REGULATING MEDIA OWNERSHIP IN INDIA

CHALLENGES AND THE WAY AHEAD

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INTRODUCTION

In April 2022, the Telecom Regulatory Authority of India (TRAI), the telecom and broadcast regulator, released a consultation paper (CP) on 'Issues Relating to Media Ownership' which notes that the media industry, comprising suppliers, distributors, and aggregators of news, information and audiovisual content, plays a vital role in democratic societies: of holding a mirror to society to help create an informed citizenry. The CP states that media pluralism "contributes to a well-functioning democracy by making diverse viewpoints available to the citizens." While the term media plurality is not clearly defined in the TRAI paper, it is used to describe the unbiased presentation of diverse viewpoints and opinions by the media to the citizenry.

The CP identifies the concentration of ownership and control[i] in Indian media markets as a key threat to media pluralism. As per the current CP and previous TRAI consultations on the issue, concentration in media ownership and control reduces the number and variety of sources of information available to the public, impacting media plurality and the right to free expression protected by Article 19(1)(a) of the Indian constitution.[1] The CP identifies two patterns of media ownership, vertical[ii] and horizontal integration,[iii] as particular threats to media plurality, noting that both forms of integration are prevalent in Indian media markets. It suggests that increased oversight and regulation of ownership in media markets may be required to address the harms arising from vertical and horizontal integration.

The CP also states that issues of media ownership and concentration need a fresh look given the recent technological advancements that have drastically changed how media is created, distributed and consumed. The internet

i. As per the CP, ownership implies a purely economic interest in the form of equity or shareholding whereas control represents the ability to influence decisions in the company.

ii. **Vertical integration** refers to a situation in which an entity/group owns or controls businesses at different parts of the supply chain. A broadcast company with a distribution network and a channel/online platform would be vertically integrated. Vertically integrated companies enjoy a competitive advantage over other firms in the market due to improved efficiency and cost reduction. Such companies or groups can also acquire positions of dominance, limiting competition by erecting barriers to entry and indulging in unfair trade practices.

iii. **Horizontal integration** occurs when an entity or entities own or control businesses across different media segments, which are print, radio, television, and the internet – for instance, a news broadcast company that also owns a newspaper and an online news channel. Also termed cross-media ownership, horizontal integration amplifies the risk to media plurality, especially if an entity has concentrated audience shares in any of the segments it operates in.

has democratised access to content and fuelled a surge of consumption on OTT platforms, but has also intensified risks from the concentration of media ownership and control. Digital convergence enabled by technological advancements blurs the lines between companies operating in mass media, telecommunications, and computing systems.[2]

Increased control and oversight of ownership in media markets would signal a considerable shift in the regulation of India's media and entertainment sector, and requires considered deliberation before being implemented. To facilitate such deliberation, the Esya Centre and the Internet Freedom Foundation brought together media business owners, journalists, academics, and other stakeholders for a roundtable on media ownership in India. The stakeholders discussed various issues raised in the CP, including the links between plurality and ownership concentration, the adequacy of the existing legal framework, and difficulties in assessing ownership and control. This paper presents key takeaways from the discussion on the central aspects of the TRAI CP. It also suggests recommendations for policymakers on how the regulation of ownership in media markets can be improved.

OWNERSHIP IS JUST ONE DIMENSION OF PLURALITY

The TRAI CP views plurality solely from the perspective of viewpoint plurality, and so establishes a link between media plurality and market concentration. It argues that the existence of multiple and diverse owners of media organisations would ensure the availability of a wide range of content. However, stakeholders noted that plurality is a multi-faceted concept and should not be defined solely from the perspective of viewpoint plurality or diversity. It is equally important to ensure plurality within media organisations ("producer diversity") and the adequate representation of marginalised demographics as well as avenues of access for consumers ("exposure diversity").[3]

