

CONSULTATION PAPER  
ON  
DISTRIBUTION OF TV CHANNELS FROM BROADCASTERS TO PLATFORM  
OPERATORS

Dated August 08, 2013

The Hon'ble Authority in recent times has been particularly active on bringing in radical changes in the cable and satellite industry and particularly for the Broadcasting sector. Admittedly, the Authority fairly believes in reviewing the present regulatory framework for ensuring *interalia* non-discriminate access to content to service providers. However, the natural tendency is that in belief of doing well to a class of people one sometimes is ignorant of harm it is causing to the others, like everybody, the Authority may not be an exception to this.

We have perused the proposed changes in the regulations and are of the view that there is **NO** need for such sweeping regulations and the departure from the status quo would **NOT** produce benefits that outweigh the potential harm that is likely to result from the proposed regulation. The basis of our viewpoint is detailed as under:

I. **Overlapping jurisdictions:**

The Authority has cited the reason behind the Consultation Paper as monopolistic practices of some of the authorized distribution agencies of broadcasters that force the MSOs to subscribe to certain packages. Be that as it may, the issues of monopoly, market power & dominance are purely competition issues under competition law. The Competition Commission of India (CCI) has a complete expertise and jurisdiction to enquire or investigate and pass suitable preventive and penal orders against the offenders.

A concerning issue emerges with proposed regulations that there will be concurrency of competition laws and the proposed regulations. The CCI has been dealing with the issue like abuse of market dominance by the aggregators in the cable and broadcasting industry. In the recent past, the CCI has already scrutinized the cases of two big aggregators viz. Mediapro and Indiacast-UTV Merger and approved the combinations/ mergers under the Competition Act.

Apparently, the legislative mandate for CCI and TRAI is distinct. Further, it needs to be appreciated that sector regulators and competition authorities' perspective regarding competition matters may be different. As a fundamental rule, competition laws seek to protect the process of competition, not agents in the market with a view to maximizing productive and allocative efficiencies. Ideally, the competition rules tell the agents in the market what they should not do, while sector regulation does the reverse and tells market agents what to do. The differences in the methods and approaches to competition matters may result in different outcomes, thereby causing confusion for stakeholders and also leading to forum shopping. Thus, one must try and appreciate the difference between technical issues and competition issues. As a sector regulator for cable & satellite services, the

Authority should have the leading role in regulating technical and commercial issues. Thus for structural issues, which in most cases are *ex ante*, the Authority should take a leading role, but for competition issues as envisaged in the Consultation Paper, which are largely behavioral and *ex post*, competition authority should take a leading role.

The proposed regulations as envisaged in the Consultation Paper can adversely affect the present Aggregator- Broadcaster business model, which, so far, has been working successfully and is accepted by all stakeholders of the industry. The proposed changes in the regulation are radical changes across the board, which can also adversely affect bonafide Aggregators. For any abuse of its dominant position by an Aggregator, an effective remedy is always available under the competition law.

## II. Consultation process:

### a) Fundamental issues not identified:

Consultation plays a key part in the formulation of policy framework leading to regulations. Inadequate consultation can result in poor policy that cannot be effectively implemented, or in deliberate or inadvertent non-compliance by the Stakeholders (as has been the case with the Authority's several regulations and orders). Howsoever time-constraint there may be, the consultation process should start with first ascertaining the fundamental issues. These fundamental issues then be tested whether a proposed policy reflects key concerns and issues and what is the competing interests of different people or groups and then building consensus through a transparent policy making process.

However, the Authority, in the present Consultation Paper has without going in the process of identifying first the issues of consultation and evaluating the need & impact for change and without even considering the view of the Stakeholders, has formulated its view and floated the draft amendment for consultation. As a sector regulator, the Authority is expected to maintain a neutral outlook on the issues of consultation during the process of consultation.

### b) No Regulatory impact analysis:

By the present consultation paper, TRAI has proposed regulations that bring in sweeping changes in the television channel distribution model. As a general practice in many international jurisdictions, a document created before a new regulation is introduced known as Regulatory Impact Analysis (RIA), RIA encompasses a range of methods aimed at systematically assessing the negative and positive impacts of proposed and existing regulations. The central purpose of RIA is to ensure that regulation will be welfare-enhancing from the societal viewpoint i.e., that benefits will exceed costs. RIA is generally conducted in a comparative context, with different means of achieving the objective sought being analyzed and the results compared.

Apparently, TRAI has not supplied any RIA on the proposed regulations nor has mentioned anywhere in the present paper that it has conducted assessment or analysis of the impact that may be caused by the proposed regulations. This may be serious lapse on the part of the Authority, that while bringing vast changes affecting multitude of stakeholders, it has not assessed whether the proposed changes will be beneficial than the status-quo or whether the changes sought through regulations being beneficial can outweigh potential harm to the stakeholders and whether, there are alternate options available to achieve the desired objectives.

c) Legality of the proposed changes:

The proposed changes in regulation are a direct restriction on the right to trade and practice occupation or business of the aggregators. The right to practice any profession or to carry on any occupation, trade or business being a very valuable right has been treated as fundamental and guaranteed under Article 19 (1) (g) of the Constitution. This right can be restricted only by law and on such reasonable grounds which are found to be in the interest of general public. However, in the Consultation Paper the Authority has not been able to clearly demonstrate that the said changes are in the interest of the general public, except that the changes are in commercial interest of a particular class of service providers. The proposed changes are based much on the assumption rather than investigation.

