Nishith Desai Associates

LEGAL AND TAX COUNSELING WORLDWIDE

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Comments on Consultation Paper on Monopoly Market Dominance in Cable TV

June 24, 2013

Disclaimer

Contact

Any comments / questions may be directed to the broadcasting laws team at Nishith Desai Associates at the following e-mail address: broadcasting.nda@nishithdesai.com.

Date: June 24, 2013

To,

Telecom Regulatory Authority of India
Mahanagar Doorsanchar Bhawan (next to Zakir Hussain College)
Jawaharlal Nehru Marg (Old Minto Road)
New Delhi: 110 002

Kind Attn: Dr. Khullar / Mr. Upadhyay

Subject: **Comments on Consultation Paper on Monopoly / Market Dominance in Cable TV Services.**

Dear Sir(s),

We write to you in response to the Consultation Paper No. 5 / 2013 dated June 3, 2013 on Monopoly / Market Dominance in Cable TV Services ("**CP**").

We have perused in detail the CP and understand that the Telecom Regulatory Authority of India ("**TRAI**") has received a reference from the Ministry of Information and Broadcasting ("**MIB**"), which has sought TRAI's recommendations on whether there is a need to impose restrictions on MSOs / LCOs to prevent monopolies / accumulation of interest in order to ensure fair competition, improved quality of service, and equity.

At the outset, we would like to congratulate TRAI for publishing a well thought out CP.

As a matter of background, we at Nishith Desai Associates ("**NDA**"), are one of India's leading TMT (Telecom – Media – Technology) law firms and have won various accolades for our practice including best TMT Firm by IFLR / Asiamoney (three time winners)*, #1 ranking by Chambers & Partners for TMT (2012 / 2013) and Legal 500 has ranked us in Tier 1 for TMT (2011 / 2012 / 2013).* We have represented stakeholders from all walks of the industry, right from broadcasters, DTH service providers to investors looking to invest in the media sector. We also have extensive experience in the competition law space and have represented our clients in some of the largest competition law litigations (including the cement manufacturers' case).

We understand that the primary purpose which TRAI seeks to achieve, by this CP, is protection of consumer interest and fair play for all the stakeholders.

Based on our experience and understanding of the functioning of the broadcasting / media sector coupled with our understanding of competition laws, we have attempted to provide holistic suggestions which seek to protect the interest of consumers as well as stakeholders.

At the outset, we would like to submit that while fair competition and consumer interest are of utmost importance, interference through any restrictions should not act as an impediment to the growth of this industry. In our response, we have justified as to why, at this stage of development of the cable industry, there should not be any regulations controlling the growth of the sector.

Before we respond to the issues raised in the CP, we have provided an overview of the working of the cable industry, as it operates in India at present, the laws that regulate this sector and a snapshot of the competition laws related framework and why we believe that the same will suffice to curb monopoly / market dominance, if any, in cable TV services.

OVERVIEW OF THE CABLE TV INDUSTRY

From its inception in the year 1983, the Indian television industry has come a long way and has grown substantially. India has a large broadcasting and distribution sector comprising 828 television channels, around 6000 Multi System Operators ("**MSO**"), approximately 60,000 Local Cable Operators ("**LCO**"), 7 Direct to Home ("**DTH**") / satellite TV operators and few Internet Protocol Television ("**IPTV**") service providers[1]. However, the penetration in television has not been commensurate to the growth of this sector as television penetration in India, currently, stands at approximately 60 % of the total households.

The growth of this sector, however, has been unorganised since its inception and has been plagued for many years by poor quality of service, use of outdated technology and few incidences of unfair trade practices of LCOs / MSOs. Digitization was, thus, a game changer of sorts for this 30 year old industry which found itself in a new found growth phase.

THE DYNAMICS OF CABLE TV SECTOR AS IS KNOWN TODAY, WILL BE COMPLETELY OVERHAULED ONCE DIGITIZATION IS COMPLETE.

AN ENTIRELY NEW TELEVISION BROADCASTING INDUSTRY WILL THUS EMERGE POST 2015.

Today, the cable industry is faced with stiff competition from new and improved technologies such as DTH / IPTV / HITS and 3G / 4G (which has made media content streaming with almost zero buffering time a possibility in India). Further, unlike other countries such as US, UK and Germany, where media content is exclusive to certain mediums, content offered in India is medium agnostic / homogenous, i.e. content that is created for television is also available over IPTV / HITS, 3G / 4G in addition to all cable and DTH platforms. Thus, the availability of content across all mediums in India has ensured the customer is no longer obligated to be bound to the cable TV medium only.

With the onset of digitization and with a view to meet competition from new mediums, established cable players are re-inventing themselves and are now increasingly adopting new technologies and improving service quality. This has resulted in existing players incurring huge capital expenditure. It is essential that the cable industry is allowed to grow unfettered to compete with new technologies / mediums since India has significant scope for expanding the footprint of overall digital television; and particularly for digital cable. Recognizing the need for additional capital requirement, the Government has recently increased the limits for foreign investment in this sector, for those entities undertaking upgradation work in an attempt to promote digitization.

The extant regulations (as amended) governing the broadcasting sector in terms of the Cable Television Act, 1995, the Cable Television Networks Rules 1994, the Telecommunication (Broadcasting and Cable Services) Interconnection Regulation 2004 (13 of 2004), TRAI Tariff Orders, Standards of Quality of Service regulations, Redressal of Grievances regulations etc. have ensured that the interest of consumers is always protected, tariffs are regulated, quality of service is

[1] Consultation Paper No. 5/2013 on Monopoly/Market Dominance in Cable TV Services.

maintained and players conducting business in this sector do so within the framework laid down by the regulators.

The CP seeks recommendations to regulate possible monopoly / market dominance in cable TV services, which we believe is adequately covered under the Competition Act, 2002.

The Competition Act, 2002 ("**Competition Act**") was enacted to replace the archaic Monopolies Restrictive Trade Practices Act, 1966 ("**MRTP Act**"), which primarily dealt with monopolistic trade practices and restrictive trade practices.

The preamble of the Competition Act states that it is *"an Act to establish a Commission to prevent anti-competitive practices, promote and sustain competition, protect the interests of the consumers and ensure freedom of trade in markets in India."*

The regime set up under the Competition Act is, thus, entirely different from the erstwhile MRTP regime whereby only an **"abuse" of dominance is considered bad and not dominance in itself**, as was the case under the MRTP Act.

The Competition Act seeks to prohibit / regulate the following:

a) Anti-Competitive Agreements[2];
b) Abuse of Dominant Position[3]; and
c) Mergers & Acquisitions.

In case of anti-competitive agreement / abuse of dominance, the Competition Commission of India ("**CCI**"), which is the nodal body set up under the Competition Act, may investigate violations on the basis of a complaint or may even do so *suo-moto.* In case an anti-competitive agreement / abuse of dominant position is proved, the CCI can impose heavy penalties and also direct entities to discontinue and not to re-enter into anti-competitive agreements or abuse their dominant position.

With respect to mergers and acquisitions ("**M&A**"), the CCI has very wide powers to not only regulate traditional M&A activities but also the acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises where these exceed the thresholds specified in the Competition Act in terms of assets or turnover. Further, if a combination causes or is likely to cause an appreciable adverse effect ("**AAE**") on competition within the relevant market in India, it is prohibited and can be scrutinized by the CCI.

Therefore, the Competition Act is a comprehensive legislation that deals with anti-competitive practices and lays down stringent penalties for violation of the same. The effectiveness of CCI as a dispute resolution body is further proved by the fact that as on March 31, 2013, the CCI had received a total of 347 cases regarding violations of anti-competitive practises, of which the CCI has closed

[2] Section 3 of the Competition Act provides that no enterprise or a person shall enter into an agreement, which causes or is likely to cause an appreciable adverse effect on competition within India. The Competition Act has laid down various conditions / criteria which the Competition Commission of India ("CCI") must consider before pronouncing a final verdict.

[3] Section (4) of the Competition Act abuse of dominant position is a situation where an enterprise that enjoys dominant position, directly or indirectly, imposes unfair or discriminatory conditions in the purchase or sale of goods or service; or imposes unfair or discriminatory prices in purchase or sale (including predatory price) of goods or services.

262 cases, in 28 cases 'cease and desist' orders have been passed, while in 19 cases, total penalties of Rs. 8,013 crore have been imposed along with cease and desist orders[4].

