

Annexure - Comments on the Consultation Paper Issued by the TRAI on Issues relating to Media Ownership

I. Introduction – Theme of the Consultation Paper

1. The Telecom Regulatory Authority of India (TRAI) has issued a Consultation Paper (CP) on “*Issues relating to Media Ownership*” on 12 April 2022. The CP primarily stresses on the importance of media pluralism for a strong and healthy democracy and purports to initiate discussion on threats to media pluralism from concentration of media ownership and the measures that may be required to prevent any harm to media pluralism.
2. It is understood based on the review of the CP, that the concerns expressed in the CP are different from the core concern of the competition law in both the ex-ante review of combinations and ex-post assessment of anti-competitive agreements and abuse of dominance.
3. It is further noted that the test of consistency for media ownership framework is in terms of ‘Public Interest Test’ which is different from the ‘Appreciable Adverse Effect on Competition Test’ as followed in competition law in India. The Annexure III of the Consultation Paper which discusses International Scenario clearly brings out the relevant factors for assessment of media pluralism as distinct from competition aspects.
4. Accordingly, given that the issues and tests for compliance are different, it is expected that the underlying assessment/review tools/methodology would also be different and the regulatory framework is not expected to raise any concern of jurisdictional overlaps. However, it is also observed that in the discussion on the media ownership, certain references have been made to the role of Competition Commission of India (CCI), provisions of the Competition Act, 2002 (Act) and to certain economic tools used in assessment of competition concerns by the CCI, which may potentially create confusion and conflict in the regulatory landscape. Accordingly, the CCI is offering comments on the limited issue of areas of potential regulatory overlaps in terms of the issues raised and the framework proposed with the competition law framework.

II. Comments of the CCI

No overlaps between assessment of media pluralism and competition assessment

5. It is very important to note that while concentration in a sector may inhibit pluralism as a consequence but the relationship is not that straight forward. The CP notes multiple instances where either the M&A transaction was found to be not reducing the competition but infringing the plurality rules (Vivendi Case, Fox/Sky Transaction) or the M&A transaction was found consistent at the broader public interest test threshold while found to be lessening competition (Astral/Telemedia). Had there been a situation

where in all cases, the transaction found to be compliant with the competition test been found to be infringing plurality rules, it might have been safe to conclude that the plurality rules have lower threshold for dominance/market power as mentioned in para 2.31 of the CP. However, existence of both types of decisional practice is a testimony to the fact that the relationship between concentration (at least as considered in competition law) and media pluralism is not straight forward and therefore requires one of the following two approaches:

- a. The pluralism rules should be self-contained and based on parameters which are different from those used in competition laws. This view is consistent with the views of scholars who have denounced use of competition parameters such as HHI for assessing media pluralism as has been mentioned in the CP; or
- b. If the competition parameters such as concentration measures etc. are to be used in assessing plurality concerns of a transaction, the same need to be appropriately modified and defined in terms which capture the end objective clearly.

In absence of any of the aforesaid recourse, the regulatory framework may be inefficient and may be counter-productive on two counts, first, for the failure to serve the regulatory purpose and instead causing an apparent harm to the industry with decisions being linked/based on faulty parameters and second, by creating a situation of risk of regulatory conflict with the competition laws given the same tests being applied differently or applied in a similar manner but yielding different results.

6. The CCI is of the opinion that the outcomes of assessment of a combination from media pluralism perspective and competition law perspective are mutually exclusive and therefore need to be regulated independently. As per the extant regulatory framework, a transaction or conduct of an entity is assessed by different regulators such as SEBI or CCI etc. as per their respective mandates. Similarly, if it is decided that the concern of media pluralism is also required to be assessed, then the assessment and approval of the same should be required separately and in addition to other regulatory approvals such as the approval of the CCI.

Reference to purely competition issues in the CP

7. Considering the broad-based approach of assuming a link between the concentration and media pluralism in general, the CP discusses certain purely competition law aspects without bringing out the media pluralism aspect. To illustrate, the aspect of Vertical Integration as mentioned in the CP expresses specific concerns as regards ownership/control of content/broadcasting services and distribution services by a single entity as potentially restricting horizontal competition as "*these practices can adversely effect competition and promote monopolistic practices*".
8. The competition law regime in the country is so designed to address any concerns arising from vertical integration be it emanating from vertical agreements, mergers and acquisitions or unilateral abuse of dominance. In view of the lack of clear relationship

between concentration and pluralism concerns, it becomes even more relevant to not bring into ambit the issues which have purely competition connotations.

