complex than the selected examples presented by TRAI.
- Second, the technical descriptions of these regimes and their market, political and cultural context emphasises that they cannot be separated from that context. They should not be taken as a blueprint for export into a wholly different market environment where the local context is very different.
- Third, even those regimes like the UK that have more complex regimes, these have developed over a number of years and are not without costs. The regimes have been implemented by specialist regulators that have had a track record of dealing with similar issues.
- Fourth recent attempts to incorporate plurality tests without a Regulatory Impact Assessment and proper consultation with industry have floundered. The month of March 2013 saw the release – and 11th hour withdrawal – of hotly contested reforms to Australian media regulation. The proposed reforms comprised four bills affecting media ownership and regulation of media professionals and incorporated a controversial plurality test. They attracted vociferous condemnation from the media industry’s most prominent leaders including public statements from News Limited and Ten Networks. Serious reservations were expressed about the content of the bills, and that they were presented without proper consultation with industry and the Opposition. The political repercussions of the aborted proposals are only just being felt. This recent experience, at the very least should urge caution to newer regulators such as TRAI in implementing radical reforms without an assessment of underlying regulatory failure and the appropriateness of the proposed regime for the specific market.

### Case studies

- 3.37 To illustrate the operation of the above models in their market context it is useful to examine examples of regimes which correspond to the various models. The level of ownership concentration differs across the countries surveyed and with some regimes having stricter and more flexible regimes than others.
- 3.38 We note that the rules operating in a particular country cannot be separated from the legal, economic and, most importantly, the political context in which they take place. This is inherent in the nature of plurality which is designed to safeguard values that are commonly recognised as underpinning modern democracies. It is possible – indeed expected – that the rules discussed in our report will change before TRAI implements its final decision. For example, in Italy, the outcome of the election is expected to influence the future direction on Italian media ownership.

### Model A: No media ownership rules and sole application of competition rules in merger control

#### *Sweden*

- 3.39 Sweden's media industry is the largest in Scandinavia. Over the years, the Swedish and other Scandinavian governments have cooperated to seek to ensure effective competition and address fears that more financially powerful Swedish companies will be able to gain market power across the Scandinavian media sector. This has contributed to an environment where there are few restrictions on media ownership. There are no sector-specific controls on ownership of the media in Sweden and mainstream competition-based merger control applies to M&A and joint ventures in the sector.

#### *Netherlands*

- 3.40 The Netherlands was comparatively late in liberalising its media and terrestrial broadcasting sector with the first commercial and private broadcasting licences first issued in 1990. Since then it has made significant advances and has now removed restrictions on companies merging or acquiring assets in individual media segments and across the media beyond mainstream competition law.
- 3.41 As of 1 January 2011, the Netherlands withdrew the Temporary Law on Media Concentrations, which prohibited cross-ownership of daily newspapers, radio and television activities in one group if the individual market share on any of these three markets was higher than 35 per cent, and the sum of the individual market shares (either on two or three markets) after the transaction exceeded 90 per cent. Therefore, there are no specific rules dealing with cross-ownership. Hence cross-ownership of media companies is assessed under competition-based merger control and competition laws only.

- 3.42 It should be noted that the outcomes in Model A regimes may be achieved in countries which adopt more complex controls and where reviews by the sector regulator and the competition authority achieve the same result.
- 3.43 A case in point is the US where both FCC and the antitrust agency may scrutinise a transaction in the media and communications sector. On 10 October 2002, the US communications authority, the FCC, announced that it had declined to approve the transfer of licences from EchoStar Communications Corporation and Hughes Electronics Corporation, a subsidiary of General Motors Corporation, to a new entity. The FCC effectively rejected any idea that the transaction could be modified to allay its concerns, notwithstanding that it had approved transactions after accepting commitments from the merged entity.
- 3.44 The FCC reached its decision before the Department of Justice's Antitrust Division reached its own decision welcoming the decision by the parties to abandon the transaction.<sup>23</sup> This is not the place to revisit the merits or otherwise of this outcome. Rather, the case points to the fact that mainstream competition based merger control and sector-specific controls can lead to the same result by different routes.

#### **Model B: Media ownership rules and sole application of competition rules in merger control**

##### ***France***

- 3.45 France has stringent and complex media ownership rules.
- 3.46 In the broadcasting sector, French law provides for a maximum holding of 49 per cent of a company that has an authorisation to provide a national terrestrial television service, where the average audience for this service (whether digital or analogue) exceeds 8 per cent. Any person who already holds a national terrestrial television service, where the average audience for this service exceeds 8 per cent, may not directly or indirectly hold more than 33 per cent of a company that has an authorisation to provide a local terrestrial television service.
- 3.47 Cross-media ownership in France is not prohibited but is subject to controls. The granularity of the regulation is cited here not as an example of an approach that should necessarily be emulated but to illustrate it is at the extreme of specific regulation. The holder of more than 15 per cent of a company operating a national terrestrial television channel may not hold more than 15 per cent of another company active in the same sector. The holder of more than five per cent of two companies holding an authorisation to provide a national terrestrial television channel service may not hold more than 5 per cent of a third company.

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<sup>23</sup> [http://www.justice.gov/atr/public/press\\_releases/2002/200539.htm](http://www.justice.gov/atr/public/press_releases/2002/200539.htm)



- 3.48 There is also a ‘two-in three’ rule whereby operators may not, beyond certain thresholds, operate or control more than two out of three of certain types of media. This applies at French national, regional and local level.
- 3.49 Although France may be regarded as a textbook example of the application of rigid media ownership cap – and is indeed cited by TRAI as an example of media ownership rules, the regime has to be understood in its political and cultural context. France had a long history of government censorship going back to the 16th and 18th centuries. Nowadays the freedom of the press is guaranteed by the French Constitution.
- 3.50 It is not surprising that in the context of this ‘Gallic’ culture there has also been an impetus to resist any form of ‘economic’ censorship as a result of any voice becoming overwhelmingly powerful owing to a concentration of media ownership. This has manifested itself on the one hand in strict formulaic ownership controls. That said, this has stopped short of any special media rules in the merger control context where a pure competition analysis is deemed sufficient. Thus, even a country that may be considered to be more an outlier in terms of media ownership regulation has elements of moderation in its pure competition based approach to merger control in the media sector.

### **Model C: Media ownership rules and modified application of competition rules in merger control**

#### *United Kingdom*

- 3.51 Regulation of the UK media industry has a long history. Over the years the government has stripped away restrictions on media ownership which has created a more attractive environment for investment.
- 3.52 The Communications Act 2003 substantially removed former restrictions on cross-media ownership in the UK by removing certain prohibitions and raising the relevant market share thresholds. The Media Ownership (Radio and Cross Media) Order 2011 was enacted in June 2011 and removed all local cross-media ownership restrictions.
- 3.53 However, the UK currently displays one of the more complex systems for control of media concentration and plurality. A detailed summary of the media plurality merger control regime in the UK is set out in Appendix 2.
- 3.54 The first case under the current legislation where the SoS has intervened in a (media) merger on public interest grounds was the aborted acquisition of BSkyB by News International/ News Corporation. Another newspaper case where the SoS considered the case for intervention was Northern & Shell’s acquisition of Channel 5 from RTL. This transaction completed on 23 July 2010, without prior notification to the OFT. The SoS did not however intervene in this case, largely on the basis that Channel 5 was not a major source of news in the UK. In addition, Northern & Shell newspaper titles (the Daily Star, Daily Express and the Sunday Express) had a significantly lower

market share - in the region of 10 to 14 per cent, compared to 37 per cent for News International titles at the time.

- 3.55 The public interest procedure continues to evolve and there is limited government guidance apart from the (old) guidance of the Department of Trade and Industry (now Business, Innovation and Skills) on the operation of the public interest provisions relating to newspaper and other media mergers.<sup>24</sup> This is despite a decade of experience by specialist regulators in implementing the rules. Ofcom has, however, provided new guidance to government on specific aspects of plurality, which we discuss below.

### **The on-going debate on media plurality**

- 3.56 Our brief survey above has been primarily descriptive of the status quo in the relevant regimes. However, the debate among regulators and policy makers in this area is on-going and remains polemic. A few examples will serve to illustrate the issues that have been faced even by countries who have had experience applying controls on plurality. In short, there is no 'one size fits all' and while pockets of consensus emerge, this is not universal.
- 3.57 Clearly media plurality is important; a crucial feature of a democratic society and a valid policy objective. But it is difficult to define (more so in practice than in theory) and challenging to measure. In particular, identifying a definitive way to measure cross-media plurality remains tricky; there is no acceptable cross-media exchange rate. This boils down to the fact that 'impact' or 'influence' is almost impossible to assess. Thus trying to add up the consumption of TV, radio, newspaper and online news is fraught with difficulties.

### **Academic perspectives**

- 3.58 The European Commission engaged a consortium of consultants and academics to conduct a major study on media plurality across EU Member States. Its objectives were to consider appropriate metrics to measure media plurality and to monitor and indicate risks to media plurality. It developed a diagnostic tool, the 'Media Pluralism Monitor' which comprises more than 160 indicators. And while a report was published in 2009, there appears to be no subsequent developments. This is not surprising – it seems unlikely that 27 Member States would compile and monitor 166 metrics.
- 3.59 Another study critically reviews how a number of plurality regimes have worked in practice, covering the Diversity Index in the US (2003), the public interest or plurality test in the UK (2003), the integrated communications system ("SIC") in Italy (2004), and the German regulator's ("KEK") approach to weighting the influence of various

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<sup>24</sup> *Guidance on the operation of the public interest merger provisions relating to newspapers and other media mergers*, Guidance Document, May 2004

media in the context of its merger decision on ProSiebenSAT.1 Media AG and Axel Springer Media AG (2006).<sup>25</sup>

3.60 The observations made in the paper are worth reproducing:

*"Measuring media concentration has always been a difficult task and results were never satisfactory. The convergence of media, telecommunications and information technologies adds a new dimension to this problem as it results in changing market structures, exacerbating among other things the handling of cross-ownership and market definitions, and in claims for a greater emphasis on empirical evidence."*

*"The instruments are novel but imperfect responses to the issues surrounding today's communications policy making. They have been appraised cautiously due to their methodological shortcomings and have been criticized outright: the [UK] plurality test applies only to mergers that would have been covered by the rules prior to their removal by the 2003 Communications Act, the [US] DI neglects variations in size of media companies, the KEK's weighting approach arbitrarily assigns the equivalence of audience share in television to other media, and the SIC's market definition is too broad, thus rendering it unlikely that a company will have a dominant position under it."<sup>26</sup>*

3.61 The study is highly critical of the various plurality regimes assessed, stating that none of the approaches are reliable or objective, and, importantly that there is a:

*"lack of sound empirical proof of whether they achieve what they are supposed to."<sup>27</sup>*

3.62 Moreover, the author relays how the FCC moved away from its diversity index following a review in 2006:

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<sup>25</sup> Natasha Just (2009) "Measuring media concentration and diversity instruments in Europe and the US", DOI: 10.1177/0163443708098248, Media Culture Society 2009; 31; 97.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

*[it] “is an inaccurate tool for measuring diversity” (FCC, 2008: 12). [In the future it will] “not employ any single metric, such as the Diversity Index, because ... there are too many qualitative and quantitative variables in evaluating different markets and combinations to reduce the task at hand to a precise mathematical formula.” (FCC, 2008: 43).*

### **Regulatory policy perspectives**

- 3.63 We also detect on the part of regulators themselves a trend of questioning of once ‘tried and tested’ mechanisms to see whether they are effective or need to be changed.
- 3.64 In the UK the Leveson Report and on-going review of media ownership regulation has again revisited the role that tighter or more sophisticated rules could play in promoting plurality. Ofcom has made some sensible recommendations in identifying the market characteristics that when present are indicative of sufficient plurality. Its suggestion that it is appropriate to examine a range of metrics ‘in the round’ and make a subjective judgment is sensible and echoes the approach adopted by the CC in ITV/BSkyB. However, this conclusion comes after many years of soul searching by an experienced regulator and many distractions along the way. It by no means follows that an approach ‘in the round’ is appropriate in all regulatory regimes given the inherent subjectivity of such a benchmark.
- 3.65 In the US there is still vigorous debate on the scope and content of media ownership rules. On 22 December 2011 the FCC proposed changes to its media ownership rules. The FCC is required by statute to review its media ownership rules every four years to determine whether they are “necessary in the public interest as the result of competition”. The final vote on the new rules was expected to take place in early 2013. However, on 26 February 2013 the FCC announced a delay while the FCC conducts an impact study on how cross-ownership affects minority ownership.
- 3.66 Appendix 2 provides further details on the on-going media ownership regulatory debate in the UK and US. In the UK concerns have arisen that the plurality test is subjective and vague and could be subject to political interference. In the US concerns have arisen that hard limits on media ownership should themselves be subject to discretionary application but with as yet no clear consensus on how that should be applied. The protracted and, at the time of writing ultimately inconclusive positions in both countries has led observers to question whether these tests provide a benchmark to be emulated overseas and in countries which have no prior experience of applying media ownership controls.

### **Conclusions and implications for policy**

- 3.67 Our survey of media ownership rules has been primarily descriptive and narrative. This is deliberate and serves to illustrate the history and market context underpinning the relevant regimes and how they have developed. Only having considered that

context can India decide whether, given elements of congruence (if any) between the overseas regimes and India, it is appropriate to draw inspiration from that experience when designing India's approach.

3.68 Below we identify the key trends emerging. The omnipresent trend emerging is that there is no 'one size fits all' and the regime design choice cannot be divorced from the political and cultural environment in which it takes place. However, some features tend to be recurrent.

- General application of competition law: In all the countries in our survey, competition law and mainstream sector-neutral merger control is applicable regardless of the sector. India has a solid platform with a modern competition authority – the CCI – already actively enforcing competition law and competition-based merger control in the media and communications sector.
- Sole application of competition law: Some countries adopt only sector-neutral regulation where the media sector is subject to the same regulation as other sectors and there are no additional requirements or controls (e.g. Denmark, the Netherlands, and Sweden). In India, the CCI is building up experience in this area. It has issued significant decision in the media and communications sector and beyond, in relation to mergers, agreements and commercial practices.. No arguments or evidence have been put forward by TRAI or others to demonstrate that the CCI is not able to address threats to competition effectively. No assessment has been put forward to demonstrate that there are significant "gap" cases where competition law cannot address concerns as to media diversity. This would imply that reliance on competition law alone is the most appropriate option for India unless and until a robust Regulatory Impact Assessment is conducted of the alternatives.
- Cooperation between competition and sector regulator: In the absence of sector-specific regulation – and even where there are sector specific rules – there is co-operation between the competition authority and the sector regulator (e.g. Finland, UK). Refraining from implementing media-specific controls in India does not mean that sector insights cannot complement and enhance the operation of the competition regime. There are already initiatives underway in India through the pending reform to competition law that are designed to bring about a more efficient and predictable division of functions between the CCI and sector regulators, including TRAI. TRAI's proposals go in the opposite direction of these reforms by advocating an additional lawyer of regulation with no proven case that there is a problem to be addressed and that the proposed solution is appropriate.