Importantly, the provisions of the Competition Act state that it will override all other provisions contained in any law[5] and that its provisions are in addition to and not in derogation of any other law[6]. Thus, any restrictions that are proposed to be introduced to regulate anti-competitive activities in the cable industry may result in a conflicting jurisprudence or positions being developed. For example, a situation where an activity is permitted under the sectoral laws but such an activity is disallowed by the CCI, will only result in confusion, leading to the need for an amendment in the law or judicial intervention (through litigation) to resolve the conflict.

Therefore, the CCI is the best body to approve / disapprove any M&A activity in this sector and there is no requirement to introduce additional restrictions for imposing a market cap / restriction on M&A activity.

COMPARISON WITH OTHER SECTORS

The CP also makes reference to the market share cap placed in the FM Radio and Telecom sectors. The said regulations can be distinguished as follows:

- the restrictions placed on Telecom and FM Radio were imposed before the Government notified[7] the Combination Regulations[8] under the Competition Act, which regulate M&As. While various sectors had sought exemption from the applicability of the Combination Regulations, the Government amended the Competition Act only to exclude the banking sector, thereby ensuring that the Combination Regulations are applicable to all other sectors;
- FM Radio as well as Telecom are both dependent on a scarce public resource i.e. spectrum, and therefore subject to the bidding licensing process, which is not applicable to the cable TV sector.

In light of the above, we believe that there is no need for any additional regulations / restrictions to be imposed on this sector due to the overhaul of the industry post digitization as well as the presence of an already existing body i.e. the CCI which is equipped to deal with anti-competitive practices.

We have provided our responses to the specific issues raised in the CP as below:

ISSUES FOR CONSIDERATION

1. Do you agree that there is a need to address the issue of monopoly / market dominance in cable TV distribution? In case the answer is in the negative, please elaborate with justification as to how the ill effects of monopoly / market dominance can be addressed?

NDA Response: The CP, in chapter 1, *inter-alia* lays down the following grounds for proposing a restriction / regulation for controlling market dominance / monopoly in the cable industry:

- Loss in consumer welfare due to inadequate competition outweighs the gains from economies of scale and measures will obviously be required for promoting competition.

[4] http://articles.economictimes.indiatimes.com/2013-04-22/news/38736164_1_competition-watchdog-cci-alleged-anti-competitive-practices-competition-act, as last visited on June 12, 2013.
[5] Section 60 of the Competition Act.
[6] Section 62 of the Competition Act.
[7] May 11, 2011.
[8] The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (No. 3 of 2011).

- Monopoly generally leads to deterioration in quality of service in the long run.
- With monopoly / market dominance, there would be a lack of incentive for making additional investments towards new technologies / innovations.
- If there is little or no competition in the market or in case where barriers are erected by the incumbents, there is a distinct possibility of the abuse of market dominance by the incumbent service providers.
- Dominant MSOs provide unfair terms to the stakeholders in the value chain thus distorting competition e.g. acquiring content at lower price and demanding higher carriage and placement fees, creating issues for broadcasters to gain market access etc.
- Dominant MSOs are able to offer better revenue share to LCOs and thereby drive them away from smaller MSOs.

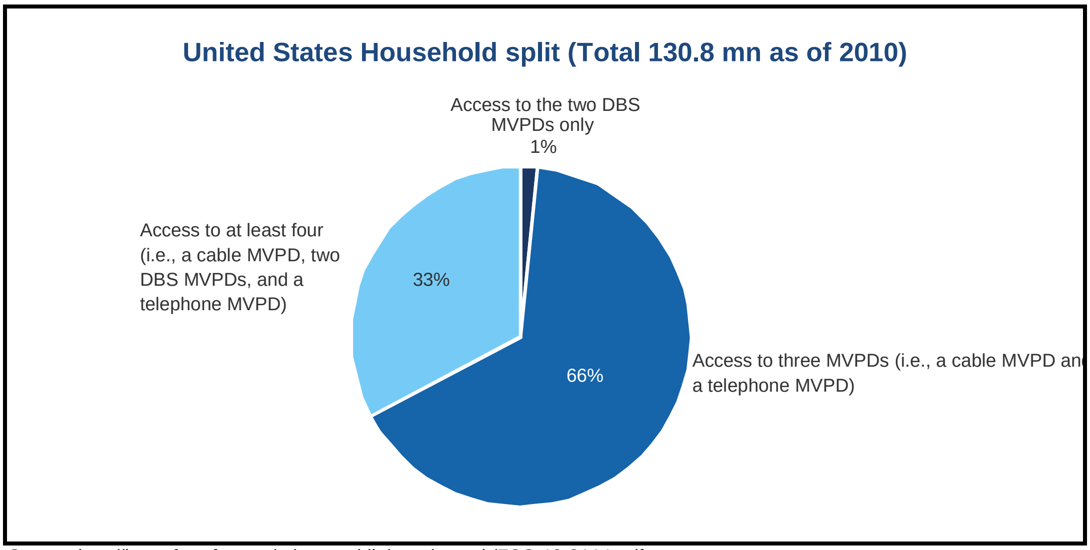
While there may be certain characteristics of market dominance in some markets in India, in light of the Competition Act along with the existing regulatory regime, we see no requirement for any additional regulations / rules to address the issues raised in the CP. We base our views on the following:

I. PROTECTION OF CONSUMER INTEREST

The primary objective of the proposed restrictions / regulations is to ensure protection of consumers' interest and that the consumers have an option of choosing a service provider that offers them the best services. Hence, competition and market dominance should be viewed from the perspective of consumer interest and choice.

A. Consumer Choice

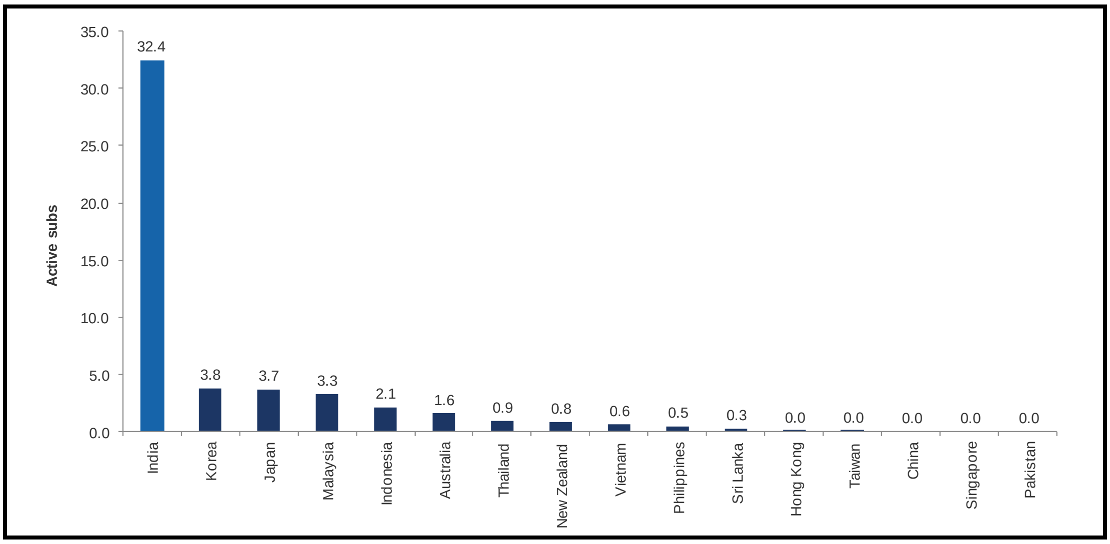
The market, as it currently stands today, comprises of around 6,000 MSOs, 60,000 LCOs, 7 DTH operators in addition to IPTV and HITS providers. Large telecom operators have launched 3G services, which enable consumers to access video / television through Over-the-Top ("**OTT**") devices. The popularity of 3G and the full-fledged launch of 4G / LTE services in India will establish another platform for distributing media content and video services. Currently, in any given neighborhood (especially in phase one and phase two digitized cities), typically, there is 1 LCO cable TV provider served by 1-3 MSO cable TV provider(s) along with 5-6 DTH providers and 1-2 IPTV provider(s). A consumer, therefore, is able to choose from 7-8 providers of pay TV / video services as compared to other international markets, such as the US and the UK, where the consumer has a choice of at best 4 service providers. In addition, there are no legally mandated "franchise" or "exclusive" areas for cable TV providers in India unlike the US and the UK where the cable TV provider in a "franchise" or "exclusive" area enjoys exclusivity to provide cable TV services. In India, multiple cable TV providers are allowed to "over build" into consumer homes i.e. build multiple cable wires into consumer homes. Therefore, India is already an extremely competitive market.



