12/12/2013

To

Mr. Wasi Ahmad, Advisor (B&CS),

The Telecom Regulatory Authority of India,

Mahanagar Doorsanchar Bhawan,

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Re: TRAI's SupplementaryConsultation Paper No. 11/2013 on Issues related to New DTH Licenses. ('The Paper')

Sub: STAR India's submission/response to the aforesaid Consultation paper.

Dear Sir,

We have perused the aforesaid Consultation Paper issued by the TRAI and have duly considered the issues that have been raised therein. We thank the Authority for affording us an opportunity to submit our response thereto.

Moreover, after the deliberations at the Open House Discussion held on 10th December 2013 we are in a better position to appreciate the issues that have been raised in the Paper and have also had the occasion to re-consider them in their proper light and appropriate perspective.

Accordingly we are hereby submitting our composite response as stated in Annexure I to all of the issues that have been highlighted in the Paper. We request your kind self to consider this instant response as our final response. We hereby withdraw our earlier submissions to the Paper. We request your kind self to take the same off from your website. We request that this instant submission/response be uploaded instead.

In our instant response we have also made certain recommendations for the Authority's kind consideration which we firmly believe would instill some of the necessary hygiene that is needed in this fast evolving sector.

Our submissions herein are to be read together with our earlier submissions made during the previous consultation processes on Media Ownership and Foreign Direct Investments.

Yours Truly

For Star India Private Limited

DEEPAK JACOB

(GENERAL COUNSEL & PRESIDENT – LEGAL AND REGULATORY)

ENCL – ANNEXURE I, as above

ANNEXURE I - Star India's Consolidated Response To Issues raised in TRAI's SupplementaryConsultation Paper No. 11/2013('The Paper').

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ISSUE 1: "Apropos the above, stakeholders are requested to give their views on the modification of clauses 1.4 and 1.5 of the DTH Guidelines,

as mentioned in para 1.15, prescribing cross-holding/control restrictions.

Stakeholders are welcome to suggest other options, if any, with justifications.

Stakeholders are also requested to give their views on the timeframe to be given to the existing DTH licencees to comply with the new provisions and the justification thereof."

RESPONSE:

I. Introduction

The Paper refers to the definitions from The Companies Act, The Competition Act, the Income Tax Act, and The Take-Over Code and has attempted to amalgamate all these definitions into one integral whole with the stated object of further tightening the existing 'vertical restrictions' in the DTH Guidelines. The Paper says:

"1.4 In the context of DTH Guidelines, the basic intent behind the provisions pertaining to cross-holdings was to ensure that the broadcasting and the different types of TV channel distribution operators do not control each other i.e. to prevent an outcome when vertical integration across segments and/or horizontal integration across TV channel distribution platforms could compromise or limit competition. This is all the more relevant in the DTH sector where the sector is facing bandwidth capacity crunch due to limited availability of transponders. This translates into a limited TV channel carrying capacity of a DTH operator. Unlike the digital addressable cable TV sector, due to the bandwidth capacity crunch, it may also not be feasible to mandate 'must carry' provisions, in the DTH sector, to protect the interests of the broadcasters. In such a scenario, ***a vertically integrated DTH operator would have all the means to prevent entry or to drive-out channels of a competing broadcaster*** *and thus has the potential to distort the market to further its own interests. Similarly, in case the distribution platform operators are integrated and have market*

dominance ***such entities can block content selectively in their own interest****. This will, in turn, also* ***restrict consumer choice*** *and may also* ***adversely affect the quality of service in the long run****. In both the scenarios,* ***the selective blocking of content may also restrict content plurality****."*

We respectfully submit that there is no empirical study conducted by any agency thatsuggests such situations to be prevailing in India. Also there are existing regulatory constructs to deal with issues such as content denial or refusal to deal. We urge the Authority to conduct a base line study (of consequences for non-intervention) and a regulatory impact assessment (for making out a case for intervention) and only if a cost benefit analysis reveals a justification for retaining or tightening the existing vertical integration restrictionsshould the Authority proceed to recommend such guidelines. In numerous countries a Regulatory Impact Assessment precedes any policy formulation exercise. Both Ofcom and the FCC have incorporated these as one of their regulatory best practices pursuant to statutory requirements. TRAI is requested to carry out such an assessment prior to any proposals in this space as any recommendations from TRAI in this regard would have far reaching consequences.

(a) Capacity constraints cannot be resolved through ownership restrictions:

Further it has to be appreciated that availability of transponder capacity is a genuine concern in the DTH industry. This however is entirely an infrastructural policy issue that regulates availability of transponder spaces in Indian and foreign satellites. This is not an issue that can be resolved by introducing or continuing with ownership related regulations or restrictions. There have been demands for an 'Open Skies' policy that would ease the capacity crunch over Indian skies, particularly in the Ku Band. To resolve pipeline capacity issues through ownership regulations would perhaps be misplaced. TRAI would be performing a yeoman's service by taking up these infrastructural bottlenecks with the Government rather than reinforcing the existing vertical ownership regulations in the Distribution sector as such restrictions may have now turned anachronistic given the cataclysmic changes that have informed the market. It also needs to be mentioned that while DTH may not have a Must Carry mandate, its immediate rival viz. Cable is by regulation - bound by the same. This will invariably result in Cable carrying more channels compared to DTH that will put competitive pressure on the latter to enhance its capacities through additional investments if necessary. Accordingly it will be competition from cable that shall unlock capacity in DTH, not restrictive ownership.

(b) Continuing with Vertical restrictions while allowing FDI may act in cross purposes:

It is a fact that DTH companies in particular are bleeding owing to multiple taxation, a steep AGR regime, low ARPUs and competition with analog (non - transparent cable). Please see Table I below. It has also been acknowledged that these firms need greater access to funds. Adverting to those needs - the FDI limits in distribution have now gone up to 74 percent; with the TRAI even recommending a further increase to 100 percent. However in the absence of a corresponding easing of vertical integration restrictions, and an enabling infrastructure policy that allows or encourages capacity expansion, or transponder availability, these enhanced FDI limits could prove to be ineffective.

(c) Existing TRAI Regulations and The Competition Act preempt any foreclosure effects that may arise out of Vertical integration:

On the question of broadcasters having stakes in distribution platforms denying carriage to rival content owners, firstly the existing regulations framed by TRAI and the extant Competition Law will never allow such refusal to deal, secondly the Authority would agree that it would purely be in the business interest of vertically integrated distribution platforms to offer diversified content in order to be relevant to a varied consumer base that characterizes India rather than only offer its own channels at the risk of being shunned by a majority of viewers.The Competition Commission has been alive to situations where carriage has been denied by a particular platform to rival content owners and the delinquent platform has been duly penalized.[1] TRAI's Regulations on non-exclusivity, nondiscrimination and 'Must Provide' ensure that vertically integrated broadcasters compulsorily share their channels with rival distribution platforms. Further as stated, with the easing of capacity constraints DTH operators would in any event be more than willing to carry greater number of channels.

(d) Plurality does not get compromised with Vertical Integration:

Today it is settled competition law jurisprudence that vertical ie non horizontal integration does not adversely impact plurality. Infact TRAI in its earlier recommendation had stated[2]:

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

There is a presumption thatvertical integration and vertical mergers are less harmful than horizontal mergers. Theview is stated most clearly in the "Non-horizontal merger guidelines" by the EuropeanCommission:

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[1] In Re Kansan News Case No. 26/2011 decided by the CCI on 03.07.2012, Also see detailed analysis of how Competition Act together with TRAI Regulations prevent foreclosure effects at pages 78-91 of Star's submissions on TRAI's CP on issues relating relating to Media Ownership dated 15.02.2013

[2]Telecom Regulatory Authority of India.25 February 2009. Recommendations on Media Ownership p.39

"Non-horizontal mergers are generally less likely to significantly impedeeffective competition than horizontal mergers.
First, unlike horizontal mergers, vertical or conglomerate mergers do notentail the loss of direct competition between the merging firms in the samerelevant market. As a result, the main source of anti-competitive effect inhorizontal mergers is absent from vertical and conglomerate mergers.
Second, vertical and conglomerate mergers provide substantial scope for efficiencies."[3]

(e) <u>Quality of Service does not get compromised by Vertical Integration on the contrary it results in far reaching benefits for consumers:</u>

(i)Pricing and Quality Benefits of Vertical Integration: Vertical integration is a common phenomenon across the globe and is prevalent in a number of industries. The benefits of vertical integration accrue not only to the integrated entity but also to the users in the form of better pricing and quality.

