Home Broadband Services

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By SPEED POST A.D/ EMAIL

To,
Mr.Wasi Ahmed,
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Subject: ***Written Comments on Consultation Paper released by TRAI on 'distribution of TV channels from Broadcasters to Platform Operators'***

Dear Sir,

At the outset we appreciate TRAI for finally coming up with a practical and realistic consultation paper on the above mentioned subject, to curb the monopolies and anti competitive practice(s). We support and endorse the opinions expressed by TRAI in the present consultation paper in totality. This will end the customer woes with reference to the forced subscription of channels/ bouquet by the Pay TV Broadcasters and the Channel aggregators while extorting higher subscription rates.

While it appears that TRAI is already well aware of the situation being witnessed by the consumers at large and the relevant players in the broadcasting and cable TV industry as a consequence of the emergence of *'aggregators'*, there are certain pertinent issues to be bought forth before TRAI so that the same can be effectively addressed and suitable amendments be made to the relevant acts, rules and regulations etc.

The written comments made henceforth are broadly divided into two parts, followed by recommendations which are additional to the proposals already made by TRAI in the consultation paper and the draft (amendment) regulations and the draft memorandum.

The first part deals with the anti-competitive practices being practiced by the 'aggregators' and related industry players which in effect is prejudicing the competition in the relevant market and is thereby adversely affecting the interest of small time *'down-vertical players'* namely, the MSOs and the LCOs, which in turn is harming the interest of Millions of consumers and the unnecessary financial burden is being passed on to these end-consumers.

The second part deals with the issues related to pricing of pay channels and as to in what manner the pay TV channels ought to be priced so that a fair situation be arrived at for all the relevant players while keeping the interest of the millions of end-consumers of the broadcasting and cable TV industry.

Anti-Competitive Practices practiced by 'aggregators', their related Broadcasting partners and Cable distribution platforms i.e DEN CABLE & WWIL

1. The Hon'ble Supreme Court of India, in *Star India Pvt. Ltd. v/s Sea T.V. Network Ltd. & Anothers* vide judgement dated 03.04.2007 had categorically opined that *"…The object of Interconnection Regulations is to eliminate monopoly…"* and *"…although a broadcaster is free to appoint an agent under the proviso to clause 3.3 such an agent cannot be a competitor or part of the network…"*.

2. In effect it was pronounced by the Apex Court that no *'competing player in the supply chain including an MSO/LCO'*, should have any interest in the *'authorised distribution agent'* of the broadcaster.

3. As already pointed in the draft memorandum that there are about 233 pay channels in the country, out of which about 170 are distributed by the four main leading *'aggregators'*, however, what the draft memorandum has missed out on mentioning is that the leading aggregators are the very

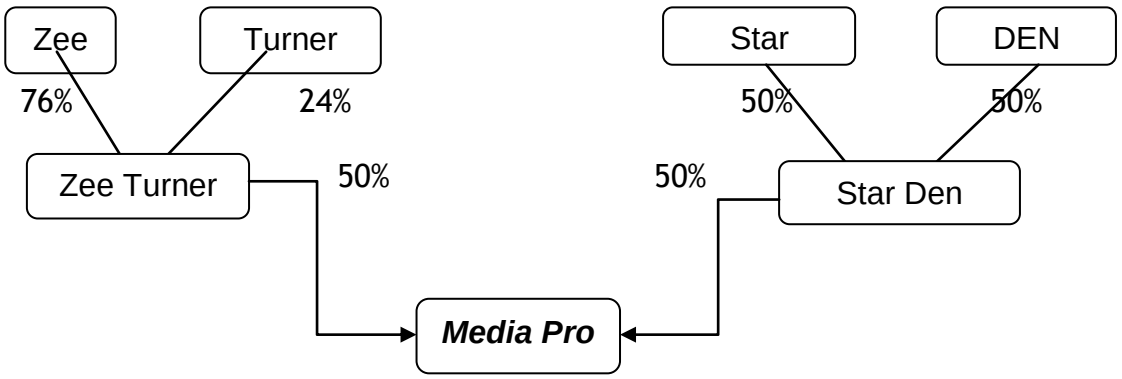
creation of the leading broadcasters and the other related industry players such as the national level MSOs and/or DTH service providers, who are interested in the aggregators, and owing to which certain anti-competitive practices are being witnessed in the relevant market.

