

## VIACOM 18 MEDIA PRIVATE LIMITED'S RESPONSE TO THE TRAI'S CONSULTATION PAPER ON ADVERTISEMENTS ON TV CHANNELS

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### **INTRODUCTION**

At the outset, we wish to submit that the ideal regulatory approach should be to simplify and minimise regulation given the goal of ushering in the evolution of a mature market where market forces and self-regulation would suffice. The efforts of the Authority towards establishment of a digitized regime are noteworthy in this context. However, it appears that the current Consultation Paper and the proposals set out therein to bring in more stringent and universal guidelines are not in sync with such a progressive approach, especially when there is an existing framework which has not been faulted in its essence.

The basic business model is that broadcasts are used as entertainment for viewers and these broadcasts also carry advertisements. Viewers are then exposed to advertisements as a side product of their consumption of the entertainment content. The entertainment content is paid for by advertisers who use the intermediary of the broadcast company to deliver messages to the advertising firms' prospective customers. This model may be described as "a two-sided market with network externalities" where the intermediary, the broadcast company, is a "platform" that needs to get both sides on board in order to generate revenues. That is, the broadcaster must deliver viewers to advertisers and does so by judicious choice of the level (and perhaps the type) of advertising it proposes along with an attractive enough vehicle to attract the prospective buyers of the advertisers products to watch. Competition with other broadcasters (other platforms), is also an important feature of the competitive landscape.

Market forces ensure that a broadcaster takes into account the extent to which increasing the number of advertisements shown will cause viewers to switch off or switch channels, and this decision also impacts the amount of revenue raised per viewer from the advertisers. No broadcaster will therefore increase the number of advertisements beyond a point that will cause viewers to switch off or move to another programme. Hence for TRAI to view advertisements as an inherent nuisance that impedes viewing reflects a basic lack of understanding of the business model of the broadcasting industry.

The present consultation paper posits that the heavy reliance of Indian broadcasters on advertising revenues is due to the "non-addressable nature of the cable TV networks," and "gross under declaration of the subscriber base." These phenomena are indeed part of the Indian landscape, but the under-representation of subscription revenues in the business model of Indian broadcasting is also due to a decade of excessive regulation of subscription models -- including tight retail rate regulation, increasing interference in wholesale rate-setting, and maintenance of "must-provide" mandates that prevent platform differentiation and

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unnecessarily restrain competition. The rate regulations remain in effect in blatant despite of the rise of six DTH-based competitors who have now successfully brought competitive forces to play in every Indian home, and in five short years have captured roughly 25% of the pay - TV market. Thus, government over-regulation and under-enforcement have played a leading role in creating the industry's current imbalances. The key to resolving the imbalances does not lie in imposing layers of additional regulation; it lies in progressively remedying the ills at their cause.

## **TRAI's STATED POSITION**

TRAI's turnaround in its views on capping advertising time defies any rational explanation. As mentioned later in this response, in Petition No. 34(C) of 2011 in the TDSAT filed by a society called Utsarg against TRAI and several other broadcasters and content aggregators seeking a cap on television advertising time on the ground that these advertisements interfered with viewership of television programmes, TRAI in its considered response as late as 22nd February 2011, articulated the following position:

***"9. That it is submitted that Government of India vide its order [S.O. 45(E)] issued on 9.1.2004 specifically sought recommendations of the answering respondent (TRAI) on "... the parameters for regulating maximum time for advertisements in pay channels as well as other channels ... ."***

***10. That after following a consultation process (emphasis supplied), the answering respondent (TRAI), inter-alia, formulated its recommendations on the issue of maximum time for advertisements in TV (emphasis supplied). In Section 8 of the Recommendations dated 1st October, 2004, on "Issues Relating to Broadcasting and Distribution of TV channels", at paragraph 8.9, the answering respondent (TRAI) mentioned that the Authority has obtained average advertisement time from the pay channel broadcasters. Almost all channels have reported an average advertisement of 10 to 12 minutes per hour which is within the limits laid down in global regulations (emphasis supplied) on advertisement time .. . In paragraph 8.11 of the said recommendations it has been mentioned that "... The primary objective of the policy is to give consumer choice and good quality service at affordable prices. To ensure affordable services to the consumers, the Authority has regulated the subscription fees of television channels ..... . Besides regulating subscriptions, regulation of the advertisement time and its corresponding affect (sic) on revenues of broadcasters may hamper growth and competition in the broadcasting industry (emphasis supplied)... ."***