- Targeted ownership restrictions: Where ownership restrictions or caps apply there tends to be differences depending on the type of media or concentration. There is no universally accepted approach among regulators. Rather, there is an appreciation of the need to take account of the specifics of individual media market segments. The trend is away from a 'sledge hammer' that uses a blunt instrument to tackle complex issues.
  - There tend to be few restrictions on ownership of the press or concentration between newspaper companies.
  - Where cross-media regulation is present, this tends to be applicable mainly to the broadcasting sector (e.g. Germany). The position in India is fundamentally different, where there is no licensing of private terrestrial broadcasters. Any risk of a private broadcaster using or leveraging its broadcasting presence into other segments of the media is not present.
  - Cross-media ownership regulation makes places no impediment on ownership across traditional and new media (i.e. a bricks and mortar newspaper provider distributing online). The evolution of new media affects media regulators in two main ways. First, at the definitional level there is no compelling need to differentiate between traditional and new media in terms of the regulation imposed provided there is functional equivalence. Second, the explosion of new media in the last decade has radically transformed the media landscape. This itself creates additional diversity which tends to obviate the need for intrusive controls that were developed for a very different regulatory era.

- **Licensing:** The licensing system is also used to supplement competition law or sector-specific controls, particularly in the broadcasting sector (e.g. Belgium, France, and UK). This impacts both the number of licensed providers, as well as the content that is disseminated. In this way, the licensing system may serve as a screen which seeks to promote pluralism by ensuring that licensed providers observe certain minimum requirements such as impartiality and accuracy. If, having reviewed the consultation responses TRAI still believes that additional controls are required one route would be via licensing obligations if these can be informed by a cost-benefit analysis. Such controls may resemble the controls on political parties owning segments of the media as appears in the Consultation. A targeted approach that is the minimum necessary to address a demonstrable market failing would be consistent with international norms and could supplement the role of the CCI. Indeed, this would be consistent with regimes which have some sector-specific modifications for the media sector. In this way, the two laws inform each other and the strictest rule applies – whether that is a sector-specific rule or general competition law. This is not a matter of treating media as a ‘special case’ but a matter of finding a problem and seeking to correct it with a targeted solution.
- **Sector-specific rules on plurality:** Some countries have supplemented their media ownership rules and mainstream merger control with sector-specific substantive rules or presumptions. These tend to be the exception and vary in sophistication. Two approaches emerge (1) adoption of proxies for measuring plurality such as market share thresholds (e.g. Greece); and (2) employing a specific substantive quantitative and qualitative assessment which seeks to define plurality more accurately (e.g. UK). A ‘bright line’ market share threshold may have advantages in terms of ease of application but it suffers as being a blunt instrument that gives no scope for qualitative assessment. The latter approach has come under criticism where it has been adopted as expensive, complex and unclear in its application.
- **Evolution: The regulatory regime is subject to evolution. Overall, there can be seen to be a reeling back of ownership regulations whether in the form of ownership caps or restrictions by category of owner (e.g. the Netherlands and UK).**
- **Risk of political capture:** It is also important to keep in sight that many of these laws take place against a background of lobbying by interest groups. It is observed that ownership caps are often influenced by the need for preservation of incumbent interests (or, conversely, may be targeted to address certain combinations which were deemed inimical to the public interest). At a time when India is keen to maintain its position as a destination for investment and a ‘halo’ jurisdiction among the BRIC countries, it should be wary of embarking on additional layers of regulation that are politically expedient in the short term and damaging to economic growth in the longer term.

- Risk of unintended consequences: In the absence of a Regulatory Impact Assessment there is a significant risk that India could embark on regulation that is not fit for purpose and based on outdated market research. Far from correcting a market failure that has not been demonstrated, the result could be significant damage to markets. Such a course is also likely to undermine the credibility of the Indian regulatory regime. This is even more worrying at a time when India's regulatory system is gaining credibility internationally and in particular through the work of the CCI.<sup>28</sup> An example of the political repercussions of regulation proposed in the absence of a Regulatory Impact Assessment and amid vehement opposition is the recent collapse of the Australian media reforms as we discussed previously in this section.
- Inherent challenges of measuring plurality: Policy makers around the world are facing similar challenges: how best to measure plurality, whether or not online media should be included and how best to achieve a balance between fulfilling policy objectives while not restricting markets. Where they exist, ownership restrictions tend to be simple and crude (albeit arbitrary) for both mono and cross-media cases; complex measurement systems are not an observed trend. This is not surprising as weighting the relative influence of the various news media is problematic; it is subjective, subject to challenge and difficult to justify on empirical or a priori grounds. This situation raises serious doubts about whether India should embark on specific plurality controls at a nascent phase in the evolution of its competition regime. At the very least, there is much to be said for allowing CCI to get a track record of cases under its belt – and cases that have withstood judicial scrutiny where appropriate – before embarking on a more elaborate regime.

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<sup>28</sup> CCI has been nominated as Competition Authority of the Year in relation to the 2013 Global Competition Review Awards. The results are awaited at the time of writing.



## 4 Vertical integration

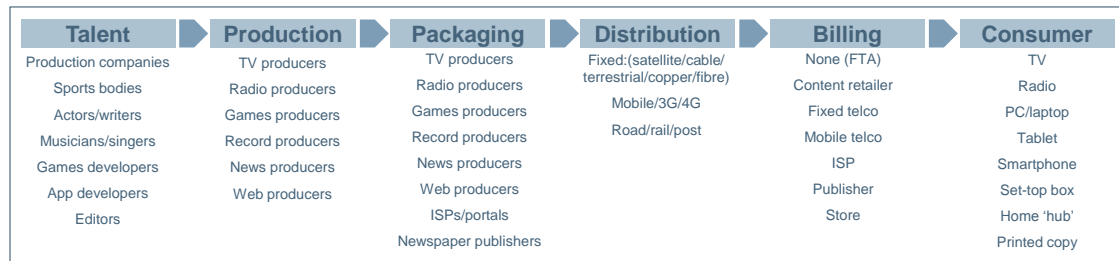
### Introduction

- 4.1 Consolidation of previously distinct enterprises (whether through merger, acquisition, joint venture or strategic alliance) can be viewed through a number of different lenses, depending on where the companies operate and interact in the supply chain.
- 4.2 A convenient economic distinction is between: (1) horizontal issues (i.e. mergers between companies operating at the same level in the supply chain such as between two mobile telephony networks); (2) vertical issues (i.e. mergers between companies operating at different levels in the supply chain which are related such as between a film producer and distributor); (3) conglomerate (i.e. mergers between companies who operate in different markets which may be upstream, downstream or neighbouring such as between a newspaper, internet service provider and TV channel).
- 4.3 In the media and communications sector, there has been a notable trend towards vertical integration and this is a feature of concentrations that has been examined closely by the competition authorities. The extension of the presence of a company across the value chain brings economic efficiencies. At the same time, it can present competition issues where the company possesses market power at one or more levels in the supply chain.
- 4.4 In this section we outline:
- the economic drivers of mergers in the media and communications sector and the economic issues raised by vertical integration;
  - recurrent themes in the competition assessment of vertical integration; and
  - how competition authorities internationally have approached the issue of vertical integration and how they have sought to balance the goals of economic efficiency and competition, permitting consolidation in the sector with or without conditions.

### A schematic of the media value chain

- 4.5 While relatively high-level, Figure 4-1 provides a schematic of the media value chain (drawn to encompass various media such as newspapers, pay TV, radio, free-to-air (“FTA”) broadcasting etc.). Clearly there are various technical interfaces between each of the stages (such as middleware, content distribution systems, conditional access systems and so on) but the diagram indicates the important elements from ‘ideas’ through to a specific service delivered to the consumer. The diagram is important as it sets out a framework within which the competitive nature of each stage may be assessed should competition concerns arise. It is also useful in that it depicts at a high level structures that are observed in ‘real world’ companies.

**Figure 4-1: Indicative media value chain**



Source: FTI Consulting

### Vertical integration in an economic context

- 4.6 The economic understanding of vertical integration and its practical implementation in competition policy and merger control has undergone substantial “swings”. The changes in scholarly opinion and antitrust and merger practice reflect the fact that there are both positive effects from vertical integration in the form of efficiencies (such as consumer benefits arising from, say, lower prices), and potentially negative effects in the form of foreclosure of non-integrated rivals.
- 4.7 The swings also reflect a shift from competition policy as a tool for protecting “competition” to a tool protecting “consumers”.
- 4.8 Vertical integration may make it more difficult for non-integrated companies to compete and therefore competition policy would interfere frequently if the protection of competition/ competitors was the objective.
- 4.9 But due to the inherent efficiencies of vertical integration the greater difficulty for non-integrated competitors does not necessarily translate to harm for consumers. Instead, the difficulty could arise because non-integrated firms face a more efficient rival. Therefore, when competition policy’s objective is to protect consumers, there should be less intervention.

### *Three phases of economic and competition policy thought*

- 4.10 Three phases can be distinguished in economic and competition policy thought. Until around 1970, vertical integration and vertical mergers were seen very critically. This was due to the focus on protecting competition and competitors, combined with a failure to recognise efficiencies of vertical integration.
- 4.11 The Chicago Law School then argued strongly and successfully for the efficiency rationale of vertical integration. It was argued that vertical integration arises due to these efficiencies rather than with the aim to foreclose competitors. It was also argued that there is only one profit to be made in the market and a single integrated firm might be better placed to exploit that profit.

4.12 More recently, a more nuanced approach has been developed. The context of individual situations now plays a more important role.

4.13 However, the pendulum of research and opinion has by no means swung back to a damning view of vertical integration. On the contrary, there is a presumption that vertical integration and vertical mergers are less harmful than horizontal mergers. The view is stated most clearly in the “Non-horizontal merger guidelines” by the European Commission:

*“Non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers.*

*First, unlike horizontal mergers, vertical or conglomerate mergers do not entail the loss of direct competition between the merging firms in the same relevant market. As a result, the main source of anti-competitive effect in horizontal mergers is absent from vertical and conglomerate mergers.*

*Second, vertical and conglomerate mergers provide substantial scope for efficiencies.”<sup>29</sup>*

4.14 For the TRAI, the concern over vertical integration arises between programming (broadcasting / content services) and access to consumers (distribution services).<sup>30</sup> The Consultation states:

*“More and more broadcasting companies owning television channels are venturing into various distribution platforms [...]. Similarly, many companies owning distribution platforms are also entering into television broadcasting.*

*Though the vertical integration of various entities within a particular sector results in reduction in cost to the company as well as offers economies of scale, it often manifests in the form of ills of monopolies viz. higher cost to the consumers, blocking of competition, higher entry barrier for the new players to venture into the sector, deter innovations, deterioration of the quality of service to the consumers in the long run etc.”<sup>31</sup>*

4.15 This thinking appears quite similar to US and European antitrust thought before the Chicago school, i.e. before the 1970s. It is hostile to vertical integration. We believe that the approach would benefit from the advances in economic thinking that have led to a more positive but still nuanced view of vertical integration.

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<sup>29</sup> “Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings”, Official Journal of the European Union (2008/C 265/07) (2008), paragraphs 11-13.

<sup>30</sup> Consultation, paragraph. 6.1.

<sup>31</sup> Consultation, paragraph. 6.1-6.2.

***A last preliminary: vertical integration and vertical restraint***

- 4.16 A first important insight into vertical integration is that such integration is not the only way for an upstream firm (a broadcaster) to enforce a certain type of behaviour on a downstream firm (the distributor). For this reason, economic theory has introduced the more general term “vertical restraint”. An upstream firm can vertically restrain a downstream firm through a particular type of contract rather than owning the firm outright. The simplest such contract, which is not allowed in many countries, is resale-price-maintenance. Under resale-price-maintenance, an upstream firm sets the retail price of the downstream firm. There are other contractual forms available to vertically restrain the behaviour of downstream firms: franchising, exclusive contracts, rebates are all ways in which an upstream firm attempts to influence the behaviour downstream.
- 4.17 Given that contractual restraints emulate vertical integration, it is correct for the TRAI to discuss these together. There are provisions in place by TRAI that limit the use of vertical restraints. These are:
- Every broadcaster must provide on request signals of its TV channels on a non-discriminatory basis to all distributors of TV channels including cable networks, Direct-to-home, Head-Ends-in-the-Sky.
  - No exclusive contracts are permitted between broadcasters and distributors of TV channels.
  - The broadcasters are not to insist on guaranteed, minimum subscription amounts from distributors of TV channels.<sup>32</sup>
- 4.18 Given these basic provisions, which are already quite strict limitations on vertical restraints, it is advisable not to impose strict additional per se rules, such as market share thresholds, above which vertical integration is no longer allowed. In such cases, firms might circumvent the regulation of vertical integration and instead use contracts to enforce vertical restraint by downstream (or upstream) companies that would still be allowed under the TRAI provisions. Such vertical restraint contracts, while having similar effects, may in some cases not yield the same efficiencies that would be obtained under vertical integration, such that the prohibition of vertical integration may lead to the undesired outcome of vertical restraint without compensating efficiency gains.
- 4.19 In our view, the vertical restraint limits in place combined with a review of vertical mergers on a case-by-case basis, and a review of other vertical clauses on the basis of existing Indian competition law are significant regulatory tools to seek to curb adverse market outcomes as a result of vertical integration. In this way, the risk of an efficiency loss through vertical separation would be minimised.

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<sup>32</sup> Consultation, par. 6.7

***The treatment of vertical restraints under Indian competition law***

*Indian competition law already has tools to address vertical restraints.*

- 4.20 The treatment of agreements under the Competition Act differs depending on whether horizontal arrangements (i.e., between enterprises or persons operating at the same level in the supply chain) or vertical arrangements (i.e., between enterprises or persons operating at different levels in the supply chain) are concerned. The treatment of vertical agreements is more nuanced than that relating to horizontal agreements, reflecting the need for an effects-based approach.
- 4.21 Horizontal arrangements, relating to price fixing, limitations on production or supply, market sharing and bid rigging, are presumed to have appreciable adverse effect (“AAE”) on competition under section 3(3) of the Competition Act.
- 4.22 Vertical agreements, such as those between a supplier and a distributor, will be subject to a rule of reason-type analysis. Section 3(4) provides that vertical agreements (specifically, including resale price maintenance, exclusive supply or distribution agreements, tie-in arrangements or refusal to deal), will be considered agreements contained within the prohibition of anticompetitive agreements under section 3(1) if that agreement causes, or is likely to cause, an AAE on competition within the relevant markets in India. Figure 4-2: contrasts the treatment of horizontal and vertical agreements under Indian competition law.

**Figure 4-2: Horizontal vs. vertical agreements**

| <b><i>Horizontal agreements</i></b><br>Between enterprises or persons operating at the same level in the supply chain   | <b><i>Vertical agreements</i></b><br>Between enterprises or persons operating at different levels in the supply chain |
|---|---|
| <i>Cartels (fixing directly, or indirectly, purchase or sale prices)</i>  | <i>Tie-in arrangements</i>  |
| <i>Limiting or controlling production, supply, markets or technical development, investment or provision of services</i>  | <i>Exclusive supply</i>   |
| <i>Sharing markets or source of production or provision of services by allocation of geographic area of market, type of goods or services, number of customers in the market etc.</i> | <i>Exclusive distribution</i>   |
| <i>Bid rigging or collusive tendering</i>   | <i>Refusal to deal</i>  |
| <i>Presumed to have an appreciable adverse effect on competition</i>  | <i>Resale price maintenance</i>   |
|   | <i>Subject to rule of reason-type approach (i.e., need to be assessed for effect on competition)</i>                  |

Source: Consultants’ analysis

***Economic reasoning of vertical integration: the initial sceptical view***

- 4.23 The initial antitrust and merger control view until around 1970 was that exclusive contracts and other types of vertical restraints were bad and that vertical mergers should be seen with suspicion, since they could foreclose competitors.
- 4.24 The foreclosure concern can apply both upstream and downstream. When an upstream firm and a downstream firm merge, the upstream firm may decide to no longer supply independent downstream competitors since it wants to avoid creating competition for its own downstream business. The downstream firm can however also decide to no longer buy from a rival of its new upstream parent and in this way foreclose the upstream firm's access to consumers. Applied to TRAI's concern, the thinking was that when a content firm and a distribution firm merge, the content firm may no longer provide content to other distributors; and the distributor may no longer buy content from other firms.
- 4.25 While the ability to foreclose rivals is present in these instances, the question of whether the vertically integrated firm has incentives to foreclose upstream or downstream is a further issue that needs to be understood. The reaction against the pre-Chicago Law School orthodoxy was that, usually, there is no such incentive to foreclose, and that, moreover, the reason for why firms vertically integrate is for reasons of efficiency. Such efficiencies can be operational in their nature as described by TRAI, but, more importantly, they can arise from overcoming the inefficiency of vertically separate contracting. The Consultation does not appear to realise that efficiencies are not only of an operational, but also of a contractual nature.

