

Response to TRAI Consultation Paper on Issues Related to New Regulatory Framework for Broadcasting and Cable Services

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Introduction

The Consultation Paper on Issues Related to New Regulatory Framework for Broadcasting and Cable Services dated 7th May 2022 (the “CP”) seeks comments on the revised regulatory framework for the broadcasting and cable services (“B&CS”) sector.² We appreciate the opportunity to engage with TRAI on this vital issue. Our comments on the regulatory framework are provided below.

It is well established that TRAI is mandated to exercise its powers to promote orderly development of the telecom and broadcasting sectors, and to ensure interests of consumers are protected. The primary focus of the regulator should be to ensure that the relevant markets are competitive, thereby ensuring that consumer interests are protected through market forces. Significantly intrusive interventions, such as those in the nature of price control mechanisms must only be used where there is significant evidence of market failure/harm, and subsequent to exploration of other less intrusive options. The regulator must ensure that interests of all stakeholders are adequately balanced, and limit unintended consequences that may arise from apparently well meaning, but deficient regulatory design. Collecting appropriate data to justify an intervention, and carrying out impact assessments is one method to avoid such problems.

Our comments below focus on how the current regulatory framework in the B&CS regime, and in particular the current CP, suffers from problems including:

- (a) Improper grounding in economic theory, and insufficient evidence of market failure or social need to regulate the sector in the manner contemplated;
- (b) No rational nexus shown between the goals of regulation, and the proposed regulatory intervention;
- (c) Difficulties in establishing appropriate rates, leading to disproportionate and arbitrary interventions;
- (d) Overall, an inadequate balance of competing interests leading to the possibility of unintended consequences that could limit orderly development of the industry and hurt consumer interests.

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² Comprising the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 (“2017 tariff order”) as amended by the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff (Second Amendment) Order, 2020 (“2020 tariff order”).

1. Analysing the rationale for regulation

TRAI has issued the 2017 and 2020 tariff orders purportedly to enable ordered growth of the B&C market, and to protect consumer interests. However, the EMs do not adequately lay down the rational nexus between the tariff orders and their impact on market growth or consumer protection using empirical evidence. There is inadequate explanation of how the relevant rates (for instance, INR 19 in the 2017 tariff order which is revised to INR 12 in the 2020 tariff order), or discounting rates, etc., have been arrived at, with no detailed data provided to justify the same.³ The present regulatory framework merely takes a market snapshot at a given point of time and arbitrarily uses this to fix tariffs, without any detailed justification or a consideration of whether other regulatory interventions (if required at all) could suffice.

The reason for capping discounting in the 2020 tariff order is stated as aiming to “*prevent skewed a-la-carte and bouquet pricing*”. However, this ignores the fact that consumers still have the choice of which channel or bouquet they wish to subscribe to. The CP itself notes that “...discounts are offered on bouquets coupled with high a-la-carte prices of popular channels make it appealing to consumers to go for bouquets...”. The CP further notes that “*some broadcasters [are] pricing some of their bouquets equal to or even less than the MRP of a single but popular channel present in that bouquet*”. This clearly points to the fact that the creation of bouquets is not hampering consumer choice.

The harm being caused by broadcasters pricing bouquets at just over driver channel prices, remains unclear. Should consumers not want additional channels, they are free to avoid any bouquet. In any event, it is worth noting that literature is inconclusive on the positive or negative effects of bundled discounts.⁴ In fact, researchers such as Crane and Wright (2008) argue that bundled discounting is generally pro-competitive and pro-consumer and should only be condemned when it is capable of excluding rivals.⁵

The CP notes that uptake of a-la-carte channels remains lower than bouquets. The conclusion that the CP draws is that this must be because a-la-carte channels are priced too high. However, another explanation could be that consumers simply prefer getting the bouquet than a-la-carte channels. There could be a number of reasons for this, including but not limited to, preferring the channels that are part of the bouquet, decision fatigue arising out of having to select every single channel they want to subscribe to, or some other reasons, including finding greater value for money in a bouquet offering.