***11. That considering all the aspects of the matter, the answering respondent (TRAI) in its recommendation dated 1.10.2004, had recommended as under:***

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**8.15 .. (i) There should not be any regulation at present on advertisement on both FTA and Pay channels (emphasis supplied).**

The above summarises TRAI's considered position in February 2011. Hence it is indeed surprising and manifest in TRAI's unbalanced approach that in less than a year after making this submission to the TDSAT, TRAI now comes out with a recommendation proposing drastic curbs on advertising time, reducing the time for Pay Channels by 50% from 12 minutes to six minutes per hour and proposing various other restrictions on how broadcasters must telecast advertisements. TRAI has offered no explanation for this 360 degree about turn. There has been no cataclysmic event in the industry that could have remotely suggested such a drastic curb was necessary.

In 2004 TRAI took the position that capping advertisements would put additional costs on Pay TV Broadcasters and had stated in Para 8.11 of its report that "**Besides regulating subscriptions, regulation on the advertisement time and its corresponding revenues for broadcasters may hamper growth and competition in the broadcasting industry.**" (emphasis supplied. In Para 8.10 after quoting from experience in Thailand, TRAI had observed "**Additionally the regulation of advertisement time, typically drives up subscription fees. .... . Therefore, the advertising rates reduce subscription fees for consumers. The restriction on advertisement time would either result in increase in subscription fee or affect the variety and quality of programming.**" These pertinent observations of TRAI are as relevant today as when they were made in 2004 and reiterated in 2011. Hence the volte face by TRAI in its March 2012 recommendation is completely inexplicable and not based on empirical data.

## **PARAWISE RESPONSE**

**ISSUE:** TRAI has taken Suo Moto cognisance based on consumer complaints relating to over advertisement without reference to the MIB which is the nodal authority as regards the existing advertisement code under Rule 7 of the CTN Rules.

## **VIACOM's RESPONSE**

- a) TRAI powers include making recommendations only in relation to parameters for maximum time durations for advertisements. Even otherwise any such recommendations would have to be made to the Ministry of Communication and IT since it is this ministry that issued the 2004 notification by which TRAI is purportedly drawing its power to recommend on issues pertaining to advertising minutage. The Notification is not even a piece of delegated legislation and at best is an executive order. TRAI fails to recognise that under an Act of Parliament namely The Cable Television Network Regulation Act, 1994 and the Rules framed thereunder, Parliament has already laid down the maximum time for advertisements including promotions as 12 minutes per hour viz. Rule 7 of the CTN Rules. The Ministry of Information and

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Broadcasting ("MIB") is the nodal ministry for implementing these rules. The MIB has in fact issued advisories regarding advertisements and the manner in which they are shown on screen. Further the MIB has been engaging with Industry bodies like the IBF about enhancing the self-regulatory role of these Industry bodies in ensuring compliance with the CTN Rules and the IBF is in constant dialogue on with the Ministry. If the MIB believed that the present regulations are not being adhered to, it is for the MIB to take action against channels that fail to do so rather than tar the entire Industry with the same brush and reduce advertising inventory by over 50%, a clear case of the remedy being worse than the disease.

- b) Even otherwise the 9<sup>th</sup> January 2004 notification under which TRAI is deriving its power was subsequently eclipsed by the insertion of Rule 7 (11) of the CTN Rules by the Central Government (MIB) in exercise of its powers under Section 22 of the CTN Act.

