TRAI Consultation Paper dated 6 August 2013 titled 'Distribution of TV Channels from Broadcasters to Platform Operators'

Set out below are the comments on behalf of TV18 Broadcast Limited to the consultation paper titled 'Distribution of TV Channels from Broadcasters to Platform Operators' dated 6 August 2013 ("**Consultation Paper**") issued by the Telecom Regulatory Authority of India (the "**Authority**").

A. Introduction

1. At the outset, we would like to place on record our reservations on the extremely one sided view adopted by the Telecom Regulatory Authority of India ("**Authority**") throughout the Consultation Paper as well as the sources of data which have been used to illustrate the adverse state of the cable television industry in India on account of content aggregators.

2. It is submitted that the Authority has suggested radical changes to the existing regulatory regime without delving into a detailed analysis or sharing the relevant data with the content aggregators or for that matter without giving content aggregators, amongst other stake holders the opportunity of presenting their views to address the concerns raised by the Authority basis which the Authority has arbitrarily drawn conclusions with respect to the role played by the content aggregators and discuss a facilitative rather than a restrictive way forward.

3. It is disconcerting to say the least that the Authority has on the basis of concerns raised by some multi system operators ("**MSOs**") and local cable operators ("**LCOs**") proposed to implement amendments to the current regulatory regime without first consulting with the various stakeholders.

4. Accordingly, without prejudice to the above, and reserving our rights under law and also with the understanding that our response to the entire Consultation Paper is an expression of our thoughts on the issues raised in the said Consultation Paper, which should not be construed as binding on us, we are submitting our comments to the Consultation Paper for your kind reference as under.

B. Existing Regulatory Framework Addressing Anti Competitive and Monopolistic Behaviour

1. It is submitted that the Consultation Paper proposes radical changes to the current regulatory regime by addressing issues which not only are without any basis or empirical data but also by arriving at conclusions which are strictly not within the domain of the Authority. The rationale being that the Consultation Paper is centred around monopolistic practices being adopted by content aggregators on behalf of broadcaster and by the broadcasters themselves, which is within the domain of the Competition Commission of India ("**CCI**"). In this regard, the CCI has held[1] that any matter that raises concerns centred around anti competitive practices would fall within the purview of the Competition Act, 2002 ("**Competition Act**") enabling the CCI to

[1] *Consumer Online Foundation vs. Tata Sky Ltd and Ors [2011 Indlaw CCI 12]*

exercise jurisdiction, stating "…*There is no doubt that TRAI is the sector regulator for the market. But competition in the market falls within the exclusive jurisdiction of CCI*[2]."

2. Accordingly, it is submitted that the Competition Act which *inter alia* deals with anti-competitive agreements and monopolistic practices will have jurisdiction in connection with the matters being covered under the Consultation Paper and the existing statutory provisions are adequate to address the concerns of the Authority regarding any anti competitive and/or monopolistic practices across the media industry and effectively covers each of the issues that have been identified by the Authority as those requiring regulation.

3. The Consultation Paper has ignored the provisions of the Competition Act and the jurisdiction of the CCI in investigating and adjudicating any matters in relation to monopolistic trade practice, dominance and abuse of dominance.

4. It is pertinent to note that the basic premise on which the Authority has proceeded in the Consultation Paper is that:

   i. There are alleged monopolistic practices; and

   ii. Various complaints have been received from MSOs on the 'modus operandi' adopted by content aggregators wherein MSOs have been forced to accept unreasonable terms and conditions to obtain signals of the broadcaster through some of the major aggregators.

5. Further, we wish to bring to the notice of the Authority that the CCI after a detailed investigation pursuant to a complaint filed by Shri Yogesh Ganeshlaji Somani in case No 31/2011 against the joint venture formed between Star Den Media Services Private Limited and Zee Turner held that the joint venture parties and the joint venture entity namely, Media Pro Enterprise India Private Limited have not contravened the provisions of either Section 3(3) or Section 4 of the Competition Act. The CCI also noted that the informant has not placed any evidence or data which can contradict the findings of the Director General's ("**DG's**") Report. In the DG's report it was clearly observed that the investigation has not revealed any evidence which suggests that any MSO or DTH operator has shut down its business due to the greater bargaining power of Media Pro Enterprise India Private Limited and there is no evidence which suggests that entry of any MSO or DTH has been restricted due to the greater bargaining power of Media Pro Enterprise India Private Limited.

6. The views expressed by the CCI in the aforementioned matter indicate that: (i) content aggregators have brought efficiency in the market and negotiate on behalf of broadcasters; (ii) content aggregators cannot engage in anti competitive behavior; (iii) the MSOs decide the channels that would finally be made available to subscriber; and (iv) MSOs earn more from placement fees rather than subscription revenue, thus they exercise greater bargaining power over the broadcasters. Thus the assumption that there are monopolistic practices being adopted by content aggregators in the Consultation Paper is entirely misplaced.