4. For instance, in 2002, a joint venture was established by Zee Entertainment Enterprises Ltd and Turner International Private Limited under the name of *'Zee Turner Ltd.'*. This entity which had a stake-holding pattern of 76:24 (Zee:Turner) was meant for distribution of channels belonging to the Zee group and the Turner group in India, Nepal and Bhutan.

5. Thereafter, in 2008, DEN Networks Ltd., a leading MSO in the country collaborated with Star India, a leading broadcaster, to form a 50:50 joint venture under the name of *'Star Den'*, for the 'exclusive distribution' of pay channels belonging to Star India and certain other broadcasters.

6. Thereafter, in May 2011, Zee Turner Ltd. and Star Den Media Services entered into a 50:50 joint venture to form *'Media Pro Enterprise India Pvt. Ltd.'* which as on date acts as the exclusive distribution agent of about 80 pay channels belonging to the Star DEN and Zee Turner bouquets.

7. To illustrate the above mentioned, a diagrammatic representation is given:-



8. That before proceeding any further, it is pertinent to point out that the very formation of *'Star Den' (i.e. Star, a broadcaster and DEN, an MSO)* was in defiance of the mandate of the above referred ruling of the Apex Court that *'although a broadcaster is free to appoint a distribution agent, such a distribution agent cannot be a competitor or a part in the network.'*

9. Therefore, it is self-explanatory as to why the very formation of *'Media Pro' (involves 3 leading broadcasters and two (2) MSO)* was/is in complete defiance of the referred to ruling of the Hon'ble Apex Court.

10. Further, as already stated in the draft memorandum, there are about 233 pay channels in India offered by 59 pay TV broadcasters therefore, if out of the 233 pay channels, 125 leading pay channels of different genres belongs to three leading broadcasters viz. Zee, Star and Turner are being distributed by one common entity namely, Media Pro, it is indicative of the fact that 'Media Pro' is enjoying a share of more than 40% of the market and is in a *'dominant position'* in the relevant market.

It is further pertinent to mention that merger of STAR Den and Zee Turner has lead to such anti-competitive misuse of its dominant position that its litigations at the Hon'ble TDSAT have grow to more than 600%.
In the year 2010 cases filed against STAR DEN **"37"** before Hon'ble TDSAT and against Zee Turner Ltd. **36** cases where filled before the Tribunal.
Whereas when both these above companies enter into a joint venture/ merger in the month of June, 2011, thereafter a total of **286** cases where filed in the Hon'ble TDSAT against MediaPro that clearly shows the anticompetitive misuse of dominance this joint venture, had enjoyed and that it exploited to its absolute benefits. As a result many MSOs in various cities where forced to close their operations and join DEN Cable or WWIL as distributors. No new MSOs where provided content of MediaPro distributed channels in the cities that had got complete monopoly over the cable TV distribution business by its affiliated MSO namely DEN Cable.

In the year 2011-2012, this joint merger of the above said companies viz: Media Pro had **286** no. of cases filed against it before Hon'ble TDSAT. Many of these cases filed have also got infructuous as after the Hon'ble TDSAT finally resumed work in May 2013 after 6 months and by then the Phase – 1 and II of the Digitization was already been implemented with the MediaPro partner MSOs had exploited their dominance in full swing by collecting Billions of Rupees in cash from the consumers on account of Set Top Boxes

and towards subscription for the Media Pro distributed pay TV Channels while also keeping the TRP of its distributed channels intact. As the entire bouquet of the Media Pro distributed channels "in Hindi, English and various Regional languages" were forced upon the Consumers through their Distributors and affiliated LMOs

11. That the draft memorandum has already pointed out that the aggregators are accumulating more and more channels of different broadcasters and are strategically accommodating some of the *'lower value channels'* in the bouquets offered by them in order to push such channels alongwith the popular ones.

12. That in this respect it is pertinent to state that no aggregator including Media Pro has refrained itself from *'tying-in'* the low value channels alongwith the popular ones, which has left the MSOs and/or LCOs with no other alternative but to purchase the low value channels tied-in with the popular ones as otherwise the MSOs/LCOs will be denied of the popular pay channels. Further, the purchase of the popular channels on a-la-carte basis at the prevalent prices puts greater burden on the MSOs/LCOs which inevitably gets passed on to the end-consumers.