***Efficiency gain of vertical integration: avoiding double marginalisation***

- 4.26 In addition to operational efficiencies, the competitive rationale for both vertical integration and the use of contracts to impose vertical restraints is the existence of the efficiency loss caused by "double marginalisation" under separate ownership.
- 4.27 The concept is the following: when one compares vertically integrated firms against firms that are vertically separated, retail prices in the separated scenario can be higher since downstream firms' input prices already face a margin, to which they add a second margin. By adding a second margin, downstream firms do not take into account that the second margin leads to lower sales for the upstream firm. If instead, upstream and downstream firm agreed on just one margin that is applied to the downstream price, prices would be lower and industry profits higher. An intuitive way to see this problem is that by fighting over the margin, upstream and downstream firms lose sight of the customer. For the downstream firm, it is better to have a higher share of the total margin, even if the overall profit pool declines due to prices that are too high for profit maximisation.

- 4.28 In the academic literature, the existence of double marginalisation has been shown to exist for example in the US cable industry.<sup>33</sup> It is shown that vertically integrated cable operators that produce both content and distribute TV have a larger subscriber base suggesting that they have better pricing.
- 4.29 The Consultation appears unconvinced regarding arguments of economic efficiency. This however is due to a narrow interpretation of economic efficiency as “economies of scale” and therefore of an operational nature.<sup>34</sup> In contrast, the economic efficiency that is considered under the topic of “double marginalisation” does not refer to greater operational efficiency and a lower cost of output, but is efficiency in contracting.
- 4.30 Once the efficiency of double marginalisation is considered, the question of foreclosure takes on a different meaning. A vertically merged firm will have incentives to use its downstream operation for efficiency reasons. This might mean that other downstream firms will not get the same favourable contractual conditions as the integrated retail arm.
- 4.31 The vertical merger, from a competition point of view, should however still go ahead since the other firms could still access the services. It is only the fact that they are more expensive to use for the upstream firm (and therefore less efficient) that they will get worse trading terms. In the worst case, the upstream firm will offer the monopoly price, but this still leaves the downstream firm able to operate. The upstream firm will not set a price higher than the monopoly price since that would hurt its own profits. Since there is only one profit to be made in the market, offering the monopoly price to downstream rivals does not undermine the integrated firm’s vertically integrated business model. It has little reason to truly foreclose a rival.

#### ***More nuanced post-Chicago view***

- 4.32 During the last decade or so, a ‘post-Chicago’ literature has developed which has introduced some nuances in this thinking. Examples are the potential foreclosure of upstream (content) firms through exclusive contracts if those firms are too small to satisfy the demand for the downstream firms.<sup>35</sup> A further nuance is the possibility that tacit collusion (coordinated behaviour) is enhanced by vertical mergers since the vertically integrated firm would be harmed less by a punishing price war as it would benefit from lower wholesale prices.<sup>36</sup> There are further such examples. They all rely on special conditions that apply in certain circumstances, but not in others. The

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<sup>33</sup> D. Waterman and A. Weiss (1996), *The Effects of Vertical Integration between Cable Television Systems and Pay Cable Networks*, *Journal of Econometrics* 72: 357-395.

<sup>34</sup> Consultation par 6.1-6.3.

<sup>35</sup> C. Fumagalli and M. Motta (2008), *Buyer Miscoordination, Entry and Downstream Competition*, *Economic Journal* 118: 1196-1222.

<sup>36</sup> V. Nocke and L. White (2005), *Do Vertical Mergers Facilitate Upstream Collusion?*, PIER Working Paper No. 05-013.

insight from this development for TRAI should be that each vertical situation should be considered on its own merit.

4.33 Even with these new contributions to the literature that provide more nuance to the Chicago Law School view that vertical integration does not matter, it is not the case that the previous school of thought that vertical integration was bad since foreclosure would occur has been resurrected. This is due to the existence of double marginalisation.

4.34 **From the view of economic theory therefore, there is little support for TRAI's view of vertical integration.**

*Efficiency gain of vertical integration: flexibility to technological change*

4.35 In the media and communications industry, there is a further important element to vertical integration in addition to double marginalisation: technological change in communications results in supply and cost shocks that can very rapidly change the competitive position of market participants in the value chain.

4.36 Three examples suffice to illustrate this force:

- The digitalisation of distribution channels - whether via fibre, xDSL, terrestrial, cable or satellite - increases the supply of distribution very significantly over the previous analogue transmission. As a result, what was previously a technical bottleneck for the provision of media content is now much less so.
- Further, this increase in distribution supply is extended to practically unlimited supply of content via internet through cable, fixed network or broadband wireless lines. Since on the internet there is effectively a one-to-one connection between a content provider and a user of content for the time of transmission of the content, there is no longer a technical limitation to how much content a user can access. In fact a user can switch seamlessly between different content providers. This change represents a very substantial supply shock for distribution networks. Without the technical limitations of distribution, they also have much lower economic incentives to foreclose content providers. As soon as there is a degree of competition of internet distribution, be it via different mobile networks for example, foreclosure of content providers seems highly unlikely.
- A similar technological supply shock has occurred in the creation and provision of content, which has been made much cheaper through technological innovation in recording and sound equipment.

4.37 In this environment of hundreds of TV channels, unlimited content access through internet services and cheap content production, it would be very difficult to economically foreclose entrants, in particular regarding news services. This new supply situation most likely also played a role in the "Arab spring" in that even authoritarian states were no longer able to suppress plurality.



- 4.38 In such an environment, many existing business models are no longer viable. For example, while the Indian press is still stable, there is a world-wide secular decline in traditional print newspapers, which occurred with the widespread adoption of the internet and has accelerated with the fast adoption of smartphones.
- 4.39 Newspaper publishers need to be able to react to such a shock to their industry segment if they are to survive. A parallel argument can be made for cable operators, content providers and all other companies in the value chain.
- 4.40 Companies react to these changes by entering different parts of the value chain. As has been shown in print, it is often not sufficient to simply produce print content as internet content in order to stabilize revenues and profits. This is particularly the case since, in most countries, a significant part of internet advertising revenues is captured by Google. Print companies therefore need to respond to the erosion of print advertising and new competition in internet advertising revenues with different business models.
- 4.41 Several print companies have moved in a direction of using their distribution network to sell other products, such as mobile phone contracts. Or they provide transactions based services such as travel booking services or financial advisory services. Most of these services are not only horizontally distinct from print, but are also different in the vertical sense. Rules that would not allow the development of such differentiated business models as a response to technological change would burden the entire industry.
- 4.42 In this context, one should note that the most successful global companies in the media and communication industry have been expanding upstream and downstream from their original business models:
- Apple, which used to be a hardware and software manufacturer, is now a significant content distributor for the music and film industry, and with its communications applications is an “over-the-top” telecommunications provider.
  - Google, originally a search engine, is a content provider with YouTube, an application service provider with its various mapping, information and communications services, has recently started operating a fibre network in Kansas and has entered the mobile phone devices business with the acquisition of Motorola. It also participated in an FCC auction for wireless frequencies.
  - Qualcomm, the world’s largest mobile chip manufacturer, has throughout its history been active as a mobile operator, a mobile content platform provider, a handset manufacturer, an IP technology provider, a network equipment provider, and so on.
- 4.43 If TRAI restricts such movement between different parts of the value chain, it hinders Indian enterprise. There may well be individual cases of an exercise of market power.

However, one would probably think that these are rare instances that would not warrant general ownership restrictions but could instead be dealt with on a case-by-case basis. Moreover, such concerns are more likely to arise over premium content rather than news or investigative journalism.

### **Competition issues**

#### ***Vertical competition issues in the media and communications sector***

- 4.44 Competition authorities have had to balance the efficiency benefits of vertical integration with potential threats to the competitive process. The multiplicity of markets involved and the often dynamic nature of media markets concomitantly increases the challenges in formulating appropriate and measured responses.
- 4.45 One consequence of vertical integration may be that this alters the incentives of the merged entity to continue to deal with third parties in granting access to content or infrastructure on competitive terms. Such a change in the competitive dynamic may take the form of an outright refusal to supply or pricing strategies where the third party is offered terms which are less favourable than the merged entity's own operations. However, the competition authorities accept that such practices may have pro-competitive effects and are already present to a large extent in the competitive dynamic of the sector. For example, a platform owner may offer its own pay TV services, internet and telephony over its own infrastructure as well as granting access to third parties to distribute their third party content over the platform.
- 4.46 Below we outline some recurrent issues that have risen in merger control proceedings involving vertical integration in the media and communications sector. We return to these theories of harm when we consider solutions that have been accepted by the authorities in concrete cases.

#### ***Access to content***

- 4.47 A company may control a key input that is of value to other companies operating in the sector. In the media sector, this will typically be the company holding the content/ and or copyright of an audio-visual product (whether films, music or TV programmes). This control will be relevant to the competition analysis depending on whether the nature and scope of products and the relevant rights enjoyed allow the holder to gain a competitive advantage over rivals such that it may engage in exclusionary or discriminatory practices and thereby restrict competition.

#### ***Access to infrastructure***

- 4.48 A company may possess infrastructure or technology/know-how that allows it to exercise control in the form of access to a certain market or customer bases. The degree of control over the infrastructure will be relevant from a competition perspective only to the extent that the holder enjoys a significant degree of market power where the infrastructure is critical for a new entrant to gain market access and

expand its presence. The role occupied by the holder of the infrastructure has often been described as a 'gate-keeper'.

### **Leverage**

- 4.49 A related theme concerning vertical integration is a concern of potential "leverage" or the ability to transfer market power into adjacent or neighbouring markets. This concern may arise where media companies seek to distribute their products across multiple platforms.
- 4.50 However, it is important to note that concerns as to market leverage can arise without merger. A notable example is Microsoft's bundling of its operating system and media player. This was the subject of competition law challenges before the EU and U.S. authorities using competition law powers.

### **Network effects**

- 4.51 Convergence in the media communications industry may reflect the phenomenon of network effects. In simple terms, a 'network effect' occurs when the benefit of an individual who is connected to the network increases with the addition of other individuals to the network.
- 4.52 This circumstance tends to invite scrutiny by the competition authorities when evaluating mergers in the media and communications sector. The concern is that the combination of network effects with market power may raise barriers to entry and result in market foreclosure of rival operators.

### **Removal of a maverick**

- 4.53 In the telecoms sector the competition authorities' interest has not been limited to traditional access issues but has shown a readiness in recent years to examine whether the merger might jeopardise the survival of disruptive players or 'mavericks' in concentrated markets.
- 4.54 At the EU national level in Belgacom/ Scarlet<sup>37</sup> the Belgian competition authority found that Belgacom's acquisition of DSL provider Scarlet would deprive the Belgian market of an innovative competitor with a developed optical glass fibre network, quite apart from its small market share. This case may be contrasted with Iliad/Liberty Surf<sup>38</sup> where the merger between two telephone and internet providers was investigated. The French Competition Authority found that rather than eliminating a maverick player the merger would likely strengthen a vibrant competitor (Iliad). The merger was cleared unconditionally.

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<sup>37</sup> "The Belgian Competition Council approves upon remedies the takeover of alternative DSL-provider by the incumbent" (Scarlet/ Belgacom), 7 November 2008, e-Competitions, no 23527.

<sup>38</sup> "The French Minister of economics clears telecom merger without remedies after investigating possible coordinated effects and elimination of a maverick" (Iliad/ Liberty Surf), 22 August 2008, e-Competitions, no 23603.

## Vertical integration and merger remedies

### Remedies typology

- 4.55 In this section we illustrate the types of remedies that competition authorities have deployed to address vertical concerns arising out of mergers in the media and communications sector.
- 4.56 A broad distinction can be drawn between structural remedies (essentially divestments) and behavioural remedies (commitments on conduct). Within these broad categorisations, there are variations on the precise formulation of the remedy. For ease of classification we have considered remedies within the type groupings set out in Figure 4-3:<sup>39</sup>

**Figure 4-3: Merger remedies by type**

| Structural remedies  | Behavioural remedies                         |
|--|--|
| Divestiture of a controlling stake in a viable standalone business | Granting of access to content                |
| Divestiture of a business carved out from a company structure      | Granting of access to technology             |
| Divestiture of assets  | Granting of access to infrastructure         |
| Divestiture or grant of long-term licence                          | Termination of exclusive vertical agreements |
| Commitment to exit from a JV                                       | Other behavioural                            |
| Other structural   |  |

Source: Based on categorisation in *National Merger Remedies* as per footnote 39

<sup>39</sup> This classification is based on the categorisation of merger remedies by type in the examination of national merger control remedies in the information and communications sector contained in “*Breaking up is hard to do*” – *National Merger Remedies*, ECLR 2009, Issue 9 (Hoehn, Rab and Saggars) (“National Merger Remedies”). The project which formed the basis for this analysis involved a review of over 500 merger remedies decisions across 30 European countries including all the EU Member States in order to examine trends in the number and types of remedies.

## EU experience

### *Structural remedies*

- 4.57 A case involving a combination of structural and behavioural remedies is *Vivendi/ Seagram/ Canal Plus*.<sup>40</sup>
- 4.58 Vivendi was a large company in the media and communications sector with interests spanning mobile telephony, film production and distribution, and pay TV. Seagram was a Canadian company whose interests included the Universal music and film business.
- 4.59 The merged entity would hold the world's second largest film library and the second largest TV programme library in the European Economic Area ("EEA"). It would occupy the leading position in recorded music and a significant presence in publishing rights. The European Commission was concerned that the merged entity's considerable access to premium content presented a risk that if the merged entity had exclusive access this would raise barriers to entry to other pay TV operators.
- 4.60 The European Commission obtained a commitment that the merged entity would not supply its downstream pay TV platform with more than 50 per cent of the premium films available, thereby making the remainder available to competitors.
- 4.61 Vivendi also divested its interest in BSkyB, thereby severing the link with Fox and reducing the amount of premium content that was owned by the merged entity.

### *Behavioural remedies*

#### *Granting access to content*

- 4.62 Access remedies have been typical in media and communications mergers raising vertical concerns. An all-embracing example of this is the 2006 merger between TPS and Canal Sat, two satellite broadcasting and TV service providers in France.<sup>41</sup> The merger was approved subject to an extensive package of commitments. 59 remedies were involved, most of which were aimed at granting access to broadcasts rights, programmes and channels by non-satellite operators. There was close coordination between the French Competition Authority and the sector regulators in this case.

#### *Granting access to infrastructure*

- 4.63 Newscorp/ Telepiu<sup>42</sup> is an example of a case where the European Commission approved a merger raising vertical issues subject to an extensive package of commitments including granting access to infrastructure.

