
Comments to TRAI Consultation Paper on Issues Relating to Media Ownership

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Subject : Comments to TRAI Consultation Paper on Issues Relating to Media Ownership 1 attachment
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Dear Shri Anil Kumar Bhardwaj

We refer to the "TRAI - Consultation Paper on Issues relating to Media Ownership" dated 12 April 2022 inviting comments from stakeholders. Please find attached our comments for the Telecom Regulatory Authority's due review and consideration.

We have included the contact information of some of the authors of the comments and would be happy to address any query / clarification that the Telecom Regulatory Authority may have.

Thank you.

Best Regards
Tanu Banerjee
Tanu Banerjee
Partner



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RESPONSES TO TRAI CONSULTATION PAPER 2022

We refer to the “Consultation Paper on Issues relating to Media Ownership” issued by the Telecom Regulatory Authority of India (“**Authority**”) dated 12 April 2022 in respect of the government’s objective to promote viewpoint plurality (“**TRAI Consultation Paper**”).

While media pluralism is a bulwark against consumers getting similar views across various forms of media, we believe that ensuring media pluralism cannot be directly correlated to imposing cross media ownership restrictions in the media sector. Further, the digital boom witnessed by India has led to an increased access by users to varied content. Smaller and unconventional voices are now finding a platform, which is substantially different from the scenario a few years ago when content was mostly disseminated by large media houses. Imposing barriers on the kind / nature of entity or regulating a specific genre of content will only be counterproductive as it stifles competition and viewpoint plurality.

The TRAI Consultation Paper has extensively referred to a few relevant concepts / provisions of the Competition Act 2002 (as amended) (“**the Competition Act**”), as such it is noteworthy that multiple economic activities by several independent enterprises in the media sector shall form exclusive relevant product markets. Hence, bundling such exclusive enterprises under one or a few enterprises may come in direct conflict with the Competition Act. This may lead to unforeseen protracted litigation between the regulatory authorities and the Competition Commission of India (“**the Commission**”), if implemented.

We believe that the current legal framework is sufficient to prevent and regulate any abuse of dominance by a media entity which could obstruct media pluralism in the country. Further, cross media ownership cannot be the only factor to drive viewpoint plurality especially because nature and consumption of content is largely driven by language, viewership, advertisements, subscriptions, reach of channels, subject matter, geographical market, revenues etc.

Accordingly, our detailed comments on queries raised in the TRAI Consultation Paper are set out below for your kind consideration:

1. ***Question 1: Media industry has expanded in an unprecedented manner. In addition to conventional television & print medium, the industry now comprises news & media-based portals, IP based website/ video portals (including You-tube/ Facebook/ Twitter/ Instagram/ Apps other OTT portals etc.). Considering overall scenario, do you think there is a need for monitoring cross media ownership and Control? Please provide detailed reasoning to support your answer.***
 - 1.1 While regulation of cross media ownership to further viewpoint plurality has been in discussion in India, there is not sufficient research or evidence to determine an actual co-relation between the two. Further, the advent of digital platforms and social media has enabled individuals, small scale news platforms and content creators to create and disseminate content which often includes news updates, opinion on topical events, photos of events, etc., thereby increasing the diversity of news and content accessible to the general population. Separately, several digital platforms and social media platforms facilitate publication of and access to user generated content such as new updates, opinion on topical events, photos of events, etc. Ownership of these platforms that primarily host user generated content does not have much bearing on diversity of content available thereon.

- 1.2 As stated above, the growth of digital media and social media has provided consumers with a wide array of choices to consume different content, including news and entertainment, in an interactive manner. It is a far cry from the pre-digital era where news and content were provided in a linear fashion (through television or radio broadcast or print circulation), with little to no ability for a consumer to comment on, question or debate over the subject matter of the content.
- 1.3 Given the general shift in consumption patterns from traditional to digital media, several broadcasters and newspaper / magazine publishers have entered into the digital media market, while continuing to operate in the original medium. This is a natural shift owing to changing technologies, ease of access to the internet and smart devices. Blanket restrictions on cross ownership in media would impede the ability of traditional media houses to compete with new age digital platforms, thereby creating entry barriers and deterring competition instead of fostering it.
- 1.4 It is also important to understand that limited diversity of content and news is not merely a consequence of concentrated ownership. Most content available in India is monetised via advertisements. Advertisement slots which have higher viewership are sold at a higher price by the broadcaster /platform. This is measured via metrics such as target rating points (TRPs) for television and clicks and impressions for digital media. As such, broadcasters and platforms are incentivized to distribute content which are popular amongst audience, and this becomes the primary driving force behind the diversity of content available to public.
- 1.5 That competition has flourished in absence of any major restriction on cross media ownership rules is evident from the entry of several digital platforms, of varying scale, in the last few years in India and growth in the digital sector despite disruption due to COVID-19.
- 1.6 In our opinion, the issue relating to viewpoint diversity does not merit regulation of cross ownership in media. It is reiterated that there are robust safeguards under the Competition Act to the extent required to against abuse of dominance by a player. In fact, the Commission has initiated several investigations in the media and digital sectors and the Hon'ble Supreme Court has been pleased to confirm in jurisdictional challenges, being brought via writ routes by parties aggrieved, that the Commission has jurisdictions to inquire, investigate, and pass necessary orders as it may deem fit on merits. Issues around fake news, inaccurate reporting etc., can also be dealt with the self-regulation mechanisms put in place for the media industry. Pursuant to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 ("**IT Rules**") and Cable Television Network Rules 1994 ("**Cable TV Rules**"), broadcast and digital media have three-step grievance redressal mechanisms with Governmental oversight. News industry also self regulates via the News Broadcasting Standards Authority which is empowered to adjudicate upon grievances pertaining to news broadcasts. These self-regulatory structures are adequately equipped for resolution of content related issues and provide for an apt balance between regulation and flexibility for media entities.
- 1.7 In our opinion, the issues around viewpoint plurality can be addressed via mechanisms existing within the current regulatory framework. Further, the ownership concentration in media is not the sole factor determining diversity of

content or opinions available through media and does not need to be monitored except as already done under existing legislations such as Competition Act and Foreign Exchange Management Act 1999 (“FEMA”).

