CUTS International

Counter Comments' Submission to TRAI's Consultation Paper on Market Structure/Competition in Cable TV Services

To,

Shri Anil Kumar Bhardwaj, Advisor (B&CS),

Telecom and Regulatory Authority of India (TRAI).

Subject: Counter Comments' Submission on TRAI's Consultation Paper on Market Structure/Competition in cable TV services

This is with reference to the consultation paper on "Market Structure/competition in Cable TV Services", dated 25th October, 2021 published by TRAI, wherein comments and counter comments are invited by all stakeholders.

At the outset, we would like to highlight that consultation(s) undertaken by TRAI are commendable and form a starting point for dialogue to resolve consumer issues. After having perused through the consultation paper and comments on the subject, counter-comments are proposed by CUTS International.

Committed to the cause of the consumer, CUTS International recognises the nature and widespread impact of the cable TV industry. Particularly, in this sector, a level playing field is essential for offering consumers their right to choice and promoting small market players such as local cable operators (LCOs).

We hope our request for consumer surveys and impact assessments are considered by TRAI.

Thank you for your time and consideration!

Yours sincerely,

Vidushi Sinha (Research Associate, C-CIER, CUTS International),

On behalf of CUTS International.

The multiple options for television distribution coupled with the rising television viewing homes[1], particularly in the aftermath of the new tariff order (NTO), has presented an opportunity for keen observation and active intervention to protect the end-use consumers.

Since the onset of the pandemic, the cable TV services' consumers have rapidly been increasing. Statistics released by Broadcast Audience Research Council (BARC) showed that television-viewing homes in the country increased by 6.9 percent, amounting to 210 million viewers by the end of 2020.[2] Further, TV viewership grew by 9 percent.[3] In the thirteenth week of April, 2020, it was recorded that Indians spent the highest ever, over 1.27tn minutes in a week, watching TV.[4] Accordingly, an upward trend in ad volumes has also been witnessed.[5]

With this background, it may be implied that a considerable number of consumers are impacted by the market structure in the cable TV industry. It is imperative that a level playing field is maintained among distribution platforms to ensure a consumer's right to choice and healthy competition is not hampered.

For assessing whether a level playing field exists in the status quo, TRAI must **conduct evidence-based studies with the competition regulator i.e. Competition Commission of India (CCI) and consumer-facing organisations** to assess the market share and consider the entire broadcasting system and even non-price factors contributing to anti-competitiveness and loss of consumer welfare in the cable TV industry.

In the recent past, the CCI has deep-dived and conducted a competition analysis in different sectors such as e-commerce[6], pharmaceutical sector[7] and the telecom sector[8]. Not only this, the CCI had even called for a proposal on market study of media and broadcasting sector in 2019.[9]

[1] https://www.business-standard.com/article/current-affairs/tv-owning-households-in-india-grew-6-9-to-210-mln-in-two-years-barc-121041500923_1.html
[2] https://www.business-standard.com/article/current-affairs/tv-owning-households-in-india-grew-6-9-to-210-mln-in-two-years-barc-121041500923_1.html
[3] https://www.businessinsider.in/advertising/media/news/tv-viewership-in-india-grew-by-9-in-2020-barc/articleshow/81273821.cms
[4] https://economictimes.indiatimes.com/industry/media/entertainment/media/india-records-highest-tv-consumption-in-a-week-with-total-time-spent-of-1-27-trillion-minutes/articleshow/75069638.cms
[5] https://www.moneycontrol.com/news/trends/entertainment/tv-records-highest-ad-volumes-in-august-post-covid-induced-second-lockdown-barc-7503861.html
[6] https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf
[7] https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-Study-on-the--Pharmaceutical--Sector-in-India.pdf
[8] https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-Study-on-the-Telecom-Sector-In-India.pdf
[9] https://www.deccanherald.com/national/cci-to-conduct-assessment-of-media-and-broadcast-sector-757483.html

However, the study has not seen the light of the day. The same may be revived, and inputs from such a study can be factored into TRAI's decision vis-à-vis broadcasting sector.

It is essential for the TRAI and CCI to adopt a collaborative approach. Opportunities to initiate the formalisation of principles of cooperation and coordination within the working dynamics of sectoral and competition regulators to ensure constructive regulation making, must not ne missed.[10]

As per the data shared by TRAI, it has been noted that the distribution channels display a concentration of power. From the data available, it seems that multiple system operators (MSOs) cluster and dominate the upstream of the industry and there is hardly any competition among the downstream entities on account of the threshold limit that has been imposed on LCOs after the NTO.

Even though there is hardly any entry barrier when it comes to the permission or the registration of a new business, the competition concern that emerges in the sector is largely regarding abuse of dominance by the existing market players in this industry. With the data available for the 13 major groups of MSOs and seeing the regional distribution, it becomes fairly obvious that these market players have capitalised the market and pose major threat to new entrants. Furthermore, since MSOs popularly opt for a collaborative advantage by repeatedly forming joint ventures, merging or acquiring smaller players, the distribution channel is effectively funnelled.