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<sup>40</sup> Case COMP/M.2050, *Vivendi/ Seagram/ Canal Plus*, decision of 24 July 2000.

<sup>41</sup> *TPS/ Canal Sat*, decision of 20 August 2006.

<sup>42</sup> Case COMP/M.2876, *Newscorp/ Telepiu*, decision of 2 April 2003.

- 4.64 Newscorp controlled the Italian satellite pay TV platform Stream jointly with Telecom Italia. Telepiu, controlled by Vivendi Universal, was the dominant pay TV operator in Italy and started operating its platform in 1991 (analogue-terrestrial) before launching satellite in 1996.
- 4.65 The main affected markets were: (a) the markets for pay TV services; and (b) the markets for content acquisition (i.e. premium films, football events, other sports and TV channels).
- 4.66 The European Commission raised concerns that the merger would give rise to significant horizontal overlaps and would increase entry barriers through the creation of a near monopoly in the Italian market for pay TV and close to monopsony positions in the related markets for the acquisition of rights.
- 4.67 The commitments accepted by the European Commission comprised three main groups: (1) access to infrastructure; (2) access to content; and (3) withdrawal from terrestrial broadcasting activities.
- 4.68 As regards access to infrastructure, the parties committed to grant to third parties access to the merged entity's satellite platform and access to the application program interface (API) and conditional access system (CAS), according to a fair and non-discriminatory pricing formula. The merged entity was also subject to the obligation of entering into simulcrypt agreements in Italy as soon as reasonably possible and in any event within 9 months from the written request from an interested third party:

*Guaranteeing terms of supply*

- 4.69 The UK Competition Commission accepted extensive behavioural remedies in a merger-to-monopoly situation in the merger of Arqiva (a subsidiary of Macquarie Broadcast Ventures Ltd) and National Grid Wireless Group.<sup>43</sup> The parties were the only two broadcast wireless transmission network operators in the UK.
- 4.70 Despite the preference of competition authorities for structural remedies, the Competition Commission listened to the views of customers who stated that they would prefer discounts and guarantees of service over a divestment of parts of the network.
- 4.71 The remedies package was underpinned by supporting provisions including a commitment that the new company would allow access at fair prices; the establishment of an Adjudication Scheme to decide disputes between the new company and third parties; the appointment of a compliance officer who was responsible for monitoring compliance and liaising with the Office of Fair Trading, the adjudicator and Ofcom.
- 4.72 The solution was innovative and complex and was facilitated by involvement of the parties' customers and the regulator in the design of an appropriate remedy package.

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<sup>43</sup> *Macquarie/national Grid Wireless*, decision of 11 March 2008.

#### *Facilitating new entry*

- 4.73 In T-Mobile Austria/tele.ring the European Commission found that the merger would result in the elimination of a firm which, prior to the merger, had exerted a significant competitive constraint on the pricing of T-Mobile Austria and its principal competitor, Mobilkom.<sup>44</sup>
- 4.74 The commitments provided that T-Mobile would sell 5 MHz 3G/UMTS frequency blocks which were previously licensed to tele.ring to competitors with smaller market shares. The case illustrates the challenges that competition authorities will sometimes have in demonstrating that competitive harm results from the removal of a maverick.
- 4.75 In securing the remedies package, the identity of suitable purchasers was key. The commitments specified the competitors who were to receive defined frequency blocks. Although this case raised both horizontal and vertical concerns it illustrates some familiar themes that recur in vertical foreclosure cases, most notably the issue of network effects. In particular, tele.ring had started with a small customer base that it had increased through an aggressive pricing strategy.

#### *Unconditional clearance*

- 4.76 It is worth mentioning News Corp/ BSkyB. The European Commission gave phase I unconditional clearance, i.e. no remedies were required. It conducted a detailed assessment of the competitive nature of the various stages of the vertical chain and identified no competition problems.<sup>45</sup>

#### **US experience**

- 4.77 The US agencies have reviewed mergers in the media and communications sector in such diverse sectors as telecommunications, newspapers, radio, films and others. Pozen in her capacity as Assistant Attorney General of the Department of Justice Antitrust Division recently commented that such cases:

*“have benefited consumers, competition and the marketplace for ideas.”<sup>46</sup>*

- 4.78 In order to provide an insight into how the U.S. has approached competition in the media and communications sectors it is useful to consider the recent case of *Comcast/ NBCU JV*.<sup>47</sup> The transaction was allowed to proceed, subject to detailed commitments.

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<sup>44</sup> Case COMP/M.3916, *T-Mobile Austria/tele.ring*, decision of 26 April 2006.

<sup>45</sup> See: [http://ec.europa.eu/competition/mergers/cases/decisions/m5932\\_20101221\\_20310\\_1600159\\_EN](http://ec.europa.eu/competition/mergers/cases/decisions/m5932_20101221_20310_1600159_EN)

<sup>46</sup> “Insights into Antitrust Enforcement in Media Industries”, *Competition law International*, January 2012 (Pozen).

<sup>47</sup> “*Justice Department allows Comcast-NBCU joint venture to proceed with conditions*”, Department of Justice press release of 18 January 2011. (NBCU was formerly called NBC Universal.)

- 4.79 On 18 January 2011 the United States, together with individual states, brought a civil action against a joint venture between Comcast and NBCU. The Antitrust Division filed a proposed settlement imposing restrictions on the conduct of the joint venture which was approved by the court on 1 September 2011.
- 4.80 Comcast was the largest cable and television and internet provider in the U.S. NBCU was the owner of the NBC television network. The Antitrust Division determined that the joint venture would be likely to harm competition in the distribution of video programming by enabling the joint venture to refuse access to or raise the price of NBCU's programming to Comcast's rival distributors, among other practices. The Antitrust Division was particularly concerned that the transaction would have enabled Comcast to foreclose new entry from online video distributors ("OVDs").
- 4.81 The Antitrust Division worked with the FCC both on the substantive aspects of the case and in formulating the remedies package. The key elements of the package were the following:
- The joint venture must make available to OVDs the same package of broadcast and cable channels that it sells to traditional video programming distributors.
  - The joint venture must offer an OVD broadcast, cable and film content that is similar to, or better than the content the distributor receives from any of the joint venture's programming peers. These peers are NBC's broadcast competitors (ABC, CBS and FOX), the largest cable programmers (News Corp., Time Warner Inc., Viacom Inc. and The Walt Disney Co.), and the largest video production studios (News Corp., Sony Corporation of America, Time Warner Inc., Viacom Inc. and The Walt Disney Co.).
  - Comcast may not retaliate against any broadcast network (or affiliate), cable programmer, production studio or content licensee for licensing content to a competing cable, satellite or telephone company or OVD, or for raising concerns to the department or the Federal Communications Commission.
  - Comcast must relinquish its management rights in Hulu, an OVD. Comcast must continue to make NBCU content available to Hulu that is comparable to the programming Hulu obtains from Disney and News Corp.
  - In accordance with recently established Open Internet requirements, Comcast is prohibited from unreasonably discriminating in the transmission of an OVD's lawful network traffic to a Comcast broadband customer.
  - Comcast must maintain the high speed Internet service it offers to its customers by continuing to offer download speeds of at least 12 megabits per second in markets where it has upgraded its broadband network.
  - Comcast is required to give other firms' content equal treatment under any of its broadband offerings that involve caps, tiers, metering for consumption or other usage based pricing.



- Comcast may not, with certain narrow exceptions, require programmers or video distributors to agree to licensing terms that seek to limit online distributors' access to content.

### Conclusions and implications for policy

4.82 A number of implications for design of policy and regulatory interventions emerge:

- **Economic context:** To understand the implications of vertical integration for competition and pluralism, it is important to examine the strategic rationale for the transaction or combination. One interpretation advances the view that the drivers of consolidation are underpinned by a quest for improvements in economic efficiency through merger synergies and development of economies of scale. This economic perspective provides part of the background against which vertical integration and consolidation needs to be appraised.
- **Ownership and merger control:** Sector-specific controls on ownership cannot be divorced from the controls that apply in the mainstream merger control regime applying to the sector. Mainstream merger control has built within it key determinants of what amounts to “ownership” and what amounts to a relevant change in control. In this respect, India is no different in that it already has an established merger control system, enforced by the CCI under the Competition Act. Any additional or different importation of concepts of ownership or control, for the purposes of regulating a particular sector must not be undertaken without careful identification of why the sector presents specific challenges which are not addressed by the standard rules. Any departure from the standard rules should be justified by a cost benefit analysis and, in particular, the need to ensure proportionality and avoid inefficiency, duplication and inconsistency.
- **Merger control ‘tool box’:** Although competition authorities adapt their merger control jurisdiction and substantive tests to deal with the particular issues presented by vertical integration, the approach is of general sector-neutral application. Vertical integration in the media and communications sector is not a “special case” notwithstanding the sector-specific challenges. We discern no meaningful trend towards ownership caps or outright prohibitions on extending an enterprise’s vertical presence across the supply chain from one media or communications market into another or within a media segment.

- Solutions can be found: Merger control in the media and communications sectors regularly produces difficult cases where issues such as market definition and competitive effects can be complex to analyse. Competition authorities around the world have shown that they are able and willing to embrace the increasing complexities of the cases before them. There are many merger cases raising vertical issues that have been successfully resolved in similar ways and in different markets. There is no reason to doubt that India's competition regulatory – the CCI – does not have the tools at its disposal to address concerns arising from vertical integration in appropriate cases.
- Flexible solutions can be found: The competition authorities have shown receptiveness to both structural and behavioural remedies to resolve vertical and horizontal issues in media and communications mergers. A prevailing theme is the concern to ensure access; whether to content or infrastructure.
- Increasingly sophisticated approaches: With the phenomenon of convergence playing out, the trend internationally has been towards increasing sophistication in the evaluation of the competitive effects of mergers across multiple markets. The effects-based assessment is conducted on a case-by-case basis without any predisposition towards what is the 'right' market structure in terms of market share or concentration levels. This approach selects a remedy, if required, based on the likely harm identified. It does not rely on a priori decisions or preferences for or against a particular business model (i.e. vertical integration).
- Interface with sector regulation: The relationship between competition law and sector regulation is again put in the spotlight in the merger control procedure. Regulators should be alive to and resist the temptation to use the merger control procedure to attempt to correct the perceived shortcomings of the sector regulatory regime through a merger remedy. That said, the involvement of the sector regulator may be useful in opening up the possibility for a wider range of solutions and monitoring.
- Interface with pluralism: Addressing competition concerns in mergers may also indirectly contribute to pluralism to the extent that remedies facilitate new entry. In some cases the remedy may go further than restoring the pre-merger market dynamic by creating the environment for a new player to challenge the merged entity through an assets disposal or licence. This may enable a maverick to emerge which, despite its smaller market share, may contribute to the diversity of the media landscape.
- Prohibition of mergers in the media and communications sector on account of vertical issues is rare but not unprecedented. Despite the challenges presented, judging by the number of prohibitions and withdrawals, experience has shown that parties are able to get their deals through with or without conditions.

## 5 The impact of the internet

### Introduction

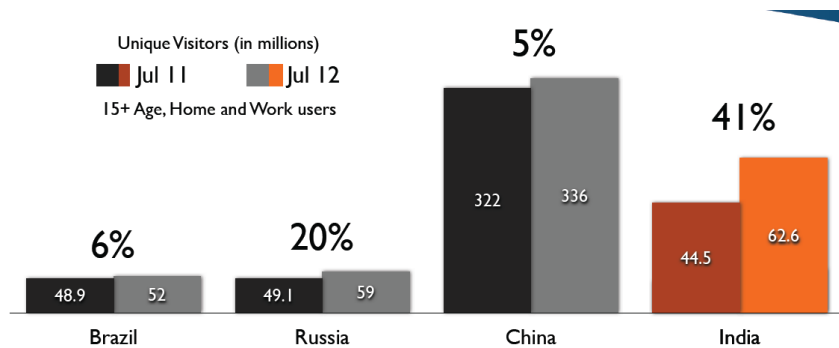
- 5.1 We begin this section with some data on online developments in India after which we discuss the impact that the internet is having on the provision and consumption of media more generally, together with a case study of the effect on news. The latter is important as it demonstrates the effect that the internet has on defining markets and measuring plurality and therefore for regulatory policy and intervention.
- 5.2 In respect of market definition, the internet of course has implications for all media markets. While TV channels historically were delivered by terrestrial, cable and satellite distribution methods, they may now be delivered by closed internet networks (IPTV) or via the open internet (so-called “over the top” or “OTT”). The internet thus adds new dimensions to market definition. In this example the TV market would include all distribution methods.
- 5.3 We acknowledge that the ‘mass’ audience of the media in India may lag behind many other more developed countries in respect of the availability of the internet and convergence services. That said, a study by Assocham and ComScore found that India is one of the three fastest growing internet markets globally. Among the BRIC nations, India emerged at the top, adding more than 18 million Internet users by July 2012, an annual rate of 41 per cent, yielding a total of 125 million Internet users.<sup>48</sup>
- 5.4 An Assocham spokesperson, stated that:
- “Interestingly, about 75 per cent of online audience between the age group of 15-34 years, India is one of the youngest online demographic globally”.*<sup>49</sup>
- 5.5 The top five popular categories accessed online were social networking, portals, search, entertainment, and news sites. TRAI reported that the broadband subscriber base increased from 14.68 million by the end of July 2012 to 14.82 million by the end of August 2012 - a monthly growth of 1.37 per cent.
- 5.6 Figure 5-1: indicates the annual growth in BRIC internet users to July 2012, demonstrating that India’s growth was the highest.

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<sup>48</sup> “State of e-Commerce in India”. [http://www.assochem.org/arb/general/Comscore\\_%20ASSOCHAM-report-state-of-e-commerce-in-india.pdf](http://www.assochem.org/arb/general/Comscore_%20ASSOCHAM-report-state-of-e-commerce-in-india.pdf)

<sup>49</sup> Ibid.

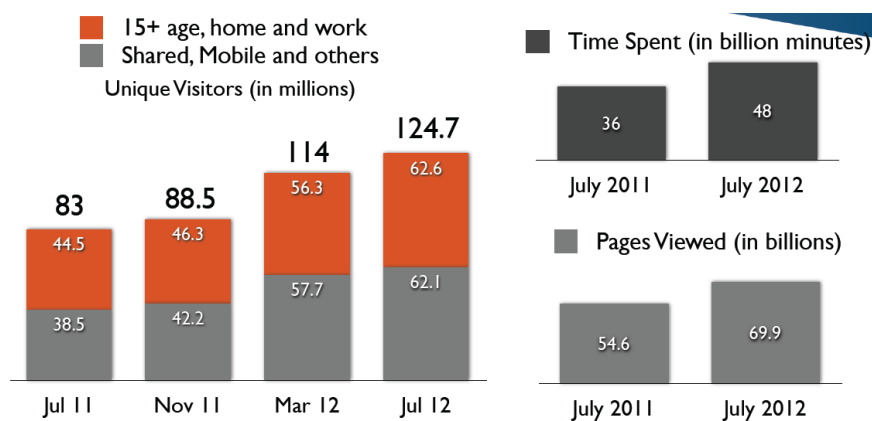
**Figure 5-1: Growth in internet users between July 2011 and July 2012**



Sources: comScore: *The Rise in India's Digital Consumer August 2012* page 9

5.7 The next figure, Figure 5-2, provides more detailed information on internet usage – fixed vs., mobile, time spent and pages viewed, all of which exhibit growth. By July 2012, internet penetration stood at 10%, according to comScore. The number of unique visitors grew by more than 40% between July 2011 and July 2012.

