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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 30 of 2017

In Re:

Noida Software Technology Park Ltd.

Informant

And

Star India Pvt. Ltd.

Opposite Party No. 1

Sony Pictures Network India Pvt. Ltd.

Opposite Party No. 2

Indian Broadcasting Foundation (IBF)

Opposite Party No. 3

CORAM

Mr. Sudhir Mital
Chairperson

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

Justice G. P. Mittal
Member

Appearances:

For Informant

Mr. Vivek Chib, Advocate

Mr. Nikhil Pillai, Advocate

Ms. Ruchira Goel, Advocate

Mr. Asif Ahmed, Advocate

Mr. Ankur Jain, MD (NSTPL)

For OP-1

Dr. Abhishek Manu Singhvi, Senior Advocate

Mr. Gopal Jain, Senior Advocate



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Mr. Rajshekhar Rao, Advocate
Mr. Saikrishna Rajagopal, Advocate
Mr. Ram Kumar, Advocate
Ms. Sneha Jain, Advocate
Mr. Sidharth Chopra, Advocate
Ms. Ruby Ahuja, Advocate
Mr. Toshit Shandilya, Advocate
Ms. Madhavi, Advocate
Ms. Chinmayee, Advocate
Mr. Mihir Rale, Advocate
Ms. Shyamla, Head Business Wing
Mr. A.N. Haksar, Sr. Advocate
Mr. Akshay Nanda, Advocate
Ms. Sitwat Nabi, Advocate
Mr. Abhinav Meena, Advocate
Mr. Gururaja Rao, Sr. Director (Legal)
Ms. Sapna Chaurasia, Sr. Manager (Legal)
Mr. Abhishek Malhotra, Advocate
Mr. Aditya K. Singh, Advocate

For OP-2

For OP-3

Order under Section 26(1) of the Competition Act, 2002

1. Noida Software Technology Park Ltd. (hereinafter, the 'Informant') filed the present information under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the 'Act') against Star India Pvt. Ltd. (hereinafter, 'OP 1'), Sony Pictures Network India Pvt. Ltd. (hereinafter, 'OP 2'), Indian Broadcasting Foundation (hereinafter, 'IBF/ OP 3') (OP-1, OP-2 and OP-3 hereinafter collectively referred to as 'OPs'), alleging contravention of the provisions of Section 3(3), 3(4) and 4 of the Act.



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2. The Informant is a public limited company engaged in the business of satellite communication *viz.* broadcasting and data services. It holds a 'Head-End In The Sky' (hereinafter, 'HITS') license issued by the Ministry of Information and Broadcasting (hereinafter, 'MIB'), to establish, install, operate and maintain HITS project for digital cable services in India. Also, the Informant is a 'distributor' of TV channels under the Interconnection Regulations (hereinafter, 'IR') framed by the Telecom Regulatory Authority of India (hereinafter, 'TRAI').

3. As per the information OP-1, a wholly owned subsidiary of 21st Century Fox, is a broadcaster of TV channels as defined under Regulation 2(e) of the 2004 IRs. It generates around 20,000 hours of premium TV content every year, broadcasts 50 plus channels in 8 different languages, reaches 9 out of 10 cable and TV satellite homes in India and has significant presence in General Entertainment Channels (hereinafter, 'GECs') in Hindi as well as regional languages. Further, it has a leading sports network in the country with 10 channel properties and exclusive rights to most premium TV content. It is stated to be among the top three in Hindi, Bengali, Malayalam, Tamil, Telugu, Kannada and Marathi language broadcasters with an overall network share of 22-23% among Indian broadcasters. According to the information, its turnover has steadily increased from Rs. 5204 crore in 2013-14 to Rs. 10, 800 crore in 2015-16.

4. As regards OP-2, it is stated in the information that it is a subsidiary of Sony Pictures Entertainment and the owner/operator of Sony Entertainment Television (a popular Hindi-language based general entertainment television channel in Indian Subcontinent). It has significant presence in movies, sports and English language general entertainment. It is the exclusive broadcaster of sporting events such as Indian Premier League, FIFA, *etc.* Moreover, its partnership with ESPN (a leading U.S. based global cable and satellite sports television channel) and acquisition of Ten Sports Network, has made it a market leader in sports broadcasting industry as well.



5. According to the information, OP-3 is an apex organization of television broadcasters in India established in 1999 with the primary objective of promoting the interests of its members. Its members include major broadcasters (including OP-1 and OP-2) with more than 250 TV channels. In order to facilitate its members, OP-3 has set up various committees to protect and govern the interests of its members. All committees are chaired by the top management of the major broadcasters (including the OPs), who act in consultation with each other to enhance and protect interests of their key stakeholders. Apart from playing the role of industry association, OP-3 also holds 60% stake in Broadcast Audience Research Council of India (hereinafter, 'BARC'), which reviews popularity of channels across a number of genres broadcasted by various broadcasters.

6. It is stated in the Information that, as a distributor of television channel content, the Informant retransmits TV channel signals received from broadcasters such as OP-1 and OP-2, through satellite to Independent Service Operators (hereinafter, 'ISOs') or Local Cable Operators (hereinafter, 'LCOs'), who in turn, provide the signals to consumers *via* cable. The Informant is thus positioned similarly as MSOs except that unlike MSOs which retransmit signal to LCOs/ consumers via cable, HITS operator retransmits television content to its LCOs *via* satellite. Further, a HITS operator, under the extant regulatory framework can only retransmit the signals to an ISO/ LCO and not directly to consumers. In addition, it is stated by the Informant that HITS is a potentially new disruptive addressable distribution technology having significant advantages over the existing addressable distribution technologies *i.e.* Direct-to-Home (hereinafter, 'DTH') Operators and Multi-System Operators (hereinafter, 'MSO') as it can reach cable dark areas, which pan India MSO cannot.

