

Without Prejudice,

Dated 2nd September 2013

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Re: Consultation Paper No. : 8 /2013

Subject: Comments on “Distribution of Tv Channels from Broadcasters to Platform operator”.

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At the outset we appreciate TRAI for coming up with an practical and realistic consultation paper on the above mentioned subject, to curb the monopoly and anti competitive practice. I have been associated with this industry for the past several years and had several court cases pertaining to the similar subjects. The comments to this consultation papers are my expression of my views to the efforts of the regulator.

While it appears that TRAI is already well aware of the situation being witnessed by 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 brought forth before TRAI so that the same could addressed and suitable amendments be made to the relevant acts, rules, 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 being passed on to the end-consumers.

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

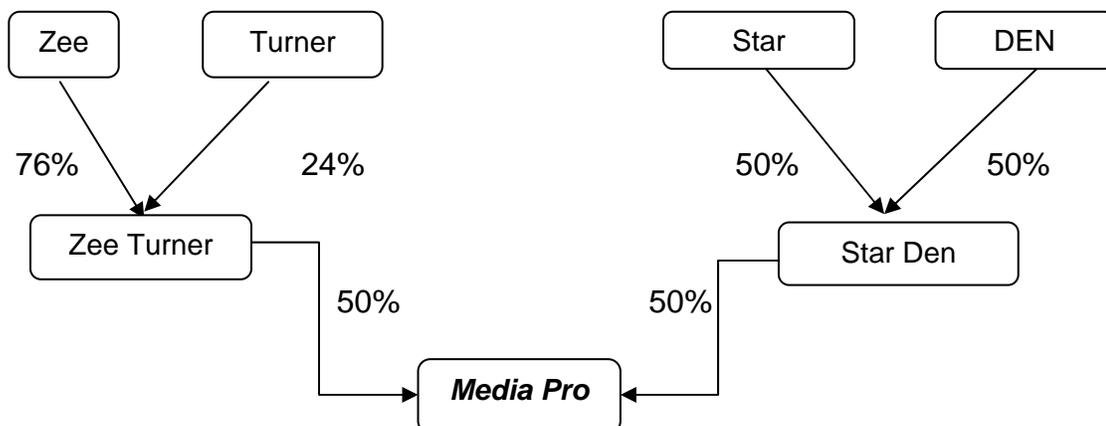
Anti-Competitive Practices practiced by 'aggregators' and related industry players+++++

1. The Hon'ble Supreme Court in *Star India Pvt. Ltd. v/s Sea T.V. Network Ltd. & Another* 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. It is also very important to note that apart from having stakes in MSO business broadcasters also have active share holding in DTH business like ZEE in Dish TV and Star in Tata Sky and Sun Tv in Sun DTH.
9. 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 to 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.*'
10. 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 Apex Court.
11. Further, as already stated in the draft memorandum, there are about 233 pay channels in India offered by 59 pay broadcasters. Therefore, if out of the 233 pay channels, 75 or 80 leading pay channels of different genres and belonging 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 about 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 level that its litigation has more than doubled.

In the year 2010 37 cases were filed against STAR DEN before Hon'ble TDSAT and 31 cases were filed against Zee Turner Ltd. before the same Tribunal. A copy of list of cases are annexed hereto and marked as **ANNEXURE A**

That both companies enter into merger in the month of June, 2011, so we have not taken the no. cases filled by then before hon'ble TDSAT.

In the year 2012, merger of the said companies viz: Media Pro filled 186 no. of cases before Hon'ble TDSAT.

12. 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.
13. 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.
14. 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 with the popular ones, and
 - (ii.) the price at popular channels are purchased on a-la-carte basis.
15. 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.*

.....”

16. 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.’

17. 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 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, or paying them higher on the carriage placement fees.

TRAI should make payment terms of all service providers 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 a excuse like wise technical excuses.

18. 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 sttled 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 than any other person/ agency/ company deciding what they want to show to the consumers.
19. 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;*

.....”

20. 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.
21. 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.
22. 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.”

23. 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.*”
24. 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.*”
25. 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 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.
26. 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

27. 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.

28. 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.
29. 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.
30. 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.
31. 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'*.
32. 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).
33. 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.

34. This in turn will also curb the practice of shuffling of popular programmes by the broadcaster from its one pay channel to another.
35. A-la –carte rate of channels should be same as that of the rate in analogue/ Digital platform.
36. 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 from the sub-scribers.
37. 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.

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 sub-scriber 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 sub-scriber 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 price accordingly.

44. Further, in the current scenario where digitization of the cable industry is to be implemented throughout the country by 2014 the broadcaster will have all the pertinent information about the end-subscriber/consumer base of an MSO/LCO and the pay channels belonging to it subscribed by the end-subscribers/consumers and thereby 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 the 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 40% of Rs. 5 i.e. Rs. 2 shall go to the broadcaster, 35% i.e. Rs. 1.75 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 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 may not be not be allowed to deal with 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 channels deciding that.
- (vii.) Pay channels should be offered by the broadcasters **only** on a-la-carte basis.
- (viii.) An upper ceiling limit 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 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.) Price of the pay channels is published on the website of the broadcaster.
- (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 supply chain.

(xiii.) There should be cap on the maximum no of channels per broadcaster.

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Yours Sincerely,

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Advocate.
