BY E-MAIL

20 December 2021

Mr. Anil Kumar Bhardwaj
The Advisor (B&CS)
Telecom Regulatory Authority of India
Mahanagar Doorsanchar Bhawan
Jawaharlal Nehru Marg, New Delhi – 110002

Subject: Counter-comments for the consultation paper published by Telecom Regulatory Authority of India (*TRAI*) on 'market structure / competition in cable TV industry' on 25 October 2021

Dear Anil,

I have had the opportunity to read the consultation paper published by TRAI on the 'market structure / competition in cable TV industry' on 25 October 2021. The paper is indeed very comprehensive; in response to TRAI's invitation, there has been a large number of comments / responses from various stakeholders.

I noticed that the majority of the comments relate to OTT video-on-demand services and several stakeholders have suggested / demanded regulation of this segment. With a view to put this regulatory demand in a broader policy perspective and with the hope to assist TRAI to take an appropriate decision regarding regulation of OTT video-on-demand services, I am taking the liberty to provide counter-comments on this important issue.

Please find enclosed my counter-comments on the consultation paper.

Thanking you.

Yours sincerely,

Vinod Dhall

Vinod Dhall
Senior Adviser, Touchstone Partners

Enclosed: As above

REGULATORY POLICY— IS VIDEO STREAMING OTT SERVICE THE RIGHT CANDIDATE?

By Vinod Dhall[1]

A. Introduction

The Telecom Regulatory Authority of India (***TRAI***) has recently published a consultation paper on market structure / competition in the cable TV services[2] (***the Cable TV Paper***) to discuss and invite public comments about the competitiveness in the cable TV industry. The consultation paper also alludes briefly to the OTT service providers (***OTT***), mainly the video-on-demand (***VOD***) segment. There has been a flood of comments from interested parties calling for the introduction of economic regulation of the VOD services. The question is whether any such economic regulation of the VOD platforms is justified on merits and in particular, in the context of a mature, objective based regulatory policy.

As generally understood, OTT services include any service or product that is made available on the internet. Here though, the concern is with one variety of OTT service viz, the VOD segment (also popularly known as online video streaming service).

This demand for regulation of the VOD segment raises the larger policy issue of what kinds of markets are suitable for economic regulation and whether the VOD segment fits into such a category. It is important to make a distinction here between economic regulation wherein a regulator can impose *ex ante* restrictions such as in respect of pricing, conditions of contract, and bundling of products and other forms of control or supervision such as, in restricting harmful content or promoting local content. It may be acceptable to control or impose certain conditions on the type of content that can be featured on the VOD platforms. On the other hand, at a policy level, it is worthwhile to examine whether a market like the VOD segment is a right candidate for subjecting

[1] Vinod Dhall is former Secretary, Ministry of Corporate Affairs and the first head of the Competition Commission of India. He has held numerous policy and regulatory positions in Government.
[2] *TRAI consultation paper on Market Structure / Competitiveness in Cable TV Services*, 25 October 2021, available here.

it to 'economic regulation' or whether that could be a counter-productive or even retrograde step. In this context, we briefly look at the following:

(a) The scope of OTT services;
(b) TRAI's consultation processes involving OTTs;
(c) The need to subject the VOD segment to economic regulation?; and
(d) The position of economic regulation of the VOD segment in other major jurisdictions.

B. Scope of OTT services

OTT services do not have a universally agreed definition across different jurisdictions. However, the essence of these prevailing definitions remains consistent i.e., provision of products / services *via* the internet; this will be illustrated by a few examples given below:

a) TRAI refers to OTT as applications and services which are accessible over the internet and ride on operators' networks offering internet access services (for e.g. social networks, search engines, amateur video aggregation sites etc.).[3] Further, an "OTT provider" is a service provider that offers Information and Communication Technology (ICT) services, but neither operates a network nor leases network capacity from a network operator.[4]
b) The International Telecommunications Union (the ***ITU-T***) defines OTT (mainly communication OTT) as an application accessed and delivered over the public internet that may be a direct technical / functional substitute for traditional international telecommunication services.[5]
c) The Body for European Regulators for Electronic Communications (***BEREC***) defines an OTT service as "content, a service or an application that is provided to the end user over the public internet."[6]

[3] *TRAI consultation paper on Regulatory Framework for OTT Services*, 27 March 2015, available here; and *TRAI consultation paper on Regulatory Framework for OTT Services*, 12 November 2018, available here.
[4] *Id*.
[5] *Series D: Tariff and Accounting Principles and International Telecommunication / ICT Economic and Policy Issues – Collaborative Framework For OTTs*, ITU-T, D.262 (05/2019), available here.
[6] *Report on OTT services*, BEREC, BoR (16) 35, January 2016, available here.

