

24th June, 2013

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Telecom Regulatory Authority of India,
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Dear Sir,

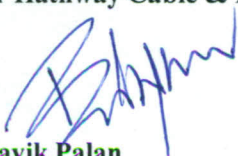
Sub: Response to Consultation Paper No. 5/2013 on Monopoly / Market dominance in Cable TV services.

At the outset we wish to thank the Telecom Regulatory Authority of India (**Authority**) for issuing and inviting stakeholder comments on Consultation Paper No. 05/2013 titled "Monopoly / Market dominance in Cable TV services" (**Consultation Paper**).

We enclose our comments on the issues for consultation stated in the Consultation Paper. Please note that we have prefaced our comments on the issues for consultation with certain preliminary submissions and request the Authority to treat them as a part of the overall response.

Should you require any clarifications / elucidations, please do let us know and we would be glad to assist.

Thanking You,
Yours Faithfully,
For Hathway Cable & Datacom Limited


Bhavik Palan
Executive Vice President – Legal & Regulatory

HATHWAY'S COMMENTS ON CONSULTATION PAPER NO. 5/2013

1. Preliminary submissions

A. Jurisdiction of the Authority

1.1 The Consultation Paper has been prepared based on the reference of the Ministry of Information and Broadcasting (MIB) requesting the Authority to provide its recommendations under section 11(1)(a) of Telecom Regulatory Authority of India Act, 1997 (TRAI Act) 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 imposed and what should be the form, nature and scope of such restrictions? Accordingly, amendments required in the Cable Television Networks (Regulation) Act 1995 and Rules framed thereunder may also be suggested." Specifically, section 11(1)(a)(iv) of TRAI Act relates to the Authority's function to make recommendations on "measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth of such services".

1.2 At the outset, it is pertinent to point out that the specific and limited function of the Authority to provide recommendations under section 11(1)(a)(iv) of TRAI Act does not relate to examining monopoly/market dominance in cable television services. The exclusive function and domain to examine issues pertaining to abuse of dominant position lies with the Competition Commission of India (CCI) under the Competition Act, 2002 (Competition Act).

The provisions of the TRAI Act also support the same wherein under section 14(a)(iii)(A) the Telecom Disputes Settlement and Appellate Tribunal does not have the power to adjudicate any dispute relating to Monopolies and Restrictive Trade Practices Act, 1969 (which was repealed by the Competition Act). The corollary extension is that whatever cannot be adjudicated by the Appellate Tribunal also *ipso facto* cannot be examined by the Authority. Further, the Competition Act came into effect after TRAI Act and provides under section 60 that it shall have effect notwithstanding anything inconsistent contained in any law for the time being in force.

1.3 The Competition Act empowers the CCI to examine any alleged violations of the Competition Act which cause or are likely to cause appreciable adverse effect on competition in India (AAEC). The statutory duty of the CCI is to *inter alia* promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India.

1.4 Thus, in view of the specific statutory provisions under the Competition Act to deal with the abuse of dominant position read with the duty cast on the CCI, it is respectfully submitted that the examination of any market dominance or monopolistic trends in the cable television services is under the exclusive domain of the CCI.

Further, it is respectfully pointed out that analysis relating to market dominance requires wherewithal in terms of capacity and resources which the Authority may not have, and therefore the determination of issues relating to market dominance are better left to the authority mandated to carry out such analysis and exercise – in this case the CCI.

1.5 In the past the CCI has actively pursued complaints in this sector (specifically the cable television and direct to home services market), and also imposed penalties on a multi system operator who was found to be abusing its dominant position. The Competition Act is a

contemporary and complete legislation whose object is *inter alia* to prevent practices having appreciable adverse effect on competition and to promote and sustain competition in markets. With such a legislation already existing, there is neither a need to nor is it advisable to bring about amendments to the Cable Television Networks (Regulation) Act, 1995 and rules framed thereunder. Such amendments, if brought about, will only give rise to jurisdictional conflicts amongst regulators which is not good for the cable industry.

Therefore, in our view there is no need for the Authority to examine any issue of monopoly/market dominance in cable television services and the same should be examined by the CCI on a case-by-case basis based on the specific facts before it.