\- 1. <u>*Indian Examples of Vertical Integration leading to efficiency gains*</u>: Prevalence of vertical integration is also evident in the context of a number of Indian industries. To quote some examples, in the Film industry, there are vertically integrated players like Reliance, which, *inter alia*, produce and distribute movies (through Reliance Entertainment) while simultaneously also operate movie theatres (via Big Cinemas).[4] Similarly, in the retail sector, there are players like Spencer (a multi-brand retail outlet) that deal in the sale of products ranging from food items to clothes while at the same time also

[3] "Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings", Official Journal of the European Union (2008/C 265/07) (2008), paragraphs 11-13

[4] Reliance Big Entertainment. Available at http://www.rbe.co.in/. Accessed on 9 October 2013.

produce its own brand of these goods.[5]Vertical Integration presents the opportunity for efficiency enhancements that can provide benefits to the firms integrating and the consumers they serve (including enhancing competition in the market). It is for this reason that there is a real cost to a blanket prohibition on vertical integration, as it denies the opportunity to realise these efficiencies and associated consumer benefits. The benefits of vertical integration are known to exist in many settings.

- 2. *International Examplesof Vertical Integration leading to efficiency gains*: For instance, in the smartphones industry, control over the entire supply chain has allowed Apple, a leading manufacturer of smartphones, to innovate better than its competitors. Apple manages all the three elements of the value chain—hardware, software and chip components in-house. Again through its various inhouse "Apps" it delivers content through "Over The Top". This is advantageous as it keeps Apple informed about the entire component ecosystem and value chain and thereby allows it to offer consumers a product with better design and features replete also with relevant content. Likewise, in the oil industry, many global players such as ExxonMobil, Shell and BP almost own the whole supply chain managing operations from that of drilling, transportation to that of refining and distribution to benefit from the reduction in transaction costs. More recently, players in other industries such as beverages (PepsiCo, forward integration with bottlers/distributors) and automobile (General Motors, backward integration with part suppliers) have also moved towards vertical integration.[6]

-3. *The Economics of Complementarity*: Vertical integration may yield efficiencies of a more typical nature, such as a reduction in transaction costs,

[5]Spencer's. Available at http://www.spencersretail.com/. Accessed on 9 October 2013.

[6] Dongli Zhang. 15 November 2012. *The revival of vertical integration: strategic choice and performanceinfluences*.Journal of Management and Strategy.

overcoming incomplete contracting problems, and economies of scale and scope. TRAI, in its consultation paper, correctly acknowledges that vertical integration can result in these forms of efficiencies.[7]However, more important in the economic literature is the observation that vertical relationships involve upstream and downstream products that are complements rather than substitutes. For complements, a reduction in the price (or increase in quality) of one product enhances the demand for the other product, and that is a positive externality.[8] This is evident in the television industry, where better content improves the demand and value of distribution platforms and improved distribution platforms similarly make programming more valuable. Firms which vertically integrate are able to capture and internalise these positive externalities because they produce both complementary products (unlike non-integrated producers). The result is that they have stronger incentives than non-integrated firms to reduce price, improve quality or make investments in one or both of the complementary products precisely because they reap the positive externalities of this behaviour in the complementary product. This behaviour, in turn, provides enormous benefits to consumers. Since the activities involved in vertical integration are complementary in nature, there is an incentive for the integrated firm to reduce prices or improve quality. This is because the reduction in prices is likely to result in an increase in sales for the integrated firm at all levels of the integrated production chain.[9] Under separate

[7]Telecom Regulatory Authority of India. 15 February 2013. *Consultation Paper on Issues relating to Media Ownership*. p.67.

[8]This is different to substitutes where the reduction in the price of one product reduces the demand for the other product. It is this key difference which makes competition authorities more concerned about horizontal mergers (i.e. between producers of substitutes) than vertical mergers (i.e. between producers of complements).As indicated by Bishop and Walker (*The Economics of EC Competition Law*. Third Edition. Sweet and Maxwell. 2010. p. 427), since vertical mergers involve integration of complementary activities, unlike horizontal mergers which involve substitute products, they do not directly reduce competition.

[9] For instance, if the firm were to lower the price of its product at the upstream level (input product), it is likely to observe an increase in demand for its products/services at both the upstream and downstream level (finished product) and vice versa ('Cournot effect'). See Bishop and Walker. 2010. *The Economics of EC Competition Law*. Third Edition. Sweet and Maxwell. p. 466.

ownership, these gains are not taken into account and, as a consequence, prices charged at each level are typically higher.[10] This problem is commonly known as the problem of double marginalisation and is avoided under vertical integration.The complementarity of content and distribution results in incentives for vertically integrated operators to remove double marginalisation in the supply chain. By offering their own channels at lower prices, integrated operators are able to bolster demand for distribution services from consumers. Non-integrated content providers do not share in the positive effect on the distribution platform of lower channel prices and are likely to price such content inefficiently higher than integrated operators. Integrated operators are therefore more likely to consider the impact of programming content on distribution profits when setting own channel prices, reducing the effective price of their own content. They will either lower prices for the same bundle of channels in a tier or offer more channels for the same price of a basic tier. Either result is of benefit to consumers as it results in reducing the effective price of content. The willingness to earn a single margin and reduce programming costs on their own channels will likely result in them being favoured by their distributors overindependent channels priced that may be priced higher, but it is precisely this action that results in the consumer benefits.[11]

(ii) Increase in incentives to invest and innovate

1. *Encourages Relation-specific investments*: Vertical integration can increase the incentive of the firm to invest and innovate by overcoming

[10] In addition, there can also be benefits in market set-ups where charging a uniform unit price is often not an optimal way of organising a supply chain and introducing a more sophisticated pricing mechanism is costly or impossible to introduce. In such cases, by removing the need for external pricing, vertical integration can lead to a more efficient outcome.

[11] Christopher Yoo. 2002. *Vertical integration and media regulation in the new economy.* Yale Journal on Regulation, Vol. 19:171. p. 214, 234-235

problems that arise from incomplete contracting, free rider problems[12], and transaction costs.[13] This is particularly relevant for investments that are relationship-specific and are made at the behest of the upstream or downstream partner. When such investments are required, and contracts are not fully specified, it may be possible for one party to take advantage of its vertical partner after the relevant investments have been made. For instance, in the absence of vertical links, a retailer may not have the incentive to engage in strategies that increase the demand of a particular product. This is because the gains from such an investment would not accrue to the retailer alone; they would be shared with other competing retailers as well. Vertical integration rules out such situations and provides a firm with incentive to undertake the desired level of investment. In addition, there are efficiencies to be realised as transaction costs are always incurred in searching for parties and in drawing up contracts when firms are under different ownership.

2. *Incentivizing investments in Programming*: This effect manifests itself as increased incentives for vertically integrated television broadcasters to invest and innovate in television programming. Since integrated operators have a share in the additional profits in distribution from additional or higher quality programming content (e.g. greater market share or additional services to sell to consumers such as HD channels), they will be incentivised to invest in the new programming content in order to realise the additional increase in demand for the distribution platform. The result is that integrated operators may invest relatively more in programming content than independent producers of content, and this benefits the consumer.

[12]Free rider problems in economics refer to gains that are realised by the players present in the market at the expense of efforts (investments) undertaken by another player.

[13] Bishop and Walker. 2010. *The Economics of EC Competition Law*. Third Edition. Sweet and Maxwell. p. 468.