2. ***Question 2: Media has the capacity to influence opinion of masses, more so the news media. Should there be a common mechanism to monitor ownership of print, television, radio, or other internet-based news media?***
- a. ***If yes, elaborate on the Authority, structure and mechanism of such monitoring mechanism/ regime?***
 - b. ***If no, should there be a self-regulatory mechanism by the industry? What should be the mechanism for defining and implementing such industry based self-regulatory regime? In case some players do not follow the self-regulation, what should be the procedure for enforcing such regulations?***

r/w

Question 3: There are regulatory agencies like CCI and SEBI among others that monitor and regulate mergers, acquisitions, and takeovers. Is there a need for any additional regulatory/ monitoring mechanism? Do you think there’s a need to monitor takeovers, acquisitions of media companies, especially the news media companies?

- (i) ***If yes, which agency/ ministry should be entrusted with the task of such data collection, regulation & monitoring?***
 - (a) ***Whether such monitoring/ control be ex-ante as is the case with combinations in the Competition Act 2002?***
 - (b) ***What should be the procedure of reporting and monitoring? What should be the periodicity of such reporting?***
 - (c) ***What should be the powers of the concerned authority for enforcing regulatory provisions, inter-alia including imposition of financial disincentives, cancellation of license/ registration etc.?***
- (ii) ***If no, please provide an elaborate justification as to why there is no need for such a mechanism? Provide market data to substantiate your opinion.***

- 2.1 It is correct that media has the capacity to influence opinion of the masses. It is important that the media industry, particularly news media, functions in a manner that is fair, balanced, and ethical. With this aim, news media is regulated under the Press Council Act, 1978 (“PCA”) which has established a press council for the purpose of monitoring the standards of newspapers and news agencies in India. Under the PCA, the Norms of Journalistic Code of Conduct set out the principals and ethics to be followed by journalists and news agencies. Over and above this, digital publishers of news and current affairs content are regulated under the IT Rules wherein they are required to abide by the aforementioned Norms of Journalistic Code of Conduct and general code of ethics applicable to digital media entities. Further, the News Broadcasting Standards Authority, which is a self-regulatory organization, also issues standards and adjudicates upon complaints about broadcasts. Concerns in respect of ‘fake news’, ‘viral videos’ leading to serious repercussions, can be addressed by self-regulatory bodies under these legislations. As such, there are clearly established structures for regulation of news content across various media. The Authority could consider guiding the self-regulatory bodies to require its members to implement fact checking mechanisms, the minimum standards for which can be agreed between the members.

- 2.2 As stated in our response to Query 1, ownership of media is not the sole factor in determining the nature of content made accessible through various channels and platforms, and content is largely driven by viewership, advertisements, and subscriptions. The advent of social media and digital platforms such as YouTube has further democratised online debate and discourse, by facilitating creation of user generated content and fostering view-point plurality.
- 2.3 In our view, there is little correlation between cross media-ownership and viewpoint plurality. In fact, recent trends as pointed out by the authority in Chapter II of the TRAI Consultation Paper hints towards the fact that migration by media houses to digital mediums such as traditional newspapers migrating to e-newspapers, linear satellite channels being available on digital mediums, is in fact promoting accessibility and viewpoint plurality. Further, since entry is generally easier on digital media due to the absence of any licensing mechanisms, the number of new entrants in digital media is larger. As per the EY FICCI M&E Report titled “Tuning Into Customer” 2022,¹ data indicates that online news had a reach of 467 million in 2021; and that by 2025 reach of online news would escalate to 750 million. A growing trend in news media consumption by the population is now in regional and vernacular language which is as high as 95% - it is touted that vernacular news portals will see increased penetration with proposed launch of low-cost smartphones by telecommunication companies. Further, while in 2013 there were only a couple of OTT platforms with few viewers, in 2020 there were over 44 platforms with 400 million customers. This increase in numbers also involved entry of regional players in an English / Hindi dominated market such as HoiChoi (Bengali), Planet Marathi (Marathi), aha (Telugu), Koode (Malayalam), City Shor TV (Gujarati). The entry of regional players not only increased diversity of content, viewpoint plurality, but also had a direct impact of the media industry – regional films such as Drishyam 2, Village Rockstars, Thackeray and Jai Bhim saw huge blockbusters due to increased popularity from digital media which was earlier lacking due to concentration of such content in traditional media only.
- 2.4 In any case, sector agonistic remedies are available under the Competition Act, for any entity which abuses its dominant position or indulges in anti-competitive practices. Further, existing regulations and guidelines such as the FEMA, Guidelines for obtaining license for providing DTH Broadcasting Services in India 2001, Guidelines for providing HITS Broadcasting Service in India 2005, Policy Guidelines on Expansion of FM Radio Broadcasting Services through Private Agencies (Phase-III) 2011 also regulate ownership in the media industry.
- 2.5 Given, that there are already sufficient disclosure requirements under the current regime, and safeguards under the Competition Act in relation to anti-competitive practices including regulation of combination between enterprises, in our view no further regulation in relation to media ownership, whether self-regulatory or otherwise, is required.