[2] Paragraph 27

7. Similarly, the CCI also allowed the joint venture aggregator (namely, IndiaCast UTV Media Distribution Private Limited) between India Cast and Disney UTV by concluding that IndiaCast UTV Media Distribution Private Limited (i.e. the content aggregator) is not likely to have any appreciable adverse effect on competition in India.

8. Before we attempt to elaborate further on why the proposed changes to the extant regulations in order to regulate content aggregators would be counterproductive, it important to highlight the role played by content aggregators.

C. Role of Content Aggregators

1. Under the extant Regulations framed by the Authority as well as under the Cable Television Network (Regulation) Act 1995, as amended, a broadcaster has been defined to include authorized distribution agencies of a broadcaster. Thus a content aggregator falls within the purview of an authorized distribution agent of a broadcaster. Accordingly, several broadcasters have appointed authorized distribution agencies namely, content aggregators.

2. The content aggregators have entered into valid and binding agreements with broadcasters, pursuant to which, content aggregators publish the reference interconnect offer ("**RIO**") on behalf of the broadcaster and enter into interconnect agreements with operators of various distribution platform thereby managing and ensuring efficiency in the entire value chain. The content aggregator is thus an important stakeholder in the value chain.

3. Content aggregators have benefitted the broadcasting and cable television sector leading to the growth of the broadcasting and cable television sector in the following manner:

    i. Increased the geographical reach of the broadcasters to smaller cities, towns and villages across India.

    ii. Created efficiency by optimizing costs associated with distribution.

    iii. Ensured that the broadcasters get a fair share in the overall subscription revenues.

    iv. Reduced the multiplicity of deals/contracts, facilitating discussions/negotiations as well as execution of commercial agreements for multiple broadcasters which has reduced the execution of multiple agreements between broadcasters and platforms operators.

    v. Curbed the monopolistic approached of MSOs.

    vi. Bringing about efficiency in the market.

4. It is pertinent to note that content aggregators have been operating in this sector for a period of 8 (eight) to 10 (ten) years and until now the Authority has not viewed the content aggregators as monopolistic or anti competitive.

5. Additionally, the TDSAT *inter alia* while dealing with disputes pertaining to the broadcasting industry has recognized the independent role played by content aggregators in a plethora of cases.

6. In view of the foregoing facts and circumstances, we attempt to respond to whether a change in the regulatory regime as proposed by the Authority in the Consultation Paper is beneficial on the following grounds.

D. Imprecise Approach of the Consultation Paper

1. The Consultation Paper is imprecise, ambiguous and seems to have been hastily put together. It neither goes into details nor clearly sets out the issues for consultation. It also does not provide any body of evidence to substantiate the statements put forth therein. By way of an example, the Consultation Paper purports to "*…address the issues that have arisen out of the present role assumed by the authorized distribution agencies of the broadcasters….*" without categorically specifying what these issues are. Therefore, the Consultation Paper is riddled with such imprecise and ambiguous statements which have not been substantiated.

2. The Consultation Paper contains mere allegations and references to 'complaints' without any details and/or supporting data or facts. We are thus constrained to respond to vague statements in the absence of any supporting data.

3. It is pertinent to draw your kind attention to the fact that such complaints are nothing but an attempt to mislead the Authority and are solely intended to shift the blame from the platform operators to content aggregators for the platform operators shortcomings in effective implementation of the digital addressable system (DAS) per the mandated phases, including in ensuring greater transparency and building public awareness through the implementation of the customer application form (CAF) process at the grass root level.

E. Why is it critical to have content aggregators?

1. Although the term 'Aggregator' has not been defined, Regulation 2(b) of the Telecommunications (Broadcasting and Cable Services) Interconnection Regulation, 2004 clearly defines and recognizes the term 'Agent or Intermediary'. Further, by the Authority's own admission in paragraph 3 of the explanatory memorandum to the Consultation Paper, the term 'Aggregators' is a popular expression and not a legal definition. Hence, it is clear that the Authority has since 2004 duly acknowledged and recognized the role of agents or intermediaries.

2. Having acknowledged and recognized the role of agents or intermediaries since 2004, which has over the years led to the growth of a large and self-sustained organized industry, which operates a legitimate business and provides employment and means of livelihood to several thousand people, the Authority cannot in a single move attempt to wipe out the entire existence and role of content aggregators.

3. Further, broadcasters have to sell to over 6,000 (six thousand) MSOs and DTH services

companies to connect to viewers. The daunting task of reaching this large base keeps distribution costs exceedingly high. These distribution costs are prohibitive for small broadcasters, whose viewers are niche, few, and most often, widely spread across India.

4. When broadcasters have chosen to distribute independently, they have been able to reach less than a fifth of the possible viewers they should be able to as the costs associated with distribution to reach the larger base would be prohibitive.

5. Accordingly, some larger national and regional broadcasters saw the opportunity to create efficiencies and help their fellow broadcasters by offering aggregation solutions. Several aggregators emerged and today, these aggregators offer most of the 233 (two hundred and thirty three) pay channels, piggybacking related free-to-air channels as intermediaries for broadcasters.