7. The Informant has pointed out that under the 2004 IRs of TRAI all similarly situated distributors are to be offered the same non-discriminatory prices by the



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broadcasters in accordance with the Reference Interconnect Offer (hereinafter, 'RIO').

8. In this backdrop, the Informant has alleged that the broadcasters like OP-1 and OP-2, in concert with and facilitated by OP-3, are:
 - a. adopting a manipulative and illegal interpretation of the regulatory provisions of the IRs as a result of which two parallel regimes of interconnect agreements are in existence—one, the RIO based regime in which all distributors on RIO based agreements would be offered the same but extremely high and onerous commercial terms of the RIOs and second, a separate set of interconnect agreements with the preferred distributors that would not be on the RIO model, but rather on a fixed fee and/or Cost-Per-Subscriber ('CPS') deal at highly attractive commercial terms, which OPs claim are outside the purview of regulatory scrutiny;
 - b. framing and pricing their TV channels in their RIOs in such a manner so as to make it commercially unviable for any distributor operating on the RIO based agreements to effectively compete in the market;
 - c. refusing to disclose the rates at which TV channels are offered to distributors who enter CPS/ fixed fee agreements; and
 - d. entering into side agreements for carriage and placement with vertically integrated as well as certain preferred distributors, so as to drastically bring down the costs of acquisition of their TV channels for such distributors.

9. The Informant has averred that the above actions of OPs, apart from being in violation of the non-discriminatory mandate of the Regulatory framework, as held by the Hon'ble Telecom Disputes Settlement and Appellate Tribunal (the 'TDSAT') in '*M/s Noida Software Technology Private Limited v M/s Media Pro Pvt. Ltd. & ors.*' (Petition No. 295(C)/2014 decided on 07.12.2015) are also in violation of the provisions of the Act.



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10. The Informant has alleged that OPs by their concerted systematic tactics of price discrimination in favour of their preferred distributor(s) are engaging in practices that are in contravention of the provisions of Section 3(3), Section 3(4) and Section 4(2) of the Act.

Allegations under Section 3(3) of the Act:

11. Alleging contravention of the provisions of Section 3(3) of the Act, the Informant has *inter alia* stated that there is concerted action by broadcasters under the aegis of the OP-3 to determine the prices at which their channels are offered to distributors, and to determine the supply of their services in the market. In this regard, the Informant has pointed out that the nomenclature, mandate and membership of some of the committees set up by OP-3 in conjunction with the broadcasters shows that these committees are acting as a facilitator for the major broadcasters, including OP-1 and OP-2, to come to a meeting of mind and understanding regarding their commercial arrangements at different levels of the supply chain within the broadcasting industry as well as to collusively boycott new entrants and potentially disruptive distribution technology such as that of Informant, under the garb of regulating the conduct and affairs of OP-3.
12. In addition, the Informant has referred to similar comments given by the three OPs during the consultation process for the Draft Telecommunication (Broadcasting and Cable Services) Interconnection (Addressable Systems) Regulations, 2016, and has averred that the fact that each of the OPs have taken the same objections using same words is clearly indicative of collusion among the OPs.
13. Citing the above facts and circumstances, the Informant has alleged that the OPs have tacitly come together to illegally boycott the Informant and control/ dictate



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the price at which TV channels are being sold and purchased in the broadcasting market with the intention to both maximize their advertising revenues and to benefit their vertically integrated and preferred distributors. It is thus submitted that the actions/omissions of the OPs are in violation of Section 3(3) of the Act.

Allegations under Section 3(4) of the Act:

14. Further, the Informant has alleged contravention of Section 3(4)(d) read with Section 3(1) of the Act by OPs by way of both constructive refusal to deal as well as outright refusal to deal.
15. Explaining the allegation, the Informant has submitted that considering the intellectual inputs, exclusive rights (sports), huge commercial cost involved in re-creating the products and consumer preferences built over a significant period of time, the products of OP-1 and OP-2 are unique in nature and cannot be substituted with any alternative product. Thus, for the Informant to survive in the broadcasting eco-system, the product of the OPs are 'essential/irreplaceable inputs'. It is alleged that the agreements amongst the OPs whereby they refuse to deal with the Informant at par with similarly situated distributors, has hindered entry of new entrants and foreclosed competition. It is alleged that OP-1 and OP-2 facilitated by OP-3, are resisting the entry of the Informant because they operate in the downstream market also, through vertically integrated entities that directly compete with the Informant. That apart, broadcasters have a vested interest in the manner the downstream market operates as majority of broadcaster's revenue comes from advertising revenue, which is maximized by joining hands with such distributors who are willing to systematically violate various provisions of 2004 IRs which mandate pro-competitive conduct on part of the broadcaster and distributors.
16. The Informant has alleged that by offering extremely onerous and unreasonable terms to the Informant *vide* their RIO, OP-1 by agreement with the Informant



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dated 01.10.2013 and 01.08.2014 and OP-2 by agreement with the Informant dated 31.10.2013 and 25.11.2014 indulged in 'constructive' refusal to deal. Both OP-1 and OP-2 refused to offer rates, which they were offering to other similarly situated distributors who were directly competing with the Informant in the downstream market. Due to the aforesaid refusal of the OPs, the Informant's product became hugely unviable to various LCOs who refused to do business with the Informant.

