Singapore, 25 June 2022

Telecom Regulatory Authority of India
For the attention of: Mr Anil Kumar Bhardwaj, (B&CS)

Via email: advbcs-2@trai.gov.in and jadvbcs-1@trai.gov.in

Dear Sir,

Additional Submission: Consultation paper on Issues relating to Media Ownership
12/04/2022

AVIA welcomes the opportunity to comment on the Consultation Paper issued by Telecom Regulatory Authority of India (TRAI) on market ownership and in particular, the effects of consolidation on media plurality. AVIA is the trade association for the video industry and ecosystem in Asia Pacific. It serves to make the video industry stronger and healthier through promoting the common interests of its members. Our membership consists of a combination of local, regional and multi-national companies, many of which are substantial cross-border investors; creating and purchasing video content to meet rapidly-expanding consumer demands and investing in India’s communications and creative industries.

Further to our original submission of 7 June, 2022, we would like to take the opportunity offered by the extension of the deadline, to include a few additional comments. We would therefore request that this be considered as our final submission, to replace the 7 June document.

Before commencing with our detailed comments on this consultation, we wish to briefly touch upon the jurisdictional aspect since, as per the TRAI Act, jurisdiction of TRAI is limited to broadcasting services, and the same is not extended to print and Internet/digital/OTT. As such, ideally, MIB ought not have referred these aspects to TRAI nor TRAI ought to give statutory recommendations on issues outside its jurisdiction\(^1\). With that in mind, we offer the following comments:

In much the same way as TRAI’s previous inquiry into media ownership issues back in 2013, this 2022 media ownership consultation paper places the issues of media ownership and plurality squarely within the context of competition policy. It raises concerns about horizontal- and vertical integration within the broadcasting industry and proffers complex solutions including the utilisation of “diversity indexes” to assess market “concentration” within media industries. What the paper unfortunately fails to do is to identify (i) actual, concrete examples of how and where TRAI believes media plurality is being eroded within the market, (ii) whether changes in

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\(^1\) Proviso to section 2(1)(k) r.w. section 11(1)(a) of TRAI Act

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Indian policy are necessary (iii) whether existing competition laws and enforcement are inadequate to deal with issues of concentration of media ownership, and (iv) which changes might be the most suitable and effective within the context of the Indian market. Instead, it jumps immediately to mechanisms which would, in our view, unnecessarily clutter the already overburdened regulatory media landscape.

We would also highlight that in order to embark any ex-ante framework, a regulator needs to discharge the duty of demonstrating the overwhelming compulsion prior to suggesting any intervention/stipulation. Since there has been no comprehensive market study or analysis, we don’t know (i) if there is concentration of ownership in the media and (ii) the degree to which concentration impacts media plurality.

Without establishing an objective relationship between media concentration and plurality, the consultation paper proposes in paragraph 1.5 to analyse the “anomalies caused by media concentration” through cross-media ownership and vertical integration. Attempting to use tools such as regulation or restriction of vertical integration or cross-media ownership, without showing how they influence the theoretical “desired level” of media plurality is putting the cart before the horse. Further, using these tools without a clear understanding of how they will impact media plurality could lead to unintended consequences as already witnessed in the TV Broadcasting and Cable Services Sector via the restriction in vertical integration in DTH and HITS.

Across the globe, the media industry has been undergoing a rapid digital evolution which has, in turn, provided consumers with an abundant choice of product options, at different price-points and across a range of platforms. The COVID-19 pandemic has accelerated the consumer’s willingness to embrace digitisation with more and more consumers relying on both broadband networks and traditional modes of broadcasting, to obtain their entertainment products. In some ways, the growth of this new digital environment is augmenting the media plurality which TRAI is so keen to foster. TRAI, however, is not convinced by the opportunities this new environment generates – in its paper, TRAI points to the fact that algorithms (i) tend to direct users to content which complements and amplifies their already-held views and (ii) do little to contribute to media plurality by failing to present consumers with different perspectives. While our members acknowledge and appreciate that algorithms tend to serve up content which a consumer is more likely to want to view, with the evolution of the industry, consumption of content is no longer the lean-back experience of a push action initiated by a broadcaster; more often than not, it is now also an experience generated by a pull action initiated by the consumer to access the content of his/her choice anytime and anywhere. The consumer is also empowered to control, hide and change the content they do not wish to watch. This view that algorithms do nothing to contribute to media plurality also fails to recognize their intrinsic value as a discoverability tool offered to consumers to help them find content that may appeal to them based on previous consumption patterns. Further, algorithms deliver benefits to consumers by saving time, providing personalized recommendations, increasing efficiency and enhancing overall product quality and user experience. If the consumer does not wish to view the recommendations, there is always the option to access the content of his/her choice. It is
incorrect to assume that the content offered by these algorithms will necessarily reflect the consumer’s existing views; in fact these algorithms may indeed offer content which presents a completely different perspective on a subject that is likely to be of interest to that consumer.