3. _Incentivizing investments in Distribution:_ Likewise, since integrated operators of distribution platforms can share in the profits from creating new programming (including HD programming), they will be incentivised to build additional capacity (or additional features such as pay per view (PPV) or PVR facilities) in order to realize those returns from the distribution of the new programming. Given the economies of scale and scope in capacity upgrades, an operator expanding its distribution network for some of its own programming can simultaneously add capacity to deliver more and benefit other programming providers. This too benefits consumers.

(iii) Productive efficiency

1. _Better Coordination_: The presence of economies of scope or scale[14] across the supply chain can result in efficient use of inputs, as well as greater managerial and financial efficiency. Vertical integration may also result in supply assurance. Further, it can increase coordination and information flow in research and development (R&D), distribution, and marketing between the upstream and downstream firms. Such coordination can play a crucial role in increasing the productive efficiency of the vertical set-up as a whole.

2. _Better Amortization of Costs_: In the television industry, the up-front costs associated with television programming are huge and are required to be amortized over a large number of viewers. The average cost declines as the number of viewers increases.[15] Therefore, economic efficiency increases with every additional viewer. Broadcasters seek to access as large an

[14] Economies of scale refer to reduction in costs that occur due to increased sale or production whereas economies of scope refer to gains that occur due to diversification of production activities in two or more products. Economies of scope also have the effect of reduction in costs (to the extent there are common costs incurred for the diversified product portfolio).

[15] Europe Economics. November 2002. *Market definition in the media sector-economic issues.* Prepared for the European Commission, DG Competition. p. 8.

audience as possible in order to attain an efficient scale of production.[16] Vertical integration with distributors can help broadcasters secure this access and attain productive efficiency.

(iv) Empirical evidence of the efficiencies in the television industry:

Vertical integration in fact is also common in the television industry across the globe with both large and small players opting to integrate in varying degrees. The increasing trend towards vertical integration in the television industry bears testimony to the advantages that such a structure can accrue to the firms and in turn to the consumers. Various broadcasting and telecommunication regulation regulators and also, competition agencies have recognised the potential of vertical integration in the television industry to generate efficiencies for consumers.

1. United States

In the US, there have been vertical mergers where the FCC (regulator) has recognised the potential of vertical merger between media firms to result in benefits for consumers. For instance, in the *Comcast/NBCU* merger, the FCC agreed with the parties to the merger that the transaction will likely <u>reduce some of the barriers and friction that exist when unaffiliated content providers and distributors negotiate to reach agreements</u>. FCC distinctively noted that this is particularly true of the media industry as it is prone to uncertainty and change and that makes it difficult to accurately predict (and therefore allocate) the risks and rewards in agreements that involve departures from standard business models which inhibits the bargaining process and slows innovation.[17] In addition, the FCC concurred with the

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[16] Christopher Yoo. 2002. *Vertical integration and media regulation in the new economy.* Yale Journal on Regulation, Vol. 19:171. p. 214, 234.

[17] Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For Consent to AssignLicenses and Transfer Control of Licensees. MB Docket No. 10-56. Memorandum and Order. FederalCommunications Commission. 20 January 2011. para 231.

parties that the elimination of double marginalization of NBCU programming costs likely will result in some benefits for consumers[18] and that the transaction will tend to promote certain synergies and economies of scale and scope in the areas of programming, advertising, and cross-promotion.[19] In totality, it is evident that the FCC did acknowledge that vertical integration in the television industry had the potential to generate efficiencies.

In the context of the US industry, there is also evidence that suggests that programming services have been financed with MSO equity capital.[20] MSOs benefit not only from the returns on the programming services but also from their ability to thereby invest in increasing the supply of such programming services. MSOs provide the requisite capital support required in the initial years of the launch of the programming services and thereby reduce the risks of failure. Home Box Office (HBO), the first widely distributed cable TV program channel, was developed by Charles Dolan, a cable TV industry entrepreneur and owner of Cablevision of Long Island, in 1972.[21] Warner Communications, Cablevision Systems Development Corporation and Viacom are all examples of cable system operators that have been entrepreneurial in launching programming services.[22]

2. Canada

Vertical integration in television broadcasting and distribution is widespread in Canada with notable consolidations including that of the

[18] Ibid. para 237.

[19] Ibid. para. 242.

[20] Thomas W. Hazlett. 19 October 2007. *Vertical Integration in Cable Television: The FCC Evidence*. Examples: C-Span, BET and Discovery.

[21] Ibid.

[22] Waterman & Weiss. 1997. *Vertical Integration in Cable Television: The Economics of Rate Controls*.. p. 52.

acquisition of TVA, a French language television network, by Quebecor Media, a multi-media player with services in analogue and digital broadcasting[23] (2001); five Citytv stations, an English broadcast television network, by Rogers Media, a diversified communications and media company(2007); Canwest Global, a television broadcasting company, by Shaw Communications, a multi-media company (2010); and CTVglobemedia, a television broadcasting and production company, by BCE, a telecommunications and media company (2011)[24]. The trend towards vertical integration in Canada reflects the efficiency benefits that distributors expect to gain from doing so.

3. Latin America

Prevalence of vertical integration is also visible in the Latin American countries of Brazil, Mexico, Argentina and Venezuela. Globo is a large vertically integrated player in Brazil having operations in both programming and broadcasting. Globo owns the main Brazilian cable network and also has shares in SkyLA, a satellite television company.[25] Globo's horizontal and vertical integration has been held to be an advantage for the production of a new product, 'telenovelas' (soap operas) that led to its establishment in international markets.[26] Group Televisa and TZ Azteca are vertically integrated players engaged in program production, packaging and delivery in Mexico.[27] Group televisa is the biggest Spanish-speaking media

[23] http://www.quebecor.com/en

[24] Parliament of Canada (Digital world publications). The Broadcasting Landscape in Canada. Available at: http://www.parl.gc.ca/content/lop/researchpublications/cei-09-e.htm

[25] Mastrini & Becerra. April 2002. *50 years of media concentration in Latin America: from artisanal patriarchy to large-scale groups*. Available at: http://www.er.uqam.ca/nobel/gricis/actes/panam/Mastrini.pdf. p. 4.

[26] Ibid.p. 4.

[27] OECD. 1998. *Regulation and Competition Issues in Broadcasting in the light of Convergence*. Available at: http://www.oecd.org/regreform/sectors/1920359.pdf. p. 10

company producing over 50,000 hours of programming per year and operating more than 300 television stations. In addition, Televisa holds 51 per cent share in Cablevision, the second biggest US cable operator and 60 per cent in Sky's DTH service.[28] In Argentina, the Clarin Group runs the main TV channels while also being the main cable service provider. Likewise, Cisneros group has interests in both content production and distribution in Venezuela.[29]

4. Australia

Like Latin America, the pay TV sector in Australia also exhibits a high degree of vertical integration. The major retail pay TV operators, Foxtel, Austar and Optus Television, are all vertically integrated.[30] Foxtel's shareholders have interests in the different levels of the television broadcasting and distribution supply chain. Telstra is the company managing its cable distribution network while News Corporation has extensive interests in media and sports. Foxtel also launched its digital services in 2004. Similarly, Optus owns the cable delivery platform over which Optus Television services are supplied. It has a 33 per cent interest in channel supplier Main Event Television and produces the MTV and Ovation channels in-house.[31] Austar, prior to the merger with Foxtel in 2012, used to provide subscription television services using digital technology in regional areas while also having ownership interests in channel suppliers, including the XYZ networks, the Weather Channel and TVSN Limited.

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[28] Mastrini & Becerra. April 2002. *50 years of media concentration in Latin America: from artisanal patriarchy to large-scale groups*. Available at: http://www.er.uqam.ca/nobel/gricis/actes/panam/Mastrini.pdf. p.9.

[29] Ibid.

[30] Australian Competition & Consumer Commission. June 2003. *Report to Senator Alston, Minister for Communications. Information Technology and the Arts, on Emerging Market Structures in the Communications Sector*. p.13.

[31] Ibid. p.15.