13. That the above stated practice of the aggregators such as Media Pro, is anti-competitive in nature and is in blatant violation of Section 4 of the Competition Act, 2002 as aggregators such as Media Pro are abusing their *'dominant position'* in the relevant market by *inter alia* imposing unfair conditions on-

(i.) the purchase of channels by the MSOs/LCOs, by tying-up the low value channels, including the regional language channels with the popular ones, and

(ii.) the price at popular channels are purchased on a-la-carte basis.

14. The relevant portion of Section 4 of the Competition Act, 2002 is reproduced below:-

"4. Abuse of dominant position.- *(1)No enterprise or group shall abuse its dominant position.*

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise or a group.—-

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

……

(d) makes 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

……

Explanation.—For the purposes of this section, the expression—

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

……"

15. As already indicated in the draft memorandum, the case of Media Pro is not an isolated one. In 2002, two of the leading broadcasters namely, Multi Screen Media Pvt. Ltd. (Sony Entertainment Network) and Discovery Communications formed the aggregator, *'MSM Discovery Private Ltd.'* popularly referred to as *'TheOneAlliance'*, which as on date is the authorised distribution agent for about 30 pay channels including some of the most popular channels of different genres belonging to Sony, Discovery, TV Today Network (India Today Group) and Times Television Network (Bennett Colman Group).

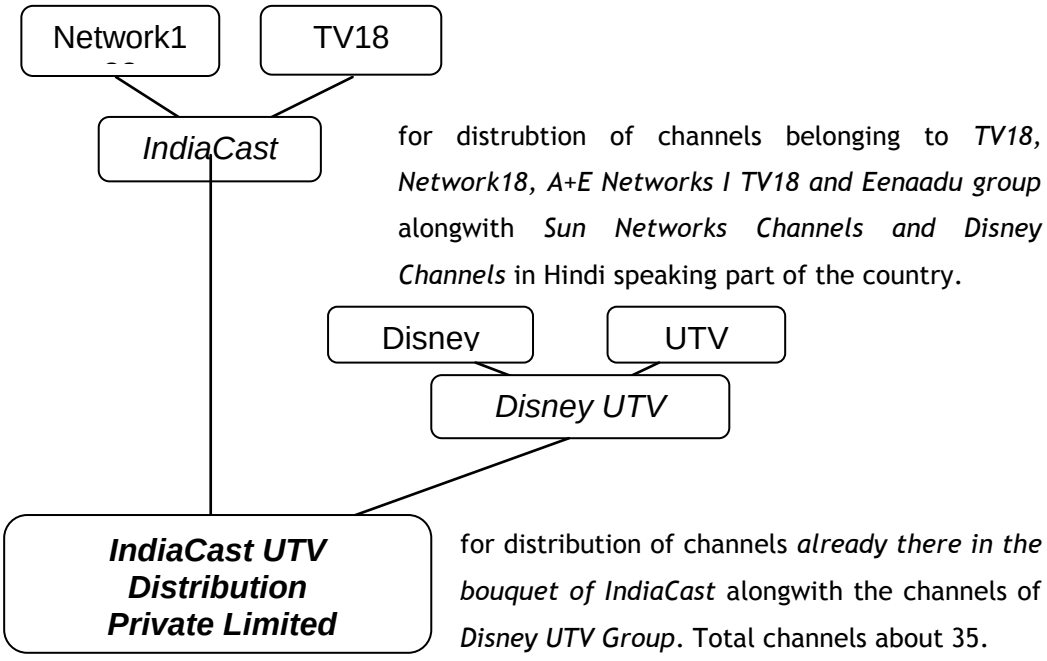
16. Similarly, in 2012 two affiliated broadcasting entities, TV18 and Network18 (which earlier were a single entity i.e. Network18) strategically formed a joint venture, popularly referred to as *'IndiaCast'* for distribution of about 26 pay channels belonging to TV18, Network18, A+E Networks I TV18 and

Eenaadu group (ETV group). In addition, IndiaCast also distributes Sun Network Channels in Tamil, Telugu, Kannada and Malayalam along with the Disney Channels in the Hindi speaking market.