¹ https://www.ey.com/en_in/media-entertainment/tuning-into-consumer-indian-m-and-e-rebounds-with-a-customer-centric-approach

3. ***Question 4. Please suggest the most suitable criteria to define and measure Ownership/Control along with suitable reasoning. Define Control and prescribe the statutory/ regulatory/ legal powers to enforce such criteria of Control.***
- 3.1 Under the TRAI Consultation Paper, the Authority has expressed concern that concentration of “control” in the hands of a few leads to negative viewpoint plurality. Specifically, it is the view of the Authority that irrespective of the number of mediums through which content is disseminated and consumed by viewers, as long as there is control in the hands of a few, news and views of users are bound to be polarised in a manner.
- 3.2 To evaluate the suitable criteria to determine “control”, the analysis of the following legislations can be undertaken:
- (i) Companies Act 2013: As per section 2(27), “control” includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.
 - (ii) SEBI Takeover Regulations 2011: As per regulation 2(e), “control” includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.
 - (iii) Competition Act: As per explanation to section 5, (a) “control” includes controlling the affairs or management by— (i) one or more enterprises, either jointly or singly, over another enterprise or group; (ii) one or more groups, either jointly or singly, over another group or enterprise. In addition to foregoing, the “group” has been explained under section 5(b) as 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. Hence, “control” and “group” if read in tandem shall make it clear that no further regulatory oversight would be required in this behalf.
- 3.3 In the case of the Business Partnership Agreement signed between Century Tokyo Leasing Corporation (‘CTLC’) and the Leasing Division of Tata Capital Financial Services Limited (‘TCFSL’), the Commission declared the leasing division to be under “joint control” of both parties via acquisition of joint managerial rights, despite absence of acquisition of shares, voting rights or assets, i.e. control could result from

mutual agreements between entities; it also listed the functions, control over which could be considered as control over management and affairs of the company².

- 3.4 In its recommendation³ dated 12 August 2014 (“**TRAI Recommendations 2014**”), the Authority has taken a comprehensive approach covering both *de jure* and *de facto* understanding of control:

*“An entity (E1) is said to ‘Control’ another entity (E2) and the business decisions thereby taken, if E1, directly or indirectly through associate companies, subsidiaries and/or relatives: 13 (a) Owns at least twenty per cent of total share capital of E2. In case of indirect shareholding by E1 in E2, the extent of ownership would be calculated using the multiplicative rule. For example, an entity who owns, say, 30% equity in Company A, which in turn owns 20% equity in Company B, then the entity’s indirect holding in Company B is calculated as 30% * 20%, which is 6%.; Or (b) exercises de jure control by means of: (i) having not less than fifty per cent of voting rights in E2; Or (ii) appointing more than fifty per cent of the members of the board of directors in E2; or (iii) controlling the management or affairs through decision-making in strategic affairs of E2 and appointment of key managerial personnel; or (c) exercises de facto control by means of being a party to agreements, contracts and/or understandings, overtly or covertly drafted, whether legally binding or not, that enable the entity to control the business decisions taken in E2, in ways as mentioned in (b) (i) (ii) and (iii) above. For this purpose: (i) The definitions of ‘associate company’, ‘subsidiary’ and ‘relative’ are as given in the Companies Act 2013. (ii) An ‘entity’ means individuals, group of individuals, companies, firms, trusts, societies, and undertakings.”*

- 3.5 Further, as per UK’s Broadcasting Act,⁴ a person controls a body corporate if—
- (i) he holds, or is beneficially entitled to, more than 50 per cent. of the equity share capital in the body or possesses more than 50 per cent. of the voting power in it; or
 - (ii) although he does not have such an interest in the body, it is reasonable, having regard to all the circumstances, to expect that he would (if he chose to) be able in most cases or in significant respects], by whatever means and whether directly or indirectly, to achieve the result that affairs of the body are conducted in accordance with his wishes; or
 - (iii) he holds, or is beneficially entitled to, 50 per cent. of the equity share capital in that body or possesses 50 per cent. of the voting power in it, and an arrangement exists between him and any other participant in the body as to the way any voting power in the body possessed by either of them is to be exercised, or as to the omission by either of them to exercise such voting power.

- 3.6 The definition of control proposed by the Authority is quite elaborate. It is inclusive of the understanding of this term under Companies Act, Competition Act, and Takeover Regulations as well. The definition proposed by the Authority also covers

² Combination Registration No C-2012/09/78 Order dated 04 Oct.2012

³ TRAI, Recommendations on Issues relating to Media Ownership (Telecom Regulatory Authority of India, 12 August 2014)

⁴ Broadcasting Act 1990, Section 5

the understanding of control under UK's Broadcasting Act as well. Hence, no further amendments are suggested to the definition of control.

4. ***Question 5: Should the licensor, based on recommendations of the concerned monitoring agency/ regulator, restrain any entity from entering the media sector in public interest? Please elaborate your answer.***

4.1 The Authority in its recommendations dated 12 August 2014,⁵ had recommended that entities (political bodies, religious bodies, urban, local, panchayat, and other publicly funded bodies, and Central and State Government ministries, departments, companies, undertakings, joint ventures, and government-funded entities and affiliates) to be barred from entry into broadcasting and TV channel distribution sectors. This practice is similar to practices in other jurisdictions like UK as well. However, government funded channels should not be completely restricted from operating media channels such as TV and radio. State owned channels on television and radio have long served immense public interest. These free to air channels carry programmes of social significance and national importance and have helped in dissemination of news, information, and entertainment in rural areas. For example – “Doordarshan National” is a state-owned public entertainment television channel in India and the flagship channel of Doordarshan, India's public service broadcaster.