The danger with some of the measures which are being proposed by TRAI in this consultation paper is that these could stifle development and dis-incentivise investment. With new players entering the market and current players extending their reach to consumers via other platforms, business models are still evolving as players experiment with multiple monetization options. Now is not the best time to be introducing legislation. It would be far more prudent to wait until the market has settled down and the dynamics of the market conditions have become more easily assessable. The media landscape in India today is significantly different from what it was five years ago, and even more different from what it was 15 years ago. The threshold for entering the media business has only reduced with time due to the increased availability of resources, a widening talent pool, and a rising consumer base with means to access different types of media among other factors. These changes erode the basis for suggesting any market intervention. However, TRAI in 2022 continues to focus on cross-media ownership and vertical integration, much as it did in its 2013 and 2008 Consultation Papers.

Our members agree with TRAI that media plurality is imperative in a democracy to encourage healthy debate and tolerance. However, as Suzanne Rab and Alison Sprague ask in their 2014 paper entitled “Protecting Pluralism in India’s media market”, “how many viewpoints make a sufficient plurality” and who should be tasked with making that decision? TRAI has not, in its consultation paper, identified particular plurality problems within India’s media market, nor has TRAI identified which policy objectives it is seeking to fulfill. The entire framing of the consultation paper and all the issues for consultation are hinged on the premise that there is an ‘desired’ level of media plurality for India. However, TRAI has not identified this desired level of media plurality, the linkage between media ownership and media plurality, and more importantly how the regulatory tools i.e., restrictions on cross media ownership and vertical integration, can be used to affect this desired level of media plurality in India.

The mere fact of increased vertical- or horizontal integration within the media industry, should not of itself dictate a change of policy or an introduction of legislation. Rather, there are several reasons to remove vertical integration restrictions. Technological advancements such as interoperability, broadcast-broadband convergence, cable TV digitization, and 5G make an integrated contented value chain possible. Initiatives like infrastructure-sharing, STB interoperability, and adoption of the ATSC 3.0 standard anticipate this integration and seamless delivery of content. Another positive that arises from this situation is the ability to provide interactive content, but to achieve this there is an urgent need to review artificial barriers on content delivery pipes.
Vertical integration leads to efficiencies such as productivity gains and better quality of services. The vertically integrated entity could combine the overhead, R&D, sales, or other costs of two related products (broadcasting and distribution) and achieve efficiency from joint production and sale. This helps both consumers and the industry. Integration between upstream and downstream services lead to enhanced coordination and seamless delivery of content. It leads to cost saving for the consumer and enables them to offer better services to consumers for a lower cost. Further, services will compete on price, quality of content, and quality of service and this will lead to better outcomes for consumers.

From past experience, vertical integration restrictions in India’s Broadcasting & Cable Services (B&CS) sector have created regulatory anomalies. Generally, the main concern with vertical integration in the broadcasting segment is the potential abuse of market power, so regulatory measures on vertical integration may be introduced when there is no framework to regulate any anti-competitive integration. Existing stipulations on vertical integration create an artificial segregation between broadcasting content services and broadcasting carriage services. These were made when the sector was nascent and it wasn’t certain how competitive it would become. The experience of more than a decade shows that it is time for these separate stipulations to be removed – the B&CS sector has matured considerably and the competition law framework has solidified with the Competition Commission evaluating several mergers in the sector since relevant provisions of the Competition Act came into force in 2011. Competition in the sector today vitiates all of these potential concerns that may have existed in 2001 and hence there is no need for any restriction on vertical integration in B&CS today. Hence any such restriction is but an artificial barrier that prevents these natural complementary services from playing out in the industry to the benefit of consumers and growth of the industry.

Furthermore, it has always been our understanding that the major concerns of a telecoms regulator are control-oriented matters such as licensing, spectrum allocation, rate regulation and standards for equipment, all of which are fundamentally different from the structures needed to support a diverse and competitive media industry especially in a democratic society such as India, where it is not believed appropriate for the government to try to determine what people choose to read, view, and think.