In one of its consultation papers[7], TRAI has opined that based on the kind of service they provide, there are basically three types of OTT apps: (a) messaging and voice services (communication services); (b) application ecosystems (mainly non-real time) linked to social networks and e-commerce; and (c) provision of video / audio content.

The Department of Telecommunications has classified OTT in the following manner: (a) OTT communication services (Voice over Internet Protocol) providing real-time person to person telecommunication services using the network infrastructure of the telecom service provider (TSP) and competing with them; and (b) OTT application services such as media services (gaming), trade and commerce services (e-commerce, radio taxi and financial services), cloud services (data hosting and data management platforms or applications), social media etc., using the network infrastructure of the TSP but not competing with them.[8] As stated above, here we focus on the VOD / online streaming segment which is the main target of the comments provided by interested parties to the TRAI.

C. TRAI's consultation processes involving OTTs

Consultation papers on OTTs[9]

TRAI had issued two consultation papers in the past pertaining to the regulatory framework for OTTs (the ***OTT Papers***). The focus was mainly the communication OTTs, and the TRAI had raised several pertinent issues such as the substitutability of TSP and voice OTT services, regulatory imbalance and non-level playing field between TSPs and voice OTT service providers and the economic aspects of regulating the two services. One of the primary issues under consideration was that whilst TSPs incur heavy costs such as license fees and have to meet regulatory obligations, voice OTTs that compete with the TSPs are not subject to any such regulatory obligations. However, after considering comments from various

[7] *TRAI consultation paper on Regulatory Framework for OTT Services*, 12 November 2018, available here.
[8] Report on Net Neutrality, DoT Committee, May 2015, available here.
[9] Supra 3.

stakeholders, TRAI rightly recommended forbearance in the matter of introducing regulation for voice OTTs, stating as follows:

a. *"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.*
b. *No regulatory interventions are required in respect of issues related with privacy and security of OTT services at the moment.*
c. *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."*[10]

In view of the above, the extant position regarding voice OTTs is that no regulation is called for and the market may be monitored, and any intervention should be considered only after there is greater clarity about the various aspects of the voice OTT services. This restrained line of thinking should apply with even greater force to the VOD services.

Consultation paper on market structure / competition in the cable TV services[11]

In December 2012, the Ministry of Information and Broadcasting (the ***MIB***) had directed TRAI to look into the level of competitiveness in the cable TV services industry in view of the fact that cable TV distribution is virtually monopolized by a single entity (being a multiple system operator (***MSO***) or a local cable operator (***LCO***) in certain states. In particular, TRAI had been directed to provide its recommendations on the following:

> "*In order to ensure fair competition, improved quality of service, and equity, should any restriction be imposed on MSOs/LCOs to prevent monopolies/accumulation of interest? If yes, what restrictions should be*

---

[10] *TRAI Recommendations on Regulatory Framework for OTT Communication Services*, 14 September 2020, available here.
[11] Supra 2.

imposed and what should be the form, nature, and scope of such restrictions? Accordingly, amendments required in the Cable Television Networks (Regulation) 1995 Act and Rules framed thereunder may also be suggested."

TRAI had, accordingly, issued its recommendations in November 2013 after following a due consultation process with stakeholders. No decision seems to have been taken by the MIB on the TRAI's recommendations; however, owing to significant changes and technological advancements in the media and entertainment sector since then, the MIB again in February 2021 directed TRAI to provide a fresh set of recommendations on the same issue.

In response to the MIB's directions, TRAI issued the Cable TV Paper on 25 October 2021. It, *inter alia*, discusses the framework of traditional distribution of broadcasting in India and its development over the years, the state of competition in the TV distribution sector (particularly in light of the rapid growth of MSOs), and the practice of cable TV operators bundling their services with TSPs and internet service providers (***ISPs***) for the provision of telephone and broadband services. It also mentions briefly the advancement and growth of OTT services and in particular, the practice of TSPs bundling their services with VOD platforms.

Whilst the focus of the Cable TV Paper is the cable TV services industry, a large number of stakeholders (including service providers, associations, consumer advocacy groups and individuals) have, in their comments, urged TRAI to commence regulating the VOD segment.[12] In short, the following arguments have been expressed in these comments:

(i) VODs provide the same services as are provided by other distribution platform operators (***DPOs***) such as, MSOs, LCOs, and direct-to-home (***DTH***) service providers, and are therefore, in direct competition with the DPOs. Yet while the DPOs are subject to regulation in some form or the other, VODs are free from any regulatory oversight. It has been argued, *inter alia,* that VODs should either be categorised as a DPO by the MIB or should 'not

[12] The responses to the TRAI's Cable TV Paper are available here.

be allowed to provide linear content' because the current situation is leading to an asymmetric regulatory mechanism.

