BIF Counter Comments on TRAI's consultation paper on "Issues relating to Media Ownership"

At the outset, we wish to thank the Telecom Authority of India (**TRAI**) for providing us the opportunity to provide our counter comments to the comments received by the TRAI from a multitude of stakeholders including industry bodies, trade associations, policy groups and individuals on the consultation paper (**Consultation Paper**) on media ownership.

We wish to highlight that while the focus of the Consultation Paper is on media plurality, comments submitted by various stakeholders have steered away from this central theme and delved into issues that are deviant from it. To assist with the consultation process, we have provided our counter comments to several of these issues and topics raised by some stakeholders through the submitted comments. However, we sincerely urge the Authority to kindly only consider the submissions and comments that directly relate to media plurality.

1. ***The CCI has sufficient tools and powers to assess anti-competitive conduct in the media sector***: A few stakeholders and industry bodies have submitted that additional regulation is needed to address concerns relating to abuse of dominance and vertical integration in the media sector. However, the comments do not state or clarify if and how the existing competition law regime fails to address the concerns.

2. The Competition Commission of India (**CCI**) has wide sector-agnostic powers to examine anti-competitive conduct of enterprises. The CCI has sufficient flexibility to assess and delineate relevant markets considering the factors set out in Section 19 of the Competition Act, 2002 (**Competition Act**). The Competition Act provides an inclusive list of factors that the CCI can rely on to assess market dominance.

3. The CCI also has powers of *ex-ante* regulation. Mergers, acquisitions and amalgamations that meet specified thresholds have to be mandatorily notified to the CCI for assessment. In the past, the CCI, while assessing notified transactions, has directed enterprises to implement structural and/or behavioural remedies to ensure relevant markets in question remain competitive.

4. The CCI has conducted several market studies and workshops to understand market dynamics in various sectors. In fact, the CCI has recently launched a market study into the media sector.

5. It is hereby humbly urged that TRAI may exercise regulatory forbearance, else there are chances that it may conflict with established jurisprudence of the CCI, dilute the mandate of the Competition Act and create regulatory uncertainty.

6. We also want to highlight that the comments made by some stakeholders confuse and confound the two separate concepts of dominance and abuse of dominance. While dominance by itself is not bad, its abuse is. Equating high market share to an abusive conduct will spell disaster for innovation and economic growth as enterprises will be penalised even if their conduct does not adversely affect competition in any market. It

must also be appreciated that in digital markets, where users frequently 'multi-home', i.e. use competing services simultaneously, determining market shares accurately is itself an exercise in futility. Further, such markets (including the digital media space) are rapidly expanding with new players entering this space regularly. With such low barriers to entry, even large players cannot rest on their laurels and must innovate continuously to maintain their market share.

7. Therefore, we firmly believe that the existing competition law regime is sufficient to address the concerns raised by the stakeholders and industry bodies on the competitive landscape of the various segments of the media sector. The issue of having specific factors built into the Competition Act to account for digital markets (which would include the digital media space as well) was discussed in detail in the report of the Competition Law Review Committee (CLRC) in July 2019. The CLRC noted that the existing tools to determine dominance and its abuse were wide/effective enough to allow the CCI to fulfil its mandate effectively. In fact, the CLRC noted that drawing any bright-line test would constrain the CCI and reduce its flexibility to determine effect on the market.

8. ***Need for a separate media regulatory body***: Suggestions have been made to have a separate media advisory body to advise the CCI in merger reviews relating to the media sector. The advisory body will first assess the "significant issues" and give its opinion to the CCI which may then either accept the opinion or reject it after passing a reasoned order.

9. The Competition Act is a sector-agnostic legislation and the CCI has significant experience in determining competition in media markets, having adjudicated multiple deals in this space. Further, the Competition Act already provides for appointment of experts as well as consultation between the CCI and other regulators. The CCI has consulted regulators in the past during inquiries and merger reviews. Further, the Supreme Court of India in *Competition Commission of India* vs. *Bharti Airtel Limited and Others* [Civil Appeal No. 11843 of 2018] has ruled that where views of any other sectoral body or regulator may be relevant, the CCI can initiate proceedings after the sectoral body has given its findings.