Considering that media pluralism, as noted in paragraph 1.3 of the consultation paper, “is the founding stone on which the fourth pillar of democracy rests”, it is important to highlight the multiple legal, economic, political, and social facets of media plurality and their intersection. By focussing on cross-media ownership and vertical integration alone (an investment-based regulatory tool), TRAI misses out on key nuances of media plurality and other indicators of a robust fourth estate. Many of the desired principles for a plural media, such as editorial autonomy and media independence, would be better evaluated by looking at media conduct.

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and India already has a regulatory framework for each media. The Constitution of India provides the fundamental principles which set out the contours for speech and expression – the wide ambit of speech and expression and the specified grounds on which it can be (narrowly) regulated. Guided by the Constitution principles, the stakeholders (across mediums) operate the specific frameworks. For instance, newspapers are subject to the Press Council of India’s Norms of Journalistic Conduct, television to the Cable Television Networks (Regulation) Act and Rules, and digital media to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. The existing frameworks being more than comprehensive, there hardly remains permissible room for any additional stipulation.

CUTS International, in its 2010 background paper for the OECD, entitled “Regulatory Management and Reform in India”, stated that regulation is only really justified under special conditions: (i) prevention of market failure (ii) restriction or removal of anti-competitive practices and (iii) promotion of public interest. There is no allegation or clear demonstration by TRAI of market failure or imminent market failure. If companies have been found to be engaging in price-fixing, or abuse of dominant power, then regulators should absolutely step in to deter such practices but no claim has been made to this effect. However, even if this were to be the case, we would anticipate that a regulator like TRAI would be examining issues of technology, cost and process whereas it would be incumbent upon the Competition Commission to act as the adjudicator against anti-competitive practices. Finally, on the issue of public interest, a regulator is required to defend and promote consumer choice and quality of service yet neither of these is raised as a concern within the consultation paper. In fact, it is unclear if and to what extent, consumer consultation has been conducted prior to the preparation and publication of this consultation paper.

On the basis that regulation should only be adopted under certain prescribed conditions, we note TRAI’s own acknowledgement within the consultation paper that some safeguards against the erosion of media plurality are already in place via: (i) the Competition Commission of India, (ii) art 19(1) and (2) of the Constitution in terms of both the scope and limitations of the right of freedom of expression, and (iii) the new IT rules which to a large degree, complement the provisions within the Cable Television Networks Act and Code to cover both curated and UGC content; although we note that the courts are looking into aspects pertaining to validity of the said Rules. TRAI however suggests that these safeguards may not be sufficient. As an example, it points to the current media industry self-regulation system, questioning whether specific enforcement tools are required to enforce compliance by media companies. This runs completely contrary to the sentiments we have heard very recently expressed by the Secretary of the Ministry of Information and Broadcasting when he applauded the fact that 90% of customer complaints are addressed by the platforms themselves without these complaints having to be escalated up the three-tier redressal system process.

Turning to the safeguard presented by the Competition Commission – we know that this body has been established to regulate anti-competitive agreements or an abuse of dominant position/monopoly if either have an appreciable effect on healthy market competition. While TRAI is correct that the current definition of “market” does not tend to take into account the
new reality of sector overlap – previously radio, tv, print, broadband access, were all in separate markets. TRAI poses the question as to which entity, in the future, should be tasked with determining what a “market” is for the purposes of an inquiry. In our humble opinion, this would be the Competition Commission. If these assessments are not left to an expert body such as the Competition Commission, which is in fact tasked to do exactly that in accordance with section 2(r) of the Competition Act, 2002, there is a distinct danger of duplication of regulation and the blurring of boundaries in terms of scope of authority. This would run counter to the move we are witnessing in India towards what the OECD refers to as “a progressive liberalization of deregulation of the economy” as India seeks to promote innovation and encourage investment. A move in the opposite direction will only create greater business uncertainty for companies in terms of identifying both the regulations which apply to their organizations as well as the specific regulatory body to which they are to be held accountable, an ambiguity which will add complexity to doing business in India.

The CCI has also in the past demonstrated its ability to understand the nuances of the media sector. It looked into seven merger notifications in the media, entertainment, and broadcasting space between 2011 and 2019, adopting a holistic approach and conducting a case-by-case assessment for each. For example, the CCI used different fit-for-purpose parameters to understand market share when looking at different types of media. The CCI used ‘gross office receipts’ to understand the film production and supply market, and ‘number of TV channels and viewership data’ for the TV market to understand the combined market share of the Walt Disney Company and Twentieth Century Fox. In the Sony Pictures/Aqua Investment combination, the commission adopted a different approach for calculating market share in the sports broadcasting businesses. The CCI examined bidding data for a 5-year period and examined the market share of the transacting parties in terms of number and value of the contract, Gross Rating Points (GRPs) and advertising revenue. When looking at broadcasting, in the matter between DishTV and Videocon, the CCI looked at the substitutability of various categories of distributors (MSO, DTH, IPTV, and HITS) and concluded that they are not substitutable.