The merger of two vertically integrated players, Foxtel and Austar, is expected to generate significant benefits for consumers as it will allow the parties to:[32] (a) roll out new digital products and services even faster to existing and new customers; (b) provide consumers in regional areas with access to new digital subscription channels as well as new flexible packages and pricing; and (c) benefit consumers in regional areas with access to the same quality digital services at the same time as their metropolitan counter parts.

5. Europe

Vertical integration is a common phenomenon in Europe as well. To quote some examples, Canal+ is the strongest vertically integrated player in France owning a majority stake in CanalSat and 16 thematic channels and Canal Studios (major film producer) while there also exists other smaller players such as TF1 and M6 that are vertically integrated.[33] In Germany, Premier and Unity Media have a high degree of vertical integration with Premier owning a satellite platform and 11-own branded channels whereas Unity Media/Arena owns cable operators and has acquired live rights to football matches.[34] Similarly, in Italy, both Mediaset and Sky Italia are vertically integrated.[35] Vertical integration is also observable in the Spanish pay TV market with Sogecable owning a satellite platform, premium channels and key content and production assets. Along with Sogecable,

[32] http://www.foxtel.com.au/about-foxtel/communications/foxtel-announces-proposal-to-acquire-austar-28205.htm

[33] Ofcom. 18 December 2007. *Summary profiles of pay TV in France, Germany, Italy, Spain, Sweden and United States*. Slide 10. Available at: http://stakeholders.ofcom.org.uk/binaries/consultations/market_invest_paytv/annexes/annex9.pdf

[34] Ibid. Slide 27.

[35] Ibid. Slide 45.

Ono is also vertically integrated as it has its own cable platform, channels and content and production assets.[36]

6. Other Examples:

Below is an Exhibit that summarises some global instances of vertical integration in the broadcasting sector:

Exhibit 7
Cross Ownership Drives Consumer and Market Value

MARKET	EXAMPLES OF VERTICAL INTEGRATION
USA	• Comcast, the leading cable MSO has acquired NBC U and has a controlling stake in Comcast Entertaiment Cablevision has a channel business in Rainbow media
Japan	• J:COM, the leading MSO, owns the largest pay-TV content group, Jupiter TV, which has 15 TV channel brands
Korea	• The CJ group owns and combines cable distribution (CJ Hello Vision) with content (CJ Media, On*Media, M Net) to drive market value
	• Leading cable MSO C&M owns three top-20 rated channel brands
Thailand	• Leading pay-TV group True Visions owns controlling stakes in 5 channels
Malaysia	• Leading pay-TV group Astro has interests in more than 25 program networks
Philippines	• Media entity Benpres controls both distribution (Sky Cable) and content (leading TV network ABS CBN)
Indonesia	• Leading group Global Mediacom has controlling interests in leading TV network MNC and leading pay-TV operator Sky Vision

Source: MPA analysis

It is evident from the above discussion that vertical integration is not a new phenomenon in the television industry across the globe. In fact, there has been an increasing trend towards firm choosing to vertically integrate either by launching their own in-house divisions or merging with established players in the industry. This pattern is indicative of the efficiencies inherent in the structure that allows players to at the least (a) reduce transaction costs of contracting with independent content providers and producers, (b) innovate and invest in better programming and distribution services, and (c) offer consumers with a wide variety of choice and flexible pricing.

[36] Ibid. Slide 62.

7. Various Studies

Empirical studies have demonstrated that consumer benefits in terms of both lower pricing and greater choice have arisen out of vertical integration in the television industry.

a. Chipty (2001)[37] examines the effect of vertical integration of programming and distribution services in the cable industry in the US. The study analyses the efficiency effects of vertical integration such as elimination of double marginalisation, better product mix, and reduced transaction costs by examining the impact of integration on prices, product offering, and penetration rates. It also examines the anti-competitive foreclosure effects of integration by comparing channels offered by integrated and non-integrated players. In order to consider the net effect of the strategic effects and the efficiency gains, the author calculated net consumer surplus and concluded that vertical integration in the industry provides net benefits to consumers.[38]

b. Suzuki (2006)[39] analyses the *Turner Broadcasting/Time Warner*[40]merger to examine the relative size of the efficiency and foreclosure effects of vertical integration in the cable industry. The merger involved vertical integration of Turner's program services and Time Warner's cable television systems. The study compares the situation pre and post the merger to examine the effect of the merger on variables such as subscriber share, price, frequency of

[37]Tasneem Chipty. June 2001. *Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry*. The American Economic Review, Vol. 91, No. 3. p. 430.

[38]Ibid p. 428.

[39]Ayako Suzuki. November 2006. *Vertical Integration in the U.S. Cable Industry.*

[40]*Time Warner Inc., Turner Broadcasting System Inc. et al v. FTC*, Docket no.: C-3709.

carrying affiliated networks and independent networks, etc. The study finds that the merger resulted in significant efficiency gains including an overall reduction in prices with an even greater reduction in merged markets.[41]

c. Hazlett (2007)[42] notes that vertical integration in the cable television industry has the potential to increase investment and innovation in the industry. Analysing the trend in television channel launches and expenditure incurred by television programmers, it finds that while both independent as well integrated players were consistently introducing new channels and increasing expenditure on programming, if cable operators are integrated with or are themselves programmers, they have greater incentives to invest both in content and infrastructure as they are complementary assets. Hence, by internalising the benefits from economies of scale and scope resulting from greater channel carriage capacity, cable operators have greater incentives to invest in additional capacity.[43]

The discussion above indicates that there is a strong economic basis to expect efficiencies from vertical integration and the television market is no different. Furthermore, realising these efficiencies has benefits for consumers, confirmed in a number of studies conducted on the television market itself. A blanket restriction on vertical integration would clearly preclude any chance of realising these efficiencies and consumer benefits. TRAI appears to recognise this when

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[41] Ayako Suzuki. November 2006. *Vertical Integration in the U.S. Cable Industry.* p. 2.

[42] Thomas W. Hazlett. 19 October 2007. *Vertical Integration in Cable Television: The FCC Evidence*. p. 6.

[43] Ibid.p.6.

it remarked that a blanket restriction on vertical integration "*would impede investment and would not facilitate the objective of promoting competition.*"[44].

(f) No vertical restrictions in Cable, yet hardly any broadcasters investing in Cable, however Cable has its own channels:

There has never been any vertical restriction in so far as broadcasting and cable is concerned, even FDI was allowed to the tune of 49 percent in cable which has now gone up to 74 percent, yet neither has there been any noteworthy foreign equity participation in the cable sector nor have broadcasters shown any keen enthusiasm forinvesting in Cable. With the exception of one Southern (Sun), one Eastern (Ortel) and one Northern entity (WWIL), the overwhelming majority of MSOs in India have no relationship whatsoever with broadcasters. Most of the broadcasters in India also do not see cable as a viable investment destination given the structural issues plaguing the sector. While the ongoing digitalization process may ensure some much needed reforms, yet it would take a lot more than mere technological change for broadcasters to have an investment appetite in cable. Add to this the conundrum that nearly all cable operators in India have their own cable channels that are not subjected to any rules and are competing with national channels that have to comply with a plethora of regulations – we get a sense of the skewed level playing fields between Cable and DTH that is a direct result of the extant vertical restrictions.

(g) No justification whatsoever for continuing with Vertical Restrictions:

Today it is an accepted reality that the economic benefits of Vertical Integration are far more substantial.[45] Hardly any country in the world has a threshold embargo on vertical integration. In India vertical restrictions are completely

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[44] Telecom Regulatory Authority of India. 1 October 2004. *Recommendations on issues relating to broadcasting and distribution of TV channels.* New Delhi. p. 17.

