
THE SUPREME COURT UPHOLDS TRAI'S TARIFF ORDER**1. INTRODUCTION**

On October 30, 2018, the Supreme Court of India (the “**Supreme Court**”) in *Star India Private Limited v Department of Industrial Policy and Promotion & Ors.*,¹ upheld the validity of the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 (the “**Regulations**”) and the Telecommunication (Broadcasting and Cable) Services (Eighth) (Addressable Systems) Tariff Order, 2017 (the “**Tariff Order**”) and dismissed an appeal by Star India Private Limited (“**Star India**”) against the Madras High Court judgement upholding the same.

The Regulations and the Tariff Order primarily dealt with the manner in which broadcasters and distributors could package, market and sell television channel subscriptions to end consumers. This news alert highlights the relevant aspects of the Regulations and the Tariff Order which were under challenge, the basis on which the Supreme Court upheld their validity and analyses its impact on the broadcasting sector.

2. BACKGROUND

The Regulations and the Tariff Order were notified by the Telecom Regulatory Authority of India (the “**TRAI**”) on March 3, 2017 and were immediately challenged before the Madras High Court by Star India. The primary basis for the challenge was the lack of authority of the TRAI to issue such regulations or orders under the TRAI Act, 1996 (the “**TRAI Act**”).

A division bench of the Madras High Court² delivered a split verdict, with one judge striking down a majority of the clauses in the Regulations and the Tariff Order under challenge, while the other judge upheld them as being in line with the TRAI Act. The case was referred to a third judge of the Madras High Court³, who arrived at the same conclusion as the latter judge and held the Regulations and the Tariff Order to be valid. Aggrieved by the judgement of the Madras High Court, Star India preferred an appeal before the Supreme Court.

3. ANALYSIS

At the outset, it is relevant to briefly set out the most relevant clauses of the Regulations and the Tariff Order under challenge before the courts. These clauses also highlight the most relevant requirements that any broadcaster or distributor would need to be aware of in the context of these guidelines from the TRAI.

¹ Civil Appeal Nos. 7326-7327 of 2018 and 7328-7329 of 2019.

² 2018 (2) CTC 113.

³ 2018 (74) PTC 417 (Mad).

3.1 Clauses of the Regulations under challenge

(a) ***A-la-carte offering***

Under Clause 6(1) of the Regulations, broadcasters are mandatorily required to offer *all* their television channels on an *a-la-carte* basis to distributors. While they may also offer their channels in the form of a *bouquet*, such *bouquets* should: (i) contain either only pay channels or free-to-air channels, and not both; and (ii) not contain high definition (HD) and standard definition (SD) formats of the same channel in the same bouquet.

(b) **Reference interconnection offer**

Pursuant to Clause 7(2) of the Regulations, broadcasters are required to publish on their websites a reference interconnection offer, which, among other details, mentions the maximum retail price of a pay channel per month and the maximum retail price of a *bouquet* of pay channels per month. Interestingly, broadcasters are not permitted to include within its reference interconnection offer, channels of *other* broadcasters (except certain group companies). This seems to suggest that a broadcaster *cannot* bundle channels of other broadcasters in its offering of channels.

(c) **Maximum discounts**

Under Clause 7(4) of the Regulations, the maximum discount that a broadcaster can offer to a distributor per pay channel or *bouquet* of pay channels is 15 % (fifteen percent) of the maximum retail price.

(d) **Interconnection agreement**

Pursuant to Clause 10(3) of the Regulations, broadcasters are required to enter into an interconnection agreement in writing with distributors on an *a-la-carte* basis for distribution of pay channels.

3.2 Clauses of the Tariff Order under challenge

Provisions similar to those mentioned in Clause 3.2(a) (*a-la-carte offering*) and Clause 3.2(b) (*reference interconnection offer*) are included in the Tariff Order and were under challenge before the Supreme Court. In addition to that, the following major provisions were also challenged.

(a) **Consistency in price**

Under Clause 3(2) and 3(3) of the Tariff Order, the maximum retail price of a pay channel and a *bouquet* of pay channels are required to be uniform for all distribution channels. This would mean that a broadcaster cannot charge different prices to different distributors even if the intended subscriber base of such distributors is different.