³ For example, the EM for the 2017 tariff order merely states that “*The amount of Rs. 19/- has been prescribed keeping in view the prevailing highest genre wise ceilings of Rs. 15.12 for all addressable systems between broadcaster & DPOs at wholesale level and further enhancing it 1.25 times to account for DPOs distribution fee.*”

⁴ Note the comments of the US Solicitor General in the 3M case, where it is stated that “*There is insufficient experience with bundled discounts to this point to make a firm judgement about the relative prevalence of exclusionary versus procompetitive bundled discounts.*” While this case did not arise in the issue of channel bouquets, the observation is nevertheless equally applicable. *3M v LePage*, Amicus Invitation (Petition), US Supreme Court, <https://www.justice.gov/osg/brief/3m-v-lepage-amicus-invitation-petition>

⁵ DA Crane and JD Wright, *Can Bundled Discounting Increase Consumer Prices Without Excluding Rivals?*, Comp. Pol’y. Int’l. 5, No. 2 (2009): 209-20. <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2580&context=articles>

The evidence presented by the CP to claim that bouquets contain so-called unwanted channels does not sufficiently support the claim. The viewership is not disaggregated by category of channel, language and temporal patterns. In the absence of this information, it is not accurate to conclude that simply because some channels in the bouquet have lower overall viewership, they are unwanted. As an example, sports channels would tend to have higher viewership when popular sporting events are happening. News channels typically would have high viewership varying by time of day. Educational/Edutainment channels aimed at children would have higher viewership outside of school hours and school days.

The CP is also inconsistent in how it treats the issue of consumer choice and decision fatigue (due to excess choice). On the one hand, the tariff order requires channels to be offered a-la-carte to consumers with the goal of increasing consumer choice. On the other hand, it restricts the number of bouquets that can be offered to consumers because that would lead to too much consumer choice which would lead to decision fatigue.

The CP states that *“it does not make much sense if the number of bouquets of pay channels offered by a broadcaster exceeds the number of pay channels offered by a broadcaster”*. It does not offer any rationale for why it is undesirable for broadcasters to be allowed to offer more bouquets than the number of channels. The conclusion is not backed by any evidence and the CP does not establish how it causes or can cause consumer harm. Further, there is no cap on the number of bouquets that the DPO may offer. Therefore, if the DPO creates a very large number of bouquets, it would lead to the same outcome that the cap on bouquets offered by broadcasters is intended to achieve.

In mandating the NCF of Rs 130 for 200 channels, the CP notes that DPOs are already providing 200 channels for Rs 130. While it may have been feasible for DPOs to do so to date, developments in the future could make it infeasible. Therefore, the rationale for requiring 200 channels for the same NCF is unsound.

With regards to the cap on NCF for multi-TV homes, the CP notes that *“It is obvious that the channels are watched by one family only and they have installed multiple TVs and set top box in the house for convenience purpose only. In short, the cable/DTH services to a house is basically meant for family viewing or family product.”* There is no evidence or rationale provided for this claim. There is also no justification given for why a family should be treated as the unit for how the service should be priced. In a subsequent paragraph the CP contradicts itself. The CP notes that a household has consumers of different age-groups who watch different TV sets, and, therefore, each TV connection may not require the same channels. It further states that in multi-TV homes, the channel subscriptions for each connection should be determined separately. This treats the multiple TVs as serving different functions and different consumers within the family.

The CP notes that the decision to cap prices is based on the fact that the marginal cost of marketing for the second connection in such cases is lower than for a connection to another

household. However, if that is the case, it should allow DPOs to compete in this space and allow the market to set prices for multi-TV homes.

On the issue of limiting promotional schemes by DPOs too, there does not appear to be a rational nexus between the goal and the means. The CP proposes to cap the duration of promotional schemes that DPOs can offer to 90 days, and not more than twice a year. The motivation for regulating promotional schemes is intended to ensure transparency and fairness. It is unclear how placing such a specific restriction on promotional schemes will lead to the intended goals, if the DPO is transparent about their promotional schemes and offers them in a non-discriminatory manner.