**ISSUE:** TRAI refers to a CMS study to make a case for the need to regulate advertisement.

### **VIACOM'S RESPONSE**

- a) The study is not made available to stakeholders, thus hit by the lack of transparency as mandated by TRAI Act.
- b) The study quoted was only in respect to news channels, as is borne out of the extracts quoted in the CP, and thus cannot be used to draw conclusions in respect of Pay TV channels.

**ISSUE :**TRAI asserts that television broadcasting should not be converted into a medium for marketing.

### **VIACOM'S RESPONSE**

- a) Advertisements are not just for marketing rather they also serve the purpose of informing consumers about the choices available for a product and service. TRAI's view of advertisements as a "nuisance" affecting the quality of a viewer's television audio visual experience and ignoring the benefits of advertising is most unfortunate. TRAI fails to acknowledge or even recognise the social benefits of advertising:
- i. the fact that advertising educates customers about goods and enables them to exercise their choice based upon a better understanding of the product and of the availability of substitute and supplementary goods.
  - ii. The fact that advertising is a major source of revenue for broadcasters (particularly in a market like India with overly restrictive price controls and tariff regulations that cap channel pricing at abysmally low levels denying broadcasters a fair share of distribution revenue).
- b) An in depth report by the Indian Broadcasting foundation on the "Impact of Television on India" found that 89% people agreed that advertisements was

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a source of valuable information as it informed them of news products and services, 96% agreed that television informed them of the latest products and 97% agreed that they were informed about the latest trends, fashion and products through television.

- c) Advertisements serve as a powerful tool for generation of sales of new products and services and hence contributes to growth of the Indian Economy. Capping advertising will lead to poor quality programming and absence of diversity as it will reduce broadcaster profitability. Further TRAI in its recommendations dated 1<sup>st</sup> October 2004 has concluded that advertisements keep subscription fees low and also contributes to the enhancement of the quality of content.

**ISSUE :** Revenue ratio of broadcasters skewed in favour of Ad revenue due to non-addressability, however situation will improve post digitalisation and therefore advertisements need to be controlled

## VIACOM'S RESPONSE

- a) TRAI has assumed that the DAS mandate will be implemented successfully and basis this assumption has gone ahead and proposed to reduce the pay TV advertising to 6 minutes and control FTA advertising 12 minutes. Even assuming such an assumption were to be true then TRAI should wait till the last sunset date of 2014 before making such an intervention.
- b) Needless to say that the skewed ratio of advertisement vs. subscription has its basis in legacy issues such as under declaration and piracy and regulatory interventions by TRAI in form of price caps and must provide which ensures that subscription fees are the lowest in the world and continue to decline. Further TRAI has not considered the impact of huge carriage & placement fees vis a vis increased advertisement minutage
- c) TRAI in its recommendations dated 1<sup>st</sup> October 2004 has given the example of Thailand where restrictions on advertising led to a huge increase in subscription fees, the present CP contradicts the stand taken by the authority earlier while also being in variance with international experience. In TRAI's October 2004 recommendations it has stated that the market has evolved a mechanism to regulate over advertising as any channel which over advertised would lose subscribers. This was based on a study done by Edelweiss Capital on Zee Telefilms. Hence TRAI has failed to explain any justifiable rationale to deviate from its earlier findings of 2004.
- d) Digitization, as is the case with extensive and large scale changes of this nature, there could be challenges in implementation and it may take time for the end results to accrue over a period of time. Therefore, to herald in radical changes of the nature proposed in the current Consultation Paper based on the assumption that digitization will be a game changer would be premature at this stage. In fact, it may also be noted that the current scenario where the revenue models and share in a digitized regime are yet to be prescribed, it is

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not possible to embark on a realistic assessment of the actual business impact that may manifest as a result of such radical changes.

Thus introducing new regulations now, which – like the rate regulations introduced a decade ago and never relaxed – will risk further distorting the marketplace well into the future. It would be wiser to wait until the new environment is clearer before considering new restraints.