Hence, it is important not to limit the focus to ownership as the sole measure of plurality. The academic literature on the subject suggests it is difficult to establish a direct correlation between ownership concentration and plurality.[4] Regulators around the world are also reconsidering the imposition of cross-media ownership rules as a means of achieving plurality. The Federal Communications Commission (FCC), the content and carriage regulator in the United States, rolled back restrictions on cross-media ownership between newspapers and broadcast companies and radio and television companies as these were no longer viewed as necessary for competition, localism or diversity in the media industry.[5] The Australian Broadcasting Legislation Amendment (Broadcasting Reform) Act, 2017 similarly repealed the "2 out of 3" rule which prevented entities from controlling more than two regulated media platforms (television, radio and newspapers).[6]

Stakeholders suggested that it is important to develop a multi-faceted measurement index for plurality in India instead of using market concentration as a proxy for plurality. Without such a measure, regulations aimed at promoting plurality would be ill informed and premature. Indeed, the CP provides little evidence of a plurality deficit beyond the prevalence of vertical and horizontal integration in some media markets in the country. It can be argued that India's media market is diverse and pluralistic in terms of the sources and producers of news, the nature of the content, and the avenues for consumption.[iv] Regulation aimed at promoting plurality must be informed

iv . The CP itself notes that there are more than 900 broadcast channels, 40 digital platforms, 1400 newspapers and 1700 distributors in India.

by a framework or index that accurately measures its different facets in the Indian context. Regulators in the EU, Australia, and the UK already use a multi-faceted approach to measure plurality and diversity in media markets.

Table 1: Factors used to measure plurality in different jurisdictions

S. NO.	JURISDICTION	MEASUREMENT OF MEDIA PLURALITY
1	European Union	The EU Media Pluralism Monitor uses the following indicators to measure media pluralism: 1. Transparency of media ownership: Extent of disclosure of media ownership to public bodies and to the public 2. News media concentration: Evaluates the structure of the media market and the concentration of ownership among different sectors 3. Online platforms and competition enforcement: Assesses the risk to media pluralism deriving from market concentration that emerges in a broad notion of the media market in which all actors in the ecosystem are included. 4. Media viability: Measures the economic sustainability of news media production 5. Commercial and owner influence over editorial content: Examines the qualitative dimension of ownership concentration

2	United Kingdom	The three metrics used to quantify media plurality are: 1. Availability: Number of providers available at the point of consumption. Consumption measures capture the number of people using news media, and the frequency or time they spend consuming it. Share of consumption is a good proxy for measuring influence in the media market. Reach and multi-sourcing are good proxies for the diversity of viewpoints consumed. 2. Impact: Impact metrics capture the influence of news content consumption over how people's opinions are formed. 3. Contextual factors: These are factors that will facilitate measurement and help paint a full picture of plurality.
3	Australia	Australia uses the following indicators to measure pluralism: 1. News infrastructure indicators: These include the supply side factors of news production such as the number of sources, the number of journalists, and market concentration. 2. News output indicators: These indicators assess journalistic output including the type and quality of the news produced. This includes the range of topics, range of viewpoints and local relevance. 3. News engagement indicators: These provide information on the actual reach and influence of news sources. Consumption and impact is measured here.

(Source: Author's own)

MEDIA OWNERSHIP IS A "HYBRID" ISSUE THAT NEEDS CAREFUL BALANCING OF RISKS

While the CP seeks to regulate media ownership with the objective of promoting plurality, stakeholders stated that such regulation is a "hybrid" issue that involves addressing economic, social, and political risks.

1. **Sociocultural risks** – Concentration of media ownership poses a considerable threat to free expression in democratic societies by reducing the multiplicity of sources and viewpoints available to consumers. At the same time, regulations limiting ownership of media entities must not disproportionately limit the right of individuals or groups to use different avenues to express their viewpoints.[7]

2. **Economic risks** – Media markets tend naturally toward concentration as the entry barriers and costs in some parts of the value chain, such as distribution, are high. Media markets also display economies of scope and scale, incentivising media owners to expand into different media segments due to lower marginal user acquisition costs.[8] Finally, media markets are two-sided in nature, i.e. they serve as a platform between two distinct but interrelated consumer groups (usually advertisers and viewers).[9] The existence of asymmetric network effects between the two sides means that consumers naturally gravitate toward platforms that are large enough for both consumer groups to be present. This leads to concerns of foreclosing competition in media markets, especially for smaller players.