B. Retrospective regulation is impermissible in law

- 1.6 Any *post facto* restrictions in a mature and broadly self-regulated cable television market will impinge on the settled law against retrospective regulation and affect the vested rights of the operators. Any new restrictions, on whatever basis be it area of operation or market share, will denigrate the free market licensing rules based on which the operators had first entered the market. The Authority has itself noted in paragraph 1.21 of the Consultation Paper that cable television subscribers constitute 60% of the total television homes in the country – any prospective restrictions imposed by the Authority after the issuance of license would be arbitrary and unfair and will impact a large number of operators and their subscribers.
- 1.7 Without prejudice, in the absence of any conclusive findings by the CCI on AAEC in cable television services (including the requirement for such *post facto* restrictions), the exercise purported to be carried on by the Authority is erroneous and impermissible in law.

In case the issue of monopoly/market power in cable television services had to be examined by the Authority, the proper course would be to refer the matter to CCI under the applicable provisions of the Competition Act.

C. Assumptions and data relied on by the Authority

- 1.8 With the introduction of digital addressable system (**DAS**) through amendment of section 4A of Cable Television Networks (Regulation) Act, 1995 read with the gazette notification of Ministry of Information and Broadcasting, the process of digitization has begun in phases and is expected to be completed by 31 December, 2014 across India.
- 1.9 In view of the problems noted by the Authority in paragraph 1.11 of the Consultation Paper, it is pointed out that until the process of digitization is completed (which will happen only once Phase III and Phase IV are completed i.e. on and after 31 December, 2014) a definite ascertainment of number of subscribers/households and the exact market share of each local cable operator/multi system operator/direct to home operator is not possible. Further a definite ascertainment of subscribers has actually and factually not even taken place in Phase I and II as all subscribers have till date not submitted duly complete Customer Application Forms with their complete address and other KYC details. Alternatively, the accurate ascertainment of the number of subscribers/households and the platform being used by them may entail a house-to-house survey without which the present data is unreliable and unsatisfactory.
- 1.10 Accordingly, it is respectfully submitted that the premise of the Consultation Paper regarding size of the markets, reach and dominant position of large multi system operators, and level of competition in business of multi system operators' is based on data which, by the Authority's own admission, does not take into account accurate data pertaining to the actual number of subscribers/households and the platform being used by them.

- 1.11 In paragraph 1.19 of the Consultation Paper the Authority has stated that monopoly/market dominance generally leads to deterioration in quality of service in the long run. Further, in paragraph 1.22 the Authority has noted that though direct to home competes with cable television, they are not perfect substitutes of each other and their operating circumstances and environment vary significantly.

In response, it is pertinent to point out that although technologically or operationally platforms such as direct to home and cable television may vary, purely from a customer's standpoint direct to home and cable television may be regarded as perfect substitutes of each other.¹ Given the market conditions and the increasing competition amongst all platforms there is constant pressure on the operators to improve their quality of service while keeping the charges low as any deviance may result in customers switching platforms and/or operators. In fact, the cable television average revenue per user in India (i) is amongst the lowest in the world, and (ii) apart from not increasing since its inception has never mirrored inflation. Further, in any event with the digitization process underway the distinguishing features between cable operators, multi system operators and direct to home operators are only likely to be technologically and operationally lessened.

- 1.12 The international practices/guidance referred to and relied by the Authority is largely based on the experience of the anti-trust regulator in those jurisdictions. It is respectfully submitted that the Authority has not provided for consultation or examined the practices adopted by the sectoral regulator of cable television services in those countries.
- 1.13 Without prejudice to the aforesaid, it is submitted that the need for examining any intervention from the Authority to curb any issue of monopoly/market dominance in cable television, in view of the digitization process and in absence of any accurate data on number of subscribers/households and the platforms used by them, should be deferred until the Authority obtains accurate and reliable data which can happen only after 31 December, 2014.

2. Response to issues for consultation

Q 1. Do you agree that there is a need to address the issue of monopoly/market dominance in cable TV distribution? In case the answer is in the negative, please elaborate with justification as to how the ill effects of monopoly/market dominance can be addressed?

- 2.1 In our view there is no need to address the issue of monopoly/market dominance in cable television distribution. Please refer to paragraph [1A] of the preliminary submissions for the justification of this view.
- 2.2 It is pointed out that the Authority has time and again emphasized that consumer protection is one of its focus areas. Accordingly, the Authority has taken several measures to protect the interests of consumers including ensuring quality of service provided and facilitation of cable television services at affordable prices. The Authority *inter alia* regulates the cost and security deposit of set top boxes, the mechanism of determination of retail prices of *ala carte* channels, and the number of free to air channels to be provided in the basic service tier.