## **ISSUE :** Reference to International Markets

### **VIACOM'S RESPONSE**

- a) The source of such references has not been provided so as to enable a comprehensible comparison by the stakeholders. Further TRAI has failed to state that in those international markets there are no price caps nor must provide mandates resulting in healthy ARPU's from subscription and consequently less reliance on advertising revenue.
- b) The reference to some international markets which are fully digitised fails to take into account the market conditions in India, it is out of context to compare the Indian TV industry with that of developed nations.
- c) It is illogical as to how TRAI compares vastly different markets and comes to a common conclusion. Markets such as Malaysia, Philippines, USA, Canada, France, Germany, Australia, New Zealand, UK, Sweden, Norway have been compared with India to arrive at the formula for capping television advertisement time. None of these markets have price regulation on distribution of television channels. In many of these markets there is a clear distinction between "public" broadcasting and "pay" television. "FTA" in these countries means "free" to the consumer, unlike India where TRAI defines "FTA" as "free to the cable operator". In India subscribers pay for "FTA" as well as "PAY" television. Yet TRAI treats all these markets as homogeneous and draws its comparisons. TRAI is oblivious of the fact that in most of these countries there are no restrictions on "PAY" television. TRAI ignores the fact that Markets closer to India like Malaysia and the Philippines the maximum time permitted for advertisements is 15 minutes to 18 minutes per hour. Even in so called "developed" markets like Australia it varies from 13 minutes to 15 minutes; in the USA there is NO regulation at all (except for children's programmes at specified times); in New Zealand it is 15 minutes, etc. Nevertheless for India TRAI comes up with a 12 minute cap for FTA channels and a six minute cap for pay television. If six minutes includes the time for channel programming, broadcasters will be left with just four or five minutes of commercial advertising time per hour.
- d) Indian cable TV channels, whether "free" or "pay," do not benefit from public subsidies, and do not bear public service obligations. It is not appropriate to compare foreign FTA regulatory approaches with Indian pay - TV approaches. The confusion on this point introduces substantial errors of fact; for example the paper's description of Australia quotes the wrong Code of Practice – the Commercial TV Industry Code of Practice. The latter does not apply to the

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cable TV industry, which is governed by Subscription Broadcasting Codes of Practice. In fact, contrary to the paper's assertions, Australia imposes no regulatory restriction on ad-minutes on any pay - TV channel (whether "free" or "pay" in the Indian sense of those words.)

- e) We will not attempt to catalogue the errors in all the descriptions of foreign markets in the consultation paper. Instead, we provide for the record and for the Authority's greater information, the attached summary of regulations for pay - TV systems developed during CASBAA's recent research for its "Regulating for Growth 2011" study. The factual state of affairs is that most governments in Asia do not impose constraints on advertising minutes on pay - TV channels. Where there are limits, only in rare cases are they lower than the 10-minute limit already imposed by Indian regulations. International precedent in fact provides scant support for the strict limit proposed by the consultation paper.

**ISSUE :** No FTA channel shall carry advertisements exceeding 12 minutes in a clock hour. For pay channels, this limit shall be 6 minutes.

## **VIACOM'S RESPONSE**

- a) No rationale has been given for the same except the traditional TRAI mechanism of drawing a golden mean between two un related figures, a practice heavily criticised by the TDSAT judgement dated 16<sup>th</sup> December 2010 in the Digital addressable tariff matter. In the introduction to this response, we would reiterate that it is premature to consider bringing in more stringent guidelines placing reliance on digitization as a solution to under declaration and revenue loss as the exercise is yet to commence and will take no less than 2 years to achieve fruition if all goes well and we have to wait to appreciate an analyse the end results. Therefore, there does not seem to be any basis to conclude that digitization would solve all issues of revenue and hence, that may be sufficient justification to curb advertisement revenues.
- b) No justifiable standard has been given to arrive at the arbitrary figure of 6 minutes for pay channels. There appears to be no logic to reduce the existing permitted limits and thus depriving a certain class of broadcasters of an existing flexibility merely because there is another class of broadcasters who are voluntarily choosing to transmit their channels on FTA basis. In fact, this does not benefit the broadcasters of the FTA channels either since the permitted timelines remain the same for them while merely creating a chimera of an artificial benefit that does not exist. Even conceptually, it does not appear sound to argue that resolution of under declaration could logically flow into a need to curb advertisement revenues since they are two separate business streams and models and not substitutable.
- c) TRAI has also failed to take into account the different target audience of FTA and Pay channels as well as the substantial higher cost for acquisition / generation of content for Pay channels. The historical fact of price fixation that is referred to in the Consultation Paper also evidences that the prices for all