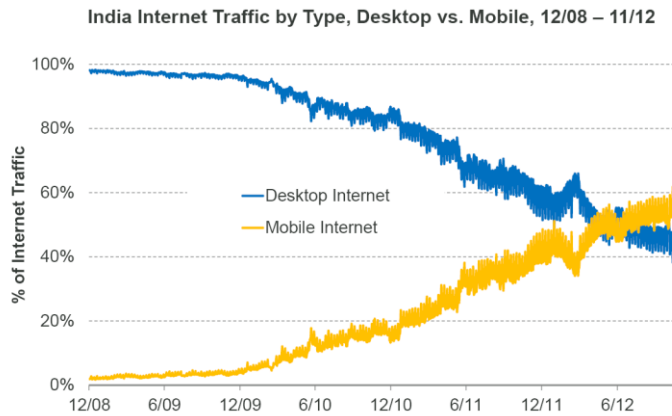
**Figure 5-2: Growth in internet users between July 2011 and July 2012**



Sources: comScore: *The Rise in India's Digital Consumer August 2012* page 10

5.8 The following figure, Figure 5-3:, paints a striking picture: as a proportion of total internet traffic in India, mobile overtook desktop around June 2012.

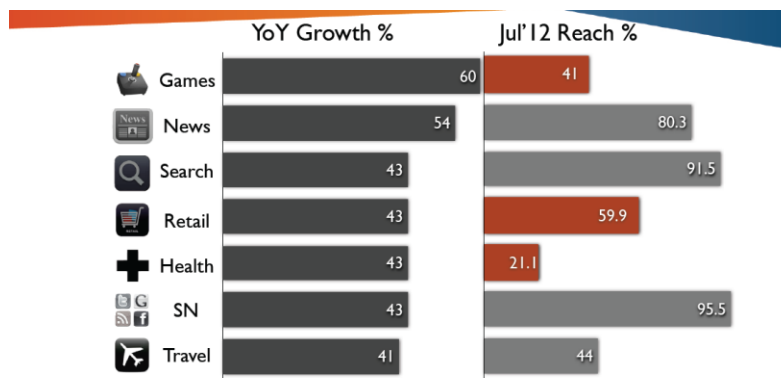
**Figure 5-3: India internet traffic between desktop internet and mobile internet**



Sources: KPCB Internet Trends 12 March 2012

5.9 In respect of the activities that India’s internet users are engaging in, Figure 5-4: demonstrates significant growth in many activities (particularly games). comScore reports that the growth in consumption in travel, search, social networking and news exceeds the worldwide average.

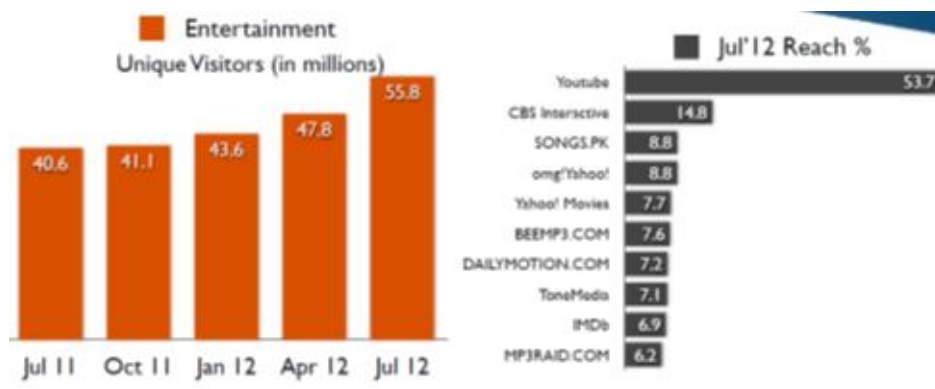
**Figure 5-4: Growth in internet activities in India**



Sources: comScore: The Rise in India’s Digital Consumer August 2012 page 13

5.10 The next chart, Figure 5-5:, shows internet activity within the entertainment category. According to comScore, the category added around 15 million additional UVs during the year to July 2012. YouTube has the greatest reach in the category and most of the growth is reported to be from Bollywood and music videos.

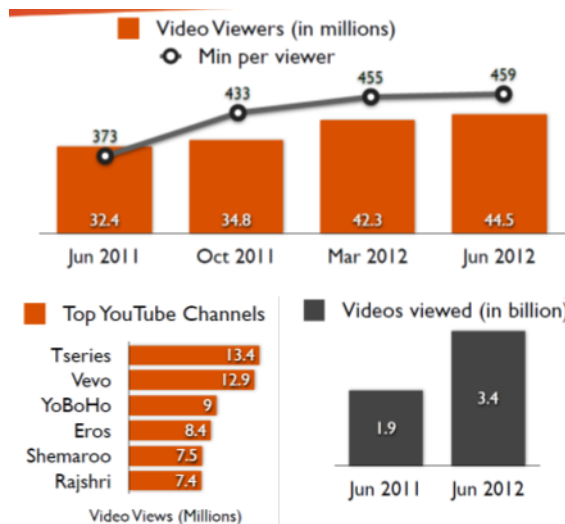
Figure 5-5: Growth in online entertainment in India



Sources: comScore: *The Rise in India's Digital Consumer August 2012* page 13

5.11 Data on online video viewing are reproduced at Figure 5-6:. This demonstrates that around 3.4 billion online videos are viewed each month and that video viewers have grown by more than 37%. comScore reports that more than 50% of the videos are in the entertainment category.

Figure 5-6: Online video viewing in India



Sources: comScore: *The Rise in India's Digital Consumer August 2012* page 24

5.12 According to one industry commentator, in India mobile internet TV and OTT services are two services that have significant growth potential.<sup>50</sup> While TV penetration stands at 65 per cent, it is reported that online TV services may particularly appeal to

<sup>50</sup> "Global entertainment and media outlook: 2012-2016", PricewaterhouseCoopers.

households that currently have no existing terrestrial infrastructure, cable or satellite services.

- 5.13 According to [indiantelevision.com](http://indiantelevision.com), an independent survey of Indian consumers was conducted to find out what people want from mobile video and willingness to pay. Of those surveyed, 54 per cent stated that they had already paid to access content and a further 88 per cent said they would consider paying for mobile video now or in the future.
- 5.14 Broadband TV News announced in September 2012 that Watch India TV had launched a TV app that provides 70 channels of Indian television channels across all internet-connected devices, including TVs, smartphones, tablets and PCs.<sup>51</sup> While the majority of take-up may initially occur from territories beyond India, the service is available domestically.
- 5.15 According to a report from Cisco, internet traffic in India is expected to increase 9-fold by 2015, at a compound annual growth rate of 55 per cent.<sup>52</sup> The principal driver of the uptake is projected to be video - internet video traffic will be 63 per cent of all consumer traffic in 2015, up from 20 per cent in 2010:

*“About 99 billion minutes of video content will cross the Internet each month in 2015, up from 7 billion in 2010. Video will exceed half of India's consumer Internet traffic by year-end 2013” (Cisco report).*

- 5.16 Further metrics and information are provided in Appendix 3.

#### **Online's stage of development**

- 5.17 While in India the current stage of broadband availability, penetration and device usage is lower than for many other territories, we are guided by the importance of not chilling markets today through intrusive and excessive regulations at the expense of digitally transformed markets tomorrow. The trends indicated above demonstrate that those who do have access to the internet behave in line with trends internationally. Presumably policy makers in India want the trends to date to continue and extend to the mass market.

#### **Effect of the internet on media**

- 5.18 The internet has a number of key effects on the consumption and provision of media services, including, but not limited to:<sup>53</sup>

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<sup>51</sup> Available at <http://www.broadbandtvnews.com/>

<sup>52</sup> <http://www.thehindubusinessline.com/industry-and-economy/info-tech/cisco-says-indias-net-traffic-will-grow-9fold-by-2015/article2071534.ece?css=print>

<sup>53</sup> We discuss the impact on regulation primarily in Section 2.

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

5.19 All of the above, as we discussed, largely in Section 3 but also in Section 4, have implications for policy and regulation.

5.20 The internet has a very specific effect on news media – reading newspapers, listening to radio news and watching television news can all be done online; online is a truly cross-media environment and this has implications for the definition and measurement of news media markets and for media plurality. We thus provide a specific case study on news media.

#### **Case study: news**

5.21 We cover the following key trends:

- how newspapers are becoming integrated media properties with links to online sites and social media such as Facebook and Twitter;
- how traditional media now face competition from online versions of traditional media (across all sub-sectors) and ‘new’ online media; and
- how online provides access to literally thousands of voices across the globe.

5.22 We also set out the implications of such trends for market definition and for plurality.<sup>54</sup>

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<sup>54</sup> The discussion is informed by FTI’s previous research into media plurality: “Ofcom: Measuring Media Plurality (Take Two). An FTI Consulting Whitepaper. <http://www.fticonsulting.co.uk/global2/critical-thinking/white-papers/measuring-media-plurality.aspx>; “The importance of the internet in how news is obtained in the UK today”, a report submitted to the Leveson Inquiry. <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/08/Annex-B-to-Plurality-submission-from-NI.pdf>; and “Measuring Plurality in News.” [http://www.culture.gov.uk/images/publications/Annexes-NewsCorps-submission-to-SoS\\_14JAN2011.pdf](http://www.culture.gov.uk/images/publications/Annexes-NewsCorps-submission-to-SoS_14JAN2011.pdf)



- 5.23 We note that while this case study focuses on news in order to indicate how trends in plurality may develop in future, much of the commentary applies equally to other media.

### *News provision*

- 5.24 In this section we outline the principal changes that have been occurring in news provision, based largely on an assessment of how the internet has changed and continues to change the landscape for news media. The wide ranging ways in which the internet contributes to media plurality, means that simple calculations of narrow, static market shares of traditional media channels no longer paint the full picture of media plurality.

- 5.25 As reported almost six years ago, “news is ubiquitous on the internet” and that:

*“The web offers the potential for almost limitless diversity in news, discussion and debate...In future there will be ever more outlets for audiovisual news including through the internet with its almost limitless capacity for information, analysis and opinion...The unprecedented availability of such a huge range of traditional and new sources of news opens up possibilities for real diversity of opinion to be heard ...”<sup>55</sup>*

- 5.26 There has been an explosion in the number and type of news sources on the internet, including new entrants that do not originate from traditional news media. The content available ranges vastly and includes text, data, infographics, audio, audiovisual and social media, and may be delivered personally to fixed and mobile devices. Services include podcasts, RSS feeds, and blogs. Owing to its ubiquity, the internet enables consumers to access news from around the world – via online sites of the New York Times, Russia Today, France 24 and CNN, for example.

- 5.27 The online news landscape contains many different types of news provider; these include:

- Global, national and regional newspapers have websites hosting online versions of their content;
- Traditional broadcasters;
- Online-only news websites, such as The Huffington Post, which have developed in the market, taking advantage of the low barriers to entry;
- News agencies such as Reuters and Associated Press, which provide news content to newspapers and other distributors;
- Aggregators of content such as Yahoo! and Google; and
- Other websites and informal sources of news such as blogs and social media.

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<sup>55</sup> New News, Future News: the challenges for television news after Digital Switch-over, Ofcom, 26 June 2007: p2.

- 5.28 Each of these providers distributes their content in several different ways, and typical offerings may include: website, an email newsletter, a mobile phone app, a tablet app, a Facebook page and a Twitter feed. This allows users to consume content from different providers in different ways.
- 5.29 The internet has increased competition (and so reduced the influence of individual providers) through a number of routes including:
- Providing competition from alternative news providers – either new entrants or entry into local news market from established overseas providers.
  - Reducing the barriers to entry so established providers have to take into account the threat of potential entrants.
  - Through user-generated news, as the internet provides a means for ‘word of mouth’ to reach a local, national and international audience.
- 5.30 Social media is increasingly used as a vehicle for news, particularly for breaking news. Twitter provides a complement to established newspapers and corresponding online content through discussion and an increasing proportion of traffic to news websites is generated by Facebook.
- 5.31 Blogs include informal discussions by individuals and newspapers use blogs to generate interest in news stories and attract users onto other related online news media properties. Audiences, politicians and celebrities are also involved in making the news and accessing the news in new ways. As reported by the Economist:
- “Thanks to the rise of social media, news is no longer gathered exclusively by reporters and turned into a story but emerges from an ecosystem in which journalists, sources, readers and viewers exchange information.”<sup>56</sup>*
- 5.32 Thus the internet has fundamentally changed the landscape for news provision; it breaks down geographical boundaries in news provision, giving users access from around the world, rather than just printed newspapers in any specific market.
- 5.33 Importantly, the development of the internet has fundamentally changed news provision for newspaper publishers who recognise the need to:
- provide an online extension of the traditional press;
  - compete in a new news market that encompasses a multitude of other online providers such as broadcasters, online-only providers, and aggregators; and
  - provide news through new news media – using apps, mobile sites and social media.
- 5.34 Through these new channels, the internet provides a means for ‘word of mouth’ to travel widely, reaching national and international audiences.

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<sup>56</sup> See: <http://www.economist.com/node/18904124>

- 5.35 Arguably, the various structural changes have led to a change in the definition of the market – in the case of newspapers, for example it is no longer ‘printed copies’ alone. As one commentator states, the “newspaper market” has become the “news market.”<sup>57</sup>
- 5.36 Such trends have led to a dynamic, vibrant news landscape. The number and variety of available voices has increased massively; all facilitated by the online environment. This is not just on the supply side; the increasing trend in online news consumption together with an increase in multi-sourcing has led to an increase in plurality on the demand-side, which we discuss below.

### ***News consumption***

While many of the trends reported below apply to a small proportion of consumers in India, as internet availability and device penetration increases, together with rising disposable incomes, more and more consumers will be able to access online news. As one report states:

*“Consumers can also access news content produced by non-traditional and online-only providers. This ranges from commercially-produced content to not-for-profit or amateur material (or ‘user uploaded content’). Blogs and the news distribution potential of social platforms such as Facebook and Twitter can also be important and influential sources of news.”*<sup>58</sup>

- 5.37 Access to the internet continues to change, especially on the move. Current devices include smartphones and tablets – the latter have been found to increase both the reach and duration of reading of online news. This trend is likely to continue as penetration of the devices increases.
- 5.38 Consumers have embraced social media (such as Facebook and Twitter), generating significant reach and a large potential influence. In India Facebook achieved a 97% reach (of online users) in July 2012, as shown in Figure 5-4:. Facebook in particular is a key traffic driver to newspaper sites. Newspapers provide social media links to news stories adding credibility to the news available and also attracting members of younger audiences.
- 5.39 Consumers are also using more news sources, comprising both traditional and new media; multi-sourcing is becoming the norm.
- 5.40 Such trends are leading to a shift in cross-media news consumption patterns towards online, which is a highly plural environment. Online news consumers have a tendency to access considerably more news outlets for news than those who rely primarily on traditional media.

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<sup>57</sup> UK Media Enters a New Age, Oliver & Ohlbaum, December 2011.

<sup>58</sup> Ofcom Consultation on Media Ownership Rules, 2009.

- 5.41 These trends are expected to continue as internet penetration and technology uptake increases. Therefore, as the internet becomes an increasingly important outlet for news, in India it is to be expected that an increasing proportion of the population will be regularly exposed to a wide variety of 'voices'.

#### **Conclusions and implications for policy**

- 5.42 The internet has a number of key effects on the consumption and provision of media services, including, but not limited to:

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

- 5.43 Each of the above has implications for regulation as boundaries between markets, networks and services become blurred. As we concluded in Section 3, regulators as a consequence need to adopt a cautious approach.

