IAMAI Counter Comments on TRAI Consultation Paper on 'Market Structure/Competition in Cable TV Services'

The Internet & Mobile Association of India ("IAMAI") is a not-for-profit industry body registered under the Societies Registration Act, 1860, representing the Indian online and mobile value-added services sectors. We are dedicated to presenting a unified voice of the Indian internet and technology businesses at large.

IAMAI would like to begin by highlighting the fact that OTTs have been allocated to the administrative profile of the Ministry of Information and broadcasting as per the allocation of business rules. TRAI does not have any jurisdiction over OTT and by its own admission in past publications is not empowered to regulate the OTT sector.

There are fundamental differences between OTT services and services provided by distribution platform operators. It is crucial to understand that the two services are not a part of the same product market and would require differing competition assessments. Orders by the Competition Commission of India, technological differences and economic principles are also testament to the differences between DSOs and OTTs. Owing to this difference, regulatory parity would not only be ineffective, but counterproductive to the growth of the two sectors. It must also be noted that concerns regarding competition in one sector cannot be used to justify regulation in a separate sector. Finally, IAMAI would also like to highlight that any competition regulation without thorough market assessment would have a chilling effect on investment and innovation while doing little in terms of promoting competition.

1. VOD and TV are distinct sectors which cannot be considered interchangeable

No academic evidence suggests that OTTs and TV are interchangeable services or that they are in the same market. There is however, abundant evidence which proves that the two are distinct services which are complementary.

There are several legal and quasi legal precedents which can be used to differentiate the sectors TV and OTTs operate in. First, a 2019 Combination Registration Order by the CCI cited multiple reasons and noted that DTH services and OTT services are not substitutable/interchangeable. The reasons include:

(i) The viewing experience on handheld sets and other devices is not comparable to TV

(ii) The prerequisite of high-speed internet connections makes OTTs significantly more expensive.

Similarly, the September 2020 recommendations issued by TRAI '[Regulatory Framework for OTT Communication Services]' state that:

(i) "Market forces may be allowed to respond to the situation without prescribing any regulatory intervention. However, developments shall be monitored and intervention as felt necessary shall be done at appropriate time.

(ii) No regulatory interventions are required in respect of issues related with privacy and security of OTT services now.

(iii) It is not an opportune moment to recommend a comprehensive regulatory framework for various aspects of services referred to as OTT services, beyond the extant laws and regulations prescribed presently. The matter may be looked into afresh when more clarity emerges in international jurisdictions particularly the study undertaken by ITU-T."[1]

Furthermore, the Bundeskartellamt, Germany's competition regulator found in a 2014 study that users do not consider subscription-based OTT services interchangeable with other audio-visual services. The regulator also stated that "*among other things, for example, being able to determine what and when one consumes constitutes a major difference between VOD and traditional, linear television entertainment services*."

The Competition Commission of India (CCI) has also held that DTH and cable TV are not interchangeable. If we compare the parameters considered by the CCI in these cases to justify the treatment of DTH and cable as non-interchangeable, it is evident that OTT services cannot be clubbed within the same relevant market as either of the two TV distribution modes.

- In *Jak Communications Pvt. Ltd. vs. Sun Direct Pvt. Ltd.*[2], the differentiation between cable TV operators and DTH providers was based on the product, pricing, and intended use. The DG looked at parameters including distribution of TV channels, quality of signals, reliability of transmissions, availability of add-on facilities and interactivity, viewing experience, technology, scalability, various options in the pricing of the product, seamless availability of DTH, and the pan-India presence of DTH operators.
- DTH distribution covers more products in comparison to cable distribution and thus they are not interchangeable and hence different product markets. The CCI held a similar view in *Big CBS Networks & Anr v. Tata Sky Ltd*[3] in 2012 and

[1] *TRAI Recommendations on Regulatory Framework for OTT Communication Services*, 14 September 2020, available here.

[2] Jak Communications v Sun Direct, Competition Commission of India Case No. 08/2009.

[3] BIG CBS Networks v Tata Sky Ltd., Competition Commission of India Case No. 36/2012.

in *Makkal Tholai Thodarpu Kuzhumam Ltd. v. Tamil Nadu Arasu Cable TV Corpn. Ltd.*[4] in 2015.