4.2 Given that there are existing restrictions in respect of foreign investments in the media sector (*please refer to paragraph 6.1*), in our view the current regulatory mechanism is sufficient and there should not be any additional any entry barriers for any entity or sector of entities to enter the media sector. Further, restraining any kind of entity from entering into the market would be counter-productive to achieving the goal of viewpoint plurality. Therefore, the media sector should be permitted to be an open market with no entry barriers.

5. ***Question 6: Which of the following methods should be used for measuring market concentration?***

- (i) ***Concentration Ratios***
- (ii) ***Lerner's Index***
- (iii) ***Hirschman-Herfindahl Index (HHI)***
- (iv) ***Any other***

Please comment on the suitability of HHI for measuring concentration in a media segment in a relevant market.

In case you support “Any other” method, please substantiate your view with a well-developed methodology for measuring concentration in a media segment in a relevant market

5.1 No detailed comments may be required as section 20(4) of the Competition Act elaborately explains as to how any combination and/or joint venture between two or more independent enterprises can cause or cannot cause any appreciable adverse effect in the markets within India. Parties to such combination, subject to provisions of the Competition Act, if discloses via notification all economic activities between

⁵ TRAI, Recommendations on Issues relating to Media Ownership (Telecom Regulatory Authority of India, 12 August 2014), p.74

such parties under statutory forms to the Commission praying *inter alia* for approval of the transaction, then no consumer harm can happen logically.

6. ***Question 7: What all genres shall be considered for the purpose of overseeing of media ownership to ensure viewpoint plurality? Please elaborate your response with justifications.***

6.1 In our view, there should be no regulation on media ownership. However, if any regulation is required to be established, then the Government's oversight of media ownership should only be limited to "news and current affairs". News and current affairs is the most relevant genre of content for dissemination of information, discourse and opinions, and is therefore crucial to ensure viewpoint plurality. However, the fact that there are reportedly 389 television news channels (as of September 2021),⁶ 14,508 newspapers (as of 31 March 2020)⁷ and 82% of the population used online portals for consuming news in India (2021)⁸, evidences a healthy competition in the media sector of different mediums, and existence of viewpoint plurality.

6.2 Further, the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 read with the FDI Policy, already set out restrictions on foreign ownership in the media sector. We have summarised these restrictions as below, for reference:

#	SECTOR	FOREIGN INVESTMENT CONDITIONS
1	Broadcasting Carriage Services	Investment over 49% in a company not seeking license from the MIB, resulting in change in the ownership pattern or transfer of stake by existing investor to new foreign investor, requires government approval
2	FM Radio	Up to 49% under the government approval route
3	Up-linking of 'News & Current Affairs' TV Channels	Up to 49% under the government approval route
4	Print Media	Up to 26% under the government approval route
5	Uploading / streaming of news and current affairs through digital media.	Up to 26% under the government approval route

As set out above, the government already has in place mechanisms which restrict foreign ownership in the genre most important for ensuring viewpoint plurality in the nation. Wider choice, affordable price, and highest form of quality of service, if made available to the end consumers, both at the point of sale and post-sale, shall be the guiding principles in improving the performance of the media sector.

⁶https://www.ey.com/en_in/media-entertainment/tuning-into-consumer-indian-m-and-e-rebounds-with-a-customer-centric-approach

⁷ TRAI Consultation Paper 2022

⁸ <https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2021/india>

7. ***Question 8: Which media segment amongst the following would be relevant for encouraging viewpoint plurality?***
- (i) ***Print media viz. Newspaper & magazine***
 - (ii) ***Television***
 - (iii) ***Radio***
 - (iv) ***Online media/Digital media/OTT***
 - (v) ***All or some of the above***

Please substantiate your answer with appropriate reasons.

- 7.1 In the TRAI Recommendations 2014, the Authority had deemed only print (newspapers only) and television as relevant segments for ensuring viewpoint plurality, since: (i) private players in the radio segment are not permitted to broadcast news except for the news which has already been broadcast by the All India Radio without any modifications⁹ and (ii) in 2014 the number of internet users was not significantly large.
- 7.2 In our view, there are sufficient safeguards in the existing regime to ensure viewpoint plurality. The Authority could consider working with the various self-regulatory bodies in the news sector, to further strengthen existing mechanisms for ensuring fair and accurate news content. As such no specific regulation or monitoring mechanism is required on any medium of dissemination.
8. ***Question 9: Should the word 'media' include television, print media, digital/online media, and other media entities? Alternatively, whether 'television' as a media segment should include only DPOs (including LCOs) or only Broadcasters or both for ensuring viewpoint plurality in the television segment? Please justify your answer.***

- 8.1 In the TRAI Consultation Paper, the Authority has expressed its intent to extend the consultation on the distinct role of broadcasters, DPOs and LCOs, in the television segment, and has invited comments from stakeholders.
- 8.2 We have examined the definition of "media" in various jurisdictions below:

- (i) Australia – Under the Broadcasting Services Act 1992, "Media operation" means:
 - (a) a commercial television broadcasting licence
 - (b) a commercial radio broadcasting licence; or
 - (c) a newspaper that is associated with the licence area of a commercial television broadcasting licence or a commercial radio broadcasting licence.