Source: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-81A1.pdf

While cable TV is the incumbent television distribution technology, DTH has emerged as a large credible competitor and has grown exponentially in the last five years.

As can be seen below, India has the largest DTH subscriber base in the entire Asia-Pacific region, reflecting that Indian consumers have actively accepted DTH as an alternative to cable.

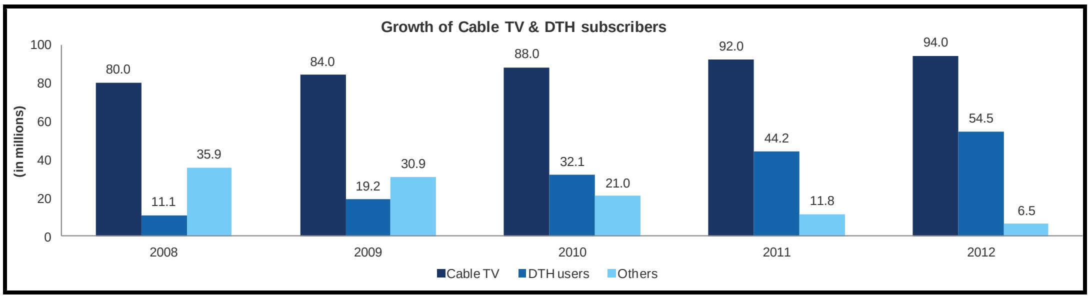


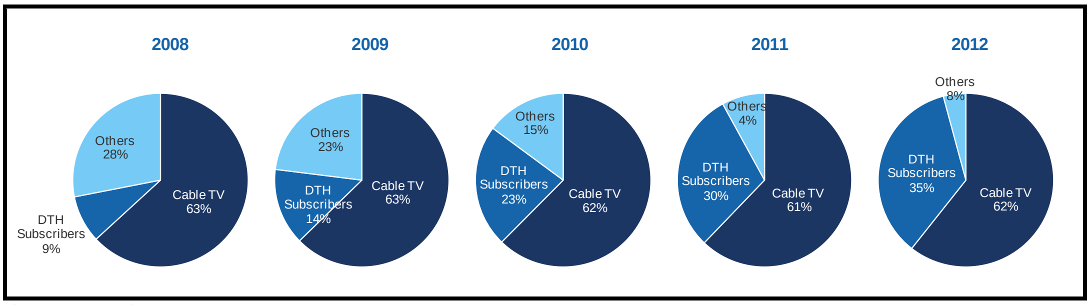
Source: Media Partners Asia 2012 – Above data comprises of active subs only

Another, contention that has been put forth is that "DTH operates on a national basis and transmits all channels throughout the country irrespective of the variation in demand of channels in the different markets" (CP para 1.21). This may not be entirely correct since DTH players have tweaked their strategies for different markets. Various DTH players offer different channel packages in different languages to address market specific demands in various parts of the country. For example, Dish TV offers channels in 13 different languages, with over 50 channels in Hindi, 37 channels in Tamil, 29 channels in Telugu, 13 channels in

Kannada, 15 channels in Malayalam, 7 channels in Odiya, 14 channels in Bangla etc. Moreover, the recent increase in transponder capacity of various DTH players has meant that the DTH players are able to offer substantially the same channels as cable TV across various markets in the country.

This has resulted in the DTH platform growing strongly in India, and has built up a market share of 35% in 2012 from 9% in 2008 as against 0% ten years ago. This kind of exponential increase in DTH would not have happened without the consumer considering DTH as a meaningful alternative to cable TV. Provided below is a tabular comparison showing the exponential growth in the DTH sector *vis-à-vis* the cable TV sector.





Source: TRAI CP

Similarly, in broadband / data services today, a consumer can choose between 1 cable MSO, 1-2 fixed line / DSL providers and 5-6 telcos offering wireless broadband. Soon, 4G / LTE offerings will be introduced in the market. Hence, here again, the consumer has a choice of 7-8 providers for broadband / data services.

Also, please refer to point 2 (Experience of International Markets) below in this regard.

B. <u>Content, Pricing and Quality of Service</u>

The competitive industry structure with multiple service providers, key regulations enacted by the TRAI to protect consumer interest and other structural elements of the Indian television industry ensure that all technologies / platforms have a level playing field and compete for the consumer on the basis of product quality and customer service. This creates an inherent mechanism for safeguarding consumer interest, which is also based on the following:

a) **Content** – Unlike the US or UK, there is no content exclusivity for any platform in India i.e. every platform has access to the same content and the consumer does not suffer by switching from one platform to the other. All DTH providers are able to provide the same channels as cable TV and are also able to offer channels in multiple languages to meet the region specific demands in various markets across the country;

b) **Pricing** – TRAI tariff orders and other regulations have resulted in reduction of costs for subscribers and an increase in the choice of channels;

c) **Quality of Service** – With a number of service providers, customer service has greatly improved as the consumer can easily switch from one provider to the other if the service continues to be poor. The TRAI has also introduced regulations specifying the Standards of Quality of Service[9] to be followed for digital addressable cable TV systems along with regulations which mandate the creation of a complaint centre[10] to handle consumer complaints within prescribed timelines. Alternatively, the consumers can also seek redressal under the Consumer Protection Act, 1986.

Additionally, any glitches in the current setup are anyway being addressed as digitization is in the process of being implemented and we believe that the choice available to the consumer will only grow by 2015.

In summary, the introduction of mediums, other than cable television, has resulted in MSOs competing against various other service providers (such as DTH, IPTV, OTT etc.). As can be seen from Figure 1.2 in the CP, the DTH subscriber growth is higher than the cable TV subscriber growth. In the mind of the consumer, there does not seem to be a distinction between cable and other technologies such as DTH / IPTV, which are considered as interchangeable or substitutable and he is already benefitting from the increased choice and competition.

II. EXPERIENCE OF INTERNATIONAL MARKETS

In most developed markets, such as the US, UK or EU, cable companies by nature have near monopolistic presence in their micro markets given the requirement to lay down physical cables for providing the connectivity to the consumers. Cable systems are limited by the extent of the cable plant unlike satellite technology, which is more ubiquitous. As a result, cable MSOs can only realize economies of scale and offer products and services to their customers by going deeper into a region or a micro market.

However, the overall competitive scenario needs to be viewed in the context of availability of alternatives to the end consumer. As an illustration, we refer to the report of the Federal Communications Commission (FCC) of the United States, where, in their Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (dated July 20, 2012)[11], it was stated as follows:

"*As a general rule, the geographic footprint of a cable MVPD [multichannel video programming distributors] rarely overlaps the geographic footprint of another cable MVPD. As such, cable MVPDs rarely compete with one another for the same video subscriber. The situation is similar for telephone MVPDs. The geographic footprint of one telephone MVPD rarely overlaps the geographic footprint of another telephone MVPD, so telephone MVPDs rarely compete with one another for the same video subscriber. In contrast, the geographic*

[9] TRAI Standards Of Quality Of Service (Digital Addressable Cable TV Systems) Regulations, 2012.
[10] TRAI Consumers Complaint Redressal (Digital Addressable Cable TV Systems) Regulations, 2012.
[11] http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-81A1.pdf

footprints of both DBS [direct broadcast satellite service] MVPDs are national and they almost always compete with one another for the same video subscriber. We also assume that a cable MVPD or a telephone MVPD almost always competes with both DBS MVPDs for the same subscriber. Finally, we assume that the two largest telephone MVPDs offer video service in geographic areas already served by incumbent cable companies and, therefore, almost always compete with a cable MVPD for the same subscriber."