- 5.44 The internet has a very specific effect on news media – reading newspapers, listening to radio news and watching television news can all be done online; online is a truly cross-media environment and this has implications for the definition and measurement of news media markets and for media plurality (noting that most of what follows applies equally to other categories of media e.g. entertainment):

- The internet has fundamentally changed the landscape for news provision: it breaks down geographical boundaries in news provision, giving users access from around the world, rather than just domestic printed newspapers or TV/radio broadcasts.

- Traditional plurality assessments are challenged: importantly, the effect that the internet has had on both the provision and consumption of news challenges the traditional approach of assessing media plurality. Indeed, we question whether such an approach remains valid. For example, in considering media plurality in respect of the press, to consider the printed copy alone would overlook two critical features on both the demand side (consumers coming to newspapers via social media and online sites) and the supply side (newspapers are now integrated with digital media - websites, videos, micro-blogging and social networks). Such trends are expected to continue as internet penetration and technology uptake increases. Therefore, as the internet becomes an increasingly important outlet for news, it is to be expected that an increasing proportion of the population will be regularly exposed to a wide variety of 'voices'; plurality will continue to increase.
- Online further complicates market definition: as we discussed in Section 3, there is an inherent difficulty in measuring media plurality across traditional news media as there is no agreed upon cross-media exchange rate. Online news media further complicate matters as it becomes increasingly difficult to define markets. How to compare and contrast video material on a newspaper website or a broadcaster's online news 'broadcast'. To define the newspaper market as simply the printed copy is a simplification as newspapers are increasingly integrated with online (websites) and social media.
- Regulate explicitly and for the future: while online trends may appear somewhat distant to the mass market consumer in India, discrete parts of the population are already engaging in such online behaviour. Policy makers need to be mindful of interventions that may possibly chill investment and innovation. This is not to say that media plurality is not important – it is – rather, that regulatory interventions should be made to address identified problems based on up-to-date empirical evidence.
- **A cautious approach required: markets are dynamic and subject to much uncertainty in respect of future technological developments. Policy makers and regulators should be cautious in applying old-style, static regulations to today's markets absent empirical evidence that real problems exist today.**

## Appendix 1: Achieving policy objectives - supplementary material

### Introduction

- A1.1 In this section we provide additional material in support of the information provided in Section 2 of the main report.

#### **Abuse of dominance**

##### *Regulatory policy framework: Competition law enforcement in the EU telecoms sector*

- A1.2 The EU competition authorities have been active in enforcing competition law in the telecoms sector. Many interventions have been aimed at curtailing abuse of power by incumbents or former incumbents who have access to key infrastructure. The practices under scrutiny have ranged from charging excessive prices, margin squeezes, predatory pricing, cross-subsidisation, unfair rebate or discount schemes, tying and bundling the sale of different products, refusals to deal, refusal of access to essential infrastructure and unjustified discrimination.

##### *(a) Price related abuse*

- A1.3 In July 2003, the European Commission fined France Télécom EUR 10.6 million for predatory pricing. Its retail ADSL access services were found to be priced below their costs of provision. The decision was upheld by both the General Court and then by the Court of Justice of the EU, which confirmed that it was not necessary in order to establish an infringement to show that France Télécom could have subsequently recouped the losses associated with its predatory prices.<sup>59</sup>
- A1.4 In May 2003, the European Commission fined Deutsche Telekom EUR 12.6 million for abusing its dominant position in the German local loop market by implementing a margin squeeze under which its regulated wholesale access prices were set at a level that did not allow new entrants to compete on the downstream voice telephony market. This was confirmed on appeal by both the General Court and the Court of Justice.<sup>60</sup>

##### *(b) Other abusive commercial practices*

- A1.5 On 22 June 2011, the European Commission fined TelekomunikacjaPolska (“TP”) EUR 127 million for abuse of dominance on the market for wholesale access services.<sup>61</sup> The case differs from the previous enforcement trend in the telecoms sector where prior Article 102 cases have focused mainly on pricing behaviour. Here

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<sup>59</sup> Case C-202/07, *France Télécom v Commission*, Judgment of 2 April 2009.

<sup>60</sup> Case C-280/08, *P Deutsche Telekom AG v Commission*, Judgment of 14 October 2010.

<sup>61</sup> Commission decision of 22 June 2011, reference: IP/11/771.

the European Commission found some of TP's wider commercial practices, such as the manner in which it conducted contractual negotiations, to be abusive. TP has appealed the decision to the General Court, claiming that the European Commission paid inadequate regard for measures it had taken in order to remove barriers to its cooperation with alternative operators, and for a memorandum of understanding entered between TP and the Polish national regulatory authority in 2009.

### Sector-specific regulation

#### *Regulatory policy framework: regulation, competition law and market investigation in the UK broadcasting sector*

- A1.6 The UK has a multi-layered regulatory and competition law enforcement system comprising sector-specific regulation, mainstream competition law and the market investigations regime.
- A1.7 The market investigation regime in the UK is an investigation carried out by the CC ex post, in the sense that the CC assesses how the market has operated in the past with a view to prescribing remedies in the future. However, it may be considered to be a rather curious example of the interface between competition law and regulation in that a market investigation may be initiated in circumstances where there is no evidence of a violation of competition law.
- A1.8 Currently either the OFT or a sector regulator may refer a market/company to the CC. The CC has the power to investigate markets and restrictions on competition and to impose remedies if required. The UK market investigation regime is based on the concept of an 'adverse effect on competition' ("AEC"). An AEC arises where "any feature or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of goods or services in the United Kingdom or a part of the United Kingdom".<sup>62</sup> The test is wider in scope than Article 101/ 102 (and the UK national law equivalents in Chapter I and II of the Competition Act 1998). An AEC can arise from (i) the market structure; (ii) the conduct of suppliers or acquirers of goods or services; or (iii) the conduct of customers. The market investigation regime therefore complements the mainstream competition regime.
- A1.9 To illustrate the interface between sector regulation, market investigation and competition law it is useful to contrast two cases in the UK involving assessments conducted by the UK competition authorities into pricing and commercial practices of British Sky Broadcasting Limited ("BSkyB").

#### *(a) "Wholesale must-offer"*

- A1.10 On 31 March 2010 the UK communications regulator Ofcom made a decision requiring that BSkyB offer Sky Sports 1 and Sky Sports 2 (and the High Definition

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<sup>62</sup> Enterprise Act 2002, section 134(1).

versions of the channels) on a wholesale basis to retailers on other platforms, at wholesale prices set by Ofcom. (“WMO”).<sup>63</sup> This decision was not based on competition law but was an exercise of Ofcom’s sector regulatory powers under section 316 of the Communications Act 2003.

- A1.11 On 8 August 2012, the UK CAT upheld appeals brought by BSkyB against the WMO.<sup>64</sup>
- A1.12 The CAT’s decision contains a number of points of interest. First, the CAT found that Ofcom had misinterpreted the factual evidence when concluding that BSkyB had not engaged constructively with requests for access and had withheld wholesale supply of its premium channels. These findings underpinned Ofcom’s competition concerns which the CAT decided were unfounded. Second, the CAT confirmed that Ofcom was not limited to imposing a remedy only in those circumstances where there was a competition law violation and, in particular, where there was found to be an abuse of a dominant position. Third, the CAT found that Ofcom did have jurisdiction to impose remedies at the wholesale level with a view to safeguarding competition at the retail level.

*(b) Pay-TV movies*

- A1.13 In 2010 Ofcom referred to the CC concerns relating to pay TV movie content and distribution. Ofcom considered that BSkyB, being the largest provider of pay TV services in the UK had effective control over rights to premium movie content. It was concerned that BSkyB would use its market power to restrict distribution of premium movie content and charge excessive prices.
- A1.14 On 2 August 2012, the CC announced the outcome of its market investigation.<sup>65</sup> The CC concluded that there were no features relating to the supply and acquisition of subscription pay TV movie rights in the first subscription pay TV window of the major studios or the wholesale supply and acquisition of packages including core premium movies channels which gave rise to an adverse effect on competition in any market. The CC considered that there was a realistic prospect that, in the future, an independent pay TV retailer would be able to outbid BSkyB for the relevant rights of at least one major studio. However, the CC observed that, in light of BSkyB’s position in the pay TV retail market and the fast-moving nature of the market, it expected that Ofcom will keep developments in this sector under review. Interestingly, this was the first market investigation where the CC concluded that there was no adverse effect on competition.

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<sup>63</sup> Ofcom Pay TV Statement, 31 March 2010.

<sup>64</sup> *British Sky Broadcasting Limited, Virgin Media, Inc, The Football Association Premier League Limited and British Telecommunications plc. v Office of Communications*, [2012] CAT 20, Judgment of 8 August 2012.

<sup>65</sup> *Movies on pay TV market investigation, A report on the supply and acquisition of subscription pay-TV movie rights and services*, 2 August 2012.



## **Appendix 2: Media ownership & merger control - supplementary material**

### **Introduction**

- A2.1 In this section we provide additional material in support of the information provided in Section 2 of the main report.

### **Media ownership and control merger regime case studies**

- A2.2 This section summarises the media ownership and merger control rules (if any) applying in the media and communications sector in the countries within our study.
- A2.3 The focus is on media ownership rules based on shareholding and interest and not on nationality (i.e. foreign ownership).

| Country        | Media Ownership  | Merger Control  |
|----------------|--|---|
| Belgium        | <p>No ownership caps.</p> <p>The Flemish community imposes certain restrictions on broadcasters as part of their licensing conditions. These provisions only prevent cross-directorships. They do not prevent companies from having the same direct or indirect shareholders (i.e. being part of the same group).</p> <p>In the French community, the French Broadcasting Decree requires service or network providers to inform the Supreme Audio-visual Council (“CSA”) of their ownership structure and their shareholders’ interests in other media companies. If the CAC determines that a service or network provider occupies a “significant position” that could damage media plurality, it must ensure that media plurality is protected.</p> | <p>Yes.</p> <p>No media-specific rules.</p>   |
| Denmark        | None   | <p>Yes.</p> <p>No media-specific rules.</p>   |
| European Union | No specific supra-national controls.   | <p>Yes.</p> <p>The European Commission has exclusive jurisdiction to review concentrations that satisfy certain turnover thresholds, such that the EU Merger Regulation (“EUMR”) provides a ‘one-stop shop’ for such concentrations. The test for clearance is a competition-based test. However, the EUMR also contains mechanisms for the reallocation of jurisdiction between the European</p> |

| Country | Media Ownership  | Merger Control   |
|---------|--|--|
|         |  | Commission and the national authorities to review mergers including on grounds of “legitimate interest”. The concept of legitimate interest covers plurality of the media. |
| Finland | None   | Yes.<br><br>No media-specific rules.   |
| France  | <p>Maximum holding of 49 per cent of a company that has an authorisation to provide a national terrestrial television service, where the average audience for this service (whether digital or analogue) exceeds 8 per cent</p> <p>Any person who already holds a national terrestrial television service, where the average audience for this service exceeds 8 per cent, may not directly or indirectly hold more than 33 per cent of a company that has an authorisation to provide a local terrestrial television service</p> <p>Detailed rules on cross-ownership including:</p> <p>Holder of more than 15 per cent of a company operating a national terrestrial television channel may not hold more than 15 per cent of another company active in the same sector.</p> <p>Holder of more than five per cent of two companies holding an authorisation to provide a national terrestrial television channel service may not hold more than 5 per cent of a third company active in the same sector.</p> | Yes.<br><br>No media-specific rules.   |

| Country | Media Ownership  | Merger Control   |
|---------|--|--|
|         | <p>Similar rules apply to satellite television.</p> <p>'Two-in three' rule whereby operators may not, beyond certain thresholds, operate or control more than two out of three of certain types of media. Applies at French national, regional and local level.</p>  |  |
| Germany | <p>Yes.</p> <p>Different regulations apply in most states in relation to cross-ownership of radio companies and local or regional television channels.</p> <p>Depending on the state, the broadcasting laws provide either for a cap on the number of radio or television channels that are operated by a broadcasting company or for restrictions of the participation in the share capital or the voting rights in broadcasting companies.</p> | <p>Yes.</p> <p>Transactions in the broadcasting market are reviewed by the Federal Cartel Office ("FCO") and the Commission on Concentration in the Media ("KEK").</p> <p>The FCO applies mainstream competition-based merger control rules. Where revenue is generated from certain media activities that are important for freedom of expression such as the publication of newspapers or the broadcasting of TV or radio programmes, the respective turnover is to be multiplied by a factor of 20.</p> <p>The KEK applies the Interstate Treaty on Broadcasting. Each company may operate an unlimited number of nationwide television channels unless it could exercise a controlling influence on public opinion. Such ability is presumed if its nationwide television channels achieve average viewer ratings of at least 30 per cent. If the company holds a dominant position in a related media-relevant market or if an overall assessment concludes that its influence is equivalent to that of a company whose average</p> |

| Country | Media Ownership  | Merger Control  |
|---------|--|---|
|         |  | viewer rating achieves 30 per cent, the applicable threshold is 25 per cent.  |
| Greece  | <p>Yes.</p> <p>Each legal person can hold only one pay-TV or radio licence, analogue or digital, per means of transmission, (terrestrial, cable and satellite).</p> <p>The same person can hold a licence for only one of the other two means of transmission.</p> | <p>Yes.</p> <p>Media-specific rules provide a less stringent test for prohibition. Concentration in media is prohibited if an undertaking acquires a dominant position that is defined as follows:</p> <p>holding more than 35 per cent of one of the four segments of the media (being television, radio, newspapers and periodicals), each one of them taken without any further distinction as to technology, subscription or not, manner of transmission etc.; or</p> <p>if one person is active in more than one media segment:</p> <p>holding up to 35 per cent in each segment; or</p> <p>holding cumulatively 32 per cent in two segments; or</p> <p>holding cumulatively 28 per cent in three segments; or</p> <p>holding cumulatively 25 per cent in all four segments.</p> |
| Italy   | <p>No content provider is permitted to hold, directly or through subsidiaries, an authorisation to broadcast more than the 20 per cent of television programmes (or 20 per cent of all radio programmes) nationwide by means of</p>                                |   |

| Country     | Media Ownership   | Merger Control                              |
|-------------|---|---|
|             | <p>terrestrial technologies.</p> <p>No registered communication operator may earn, directly or through subsidiaries, revenues exceeding 20 per cent of the communications integrated system (“CIS”) (which includes all media sector activities, such as broadcasting, sponsorship, radio, cinema, advertising, publishing of newspapers, magazines, as well as e-publishing.</p> <p>Telecoms operators that earn 40 per cent of their overall revenues in the telecoms sector may not accrue revenues exceeding 10 per cent of the CIS.</p> <p>Television undertakings may not participate in companies that publish daily newspapers.</p> |   |
| Netherlands | None  | <p>Yes.</p> <p>No media-specific rules.</p> |
| Spain       | <p>Broadcasting</p> <p>It is prohibited to acquire a ‘significant holding’ in more than one national television broadcaster if the combined average audience was above 27 per cent of the total audience in the preceding 12 months of the acquisition.</p> <p>It is prohibited to acquire a significant holding or voting rights in more than one television broadcaster where: a national television broadcaster has more than two multiplexes; a</p>   | <p>Yes.</p> <p>No media-specific rules.</p> |