Further, "Commercial television broadcasting service" means a commercial broadcasting service that provides television programs. And "program", in relation to a broadcasting service, means:

⁹ https://mib.gov.in/sites/default/files/PolicyGuidelines_FMPhaseIII%20%281%29.pdf

- (a) matter the primary purpose of which is to entertain, to educate or to inform an audience; or
 - (b) advertising or sponsorship matter, whether or not of a commercial kind.
- (ii) United States of America – Under Section 309(C)(i) of Communications Act 1934, the term "*media of mass communication*" includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.
- (iii) Singapore - As per Section 2 of Info-Communications Media Development Authority Act, 2016, "*media*" means —
- (a) a film as defined in section 2(1) of the Films Act 1981;
 - (b) a newspaper;
 - (c) a broadcasting service;
 - (d) a publication as defined in section 2 of the Undesirable Publications Act 1967; or
 - (e) any other medium of communication of information, entertainment or other matter to the public (or a section of the public) that the Minister may, by order in the Gazette, specify, and "*media industry*" and "*media service*" have corresponding meanings.
- (iv) United Kingdom – This jurisdiction does not have a legislation which contains the definition of "*media*" or related words on a general basis.

8.3 The definitions utilised for the term "*media*" in different jurisdictions, are broad and include broadcasting services as a line-item. It appears that this is intended to include not only broadcasters but also digital platform operators and local cable operators. Accordingly, the definition of "*media*" and "*television*" should include all relevant stakeholders in the broadcasting segment such as local cable operators, broadcasters, and distribution platform operators, since they form part of the value chain which disseminates content over television. Having said that, in our view LCOs and DPOs are sufficiently governed under the Cable TV Rules, and therefore no further regulation is required.

9. ***Question 10: What should be the basis of classification of relevant geographic markets for evaluating concentration in media ownership? Should it be aligned with state or a region / metro / non-metro cities or the whole country? Please support your answer with reasons.***

r/w

Question 11: Should the relevant geographic market be defined on linguistic criteria? If yes, please list the languages which may be included in this exercise, along with justifications.

r/w

Question 12: Should the relevant geographic market be defined uniformly for the whole country? Is there a need to adopt separate criteria for certain states and/or Union Territories in light of their peculiar circumstances such as difficult terrain, hilly region, huge distance from mainland, low media penetration etc.?

In case you support the need of a separate criteria for certain states and/or union territories, please specify such states and/or union territories and the criteria suitable for them along with appropriate justifications. Methods for Calculating Level of Consumption in a relevant market.

- 9.1 'Relevant geographic market' is essentially deemed to be the area in which conditions of competition for supply of goods or provision of services or demand of goods or services are 'distinctly homogenous' and can be distinguished from the conditions prevailing in the neighboring areas.
- 9.2 In the Indian context, given the diverse nature of the market, both from a demographic and geographic considerations standpoint, the (i) customer preferences and consumption patterns, and (ii) nature of products / services made available, are subject to stark variation on a region-to-region basis. Accordingly, it may not be feasible to deem 'India' as a whole to be the relevant geographic market while assessing issues pertaining to media ownership.
- 9.3 The determination of relevant geographic market will also differ for different media. For instance, digital media does not have territorial restrictions or licensing requirements but consumption is driven by factors such as linguistic preferences, price points for access, ease of access of internet etc., whereas (i) radio and/or television broadcast, and (ii) print media, in any region is subject to the registration / licensing requirements prescribed for the relevant medium - which has significant participation from local players and consumption is driven based on preferences relating to language / regional sensibilities.
- 9.4 Broadcast Audience Research Council of India ("**BARC**") also classifies television broadcast markets basis language (e.g., HSM or Hindi speaking market), and further also as megacities, urban and rural.
- 9.5 At the time of determining the relevant geographical market for any media form, the following factors should be assessed: (i) demography, (ii) linguistic preferences, (iii) cultural inclinations, (iv) fiscal wherewithal / per capita income, etc. An assessment basis such criteria not only brings out distinctions at a state-level but will also

highlight variations within a state, between urban and rural regions, or regions with varying cultural groups (such as, pre-dominantly tribal areas).

- 9.6 Linguistic criteria have objective qualities and are certainly an important metric in determining relevant markets. As such, it should be taken into consideration in conjunction with the other criteria set out above in #3.5. Basis this additional dynamic, a more granular and holistic analysis can be undertaken after folding in all the languages recognized in the Eighth Schedule of the Constitution of India (i.e., Assamese, Bengali, Bodo, Dogri, Gujarati, Hindi, Kannada, Kashmiri, Konkani, Maithili, Malayalam, Manipuri, Marathi, Nepali, Oriya, Punjabi, Sanskrit, Santhali, Sindhi, Tamil, Telugu, and Urdu).
- 9.7 In our view, the determination of relevant geographic markets for evaluating concentration in media ownership, can be done only on a case by case by basis, and should be aligned on a regional (i.e., metro, non-metro, urban and/or rural regions), taking into considerations of (i) language (ii) cultural inclinations and (iii) demography, instead of a blanket state-level classification or treating the entire country as a single geographic market.
10. ***Question 13: Which of the following metrics should be used to measure the level of consumption of one type of media (media outlet) in a relevant market?***

13.1. Volume of consumption

13.2 Reach

13.3 Revenue

13.4 Any other

Please elaborate your response with justifications. In case you find “Any other” metric to be suitable for the said purpose, you are requested to support your view with a detailed methodology.