17. The Informant has alleged that apart from 'constructive' refusal to deal, there was also actual and 'outright' refusal to deal by OP-1. It is averred that in 2014, when OP-1 published a new RIO on its website alongwith an incentive scheme offering a wide range of discounts to distributors based on various factors applicable to all digital addressable cable systems (which includes HITS operator), it excluded HITS operators. Further, OP-1 deliberately chose not to inform the Informant of their newly published RIO and when the Informant approached the OP-for the same, it was only met with silence from OP-1. However on 12.06.2015, OP-1 orally undertook to extend the incentive schemes to the Informant provided it cleared the outstanding dues of OP-1. Believing the representation to be true, the Informant *vide* an email dated 13.06.2015 offered to clear its dues in 12 instalments; however OP-1 instead of making the incentive schemes available to the Informant issued disconnection notices to the Informant.
18. The Informant has submitted that OP-1's refusal to extend the newly published RIO along with its incentive scheme that it offered to all other distributors in the downstream market amounts to an outright refusal to deal which contravenes the provisions of Section 3(4)(d) of the Act.

Allegations under Section 4 of the Act:



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19. The Informant has also levelled allegations of abuse of dominance by OP-1 and OP-2 in the relevant market. Delineating the relevant market, the Informant has submitted that OP-1 and OP-2 are operating in two different markets pertaining to production and distribution of broadcasting services. According to the Informant, at the broadest level the relevant product market could be defined as the market for “*distribution of TV channel signals*”; and based on the fact that OP-1 and OP-2 are both broadcasting companies the relevant market could be defined as “*the market for broadcasting*”. However, the Informant has suggested that given the unique structure of broadcasting sector it is important that considerations such as genre, consumer preferences, regulatory trade barriers *etc.* may also be taken into account while delineating the relevant product market.

20. With respect to dominance, the Informant has submitted that OP-1 and OP-2 being major broadcasters in various regions across the country and owing to the premium TV content owned by them, are one of the most popular channels with the highest ratings in terms of viewers' across various genres, which in itself is demonstrative of the market power possessed by them. Further, OP-1 and OP-2 individually enjoy dominant position in different relevant markets, categorized by the genre of TV content provided. This is more so in cases of premium TV content such as live sporting events *e.g.* ICC Cricket World Cup, Indian Premier League, FIFA World Cup, Wimbledon series *etc.* which are hugely popular in India and for which the OP-1 and OP-2 have exclusive broadcasting rights which makes them virtually indispensable in upstream market.

21. The Informant has alleged that OP-1 and OP-2 have abused their dominant position in several relevant markets to systematically deny market access to the Informant, thereby restricting the provision of services and restricting the development of HITS technology to the prejudice of both the Informant and the



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end consumers. Accordingly, it is submitted that the OPs have through their practice of forcing the Informant and other similarly placed distributors to enter into unfair and discriminatory terms and conditions under the RIO have contravened the provisions of Section 4(2)(a)(i), 4(2)(b)(i), 4(2)(b)(ii) and 4(2)(c) of the Act.

22. Based on the above facts and allegations, the Informant has, *inter alia*, prayed for initiation of an investigation against the OPs under Section 26 (1) of the Act, and subject to the conclusion arrived at in the investigation (i) declare the practices of the OPs to be in contravention of provisions of Sections 3 and 4 of the Act, (ii) direct the modification of RIO agreements submitted by the OPs in terms of provisions of Section 27 of the Act, (iii) direct the OPs to furnish an undertaking for providing their services to all distributors on a transparent and non-discriminatory basis and to provide distributors with a non-confidential range of commercial terms provided to distributors on the basis of mutual negotiations, (iv) impose penalty on the OPs in terms of Section 27 of the Act and (v) pass any other direction that the Commission may deem appropriate.
23. The Commission considered the material placed on record by the Informant and also heard the parties. The Informant was heard on 12.09.2017, OP-2 and OP-3 on 01.11.2017 and OP-1 on 27.02.2018.
24. OP-1 in its submissions contended that the Informant by invoking the jurisdiction of the Commission is indulging in forum shopping. The Informant had approached the sectoral regulator/ TDSAT on a similar set of facts/ cause of action and the matter has already been adjudicated *inter-se* the parties by TDSAT *vide* Petition no. 166 (C)/ 2013 and 295(C)/ 2014. Moreover, the essence of the Informant's case before the Commission is regarding pricing and manner of offering, which lies in the domain of sectoral regulator TRAI and is, therefore, an occupied field. It is alleged that the instant information is an



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indirect attempt to bypass and circumvent the sectoral regulator and essentially challenge RIO rates before the Commission, which in fact falls within the domain of TRAI.

25. Further, OP-1 has averred that the carriage and placement fee are also under the TRAI's purview. Under the extant TRAI regulations, if any operator demands carriage fees, it is open to the broadcaster to deny signals to the operator. It is only the quantum of carriage and placement fee that are under regulatory forbearance. From a commercial standpoint, these fees are a factor of subscriber base and market position. In the instant case, neither the Informant's subscriber base nor its market position would make it commercially feasible for any broadcaster to pay carriage and placement fee to it. Moreover, for any issue relating to these fees the appropriate regulator ought to be TRAI.
26. OP-1 has alleged that Informant as a retaliatory measure against Star has initiated this case as it has failed to settle the unpaid subscription which was admitted and adjudicated by TDSAT and subsequent disconnection of its channels in April 2016 due to non-payment of subscription fees. Also, the Informant has initiated (a) Contempt proceedings before TDSAT challenging Star India's RIO and (b) Criminal Complaint against senior employees of Star before CMM, Patiala House.
27. OP-1 has averred that the ingredients of Section 3(3), 3(4) or 4 of the Act are not met by the Informant, in absence of which investigation is not required to be called for.
28. With respect to the allegations under Section 3(3) of the Act, OP-1 has submitted that the Informant has falsely accused OP-1 of being in collusion with OP-2 and OP-3 and intentionally boycotting an innovator/ market disruptive technology. In fact, in 2012, OP-1 had offered a fair negotiated deal to the



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Informant at rates similar to those offered to new MSOs/ distributors, which was unacceptable to the Informant.