The said FCC report also analyzes the impact of increased competition from DBS MVPDs and Telephone MVPDs over a period of time:

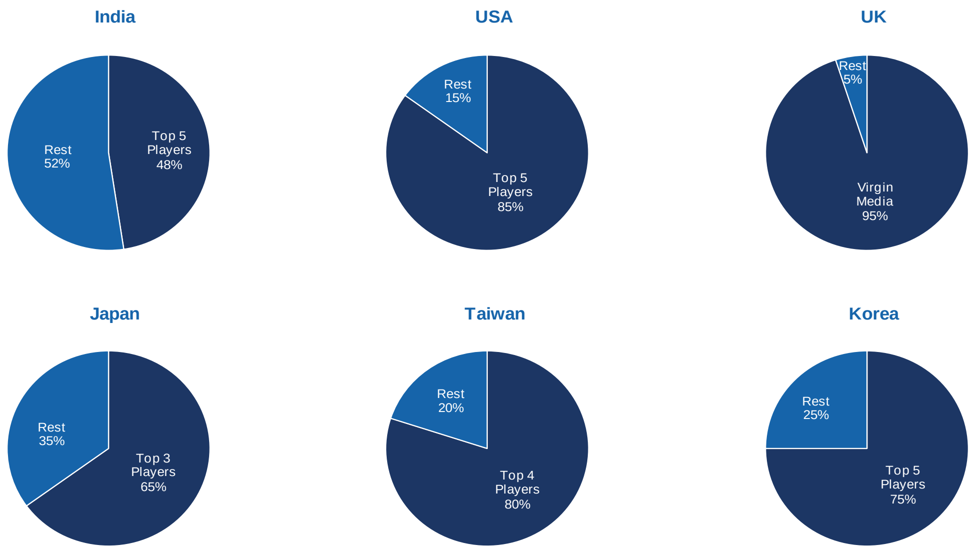
Access to Multiple MVPDs	Homes 2006	Percentage of Homes 2006	Homes 2010	Percentage of Homes 2010
Access to Two MVPDs Only	5.1 million	4.0	2.0 million	1.5
Access to Three MVPDs Only	115.6 million	91.2	85.9 million	65.7
Access to at Least Four MVPDs	6.0 million	4.7	42.9 million	32.8

Accordingly, the report concludes that while a cable company may have a near monopolistic presence in their respective markets, the overall competition must be viewed from the perspective of the consumers having access to multiple service providers including satellite service providers and telephone provides that offer video programming services. Increasing availability of multiple service providers over a period of time provides greater choice to consumers - a phenomenon similar to what is being witnessed in India, with DTH taking on an increasing market share and the launch of 4G services being planned by large telecommunication operators.

The Indian cable television industry is highly fragmented and as a result the concentration amongst the top five players in the Indian cable television market is amongst the lowest in the world, where the top players have a much bigger market share. Therefore, compared to international markets, cable MSOs in India have a much lower market power and / or dominance with respect to end consumers on one hand and broadcasters on the other hand.

Provided below is a comparison of concentration of top players in different markets.

Universe of top 5 Indian cable operators estimated to be 48% of total cable market, which is amongst the lowest as compared to several other international regions.



Source: Media Partners Asia; Top 5 Indian players comprise of: Hathway Cable (8.75 mn subs); Den Networks (11.0 mn subs); Siticable (10.0 mn subs); In cable (8.5mn subs) Digicable (7.5 mn subs); For all other countries, concentration mix as at 2011

The experience of developed markets suggests that regulating cable MSO share in a micro market will be anti-competitive and will constrain the growth of the cable industry, negatively impacting the final product and service that is offered to the consumer.

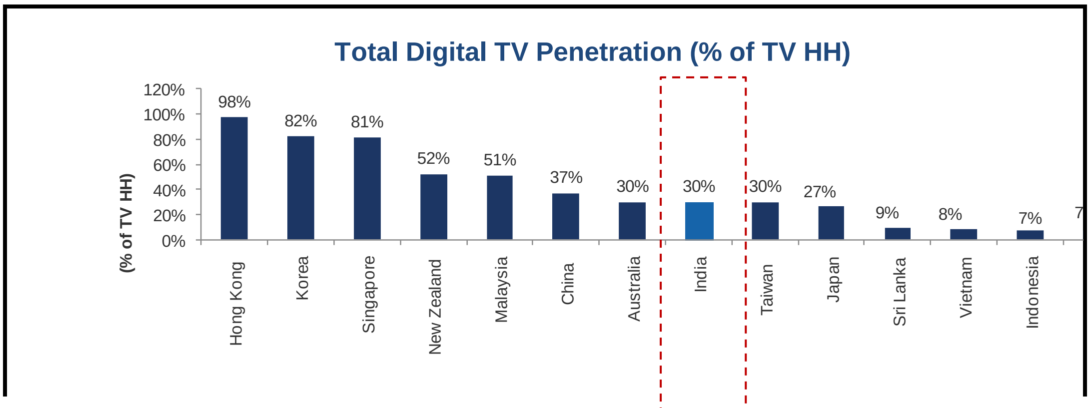
III. NEED TO DRIVE DIGITAL TV AND BROADBAND PENETRATION IN INDIA

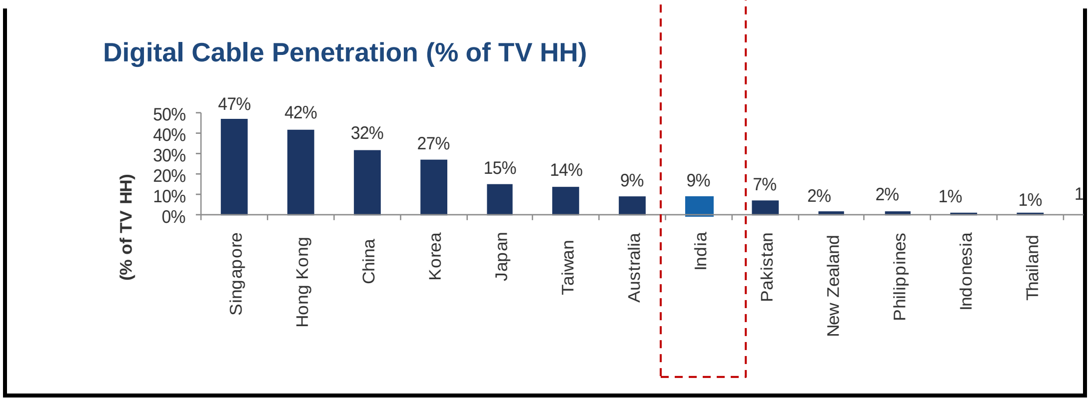
India has low digital TV and broadband penetration as compared to most emerging markets, particularly in Asia. Increase in penetration of digital TV (as has been envisaged by the TRAI) results in greater transparency in the industry. Greater transparency will result in higher tax revenues for the government and will also ensure broadcasters are adequately compensated for their content. This will in turn, encourage existing channels to invest more in content and launch new channels, thus benefitting the end consumer.

Broadband is a powerful tool for inclusive growth and helps in capacity building of individuals in poorer communities, as it aids in the roll out of e-Education, e-Health, e-Commerce and e-Banking. Increase in broadband penetration has a multiplier effect on GDP. As per the World Bank, 10% increase in broadband penetration increases GDP of a developing country by 1.38%[12].

India has significant scope for expanding the footprint of overall digital television; and particularly for digital cable as is presented below.

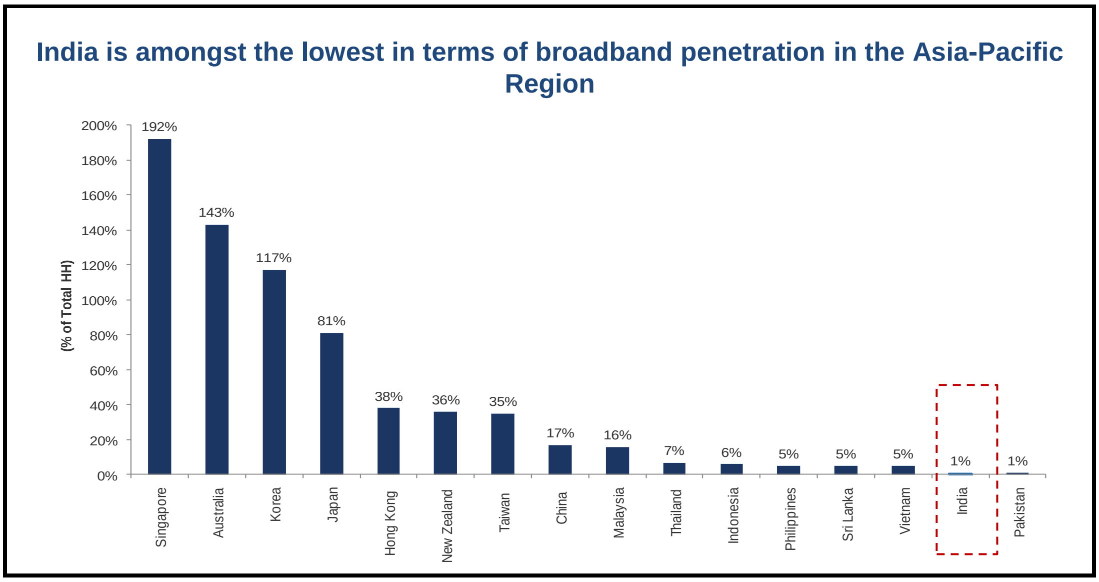
[12] National Broadband Plan, 2010.