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sides means that consumers naturally gravitate toward platforms that are large enough for both consumer groups to be present. This leads to concerns of foreclosing competition in media markets, especially for smaller players.

4. **Political risks** – Concentration also increases the chances of media capture by exogenous political or commercial interests. Such risks are particularly acute in nations where a high proportion of media entities are owned by political parties, industrial businesses, or conglomerates.[v]

Creating regulations to adequately deal with all three risks is challenging for regulators, mainly because measures directed toward one kind of risk may amplify the others. For instance, stringent restrictions on the ownership of media entities by certain kinds of organisations could amount to arbitrary limitations on the right to free expression protected by Article 19(1)(a) of the Indian constitution.

v . It is estimated that one third of all news channels and 60% of cable distributors are owned or controlled by political parties in India: https://www.nber.org/papers/w10613

REGULATION OF OWNERSHIP IN THE PRINT AND DIGITAL MEDIA SECTORS IS BEYOND TRAI's JURISDICTION

TRAI's jurisdiction under the TRAI Act 1997 is limited to regulating broadcast and telecom services, i.e. the carriage of content and not the content itself.[12] In this context, carriage refers to the underlying network spectrum used to deliver different media to users. Historically, telecom regulation has focused on carriage regulation as it involves the allocation and use of a scarce public resource, spectrum. However, the CP attempts to extend TRAI's jurisdiction to issues of content by including print and digital media in the definition of "media" for the purposes of ownership regulation. It also states that better oversight mechanisms may be required to check the distribution of fake videos online and to address the threats to media pluralism posed by the growing heft of digital media platforms as gatekeepers of information. It notes that the self-regulatory regime for digital media under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 is insufficient to address content moderation concerns as it is not binding.

Most stakeholders underscored the importance of maintaining the distinction between content and carriage regulation in the Indian context. They stated that unlike regulators such as the FCC or OfCom, which regulate both content and carriage, the regulation of print and media entities is wholly outside TRAI's purview. Some stakeholders noted that TRAI lacks the expertise, domain knowledge, and manpower to regulate content effectively. Additionally, it was noted that the standards for content regulation are already well established under Articles 19(1)(a) and 19(2) of the Constitution and that a three-tier grievance redressal mechanism for content oversight has been set up under the IT Rules. Recent amendments to these Rules provide for a Government-appointed Grievance Appellate Committee to hear complaints against the actions of the grievance officers employed by companies.[13] Hence, the rules already provide for Government oversight of content, a function that the proposed media regulator is supposed to perform.

Stakeholders suggest that TRAI would do better to ensure that existing regulations to address ownership concentration are applied evenly and consistently to all entities within its jurisdiction. For instance, the restrictions on vertical integration in the media industry currently apply to broadcast companies, direct-to-home (DTH) and headend in the sky (HITS) operators, but not to multi-system operators (MSOs). For a DTH licence, no more than 20% of the paid-up equity in a licensee should be owned by a broadcast and/or cable network. Further, a DTH licensee cannot own more than 20% of the equity share in a broadcast and/or cable network company.[14] Broadcast and DTH companies also cannot hold more than 20% in HITS operators and vice versa.[15] No restrictions are placed on vertical integration between MSOs, which operate cable TV networks, and broadcast companies. This even though both DTH and cable TV have a similar number of subscribers, and that the top 14 MSOs serve over 50% of the subscriber base.[16]

Table 2: Number of DPOs and respective subscriber base

DISTRIBUTION PLATFORM OPERATOR	NUMBER OF ENTITIES	SUBSCRIBER BASE
Multi-system operators	1,724	73 million
Direct-to-home services	4	70 million
Head End in the Sky	1	2.15 million
IPTV	10	28,500
Free-to-air DTH	1	38 million

(Source: TRAI)

THE EXISTING LEGAL AND REGULATORY FRAMEWORK IS SUFFICIENT TO ADDRESS MEDIA OWNERSHIP ISSUES

A central argument in the CP is that the existing regulatory and legal framework is insufficient to address issues arising from the concentration of media ownership. Besides the licensing requirements mentioned above, other cross-cutting and general-purpose laws such as the Competition Act and the Companies Act also govern the regulation of media ownership in India.