- In another case *Consumer Online Foundation v. Tata Sky Limited, Dish TV India Limited, Reliance Big TV Ltd. and Sun Direct TV Pvt Ltd.*[5], the CCI distinguished between DTH, cable, and IPTV based on their varied mode of distribution even though the intended use for the three is the same. The CCI also noted that pricing for the three were different and cable TV had infrastructure constraints. On the demand side, the CCI found that cable TV did not offer the quality of service or number of channels that could be offered through DTH and concluded that DTH as a service is distinct from IPTV and cable.

The CCI orders mentioned above differentiate between different modes of TV distribution based on pricing, quality of service, mode of distribution, and the infrastructure used. OTT services are differently priced, offer better quality of services, and use broadband infrastructure for distribution. They are a distinct market from TV distribution when we assess them against the parameters evolved through CCI jurisprudence.

Economic principles

OTT and TV distribution do not operate in the same playing field. The parameters in Table I explain the differences between OTT and TV. We explain these parameters in Table II.

Parameter	OTT	TV
Asynchronous content delivery (Operational model)	High	Low
Local monopoly (non-replaceability in a given area)	Low	High
Global competition (Operation risk)	High	Low
Bundling ability (stand-alone vs. grouping)	Low	High
Target audience level (precise content taste vs. average content taste)	Individual	Household
Fixed cost for subscription (Lock-in period)	Low	High
Checks against hostile acquisition (Historical evidence)	Low	High
Layers to reach consumer (Distribution risk co-managed /self-managed)	Single	Multi

Table I: Difference between OTT services and TV distribution

No	Parameter	Brief Description

[4] Makkal Tholai Thodarpu Kuzhumam Ltd. v Tamil Nadu Arasu Cable TV Corpn. Ltd., 2015 SCC OnLine CCI 162.

[5] Consumer Online Foundation v Tata Sky Limited, Dish TV India Limited, Reliance Big TV Ltd. and Sun Direct TV Pvt Ltd., 2011 SCC OnLine CCI 12: [2011].

1.	Asynchronous content delivery (Operational model)	When the user is not able to consume the content in real-time it is called asynchronous content delivery. For eg, on online learning platforms, learners can learn in their own time rather than on real-time (Smith, 2013)
2.	Local monopoly (non-replaceability in a given area)	A producer facing no competition from other competitors in a geographical area would be referred to as local monopoly (Hirst, 1905)
3.	Global competition (Operation risk)	Competition between rivals of the same industry to produce goods and services is termed as global competition. (Kuptsch & Fong, 2006) An OTT platform which penetrates households of multiple countries faces stiffer competition with other platforms. Cable TV broadcasters, however, do not face much competition with broadcasters on a global level
4.	Bundling ability (stand-alone vs grouping)	The grouping of networks or channels into one bundle before selling it to consumers is called bundling (Coppejans & Crawford, 1999). This ability is high in Cable TV as it provides a bunch of channels to provide content of varied categories. Whereas OTT broadcasters feature different content on one platform.
5.	Target audience level (precise content taste vs. average content taste)	A group of consumers to whom the broadcaster aims to provide content (Franz, Fowler, Ridout, & Wang, 2020). Cable TV reaches multiple people as its content can be viewed by all the members of a household at the same time. OTT on the other hand, can be accessed by individuals of a household, depending on their preference and time.
6.	Fixed cost for subscription (Lock-in period)	It is a fixed amount that a consumer requires to pay to avail the network/broadcasting service (TRAI, 2019). OTT consumers pay a fixed monthly subscription fee to the service provider, and Cable TV consumers pay more than one stakeholder. For instance, besides paying for the bunch of TV channels that consumers want to view, they would also have

		to pay a network capacity fee to the distributor for availing those channels.
7.	Checks against hostile acquisition (Historical evidence)	The process of acquisition of a company by another where there is little agreement on the process of acquisition between the two companies. The takeover company muscles its way into the acquisition (Ramić, Silić, & Buterin, 2021) This risk is high for cable TV broadcasters than for OTT platforms. Different cable TV broadcasters have different levels of reach to the audiences. Another network would want to acquire a network to increase its presence and penetration. OTT platforms on the other hand already have a wide presence. It can also provide content catering to audiences of different regions.
8.	Layers to reach consumer (Distribution risk co-managed /self-managed)	The level of stakeholders that exists in each system to reach the final consumer (TRAI, 2013). A broadcaster in the cable TV network has to go through Multi System Operators (MSOs) and then Local Cable Operators (LCOs) before it reaches the viewer. OTT platforms on the other hand do not have these layers. They connect with the consumers through internet service providers. In fact one key difference is that cable /DTH is a distribution medium/pipe via which content providers reach the customer. While OTT is the content provider which needs the ISP pipe to reach the customer. So its incorrect to compare the pipe (cable) and OTT services (which are Content producers who use an ISP pipe)

Table II: Explanation of parameters

Data on OTT services and cable TV services also shows that they are not substitutable/interchangeable but complementary.