Roles of sectoral regulator and competition regulator are indeed complementary but in a peculiar way

9. It has been stated in the CP that while sector specific regulation identifies a problem ex-ante and builds an administrative machinery to address behavioural issues before the problem arises, while on other hand, competition policy would usually address the problem ex-post. In this regard, first and foremost, it may be noted that there is no gap as such in the competition law framework which is applied ex-ante in case of M&As and ex-post in case of anti-competitive agreements and abuse of dominance. Moreover, the complementarity in roles of regulators comes from the mandate. The CCI reiterates that the roles of different regulators are always complementary and even in the instant case, there is no overlap in the concern of media pluralism and competition. Accordingly, the sectoral regulator may provide for suitable regulatory framework to address pluralism concerns and avoid prescribing any ex-ante restrictions/screens for the conduct of businesses on the same issues/parameters which are dealt/considered by the competition regulator either ex-ante or ex-post.
10. In this regard, it has also been stated that if the M&As in media sector are not to be subjected to sectoral regulator, what should a regulator do to ensure fulfilment of its mandate of orderly development and growth of the sector. In this regard, it is stated that the growth and development is the ultimate objective of any regulatory framework and within the ambit of this overarching objective, different regulators play a complementary role. The objective in the instant case is media pluralism and any regulatory framework which helps in the attainment of this objective is also relevant to orderly growth of the sector even on a standalone basis and the same need not overlap with the competition aspects.

Lack of clarity on proposed M&A regime as a part of sector specific regulations

11. While initiating a discussion on subjecting the M&As in media sector and mentioning the limitations and complementarities in roles of CCI and sectoral regulator, a question has been posed whether Merger & Acquisitions in media sector be subjected to sector specific regulations. A follow up question is asked wherein the stakeholders are asked to comment that in case they agree for subjecting M&As in media sector to sector specific regulations, they may comment on the most appropriate criteria for regulation of M&As. The criteria mentioned appear to be quantitative screens. It is not clear whether the sector specific regulations will include the single criterion on the lines indicated in Q 23(b) or there would be a broader framework of regulations also covering the stated issues in terms of 'limitations' of M&A regime under the Competition Act, 'complementarity of regimes', objective of ensuring orderly growth of the sector etc. The CCI at this stage is constrained by the same in not commenting on these aspects in greater detail in addition to what has been stated in the above paras.

There are no gaps of concern in merger regulation framework under the Competition Act

12. Another point which has been made is regarding limitations of the M&A regime under the Competition Act, 2002 given the Small Target Exemption. In this regard, it may be noted that the Small Target Exemption is available to certain M&As wherein the values of assets and turnover being acquired are less than thresholds prescribed. The exemption has been granted by the Government of India as it has been considered to be in public interest. As far as the rationale and effect of the same is concerned, it may be noted that the exemption is given on the premise that a “small target” with its relatively small presence may not have the ability to influence market dynamics significantly to merit any assessment. As stated earlier, given the mutually exclusive mandate and concerns, the aforesaid specific provision has no relevance for the core concern mentioned in CP.

Concluding Remarks

13. On an overall basis, CCI would like to state that there is no overlap in the primary subject matter of the CP which is to deal with issues of media pluralism and the subject matter of the competition law. It would be appropriate if the scope of CP and any recommendations in this regard to be made by TRAI is confined to the aspect of pluralism *only*. Even if it is deemed expedient to refer to traditional parameters of competition for assessing plurality dimensions, it is imperative that due care is taken to ensure that no overlap/confusion/conflict is created in the process giving rise to potential regulatory arbitrage opportunities. Any sector specific dispensation on the overlapping aspect would not only create an additional layer of compliance but would be wholly unnecessary and against the stated public policy objectives of the Government of India towards compliances and ease of doing business. Over the years, the CCI has acquired the requisite domain experience and therefore is best placed to evaluate the competition issues. Still, if the sectoral regulator has any concerns, a robust inter-regulatory mechanism is provided under the Competition Act whereby sectoral regulators and market regulator can draw upon each other’s expertise, while exercising their respective jurisdictions.