29. Further, OP-1 has also rebutted the allegations raised by the Informant regarding collusion by way of formation of an association and its sub-committees. OP-1 has stated that competition law does not prohibit enterprises from forming trade associations or interacting with their competitors through trade associations. Further, it is common for trade associations to constitute sub-committees to effectively deal with subject matters that are of interest to its members. Thus, mere existence of an association cannot be considered as violation of competition law unless there is cogent evidence on record to prove existence of a cartel. In the instant case, the Informant has not presented a shred of evidence to prove the existence of cartel or collective boycott by the OPs. It is averred that an association and OPs simply taking a joint/ similar stance in relation to industry/ policy issues cannot be considered violation of competition law. Moreover, there is no scope of cartelisation as the broadcasting sector is heavily regulated and all the aspects of broadcaster's business are regulated by TRAI and adjudicated by TDSAT. Further, OP-1 has denied that it decides on distribution and supply of television channels through OP-3.
30. With respect to the allegations of constructive refusal to deal under Section 3(4) of the Act, OP-1 has submitted that the Informant misrepresented that Media pro/Star India had offered TV channels to the Informant at exorbitant RIO rates which amounts to constructive refusal to supply. OP-1 has submitted that it did not refuse to deal but rather fairly negotiated with the Informant.
31. OP-1 has submitted that it does not have the economic incentive or ability to foreclose the Informant or other DPOs. There is no incentive to foreclose as it is not vertically integrated. As per extant MIB guidelines, foreign broadcasters such as OP-1 are prohibited from owning or controlling distribution platforms.



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Also the broadcasting sector is highly regulated and TRAI has put in sufficient regulatory checks on broadcaster's bargaining power. '**Must provide**' obligation by TRAI mandates the broadcasters to provide their channels to the distributors/MSOs. However, there is no such equivalent obligation on distributor to carry the channels of the broadcaster. In addition, there is also no incentive to foreclose as advertising revenue constitutes a major portion of the broadcaster's earnings. Hence, it is in the interest of the broadcaster that its content reaches as many eyeballs as possible, including new entrants, who may provide signals to subscribers beyond the reach of existing operators.

32. With respect to the allegations of abuse of dominance, OP-1 has submitted that the relevant product market should be defined as the market for the supply of TV channels and not limited to genre-wise classification. However, if genre wise classification is considered appropriate, even then OP-1 is not dominant in the market as there are approx. 866 channels in the market. In GEC genre, OP-1 has a meagre market share of 20% with other strong competitors like Zee, V18 and Sony. With respect to sports genre, Prasar Bharti exercises significant constraint on Star India. Moreover, the market share in television business is ephemeral as it fluctuates on a weekly/ monthly basis, which shows level of competition as well as substitutability between channels.
33. Further, OP-1 has contended that even if it is considered dominant in any of the genres as alleged by the Informant, there is no abuse. It has neither unfairly discriminated between the Informant and other larger distributors such as TataSky, Hathway, Siticable, *etc.* nor has it constructively refused to deal by quoting exorbitant RIO rates (that are approved by TRAI).
34. With respect to the allegation that OP-1 had offered differential pricing/ terms and conditions to the Informant *vis-à-vis* other larger distributors, OP-1 has submitted that it is a settled position in competition law that an enterprise, even



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if it is dominant, has the right to determine the terms and conditions of offering its product or services. Merely charging differential pricing to customers is not a violation of competition law. The Commission, in *Case no. 63 of 2014* titled *Saurabh Tripathy Vs Great Eastern Energy Corporation Limited*, has observed that:-

“.....lack of uniformity in itself cannot be a ground to hold discrimination unless the same is demonstrably shown to be a result of abuse treating similar set of customers differently.”

In the instant case, the Informant and other larger distributors are not similarly placed on the following criteria: (a) subscriber base; (b) channel take-off; (c) geographic reach ; (d) location of the channels, *etc.*

35. Regarding the allegation of offering low discount price to the Informant, OP-1 has submitted that broadcasting is a two sided market *i.e.* subscription and advertisement, with a ratio of 30:70. A large subscriber base assures broadcaster of wider geographic reach and larger channel take-off, which in turn would increase broadcaster’s revenue; hence, broadcaster is able to cross-subsidise and offer larger discount in the subscription rate. A small distributor like the Informant would not have the same reach or channel requirement and therefore there is no scope for broadcaster to earn revenue through advertisement revenue. So, the broadcaster would offer a lower discount to smaller player. This practice is not discriminatory as held by the Commission while assessing different discounts offered to the OEMs and distributors by Intel in *Case no. 48 of 2011* titled *ESYS Information Technologies Pvt. Ltd. v Intel Corporation & Ors.*, wherein it was observed that:-

“.....Any lower price given to the OEMs on account of volume discount or nature of their relationship is a reasonable business practice which cannot be said to be unfair and discriminatory”.