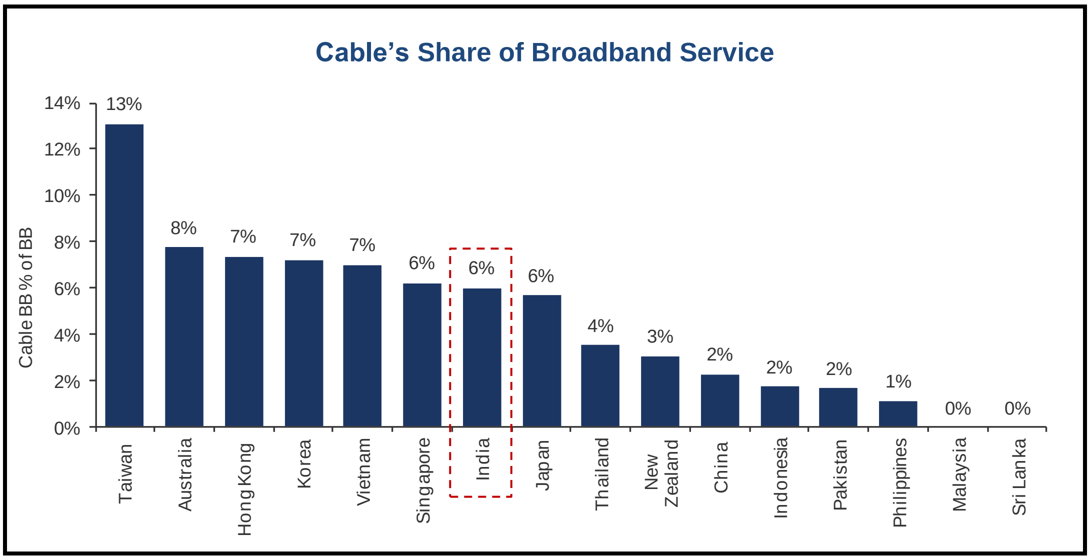
Source: Media Partners Asia 2012 – Above data comprises of active subs only; all data for CY2012

Broadband Penetration (% of Total HH)



Source: Media Partners Asia 2012 – Above data comprises of active subs only; all data for CY2012

Worldwide, the penetration of digital TV and especially broadband has been driven by cable, while in India broadband penetration is at 1% and in comparison to the Asia – Pacific region, the market share of broadband via cable stands at only 6%.



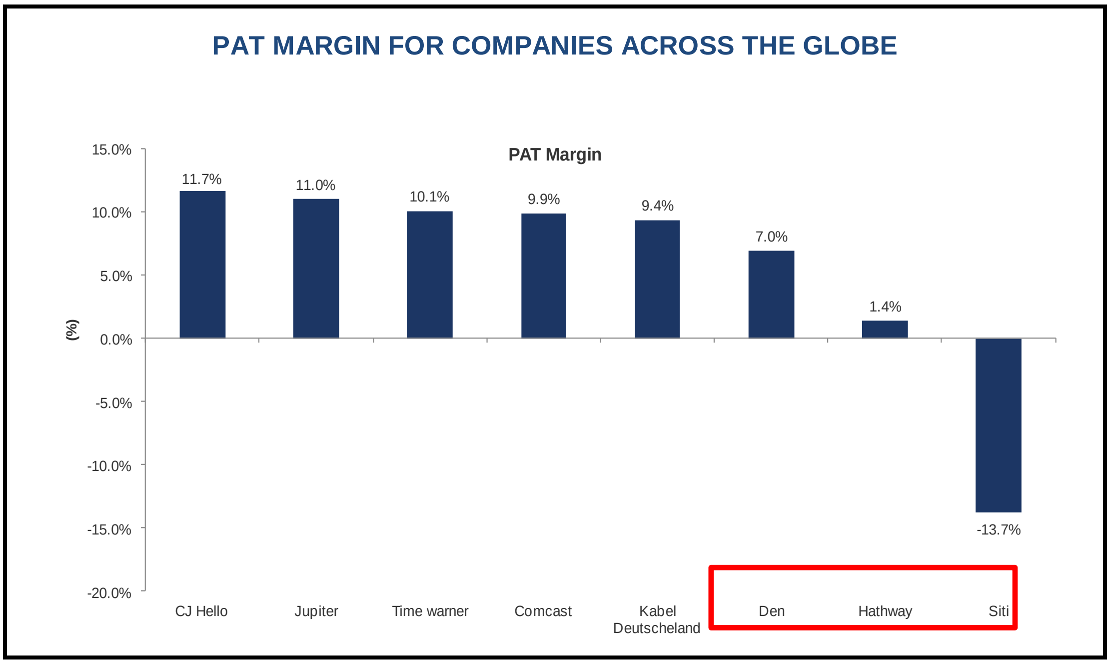
Source: Media Partners Asia

Therefore, instead of restricting the growth of MSOs, the government should provide an impetus to their growth as they are carrying out an important function of helping the penetration of broadband services by providing their customers with access to the internet at low prices in addition to cable TV services. The first internet experience for most consumers is usually via the internet setup by their LCO / MSO.

Hence, the cable sector does not need any additional regulations at this stage, but needs to be allowed to flourish as it can be expected to play a pivotal role in increasing the penetration of these services. The TRAI, therefore, should focus on sustainable competition for both pay TV and broadband services by stimulating different technologies – satellite transmission, DSL, Cable and Fibre to the Home (FTTx). It should aim to put in place a policy that promotes the development of open / shared infrastructure, which will allow different technologies to effectively compete with each other, benefiting the end consumer.

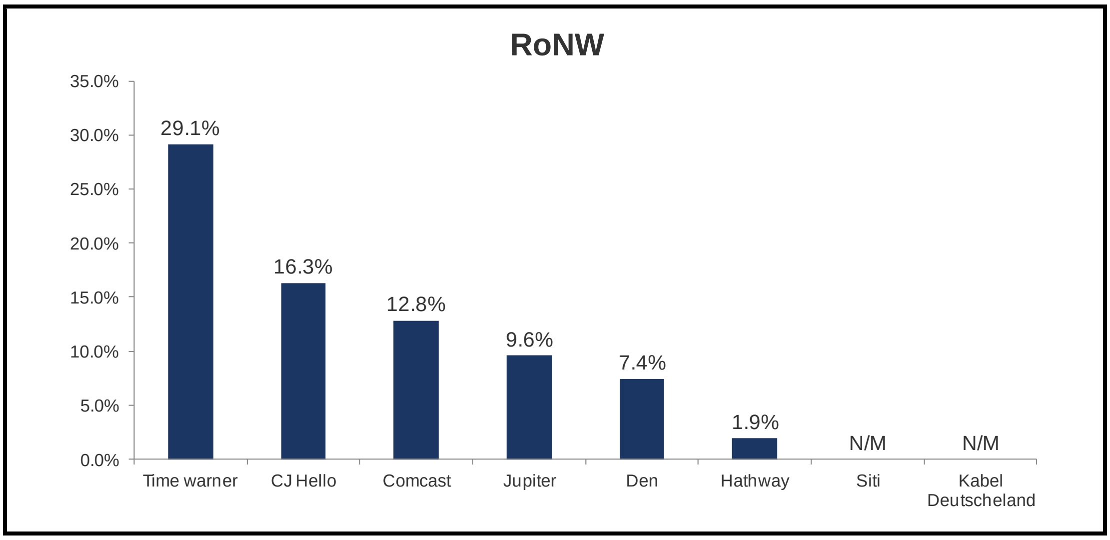
IV. LACK OF PROFITABILITY

A concern has been raised that dominant MSOs are in a position to exercise market power in the negotiations with the LCOs on one hand and with the broadcasters on the other. This concern does not appear to stem from facts. If it were true, MSOs would be generating abnormal levels of profitability. In fact, Indian MSOs are amongst the least in terms of profitability compared to their peers globally.