[45] For Benefits of Vertical Integration and Countries where it is successfully practiced – See Above under I (i) supra;

inapposite owing to (a) the plethora of players at each level of the M&E sector, even within the DTH segment there are seven players which is unprecedented. All these DTH Operators are competing with over 6000 Multi System Operators. Further there are more than 800 channels registered with more than 600 channels actually operational (b) the sheer inbuilt diversity that is wired in to the psyche of this country necessitating vertically integrated entities offering a diverse array of content to sustain relevance (c) extant sectoral regulations - no exclusivity, non-discrimination etc. - that take care of all potential anti-competitive fall outs of vertical formations, leaving only economies of scale and efficiencies to be achieved (d) existing laws on competition viz. the Competition Act together with the Rules and Regulations framed thereunder and finally (e) the Competition Commission which has been effective in screening cases of combinations, anti-competitive practices and abuse of dominance. Therefore suchguidelines on restricting vertical integrationcould be interpreted by prospective investors as regulatory micromanagement or an exercise in duplicationwhich in turn could put off investments in the sector.

(h) Internet and changing consumer habits: [46]

With the advent of the internet; all traditional notions of media ownership have to be revisited as the thin line between content production and dissemination is becoming increasingly non-existent. Consumers also have begun to consume information and entertainment from multiple sources simultaneouslyand therefore competition with viewpoint plurality is strengthened by the fact that no single media outlet or segment is capable of satiating the information and entertainment needs of the ever growing and discerning viewers, listeners and readers of today.

(i) No monopoly in the DTH sector:

[46] Impact of Internet – Page 67 -72 , "Issues relating to media ownership:TRAI's consultation paperA report for CASBAA" By FTI Consulting dated 26th March 2013

The Secretary Ministry of Information and Broadcasting has gone on record before the Standing Committee on Information and Technology contending[47]:

"—xxxxx……in DTH, there are roughly seven players today and they are having roughly 34-35 million TV homes. ***So, there is a plurality, but looking at the size of the country, it may be said that one particular DTH operator on an average takes care of about five million connections. There have been no complaints about monopoly on this****………xxxxxxx………."*

II. PRESENT DAYECONOMIC REALITIES; HEALTH OF DTH SECTOR:

(a) *The present state of DTH in India:*

There is a need to study the overall performance of the DTH sector since the notification of the DTH guidelines in 2001. As will be seen from Table 1 *infra,*the health of the DTH industry is abysmal and an urgent course correction is needed. The existing vertical integration restrictions are actually impeding the growth of the industry and an objective examination is much needed of whether such restraints are outmoded or are still relevant in the existing scheme of things.While the Paperadvocatesfurther rigidifying the existing DTH guidelines that restrict vertical integration by importing definitions from various statutes and amalgamating the same thereby producing an entirely new formulation,it has to be appreciated that such regulatory constructs are untried and untested and could unintentionally lead to more harm than good.TRAI has undertaken a remarkable study on the capitalization of the telecom sector[48]. However, a similar study for the cable, DTH and satellite broadcasting sector is yet to be conducted by TRAI. Today there is a crying need for capitalization in the DTH industry, as the DTH business today is

[47] Demand for Grants (2012-13) , at para 94 , pg no. 36

[48]TRAI's Study Paper on capitalization of telecom Shareholding pattern, financing pattern And capital structure of Indian private telecom access service providers.

highly geared and is reeling under debts that are the preponderant source of funding. Again, almost 50% of the subscription collected from the Indian public by DTH operators is a pass through of license fees and taxes imposed by the state and central governments. No other industry is penalized like this, except for the alcoholic beverages or the tobacco industry. As a result, the less-taxed cable TV industry is thriving at the cost of the government and public and the DTH industry is bleeding despite providing a technologically superior and better product.Apart from a steep taxation and AGR regime, over the years, DTH operators have been increasingly subsidizing set-top boxes in a bid to attract customers and stave off rivals. The depreciating rupee adds to the burden on operators, since set-top boxes are mostly imported. Not surprisingly therefore, operators are deep in debts and losses. Over the past five years, Indian DTH players have accumulated debts of over Rs 7,500 crore and losses of over Rs 9,000 crores.[49] The following Table below summarizes the state of play for the DTH sector in India:

TABLE I

	Dish TV	**Tata Sky**	**Airtel**	**Videocon**	**SunDirect**	**Big TV**
Launch Date	**Oct-03**	**Aug-06**	**Oct-08**	**Jan-08**	**Apr-09**	**Aug-08**
Op. Metrics - Subscribers	**FY13**	**FY13**	**FY13**	**FY13**	**FY13**	**FY13**
Gross Base (in mil.)	15.1	10.9	10.6	8.0	8.3	4.7
- Market Share (%)	*26%*	*19%*	*18%*	*14%*	*15%*	*8%*
Active Base (in	8.2	7.7	6.8	5.8	4.9	2.3

[49] Article appearing in Outlook Business Magazine dated June 22, 2013, "Digitisation – Cable Wars"

mil.)						
- Market Share (%)	*23%*	*22%*	*19%*	*16.2%*	*14%*	*7%*
Op. Metrics – ARPU (Rs)	**FY13**	**FY13**	**FY13**	**FY13**	**FY13**	**FY13**
Blended exit ARPU	165	235	185	180	145	155
ARPU (Basic Pack - RoI)	220	220	220	220	199	220
ARPU (Basic Pack - South)	170	170	175	165	155	170
Financial Metrics (Rs mil.)	**FY13**	**FY13**	**FY13[50]**	**FY13[51]**	**FY13****	**FY13**
Revenue	21,668	22,970	16,294	11,567	8,877	3,551
Operating profits	5,794	(3790)*	452	1,614	915	(1,237)*
Operating margin (%)	*27%*	*(16%)**	*3%*	*14%*	*10%*	*(35%)**
Net Loss	*(660)*	-	-	*(11400)*	-	-
Net Worth	-	-	-	*(5900)*	-	-
Gross Debt on	*10264*	*17010*	*36266*	*18877*	*16000*	*3641*

[50]The DTH business' revenues for the whole year rose 26 per cent to Rs 1629.4 crore (Rs 1296 crore up to March 2012). Its EBITDA numbers were down three per cent to Rs 45.2 crore (Rs 46.5 crore). Its operating loss rose from Rs 719.8 crore to Rs 815 crore. And its operating free cash flow requirement improved seven per cent from a negative Rs 763.4 crore to Rs 709.6 crore - **Airtel DTH: Q4 2013 , Article in Indiantelevision.com dated 11th May 2013.**

[51]The company has a negative net worth of Rs 5.90 billion as of 30 September 2012, reporting net loss of Rs 11.40 billion in the last three fiscals. In the first half of this fiscal, it had a net loss of Rs 2.70 billion on revenue of Rs 4.93 billion. **Videocon's DTH arm plans to raise Rs 7 bn via IPO – Article in Indiantelevision.com dated 18th Dec 2012.**

Books (FY13) (Rs. Mil)						

SOURCE: MPA, Blank boxes indicate unavailability of data.

* Note: For Big TV and Tata Sky, PAT and PAT Margin has been reported

** Leading Advisors Motilal Oswal states that:
"Subscription revenue from Sun Direct DTH declined 3% YoY to INR1.78bimplying fall in its contributionto 48% of Sun TV's DTH revenue in FY13 vs 55%in FY12. Business momentum for Sun Directlikelyremains weak as indicated by decline in revenue contribution. Receivable days for revenue from SunDirect hasincreased from 118 days in FY11 to 200 days in FY12 and 205 days in FY13."

It would be pertinent to mention that while some DTH Operators were negotiating for mergers and buy outs or even contemplating IPOs, not one transaction has actually come to pass because of the bleak financials that mar the industry. Accordingly the glut in funding for DTH businesses continues unabated.[52] If the proposed regulations are implemented, equity infusion in DTH would be further impaired and the industry would be driven towards further gearing as it would be compelled to depend more on debts for its finances. However debts would not be forthcoming given the profile of the DTH sector which is high on risks but low on returns. This could then lead to undesirable elements populating the distribution space which has also been TRAI's concern[53]

(b) <u>The unintended consequence of the vertical integration restrictions:</u>

[52] Tata Sky and Videocon D2H have been planning for an IPO for quite some time without much headway; Bharti DTH has shelved plans for selling a stake to other Operators. There were talks of Reliance DTH merging with Sun Direct however nothing came off it.