17. It is pertinent to mention that the predecessor of IndiaCast was Sun18 Media Services (North) Co., which was the erstwhile alliance between Network18 and Sun Network Limited for the geographic area of north India.

18. Thereafter, IndiaCast entered into a further joint venture with Disney UTV group to create, *'IndiaCast UTV Distribution Private Limited'* for distribution of channels which were already there in the bouquets of IndiaCast alongwith the channels belonging to Disney UTV group. As on date, IndiaCast UTV Distribution Private Limited is into the distribution of about 35 pay channels belonging to various leading broadcasting entities.

19. To illustrate, the formation and functioning of IndiaCast UTV Distribution Private Limited, a diagrammatic representation is given below.



20. Further, as already mentioned in the draft memorandum, there is another leading aggregator i.e. *'Sun Distributors Services Private Limited'*, which is the successor of Sun18 Media Services (South) Co., which as mentioned

earlier was the erstwhile alliance between Network18 and Sun Network Limited for the geographic area of south India.

21. It is pertinent to point out that *'Sun Distributors Services Private Limited'* belongs to the media conglomerate, Sun TV Group which is also in the business of providing DTH services under the brand *Sun DTH.*

22. As already stated in the draft memorandum, the above named *'four aggregators control about 73% of the pay channel market and thereby have the substantial negotiating power which is often being misused.'*

23. The oligopolistic approach of the leading broadcasters of forming cartels in the guise of *'aggregators/joint venture'* is an anti-competitive practice as the arrangements between the broadcasters have in no manner increased the *'efficiency'* in the relevant market but on the other hand, have led to a situation where the *'players at the lower-end of the supply chain viz. the independent MSOs and the LCOs'* are facing undue hardships with respect to the provision and pricing of the pay channels and are left with no other alternative but to pass on the burden to the end-consumers.

Due to the vertical Integration business between the Content Aggregator, Broadcaster and certain national level MSO's, there arises unfair trade practices by charging lesser amount/ Subscription fee to such MSOs in the garb of wholesale discount, fixed subscription deals or paying them higher on the carriage placement fees.

TRAI should make uniform payment terms of all service providers / Distribution Platforms i.e. DTH/ IPTV, Cable TV, OTT etc at par to overcome the unfair trade practices.

Pay channel rate should be equal for all MSO's, irrespective of the fact whether such MSO is small or national level MSO.

It is pertinent to mention that when any MSO seeks the channel on RIO basis, broadcaster refuses to give so, by giving any unreasonable operational and technical excuse.

24. Certain/ many agencies/ aggregators operate as authorized agents of more than one broadcaster creating cartel of pay channels and deciding the

content to be consumed by the consumers at the price settled by them. Therefore, TRAI should take serious action against such agencies/ aggregators, for getting rid of them so that consumers have power to decide what channels they want to watch rather then any other person/ agency/ company deciding what they want to show to the consumers.

25. The above stated practice of the broadcasters of forming cartels in the guise of 'aggregators/joint ventures' is in blatant violation of Section 3 of the Competition Act, 2002 which provides:-

"3. Anti-competitive agreements.- *(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.*

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

……

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in

production, supply, distribution, storage, acquisition or control of goods or provision of services.

……

(4) 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—

(a) tie-in arrangement;

……

(c) exclusive distribution agreement;

……

Explanation.—*For the purposes of this sub-section,—*

(a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

…….....

(c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;

……..”

26. That a perusal of the above cited legal text will also indicate that the *‘exclusive distribution agreement’* between the broadcaster(s) and the aggregators are also in blatant violation of Section 3 of the Competition Act, 2002.

27. Similarly, the agreements whereby the MSOs/LCOs are compelled to purchase the low value channels in bouquets alongwith the popular channels, are also in violation of Section 3 in view of explanation of *‘tie-in arrangements’* given thereunder.