2. Does economic theory support tariff setting?

Stigler and Friedland in their seminal article, analysed the effects of tariff regulation of electricity rates using industry data, and demonstrated that imposing a cap on the maximum tariff did not lower the electricity rates for the customers.⁶ Based on these results, and subsequent research Stigler contended that the economic effects of regulation tend to serve the regulated entities regardless of the statutory characteristics of the regulations.⁷ Therefore, tariff controls do not automatically translate to lowering the costs for customers.

The impact of price controls on the cable TV market was studied by various scholars at the time deregulation of the market was being considered in the US. The general consensus for deregulation of the market seems to stem from the understanding that while price controls hold out the theoretical possibility of enhancing welfare by lowering market price and expanding the volume of sales past the point where marginal revenue equals marginal cost, the suppliers have an incentive to lower their quality and exploit the market power available at the lower level of product quality, or escape the market altogether.⁸ Further, when product escape is not possible, rate regulation encourages transactional costs and rent seeking behaviour. Price is just one component of the access regulation problem - it is impossible to successfully regulate price without also regulating quality.⁹ In order to implement tariff orders, TRAI will need to monitor for unintended consequences of tariff-control such as loss of quality content. In the diverse B&C market, it may not be possible for TRAI to measure the quality of content, leading to ineffective monitoring of tariff orders.

In addition, tariff orders are highly restrictive to the industry. The regulatory principle of 'least restrictive means' or 'necessity' applicable in common law countries requires regulators to pursue their regulatory objectives in the manner that is least restrictive of other societal values,

⁶ George J Stigler and Claire Friedland, C, *What Can Regulators Regulate? The Case of Electricity*, The Journal of Law & Economics, Vol. 5, 1962, pp. 1–16, <http://www.jstor.org/stable/725003>.

⁷ George J Stigler, *The theory of economic regulation*, The Bell Journal of Economics and Management Science, Vol. 2, No. 1 (Spring, 1971), pp. 3-21, <https://www.jstor.org/stable/3003160>

⁸ Thomas Hazlett, *Cable Television Rate Deregulation*, International Journal of the Economics of Business, 3:2, 145-164, <https://www.tandfonline.com/doi/abs/10.1080/758528450>

⁹ Daryll Biggar, *Access Price and Competition*, Prepared for the ACCC conference on Regulation and Investment Sydney, March 26-27, 2001, <https://www.accc.gov.au/system/files/Darryl%20Biggar%20paper%20-%20Access%20Pricing%20%26%20Competition.pdf>

national and international legal systems.¹⁰ A regulator should ensure that its interventions deliver desired outcomes in the least burdensome way such as by imposing requirements only where necessary, considering alternatives to regulation, and minimising the risk of unintended consequences.¹¹ It is an established principle of economics that competition and consumer empowerment are usually the most efficient and effective ways of delivering benefits for consumers.

The Indian regulatory framework accepts that economic interventions such as tariff setting should not be routinely used by regulators. The Planning Commission in its consultation paper on approach to regulation advised regulators to recognise that competition is the best safeguard for public interest.¹² It also clarified that the services amenable to competition should be regulated in a light touch mode, and tariff-setting should be left to competitive markets in such cases, with the only exceptions being monopolistic markets. Tariff setting should be avoided in the absence of such conditions.

Where this is not possible, regulation needs to be a less restrictive, cost-effective alternative. In order to pass this test of achieving least restrictive means, TRAI would need to consider whether there are alternative, lesser restrictive regulatory mechanisms available to achieve the goal of the 2017 and 2020 Tariff Orders. These alternatives may range from regulatory forbearance, to regulations related to transparency in bundling prices, etc.

3. Unintended outcomes and proportionality

It is established that any State action must be proportionate to a legitimate aim.¹³ Fixing tariffs (as contemplated by the current regulatory regime) represents a significant exercise of State power, and an intrusion into the rights of expression and business. Accordingly, any interference must *demonstrate* a significant harm that is sought to be ameliorated, and must be proportionate thereto.

As recognised by TRAI, it may use its regulatory powers either in the context of a market failure to ensure orderly growth of a sector, or to ensure consumer protection.¹⁴ This would imply that TRAI ought to identify specific areas where there is an identified problem in the form of a market failure (such as monopolisation or a lack of competition) or a specific social need (such as the need to enable access to underprivileged sections) and introduce targeted regulation.