Due to the crucial role of MSOs to provide a bundled feed of multiple channels to LCOs, MSOs are peculiarly placed in the television distribution industry. There have been various recent instances of MSOs leveraging and abusing their dominant position. The Supreme Court notes in the recent case of ***Competition Commission of India v. M/s Fast Way Transmission Pvt. Ltd. & Ors***.[11] that there is a clear case of denial of market access, however does not penalise the MSO for the anti-competitive behaviour. There is evidence that such cases have been prevalent in the television industry since 2013. In fact, reportedly, in 2019, the Competition Commission of India (CCI) had noted the need to assess the media and broadcasting sector due to the effect of rapid technological change.[12]

[10] https://cuts-ccier.org/pdf/Edition-11-Analysis_of_Competition_Cases_in_India.pdf
[11] https://main.sci.gov.in/supremecourt/2014/22445/22445_2014_Order_24-Jan-2018.pdf
[12] https://www.thehindubusinessline.com/news/cci-to-assess-media-broadcasting-sector-says-sources/article29270427.ece

There is definitely a compelling need to **optimally regulate LCOs** in order to protect the interest of consumers. The most important reason for the same is that these smaller players are the day-to-day connect and most regular touch point for the consumers. If there is no regulation of LCOs, it shall be to the detriment of both the LCOs and the consumers.

A few regulatory measures that may be incorporated include:

a. Extensive consultation processes to understand and highlight the consumer facing concerns
b. Protection of the interests of LCOs for availability of competitive prices, packages and options
c. Recognition of investment in a regulatory process as a means to an end and not as an end in itself.

As mentioned earlier, assessment of the market structure is essential with a purely evidence based approach. This shall determine the substitutability of services among consumers and also determine market concentration. Assessment of the same may be done through the Herfindahl–Hirschman Index (HHI), which is a commonly accepted measure of market concentration.

The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. It takes into account the relative size distribution of the firms in a market and approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.[13]

Even though HHI is a highly trusted concentration index, there are a few apprehensions regarding the index:

a. The fundamental assumption that the bigger the firm the more likely it is to engage in anticompetitive conduct may be problematic specifically for industries that are dependent on technology as well such as the cable TV industry.
b. The margin of error always exists with data such as market share data and with the slightest inaccuracy in data, the HHI may be highly distorted.
c. Qualitative aspects may not be considered in a quantitative computation such as the HHI.

[13] https://www.justice.gov/atr/herfindahl-hirschman-index

Therefore, necessary precautionary measures must be put in place. After calculation of HHI, a thorough empirical evidence based analysis on other non-market share factors must be focused on.

In this regard, TRAI's 2013 Recommendations noted that, "*Currently, there are no restrictions on the area of operation and accumulation of interest in terms of market share in a city, district, State or the country, by MSOs. It has been observed in some States that a single entity has, over a period of time, acquired 'control' of several MSOs and LCOs, virtually monopolising cable TV distribution in that market. Cases of market dominance by MSOs have been reported at various forums. Such monopolies/market dominance in the TV channel distribution market are not in the best interest of consumers and may have serious implications in terms of competition, pricing, quality of service and the efficient growth of the TV channel distribution market*."

Further, *The Authority recommends that the threshold value for any individual/ 'group' entity contribution to the market HHI should be no more than 2500.*[14] The Indian regulators have employed this tool earlier as well. In fact, it is even mentioned in Form II under the combination regulations[15]. In 2016, during the adjudication of the DLF Acquisition case[16], market concentration was gauged and certain thresholds have been set. Markets with a post-merger HHI of below 1000 are termed as un-concentrated, between 1000 and 2000 as moderately concentrated and above 2000 as highly concentrated. Further, if comparative analysis is done, an increment of 150 or 250 is moderately concentrated and once it goes higher than this, the likelihood of appreciable adverse effect on competition arises.

Accordingly, HHI above 2000 should be considered rather than the earlier limit of 2500. This **along with other qualitative factors** must be taken into consideration while making determination on the concentration of HHIs.

[14] Threshold value of market share/ HHI : https://www.trai.gov.in/sites/default/files/Recommendations__Cable_monopoly__final__261113%20%281%29.pdf

[15] Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011

[16] https://www.cci.gov.in/sites/default/files/Notice_order_document/C-2015-07-288.pdf

In a nutshell, we propose the following recommendations:

a. Robust evidence-based inquiries into the market structure and share of each company by the appropriate regulator (CCI) along with TRAI. A collaborative effort and harmonious construction is imperative to analyse the true effect of the peculiarly organised distribution channel.
b. Optimal regulation at all levels of the cable TV industry to ensure there is competition and therefore, right to choice available to all consumers.
c. Decrease the threshold of HHI to declare a score of 2000 as highly concentrated rather than a score of 2500.
d. Consumer survey and consumer impact assessments, coupled with active dialogue-based consumer consultation.