| Country        | Media Ownership  | Merger Control  |
|----------------|--|---|
|                | <p>regional television broadcaster has more than one multiplex; or the cross-ownership results in the existence of less than three different national television broadcasters in Spain.</p> <p>Radio</p> <p>It is prohibited to hold more than: 50 per cent of the licences awarded for a given area; five licences for the same area; 40 per cent of the licences awarded for an area of a particular Spanish region; and one-third of the overall total number of Spanish radio licences.</p> <p>There are no other cross-media ownership restrictions in Spain.</p> |   |
| Sweden         | None   | <p>Yes.</p> <p>No media-specific rules.</p>   |
| United Kingdom | <p>Cross-media</p> <p>No publisher controlling more than 20 per cent of the national newspaper market (or company holding a 20 per cent interest in such a national newspaper publisher) may itself hold a Channel 3 licence or more than a 20 per cent stake in a Channel 3 company.</p> <p>No Channel 3 company may hold more than a 20 per cent stake in a national newspaper publisher.</p> <p>NB. The Media Ownership (Radio and Cross Media) Order 2011 significantly relaxed local</p>  | <p>Yes.</p> <p>In addition, the mainstream UK merger regime is subject, in cases involving broadcasting or newspaper companies, to the media public interest intervention regime.</p> <p>The Secretary of State may intervene on broadcasting/newspaper public interest grounds in a 'special merger situation', namely, where one of the merging parties has an existing 25 per cent share of supply of the relevant broadcasting/newspaper activities in the UK or a substantial part of the UK (regardless of whether the merger</p> |

| Country       | Media Ownership  | Merger Control  |
|---------------|--|---|
|               | <p>radio ownership restrictions. It is now possible to own a regional Channel 3 licence together with one or more local radio licences and local newspapers in the same area, regardless of audience share or circulation. Restrictions on the number of analogue and digital licences that can be owned, and on owning more than one national radio multiplex licence, were also removed.</p>   | <p>enhances that share or meets the £70 million turnover test under the mainstream merger control rules). A special merger situation is subject to specific broadcasting/newspaper public interest considerations.</p>  |
| United States | <p>Media ownership is subject to restrictions, including limits on:</p> <ul style="list-style-type: none"> <li>ownership of multiple broadcast television stations in a single market;</li> <li>ownership of broadcast television stations reaching a certain percentage of the population;</li> <li>ownership of broadcast radio stations within a local market;</li> <li>cross-ownership of broadcast television and radio stations within a local market; cross-ownership of broadcast television or radio stations and newspapers in the same geographic area;</li> <li>service to a certain percentage of the population by a single cable operator; ownership by a cable operator of a certain percentage of the channels it carries; ownership of two or more of the 'top four' television networks (ABC, CBS, FOX and NBC).</li> </ul> | <p>Yes.</p> <p>No media-specific rules.</p> <p>The Team Telecom agencies conduct national-security reviews of mergers and acquisitions in the telecoms and broadcasting sectors (and the new media sector, if there are FCC licences to be transferred or assigned in the transaction).</p> |

Source: Multiple, including Getting the deal through and Consultants' research



## Case studies – Competition and plurality review in international merger control

### Case 1: Competition review only – United Kingdom

- A2.4 Global Radio's acquisition of GCap Media is an example of a media merger which was assessed purely on the basis of competition issues. No plurality considerations arose.
- A2.5 The OFT cleared the London aspects of the transaction. Although each party had a 20-30 per cent share of radio advertising, the OFT concluded that there was no realistic prospect of harm to London advertisers or listeners because the parties were not their closest competitors in that region and the OFT expected the transaction to generate significant efficiencies of benefit to advertisers and listeners.
- A2.6 Global Radio offered to divest a package of radio stations to purchasers approved up-front by the OFT to restore competition to pre-merger levels in the Midlands, where the OFT had competition concerns since the parties had overlapping interests in that region.
- A2.7 According to the OFT's press release, efficiencies evidence provided by the parties made a material difference to the outcome of this case. The OFT Senior Director of Mergers commented that:

*“Merger efficiencies benefit customers and put pressure on rivals. In this case, they tipped the balance in favour of clearance in London. This shows that with the right facts, efficiencies can make a difference, even at first phase, and even in a horizontal merger with high market shares. The divestment remedies in the Midlands, where efficiencies were not sufficient, are about restoring competition to make sure customers will not be harmed.”<sup>66</sup>*

### Case 2: Plurality - France

- A2.8 In 2005, the French Competition Authority raised concerns that the merger between the newspaper companies SIPA and Socpresse would result in homogenisation of the content of the affected newspapers and that this would reduce the overall quality of news for readers.<sup>67</sup> The parties committed, among other things, to maintain the editorial independence of the affected newspapers and ensure that each newspaper would have its own editor in chief. Although this

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<sup>66</sup> “Global/GCap radio merger: OFT seeks remedies and relies on efficiencies for the first time”, OFT press release of 8 August 2008.

<sup>67</sup> SIPA/Socpresse, decision of 28 October 2005.

review was conducted under an ostensibly competition-based assessment, it illustrates a case where a remedy was put in place which addressed issues which were grounded in pluralism (viewpoint diversity) rather than concerns as to market power.

### ***Case 3: Competition and plurality - Germany***

- A2.9 In Germany, mergers in the TV and broadcasting market are reviewed by the FCO and the German KEK. The FCO applies mainstream competition law, whereas the KEK applies the Interstate Treaty on Broadcasting.
- A2.10 This system of double scrutiny led to a first prohibition – the proposed merger between Axel Springer AG and ProSiebenSat.1 Media AG in 2006.
- A2.11 The FCO prohibited the merger on the basis of competition considerations, namely that: (1) the parties would have had a 40 per cent share of the advertising market (the newspaper BILD was viewed as the only economically viable alternative to TV advertising); (2) the merger would strengthen Springer’s position in the newspaper market; and (3) the merger would strengthen Springer’s dominant position in the newspaper advertising market.
- A2.12 The KEK prohibited the merger on the basis of section 26 of the Interstate Treaty on Broadcasting, which empowers it to block a merger where it would result in the acquisition of a “dominant power of opinion”. The KEK found that the merged group would hold a TV audience share of 22.06 per cent but having regard to its share of other media markets the audience share would be over 40 per cent. This exceeded the statutory threshold for prohibition. However, at the time the Treaty rules were ill suited to deal with cross-media mergers. The KEK had arrived at its audience share calculation by transposing market shares expressed as sales into audience shares. Later, the statutory provisions were modified to deal with this type of situation.
- A2.13 The parties appealed both the FCO and KEK decisions. In the competition case, the Federal Supreme Court confirmed the FCO’s view in June 2010. In a decision of 15 February 2011, the Bavarian Higher Administrative Court overruled the 2006 decision by the KEK finding that the KEK exceeded its powers. It should not have considered Axel Springer’s activities in other media markets but should only have focused on ProSiebenSat.1’s television audience share which was below the statutory threshold.
- A2.14 Although the case revolves around the interpretation of the specific statutory provisions, it illustrates some of the complexities in devising rules to capture pluralism in the absence of competition concerns.

### Media plurality – UK merger control regime

- A2.15 Merger control in the UK is voluntary in the sense that there is no requirement to inform the UK competition authorities of a merger either before or after completion. However, since the OFT may refer a completed transaction to the CC for an in-depth investigation within four months of completion and ultimately prohibit a transaction or require remedies, parties to a proposed merger typically seek advance clearance from the OFT in order to achieve legal certainty before implementing a transaction.
- A2.16 The UK SoS is able to intervene in a newspaper or a broadcasting/ media merger where she believes that a merger may raise a relevant public interest consideration and the transaction constitutes a relevant merger situation under the standard UK merger control rules. There are specific public interest considerations for newspaper cases and also broadcasting and cross-media cases.
- A2.17 The public interest considerations for newspaper mergers are:
- the need for accurate presentation of news in newspapers;
  - the need for free expression of opinion in newspapers involved in the merger; and
  - the need for, to an extent that is reasonable and practicable, a sufficient plurality of views expressed in newspapers as a whole in each market for newspapers in the UK or part of the UK.
- A2.18 The public interest considerations for broadcasting and cross-media mergers are:
- the need for there to be a sufficient plurality of persons with control of the media enterprises serving that audience in relation to every audience in the UK or a locality of the UK;
  - the need for the availability throughout the UK of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and
  - the need for persons carrying on media enterprises and for those with control of such enterprises to have a genuine commitment to the attainment in relation to broadcasting of the standard objectives contained in the Act relating to due impartiality of news, taste and decency.
- A2.19 Where a transaction is identified as giving rise to public interest considerations, the SoS may intervene by issuing an Intervention Notice. If she intervenes, the SoS will be able to consider whether to refer the transaction to the CC; clear the merger; or direct the OFT to seek undertakings in lieu of reference (i.e. remedies).

If a merger is referred to the CC, the SoS will accept the CC's findings on jurisdiction and substantive competition issues (where relevant as not all cases will raise competition issues). However, as regards adverse public interest findings and remedies the ultimate decision rests with the SoS.

- A2.20 The standard public interest procedures described above focus on transactions which involve acquisitions of enterprises with relatively high UK turnover (i.e. more than £70 million) or have a consolidating impact (i.e. meet the share of supply test). However, newspaper (or broadcasting/ cross-media) mergers may be scrutinised under the special public interest regime even where the standard merger control tests are not met and the acquirer does not hold an existing newspaper (or broadcasting/ media) interest. Provided that one of the parties to the merger has a 25 per cent or more share of supply of newspapers of any description in the UK or in a substantial part of the UK, the SoS may intervene by issuing a Special Intervention Notice. In such a special merger situation, the review will be on the basis of public interest considerations alone – there will be no competition assessment.
- A2.21 If the SoS decides to intervene she will consider whether to: (a) refer the transaction to the CC for examination of any newspaper/ media public interest considerations together with any competition issues that are identified by the OFT (in the case of mergers meeting the standard jurisdictional criteria); (b) clear the merger; or (c) direct the OFT to seek undertakings in lieu of a reference (remedies).
- A2.22 Both the OFT and Ofcom must provide advice to the SoS within the deadline set by the SoS. In the context of a special merger situation, the OFT will assess only jurisdiction and will not carry out any competition analysis. Once a merger where a newspaper/ media public interest consideration has been specified in the reference has been referred to it, the CC will be required to conduct an investigation and publish a final report. Where the CC investigates a special merger situation, it may have regard only to the public interest considerations specified in the reference – no competition assessment is carried out.
- A2.23 The SoS must take her decision on whether to make an adverse public interest finding, or make no finding at all (in which case the case will revert back to the CC who will make the final decision), or consider the question of remedies, within 30 working days of receipt of the report. She must accept the CC's conclusions on jurisdiction and competition (where applicable). Ofcom can advise the SoS following the receipt of a CC report. The SoS has ultimate discretion to make an adverse public interest finding.

## On-going regulatory policy perspectives

### United Kingdom

A2.24 In June 2012 and October 2012, Ofcom provided two responses to the SoS' request for advice on how best to measure and review media plurality. Ofcom answered the question, "What are the options for measuring media plurality across platforms? What do you recommend is the best approach?" as follows:<sup>68</sup>

*"There are three categories of metrics relevant to measuring media plurality: availability, consumption and impact. All should be included in a review of plurality, but the consumption metrics, especially reach, share and multi-sourcing, are the most important.*

*In addition to metrics, other relevant contextual factors should be considered, for example governance and regulatory frameworks such as those which ensure impartiality.*

*Given the dynamic nature of the news market, the metrics framework itself should be assessed during each review to ensure its continuing efficacy and relevance."*

A2.25 Plurality is thus difficult to measure plurality and it is important that a range of indicators are considered 'in the round'. Ofcom also stated that:

*"We believe the features of a plural news market would include many or all of the following: a diverse range of independent news voices; high overall reach and consumption with consumers actively multi-sourcing; sufficiently low barriers to entry and competition to spur innovation; economic sustainability and no single organisation accounting for too large a share of the market.*

*It may also be possible to develop a view as to what levels of the key consumption metrics provide an indication of a potential plurality concern, so that these levels are taken into consideration within a plurality review, without being regarded as absolute limits."*

A2.26 Additionally, Ofcom concluded:

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<sup>68</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/measuring-plurality/statement>

*“Plurality needs to be considered both within organisations (i.e. internal plurality) and between organisations (i.e. external plurality).*

*In terms of scope, a review of plurality should be limited to news and current affairs but these genres should be considered across television, radio, the press and online.”*

A2.27 Ofcom ultimately recommends a sensible framework for assessment, that plurality should be considered in respect of certain market characteristics, and that the features of a plural news market include:

- the presence of a diverse range of independent news voices;
- high reach and consumption of multiple news sources;
- low barriers to entry and competition to encourage innovation; and
- economic sustainability, with no single organisation holding too large a market share.

A2.28 Most encouragingly, Ofcom echoes the CC’s ITV/BSkyB approach, referencing a need to consider ‘things in the round’, and that there is a need ‘to make judgements’. Crucially, Ofcom provides a clear steer away from rigid triggers.

A2.29 The main conclusions of the Ofcom report are:

- measurement – Ofcom acknowledges the inherent measurement challenges and puts forward a range of measures to consider ‘in the round’. It agrees that ‘impact’ is difficult to measure and overall appears to suggest a pragmatic framework and even suggests that the suitability of metrics be re-assessed over time;
- online news media – these are now endorsed as clear contributors to media plurality and that they: “should be included in a plurality review as online news sources are used by a significant and growing proportion of the UK population”;
- triggers – Ofcom suggests a periodic review approach (every 4-5 years) and dismisses the idea of reliance on discretionary interventions.<sup>41</sup> But it also asks whether the existing media merger regime should sit within a ‘new proposed plurality regime’ or exist in parallel. We await further news on how the new regime may look; and

- setting limits on news share – it is concluded that such an approach is inflexible and inadvisable and that any concerns should be addressed within the periodic review. Ofcom asks parliament to determine what constitutes sufficient plurality and whether there should be any further relaxation in cross-media ownership rules.
- A2.30 Ofcom has made some sensible recommendations in identifying the market characteristics that when present are indicative of sufficient plurality. Its suggestion that it is appropriate to examine a range of metrics ‘in the round’ and make a subjective judgment is sensible and echoes the approach adopted by the CC in IT /BSkyB.
- A2.31 In July 2012, DCMS submitted to the Leveson Inquiry:<sup>69</sup>
- “... any rules inevitably act as a potential constraint on that market so it is essential that they be proportionate and do not unnecessarily restrict growth and innovation... The maintenance of plurality is still vital but, as more and more services become available on different platforms, concerns over ownership have diminished to some extent and greater liberalisation has been permitted.”*
- A2.32 On 29 November 2012, the report of the Leveson Inquiry into the culture, practices and ethics of the press was published. In relation to the media mergers public interest regime, Lord Leveson considers that the SoS should remain decision-maker but he recommends certain measures to ensure the probity and rigour of decision making.<sup>70</sup>
- United States**
- A2.33 On 22 December 2011 the FCC proposed changes to its media ownership rules. The FCC is required by statute to review its media ownership rules every four years to determine whether they are “necessary in the public interest as the result of competition”.
- A2.34 In proposing changes to the existing regime, the FCC stated:

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<sup>69</sup> Ibid.

<sup>70</sup> Lord Leveson discusses the possibility of introducing a media plurality public interest test for the SoS to intervene in market investigations. He recommends that the government consider whether this or periodic plurality reviews would be the best way of responding to plurality concerns as a result of organic market developments (rather than mergers).