10. In view of this, we are of the humble opinion that there is perhaps no need to establish a separate regulatory or advisory body for the media sector to advise the CCI either in its inquiry proceedings or merger review process.

11. ***Flawed assumption for seeking regulation of cross-media ownership***: Comments have been made by certain stakeholders and industry bodies on the need to regulate cross-media ownership to reduce market concentration. The underlying assumption is that markets are competitive only if the market concentration is low. In doing so, the stakeholders have failed to consider the fact that oligopolies can be competitive and typically compete not only on price parameters but also on non-price parameters. In case of the media sector, non-price parameters would include pluralism. Merely because certain markets are characterised by oligopolies does not mean regulatory intervention is needed. While comments also state that there is direct correlation between high

market concentration and low media plurality, no demonstrable evidence has been offered to support this.

12. ***Need for regulatory restraint***: Any regulatory or policy measure proposed by the TRAI should be backed by a carefully considered assessment of demonstrable market failure, backed by evidence and the policy or regulatory measure that is being proposed to address the given market failure. Doing nothing is an option if markets are competitive and there are no market failures that need to be remedied. Uncertainty over anticipation of future harms should not be the basis for proposing regulatory intervention. A light touch regulation or no regulation is desirable and ex-ante regulation in any form should preferably be avoided.

13. Freedom of expression and freedom to carry out business are needed to ensure media and viewpoint plurality. If these freedoms are excessively and unduly restricted, new firms will hesitate from entering media markets and existing players may exit the markets. This would defeat the very objective of the Consultation Paper i.e., media plurality and diversity of views.

14. We agree with the submissions made by some of the stakeholders, industry bodies and policy groups that regulating cross-media ownership will not ensure media or viewpoint plurality. In the absence of strong and compelling evidence that cross-media ownership affects media plurality, we recommend that TRAI may not propose any restriction on cross-media ownership.

15. Suggestions have also been made to regulate entry into the media sector. Regulating market entry will only increase barriers to entry and ultimately, reduce competition in media markets. We strongly recommend that the TRAI may choose not to propose any restrictions on market entry.

16. Regulating OTTs:
    a. OTT is essentially an internet-based app, not owning or working a telegraph.
    b. It should be appreciated here that central to the Telegraph Act is the concept of owning, establishing, operating and maintaining a telegraph which, as defined in the Telegraph Act, is what attracts licensing. OTT's do not own, establish, operate or maintain a telegraph – so the question of attracting a license as a TSP, does not arise.
    c. The Telecom Regulatory Authority of India (TRAI), in its consultation paper on Regulatory Framework for OTT Services, 2015, defined "OTT provider", as a service provider which offers Information and Communication Technology services, but neither operates a network nor leases network capacity from a network operator. Further, it also stated that based on the kind of service they provide, there are basically three types of OTT apps, namely, messaging and voice services (communication services); application ecosystems (mainly non-real time), linked to social networks, e-commerce; and, video/ audio content.
    d. In view of TRAI's own definition, OTT services are mere *applications* provided to end users over the internet using the network infrastructure of licensed

Telecom Service Providers (TSP). They neither operate on a network nor lease network capacity from a network operator for the provision of their services.

e. Thus, the argument that the licensing under Indian Telegraph Act applies to OTTs is flawed. OTTs clearly fail this test and are anyway governed by the Information Technology Act, 2000.

f. OTTs are not substitutes of TSPs; instead, they depend on them. OTT applications cannot be offered without access to the physical networks that *only* TSPs deploy. TSPs control the underlying broadband access infrastructure, and are the gatekeepers to broadband internet access and therefore, OTTs themselves.