(ii) The recent surge in OTT platforms is turning out to be disruptive for the DPOs. Since OTTs provide the same services (as the DPOs) without being subject to any regulation, they can invest the surplus revenue on content and customer acquisition.

(iii) DPOs are already being heavily regulated. Any further restrictions, if imposed on MSOs or LCOs (in the absence of any regulation on OTTs), would only further affect the level playing field.

A total of 67 comments have been received by the TRAI. Despite the paper being mainly about the cable TV industry, 49 of these comments refer to OTTs and a majority of these ask for regulating the OTT services. Interestingly, as many as 5 Cable Operators Associations and 29 MSOs / LCOs have made identical or substantially similar submissions in regard to OTTs, raising questions about whether these identical / similar demands were mutually coordinated.

The primary basis for asking for regulation of VODs is that DPOs, who compete with VODs, are subject to a regulatory regime whereas VODs are not. From a competition perspective, the first question that must be answered here is whether VODs can really be considered a 'substitute' of DPOs? The stakeholders seemed to have used the concept of substitution rather loosely and ignored some crucial differences between the VODs and the DPOs such as that the content provided by the VODs is much wider than the linear content offered by the DPOs and the pricing model of the VODs is different from that of the DPOs. Further, the VOD platforms are not merely an intermediary or carriage provider like DPOs – several of them either create their own content or secure license of content from others and are therefore, the rightful owner or license holder of the featured content unlike in the case of DPOs. Viewed from the all-important end user perspective, the VOD platform is a far more efficient service provider meeting burgeoning consumer demand.

The Competition Commission of India (the ***CCI***) has also in the past observed that OTT applications are not substitutable with DTH and / or cable TV services for the following reasons: (a) the viewing experience of handheld devices does not compare to the viewing experience on TV sets; and (b) access to content through OTT modes requires high speed internet connection and a high level of data usage which makes it relatively expensive as compared to cable TV and DTH.[13] In another case, whilst opining on the substitutability of OTTs with DTH, the CCI observed, inter alia, that "*OTT services are specialised in nature as they are provided through internet and therefore, IPTV, OTTs etc. are not substitutable with DTH, as only limited content is available through them and the medium of providing these service is internet, which still has limited reach*"[14]. Accordingly, the CCI has considered OTT services as forming a separate market altogether.[15] While the CCI's observation at that time regarding "limited content" may have undergone change over the years, the other distinctions between OTT services and DTH remain largely valid. In fact, as per news reports, the CCI is planning to launch a study on film distribution through which it would also assess the impact that OTT platforms have had on film distribution.[16] This could potentially shed some light on the anti-competitive concerns, if any, that the VOD segment poses.

The European Commission (the ***EC***) has also held that within the pay-TV market, the retail supply of non-linear services and linear channels belong to two separate markets.[17]

In any case, the rationale for calling for regulation cannot simply be that because the DPOs themselves are being regulated, an upcoming and dynamic market like the VOD segment should also be burdened with economic regulation. If indeed the regulation of the DPOs is excessive and discriminatory (several comments have cited specific examples of alleged discriminatory treatment), the appropriate answer to the problem may lie in reviewing the extent, and the discriminatory elements, of the regulation themselves with the view to allowing more space to competition and innovation while protecting consumer demand and public interest. Any unwarranted regulatory intervention in the VOD space could unnecessarily restrict freedom of trade, create a chilling effect on innovation and adversely affect consumer welfare.

---

[13] Combination Registration No. C-2018/10/609 and C-2018/10/610; Combination Registration No. C-2016/12/463
[14] Combination Registration No. C-2016/12/463
[15] Combination Registration No. C-2020/05/745; Combination Registration No. C-2018/07/583.
[16] *CCI to launch study into film distribution and examine OTT impact on releases*, Business Standard, 2 August 2021, available here.
[17] Case No. COMP/M.5932

It is not uncommon for new technologies or products to cause disruption in existing markets and put new pressures on the players previously active in those markets. Economic history is awash with such examples like the effect that the emergence of e-commerce platforms like Amazon have had on brick-and-mortar retailers, the impact of app-based taxi aggregators like Uber and Ola on conventional taxi services, the way Airbnb has provided an alternative to the hotel industry, the growth of electric vehicles and the market share these are weaning away from traditional vehicles, and so on. On the other hand, these new services have brought immense convenience and choices to the consumers' doorstep. The response to these developments cannot and should not be to curb their growth and evolution, but to see how the traditional businesses should better cope with the new challenges by upgrading their own products and services and in fact, coopting the new products and services into their own offerings.