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pay channels existing at the time were arrived at on the basis of relevant factors, including a certain revenue expectation from advertisements without contemplation of a later discrimination on this basis. Due to the existing ceilings, the broadcasters would not be at liberty to alter pricing of channels and the revenue loss arising out of such a drastic reduction in advertisement time will be huge. No case has been made out by data or principle that could justify such an excessive impact.

- d) TRAI has ignored that the consumer is not aware of which channels are FTA and which are Pay, chiefly due to non-enforcement by TRAI of the QoS for Non-CAS systems dated 24<sup>th</sup> February 2009. If the primary objective is to serve consumer interest, then the wisdom of such a measure would be further suspect given that the consumer would continue to have the same exposure to advertisements on FTA channels because of which he/she is not really benefitting assuming viewership is influenced by the content of each channel as much as the frequency of advertisements.
- e) It is indeed ironic, nay perverse that TRAI as the regulator introduced tariff and pricing restrictions on distribution of television channels in 2004, and complex “must provide” and other inter-connect obligations, putting caps on the MRP of television channels in CAS areas at Rs. 5 per channel (since increased by 0.35 paise after seven years- out of which the broadcaster’s share is Rs. 2.25 per channel) and capping distribution revenues on analogue and digital platforms thereby foreclosing growth in distribution revenues and compelling broadcasters to increase advertising revenues to survive. These new recommendations will sound the death knell of the broadcasting industry, struggling as it is in a highly fragmented and price sensitive market, with extortionate carriage and placement demands from operators.
- f) It is also worth noting, as the consultation paper rightly does, that from the consumer’s point of view all channels are paid. No consumer currently pays more for a “pay” channel than for a “free” one and therefore there is no justification for – and no evidence for – a consumer feeling that “pay” channels should be treated any differently because someone somewhere up the value chain is paying one type of fee or another. Consumers care what they pay, not what is paid at the wholesale level.

Therefore, in light of the absence of any compelling commercial arguments, market data, international precedents or actual betterment of viewers or any class of broadcasters that would be achieved by the proposed differential treatment, we submit that there is no reason or grounds for differential treatment between FTA and pay channels in this regard.

**ISSUE:** Connecting the DAS CP and Tariff with the advertisements on TV channels

## **VIACOM’S RESPONSE**

- a) The earlier tariffs have never considered advertisement revenue, further as the tariffs lacked proper research they are all currently disputed.

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- b) There is no evidence in the CP which proves a connection between the tariff and the advertisements, thus showing the highly arbitrary nature of the assertion.

**ISSUE :** The 12 minutes of advertisements will not be in more than 4 sessions in one hour. In other words, there will be continuous airing of the TV show for at least 12 minutes each. Not more than three advertisement breaks shall be allowed during telecast of a movie with the minimum gap of 30 minutes between consecutive advertisement breaks.

In case of sporting events being telecast live, the advertisements shall only be carried during the interruptions in the sporting action e.g. half time in football or hockey match, lunch/ drinks break in cricket matches, game/set change in case of lawn tennis etc.

## **VIACOM'S RESPONSE**

- a) There should not be a reduction in advertisement time on pay channels or any intervention on the number of breaks genre wise, on an per hour basis. These issues are out of the purview of TRAI and it is not empowered to regulate on these issues,
- b) The rationale behind the same cannot be understood. Without prejudice, not only is TRAI attempting to recommend regulation of ad time on a clock hour basis but at the same time it seems that TRAI wishes to micro manage the business of the broadcasters also and such stipulations shall cause obstruction of business and the smooth functioning of the same and nowhere can this be a mandate or objective of a regulator.
- c) Further, any unreasonable restriction on advertisements is violative of Article 19 (1) (a) and (g) of the Constitution, since it would restrain commercial speech of advertisers and restrains the broadcasters from conducting business.
- d) Also, many of children's television shows are of a very short duration (7/8 minutes), hence breaking an episode to insert advertising breaks in the middle of an episode does not make any sense.