- 10.1 Instead of focusing on a standard metric across each type of media (i.e., *print, radio, television and digital*), different metrics (and permutations and combinations thereof, if required) should be taken into consideration for determining consumption in each media. To further elaborate:
- (i) Print Media | Reach: From a practical standpoint, any publisher will endeavour to ensure that the (A) areas within which its publications are made available to customers, and (B) volume made available for sale and consumption, are aligned with the market demands. Further, a publisher will always endeavour to ensure that the expenses incurred to make its publications available in the relevant market are duly recouped. Given that newspapers and magazines are also made available to general public free of cost in various places, such as libraries, public waiting rooms, corporates etc., and are also passed along amongst individuals, the sales or subscription thereof may not be an accurate metric to determine a publisher’s influence. Similarly, time spent in consumption of print media would also be inaccurate measure of its consumption and practically challenging to assess. The volume of consumption (i.e., time spent) of any publication is contingent on the consumer’s consumption rate, preferred topics, level of understanding, etc.

Basis this rationale, market share of print media should be computed basis each publications 'reach' i.e., the percentage of people exposed to the relevant publication. The assessment of 'reach' may be measured basis periodic surveys conducted by professional and independent agencies.

- (ii) Radio | Reach and Volume of Consumption: As mentioned earlier, a radio broadcast is subject to registration / licensing requirements – the procurement of which is driven by demand based on the regional linguistic and cultural preferences. Revenue for radio broadcast may be linked to varying commercial considerations such as availability of target audience for an advertiser in a specific market, spending power of consumers, inclusion of public interest advertisements etc. However, collectively, the reach of a radio broadcast as well as the volume of consumption is a reliable metric of determining consumption of radio broadcast.
- (iii) Television| Reach and Volume of Consumption: As such, akin to radio broadcasts, television broadcasts are also subject to registration / licensing requirements. That said, in view of the bouquet system of channel distribution, the level of consumption of a particular channel cannot be fairly assessed purely on the basis of 'reach' and will need to be supplemented and aligned by an assessment of the 'volume of consumption' of each television broadcast. While television broadcast has traditionally relied on TRP ratings to assess consumption, new technology and use of set top boxes can enable broadcasters and cable operators to procure more accurate viewership data in the form of return path data ("RPD").
- (iv) Digital Media| Reach and Volume of Consumption: The unique factor of digital media is that it is freely accessible by consumers across territories. Further, the platforms have a relatively greater scope of visibility on the reach, consumption patterns and revenue trends. In view of this, for a holistic assessment of consumption patterns of digital media platforms as well as digital content, reliance may be placed on 'reach', 'volume of consumption', and 'time spent by users on digital media platforms'.
- (v) While these are indicative parameters, there are several subjective matters that also govern determination of a market for the consumption of media. These may include subject matters of content, societal and moralistic issues and opinions, age groups, etc.
- (vi) "Relevant market" is the combination of relevant product and/or services along with the geography in which such products and/or services are being operated by enterprises. The Commission has mandated under section 32 of the Competition Act to remedy anti-competitive effects caused to the domestic markets within India by overseas enterprises which are being operated by their subsidiaries in India. Hence, at times, depending on the facts and circumstances in a given situation, the determination of the relevant market may go beyond the geographical boundaries of India. Coupled with this statutory mandate, the Commission has also been conferred powers to

enter into international cooperation agreements with its overseas counterparts (overseas competition agencies) in terms of section 18 of the Competition Act *inter alia* to collect evidence of anti-competitive practices to implement the provisions of section 32 of the Competition Act. The Commission until date has entered into international cooperation agreements with several overseas competition agencies.

11. ***Question 14: Whether circulation details of newspapers should be used as a proxy for readership to measure the reach of media outlet in print segment in a relevant market?***

In case you disagree, kindly provide a detailed methodology to measure the level of consumption of print media segment.

11.1 Circulation refers to the number of copies that a publication has distributed. As indicated in our response to question 13 above, while a publisher will endeavour to print and circulate such number of copies as it would expect to be consumed, circulation may not be the most accurate measure of consumption, due to pass along readership and availability of the copies in public places such as libraries, waiting rooms etc.

11.2 In our view, reach of a publication in print media may be more appropriate measure of consumption. Given that a print copy is likely to be read by more than one reader, the actual consumption could be calculated by multiplying 'copies in circulation' with 'reader per copy'. The value for reader per copy could be determined by an independent media rating agency through methods such as surveys.

12. ***Question 15: According to you, what measures should be adopted to discount the impact of bouquet system of channel distribution on the viewership of television channels? Please support your suggestion with reasoning.***

12.1 As highlighted by the MIB in its letter dated 19 February 2021, the bouquet system of channel distribution obfuscates the per channel viewer distribution metrics to an extent. The rationale being that a viewer who subscribes to a bouquet, may eventually (i) watch only a select few channels, or (ii) devote a majority of his / her viewership duration towards such select few channels.

12.2 In view of the above, a mechanism should be implemented which enables an assessment of not only the reach of each channel but also the consumption of such channel. To this end, from a practical standpoint, BARC may consider bolstering its scope of collaboration with direct-to-home (DTH) and cable operators to ensure RPD capabilities are incorporated in set-top-boxes spanning across all regions and income-groups.