*“Our challenge in this proceeding is to take account of new technologies and changing marketplace conditions while ensuring that our media ownership rules continue to serve our public interest goals of competition, localism, and diversity.”<sup>71</sup>*

- A2.35 The existing rules prohibit inter alia ownership of both a major newspaper and a major television station in the same media market. The proposed rules would relax the restriction on owning both types of outlets in the top twenty media markets. In the top twenty media markets, a daily newspaper could seek to merge with a television station, provided that (a) the television station is not ranked among the top four television stations in the market, and (b) at least eight independently owned major media outlets would remain in the market after the combination. In such circumstances, the FCC would presume that a waiver of the prohibition would be consistent with the public interest. If the conditions are not met, then a waiver would be presumed to be against the public interest.
- A2.36 It is of note that there are no formal guidelines governing how the FCC exercises its discretion to grant waivers from the restriction on cross-media ownership.
- A2.37 The final vote on the new rules was expected to take place in early 2013. However, on 26 February 2013 the FCC announced a delay while the FCC conducts an impact study on how cross-ownership affects minority ownership.
- A2.38 FCC chairman Julius Genachowski when announcing the delay confirmed that the Minority Media and Telecommunications Council in a filing with the agency offered to conduct and pay for the independent study; his statement recognised that this is a:

*“heavily-litigated area where a strong record is particularly important”.*<sup>72</sup>

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<sup>71</sup> Notice of Proposed Rule Making, 22 December 2011.

<sup>72</sup> “Yesterday, the Minority Media and Telecommunications Council informed the Commission that it will conduct a focused, independent study on the effects of cross-ownership rules on minority ownership and newsgathering, in order to enhance the record in the Commission’s proceeding. The study is expected to take several weeks and will be filed with the Commission, after which MMTC suggests that the agency solicit public input, to be followed by a Commission vote. In this heavily-litigated area where a strong record is particularly important, I believe this is a sensible approach to moving forward and resolving the issues raised in this proceeding” (Statement from FCC chairman Julius Genachowski on the status of media ownership proceeding, 26 February 2013).

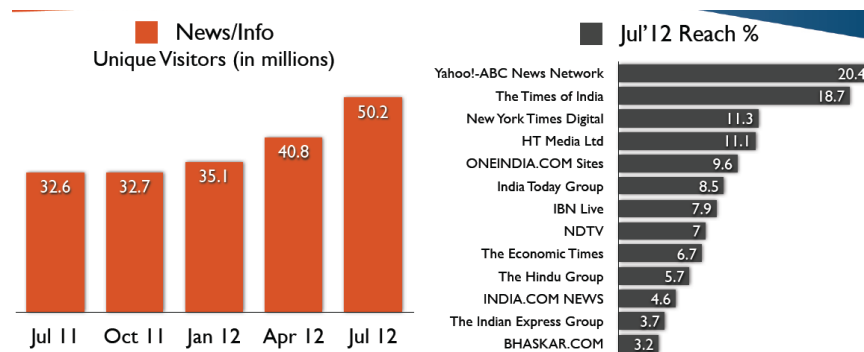


## Appendix 3: Online behaviour in India - supplementary material

### Introduction

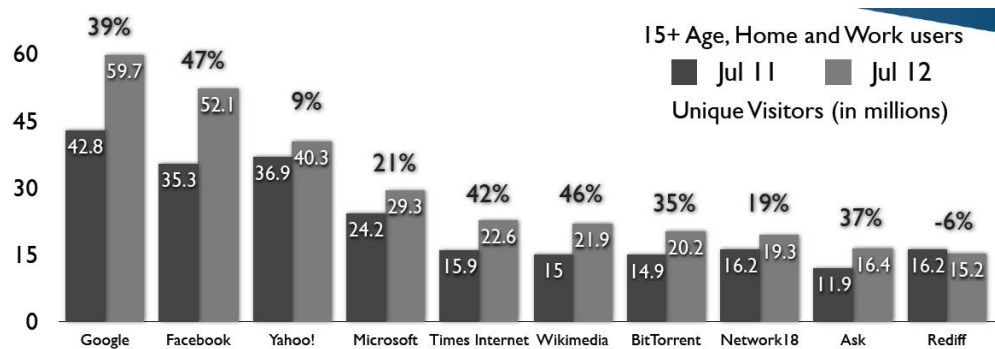
- A3.1 As per the discussion in Section 5, we provide some supplementary metrics on online behaviour in India.
- A3.2 A granular presentation of online news consumption is provided in Figure A3-1:.

**Figure A3-1: Online news consumption in India**



Sources: comScore: *The Rise in India's Digital Consumer August 2012* page 15

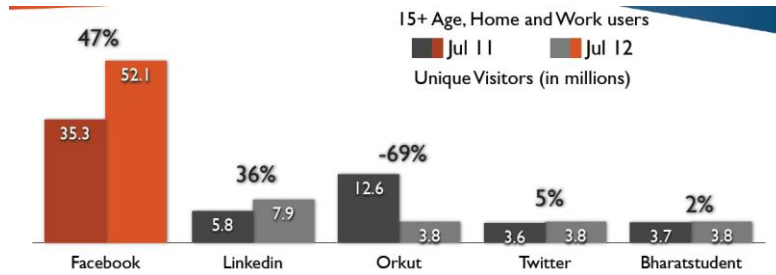
**Figure A3-2: Year on Year growth of the top 10 sites**



Notes: Google is used primarily for search and news consumption.

Sources: comScore: *The Rise in India's Digital Consumer August 2012* page 14

**Figure A3-3: Visitors to Social networking sites**



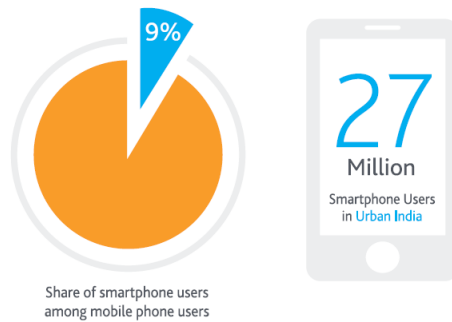
- Facebook has emerged as the market leader in the SN category
- The engagement on Facebook is highest among any category
- Facebook users spent 3.8 hrs on an average in July 2012 and 17.4 visits per person
- LinkedIn has also shown over 36% growth in the last 12 months

*Notes: If it is proven elsewhere that logs on Facebook equate to logs on news websites and news consumption then it follows that growth of Facebook in India will result in growth of news consumption.*

*Sources: comScore: The Rise in India's Digital Consumer August 2012 page 21*

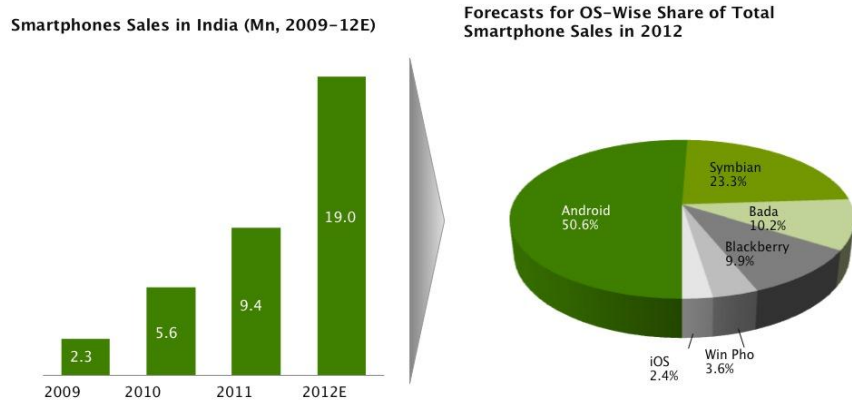
**Figure A3-4: Uptake of smartphone users (March 2012)**

With a base of 27 million users (and growing), insights into how consumers across cities and towns are using their smartphones will go a long way in helping manufacturers, marketers and advertisers make strategic decisions. No longer can marketers (across the board) ignore the potential of this medium.



*Sources: Featured Insights. Smartphone the emerging gadget of choice*

**Figure A3-5: Growth of smartphone sales**



Sources: <http://www.convergencecatalyst.com/blog/2012/05/10/is-india-ready-for-customized-and-branded-mobile-app-stores/>

**Figure A3-6: Smartphone shipment 2013**

| Smart phone market shipment forecast, 2013 |                                    |                  |
|--|------------------------------------|------------------|
| BRIIC countries                            |                                    |                  |
| Country                                    | 2013 shipment forecasts (millions) | Growth 2013/2012 |
| Global total                               | 837.0                              | 22.5%            |
| Brazil                                     | 17.2                               | 40.0%            |
| Russia                                     | 18.8                               | 30.7%            |
| India                                      | 26.5                               | 61.4%            |
| Indonesia                                  | 15.7                               | 51.7%            |
| China (mainland)                           | 239.8                              | 29.1%            |

Source: Canals forecast © Canals 2013

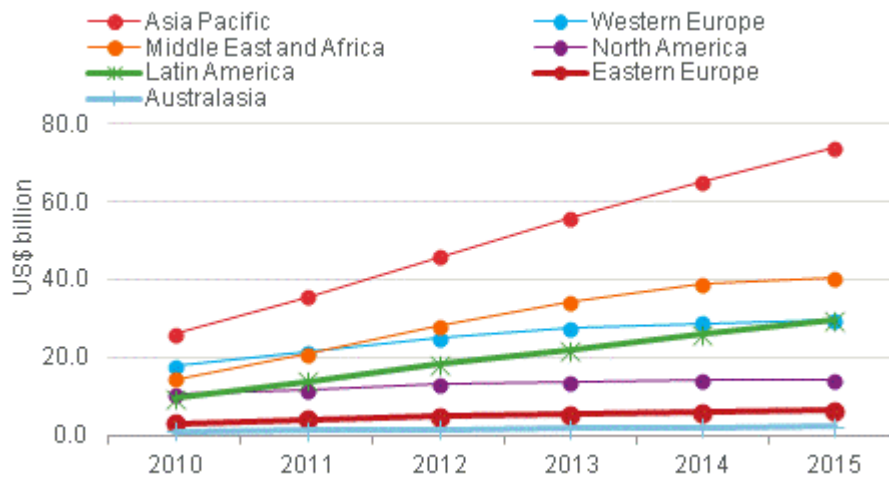
Sources: Canals Press release 2013/053 17 January 2013 – “Developing markets will drive smart phone market growth in 2013”

Figure A3-7: Tablet ownership and intention to purchase in India



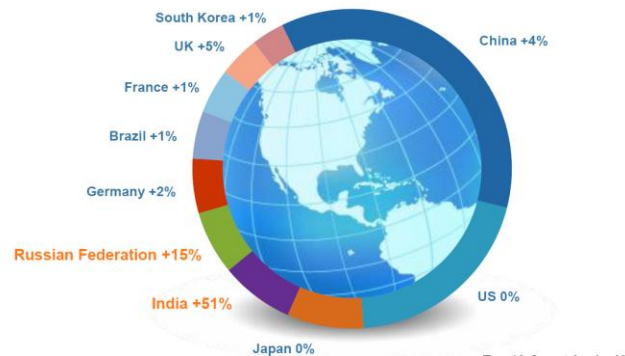
Sources: <http://www.nielsen.com/us/en/newswire/2013/smartphones-keep-users-in-india-plugged-in.html>

Figure A3-8: Retail sales of smartphones by region



Sources: <http://blog.euromonitor.com/2012/05/top-10-consumer-trends-for-2012-smartphone-universe.html#more>

Figure A3-9: Year on year growth of the internet to 2012



Sources: comScore: *The State of Digital Q4 2012*.

### Recent press commentary

#### A3.3 Recent comments on device penetration include:

*“The overall India Tablets market recorded sales of 1.1 million units in 3Q (July-September) 2012. According to CyberMedia Research estimates, total shipments for the India Tablet PC market are expected to close at 3 million units in 2012.*

*The research firms predicted that the market is expected to increase by at least 100 per cent in 2013 (double the number of units sold in 2012).*

*The key drivers for this are a large number of launches by OEMs eyeing the India consumer market, as well as the demand expected to be generated via enterprise adoption of Tablets. CyberMedia Research also predicts that in case large deals are announced by vendors for supplies to the central or state governments for distribution to university, college and high school students, the forecast number of Tablet sales for 2013 could easily exceed 6 million units.”*

*“The report said that in a very short span of time the India Tablets market has become one of the key drivers of data and content consumption in the country.”*

Source: [http://www.business-standard.com/article/technology/tablet-shipment-in-india-to-close-at-3-mn-in-2012-113010400163\\_1.html](http://www.business-standard.com/article/technology/tablet-shipment-in-india-to-close-at-3-mn-in-2012-113010400163_1.html) and <http://cmrindia.com/india-media-tablets-market->

*expected-to-touch-3-million-units-in-cy-2012-cy-2013-likely-to-see-6-million-units-or-higher-shipments-to-consumers-and-enterprises/*

*“Mobile phone sales in India grew by 16 per cent to 218 million units last year on the back of rising demand for smartphones, a study by market research group IDC said.*

*According to IDC's Asia Pacific quarterly mobile phone tracker, smartphone sales in the country grew by 48 per cent to 16.3 million in 2012 against 11 million in 2011.”*

*Source: [http://zeenews.india.com/business/news/economy/mobile-phone-market-sales-up-16-at-218-million-in-2012\\_71666.html](http://zeenews.india.com/business/news/economy/mobile-phone-market-sales-up-16-at-218-million-in-2012_71666.html)*

## Glossary

|                            |   |
|----------------------------|---|
| AAE                        | Appreciable Adverse Effect (i.e. on competition in India for the purposes of the Competition Act) |
| AEC                        | Adverse Effect on Competition (for the purposes of the UK market investigation regime)            |
| ASCI                       | Administrative Staff College of India   |
| Bill                       | Enterprise and Regulatory Reform Bill   |
| BRIC                       | Brazil, Russia, India and China   |
| BSkyB                      | British Sky Broadcasting Limited  |
| CAS                        | Conditional Access System   |
| CASBAA                     | Cable and Satellite Broadcasting Association of Asia  |
| CAT                        | UK Competition Appeal Tribunal  |
| CC                         | UK Competition Commission   |
| CCI                        | Competition Commission of India   |
| CMA                        | UK Competition and Markets Authority  |
| Comcast                    | Comcast Corporation   |
| Competition Act            | Indian Competition Act 2002   |
| Competition Amendment Bill | Indian Competition (Amendment) Bill 2012  |
| CSA                        | Supreme Audio-visual Council  |
| DCMS                       | Department for Culture, Media & Sport   |
| EUMR                       | EU Merger Regulation  |
| FCC                        | Federal Communications Commission   |
| FCO                        | Federal Cartel Office   |
| FTC                        | Federal Trade Commission  |
| FTI Consulting             | FTI Consulting LLP  |
| IPR                        | Intellectual Property Rights  |
| IPTV                       | Internet Protocol Television  |
| KEK                        | German Commission on Concentration in the Media   |
| MIB                        | Ministry of Information & Broadcasting  |
| NBCU                       | NBC Universal Inc   |

|        |   |
|--------|---|
| Ofcom  | The Office of Communications  |
| OFT    | Office of Fair Trading  |
| OTT    | Over the top  |
| OVD    | Online video distributors   |
| SIC    | Integrated Communications System (Italy)<br>(sistemaintegrato dellecomunicazioni) |
| SMP    | Significant Market Power  |
| SoS    | Secretary of State  |
| TFEU   | Treaty on the Functioning of the EU   |
| TP     | TelekomunikacjaPolska   |
| TRAI   | Telecom Regulatory Authority of India   |
| Treaty | Interstate Treaty on Broadcasting (Germany)                                       |
| UV     | Unique visitor  |
| WMO    | Wholesale Must-Offer  |



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