- Both Cable TV and OTT have seen growth in the last one year. According to Chrome DM's bi-annual subscriber establishment survey (SES) released in

November this year, cable TV households grew by 4.1% to around 110 million in 2021 from 105 million. Similarly, FICCI M&E Report 2021 estimates that OTT subscribers grew by 34% from 29 million in 2020 to 39 million in 2021.

- The Consultation Paper acknowledges that cable operators with ISP licenses are building their Cable TV services with subscriptions-based OTTs (para 2.32) to allure subscribers, hence complementing each other to drive subscriber growth.

- The fact that MSOs are increasingly adopting hybrid STBs indicate that cable TV services co-exist with OTT.

- Data indicates that both the services are growing simultaneously and not replacing each other. While FICCI M&E 2020 Report highlighted evidence of cord-cording in 2019, a deeper analysis of the report suggests that the cord-cutting in 2019 was an outlier incident caused by disruptions/change in regulatory framework, and non-readiness of the ecosystem to seamlessly transition consumers into the new framework. Therefore, cord cutting as saw in 2019 was an outlier and not market driven.

Difference in technology and offering

- OTT services differ from TV distribution as there is no fixed program schedule for OTT services. OTT subscribers can watch all available content whenever they want and compile their "program" by themselves. In contrast, the TV channel packages content for TV subscribers.

- ***OTT services provide 'pull' based curated content (narrowcast), while TV and provides 'push' based content.*** The essential difference here is that in the case of push-based services, content is mass distributed via a push model of dissemination. For OTT services, the user decides what content to consume and therefore is a 'pull' model of dissemination. There is also the factor of interactivity between the subscriber and the OTT service. This means that the service caters to the subscribers myriad choices of actions at each time like requesting (or "pulling") programmes at the time of his choosing, time shifting / toggling within a programme to move the programme forward or backward). Such interactivity continues for the entire duration of the subscriber's engagement. In the case of traditional broadcast technologies, linear time dependent channels are "pushed" to the subscriber without any ability for interactivity on a network which is completely controlled from end to end by the distribution platform.

- The device used for distribution and consuming content is another departure. Consumers access TV content through an intermediary and consumes the same through a television set. They can consume OTT services on any device with an internet connection. Further, consumers also have the choice of downloading OTT content and watching it without an internet connection while television content does not have that mobility.

- OTT services also have other technologies like age-rating and parental control to ensure that specific content is inaccessible to children while in case of television there is no mechanism to prevent children from accessing content on a particular TV channel.

- Cable TV services function in a closed transmission systems where subscribers can access and view only a particular cable TV service. Whereas OTT services are accessible over open Internet network of any internet service provider or by access to the internet through your telecom provider's services and are not limited to a closed network of any one service provider.

2. The question of regulatory parity or even playing field between OTT services and TV distribution does not arise because they are different services.

Regulatory parity or regulatory symmetry is advisable in case of like services. Regulatory parity means that the regulator/licensing authority must impose the same conditions on a new entrant that existing entrants providing the same service follow. For instance, a new DTH operator must follow the same licensing conditions that existing operators follow. However, we cannot extend regulatory symmetry to different services, especially in case of digital because technology and the mode of distribution differentiates the offering. We submitted in the earlier section that TV distribution and OTT services are distinct. Therefore, the question of regulatory parity between the two does not arise.