¹ In *Europemballage Corpn and Continental Can Inc v. Commission*, [1973] ECR 215, the European Court of Justice enjoined the European Commission, for the purpose of delimiting the market, to investigate “[those] characteristics of the products in question by virtue of which they are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products”. Also, in *United Brands v. Commission*, [1978] ECR 207] wherein the applicant was contending that bananas were in the same market as other fruit, the European Court of Justice held that this issue depended on whether the banana could be “singled out by such special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible”.

2.3 With these existent safeguards of tariff regulation under the statutory power of the Authority, there is neither any scope of a customer being overcharged nor is it likely that the operator can make supernormal profit. Hence, under this regulated tariff mechanism in a competitive market where from a customer's standpoint direct to home and cable television are perfect substitutes, it is respectfully submitted that there is no requirement for the Authority to address the issue of monopoly/market dominance in cable television distribution.

Q 2. Do you agree that the State should be the relevant market for measuring market power in the cable TV sector? If the answer is in the negative, please suggest what should be the relevant market for measuring market power? Please elaborate your response with justifications.

2.4 No, the State should not be relevant market for measuring market power in the cable television sector. Please refer to paragraph [1C] of the preliminary submissions for the justification of this view.

2.5 As stated above, from a customer's standpoint the platforms such as cable television and direct to home are substitutable with each other. The direct to home operators and national multi system operators offer their services on a pan-India basis; the present market conditions ensure that even *inter se* amongst direct to home operators and multi system operators there is sufficient competition (on a national basis) to promote quality of services at low prices to the customers. Further, there are no legal or regulatory entry barriers for operating either as a local cable operator or as a multi system operator except the requirement of mandatory registration with the Authority.

Q 3. To curb market dominance and monopolistic trends, should restrictions in the relevant cable TV market be:

(i) Based on area of operation?

(ii) Based on market share?

(iii) Any other?

Please elaborate your response with justifications.

2.7 In our view there is no requirement for imposing any restrictions in the cable television market whether based on area of operation, market share or any other factor. Please refer to paragraph [1A] of the preliminary submissions for the justification of this view.

2.8 In view of the statutory powers under the Competition Act to deal with abuse of dominant position (which it has exercised in several cases) read with the duty cast on the CCI to prevent practices having AAEC, it is respectfully submitted that there is no requirement for the Authority to impose any restrictions in the cable television market. Further, any *post facto* restrictions in a mature and broadly self-regulated cable television market will impinge on the settled law against retrospective regulation and affect the vested rights of the operators.

In our view there is no requirement for a fixing a standard/parameter for imposing restrictions in cable television market and the same should be examined by the CCI on a case-by-case basis based on the specific facts before it.

Q 4. In case your response to Q3 is (i), please comment as to how the area of a relevant market ought to be divided amongst MSOs for providing cable TV service. Please elaborate your response with justifications.

Q 5. In case your response to Q3 is (ii), please comment as to what should be the threshold value of market share beyond which an MSO is not allowed to build market share on its own? How could this be achieved in markets where an MSO already possesses market share beyond the threshold value? Please elaborate your response with justifications.

Q 9. In case your response to Q3 is (iii), you may support your view with a fully developed methodology indicating a measure arrived at to determine market power and proposed restrictions to prevent monopoly/ market dominance in the relevant market.

2.9 Please refer to our response in 2.7 above.

Q 6. In case your response to Q3 is (ii), please comment on the suitability of the rules defined in para 2.26 for imposing restrictions on M&A. Do you agree with the threshold values of HHI and increase in HHI (X, Y and Delta) indicated in this para. If the answer is in the negative, what threshold values for HHI and delta could be prescribed for defining restrictions? Please elaborate your response with justifications.

2.10 In addition to our response in 2.7 above, it is respectfully submitted that Q.6 read with para 2.26 and table 2.3 of the Consultation Paper are not based on proper calculation of Herfindahl–Hirschman Index (HHI). For calculation of HHI the segregated market share of each player in the market needs to be known. Table 2.3 is State wise data of top five multi system operators and their contribution to HHI; however, the State wise data is itself premised on set top boxes seeded in 2-3 cities of each state where DAS has been implemented. In assuming that 2-3 cities of each State represents the entire State, the Authority has erred in computing HHI, without taking into account the features and limitations of different cities within a State. This erroneous computation of HHI illustrates that the analysis relating to market dominance requires wherewithal in terms of capacity and resources which the Authority may not have, and therefore the determination of issues relating to market dominance are better left to the authority mandated to carry out such analysis and exercise – in this case the CCI.