Table 3: Regulatory authorities with oversight of media markets

REGULATOR	OVERSIGHT FUNCTION
Competition Commission of India	Prohibition of anti-competitive agreements (including cartelisation and integration) and abuse of dominant position Ex-ante merger control
Securities and Exchange Board of India	Regulation of takeovers and acquisitions in terms of process
National Company Law Tribunal	Adjudication of disputes between entities and share-holders Prevention of oppression and mismanagement of mi-nority shareholders Approval of mergers and amalgamations
Ministry of Information and Broadcasting	Oversight of three-tier grievance redressal mechanisms set up by digital platforms

The CP notes that vertical and horizontal integration appear to be prevalent in the media industry despite the existing legal and regulatory architecture. It suggests that a new media market regulator may be required to address the concentration of media ownership/control, especially as there are gaps in the current regulatory framework for monitoring ownership and control. For example, it states that certain mergers and acquisitions which could negatively impact plurality and diversity are not reviewed by the CCI as they fall below the minimum monetary threshold.

Stakeholders agreed that a new media market regulator would create more problems than it would resolve. They noted that it would be challenging to bring the entire spectrum of media-related issues before a single super-regulator. A new media regulator would also have to deal with jurisdictional overlaps with other regulators, such as the CCI, and SEBI. It was felt that strengthening and reinforcing existing regulators was preferable to creating a new media regulator.

The CCI has dealt effectively with competition issues in media markets

As noted above, the CCI exercises ex-ante regulation of certain combinations and ex-post adjudication of anti-competitive agreements and abuse of dominant position. Most stakeholders agreed that this brings media-ownership related issues within the CCI's remit. Indeed, several issues highlighted in the CP, such as the determination of relevant markets and assessment of concentration, are routinely carried out by the CCI for other sectors. The competition regulator has also shown its understanding of the media and entertainment industry in merger notifications and antitrust cases placed before it. Since 2011, the CCI has considered 13 merger notifications related to the M&E industry, including films.[17] While it approved all the mergers, its analysis reveals an understanding of the nuances of the media industry. For instance, in the recent merger between Eros and STX, the CCI demarcated the relevant market for the film sector based on language.[18] In other cases involving DTH operators and broadcast companies, it termed the high degree of competition across multiple players at a pan-India level an important factor in allowing combinations.[19]

Hence, the CCI has clearly demonstrated its ability to adequately address issues related to ownership concetration in the media industry. Moreover, the proposed Competition Amendment Bill 2022 allows the CCI, instead of the Central Government, to appoint the Director General, which is the CCI's investigative arm.[20] This change is expected to expedite the process of filing up vacancies in the DG and bolster the CCI's ability to effectively tackle ownership issues

Concerns about the Act's minimum threshold for merger notification are also easily addressed. The Competition Amendment Bill 2022 has introduced a deal value threshold of INR 2,000 crores in addition to existing asset and turnover thresholds.[21] This is expected to widen the scope of combinations in the CCI's purview, especially in digital and technology markets.[22] Under the existing Act, the CCI is to be notified of a merger or combination only if it meets the specified turnover or asset thresholds. Many digital businesses have low asset bases and do not generate notable turnover for several years, and hence fall outside the CCI's ex-ante merger regulation regime. It was also suggested that removing the deal value thresholds in the Act would be more straightforward than creating a separate media market regulator.[23]

DATA FOR MONITORING OWNERSHIP AND CONTROL IS LACKING

While the CP makes the case for regulatory intervention to promote media plurality, it does not provide any data or evidence to show that there is a deficit of plurality. It cites some examples of vertically and horizontally integrated companies but does not establish how such integration affects competition, dynamism and plurality in the media sector. Stakeholders noted that regulatory interventions based on incomplete or anecdotal information about ownership in the sector would be unable to address specific and identifiable harms in the industry.