A report by the ESYA Centre on levelling the playing field between traditional and digital businesses notes that, "*Demands to impose traditional regulatory requirements on transformative digital businesses rely on inaccurate comparisons between the nature of the services provided, and do not account for developments in the legal and regulatory framework that apply to digital businesses*". [6]

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[6] Mohit Chawdhury, *Levelling the Playing Field Between Traditional and Digital Businesses*, ESYA centre Brief No. 009, June 2021, available at:

A policy brief by the OECD on 'Regulatory Effectiveness in the era of digitalisation' notes that the digital economy follows different rules on pricing and service offerings. The Organization recommends a 'fit-for-purpose', bespoke regulatory approach to regulating new technologies and notes that governments should not transpose traditional regulation and policy to a digital service.[7]

The Competitions and Markets Authority (CMA) in the UK, in a decision explained that migration from one service to another does not prove substitutability. In a report on the merger between an online gambling and a traditional betting service, the CMA noted that, *"it is entirely possible that general changes in customer preferences or behaviours over time result in a degree of migration which does not indicate a sufficient degree of substitutability between the retail and online channel and cannot be equated with diversion (which is relevant for market definition purposes)."*[8]

3. Regulators cannot address competition concerns in one market (TV distribution) by bringing the same in parity with a different market (OTT services).

Competition concerns in TV distribution requires intervention in that market and not another market. In the first section, we explained why TV distribution and OTT services are distinct. In section two, we explained that there is no need for regulatory symmetry between the two distinct services. This means that concerns in one market cannot be solved by regulating another. From a competition lens, these are two distinct relevant markets and intervention in the interest of competition must cater to addressing concerns within a relevant market.

A 2018 judgement by the Supreme Court clarified that the TRAI can intervene to make arrangements for protection and promotion of consumer interest and ensure fair competition.[9] However, prior to regulatory intervention in the interest of competition, it is imperative to assess the market and carve out the "relevant market". [10] The CCI looks at the

https://static1.squarespace.com/static/5bcef7b429f2cc38df3862f5/t/60dc04c03eb13c30c6a13c24/1625031875842/Issue+No+009+-+Levelling+the+playing+field.pdf

[7] OECD, *Regulatory Effectiveness in the Era of Digitalization,* June 2019, available at: https://www.oecd.org/gov/regulatory-policy/Regulatory-effectiveness-in-the-era-of-digitalisation.pdf

[8] UK CMA, *A report on the anticipated merger between Ladbrokes plc and certain businesses of Gala Coral Group Limited,* July 2016, available at: https://assets.publishing.service.gov.uk/media/5797818ce5274a27b2000004/ladbrokes-coral-final-report.pdf

[9] CCI v. Bharti Airtel Ltd, Supreme Court of India, Civ. App. 11843 (2017), para 79, available at: https://main.sci.gov.in/supremecourt/2017/40072/40072_2017_Judgement_05-Dec-2018.pdf

[10] Dr. S Chakravarthy, "Relevant Market in Competition Case Analyses" https://circ.in/relevant-market-in-competition-case-analyses/

relevant geographic market[11] and the relevant product market[12] for carving out the relevant market.[13] The Commission defines the 'relevant market' to identify competitors for a product or service that possibly throttle competition. Any assessment of competition concerns should start with identifying the 'relevant market'. According to the European Commission, 'relevant markets' are defined for the effective execution of competition policy.[14]

TRAI as the sectoral regulator should conduct a market study to identify the 'relevant market' in the television distribution segment. TRAI should base any regulatory intervention in the interest of competition on a market study and clearly carve out the 'relevant market'. It is also pertinent to note that a static definition of the market cannot be used for the long-term and a market study should precede any intervention that the TRAI considers in the future. Approach to stipulate ex-ante regulations must follow a robust process and justify regulatory interventions with research and empirical evidence. In this case, a market assessment will conclude that OTT services and TV distribution are distinct relevant markets. Therefore, competition concerns in either case needs a differentiated approach.

4. Ex-ante competition regulation without a market assessment throttles innovation instead of promoting competition.

The OTT services segment has seen significant growth since its entry into India. FICCI M&E Report 2021 estimates that OTT subscribers grew by 34% from 29 million in 2020 to 39 million in 2021. The Report also states that India has amongst the highest consumption of online video content in the world. Indians spend as many as 10.9 hours a week on video consumption. According to a market report by MICA[15], a promising ecosystem, value-driven bandwidth costs and strong consumer demand catalysed the widespread popularity of OTT platforms. Consumers have options to access content across multiple platforms and users consume content based on their preferences in case of OTT services.[16] The OTT services segment has limited barriers to entry and there is a variety of offerings in terms of the subscription costs and the quality, type, and variety of content.

