Response to comments on TRAI's Consultation Paper on "Market Structure/Competition in Cable TV services"

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To,
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Koan Advisory Group is a New Delhi based policy advisory firm. Our team combines thorough domain knowledge across multiple technology-oriented sectors, and we continuously engage with decision makers in industry and government. We specialise in policy and regulatory analysis in traditional and emergent technology markets and aim to identify optimal policy and regulatory frameworks.

We are delighted to respond to the comments submitted by stakeholders to the Telecom Regulatory Authority of India's (**TRAI**) consultation paper titled 'Market Structure/Competition in Cable TV services'. We have gone through the comments sent to TRAI and we have the following counter-comments to submit.

Our submission addresses the concerns stakeholders have raised on Over-the-Top (**OTT**) services and their impact on competition in cable TV services. Several distribution platforms and associations of cable operators have asked the TRAI to regulate OTT services at par with Distribution Platform Operators (**DPO**). They argued that TRAI should extend the licensing framework and regulatory framework applicable to DPOs to OTT services as well.

We agree that the TRAI should follow a non-discriminatory approach, promote competition, and provide equal business opportunity to all. But this approach does not justify treating OTT services and DPOs similarly, because they are significantly different services. A non-discriminatory approach is necessary for like products or services, but OTT services and TV distribution are different services. Different services require differential regulatory treatment.

Our submission analyses the difference in services provided by OTT providers and DPOs. As they are different services, there is no case for regulatory symmetry between the two. The question of an even playing field between OTT services and TV distribution does not arise because they are distinct services.

OTT services and DPOs offer distinct services to customers, and these are not substitutable or interchangeable.

Some stakeholders contend that OTT services and DPOs operate in the same playing field because of the rapid proliferation of OTT services. The TRAI has addressed this issue in earlier consultations. This CP does not discuss regulatory intervention in OTT services, but TV distributors and cable operator associations have called for economic regulation on OTT services. There is no evidence to suggest that Cable TV Services and OTTs are substitutes. On the contrary, there is ample evidence to suggest that both services are complementary.

In a 2019 Combination Registration Order, the Competition Commission of India (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 does not compare to the television viewing experience.
(ii) Access to OTT content requires high-speed internet and consumes data making it more expensive than television content.

In 2014, the Federal Cartel Agency in Germany, Bundeskartellamt conducted a market study and found that users do not consider subscription-based OTT services as interchangeable with other audio-visual services. The government agency said 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*."[1]

The CCI has evolved parameters to differentiate between modes of TV distribution in cases. If we compare the parameters considered by the CCI in these cases, it is evident that OTT services cannot be clubbed together with TV distribution.

- In *Jak Communications Pvt. Ltd. vs. Sun Direct Pvt. Ltd.*[2], the Director General (DG) investigating the matter 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, and the pan-India presence.

- In another case *Consumer Online Foundation v. Tata Sky Limited, Dish TV India Limited, Reliance Big TV Ltd. and Sun Direct TV Pvt Ltd.*[3], 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 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 uses broadband infrastructure for distribution. They are a distinct market from TV distribution when we assess them against the parameters evolved through CCI jurisprudence.

[1] ARD and ZDF online platform "Germany's Gold", Reference No. B6-81/11-2, 18 February 2014.
[2] Jak Communications v Sun Direct, Competition Commission of India Case No. 08/2009.
[3] 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].

In September 2020, the TRAI issued recommendations on '[Regulatory Framework for OTT Communication Services]'. The regulator opted for forbearance instead of regulation of OTT communication services. The TRAI recommended that,

> *"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. No regulatory interventions are required in respect of issues related with privacy and security of OTT services at the moment. 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."*[4]

Difference in product offering

OTT services differ from DPOs 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 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.

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.

Economic Principles

Our economic analysis also shows that 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 **Annexure-I**.

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

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

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

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 Internet Service Provider or a Telecom Service Provider 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.

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*". [5]

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.[6]

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).*"[7]

Competition concerns among DPOs requires intervention in that market and not another market. We explained above 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 the relevant market.

The OTT services segment has seen significant growth in India. FICCI M&E Report 2021 estimates that OTT subscribers grew by 34% from 29 million in 2020 to 39 million in 2021. OTT services are competitive, and they show potential for tremendous growth and

[5] Mohit Chawdhury, *Levelling the Playing Field Between Traditional and Digital Businesses*, ESYA centre Brief No. 009, June 2021, available at: https://static1.squarespace.com/static/5bcef7b429f2cc38df3862f5/t/60dc04c03eb13c30c6a13c24/1625031875842/Issue+No+009+-+Levelling+the+playing+field.pdf

[6] 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

[7] 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

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. The 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. There are multiple players, wide consumer choice, and on-going innovation. It would be counter-productive to introduce economic regulation in such a market.

The TRAI themselves note this in the CP on Page 21 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*". OTT services are an example of the former where firms are competing on fair terms and there are no artificially erected barriers of entry.

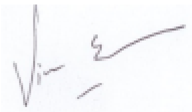
Neither the Consultation Paper nor MIB's Reference letter refer to regulation of OTT services. Further, economic regulation of OTT services lies outside TRAI's ambit under the present regulatory framework.

The TRAI floated this CP following a Reference letter from the MIB. The Ministry had raised concerns such as whether TRAI's 2013 Recommendations on the subject apply to both MSOs and LCOs and whether the earlier recommendations continue to be valid. The regulator did not hint at regulatory intervention of OTT services in this CP, but TV distributors and cable operator associations have given comments asking the TRAI to regulate OTT services.

Even though we are delighted to respond to this CP and assist the TRAI with policymaking, we feel that this consultation process is not the appropriate forum for a discussion on regulation of OTT services. First, the CP nor MIB's Reference Letter discusses OTT regulation. Second, OTT services regulation lies outside the scope of TRAI's powers under the Telecom Regulatory Authority of India Act, 1997. The provenance of TRAI powers stem from Section 11 of the TRAI Act. In 2004, the government issued a notification extending the TRAI's ambit to broadcasting. However, as we have explained above, OTT services and TV broadcasting are not the same. Further, the MIB is the relevant body for looking into OTT regulation following an amendment to the Allocation of Business Rules, 1961 last year. We feel that this consultation process is not the proper forum for a discussion on OTT regulation for these reasons.

We hope our submission aids with your decision making. Additionally, we hope to continue to contribute to such consultations in the future and remain at your disposal for any clarifications.

With Warm Regards,



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Annexure I: Explanation of economic analysis parameters

No	Parameter	Brief Description
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 without the presence of any middlemen.