13. ***Question 16: Would it be appropriate to put restrictions on cross media ownership in one or more type of media segment based on mere presence of an entity in any segment in a relevant market?***
- 13.1 Over the course of the last few years, each of the media segments (*i.e., print, radio, television and digital*) has undergone phenomenal growth. Further, the market players in any of these market segments no longer operate in silos and tend to structure their business operations in a manner that they are present in other media segments for a broader reach. To illustrate, media outlets (*e.g., news publishers and channels broadcasting 'News and Current Affairs'*) have now launched their own online applications and/or actively share content through social media channels.
- 13.2 Given the number of regional and national market players active in India, and the diverse media segments these outlets are active in, it would not be feasible to introduce any cross-media ownership restrictions. It is important to note that even other jurisdictions in which cross-media ownership restrictions were in place (*e.g., USA, UK*) are being relooked at, and gradually being phased out.¹⁰
- 13.3 Lastly, the Indian framework already provides for adequate checks and balances against the issues linked with cross-media ownership through the provisions of Competition Act. It is also important to note that what is regulated under the Competition Act is abuse of dominance and not dominance itself. Further, the proposal to restrict cross ownership based on mere presence of an entity in a particular segment, is a very high threshold and is likely to restrict new entrants instead of fostering competition.
- 13.4 Further, content related concerns can be addressed through the compliance requirements, safeguards and/or grievance mechanism prescribed under *inter alia* IT Rules.
- 13.5 Accordingly, in our view, instead of implementing additional restrictions on cross media ownership, more emphasis should be placed on bolstering the implementation of the existing legal framework.
14. ***Question 17: In case you support the restriction based on mere presence in the relevant market, what all segments should be included for imposition of restrictions? Further, in how many segments, presence of an entity should be allowed i.e., should it be "2 out of x" or "1 out of x", x being the total number of segments?***
- 14.1 As highlighted in our response to Question #16, there should not be any restriction based on mere presence in the relevant market.

¹⁰ FCC v Prometheus Radio Project; <https://www.theguardian.com/media/2010/aug/09/ofcom-cross-media-ownership-rules>

15. ***Question 18: Would it be suitable 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 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. In case you support such restriction, please suggest the threshold level of market share for the purpose of imposing cross-media ownership restrictions.***
- 15.1 As mentioned in our response to Question #16 above, in our view, there should not be any restrictions on cross media ownership.
- 15.2 In any case, the challenge with proposing any threshold is the lack of an objective metric / rationale basis which a threshold can be clearly specified and enforced. Further, since media is a dynamic segment where technology is evolving continuously, applying the same metrics to all mediums may not be of any value. Accordingly, unless a proper empirical rationale for a threshold is verified by all stakeholders, it may not be suitable to implement a threshold linked restriction.
16. ***Question 19: Whether in your opinion, the restrictions on cross media ownership should be imposed 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.***
- 16.1 No Comments. However, it is reiterated that the Commission has enough statutory powers to remedy such oligopoly or duopoly or even monopoly situations in India. The decision of the Commission against the monopolist Coal India Limited, alleged to have abused its monopoly position, is an appropriate illustration to support that the existing regulatory framework is sufficient to meet the challenges. It is not out of place to mention that the Commission is mandated to eliminate anti-competitive practices in respect of enterprises involved in such practices, therefore, it is a sector agnostic authority.
17. ***Question 20: In case your response to the above question 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.***
- (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.***
- 17.1 No Comments since substantial response has been given in the earlier segment(s).

18. ***Question 21: Please provide your inputs on the suitability of imposing restrictions on cross media ownership only in highly concentrated relevant markets using Diversity Index Score as a tool to measure concentration.***

In case you find the abovementioned criteria of restricting cross media ownership appropriate, 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.***

18.1 No Comments.

19. ***Question 22: In case you consider any other criteria for devising cross media ownership rules to be more appropriate, please suggest the same with sufficient justifications.***

19.1 No Comments.

20. ***Question 23: Considering the fact that sectoral regulators have played important role in bringing necessary regulations to facilitate growth and competition and to promote efficiency in operations of Telecom Services (Telecommunications and Broadcasting), in your opinion, should Merger & Acquisitions in media sector be subjected to sector specific regulations? Please justify your response.***

r/w

Question 23(a): If yes, which among the following should be taken as the criteria for the same –

- (i) ***minimum number of independent entities in the relevant market***
- (ii) ***maximum Diversity Index Score***
- (iii) ***any other measure***

r/w

Question 23(b): If no, what mechanism would you suggest for regulator to use for ensuring smooth and equitable growth of the sector?

- 20.1 The media sector is currently one of the fastest growing sectors in India, owing to a broad regulatory framework allowing players in the sector to self-regulate.
- 20.2 There are currently multiple legislations which address / cover various aspects of the media sector such as (i) the FEMA which regulates and sets out the extent of foreign direct investment permissible in companies, including in the media industry, and the process to be followed to undertake such investment; (ii) the Competition Act which regulates and aims to address and prevent anti-competitive practises / abuse of dominance in a sector agnostic manner; (iii) and sectoral laws and regulations, which specifically cover the various verticals in the media industry, such as the Cable

Television Network (Regulation) act of 1995 and the rules framed thereunder, the IT Rules which specifically addresses and covers content related concerns and compliances, PCA, guidelines issued by the Department of Telecommunications, the Authority, the Ministry of Information and Broadcasting (“MIB”), etc.

20.3 As such, not only are there specific legislations to regulate foreign investment and abuse of dominance by enterprises, but there are also legislations / self-regulatory framework to regulate content related issues (such as ethical news reporting, fakes news etc.) that the TRAI Consultation Paper aims to address. Further, concentration of any enterprise in exercise of fair and reasonable economic and efficiency-justifications may not by itself be anti-competitive conduct. The Competition Act aims at remedying "abuse of dominance" and not dominance per se, hence a framework that restricts media ownership and control ex-ante is likely to come in conflict with the established principle of Competition Act. In this context, a separate regulator only for the media and entertainment sector may be redundant.