6. As a consequence of aggregation, broadcasters also sought to pursue the possibility of accessing a more equitable share of subscription fees collected by LCOs, MSOs and DTH services companies.

7. In view of the foregoing, we submit that content aggregators are an integral part of the value chain in the distribution of television channels from broadcasters to platform operators from the very beginning and continue to be so. It not only has an established and legitimate business model, but also (i) aids broadcasters to effectively make available their channels to the public at large, across all parts of the country; (ii) ensuring collections of subscription revenue from the far corners of the country, which a broadcaster may be unable to reach; and (iii) promote the legitimate interests of the broadcasters.

8. It would be pertinent to point out here that as the Authority would no doubt be aware, the entire exercise associated with (i) reaching out to the deepest corners of the country to sign agreements (as well as seeding boxes and collecting subscription revenue) with the various distributors of television channels requires a very specialized knowledge of the market dynamics in each location; (ii) effective networking and connections on the ground, along with specialized manpower, which is not available with the broadcasters, who are primarily focused on creation of content for their respective television channels; and (iii) collecting advertisements, as well as technical operations of running their television channels would pose extreme challenges. Therefore such functions have thus been outsourced by broadcasters to their authorized agents or intermediaries. Such business process outsourcing leads to cost and operational efficiencies and are in the interest of both the broadcasters and the general public, as cost efficiencies and savings are ploughed back by broadcasters into better and higher quality of programmes and dissemination thereof using cutting edge technological advances.

F. One-sided Tenor of the Consultation Paper

1. On the one hand the Consultation Paper takes away the right of the ‘agent or intermediary’ to offer different bouquets in various combinations to their subscribers and on the other, there is no such bar on the MSOs and DTH operators from doing so, thus rendering the proposed amendments meaningless, whilst concentrating more power in the hands of the MSOs and

DTH operators.

2. It is pertinent to note that the Authority has admitted in the Consultation Paper on Monopoly/Market Dominance in Cable TV Services dated 3 June 2013 that cable operators have extensive monopoly. However we note in this Consultation Paper that the Authority recommends transfer of more powers in the hands of MCOs and DTH operators.

3. This Consultation Paper fails to recognize that even an MSO is an aggregator and negotiates on behalf of numerous LCOs with broadcasters and enters into agreements with broadcasters in its own name.

4. MSOs and DTH operators further re-package bouquets they have subscribed to from broadcasters leading to discrimination and arbitrariness in the entire process.

G. Agreements between Content Aggregators and Distribution Platforms on Unfair Terms – a Myth

1. As regards the commercial terms, it is submitted that there is no coercion and that the parties involved have mutually agreed to these commercial terms. Such allegations of abuse of dominant market position made by MSOs are baseless. In fact MSOs have the choice of subscribing to channels on *a-la-carte* basis but have continued to (and continue to do so) usurp the benefits associated with bouquets and price freeze for the last 10 (ten) years.

2. The Consultation Paper fails to recognize the fact the MSOs/DTH operators have had the advantage of higher discounting on rates through bulk buying as is evident from the contracts filed with the Authority.

3. The Consultation Paper also wrongly assumes that fixed fee deals have been imposed on MSOs when in fact it was the MSOs who insisted on fixed fee deals and sought the Authority's intervention in ensuring deals are signed on fixed fee basis to facilitate smooth transition to the digitized environment.

4. As a matter of fact, at the broadcaster level, several broadcasters are suffering losses due to high and unregulated costs of content acquisition with no commensurate revenues.

H. Lack of a Holistic Approach – Multiple Discussions on Multiple Issues

1. It is submitted that the Authority has opened up multiple discussions on related issues vide separate consultation papers, but the same are not being looked at holistically. There is an urgent requirement to discuss all such related issues under a common lens, namely Issues Related to Media Ownership, Monopoly/market dominance in Cable TV Service and the subject matter of the this Consultation Paper.

2. The Authority has also failed to establish as to what public interest will be served by undertaking the proposed amendments as set out in this Consultation Paper. In fact such action will only be counterproductive to interests of the end consumer.

I. Existing Checks and Balances

1. The authorized agents or intermediaries of the broadcasters are bound by various regulations prescribed by the Authority including annual filing of details of all interconnect agreements. Thus, no purpose is served by the proposed amendments to the said regulations as they exist.

2. It is submitted that there exists provision in the extant regulations such as 'Must Provide' which duly protect the distribution platforms under the larger protection of non-discrimination. In the absence of effective 'Must Carry' protection, the broadcasters and their authorized agents or intermediaries are left with no protection whatsoever.

3. Accordingly, the extant regulations do not need to be amended, as proposed, since it would only prove to be counterproductive. Also, if the proposed changes are implemented the role of the content aggregator will be rendered otiose and practically meaningless.

J. Conclusion

The Authority's mandate *inter alia* is to facilitate rather than restrict the orderly growth of the broadcasting and cable television sector in India. In the event the proposals set forth in the Consultation Paper are adopted, the Authority would play a major role in restricting the orderly growth of the broadcasting and cable television sector as the proposal is counterproductive.

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