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36. Further, as regards the allegation that RIO rates are exorbitant and, therefore, an offer to supply channels on RIO rates by OP-1 amounts to discrimination/constructive refusal to deal, OP-1 has submitted that the RIO rates in the broadcasting sector is the regulated wholesale price, approved by TRAI. In fact, TRAI has frozen the pricing of TV channels (as of 2003) and the industry practice has been to sign a RIO based agreement, whenever negotiations fail.
37. During the hearing on 01.11.2017, the learned counsel for OP-2 refuted the allegations of collusion, constructive refusal to deal and abuse of dominance.
38. Regarding allegation of collusion, OP-2 submitted that concert cannot be deduced amongst OPs merely because of similar interpretation of law by them. On allegation of refusal to deal, OP-2 submitted that as it has no vertical integration, it has no incentive for constructive refusal to deal. Further, it has stated that although in mutually negotiated agreements the rates are different from the RIO rates on account of discount schemes (volume discounts), there was no occasion for OP-2 to refuse to deal with the Informant on that basis as it was never approached by the Informant for a mutually negotiated agreement.
39. With respect to allegation of abuse of dominance, OP-2 submitted that dominance of OP-2 is not shown in the information. In terms of channels, out of around 877 channels, it has only 31 channels. Further, according to the market shares determined by Broadcast Audience Research Council of India (hereinafter, 'BARC') based on viewership, average viewership of its channels ranged between 10 to 11 percent as against viewership of around 20 percent of OP-1's channels. If seen in this context, no case of dominance is made out against OP-2. Also, no case of collective dominance can be made out under the Act.



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40. OP-2 has averred that irrespective of issue of dominance, the allegation of discrimination against it is unfounded. It has no issue with HITS technology and provision of its channels to the Informant would mean more viewership and more advertising revenue. However, in the instant case the problem is of default in payment by the Informant. OP-2 has submitted that until 31.03.2016, it had a RIO based agreement with the Informant, under which the Informant was in default of payment since April 2014. Accordingly, it stopped supplying its channels to the Informant. Even the ‘must provide’ obligations of TRAI do not apply on the broadcaster if the distributor is in default.
41. In addition, OP-2 has submitted that in view of the judgement of the Hon’ble Bombay High Court in *Vodafone India Limited & Ors. v. The Competition Commission of India & Ors.*[2017]144SCL580(Bom.), the Commission ought not to have taken cognisance of the information.
42. The learned counsel for OP-3 submitted during the hearing that the sphere of activity of broadcaster and the association is distinct. The association has no role to play in the fact whether a broadcaster enters into a contract with distributor/ operator on RIO based agreement or mutually negotiated agreement. IBF has no control over pricing of channels, deals and discounts offered by the broadcaster or the decision with whom to enter into contract. Its primary objective is to promote the interests of its members from the broadcasting industry. It plays a critical role in building consensus on major issues across the industry. This cannot be considered a violation of the competition law. The Commission has also observed this in *Advertising Agencies Guild v IBF & its members* (Case no 35 of 2013). Thus, given the role of association, when it submits a response, its language and that of the broadcasters whose position it is broadcasting can be identical, as it circulates the same among its members who can then use the language as it is.



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43. The Commission has considered the background of the instant matter as well as the allegations of the Informant. It is evident that though the Informant has levelled the allegation of contravention of Section 3(3), 3(4) as well as Section 4 of the Act, its primary grievance is with respect to price discrimination by OP-1 and OP-2 in supply of television content to it in comparison to similarly placed MSOs/ distributors/ operators. It is observed that the various allegations of Informant under Section 3(4) regarding refusal to deal and under Section 4 of the Act regarding discriminatory pricing *etc.* find basis in the same issue *i.e.* price discrimination.
44. Dealing first with the allegation under Section 3(3) of the Act, it is observed that the Informant has alleged concerted action by the OPs under the aegis of OP-3 to determine not only prices at which their channels are offered to distributors but also supply of its services in the market. A perusal of the information reveals that these are mere conjectures, unsubstantiated by credible evidence. Cartelisation cannot be inferred merely on the basis of formation of an association by members of an industry and nomenclatures of sub-committees of association. Also, an association favouring a stand taken by its members *i.e.* OP-1 and OP-2 in Petition no. 295(C) of 2014 before the TDSAT and consultation process of TRAI, cannot be considered anti-competitive if it is *bonafide* and not sham or frivolous. There is lack of evidence to this effect. Further, there is no specific evidence with respect to sharing of sensitive price and commercial information among the members, which could indicate meeting of minds. Accordingly, the Commission is of the view that no case of contravention of the provisions of Section 3(3) of the Act is made out from the information furnished by the Informant.



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45. Now, coming to the issue of price discrimination, the Commission notes that the Informant has alleged price discrimination by OP-1 and OP-2 under Section 3(4) as well as Section 4 of the Act. Since the Act does not envisage the concept of collective dominance, Section 4 the Act would not be applicable in the instant case. Thus, the only provision under which the allegations of the Informant can be examined is Section 3(4) of the Act. However, even for examining conduct under Section 3(4) of the Act, determination of market power of the firm alleged to be indulging in price discrimination has to be considered first, for which the market is required to be identified.
46. Considering the facts, allegations and the business of the OPs in the instant case, the Commission finds that at broad level the market can be considered as the “*market for broadcasting of television channels in India*”. However, in this market narrower markets on the basis of ‘genres’ and regional preferences also exist.
47. It is observed that in the market for broadcasting of television channels in India, both OP-1 and OP-2 are leading broadcasters owning premium content and offering some of the most popular television channels with high ratings in terms of viewership across various genres. As such, no distributor can operate in the market of distribution of television channels without offering channels of OP-1 and OP-2. It is noted from information available in public domain¹ that OP-1 owns more than 60 channels including Star Plus, one of India’s top Hindi General Entertainment Channels. Also other popular channels like Star Bharat, Star Gold, Channel V, Star World, Star Movies, Movies OK, Star Vijay, Asianet, Asianet Plus, Star Suvarna, Star Maa, Star Maa Gold etc. are offered by it. Its sports portfolio, Star Sports, comprises around 12 channels. It is noted that OP-1 has a major presence in broadcasting of sporting events, most