[53] TRAI's recommendation dated 12th Nov 2008.

Today DTH companies beset by economic troubles in a transformative time do not have the flexibility to combine forces to weather the storm. And most of all, consumers are harmed by rules that perpetuate restrictions on ownership which, if permitted, quite clearly would enable the provision of *more* localism and *more* diverse content. The time has come for the TRAI to recommend the dismantling of the decades-old structural ownership rules once and for all, and in the process eliminate the vertical integration restrictions in the distribution space. Doing so would mark a significant step forward in TRAI's quest to become a modern agency focused on meeting the challenges of the world in which we live.

Put succinctly, the chasm between the media marketplace of 2013 and the decades old rules that continue to bedevil broadcasters and DTH operators has never been wider or more perilous. Also the latest Economic Survey[54] has been clamoring for fresh investments to reduce the Current Account Deficit. The recent hike in FDI limits for distribution platform was a welcome step towards the right direction. However retaining or rigidifying the existing vertical integration restriction may send out confusing signals to the investor community both within India and abroad.

III. <u>APPROACH SHOULD BE CONSISTENT WITH NATIONAL TELECOM POLICY 2012:</u>

We suggest that TRAI rather than recommending further tightening of investments in the DTH sector - liberalize the extant dispensation in terms of

[54] Economic Survey 2012-13 - Chapter 1 P 1. : "The situation warranted urgent steps to reduce government spending so as to contain inflation. Also required were steps to facilitate corporate and infrastructure investment so as to ease supply" and at Box 6.3, p 137: "Despite successive moves to liberalise the FDI regime, India is ranked fourth on the basis of FDI Restrictiveness Index (FRI) compiled by OECD……"

the recently enunciated National Telecom Policy 2012 which in its Preamble states as follows:

"By formulating a clear policy regime, NTP-2012 endeavors to create an investor friendly environment for attracting additional investments in the sector apart from generating manifold employment opportunities in various segments of the sector."

And who's stated Mission includes among others:

"7. To attract investment, both domestic and foreign."

As global investors are awakening to the possibility of India becoming a hub for strategic investments in the media and communications field, we urge that it is important that the signals emanating from TRAI inspire confidence among prospective investors.

In the National Telecom Policy of 2012,[55] it has also been stated thus:

"3. LICENSING, CONVERGENCE AND VALUE ADDED SERVICES
3.1. To orient, review and harmonise the legal, regulatory and licensing framework in a time bound manner to enable seamless delivery of converged services in a technology and service neutral environment."

And further

"3.4. To put in place a liberalized merger and acquisition policy with necessary thresholds, while ensuring adequate competition."

[55] P 11 of NTP 2012

The existing DTH ownership regime itself has outlived its relevance and is ripe for dissolution. The 20% direct shareholding restriction in the DTH guidelines is devoid of reason and indeed in the context of a vibrant and fragmented industry (unlike any other worldwide) with at least 6 serious DTH players competing with atleast 5 major national Multi system operators (besides thousands others at the regional level) for retransmitting more than 600 channels, appears completely unnecessary.Notwithstanding these seismic changes that have irrevocably altered the DTH landscape, DTH companies today continue to be stymied by archaic and counterproductive structural ownership rules passed more than a decade ago – a time that bears no resemblance to the modern one in which they operate.

The industry and recently even the Sectoral Innovation Council[56] has been asking the licensor and the regulator to take stock of the modern media marketplace, to acknowledge how dramatically technology and innovation have transformed the ways that consumers use and interact with media, and to eliminate those regulations that no longer are necessary as a result of competition.

The Sectoral Innovation Council has been admirably forward-thinking in addressing the fast-changing world of modern technology, recommending the alignment of media policies for the internet and personal wireless communications' market segments, among others, toward the future.

IV. RECENT INDUSTRY DELIBERATIONS

Off-late various representations have been made by leading industry bodies for relaxation of ownership rules in the media and communications sector. In

[56] The Report of the Sectoral Innovation Council, Govt of India, Ministry of Information and Broadcasting, July 2012

TRAI's recent consultation exercise on media ownership, an absolute majority of stakeholders had called for liberalizing the vertical integration restrictions in the DTH sector. A microscopic minority primarily comprising of certain retrograde cable operators and a telecom dominated DTH firm were advocating continuation of such anti-competitive restrictions being obviously prompted by vested interests and a protectionist approach that actually stemmed from a perpetual desire of protecting respective turfs.

The Confederation of India Industries in its submissions to TRAI has stated[57]:
"We however hasten to add that even though in September 2012 the FDI regime for broadcast carriage services has been liberalised and the caps have been increased from 49% to 74%, for all carriage and distribution platforms including direct-to-home (DTH), head-end in the sky (HITS), multi-service operators (MSOs) and cable TV, there is hardly any funding that is coming in from abroad. The reason is that prospective investors who would like to take a stake in India's broadcast carriage services are wary of the restrictions on vertical integration presently in place for platforms like DTH, HITS and IPTV in India. Presently broadcasters on the one hand and carriage services like DTH, HITS, IPTV etc on the other are prohibited from having an equity stake of more than 20 percent in each other. CII believes that removing these restrictions on vertical integration will be going a long way to generate interest and confidence among global players who in their respective jurisdictions are mostly vertically integrated. There is hardly any country in the world that imposes a ban on vertical integration or imposes restrictions on equity holdings among broadcasters and carriage services inter se; universally these are acknowledged to be pure business decisions and are not viewed as one requiring ex ante regulations. In any event the Competition Commission of India is well equipped to deal with cases of anti-competitive practices and abuse of dominance and it does consult

[57] CII Submissions to TRAI's CP on Consultation Paper on Foreign Direct Investment in Broadcasting Sector in India dated 30.07.2013

sectoral regulators on combination related issues. Also it needs to be acknowledged that there is an unprecedented fragmentation in the Indian market place for distribution and carriage services with 7 DTH players and around 6000 MSOs providing signals to about 60000 LCOs on a pan India basis. Also on the content side there are more than 800 Television channels being owned by numerous broadcasters. Accordingly any concern that vertical integration shall impair competition is entirely unfounded. With the raising of FDI limits the Government should also look at removing VI restrictions for FDI to freely flow in the media space."

In the same vein Federation of Indian Chambers of Commerce and Industry has argued[58]:

"However we believe that increasing FDI caps alone shall not resolve the issue of investments in carriage services. In order to attract serious players to invest in to carriage and to ensure that such players have a serious stake in content as well, it is imperative that vertical integration restrictions be done away with forthwith. FICCI has already submitted an exemplary analysis on why Vertical Restrictions ought to be removed at the earliest to facilitate investments and how such restrictions do not impact competition or plurality discourses in this country that is characterized by numerous distributors and content providers which is unprecedented in the world."

V. NO NEED FOR A SPECIAL DISPENSATION FOR DTH:

We request the Authority that while all other sectors of the Indian economy continue to be governed by one set of Laws and Rules on Ownership and Control, the DTH industry should not be asked to comply with a completely different definition of Ownership and Control.

[58] FICCI's Submissions to TRAI's CP on Consultation Paper on Foreign Direct Investment in Broadcasting Sector in India dated 30.07.2013

Earlier, TRAI has had the occasion of deliberating on indirect holdings through the 'investment company' route[59]. TRAI in its earlier recommendations had stated[60]:

"3.24 Regarding the argument that as per the new FDI policy it is possible to have foreign investments far more than the prescribed limits by forming multiple layers of Indian holding companies, as explained above the new policy is based on ownership and control and has other safeguards. Also as pointed out by some stakeholders, availability of funds from multiple sources will help in getting the funds at more competitive rates. There is substantial requirement of funds for migrating to digital and addressable environment. It is also possible that Foreign investment brings with it world class technology and international best practices."