It is noteworthy that the consultation paper raises several technical antitrust-specific questions pertaining to the cable TV industry. These questions include, *inter alia*, how the relevant market should be defined, what should be the measure for determining market power of cable TV service providers, whether DTH services are a perfect substitute of cable TV services, and what type of economic tools should be used to measure market concentration. It would be unrealistic to expect that the target audience of the consultation paper would be capable of commenting on such technical questions. These questions are more relevant for *ex post* competitive analysis on a case-by-case basis rather than *ex ante* prescription of broad regulatory obligations. As part of its analysis in individual cases, the CCI is generally required to undertake a detailed examination of aspects such as, defining the relevant market, assessing market shares, market power and dominance. The CCI, being the competition regulator, would be in a better position to analyse these questions from a competition and economic standpoint as and when a specific case is taken up by it for examination.

It is possible the TRAI may be contemplating these questions for the purpose of putting some restrictions on mergers and acquisitions in the cable TV industry that in its view could create local monopolies but where these transactions fall below the thresholds of CCI jurisdiction. However, that would not justify imposing broad *ex ante* behavioral regulation on a sector like VOD services.

D. Whether the VOD segment needs to be economically regulated?

From a broader policy perspective, Government authorities are generally advised to adopt a cautious approach when considering bringing regulation in a market and, *inter alia,* strike a balance between regulation and competition, the point being that as far as possible, markets should be enabled to function independently and thereby produce the benefits that healthy markets are expected to bring like greater consumer welfare, enhanced innovation, lower prices and the like. It is recognized that unnecessary or excessive regulation can destroy many of these benefits and create avoidable regulatory barriers. There is also the ever-present risk of regulatory capture wherein the regulated entities in fact capture the regulatory apparatus at the cost of the consumers. Authorities are often encouraged to undertake a regulatory impact assessment (***RIA***) before adopting policy measures in a particular sector. RIA is considered as 'a key tool in delivering better regulation, supporting the government's aim of only regulating when necessary and when it is, to do so in a way that is proportionate to the risk being addressed and to regulate and simplify wherever possible'[18]. In some countries it is mandatory to specifically conduct an RIA before introducing any legislation or a regulation relating to economic activity. The intention is to carry out a cost-benefit analysis of the proposed measure and, in particular, its possible impact on the healthy functioning of competitive markets. The objective is to forbear from imposing regulation as much as possible on well-functioning markets.

TRAI itself, in its Cable TV Paper, 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*'.[19]

The current VOD landscape is extremely dynamic, innovation driven and highly fragmented. Its vast appeal is accounted inter alia by:

- provision of high value content at competitive prices;
- access to a wide variety of content from the consumers' standpoint;

[18] *RIA Guidance*, Department for the Economy, Government of United Kingdom, available here.
[19] Supra 2, paragraph 3.5.

- availability of original content (VOD providers like Netflix, Amazon, Disney+ Hotstar etc. produce their own content which is made available exclusively through their respective platforms); and
- multiple device compatibility (VOD content is accessible not just on TVs but on multiple devices like laptops, mobiles, tablets, etc.)

As per a market report[20], there are three factors that are prompting the widespread popularity of OTT platforms for consuming entertainment – a promising ecosystem, value-driven bandwidth costs and strong consumer demand. Consumers today have wide range of options and are empowered to access content across multiple platforms. They are screen agnostic and utilise multiple devices. While television remains the preferred choice for family entertainment, mobile is fast emerging as a default second screen to consume content of one's liking at their convenience. Users consume content based on their preferences and are adaptable to the best available technology solutions.[21]

The video streaming OTT services market in India has been predicted to grow exponentially from USD 1.5 billion in 2021 to USD 4 billion in 2025 and further to USD 12.5 billion by 2030.[22] It is being said that by 2024, the total revenue in the Indian video streaming OTT market will overtake that of countries like South Korea, Germany and Australia and the Indian market will jump to be the 6th largest in the world.[23] The userbase of the video OTT market in India is expected to be at 462.7 million by 2025[24] which indicates the growing significance and adoption of these platforms amongst users.