Q 7. Should 'control' of an entity over other MSOs/LCOs be decided as per the conditions mentioned in para 2.29? In case the answer is in the negative, what measures should be used to define control? Please elaborate your response with justifications.

2.11 The merger control provisions of the Competition Act mandate prior approval of combinations from the CCI and the purpose of CCI's review is to ensure that a proposed combination does not cause (or is likely to cause) an appreciable adverse effect on competition within the relevant market in India. The term 'combination' for the purposes of the Competition Act is defined very broadly, to include any acquisition of shares, voting rights, control or assets of an enterprise, or mergers and amalgamation between enterprises, subject to meeting the minimum monetary thresholds prescribed under section 5.

Accordingly, since there is already an existent mandatory notification requirement under the Competition Act, it is respectfully submitted that it is not necessary for the Authority to regulate either mergers and acquisitions or prescribe the conditions for evaluating control.

Q 8. Please comment on the suitability of the rules defined in para 2.31 for imposing restrictions on control. Do you agree with the threshold values of HHI and increase in HHI (X, Y and Delta) indicated in this para. If the answer is in the negative, what threshold values for HHI and delta could be prescribed for defining restrictions? Please elaborate your response with justifications.

Q 10. In case rules defined in para 2.31 are laid down, how much time should be given to existing entities in the cable TV sector (which are in breach of these rules as on date), for complying with the prescribed rules by diluting their control? Please elaborate your response with justifications.

2.12 Please refer to our response in 2.12 above.

Q 11. Whether the parameters listed in para 2.33 are adequate with respect to mandatory disclosures for effective monitoring and compliance of restrictions on market dominance in Cable TV sector? What additional variables could be relevant? Please elaborate your response with justifications.

Q 12. What should be the periodicity of such disclosures?

Q 13. Which of the disclosures made by the Cable TV entities should be made available in the public domain? Please elaborate your response with justifications.

2.13 Our response has been provided in the table below against each parameter listed in para 2.33 of the Consultation Paper:

<i>S. No</i>	<i>Parameter</i>	<i>Comment</i>
a.	Equity structure of the entity/company	In case of a company incorporated under the Companies Act, 1956, the details of the equity structure and shareholding pattern are filed by such company with the Registrar of Companies from time to time and are available in public domain (MCA21).
b.	Share holding pattern of the entity/company	
c.	FDI pattern of the entity/company	In case a company incorporated under the Companies Act, 1956 has foreign shareholders, the details of such shareholders are filed with the Registrar of Companies and are available in public domain (MCA21).
d.	Interests of the entity /company in other entities/companies engaged in Cable TV distribution	In case of a company incorporated under the Companies Act, 1956, the details of its subsidiaries, related party transactions and inter- corporate loans/deposits are provided in the form of annual report (comprising of auditors report, audited accounts and directors report) to the Registrar of Companies which are available in public domain (MCA21).
e.	Interests of other entities / companies, having shareholding beyond a threshold in the Cable TV entity / company under consideration	
f.	Shareholders agreements, loan agreements	The shareholders agreements and loan agreements are private commercial arrangements between the parties and it is respectfully submitted that the same should neither be shared with the Authority nor be made available to the public.
g.	Details of key executives and Board of Directors of the entity/Company	In case of a company incorporated under the Companies Act, 1956, the details of the board of directors are filed with the Registrar of Companies which are available in public domain.
h.	Details of Subscribers served	Apart from details on the total number of subscribers, the other details of each subscriber are confidential business information which should remain privileged and not be shared with the public.
i.	Details of areas of cable TV operation	Apart from details on the total number of subscribers, the other details of each subscriber are confidential business information which should remain privileged and not be shared with the public.
j.	Details of revenue earned from services provided through cable TV network	In case of private company incorporated under the Companies Act, the profit and loss account is filed with the Registrar of Companies but not made available in public domain. It is respectfully submitted that business-wise accounting and

	disclosure of revenue is not desirable.
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Q 14. What according to you are the amendments, if any, to be made in the statutory rules/ executive orders for implementing the restrictions suggested by you to curb market dominance in Cable TV sector?

2.14 In view of our preliminary submissions, it is respectfully submitted that the CCI is the appropriate authority to examine issues pertaining to monopoly/market dominance in cable television services and the Authority is not required to pass any orders in this regard.

Q 15. Stakeholders may also provide their comments on any other issue relevant to the present consultation.

2.15 We humbly request the Authority to grant us an opportunity to discuss our response in a meeting.