The dilemma that could arise from TRAI's new definition of ownership and control in the Paper is that while indirect holdings would be acceptable from a FDI point of view, they would not be so acceptable from a Vertical integration viewpoint. This inspite of the fact that such indirect holdings are purely economic holdings that do not even result in commensurate incremental ownership and control in the ultimate entity where the funds are invested. It is important to note that the definitions that have been taken from the Companies Act., The Income Tax Act, The Take-Over Code and The Competition Act are disparate in themselves owing to the differing objects and reasons for which their respective statutes had been enacted in the first place. Therefore to compile all these definitions into one whole may result in confusing investors, which is best avoided. Given that the focus is on state of market competition alone, it is therefore all the more necessary that such

[59] Page 10 of 29 and 11 of 29, para 1.12

[60] TRAI Recommendations On Foreign Investment Limits for Broadcasting Sector dated June 30, 2010.

sector specific formulations as stated in the DTH guidelines and this instant Paper are done away with and the principles enshrined in the Competition Act are only followed.

While it is true that there are certain State specific anomalies that exist, for example in Tamil Nadu and Punjab, however such local issues are best dealt with through prescribing eligibility norms rather than stipulating ownership restrictions. TRAI has already recommended that certain undesirable elements be kept away from the sector and it is these recommendations that need to be given effect to in the DTH guidelines rather than restricting ownership through equity caps.[61]

FTI Consulting says[62]:

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

- *Economic context: To understand the implications of vertical integration for competition and pluralism, it is important to examine the strategic rationale for the transaction or combination. One interpretation advances the view that the drivers of consolidation are underpinned by a quest for improvements in economic efficiency through merger synergies and development of economies of scale. This economic perspective provides part of the background against which vertical integration and consolidation needs to be appraised.*
- *Ownership and merger control:* ***Sector-specific controls on ownership cannot be divorced from the controls that apply in the mainstream merger control regime applying to the sector. Mainstream merger control has built within it key determinants of what amounts to "ownership"***

[61] TRAI Recommendations on issues relating to entry of certain entities into broadcasting and distribution activities dated 12/11/2008. See pages 107 to 121

[62] "Issues relating to media ownership:TRAI's consultation paperA report for CASBAA" By FTI Consulting dated 26th March 2013, pages 65-66

and what amounts to a relevant change in control. In this respect, India is no different in that it already has an established merger control system, enforced by the CCI under the Competition Act. Any additional or different importation of concepts of ownership or control, for the purposes of regulating a particular sector must not be undertaken without careful identification of why the sector presents specific challenges which are not addressed by the standard rules. Any departure from the standard rules should be justified by a cost benefit analysis and, in particular, the need to ensure proportionality and avoid inefficiency, duplication and inconsistency.

- ***Merger control 'tool box': Although competition authorities adapt their merger control jurisdiction and substantive tests to deal with the particular issues presented by vertical integration, the approach is of general sector-neutral application. Vertical integration in the media and communications sector is not a "special case" notwithstanding the sector-specific challenges. We discern no meaningful trend towards ownership caps or outright prohibitions on extending an enterprise's vertical presence across the supply chain from one media or communications market into another or within a media segment.***
- ***Solutions can be found: Merger control in the media and communications sectors regularly produces difficult cases where issues such as market definition and competitive effects can be complex to analyse. Competition authorities around the world have shown that they are able and willing to embrace the increasing complexities of the cases before them. There are many merger cases raising vertical issues that have been successfully resolved in similar ways and in different markets. There is no reason to doubt that India's competition regulatory – the CCI – does not have the tools at its disposal to address concerns arising from vertical integration in appropriate cases.***
- *Flexible solutions can be found: The competition authorities have shown receptiveness to both structural and behavioural remedies to resolve vertical and*

horizontal issues in media and communications mergers. A prevailing theme is the concern to ensure access; whether to content or infrastructure.

 Increasingly sophisticated approaches: With the phenomenon of convergence playing out, the trend internationally has been towards increasing sophistication in the evaluation of the competitive effects of mergers across multiple markets.The effects-based assessment is conducted on a case-by-case basis without any predisposition towards what is the 'right' market structure in terms of market share of concentration levels. This approach selects a remedy, if required, based on the likely harm identified. It does not rely on a priori decisions or preferences for or against a particular business model (i.e. vertical integration).

 Interface with sector regulation: The relationship between competition law and sector regulation is again put in the spotlight in the merger control procedure. Regulators should be alive to and resist the temptation to use the merger control procedure to attempt to correct the perceived shortcomings of the sector regulatory regime through a merger remedy. That said, the involvement of the sector regulator may be useful in opening up the possibility for a wider range of solutions and monitoring.

 Interface with pluralism: Addressing competition concerns in mergers may also indirectly contribute to pluralism to the extent that remedies facilitate new entry.In some cases the remedy may go further than restoring the pre-merger market dynamic by creating the environment for a new player to challenge the merged entity through an assets disposal or licence. This may enable a maverick to emerge which, despite its smaller market share, may contribute to the diversity of the media landscape.

 Prohibition of mergers in the media and communications sector on account of vertical issues is rare but not unprecedented. Despite the challenges presented, judging by the number of prohibitions and withdrawals, experience has shown that parties are able to get their deals through with or without conditions."

Likewise FICCI has also cautioned against reinventing the wheel in so far as the definition of Control is concerned.[63]

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

ISSUE 2: Do you agree with the approach discussed in para 1.25, on the aspect of technical compatibility and effective interoperability of STBs among different DTH service providers?
If not, an alternative approach may be suggested with justification.

RESPONSE:

We would recommend that the existing regulations of TRAI that ensure commercial interoperability are sufficient in this regard. Accordingly there is no need for the technical interoperability requirement as the same is not commercially viable. The cost of the requisite equipment ("CAM") that would ensure such technical interoperability is much higher than the set top box of any DTH operator. Also competition shall ensure that interoperability concerns are duly taken care of. Further there are technical complexities involved that prevent platforms based on Mpeg2 from being compliant with those based on Mpeg4 and thus in the spirit of technological neutrality of regulatory guidelines it would be in the fitness of things that this issue be answered on the basis of the extant commercial interoperability requirements as already stipulated by the Authority.

ISSUE 3: Do you agree that, in line with the Unified Licence, the licence fee for DTH services should be charged at the rate of 8% of the AGR

[63] Comments on Telecom Regulatory Authority of India's Consultation Paper on Issues relating to Media Ownership by Dhall Law Chambers for FICCI - dated 25th Apr 2013, page 45

where AGR be calculated by excluding Service Tax and Sales Tax actually paid to the Government, if Gross Revenue had included components of Sales Tax and Service Tax?

If not, an alternative formulation may be suggested along with justifications.

RESPONSE:

We would recommend that entertainment tax paid to state governments are also excluded along with Service Tax and Sales Tax. Pass through revenues for content and revenues from non-licensed activities should also be likewise excluded. This would mitigate the burden of DTH operators given that its immediate rival, namely cable is immune from the AGR regime.

ISSUE 4: Do you agree with the approach discussed in para 1.39, for arriving at the quantum of migration fee to be charged from the existing DTH licencees on their migration to the new DTH licencing regime?

If not, an alternate formulation may be suggested along with justifications.

RESPONSE:

We agree with the Authority. Further we suggest that INR 1 Crore be levied on those operators that migrate to the new regime. We would also suggest that the initial period of the new license be 20 years with an auto-renewal of another 20 years given the capital intensity of the business and the need for certainty. We would also recommend that a one-time entry fee of INR 10 Crores be levied on all new DTH operators for the duration of the License.

ISSUE 5: Do you agree with approach regarding migration of existing DTH licenceesto a new licensing regime, discussed in para 1.41?

If yes, how much time, after notification of the new DTH licensing regime,should be given to the existing DTH operators for migration to new DTHlicencing regime?
If not, what should be the approach followed for migration of existingDTH operators to a new licensing regime?
Please elaborate your response with justifications.

RESPONSE:

We agree with TRAI in this matter and would suggest a transfer fee of INR 1 Crore be levied on operators that migrate to the new regime. Also this should be implemented immediately.

ISSUE 6 (i) If any stakeholders has a view that any other provision of the DTHGuidelines requires any change or any provision is required to be added tothese guidelines, the same be suggested along with justifications.
(ii) In light of the fact that a new DTH licensing regime is being discussed,stakeholders may also give their modified views, if any, on the issues thathave been discussed in the consultation paper dated 1st October 2013.