**III. Deficiencies in the Consultation Paper:**

a) Consultation Paper based on assumption:

The Consultation Paper is based on assumption and fails to establish Aggregators' monopolistic practices. Whilst, the Authority has admitted in its previous consultation papers that the cable operators have an extensive last mile monopoly, surprisingly, the Authority now recommends for even more power in the hands of cable intermediaries. The Authority has submitted in its various consultation papers, including 'On issues relating to Media Ownership' and three recommendation papers for the imposition of 'Digital Addressable Systems' where it has dealt in detail about the problems being faced by the cable & satellite industry, however, the issue of monopolistic practices by Aggregators, as asserted in the Consultation Paper, has never been discussed.

Moreover, be that as it may, for one Aggregator's actions, all the fraternity can't be made to suffer, especially when the regulations for Broadcasters/ Aggregators are already very stringent and their actions are under continuous and careful scrutiny of the Authority, Telecom Dispute Redressal and Appellate Tribunal (TDSAT) & CCI.

b) Making the weak weaker:

Since 2003, the Authority has put a freeze on the channel rates for the Broadcaster/ Aggregator. Further, there has only been controlled increase in the channel rates, where the last allowed increase was at the start of 2009. Moreover, every Broadcaster/ Aggregator is

under an obligation to provide its channels at a-la-carte rates, besides compulsory provision of bouquets as existed on December 2007. There is also a stringent "Must Provide" obligation upon Broadcaster/ Aggregator and a very weak "Must Carry" provision, that too is only restricted to DAS cable systems platform. On the other hand the carriage obligations for the channel broadcasters have been consistently increasing, despite of implementation of DAS Phase II.

The Authority by way of the proposed amendment seeks that the Broadcaster/ Aggregator should only offer broadcaster wise channel packages. In effect, this would mean that the existing bouquets of channels have to be further divided into broadcaster wise bouquets. The main reason cited by the Authority that the Aggregators have imposed all their bouquets and channels on the MSOs. On the contrary, it is the MSOs, who despite having the option of subscribing for channels on a-la-carte basis, have preferred for all the channels distributed/offered by Broadcasters/ Aggregators. Moreover, the channels in a form of a bouquet are already offered at far lesser rate than their a-la-carte rates. The Authority has failed to appreciate the fact that the MSOs/DTH operators have the advantage of higher discounting on rates through bulk buying. Though, every contract details are available with the Authority, it has failed to realize that the MSOs/DTH operators are enjoying far more discounted rates that the Authority is envisaging by way of this Consultation Paper.

Whilst, the Broadcasters/ Aggregators under the existing provisions of the Authority's regulations are already on the weaker footings against the distributors of channels, the proposed amendments in the regulations structure will take away the limited bargaining power that the Broadcaster currently has and will lead to increase in carriage costs of broadcasters and reduction of subscription revenue.

c) Ineffective DAS Implementation not attributable to Aggregators

The Authority has erred in presuming that the Broadcasters/ Aggregators are responsible for ineffective implementation of Digitization, in fact it is the cable intermediaries viz. MSOs & LCOs who have failed to execute agreement amongst them and collect duly filled up subscriber forms from their subscribers. Further, the Authority has wrongly assumed that Fixed Fee deals have been imposed on MSOs when in reality it was the MSOs who insisted on Fixed Fee deals from the Broadcasters/ Aggregators and sought Authority's intervention in ensuring such deals are signed on Fixed Fee basis to facilitate smooth transition to Digitization. Whereas Broadcasters/ Aggregators were always ready to execute cost-per-subscriber deals.

The Authority has completely overlooked the fact that till date none of big MSOs have provided accurate and correct subscriber report for DAS areas of operations. Even the Authority has not shared the data filed by MSOs the Aggregators/Broadcasters. The Authority has completely ignored the increasing reported margins of MSOs and on the contrary is holding the Aggregators/Broadcasters guilty of unreasonably high profits/revenue. Even losses of DTH operators, is not attributable to higher content cost but to higher license fee, tax burdens and failure to meet satellite bandwidth demand.

d) Proposed amendments will increase unnecessary workload of all Stakeholders.

The Authority did not realize that the de-bundling at the broadcasters level shall not result into benefits to consumers/end viewers since the MSOs/DTH Operators will continue to sell multi broadcaster bouquets to consumers and LCOs.

For the sake of maintaining the identity of the channels under single brand name (like Times channels, Reliance channels, Network18 Channels, etc.) and logistical convenience, at some level the channels have to be brought under one umbrella, that job was done by Aggregators. The aggregation of channels under one umbrella is only a natural extension in the cable business. After the DAS Cable implementation, the market is rapidly moving towards consolidation and potentially would reduce to only a handful of MSOs in the coming time. The Aggregators in the same count will maintain the right balance in the cable television distribution ecosystem.

Even MSOs would have problems on signing of multiple broadcasters wise agreements. For e.g. MSM Discovery & Indiacast distributes channels of 5 broadcasters each, if the proposed amendment is made effective the MSOs have to negotiate and sign 10 different agreements in place of 2 agreements, 10 invoices and same number of payment transactions, even for regulatory filling for same number of channels there will be 10 fillings. This would unnecessary increase the workload of all the Stakeholders including MSOs and the Authority.

**Conclusion:**

The aggregation, infact, gives a collective identity to the channels, decreases multiplicity of the same work and brings in lot of working convenience into the whole distribution system. We submit that even the MSO is an aggregator and negotiates on behalf of numerous LCOs with the Broadcasters.

In view of the above, we reiterate that there is no need for such sweeping regulations and the departure from the status quo would not produce benefits that outweigh the potential harm that is likely to result from the proposed regulation. The proposed amendments in the regulations require an assessment of their potential impact and contemplation whether desired results can be achieved. Recently, there have been several initiatives by the Authority by way of consultation and regulations that may form impediments in the desired growth in the broadcasting sector, whilst the country going through an economic crisis, the industry desires a much needed shot in the arm in the form of encouraging regulations rather than being pulled down by potential regulatory policy errors that will take of lot of time and work to repair the damage.