28. That it is further pertinent to point out that Regulation 3 of the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 mandates that channels shall be offered by the broadcaster or its authorised distribution agent on a "*non-discriminatory basis*" and "*in a manner which is not prejudicial to competition*" and that "*no broadcaster shall engage into any practice or activity or enter into understanding or arrangement, including exclusive contracts with any distributor of TV channels from obtaining such TV channels for distribution.*"

29. Similarly, Regulation 3 of the Telecommunication (Broadcasting and the Cable Services) (Digital Addressable Cable Television Systems) Interconnection Regulations, 2012 mandates that every broadcaster or its authorized distribution agent shall provide television channels to multi-system operators on "*non-discriminatory*" basis and *"no broadcaster of TV channels shall engage in any practice or activity or enter into understanding or arrangement, including exclusive contracts with any multi-system operator from obtaining such TV channels for distribution."*

30. Further, regulation 3(9) of the 2012 Interconnect Regulations provides that *"no multi-system operator shall enter into any understanding or arrangement with the broadcaster that may prevent any other* broadcaster *from obtaining access to the cable network of such multi-system operator."*

31. However, in the current scenario where for instance Media Pro, a leading aggregator and which is a creation of three of the leading broadcasters and a national level MSO, is the authorised distributor for about more than 40% of the pay channels in the industry; it is unreasonable to imagine that supply of channels to the '*players at the lower end of the supply chain viz. the MSOs and the LCOs'* will happen on a non-discriminatory basis.

32. TRAI should come up with cap on maximum number of channels per broadcaster because there is a fear of consolidation/ acquisition/ taking Indian rights of unlinking/ downlinking of channel by large broadcasters over

small broadcaster. Again a similar cartel situation can arise and this time by large broadcaster in place of aggregators.

Fair Pricing of Pay Channels on a-la-carte basis

33. It is pertinent to state that irrespective of delinking the pay channels of one broadcaster from that of the other broadcaster and reconstituting the whole bouquet so as to provide the pay channels of only broadcaster, no fair solution to the whole issue could be achieved.

34. That even in the case of a reconstituted bouquet where all channels belong to only one broadcaster, the broadcaster will have the leverage to club the *'lower value channels'* belonging to itself alongwith the popular ones.

35. The MSOs/LCOs in such an event would again be compelled to purchase the lower value channels else they shall be denied of the popular pay channels of the broadcaster. Eventually putting the burden on the Consumers.

36. That thereby, the anti-competitive practice of 'tying-in' the lower value channels with the popular ones shall remain prevalent even if the bouquets offered by the aggregators at present are reconstituted and bouquets having the channels of a single broadcaster are offered.

37. Therefore, to remedy the situation it is inevitable that the offering of bouquets of pay channels is disallowed and it be made mandatory for the broadcasters to offer pay channels only on *'a-la-carte basis'*. In interest of the consumers at large.

38. Further, in order to ensure that the broadcasters are restrained from demanding unreasonably exorbitant charges for the pay channels offered on a-la-carte basis, an *'upper ceiling limit per end-subscriber/consumer'* be prescribed as had been prescribed during the erstwhile CAS regime under Clause 6 of the Telecommunication (Broadcasting and Cable) Services (Third) (CAS Areas) Tariff Order, 2006 (6 of 2006).

39. The broadcasters be allowed to price a particular pay channel within the prescribed upper ceiling limit and, if there are two channels offered by the broadcaster belonging to the same genre then both the channels be priced equally.

For example, if a broadcaster has two channels 'A' and 'B', both belonging to the genre of General Entertainment then the price of both 'A' and 'B' has to be equal.

But, If the contents of channel A is repeated in channel B, then Broadcaster should not be allowed to charge channel B at par with channel A.

40. This in turn will also curb the practice of shuffling of popular programmes by the broadcaster from its one pay channel to another.

41. A-la –carte rate of channels should be same as that of the rate in analogue/ Digital platform.

42. Further, the fixing of an upper ceiling limit would not cause any undue prejudice to the revenue of the broadcaster as unlike some of the other countries where pay channels are advertisement-free; there is no bar in India for the broadcasters to have two parallel sources of revenue, one from the advertisers and second subscription collected from the subscribers.

43. Further, it has been witnessed that some of the pay channels remain popular during a certain particular period of the year. However, the prices charged for such channels remains the same throughout the year. i.e the Sports Channels having exclusive Cricket telecast rights,

For example, one of the film based channel offered by a leading broadcaster also broadcasts an annual major sporting event organized during April-May-June.