(b) **Maximum retail price and discounts on bouquets**

Pursuant to Clause 3(3) of the Tariff Order, any pay channel which is part of a *bouquet* cannot have a maximum retail price per month of above INR 19 (Indian Rupees nineteen). Further, the maximum retail price per month of a *bouquet* of pay channels cannot be less than 85 % (eighty five

percent) of the aggregate of maximum retail prices per month of the constituent pay channels. For instance, if 10 (ten) pay channels with maximum retail price of INR 10 (Indian Rupees ten) each per month is bundled in a bouquet, then the maximum retail price of the bouquet cannot be less than INR 85 (Indian Rupees eighty five).

(c) **Promotional scheme**

Under Clause 3(4) of the Tariff Order, broadcasters are permitted to offer promotional schemes on the maximum retail price per month of its *a-la-carte* pay channels. In such a case, the price offered under the promotional scheme shall be construed as the maximum retail price during the period of offer. However, such schemes can only be offered twice a year and for a period not exceeding ninety day in each instance.

3.3 Arguments before the Supreme Court

The primary argument of Star India was that the TRAI Act allowed the TRAI to only regulate the *carriage* and *means* of transmission, but not regulate the *content* that is being transmitted. It was alleged that the above clauses, in effect, resulted in regulating the *content* of the broadcast. It was further argued that *content* is covered and controlled solely by the Copyright Act, 1956, implying that the TRAI did not have the jurisdiction to regulate it.

3.4 Finding of the Supreme Court

The Supreme Court rejected the argument of Star India that the above clauses resulted in regulation of the *content* of the broadcast. Consequently, it was held that the TRAI did not directly encroach on the rights available under the Copyright Act, 1956. Even if any such rights were being restricted, considering the regulation of compensation payable to broadcasters, it was seen as justified in the public interest of consumers.

It was noted that the objective of the TRAI Act included the protection of the interests of both service providers and consumers. In light of this, it was concluded that this involves regulating not only the terms of carriage *simpliciter* but also the terms and conditions of interconnectivity between the participants, (that is, broadcaster, distributor or operator and consumers) such that both broadcasters *and* consumers get a fair deal.

In this regard, the explanation memorandum to the Tariff Order was relied on, which argued that artificially high prices were set for *a-la-carte* channels and high discounts were offered for the *bouquets* which resulted in perverse pricing, where consumers are forced to opt for the *bouquet*, thereby giving limited choice to consumers.

The Supreme Court concluded that one of the objectives of the TRAI Act was to ensure fair competition while promoting consumer interest, and that the Tariff Order did not affect the flexibility of the broadcasters in the formation of a *bouquet*, that is, the choice of the channels to be included in a *bouquet* together with the *content* of such channels.

4. **INDUSLAW VIEW**

The Supreme Court, by upholding the validity of the Regulations and the Tariff Order, has altered the landscape of broadcasting in India and will definitely have an impact on how consumers are offered television channels, essentially allowing more flexibility and *true* choice to consumers in relation to the channels *they* want to subscribe to and pay for.

Nevertheless, the Regulations and the Tariff Order could also be seen as imposing certain limitations on the manner in which broadcasters and distributors package and sell channels to consumers.

By restricting the maximum retail price and the discounts, the utility of offering channels in *bouquets* may be lost. It effectively reduces the scope for cross subsidization and flexibility in offering *bouquets*, which may not necessarily be in the interest of all consumers.

This could also severely impact many upcoming channels which could have earlier obtained visibility by being a part of a discounted *bouquet*. Many broadcasters and distributors will now be required to rethink their existing business models.

One interesting point to be noted is that *both* judges of the division bench of the Madras High Court found clauses in the Regulations and the Tariff Order, imposing a *limit* on the maximum discounts on pay channels to be invalid.

Technically speaking, this was not appealed before the Supreme Court which implies that these provisions could not have been upheld by the Supreme Court. However, a holistic reading of the judgement of the Supreme Court suggests that the discount related clauses were considered by the Supreme Court as an important aspect of the Regulations and the Tariff Order and are still valid.

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