Source: Company filings; Factset

Further, Indian MSOs have relatively lower Return on Net Worth (RoNW) compared to companies across the globe, as is depicted below.

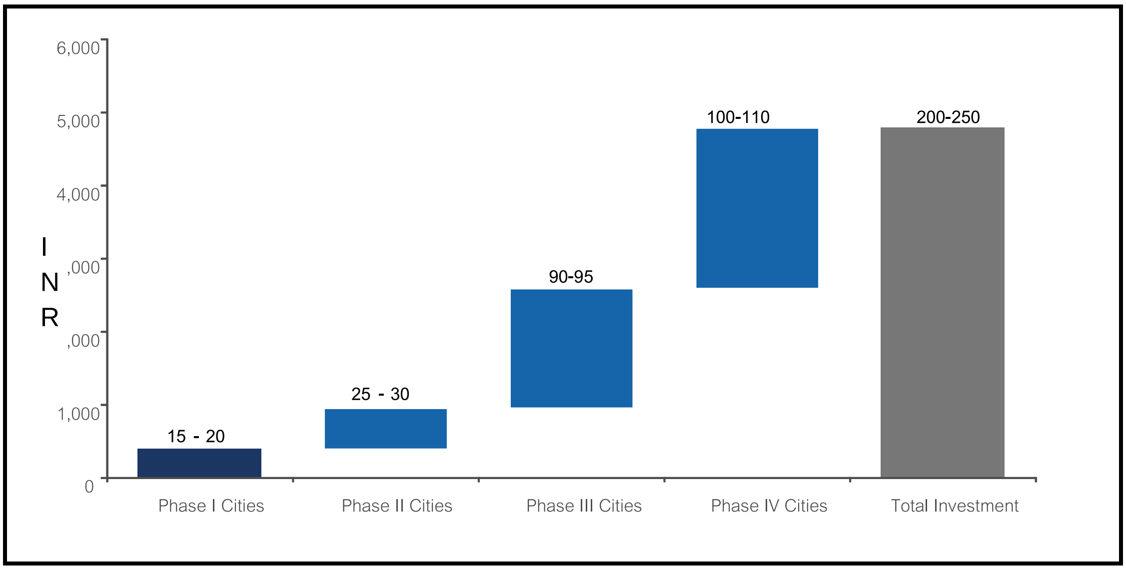


**RoNW = PAT / average networthPAT for the year ended Dec 2012 / Mar 2013 for all companies Source: Factset, Company filings*

Until digitization, the MSO was a non-exclusive intermediary with poor financials, whereas, LCOs enjoyed a position of power and played one MSO against the other. Only with the roll out of digitization, MSO financials are expected to improve. However, the requirement for MSOs to invest in upgrading the infrastructure for digitization, subsidizing set top boxes for homes and roll-out of broadband has gone up substantially. Thus any additional regulations will impact their ability to invest in this sector. Financially healthy MSOs are critical to stimulate investment into roll out of infrastructure, digitization of the plant and introduction of more sophisticated transmission standards (such as DOCSIS 3.0) for broadband. Indian cable companies have barely started registering profits from the current year and will need a few years of a stable operating environment to continue to make investments to develop the sector.

V. CAPITAL INTENSIVE INDUSTRY AND INCREASED FDI LIMITS

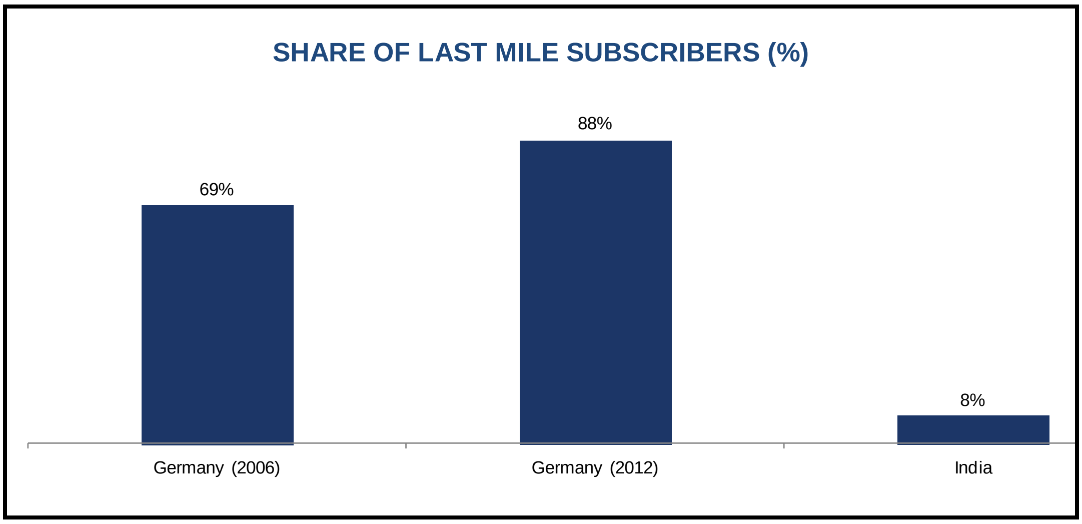
The cable TV industry, by its nature, is a capital intensive industry, wherein substantial investments are required towards cables / ground infrastructure and other technical equipment required for distribution of channels. While the cable TV industry has invested huge sums of money to set up their nationwide network, investment requirements have already increased substantially to effectively implement digitization. This has resulted in the requirement for additional expenses for procuring of licenses, set top boxes and modernization of existing infrastructure. There is significant investment required, as shown below, for meeting the digitization objectives laid down by the Government, which would require a healthy cable industry.



Source: FICCI KPMG report 2012

Additionally, to compete with DTH operators as well as to ensure rapid transition from analog to digital in line with the Governmental guidelines, MSOs are making significant investments by subsidizing set top boxes, which has resulted in MSOs incurring heavy capital expenditure in their books.

Furthermore, MSOs share of the last mile market in India is at best 5-8% compared to the last mile ownership in other countries such as Germany. At such low levels of last mile ownership, it is not financially viable for the MSO to invest in the upgradation of last mile infrastructure, which is critical to offering quality consumer experience. Thus, smaller LCOs who are unable to invest in upgradation and are in need of access to better infrastructure / networks / technology etc. seek to merge with bigger MSOs who have the necessary resources but lack the reach of smaller LCOs. This, in turn, will help consumers of smaller LCOs to receive better quality of service in an organized manner.



Notes:
Kabel Deutschland, A.G used as proxy for Germany (March 2006 and December 2012 data shown)

Recognizing the need for additional investments in the sector, the Government has also increased the foreign investment limit from 49% to 74% in the cable sector[13], specifically, for MSOs (operating at National or State or District level) undertaking upgradation of networks towards digitization. Since this has been done with a view to attract investments in the sector, the MSO business model needs to be attractive for foreign investors and any impediments / restrictions on growth potential of the MSOs is likely to deter financial investors from investing in MSOs and in turn, not only affecting the timely roll-out of digitization but also the full-fledged development of the digital cable TV sector.

Moreover, any restrictions that are introduced will deter additional investments from existing financial investors who had made investments into MSOs when digitization was announced. Thus, it may not be in the spirit of fairness to consider new regulations until a thorough study of the market post digitization is undertaken and practical experiences are examined.

VI. DIGITIZATION

We have set out below a brief comparison of scenarios in the pre and post digitization phases:

Pre Digitization	Post Digitization
No separate licensing / registration requirements existed for MSOs. **Consequence:** No clarity on the area of operations of MSOs, their subscriber base and the arrangements between MSOs and LCOs.	Compulsory licensing / registration of MSOs from the MIB. **Consequence:** Mandatory filings need to be made by the MSOs disclosing relevant details. This ensures transparency in operations and accuracy in data collation.

[13] Press Note 7 of 2012.

Alleged instances of under reporting by MSOs / LCOs of subscriber base and revenues. **Consequence:** Loss of subscription revenue to broadcasters and tax evasion.	Mandatory reporting requirements obligates MSOs to submit relevant data to the authorities. **Consequence:** Accurate reporting of the subscriber base will result in increase of revenue for broadcasters and prevention of tax evasion.
Capacity constraints due to analogue signals. **Consequence:** MSOs either refused to carry channels or demanded higher carriage fees.	Increased capacity due to digital signals along with 'must carry' provisions and non-discriminatory provisions for providing carriage to broadcasters. **Consequence:** Wide variety of channels to consumers along with a 'must carry'[14] obligation on a non-discriminatory basis on the MSO will result in a level playing field.