This channel remains popular only during such period when the sporting event is broadcasted. However, during rest of the year its popularity remains below par.

Now, because it is offered in bouquets alongwith other popular channels, the sub-scribers are compelled to continue subscribing it throughout the rest of the year as well. Though, the channel is also offered on a-la-carte basis, the

a-la-carte price is such that it would be financially unviable for the subscriber to avail it on a-la-carte basis.

43. Therefore, if an upper ceiling limit is prescribed on the a-la-carte price of this channel, the consumers will have the flexibility to avail the subscription of the channel only for the period when the channel broadcasts the major sporting event and to pay the subscription accordingly.

44. Further, in the current scenario where digitization of the cable industry is to be implemented throughout the country by ……, the broadcaster will have all the requisite information about the end-subscriber/consumer base of an MSO/LCO and the various pay channels belonging to it, subscribed by the end-subscribers /consumers and thereby 100% transparency would be prevalent when the aggregate payment is made by the MSO/LCO to the broadcaster.

45. Furthermore, there should be a *'fixed revenue sharing model'* as was prescribed for CAS, where a certain percentage of the a-la-carte price paid by the end-subscriber/consumer will be shared between the broadcaster and the other players in this distribution supply chain.

    For example, if Rs. 5 is paid as the a-la-carte price of a pay channel by the end-subscriber/consumer, then 45 % of Rs. 5 i.e. Rs. 2.10 shall go to the broadcaster, 30% i.e. Rs. 1.65 will go to the MSO and 25% i.e. Rs. 1.25 will go to the LCO.

46. It is further pertinent to point out the fixation of upper ceiling limit / A MRP, on the price of pay channels and fixation of the revenue sharing model, shall do away with the situation where unfair and discriminatory charges could be demanded by the broadcasters from the other players in the supply chain.

In view of the above, and in addition to the proposals already made by TRAI in the consultation paper, the following recommendations are made:-

(i.) The broadcaster and authorised distribution agents will act on a principle-agent basis and, the authorised distribution agent shall act only as a division of the broadcaster.

(ii.) The authorised distribution agent will merely act as a liasoning division for the broadcaster and shall not enter into any agreement on behalf of the broadcaster.

(iii.) The authorised distribution agent of the broadcaster shall have no interest with respect to any another broadcaster.

(iv.) The authorised distribution agent of a broadcaster shall have no interest with respect to any other player in the supply chain or in the industry be it an MSO, LCO, DTH service provider, etc.

(v.) Restrict the role of Aggregator to single broadcaster and they shall not be allowed to deal with multiple broadcasters or represent the interest of multiple broadcasters.

(vi.) Get rid of aggregators of pay channels so that consumers have more power to decide what content they should consume rather than a cartel of pay channel broadcasters deciding that and continue to extort money from the consumers at large.

(vii.) Pay channels should be offered by the respective broadcasters only on a-la-carte basis, priced reasonable for the Indian consumers.

(viii.) An upper ceiling limit/ MRP per end-subscriber/consumer is fixed and the broadcaster is obliged to fix the price of a pay channel on a-la-carte basis, only with respect to such prescribed upper ceiling limit.

(ix.) If two pay channels are offered by the broadcaster belonging to the same genre then the price charged for one shall be the same as charged for the other, but if a content of channel is repeated in the another channel then it should not be charged similarly

(x.) The price charged by the broadcaster from one player in the supply chain should be the same as charged from another player in the same sphere irrespective of the size, sub-scriber base, geographic location of the player etc.

(xi.) The MRP Price of the pay channels has to be published on the website of the broadcaster and on any promotion carried for the marketing of the channel or its particular program.

(xii.) A *'fixed revenue sharing model'* is prescribed where a fixed percentage of the a-la-carte price paid by the end-subscriber/consumer will be shared between the broadcaster and the other players in the distribution supply chain.

(xiii.) There should be a cap on the maximum no of Pay TV channels per broadcaster. No Cap is required if the broadcaster wants to provide Free FTA channels.

We sincerely again thank you for your endeavors in protecting the Consumers interest and to free them from this ongoing exploitation and unnecessary financial burdens

Thanking you

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