The CCI has also proven its ability to conduct appropriate market studies when analysing competitive behaviour in the media. In the Prime Focus Limited/Reliance MediaWorks Limited combination, the competition regulator conducted a market investigation and concluded that there were no AAEC concerns due to the presence of several competitors. In 2017, the CCI approved the combination between AT&T Inc. and Time Warner Inc. and observed that there were several players in the streaming services market and in the audio-visual content distribution market thereby providing a choice to customers.

In addition to investigative experience and depth, the CCI maintains a strong consumer welfare perspective. In a note by India on Vertical mergers in the technology, media and telecom Sector

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4 Combination Registration No. C-2018/07/583.
5 Combination Registration No. C-2016/09/436.
6 Combination Registration No. C-2014/08/198.
7 Combination Registration No. C-2016/11/456.
for the OECD, it was acknowledged that when assessing vertical mergers, the CCI considers efficiency gains while “ensuring that the consumers not lose out”.

In our view, any inquiries as to market, ownership and concentration within the media sector are best left to the Competition Commission to determine according to the relevant laws which are already in place. No specific evidence is offered by TRAI to justify the need for sector-specific regulation and control and so there appears to be no need for the media industry to be regulated by two separate bodies.

The question which TRAI raises and which we acknowledge might be a more challenging one, is what happens in instances where media plurality is affected by a market change which arises outside of a merger/acquisition and therefore is beyond the scope of the authority of the Competition Commission? Examples of these scenarios could be (i) the organic growth of a particular organisation’s market share or (ii) the exit by several players at any one time from the market or (iii) circumstances in which a media owner garners far too much influence over public opinion and the political agenda. If this influence over public opinion is what TRAI is ultimately concerned about, then it is our view that restrictions around ownership by political parties or government agencies might be the appropriate way to address this concern as opposed to importing an entirely new raft of media industry-specific regulation. Of particular concern to our members are TRAI’s questions as to which type of media should be regulated or which type of owner should be banned from acquiring an interest in media. Without a clear indication of what TRAI anticipates the actual or potential harm to media plurality may be and industry consultation on these specific views, implementing such regulatory restrictions and/or bans would be premature and could inadvertently have the reverse effect of stifling media plurality and limiting choice for consumers.

In its previous submission in 2013, AVIA (then known as CASBAA) also warned against an approach which does not consider a “no change” scenario. It appears the same omission has occurred in this consultation paper. TRAI presents additional regulation as the solution but does not examine what might happen if the status quo were to be retained. If TRAI, in this consultation paper, were to have (i) clearly identified the examples of instances where media plurality is being eroded (and shared the empirical data which substantiates these claims) and (ii) set out the impact of each likely solution as well as the scenario where no regulation is introduced, this approach would have been much more useful in offering industry both the data and transparency it requires to provide detailed and useful feedback.

We would urge TRAI to not rush into introducing legislation as the growth of new platforms and the development of new business models within the media industry, continue to surge. India’s 2047 Vision envisages “the elimination of unnecessary interference by the government in the lives of citizens” (as stated on the mygov.in website operated by the Ministry of Electronics and Information Technology). Technology has democratised content access with Indian consumers more empowered than they have ever been in terms of their entertainment and information

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8 Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs – Competition Committee, “Vertical mergers in the technology, media and telecom sector – Note by India”, 2019
choices. In the absence of a proper regulatory assessment and comprehensive public consultation which clearly indicates that a review of the current regulatory landscape may be required, we would urge TRAI to refrain from introducing regulation that compromises one of the core principles of Prime Minister Modi’s 2047 Vision.

Sincerely yours,

Louis Boswell
Chief Executive Officer
Asia Video Industry Association

About the Asia Video Industry Association (AVIA)
AVIA is the non-profit trade association for the video industry and ecosystem in Asia-Pacific. It serves to make the video industry stronger and healthier through promoting the common interests of its members. AVIA is the interlocutor for the industry with governments across the region, leads the fight against video piracy and provides insight into the video industry to support a vibrant industry ecosystem. AVIA evolved from CASBAA in 2018.