¹⁰ Alan O. Sykes, *The Least Restrictive Means*, 2003 *The University of Chicago Law Review*, 70(1), 403–419, <https://www.jstor.org/stable/1600566>

¹¹ Department of Business, Innovation and Skills, *Principles for economic regulations*, 2011, UK Government, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31623/11-795-principles-for-economic-regulation.pdf

¹² Planning Commission, *Approach to Regulation of Infrastructure*, Government of India, 2006, https://niti.gov.in/planningcommission.gov.in/docs/sectors/ppp_report/reports_guidelines/Approach%20to%20Regulation%20of%20Infrastructure.pdf

¹³ See for instance, *IAMI v RBI*, WP No. 373/2018, Supreme Court of India, https://main.sci.gov.in/supremecourt/2018/19230/19230_2018_4_1501_21151_Judgement_04-Mar-2020.pdf

¹⁴ See for example, Para 34, Explanatory Memorandum to the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017.

However, as discussed above, there is insufficient evidence of the need to fix prices of bouquets or channels. There are sufficient content offerings for consumers, and competition in the sector so as to ensure bouquets/channels are priced at appropriate levels.¹⁵ Consumers have sufficient choice to subscribe to a-la-carte channels or bouquets, given the obligations concerning non-discrimination and mandatory provision of a-la-carte channels under the current regulatory regime. Indeed, research has demonstrated that introduction of the new regulatory regime in 2017, has had no significant effects in ‘solving’ issues of deep discounting or bundling of undesirable content.¹⁶ Merely changing the methodology through which such rates are calculated is unlikely to change this situation. Indeed, a study by ICRIER on competition in this segment points *inter alia* to problems such as consumer inertia in switching to a-la-carte, which could for instance, be solved through greater consumer awareness.¹⁷

There is also no significant consumer, social or ‘public interest’ in the fixing of prices of television channels. Television programming is not an essential service/good or public utility and should not be regulated as such. In the context of certain programming seen as essential or in the public interest, this requirement is filled by the national broadcaster. Indeed the legislature has specifically recognised the need to enable general viewership of certain events of national importance. For example, insofar as sporting events are concerned, the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007, permits the government to mandate sharing of sports broadcasting signals concerning events of national importance with Prasar Bharati.¹⁸ The government is free to add to the prescribed list, or indeed alter the programming of Prasar Bharati channels to reflect public interest (by purchasing relevant content from content providers). In addition to the Prasar Bharati channels, there are numerous free to air channels on terrestrial television, as well as a range of online streaming sources that provide free (or near free) access to diverse content. Additionally, the use of a tiered system (as already contemplated by the present regulatory regime in the form of the Basic Service Tier) enables basic programming to be mandatorily provided to consumers, so as to meet minimum social requirements/social goals. Given that consumers therefore have viewing options at a minimal price, there is little reason to regulate the tariffs in the entire ecosystem. It may be worth noting that even essential infrastructure such as water and electricity are provided at discounted/limited rates upto a certain threshold, following which market forces are allowed to determine rates.

There is also no evidence of any significant harm that is likely to accrue to participants in the B&CS ecosystem by de-regulation of tariffs, particularly if done in a tiered manner. Issues such as lack of transparency or discrimination in the distribution value chain, monopolisation of last

¹⁵ Rajat Kathuria, Mansi Kedia, Richa Sekhani, *An Analysis of Competition and Regulatory Intervention in India's Television Distribution and Broadcasting Services*, ICRIER, March 2019, https://icrier.org/pdf/An_Analysis_of_Competition_and_Regulatory_Interventions.pdf, at 39

¹⁶ *Ibid* at 33.

¹⁷ *Ibid* at 33.