   i. Telecom networks and OTT applications operate in different layers (network layer and application layer respectively)

   ii. **TSP licenses also confer several exclusive rights that OTT players do not enjoy. These include, for example: (i) the right to acquire spectrum, (ii) the right to obtain numbering resources, (iii) the right to interconnect with the PSTN, and (iv) the right of way to set up infrastructure.**

   iii. Unlike TSP networks, OTT apps operate in a highly competitive market in which it is easy and often cost-free for consumers to switch between competing apps, and many consumers access multiple OTT communications apps from one device (thus, the rationale underpinning many legacy telecommunications regulations does not apply to OTT communications applications).

g. The argument that OTT services should be regulated under the same licensing regime that applies to TSPs is incorrect. This erroneously overlooks the vast and critical differences between the two categories. The two types of entities are placed in very different circumstances. TSPs, for e.g., enjoy several exclusive rights that include (1) the right to interference-free spectrum, (2) the right to numbering resources, (3) the right to interconnect with PSTN, and (4) the right of way to set up infrastructure. However, OTT players neither have these privileges listed above, nor own the network or control the access to telecom infrastructure; therefore, question of level playing field simply does not arise.

h. OTT service providers fall under the ambit of Section 2(w) of the Information Technology Act, 2000, (IT Act) defining them as intermediaries. Consequently, they are subjected to the exemptions as envisaged under Section 79 thereof. The extant framework accounts for the content and the subject matter of the OTT services, in spite of the relaxed licensing regime.

i. Evidently, the courts have held that intermediaries are subjected to the provisions of IT Act. Also, in the matter of Justice for Rights Foundation v. Union of India, before the Hon'ble Delhi High Court, the Ministry of Information and Broadcasting has reaffirmed its stand attesting to the fact that the online platform are not required to obtain any license from the Ministry for displaying their contents, and further explained that the same is not regulated by the said Ministry. Further, the IT Act continues to be the applicable regulatory framework for this particular breed of technology and lends sufficient guidance to the players and the end users.

17. OTTs have provided consumers with access to services at a lower cost. OTTs have increased consumer choice and have provided new avenues to media content creators. Introducing a licensing regime for OTTs will increase barriers to entry, reduce innovation, reduce competition, and have a significant negative impact on existing OTTs' business. This would, ultimately, have adverse impact on consumer choice and India's economic growth.

18. ***Content filtering***: Social and search platforms invest heavily in technology and are constantly innovating to provide better offerings to users. Platforms use complex processes and algorithms to show content and generate search results for users. However, platforms are intermediaries and do not proactively monitor every post or activity. Platforms provide users with various options to modify their "feed". For example, users can select "not interested in this topic" or "not interested in the user/ account" option to remove certain types or categories of results they do not wish to see. Users have considerable control over what they see and how the platforms deliver content and results. In other words, the prediction accuracy of algorithms is driven by the actions of users.

19. ***User generated content***: We humbly beg to differ with the comments made by certain industry bodies that user generated content (**UGC**) has reduced viewpoint plurality. If anything, platforms have given millions of users the opportunity to present their views to the world and to freely engage in debates, at no cost, which has only enhanced viewpoint plurality. We urge TRAI to not draw any conclusion or make any recommendation on the impact of UGC on viewpoint plurality based on mere statements made that are not backed by any data or market study.

20. ***Fake news***: Some of the comments submitted highlight the need to curtail fake news. While we appreciate the intent of the submissions, regulating misinformation and fake news is a near impossible task given the volume of content available on platforms and the quantum of daily uploads. Further, identifying or qualifying content as "fake" is not a straightforward exercise. Opinions or views that one does not agree with can be termed "fake". Having said that, news sources in India are myriad, with internet being one of many. Many people still read newspapers published in regional languages, watch news telecasted in regional languages, or listen to news in regional languages on the radio. Given this, we believe that the problem of "fake news" in India may be an overstated one and not one that requires any regulatory intervention.

In conclusion, we reiterate that regulatory interventions must be evidence-based. In the absence of strong and compelling evidence of market failure(s), any policy or regulatory measure proposed would be premature and perhaps not justified.