¹ <http://www.startv.com/>



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notably after acquisition of IPL media rights for 2018–2022². OP-2 broadcasts around 30 channels including Sony Entertainment Television, also one of India's leading Hindi General Entertainment television channels. It owns other popular channels like MAX, SAB, PIX, AXN, BBC Earth, *etc.* Its sports Network comprises around 11 sports entertainment channels like Sony ESPN, Sony TEN *etc.*³.

48. Given the bouquet of channels owned by OP-1 and OP-2, it is obvious that they enjoy significant market power. Both are present across genres and broadcast channels with highest viewership. OPs have argued that since they compete in a market of around 900 channels, they cannot be considered as having any market power. This argument may be attractive from the broadcaster's perspective. However, if the same were to be examined from the lens of the distributor/ consumer, it would not hold good. This is so because if a distributor does not offer channels of OP-1 and OP-2, very few consumers would be willing to procure channels from it, making its business unviable. Overall, the market position of OP-1 and OP-2 as leading broadcasters with a portfolio of channels, which few others can match and which consumers of broadcasting services infallibly demand from the distributors, cannot be disputed.
49. However, OPs have argued that their market shares do not show that they are in a dominant position or have any significant market power. In this regard, the Commission observes that market share is only one of the factors that indicates market power. Apart from market share, there are several other factors like size and resources of the enterprise, size and importance of the competitors, economic power of the enterprise including commercial advantages over competitors, dependence of consumers on the enterprise, *etc.* which need to be

² <https://www.thehindu.com/business/Industry/star-india-bags-indian-cricket-home-series-media-rights/article23445005.ece>

³ <https://www.sonypicturesnetworks.com/overview>



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considered for the purpose. Such factors have to be considered in conjunction with market share of OP-1 and OP-2 as compared to other broadcasters to ascertain market power.

50. On considering the entire portfolio of channels of OP-1 and OP-2, the Commission finds that out of the entire market for broadcasting of television channels in India, the two genres in which both OP-1 and OP-2 have a significant market power is the genre of ‘Sports’ and ‘Entertainment’. In Sports, these two broadcasters between themselves have live broadcasting rights of almost all the major sporting events including Indian Premier League (‘IPL’). In September 2017, Star acquired live global and digital broadcasting rights of IPL⁴. It now has television, digital, Indian and global media rights to the IPL for the next five seasons. Given that it already had television rights to all tournaments organized by the International Cricket Council, including the cricket world cup and all matches organised by the Board of Control for Cricket in India (BCCI), the acquisition of IPL rights gave OP-1 a virtual stranglehold over all cricket media rights in India. Apart from Cricket, OP-1 also owns flagship properties across other top sports namely Football, Kabaddi, Tennis and Badminton.
51. Till 2017, OP-2 had held the media rights for IPL for past 10 years. Now, it has the media rights of seven international cricket boards including the top three cricket boards *i.e.* England and Wales, Australia and South Africa as well as those of Sri Lanka, Pakistan, West Indies and Zimbabwe. The media rights of England Cricket Board (‘ECB’) would allow OP-2 to broadcast ECB matches in India, along with Bangladesh, Pakistan and Sri Lanka. These rights include both television and digital streaming of men’s and women’s international test matches, T20 Internationals and one-day internationals, played in

⁴ https://www.business-standard.com/article/companies/star-india-set-to-pip-sony-for-india-cricket-broadcast-crown-117090400740_1.html



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England. Apart from Cricket, it also has rights of FIFA (Fédération Internationale de Football Association), WWE (World Wrestling Entertainment), UFC (Ultimate Fighting Championship) and many other sporting properties that have allowed the network to position as a one-stop destination for sports.

52. Further, it is observed from the decision of the Commission in Combination case C-2016/09/436 that in 2016 OP-2 had *inter-alia* acquired sports broadcasting business consisting of broadcast distribution and syndication of sports content on the Ten1 HD, Ten Golf HD, Ten Cricket (Middle East), Ten 1, Ten 2, Ten 34 and Ten Cricket (Caribbean) channels (collectively 'Ten'), which reduced the number of competitors in the market for acquisition of rights for broadcasting of sports events in India from three *i.e.* OP-1, OP-2 and Ten to two *i.e.* OP-1 and OP-2. Further, it is noted that in terms of Gross Rating Points (for the period starting from week 41 of 2015 to week through week 34 of 2016), the combined market share of OP-2 and Ten was observed to be in the range of 40-50 percent, whereas market share of OP-1 was observed to be in the range of 40-45 percent. Thus, from the bare perusal of the said order of the Commission, it is evident that OP-1 and OP-2 are the only two significant players in the Sports genre.
53. Another, genre in which both OP-1 and OP-2 have significant market presence is the 'Entertainment' genre. In this genre, OP-1 broadcasts more than 48 channels in seven languages across various categories such as soaps, reality, news and films. It reaches more than 600 million viewers every week across India and 100 other countries. OP-1 has a leading presence in Hindi Entertainment as well as regional broadcasting. OP-2 is also owner of Sony Entertainment Television (SET) one of India's leading entertainment channels. Since its inception in 1995, it has created popular shows that have managed to attract large audiences and offers a bouquet of shows that caters to all age



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groups. It reaches over 42 million households in India and 300 million viewers worldwide, which includes countries and regions such as the US, the UK, Africa, the Middle East, Europe, Canada, Australia, New Zealand, Singapore, Nepal, Bangladesh, Maldives and Malaysia.