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[11] Section 2(s) read with Section 19(6) of the Competition Act; The area in which conditions of competition for supply or demand of goods or services are distinctly homogenous and can be differentiated from the prevailing conditions in the neighbouring areas.

[12] Section 2(t) read with Section 19(7) of the Competition Act; Market comprising market comprising goods and services which the consumer regards as interchangeable or substitutable by the consumer based on the products or services, their price and intended use.

[13] *Competition Commission of India v Steel Authority of India Ltd. & Anr.*, (2010) 10 SCC 744

[14] European Commission, 'Market Definition in the Media Sector- Economic Issues: Report by Europe Economics for the European Commission, DG Competition' (Information, Communication and Multimedia Media and Music publishing, November 2002) p 101.

[15] *Indian OTT Platforms*, MICA – the School of Ideas, 2018, available here.

[16] *Id*.

OTT services are competitive, and they show potential for tremendous growth and popularity. It does not exhibit any of the features that characterize a non-functional or restrictive market, nor does it seem to have the potential of evolving into one. There are multiple players, wide consumer choice, and on-going innovation. It would be counter-productive to introduce economic regulation in such a market.

Market studies can play a key preventive role in finding and diagnosing emerging competition issues by exploring the different drivers and clarifying the options available to regulators. Based on the study, regulators can choose to tackle them from a competition policy, enforcement, regulatory, or other policy perspective. Market studies can propose solutions to mitigate consumer harm before it becomes significant, promote further competition, and reduce the likelihood of (or opportunities) for violations of competition rules. According to the Organization for Economic Cooperation and Development (OECD), "*Market studies assess whether competition in a market is working effectively and identify measures to address any issues that are identified. The most common market study outcomes are recommendations for regulatory changes, calls for firms to change their behaviour, or law enforcement interventions*".[17]

Government authorities should adopt a cautious approach when considering regulation in a market and, *inter alia*, strike a balance between regulation and free competitive markets. TRAI in its CP, observed that '*in a well-functioning market, where firms are competing on fair terms and there are no artificially erected barriers of entry, there is no need to impose restrictions. However, if there is little or no competition or in case where barriers to entry exist, there is the distinct possibility of abuse of dominance by the service providers*'.

Economic regulation is warranted in certain instances where there is a natural monopoly (e.g. a gas pipeline or electricity transmission line), information asymmetry (e.g. life insurance) or there is a scarcity of resources (e.g., spectrum). OTT services do not fall under any of the above and therefore there is no need for ex-ante regulation in the segment. Unjustified intervention could throttle innovation.

5. Content is recognized as a work protected under Copyright Act and the copyright holder can exploit it through different modes and mediums.

At the outset, the legislative intent to treat cable services and OTT services differently is evident from the scheme of the Copyright Act itself. An owner of copyright in a work (which includes a

[17] https://www.oecd.org/daf/competition/market-studies-guide-for-competition-authorities.htm

programme, film, TV Show etc.) is entitled to different windows of exploitation of the work. Such owner may release the work in cinema theatres; he may thereafter make available for viewing the work on a TV channel or may license the right to communicate the work through various modes including video streaming over the internet, or issue CDs/physical copies of the work or individually selling the songs contained in the film. Thus, mode of exploitation through cable services in the form of a TV channel is different than through internet service in the form of video streaming. The legislative intent to treat cable TV services and OTT services differently is also evident from the fact that the cable TV services are protected as a "broadcast reproduction right" under Chapter VIII of the Copyright Act whereas OTT services relate to protection of programmes as "works" defined under section 2(y) of the Copyright Act.

Conclusion

As stated above, cable TV services are a different service altogether viz a viz OTT services. The products and offerings are therefore totally different and are not substitutes in any manner whatsoever. Cable TV service providers own the means of transmission / infrastructure related to transmission whereas OTT service providers are the owners/licensees of copyright in the programmes, relying on internet service providers for delivery of that content.

Note:

One of our Telecom Operator member (Airtel) is not in agreement with our above submission and has suggested that:

i. OTT Platforms should be subject to same framework as is applicable for DPO's.

ii. The "Must Provide" principle must apply equally to all the digital platforms viz; DPOs, OTT/App etc.

iii. Address the current violation of the Downlinking policy by the Broadcasters who are providing their channels to OTT platforms.