Once digitization sets in completely, (i) it will help eliminate cases of abuse of market dominance (increased competition across mediums and mandatory reporting requirements); (ii) consumers will get better service and viewing experience; (iii) broadcasters will get compensated better for their content (under reporting of subscribers will stop); (iv) new broadcasters will be incentivized to offer content (subscription revenue stream); and (v) cases of tax evasion will be reduced. Further, as mentioned above, the regulators have put in place sufficient regulations that govern the interaction amongst various members of the value chain i.e. LCO, MSO, Broadcaster and Consumers in a manner that no one in the system can abuse their market power even if they wanted to. The implementation of these regulations in a strict manner would address the concerns laid down in the CP.

In light of the TRAI regulations and the Competition Act (as discussed below), we believe that most existing complaints of subscribers should be resolved. This should ensure the prevention of cases such as the Kansan News Case[15].

VII. Competition Law

As has been articulated in the introduction, one of the primary objectives of the Competition Act is to protect the interests of the consumers and ensure freedom of trade in markets in India. The CCI exists as the apex body to monitor and regulate abuse of market power and anti-competitive arrangements. Since the CCI was established with these objectives in mind, we believe that the activities which the TRAI proposes to regulate are already covered under the Competition Act.

[14] As per the amended Telecommunication (Broadcasting and Cable Services) Interconnection Regulations 2004), a MSO shall, within sixty days of receipt of request from a broadcaster, provide on non-discriminatory basis, access to its network or convey the reasons for rejection of request if the access is denied to such broadcaster. The said section also specifies certain conditions in which it shall not be mandatory for a multi system operator to carry the channel of a broadcaster.

[15] *Kansan News Pvt Ltd v Fastway Transmission Pvt Ltd and others,* CCI Case No: 36/2011.

Any restrictions that are proposed to be introduced to regulate anti-competitive activities in the cable industry may result in a contrary jurisprudence being developed, resulting in a conflict situation between the two laws and an added hurdle to consolidation activities. For example, a situation where an activity is permitted under the sectoral laws but such an activity is disallowed by the CCI, will only result in confusion, leading to the need for an amendment in the law or judicial intervention (through litigation) to resolve the conflict. Thus, multiplicity of regulations should be avoided.

A. Anti-Competitive Agreements

In the CP, the TRAI has discussed the possibility of unfair terms being imposed by MSOs on consumers, LCOs and broadcasters. This concern is adequately addressed under Section 3 of the Competition Act.

Section 3 of the Competition Act deals with horizontal agreements and vertical agreements that cause or are likely to cause AAE on competition. The Competition Act states that no enterprise or person shall enter into an agreement, which causes or is likely to cause an AAE on competition within India. In the context of the CP, vertical agreements are more relevant.

Vertical agreements are held void in the event it is proved that such agreements cause an AAE on competition within India. Therefore, the Competition Act prohibits any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including:

- conditional purchase / sale (tie-in arrangement);
- exclusive supply arrangement;
- exclusive distribution arrangement;
- refusal to deal; and
- resale price maintenance.

Therefore, any anti-competitive act by the MSOs (not limited to the acts listed above) in its dealing with Broadcasters / LCOs / Customers will be considered as a vertical agreement and will be held void in the event that it causes an AAE on competition within India.

While the term AAE has not been defined in the Competition Act, Section 19 (3) of the said Act states that while determining whether an agreement has an AAE on competition, CCI shall have due regard to all or any of the following factors:

- creation of barriers to new entrants in the market;
- driving existing competitors out of the market;
- foreclosure of competition by hindering entry into the market;
- accrual of benefits to consumers;
- improvements in production or distribution of goods or provision of services;
- promotion of technical, scientific and economic development by means of production or distribution.

Thus, all the parameters that are specified in the CP are covered by this provision.

The CCI may take action against parties to an anti-competitive agreement if it determines that such agreement has an AAE on competition in India. Such action may be taken *suo-moto* by the CCI or they may also act on the basis of a complaint by a party.

This section provides an important remedy to consumers as well as to a third party in the broadcasting sector who may file a complaint with the CCI against an anti-competitive agreement / arrangement amongst LCOs and MSOs or between broadcasters and MSOs etc.

With respect to horizontal agreements, Section 3(3) of the Competition Act provides that certain agreements (such as agreement to fix prices, agreement to allocate markets etc.) are presumed to be *per-se* illegal as it is deemed to cause an AAE on competition in India.

Importantly, this section of the Competition Act also deals with cartels which have been defined to "*include an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services*"[16].

B. Abuse of Dominance

Dominance refers to a position of strength in the relevant market in India that enables an enterprise to operate independent of competitive forces or to affect its competitors or consumers or the market.

It is an established principal of competition law that dominance is not considered bad per se but its abuse is. Abuse is stated to occur when an enterprise or a group of enterprises uses its / their dominant position in the relevant market in an exclusionary and / or in an exploitative manner[17].

Dominance has significance for competition only when the relevant market has been defined. The relevant market means "*the market that may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets*"[18]. The Competition Act lays down several factors which the CCI may take into account while defining the relevant market. We have discussed the same in detail in our responses below.

There are various criteria laid down under the Competition Act, based on which the CCI shall conclude whether an enterprise enjoys dominant position which, *inter-alia,* includes:

- market share of the enterprise;
- size and resources of the enterprise;

[16] Section 2(c) of the Competition Act.
[17] http://www.cci.gov.in/images/media/Advocacy/AOD2012.pdf, as last visited on June 12, 2013.
[18] Section2(r) of the Competition Act.

- size and importance of the competitors;
- economic power of the enterprise including commercial advantages over competitors;
- vertical integration of the enterprises or sale or service network of such enterprises;
- dependence of consumers on the enterprise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale;
- high cost of substitutable goods or service for consumers;
- countervailing buying power;
- market structure and size of market;
- any other factor which the CCI may consider relevant for the inquiry.

An abuse of dominant position includes situations of (i) imposing unfair or discriminatory condition in purchase or sale of goods or service or price (including predatory price) or (ii) limiting or restricting (a) production of goods or provision of services or market therefor; or (b) technical or scientific development relating to goods or services to the prejudice of consumers; or (c) practices resulting to denial of market access; or (d) conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Therefore, in the event that a consumer believes that a LCO / MSO is imposing unfair or discriminatory conditions in the sale of its service; or imposing unfair or discriminatory prices in the sale (including predatory price) of its services, it can always approach the CCI seeking action against any such discriminatory conditions. Similarly, if a broadcaster believes that a LCO / MSO is limiting or restricting a channel's reach or is denying market access or is imposing any unfair or discriminatory conditions in its purchase of service then it may approach the CCI, like in the Kansan Case.

Thus, if a LCO / MSO is indulging in any anti-competitive activity, we believe that the Competition Act provides consumers and broadcasters with a speedy and comprehensive remedy against such activities. This view gains credence by the fact that the CCI has gained valuable experience over the past few years in dealing with such complaints. Further, since competition is a highly technical economic concept, we believe that the CCI will be the best forum to deal with any such complaints and protect interest of consumers, rather than establishing a parallel regulatory body.

Thus, in light of the aforesaid reasons, imposition of conditions to regulate competition in the broadcasting sector in addition to the Competition Act will only act as an impediment to its healthy growth rather than giving it further impetus.

2. Do you agree that the State should be the relevant market for measuring market power in the cable TV sector? If the answer is in the negative, please suggest what should be the relevant market for measuring market power? Please elaborate your response with justifications.

NDA Response: For the purpose of determining market share in the cable TV sector, we believe that state wise demarcation may not be an accurate measure of the relevant market for the following reasons:

(a) Varied size of different states and union territories, and population;
(b) Socio-Cultural diversity across India resulting in varied viewing habits in any given territory.

Additionally, we believe that the concept of relevant market is highly technical and will need to be determined on a case to case basis. In this context, reference may be made to the provisions of the Competition Act which defines relevant market to mean '*the market which may be determined by the CCI with reference to the relevant product market or the relevant geographic market or with reference to both the markets*'[19.]