¹⁸ This power has been utilised to cover a range of events/sports, such as the Olympics & Paralympics, Asian Games, Commonwealth Games, Badminton World Championships, Football World Cup, Cricket World Cups, etc., as well as various sports featuring Indian representation. Notification of the Ministry of Information and Broadcasting, SO 2160(E), May 9, 2022, <https://mib.gov.in/sites/default/files/Notification%20of%20sporting%20events%20of%20national%20importance%20.PDF>

mile access, etc., have and should continue to be addressed by adopting mechanisms that target the source of the real problem in the form of any identified (mal)practices. The existence of anti-competitive or discriminatory practices by entities in the distribution chain can and must be dealt with through normal processes in this regard.

It is worth noting that regulatory forbearance has not had significant adverse effects in access markets (broadband, mobile, etc.), despite the fact that these markets demonstrate significant concentration. Regulatory forbearance on tariffs has resulted in some of the lowest access prices in the world, thereby reducing the digital divide and promoting consumer welfare. There is therefore no significant benefit achieved by regulating the price of television channels. Any benefits that tariff fixing is likely to bring (such as reducing access prices for consumers or ensuring earnings across the value chain) can also be achieved through the forces of competition.

Further, limiting tariffs stifles the content industry and development of novel and new content. Setting artificial rates limits the incentive of content producers to invest in increasing production values and creating novel/innovative content.¹⁹ Similarly, guaranteeing fees payable to distributors reduces the incentive for improving services and upgrade technologies, thereby limiting quality of service to consumers. The fact that many distributors in the last mile enjoy monopolies is also a relevant factor to consider (and may be a relevant area for regulatory intervention). A similar issue of market power in the multichannel video market in the US reportedly led to price increases and restriction of consumer choice to a small number of ever larger, ever more expensive bundles.²⁰ The cost imposed on consumers by this abuse of market power was estimated to be between \$4.5 and \$6 billion per year, compared to what prices would be in a competitive market. It can therefore be argued that restricting the consumer choice in terms of the type or number of bundles available to them may stifle competition, and adversely affect consumers.

A direct consequence of artificial rate setting is that the entire B&CS value chain is forced to rely on advertising revenue, which can be volatile (and is also seeing diversion to new forms of media such as in the form of online content offerings). This also limits entry of new channels, who may be unable to compete with established channels with large subscriber numbers. TRAI itself has, on numerous occasions, recognised the problems caused by forcing content producers and distributors to focus on advertising based revenue streams as this is seen as directly affecting the quality and nature of content made accessible to consumers. It is also worth noting that the content development market in India is a major source of employment as well as revenue generation for the government. Providing a boost to this sector, by enabling the market to fix prices as appropriate, will therefore lead to broader social and economic gains.

¹⁹ Economic literature recognises that content and infrastructure are highly interconnected, with each bringing value to the other. T Evens and K Donder, *Television Distribution: economic dimensions, emerging policies*, Telematics and Informatics, 33(2), 661-664, 2016, <https://biblio.ugent.be/publication/7002356/file/7002357>

²⁰ The Consumer Federation of America, *The continuing abuse of market power by the cable industry: Rising prices, denial of consumer choice and discriminatory access to content*, February 2004, <https://consumerfed.org/pdfs/mpcableindustry.pdf>

Finally, it appears perverse to regulate prices of television programming when online offerings (such as streaming and other OTT services) remain unregulated. This may in fact lead to people with only access to television missing out on quality and up to date programming, as broadcasters will have little incentive to provide such content on television. That said, given increasing convergence and growing Internet penetration, the differences in how people access content are only likely to reduce. While television programming will no doubt remain important in the near future (cord-cutting being a slow process, with some also pointing to how pay TV and OTT services are complementary and not substitutable), commentators have made the case for regulatory interventions to enable the emergence of innovative distribution formats including through multi platform distribution strategies - “*there is an increasing support for a platform neutral regulatory approach*”.²¹ Thus, implementing tariff regimes for one ecosystem while the other remains unregulated, may at best display a lack of forward thinking and at worst be considered arbitrary.