Instead, they suggest that the Government should gather and analyse granular data on ownership and control patterns in media markets by expanding the disclosures that such companies are required to make. Currently, media companies are required to make the following disclosures to the Union Ministry of Information and Broadcasting (MIB):

Table 4: Disclosures required by Indian media entities under different rules and regulations

NATURE OF MEDIA ENTITY	REQUIRED DISCLOSURES[vi]
DTH Operator	Equity distribution and holding Details of investments made by the licensee Changes in equity and shareholders agreement Changes in key personnel
FM Radio Service	Shareholders agreements, loan agreements and other agreements that are finalised/proposed to be entered into
IPTV Service	Self-certification stating shareholding patterns and details of foreign investment

vi. All disclosures are made to the Ministry of Information and Broadcasting. The period of data submission ranges from 15 days to a year.

HITS	Shareholders agreements, loan agreements and other agreements that are finalised/proposed to be entered into
Television Channels	Shareholders agreements, loan agreements and other agreements that are finalised/proposed to be entered into Changes in Foreign Direct Investment in the Company
Print Media	Shareholders agreements, loan agreements and other agreements that are finalised/proposed to be entered into

(Source: Author's compilation)

In its previous consultation on cross-media ownership, TRAI recommended a range of additional disclosures that companies in different media sectors should make. These include the disclosure of shareholding patterns, foreign investment, direct and indirect interests in other media and non-media entities, details of key personnel, and loans made to/by the company.[24] While these recommendations are a step in the right direction, they do not uncover the deeper links between media companies – for instance, the undisclosed commercial and political interests of promoters or non-promoter investors. Individuals or entities who are not promoters or investors may also act in concert to own, control, or influence a media company.[25]

Moreover, the current disclosure regime does not cover possible changes in media ownership due to third-party loans, contractual clauses, or investment agreements.[26] The recent acquisition of a 26% stake in the NDTV Group by an entity belonging to the Adani conglomerate highlights how loan agreements can cause changes in ownership patterns in media markets.[27] The effective regulation of ownership requires reliable information not only about the current state of the market but how ownership patterns may change in future.

Stakeholders suggested that market studies are an effective mechanism to gather data and evidence of any potential market failure. They also allow the regulator to engage with stakeholders in a non-rivalrous setting and form a grounded perspective of critical issues in the industry. The CCI has undertaken such studies for the film distribution value chain, pharma industry, and e-commerce sector and is, therefore, best placed to identify any market failures that may arise in the media industry through a similar exercise.

RECOMMENDATIONS

Stakeholders suggested various measures to help boost media plurality and enable better monitoring of ownership and concentration in media markets. The suggestions and recommendations that most stakeholders agreed on are listed below.

RECOMMENDATIONS
1. **Harness the existing regulatory framework.** Existing regulatory bodies, such as the CCI, have demonstrated their ability to identify and tackle ownership issues in media markets. Instead of creating a new regulatory body, the Government should consider measures, such as capacity building and increasing manpower, that enable existing regulators to deal with media ownership issues more effectively.
2. **Adopt a holistic definition of plurality.** Other facets of plurality, such as source or exposure diversity, must also be studied when considering regulatory interventions to increase pluralism. A holistic definition of plurality can be developed by adopting best practices from the EU, UK and Australia and adapting them to meet the Indian context.
3. **Develop a measure of plurality.** Plurality is currently measured primarily by data on ownership concentration, leading to a skewed perception of the nature of the market. To capture a holistic view of plurality in India, it is important to develop a multi-faceted measurement index. The Media Diversity Index, developed by the Centre for Culture, Media and Governance at the Jamia Milia Islamia University provides an early blueprint that can be further built on. It uses eight domains, including ownership, access, geographic centralisation and diversity, to assess the diversity and plurality of media in 12 Indian states.

4. **Identify market failure before considering regulatory intervention.** Interventions in media markets must be targeted towards addressing a determinate and identifiable market failure. Market studies and other forms of primary and secondary research should be used to assess the market and build a cogent evidence base before creating new regulations.

5. **Modify the disclosure regime for better monitoring of ownership.** While media companies are subject to disclosures under different rules and regulations, these are insufficient to provide a complete picture of ownership and control in the industry. Disclosure requirements may be expanded to include political interests and affiliations, third-party loans, and other investment agreements that could impact ownership and control in the future.

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