'*Relevant product market'* as well as *'relevant geographic market'* has also been defined under the Competition Act, as follows:

Relevant product market means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use[20].

In the case of relevant product market, the Competition Act requires the CCI to give due regard to all or any of the following factors, namely:

a) physical characteristics or end-use of goods;
b) price of goods or service;
c) consumer preferences;
d) exclusion of in-house production;
e) existence of specialised producers;
f) classification of industrial products[21].

Relevant geographic market means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas[22].

The Competition Act mandates that the CCI shall give due regard to all or any of the following factors while determining the '*relevant geographic market*', namely:

a) regulatory trade barriers;
b) local specification requirements;
c) national procurement policies;
d) adequate distribution facilities;
e) transport costs;
f) language;
g) consumer preferences;
h) need for secure or regular supplies or rapid after-sales services[23].

[19] Section 2(r) of the Competition Act.
[20] Section 2(t) of the Competition Act.
[21] Section 19(7) of the Competition Act.
[22] Section 2(r) of the Competition Act.
[23] Section 19(6) of the Competition Act.

In light of the above, since the Competition Act has already laid down certain criteria to determine relevant market, we believe that the relevant market for measuring market power in the cable sector should be determined in accordance with its provisions, by the CCI.

However, if the regulatory authorities still feel the need to define the 'relevant geographic market' the same should be based on the homogeneity in socio-cultural norms and viewership habits.

Similarly, the 'relevant product market' post digitization should include all prevalent technologies / platforms (cable TV, DTH, IPTV, HITS, 4G / LTE etc.).

3. To curb market dominance and monopolistic trends, should restrictions in the relevant cable TV market be:

I. Based on area of operation?
II. Based on market share?
III. Any other?

Please elaborate your response with justifications.

NDA Response: We believe that currently the cable TV market does not require any additional restrictions since (i) the interest of consumers is adequately safeguarded; (ii) monopolies / abuse of dominance are adequately dealt with under the Competition Act; (iii) the cable TV industry is a capital intensive industry that requires huge investments more so with the advent of the impending digitization process; and (iv) the existing regulatory framework (MIB / TRAI) sufficiently protects consumer interest while ensuring growth of the industry. Thus, any further restriction will only hamper the full-fledged development of this sector.

Additionally, this sector is in a growing phase as digitization is completely going to change the industry as it is known today. Since it is an established principal of competition law that dominance is not considered bad *per se,* but its abuse is, this sector should be allowed to grow. Restrictions, if at all, should only be considered once this sector has fully developed, on the basis of the functioning of the market, at the relevant point in time.

4. In case your response to Q3 is (i), please comment as to how the area of a relevant market ought to be divided amongst MSOs for providing cable TV service. Please elaborate your response with justifications.

NDA Response: Not applicable in light of our response to issue 3.

5. In case your response to Q3 is (ii), please comment as to what should be the threshold value of market share beyond which an MSO is not allowed to build market share on its own? How could this be achieved in markets where an MSO already possesses market share beyond the threshold value? Please elaborate your response with justifications.

NDA Response: Not applicable in light of our response to issue 3.

6. In case your response to Q3 is (ii), please comment on the suitability of the rules defined in para 2.26 for imposing restrictions on M&A. Do you agree with the threshold values of HHI and increase in HHI (X, Y and Delta) indicated in this para. If the answer is in the negative, what threshold values for HHI and delta could be prescribed for defining restrictions? Please elaborate your response with justifications

NDA Response: Not applicable in light of our response to issue 3.

7. Should 'control' of an entity over other MSOs / LCOs be decided as per the conditions mentioned in para 2.29? In case the answer is in the negative, what measures should be used to define control? Please elaborate your response with justifications.

NDA Response: Since we do not believe that there is a need of any restriction to be imposed on this sector, we have no comments on this point.

8. Please comment on the suitability of the rules defined in para 2.31 for imposing restrictions on control. Do you agree with the threshold values of HHI and increase in HHI (X, Y and Delta) indicated in this para. If the answer is in the negative, what threshold values for HHI and delta could be prescribed for defining restrictions? Please elaborate your response with justifications.

NDA Response: While the HHI is a widely used indicator for the purposes of determining market concentration, the threshold values are dependent on the demarcation of the relevant market. As mentioned above, in our view, the concept of relevant market is dynamic in nature and needs to be decided on a case by case basis, by the CCI. Thus, there should be no prescribed limits (as set out in para 2.31), but the same should be left to the CCI which may *inter-alia* refer to HHI for determining market concentration.

The CCI, under the Competition Act, looks at various criteria / factors (as set out below, and not just market concentration) for allowing / disallowing a combination.

The factors for determining whether a combination would have the effect of or is likely to have an AAE on competition in the relevant market, includes:

a) actual and potential level of competition through imports in the market;
b) extent of barriers to entry into the market;
c) level of combination in the market;
d) degree of countervailing power in the market;
e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
f) extent of effective competition likely to sustain in a market;
g) extent to which substitutes are available or arc likely to be available in the market;
h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

j) nature and extent of vertical integration in the market;
k) possibility of a failing business;
l) nature and extent of innovation;
m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
n) whether the benefits of the combination outweigh the adverse impact of the combination, if any[24].

Thus keeping in mind the overarching objectives of the Competition Act (*prevent anti-competitive practices, promote and sustain competition, protect the interests of the consumers and ensure freedom of trade in markets in India*) coupled with the fact that competition and market concentration are highly technical economic concepts, we believe that the CCI will be the best forum to take a holistic decision on whether a combination should be allowed or disallowed.

9. In case your response to Q3 is (iii), you may support your view with a fully developed methodology indicating a measure arrived at to determine market power and proposed restrictions to prevent monopoly / market dominance in the relevant market.

NDA Response: No further comments, in view of our response to issue 3.

10. In case rules defined in para 2.31 are laid down, how much time should be given to existing entities in the cable TV sector (which are in breach of these rules as on date), for complying with the prescribed rules by diluting their control? Please elaborate your response with justifications.

NDA Response: We do not believe that any restrictions should be placed on entities in the cable TV sector.

11. Whether the parameters listed in para 2.33 are adequate with respect to mandatory disclosures for effective monitoring and compliance of restrictions on market dominance in Cable TV sector? What additional variables could be relevant? Please elaborate your response with justifications.

NDA Response: We believe that the existing filing / reporting requirements imposed by the MIB in terms of the amendments to the Cable Television Act, 1995 and the Cable Television Networks Rules 1994 (in view of digitization) and the reporting requirements to TRAI in terms of the amendments to the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations 2004 are sufficient for effective monitoring and determining market share of players in the cable TV sector and the parameters listed in para 2.33 are, therefore, not required to be implemented.

[24] Section 20(4) of the Competition Act

12. What should be the periodicity of such disclosures?

NDA Response: In light of our response to issue 11 above, this issue will not be applicable.

13. Which of the disclosures made by the Cable TV entities should be made available in the public domain? Please elaborate your response with justifications.

NDA Response: In light of our response to issue 11 above, we believe that public disclosure of documents / details should be dealt with in accordance with the Cable Television Act, 1995, Cable Television Networks Rules 1994 and Telecommunication (Broadcasting and Cable Services) Interconnection Regulations 2004, as amended from time to time (taking into account digitization).

14. What according to you are the amendments, if any, to be made in the statutory rules / executive orders for implementing the restrictions suggested by you to curb market dominance in Cable TV sector?

NDA Response: In light of all our responses set out above, we believe that no additional amendments are required to be made in the statutory rules / executive orders governing the cable TV sector.

15. Stakeholders may also provide their comments on any other issue relevant to the present consultation.

NDA Response: In addition to our comments above, we would urge the TRAI to not develop a regulatory framework based on the data / behaviour observed for phase one and two cities that have been digitized. The cities that have been digitized are those with a population over one million and represent close to only 15% of India's population. Any regulations that maybe introduced on the basis of this data may not be representative and may not necessarily address the needs of the remaining 85% of India. Hence, with such limited data it will be premature to formulate regulations for the entire country

Thus, this would not be an appropriate time and stage to introduce any regulation for the cable TV sector as these may constrain the development of the pay TV and broadband in India. The TRAI should wait till pan-India roll-out of digitization is complete and then, if there is a need, revisit the subject with more representative and accurate data.

Any comments / questions may be directed to the broadcasting laws team at Nishith Desai Associates at the following e-mail address: broadcasting.nda@nishithdesai.com.

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