4. Capacity constraints

As recognised by TRAI (including in the EMs annexed to the 2017 and 2020 tariff orders), it can be extremely difficult to set appropriate price levels for channels (or indeed the relationship between bouquet pricing and prices of channels, etc.), given the diversity and nature of input and other costs that go into content production.²² It is commonly recognised that rate regulation becomes less viable as the complexity of the regulated product increases.²³ Setting appropriate tariffs and robust methodologies to calculate the same requires complex analysis of diverse data points, including information on consumers’ willingness to pay for different types of content, costs of production and delivery, break-up of revenues from advertising and subscriptions, etc. The absence of information on consumer preferences, costs of production and distribution and the efficiency gains derived from bouquets of different sizes and values, means it is difficult to assess whether or not to cap, and the quantum of cap on discounts. Establishing appropriate tariff levels in a dynamic, competitive and fast moving market requires significant expertise, time and resources of the regulator, particularly as there may be a need for periodic revision thereof.²⁴ In the alternative, rates will be inappropriate and arbitrary, skewing the market and affecting growth of the sector, as well as consumer welfare. These are in fact the very problems that have led TRAI to issue the current CP viz. the arbitrariness inherent in fixing bouquet prices to that of a-la-carte channels.²⁵

It is also relevant to note that the present regime has led to significant litigation over the last 8-10 years (despite revisions thereto), diverting resources into unproductive activities and

²¹ T Evens and K Donder, *Television Distribution: economic dimensions, emerging policies*, Telematics and Informatics, 33(2), 661-664, 2016, <https://biblio.ugent.be/publication/7002356/file/7002357>

²² For example, refer Para 54, EM to the 2017 tariff order.

²³ Thomas Hazlett, *Prices and Outputs Under Cable TV Reregulation*, Journal of Regulatory Economics, 12:173-195 (1997), https://www.researchgate.net/publication/5155923_Prices_and_Outputs_Under_Cable_TV_Reregulation

²⁴ We note that regulatory cost has been recognised as a relevant factor in determining policy interventions, as seen for example in the context of TRAI’s Prohibition of Discriminatory Tariffs for Data Services Regulation of February 2016.

²⁵ As evident from the striking down of the relevant obligations linking bouquet pricing with that of a-la-carte channels by the Bombay and Madras High Courts.

promoting regulatory uncertainty, thereby hindering development of the sector. It is notable that other attempts at tariff setting, for instance, in the context of fixing access facilitation and co-location charges for landing stations, have also seen many years of litigation.²⁶

Conclusion and pathways to action

Attempts to fix tariffs of television channels (by regulating the pricing of bouquets or discounts that can be provided thereon, etc.) is an arbitrary and disproportionate intervention. TRAI has not demonstrated sufficient problems (such as monopoly power being used to distort the market) that require tariff related interventions of the nature that are currently in place (and being contemplated in the CP). Rather than double-down on a regulatory intervention that is neither sufficiently backed by economic theory and evidence, nor likely to lead to significant social or economic benefits, TRAI would do well to reassess its position. Accordingly, we suggest that TRAI ought to engage in regulatory forbearance when it comes to the issue of setting tariffs for TV channels (in the form of setting rates at which channels may be included in a bouquet or at which consumers can be offered discounts). The policy of forbearance has served TRAI well in a number of other areas, for instance, related to pricing of access services.

As an alternative, TRAI may also consider de-regulating pricing in certain developed markets/geographies such as the metros and other big cities/towns. This would provide an appropriate evidence base to gauge the results of competition. It is relevant to note that TRAI has already created a tiered market structure, whereby a set/minimum number of channels are provided at a limited price (Basic Service Tier), thereby serving underprivileged sections of the population. Market forces should be free to establish pricing beyond such a tier. Similar systems are followed in markets such as that for electricity and water.

Finally, the B&CS regulatory regime should focus on identifying specific problems/harms in the sector, such as those arising from monopolistic power such as discriminatory behaviour, or issues such as lack of transparency in the value chain, etc. Evidence of harm can then lead to the design and implementation of proportionate regulatory interventions, that would not skew the general market. That said, we also recommend that a regulatory impact analysis be carried out so as to gauge possible unintended effects, likelihood of meeting regulatory goals, etc., before regulatory interventions.

²⁶ See TRAI, *Consultation Paper on Estimation of Access Facilitation Charges and Colocation Charges at Cable Landing Stations*, CP No. 7/2018, October 18, 2018, <https://traai.gov.in/sites/default/files/CP18102018.pdf>