**ISSUE: The audio level of the advertisements shall not be higher than the audio level of the programme.**

## **VIACOM'S RESPONSE**

- a) These issues are out of the purview of TRAI and it is not empowered to regulate on these issues. The issue of volume of ad breaks is already addressed vide Rule 7 (6) of the CTN Rules. Assuming that the real concern would be of controlling and limiting loudness rather than establishing comparative standards, it is submitted that there is no demonstrated need for further regulation in this regard.

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**ISSUE:** The limits for the duration of the advertisements shall be regulated on a clock hour basis i.e. the prescribed limits shall be enforced on clock hour basis.

## **VIACOM'S RESPONSE**

- a. We submit that the limits for the duration of advertisements should not be regulated on a clock hour basis and may continue to be regulated on a 24 hours basis in accordance with the extant laws. No basis or data to support the benefit of such a stipulation has been put forth in the Consultation Paper. At a conceptual level, a change in the existing laws in this regard would not in effect serve the consumers as it is widely known that the viewership patterns differ throughout the day due to which a clock basis approach that would apply universally to all hours would not be logical.

**ISSUE:** There shall only be full screen advertisements. Part screen advertisements will not be permitted. Drop down advertisements will also not be permitted.

## **VIACOM'S Response**

- a. Further, Rule 7(10) of the Cable Television Networks Rules, 1994, already captures the legislative intent and mandate in this regard by stipulating that advertisements must be clearly distinguishable from the programme and should not interfere with the programme. Therefore, there appears to be no need for further regulation. The extensive international reference points cited in Annexure I to the Consultation Paper also seem to suggest that the prevailing global practice does not favour total prohibition or even regulation in most cases. It is also noteworthy that this practice is also followed by the national broadcaster, Doordarshan, during its telecast of sporting events.

**ISSUE:** In so far as News and Current Affairs channels are concerned, they are allowed to run not more than two scrolls at the bottom of the screen and occupying not more than 10% of the screen space for carrying non-commercial scrolls, tickers etc.

## **VIACOM'S Response**

- a. We submit that this proposed stipulation over reaches the mandate of making recommendations on maximum time for advertisement and enters the realm of content regulation which is clearly not within the powers of the Authority. Furthermore, Rule 7(10) of the Cable Television Networks Rules, 1994, already lays down the parameters for screen space in as much as it requires that the advertisement must be distinguishable from the programme and there should be no interference. Ultimately, it should be the broadcaster's prerogative as to how it regulates its content so long as it meets the law of the land.

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## CONCLUSION:

In light of the above, we submit that while the stated objective of the Authority in serving consumer interests better and improving viewership experience are certainly worthy pursuits, the need and basis for the current Consultation Paper merit reconsideration for the plethora of reasons elaborated above. It is submitted that in order for a legal prescription to be effective and visionary, it would be more appropriate to focus on implementation of existing regulations and monitoring of the intended effect rather than bring in extreme and unwarranted measures to address only few practices that may be currently prevalent and perhaps even misused by some broadcasters. It is submitted that TRAI's proposed recommendations are retrograde, will substantially increase the costs to consumers, will burden advertisers with higher costs, drive out marginal and smaller advertisers from advertising their products on national television, result in regulatory over-reach and is therefore strongly opposed.

Lastly, it is important to consider that any balanced assessment of advertisements would not be possible unless we recognize that the ultimate goal in regulation of advertisement time is perhaps not elimination of commercials altogether but to ensure judicious telecast of commercials which have their own role in spreading information and awareness about different options available to viewers and also serve a certain educational and/or artistic purpose. Such an approach would serve the purpose of generating maximum value to a viewer who can benefit from the commercials as well as the programming.



(Authorized Signatory)

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