The intensely competitive VOD landscape in India is marked by the presence of a significant number of strong well-resourced entities competing for consumers, such as, Disney+Hotstar, Netflix, Amazon Prime, SonyLiv, Voot, Zee5, etc. Apart from these established players, a number of new VOD players (such as Lionsgate Play,

[20] *Indian OTT Platforms*, MICA – the School of Ideas, 2018, available here.
[21] *Id*.
[22] *India's OTT Market to Touch $12.5 billion by 2030*,Times of India, 18 July 201, available here.
[23] *Media Sector*, Invest India, available here.
[24] Supra 22.

Apple TV+, HBO Max, Discovery+, BookMyShow Stream, Biigbang Amusement) have recently entered, or are making their way into, the Indian market.[25]

The players mentioned above compete vigorously in terms of the subscription costs and the quality, type and variety of content. There are no barriers to entry and there is no exclusivity or lock-in involved as a consumer can subscribe to multiple VOD platforms or cancel the subscription at any stage. There are no switching costs either. Thus, there is no obvious ground calling for regulatory intervention at this stage.

It is not as if the VOD segment in India is entirely unsupervised. The IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, impose certain restrictions on OTT platforms in relation to featuring content which: (a) affects the sovereignty and integrity of India; (b) threatens, endangers or jeopardises the security of the state; (c) is detrimental to India's friendly relations with foreign countries; and (d) is likely to incite violence or disturb the maintenance of public order. The rules also require the establishment of a 3-tier grievance redressal mechanism.

In addition, all the central laws of the land such as the Indian Penal Code, Information Technology Act, Protection of Children from Sexual Offences Act, etc. are applicable to the VOD segment; the underlying provisions of the Constitution of India extend to all functionaries.

E. Position in other jurisdictions

The VOD segment does not appear to be subject to economic regulation in any of the major developed jurisdictions in the world (including the European Union, United States of America, United Kingdom, Australia and Singapore). In most jurisdictions, it is only the content aspect of VODs that is regulated which is on the basis of concerns relating to, *inter alia*, national interest, national security, public interest, a country's foreign relations, promotion or incitement of violence, racial or religious intolerance, and child pornography (which is in line with the restrictions imposed in India as well).

Moreover, certain jurisdictions, such as the European Union, require on-demand audiovisual media services to promote the production and distribution of local

[25] *The OTT War in India becomes intense in 2021*, Economic Times, 6 February 2021, available here.

(European) works by ensuring that their catalogues contain a minimum of 30% of such works and that they are given sufficient prominence. As far as licensing is concerned, most major jurisdictions do not have such prescriptions other than minimal requirements in Singapore and United Kingdom.

In Singapore, the government requires service providers of, *inter alia*, television services transmitted over the internet i.e. OTT television services in and / or from Singapore to apply for the 'Niche Television Service Licence'. This licence remains valid for a period of 5 years and does not require payment of any fee to the government[26].

In the United Kingdom, VOD services are required to follow a notification process with the Office of Communications (i.e. Ofcom) if they are based in the UK. In this regard, it may be noted that the UK government came out with a consultation on audience protection standards on VOD services on 31 August 2020, which was closed in October 2021.[27] This consultation mentions that the government is open to understanding whether or not to create a new licensing regime for VOD services or to adapt the current notification system already in place. Accordingly, there seems to be limited regulatory intervention in the VOD segment internationally as well.

Thus, imposing economic regulation on the VOD segment would make India an outlier in this field.

F. Conclusion

Regulation cannot and should not be an end in itself. Nor can it be the first tool in achieving an objective, which can often be achieved through a more hands-off pro-competition approach. It is important to keep in mind the broader policy perspective before considering regulation in any market. If the markets are functioning well on their own, regulation is not needed. Regulation could in fact curb the benefits of healthy competitive markets for consumers like lower prices, wider choices, and more innovative products and services.

[26] Infocomm Media Development Authority, OTT Niche TV Service License, available here.
[27] Government of UK, Audience Protection Standards on VOD Services, available here.

On the other hand, if extant regulation is perceived to be restricting healthy competition without commensurate benefits for consumers and enterprises alike, it may be worthwhile to revisit and review the current regulatory architecture.

The VOD segment is highly competitive and is witnessing enormous growth that is expected to continue unabated in the near and mid-term future as well. Its popularity with consumers is evident. It does not present any features that could possibly invite economic regulation.

It is also important to keep in mind that an empowered body under the Competition Act, 2002 *viz.* the CCI has the mandate to intervene in any sector, including the VOD segment, basis a complaint or even *suo moto* if indeed there is an instance of competition being suppressed through measures like a cartel or abuse of dominance. The VOD segment is thus best left to the forces of competition and to be dealt with by the existing law on competition.