20.4 Therefore, while there already exists a robust framework to check anti-competitive practices and abuse of dominance under the Competition Act, specific concerns around viewpoint plurality can be addressed through self-regulatory mechanisms. The actual players in the media sector are best placed to enact self-regulations which address issues relating to viewpoint plurality. This also enables a balance between equitable growth of the industry *vis-à-vis* addressing issues around content regulation. The news, broadcasting and digital sectors are already governed by robust self-regulatory mechanisms, which can be enhanced specifically to address issues around ensuring diversity and plurality in views / content and curbing of fake, inaccurate news.

21. ***Question 24: In your opinion, should any entity be allowed to have an interest in both broadcasting and distribution companies/entities?***

r/w

Question 24(a): If “Yes”, how would the issues of vertical integration be addressed?
r/w

Question 24(b): If “No”, whether a ceiling of 20% equity holding 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?

r/w

Question 25: Please suggest any other measures to determine “Control” and the limits thereof between the broadcasting and distribution entities.

21.1 The mere fact that a single entity has an interest / ownership in both broadcasting and distribution companies / entities may not be an indication that the relevant entity is engaging in any anti-competitive practises or is abusing its dominant position. The Competition Act which regulates and aims to address and prevent anti-competitive

practises / abuse of dominance, states that vertical integration in itself is not adequate to set out that an entity is abusing its dominant position and that each such arrangement must be objectively analysed to determine if there is actual abuse of dominance which is corroborated by evidentiary proof.¹¹ Accordingly, an entity should not be totally restricted from having an interest in both broadcasting and distribution companies.

- 21.2 The issue of vertical integration and instances of abuse of dominance can be addressed via an objective case to case analysis of each such arrangement to determine factually if actual abuse of dominance has taken place, under the existing process set out under the Competition Act. Under the 2020 amendment to the Guidelines for obtaining License for Providing Direct to Home Broadcasting Services in India, which was adopted by the MIB pursuant to the recommendations issued by the Authority, the maximum capacity that can be reserved by a vertically integrated entity is capped at 15% with the requirement to offer the remaining capacity to other broadcasters on non-discriminatory basis. Further, the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004 also regulate agreements between broadcasters and distributors of TV channels to ensure non-discriminatory behaviour and restrict broadcasters from entering into exclusive contracts with distributors or arrangements that prevent any other distributor of TV channels from obtaining such TV channels for distribution. In view of the existing framework for governing vertical integration and arrangements, in our view, there is no need for additional regulation in this regard, or to delineate permissible “Control” *inter- se* broadcasters and distributors.
- 21.3 The current concept within India is competition amongst enterprises with an objective of attaining overall “competitiveness” in economic activities ensuring that Indian enterprises finally become global competitors.
22. ***Question 26: Do you think that the disclosures/ compliance reports for different type of licensees as described in Part II of Chapter VI are sufficient to ascertain the media Ownership/ Control by certain entity(ies)? If no, please specify, what additional details should be sought by the licensor or the regulator for effective monitoring.***

r/w

Question 27: What additional parameters, other than those listed in this consultation paper, could be relevant with respect to mandatory disclosures for effective monitoring and compliance of media ownership rules? Further, what should be the periodicity of such disclosures? Please justify your answer.

- 22.1 In our view, existing sectoral laws, and regulations, such as the Cable Television Network (Regulation) Act of 1995 and the rules framed thereunder, PCA, guidelines issued by the DOT, the Authority, MIB, etc., which prescribe thresholds / limitations for ownership / shareholding and associated disclosures / compliance reports are sufficient.
- 22.2 There are comprehensive disclosure requirements under existing laws and regulations. These include: (i) DTH Guidelines which prescribe disclosure requirements setting out information pertaining to the shareholding, relevant

¹¹ Section 4 of the Competition Act 2002

shareholding agreements, loan agreements and details of investment obtained by DTH licensees; (ii) the Guidelines for Providing Headend in The Sky Broadcasting Services (“**HITS Guidelines**”) which prescribe disclosure requirements setting out information pertaining to the shareholding, relevant shareholding agreements, loan agreements and details of investment obtained by HITS providers; (iii) Companies Act 2013, which has annual disclosure requirements for companies regarding their shareholding and investors, etc; (iv) regulations issued by the Securities and Exchange Board of India which requires acquirers / investors in listed companies to make annual disclosures; (v) Policy Guidelines for Uplinking of Television Channels, which requires media companies to divulge details of their director, share of equity capital, shareholding pattern, foreign investment and source of funds; and (vi) the disclosure requirements introduced by the MIB vide a clarification to Press Note 4 (2019 series), which required relevant entities to disclose (a) their shareholding details; (b) names and address of promoters / directors / significant beneficial owners / shareholders; (c) latest audited / unaudited profit and loss statements; (d) permanent account numbers; and (e) confirmation of compliance with the FDI policy and relevant rules enacted thereunder. Accordingly, there should be no further requirement for disclosure.

22.3 If any disclosure requirements are mandated, in our view, these should be on an annual basis (aligned with each financial year) in order to ensure that there are regular / periodic disclosures from relevant entities however the burden of compliance is not too high.

23. **Question 28: Stakeholders may also provide their comments on any other issue relevant to the present consultation.**

23.1 No Comments.

DISCLAIMER: Please note that the comments and suggestions hereinabove are the personal views of Manas Kumar Chaudhuri, Tanu Banerjee, Ishan Johri, Abhishek Senthilnathan, Amulya Sharma, Garima Kedia, Divya Patil, Akriti Sirsalewala, and Preethika Piliya, in their individual capacities, and do not express the views or should not in any way be deemed to be the views of Khaitan & Co.

In case of any queries or comments on the responses above, please feel free to reach out to the individuals mentioned hereinbelow:

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