RESPONSE:

We suggest that TRAI may however specify stringent reporting and disclosure requirements regarding ownership of both TV channels and also private operators. It may also require operators to regularly furnish and publicize various retail packages being offered by their respective platforms together with channel composition of each such package. This will enable transparency in retail packaging of channels and will enable TRAI to determine whether any distributor is resorting to discrimination in the carriage and placement of television channels. TRAI may also require all retail tariff packs to be submitted to the Authority by distributors prior to its launch and also each such retail packs being displayed prominently in their respective websites. Similarly if any retail pack is withdrawn, suitable disclosure norms should be mandated to that effect. TRAI may also prescribe that at any given point of time Operators should not have more than a predetermined number of retail packs. This would ensure that viewers are not confused while comparing various retail packs of a particular distributor- operator. TRAI has similar regulations for the telecom sector. It may thus replicate those regulations in the field of distribution of TV channels as well. In order to monitor the growth of the sector it may require operators to report and publicize their subscriber numbers. TRAI may then come up with a quarterly performance indicator report for broadcasting and distribution. TRAI does publish such reports for the telecom sector, which it may replicate for the broadcasting and distribution sector as well.

While disclosure norms should be prescribed they should not however have the effect of compromising an entity's strategic competitive edge qua other competitors. While transparency brooks no difference, it should not result in self-harm. Accordingly it is acceptable that the Government be privy to material information, however proper arrangements should also be made to secure confidentiality of the strategic pieces in the said information. It is also necessary that the Government does not par-take the character of a competitor by entering into a business which directly competes with the entity that has parted with relevant information. Also entities should have the liberty to earmark that part of the information/disclosure which they believe could be placed by the government in the public domain. Accordingly all requests for confidentiality of select portions of the information should be accepted and acted upon by the Government. For example while it is understandable that while wholesale deal values should not be brought into the public domain, there is no reason however why subscriber base of various television channels and distributors should not be brought to the fore. Likewise all retail offerings by all distributors of TV channels should be widely publicized and readily available. This would also enable the Authority to collect requisite data and monitor markets. Disclosures on data could be annual, biennial, or triennial depending upon the nature of information required. However frequent data submission requirements within one year should be avoided as it may lead to inefficiencies and information overload thereby leading to idle storage of data without any corresponding analysis thereof. Analysis of data requires time, frequent data collection shall impair data analysis.

In sum, STAR submits that the TRAI should recommend an eliminationof the entire legacy structural ownership regulations that tie the hands of broadcasters. As demonstrated above, the media marketplace of 2012-13 has become so robustly competitive and so diverse – offering a staggering quantity of independent voices on subjects too numerous to count – that the broadcast ownership rules cannot possibly survive more so given that the Competition Act already provides for necessary safeguards for anti-competitive behavior, abuse of dominance and even curtailment of plurality by ensuring freedom of trade.

This instant review presents the TRAI with a fresh opportunity to take account of the transformed media marketplace. When it does so, STAR believes that the only rational conclusion is that the TRAI should recommend the elimination of the media ownership rules once and for all however asking the Ministry to put in place suitable eligibility and disclosure norms as stated and recommended herein.

Further there are three critical areas where the Authority could make appropriate recommendations:

1. That all DTH Companies should duly comply with the mandate of Section 65A and Section 65B of the Copyright Act 1957 as amended from time to time.

Explanatory Memorandum:

These two sections have been enacted recently by virtue of the recent amendments to the Copyright Act viz. the Copyright (Amendment) Act, 2012.Section 65A criminalizes the circumvention of an effective technological protection measure which has been applied for the purpose of protecting any of the rights conferred by the copyright statute if the circumvention is performed with the intention of infringing rights conferred by the Act — unless it is carried out in one of the many circumstances in which the Act states that circumvention is permissible (such as for conducting any lawful investigation or taking measures necessary in the interest of national security). Section 65B not only criminalises certain acts relating to Rights Management Information(RMI) but also states that rights owners would be entitled to avail of certain civil remedies. The prohibited acts include the unauthorised removal or alteration of RMI on copies of works, or the unauthorised and 'knowing' distribution, importation, broadcast or communication to the public of such copies of works. Given that these amendments are very recent and the fact that distribution platforms like DTH are duty bound to comply with all applicable laws, iIt would be in the fitness of things that these provisions are duly included in the DTH guidelines. With the onset of digitalization whereby it is mandatory for signals of all television channels to be encrypted in a secured manner such a guideline will only help in due compliance of the TRAI regulations.

2. That all DTH companies should duly comply with the Sports Broadcasting Signals (Mandatory sharing with Prasar Bharati) Act, 2007 by taking appropriate measures to block and thereby not retransmit the relevant channels of Prasar Bharati that telecasts sporting events of national importance during the duration of such sporting event. Accordingly necessary changes may be made to the mandate of Must Carry provisions in so far as channels of Prasar Bharati are concerned.

Explanatory Memorandum:

The said Act mandates that Prasar Bharati shall avail the signals of the relevant sporting event of national importance from the rights owner/authorized broadcaster for retransmission via its own terrestrial and DTH networks only. However during such sporting events it has come to light that all private operators retransmit the relevant Doordarshan Channel(s) that telecasts such sporting events thereby resulting in the breach of the said Act. This adversely impacts the authorized broadcasters of such sporting events as the private operators refuse to deal with such authorized broadcasters. These operators do not have any incentive to legitimately avail the channel of such authorized broadcasters that telecasts such sporting events. Instead they avail the channels of Prasar Bharati telecasting the relevant sporting events of national importance under the said Act for free while at the same time charging the viewer thereby openly flouting and violating the said Act whose stated object and reason was to provide the signals free to only those viewers availing Doordarshan's terrestrial network or its DTH arm namely DD Direct.

3. That once a subscriber opts for channel(s) either as ala carte or as part of a retail package from a DTH or Cable operator, such DTH or Cable operator should provide the channel(s) to subscribersin a continuous, uninterrupted manner without hindering or obstructing the signal flow at any time.Once the subscriber indicates explicitly to opt out of channel(s) in accordance with existing TRAI regulations or defaults in making payments, the DTH or Cable operator as the case may be, shall cease to provide the channel(s) to such subscriber. Further all the channels comprised in a package opted by the subscriber should be simultaneously activated at the Set Top Box of such subscriber. As and when the subscriber opts out of the said package or defaults in payments, all channels comprised in that package shall cease to be provided at such subscriber's set top box. In case the subscriber switches to another package in accordance with the regulations that comprises of certain channels that were a part of the earlier pack

subscribed to by him or if he explicitly intends to continue availing only certain channels forming part of the earlier pack subscribed to by him, then excepting such channels, all other channels shall cease to be provided to such subscriber.

Explanatory Memorandum:

Recently various operators are now resorting to arbitrary switching on and off of channels chosen by a subscriber in furtherance to stated aims and objects of reducing pay outs to broadcasters or in order to extract more carriage fees. Operators after availing the channels under the Must Provide, offer the said channels to subscribers on the basis of specific programing events. As soon as the events start, the said channel gets activated at the subscriber's set top box. As soon as the events end the subscriber ceases to receive the channel. Accordingly if such events are held within a month but not on the first or last day of the month, the broadcaster does not get paid for the channel. In effect the Operator avails the channel at regulated rates under the Must Provide in terms of existing regulations framed by TRAI but provides the same to the subscriber only for the duration of certain specified events thereby depriving the broadcaster of its legitimate dues while at the same time recovering subscription fees from the viewers. There have also been cases where even after the subscriber having opted for particular channel(s) or a package comprising of certain channels has suddenly found to his bemusement that his chosen channel(s) has been deactivated at his set top box as he had not sent a second sms to the Operator for continuing to avail the said channel(s). Given such malpractices that make a mockery of existing regulations it is requested that the conditions as stated above are made a part and parcel of the DTH guidelines.

END