54. Further, from the information in public domain, it is observed that in terms of size and resources, OP-1 is a fully owned subsidiary of 21st Century Fox⁵. It also manages a portfolio of business ventures including DTH operator Tata Sky, cable system Hathaway, channel distributor Star Den, news channel operator MCCS, the film production and distribution business Fox STAR Studios India. Further, OP-2 is a subsidiary of Sony Corporation which owns and operates the Sony Entertainment network of television channels⁶. Sony Entertainment Television is also a part of the network of channels distributed by The One Alliance - a joint venture (JV) between Multi Screen Media Pvt Ltd and Discovery Communications India⁷.
55. Thus, on considering the size and importance of OP-1 and OP-2 as compared to their competitors, the commercial advantage enjoyed by them over their competitors because of their portfolio of channels in sports and entertainment genre, dependence of consumers on the OP-1 and OP-2, *etc.* it is evident that OP-1 and OP-2 enjoy significant market power in the relevant market of 'Sports' and 'Entertainment' genre in the 'territory of India'.
56. Having found OP-1 and OP-2 in a position of significant market power, the Commission now proceeds to examine the allegations against them of price discrimination. It is observed that, as regards price discrimination, the Informant has submitted that since a major source of revenue for the broadcasters is the

⁵ <https://www.ibef.org/industry/media-entertainment-india/showcase/star-india>

⁶ <https://www.sonypicturesnetworks.com/overview>

⁷ <https://www.ibef.org/industry/media-entertainment-india/showcase/multi-screen-media-pvt-ltd>



advertising revenue, they try to maximize the same by maximizing their subscriber reach. To this end, fee charged or the pricing of channels by the broadcasters varies from distributor to distributor. The manner in which price discrimination is implemented is that the broadcasters enter into an agreement with their 'favoured' distributors whereby they pay them a 'carriage' fee to carry their channels, as well as 'placement' fee for placing their channels at certain prominent positions in the distributors' bouquets. It is alleged that the agreement for carriage and placement fee are not within the regulatory scrutiny. These fees are never actually reflected in, or form a part of, the Interconnect Agreements that are required to be filed with TRAI. Thus, the broadcasters, under the garb of complying with the regulatory framework, are able to distort the real commercial arrangement with their 'favoured' distributors. It is alleged that on many occasions, the carriage and placement fees paid by broadcasters completely offsets, or sometimes is even more than the license fees charged to certain distributors, which results in significant reduction in the net cost to the 'favoured' distributor for carrying a particular broadcaster's channels.

57. Another manner in which price discrimination is alleged to be practiced by broadcasters is by resorting to bundling and making bouquets of channels, whereby they 'push' unpopular channels with popular channels. Once the channels are sold in bouquet, the broadcaster's channel (even if it is unpopular), is automatically switched 'on' in the subscriber's Set Top Box, thereby garnering deemed 'eyeballs' for advertising revenue. It is alleged that the pricing of the channels in bouquets and pricing of the same channels on *a-la-carte* basis is done in such a manner that it renders *a-la-carte* choice illusory. Further, the individual broadcasters in their mutually negotiated non-RIO based agreements bundle or put in bouquets of their own channels to sell to certain distributors at prices that are far more attractive than *a-la-carte* RIO prices of same channels, which in turn, incentivises the distributor to price its channels at the retail level such that subscribers would be forced to opt for the bouquets as



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opposed to individual channels. This increases the subscriber fee for the broadcaster because once the distributor acquires a broadcaster's channels in a bouquet it must pay per subscriber for the entire bouquet.

58. The Commission notes that these issues were raised by the Informant before the Hon'ble TDSAT alleging non-adherence to non-discriminatory mandate under the Interconnect Regulations of TRAI. Hon'ble TDSAT in its judgement in Petition no. 295 (C)/ 2015 had noted the irregularities in the conduct of broadcasters and to ensure compliance with the non-discriminatory mandate of the Regulatory Framework, ordered that all future Interconnect Agreements would have to be based on the said RIOs (therefore there could be no mutually negotiated agreements outside of the RIO framework). In addition, keeping in view the decision of the Hon'ble TDSAT and taking into consideration the issues raised by the Informant and other such stakeholders, TRAI, after due consultation process, brought out 'The Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017' to address the issues of discriminatory pricing. Further, TRAI also issued tariff orders taking into account components such as carriage and placement fee, pricing of *a-la-carte* channels *vis-à-vis* bouquet rates, *etc.*, which resulted in discriminatory pricing in the past.

59. As stated earlier, the Informant has now invoked the jurisdiction of the Commission against OP-1 and OP-2, who have contended that since the distribution agreement with the Informant was entered on RIO terms, which are regulated by TRAI, the Informant's allegation of price discrimination is misplaced as all distributors similarly placed to the Informant were being offered the same terms. In this regard, the Commission notes that firstly, neither OP-1 nor OP-2 has placed any material on record to establish their claim of similar treatment to similarly placed distributors and secondly, with respect to RIO terms being offered by broadcasters, it is noted that Hon'ble TDSAT in



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order dated 07.12.2015 passed in Petition no. 295 (C) of 2014 (*NOIDA Software Technology Park Ltd. v Media Pro Enterprise India Pvt. Ltd. & Ors.*) has *inter alia* observed that:

“ the a la carte basis for the interconnect agreement is normally kept reserved by the broadcaster for the distributor with whom, for some reason it does not wish to enter into any commercial relationship but cannot outright deny the request for signals in view of the must provide mandate of the Regulations.”

Further,

“But in this country, unfortunately RIOs are framed seemingly in negation of all the attributes of a true RIO. The RIO is used by the broadcaster as a coercive tool and a threat to the seeker of TV channels and it undermines the essence of the Regulations, which is to provide healthy competition by providing level playing field.”

Thus, the above observations of Hon’ble TDSAT refute the contention of OP-1 and OP-2 that if channels are offered at RIO rates then the allegation of refusal to deal is misplaced. The observations of Hon’ble TDSAT indicate that offer of RIO terms by the broadcasters, could be a mechanism for refusal to deal.

60. OP-1 and OP-2 have argued that the broadcasters have no incentive or ability for refusal to deal. However, the judgment of Hon’ble TDSAT shows that the broadcasters, despite regulatory oversight, had the ability to discriminate amongst distributors and use RIO based agreements as a mechanism of refusal to deal. So much so, that TRAI was constrained to issue new regulations to ensure non-discrimination. Thus, the contention of Informant that agreement by OP-1 and OP-2 in RIO terms amounted to refusal to deal by them has some merit. Under the Competition Act, such agreements are prohibited under Section 3(4) of the Act. *Prima facie* insistence of the broadcasters to deal with the Informant only on RIO basis, which has been held to be discriminatory by



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Hon'ble TDSAT indicates a constructive refusal to deal with the Informant by OP-1 and OP-2 in contravention of the provisions of Section 3(4) of the Act.

61. Based on the foregoing, the Commission is of *prima facie* view that the conduct of OP-1 and OP-2 is in contravention of provisions of Section 3(4) of the Act
62. On the issue of the jurisdiction, the Commission notes that OP-2 has pointed out that in view of the Judgement of Hon'ble High Court of Bombay in Vodafone India Limited & Ors. v. The Competition Commission of India & Ors. (*supra*), the Commission ought not to have taken cognisance of the information. In this regard, the Commission observes that while TRAI is the sectoral regulator for regulating tariff and ensuring non-discriminatory conduct by market participants in the telecom sector, the Competition Act also imposes a duty on the Commission to take cognisance of anti-competitive behaviour.
63. Under the Act, the powers of the Commission are in addition to and not in derogation of the TRAI's mandate to regulate the practices of the broadcasters in the sector. The scope of powers and functions of the Commission under the Act and that of TRAI under the TRAI Act are distinct in terms of process of investigation and inquiry as also the remedies that may arise from contravention of the provisions of the respective Acts. In its judgement, Hon'ble High Court of Bombay had also observed as follows:

“The Competition Act and the TRAI Act are independent statutes. The statutory authorities under the respective Acts are to discharge their power and jurisdiction in the light of the object, for which they are established. There is no conflict of the jurisdiction to be exercised by them.”
64. However, the decision of the Commission was overturned particularly for the reason that the Hon'ble High Court was of the view that the Competition Act



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itself was not sufficient to decide and deal with the issues, arising out of the provisions of the TRAI Act and the contract conditions under the Regulations. It was observed in the judgement that:

“...The Commissionought not to have been opined, even prima facie, unless their respective rights and obligations under the Telecommunication laws are clarified and/or decided by the Regulatory authorities/Tribunal and the High Court.”

65. In the instant matter, the facts show that the matter has been decided finally under the Telecommunication laws. Both TDSAT and TRAI have recognised that the broadcasters had engaged in the practice of price discrimination/ refusal to deal. TRAI has brought out a regulation in 2017 to address the issues, which have been upheld by the Hon’ble High Court of Madras on 23.05.2018.
66. Thus, even in context of the judgment of High Court of Bombay, there remains nothing more to be decided by the Regulatory authorities/Tribunal and the High Court under the Telecommunication laws in the matter which restrict the Commission’s jurisdiction to look into the aspect of violation of provisions of the Act by OP-1 and OP-2 relating to a period prior to notification of the said 2017 regulation by TRAI.
67. In view of the foregoing, the Director General (hereinafter, the ‘DG’) is directed to cause an investigation into the matter to ascertain whether the OP has indulged in refusal to deal by way of price discrimination with the Informant in contravention of the provisions of the Section 3(4) of the Act. Further, the DG is directed to complete the investigation within a period of 60 days from the receipt of this order and submit its report.
68. It is made clear that, if during the course of the investigation, the DG comes across anti-competitive conduct of any other OP in addition to those mentioned



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in the information, the DG shall be at liberty to investigate the same. Also, the DG is directed to conduct a detailed investigation without restricting and confining to the duration mentioned in the information.

69. The DG is further directed to look into the role of the persons/ officers who were in-charge of and responsible for the conduct of the businesses of the OP at the time of the alleged contravention.
70. Nothing stated in this order shall tantamount to final expression of opinion on the merits of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.
71. The Secretary is directed to send a copy of this order along with the information and the documents received in relation to this matter to the Office of the DG.
72. It is ordered accordingly.

Sd/-

**(Sudhir Mital)
Chairperson**

Sd/-

**(Augustine Peter)
Member**

Sd/-

**(U.C. Nahta)
Member**

Sd/-

**(Justice G. P. Mittal)
Member**

New Delhi

Dated: 27.07.2018