

**TRAI'S CONSULTATION PAPER ON "ISSUES RELATED TO ADVERTISEMENTS IN TV CHANNELS DATED 16<sup>TH</sup>  
MARCH 2012**

**RESPONSE BY SOUTH INDIAN REGIONAL CHANNELS**

**INTRODUCTION**

TRAI had come out with a Consultation Paper on "Issues Related to Advertisements in TV Channels" inviting stakeholder's comments on the proposed stipulations for regulating advertisements on TV channels in the same. The grounds on which the present consultation paper has been issued by the TRAI may be summarised as below:

1. Study carried out by the Centre for media studies (CMS) regarding
  - i. cluttering of TV screen by advertisements and various program content such as captions, data, graphics etc. and
  - ii. the duration of advertisements carried during prime time by leading news channels in India.
2. Adverse effect on the viewing experience of the subscriber due to
  - i. increased advertisements by the broadcaster's in their channels.
  - ii. encroaching ofscreen space by banners astons etc..
3. The business model of the broadcasters
  - i. advertisements in free to air channels.
  - ii. advertisements in pay channels.
4. International Practices

At the very outset it is humbly submitted that the consultation paper lacks jurisdiction and is without any legislative sanction. According to the consultation paper it derives its genesis from the notification (S.O. 45(E)) wherein TRAI can make recommendations regarding, "*the parameters for regulating maximum time for advertisements in pay channels as well as other channels.*" Issued by the Ministry Of Communication And Information Technology (Department of telecommunications). The consultation paper chooses to ignore the fact that the Ministry of Communication and Information Technology is not the nodal ministry for television broadcasting, a role which is performed by the Ministry of Information and Broadcasting. Further the aforesaid notification has become redundant due to the fact that Central Government has already put in place a proper legislation by making Suitable amendments in CABLE TELEVISION NETWORK (REGULATION) ACT Vide notification No G.S.R. 452 (E) dated 31<sup>st</sup> July 2006 applicable to all TV channels.

The Consultation Paper suggests a generic approach towards all broadcasters (News, Sports, Niche, General Entertainment, Regional Channels etc.,) without detailing the unique differentiators and constraints of each type of broadcaster which prevail due to the essential difference in content. The discussions in the Consultation Paper do not set out any research or data relating to or addressing any of the relevant factors

that ought to be considered while contemplating any regulation that will affect regional channels which operate differently due to huge content costs, high carriage costs and near 100% dependence on advertisement revenue. This demonstrates an inherent issue in the approach itself that needs to be rectified even if one were to embark on such an exercise. It appears that most of the discussion relates to news channels while the proposed stipulations that have apparently stemmed out of such concerns seek to regulate the entire industry at large which is not a logical corollary.

The Consultation Paper lacks in providing adequate justifications for a differential regime for Pay and FTA channels and also does not take into account the unique business model of regional broadcasters who operate in challenging regime of sky rocketing content acquisition costs (C&S rights cost for movies have grown by 300% in the last 3 years) and an onset of Carriage spends which makes mockery of the “Pay revenues” earned from the MSOs and Cable Operators (In Karnataka, the #2 General Entertainment Channel shells out a Carriage payout which is 142% of the Pay revenue and in Kerala, the Carriage outlays for the #1 GEC is almost 100% of the analogue pay revenues). While ARPUs are “regulated” and the phenomenon of “under-declaration” is an accepted norm, there are no regulations to ensure a “must carry” provision which leaves the broadcasters at the mercy of MSOs and Cable Operators.

It is pertinent to note that Regional broadcasters entirely depend on advertisement revenue and any attempt to rein in advertisement duration without addressing the anomalies in Pay revenue (Gross under declaration) and regulating costs (Carriage, Content) will sound a death knell for the industry. Smaller players will be forced to shut down and incumbents will spend lesser on content thereby depriving the viewer’s access to quality entertainment content. We will be going back the dark ages with tacky shows and all investments by broadcasters in technology upgrade (High Definition with Dolby Sound) will be curtailed. The proposed move is regressive and is not holistic in approach. The very stated goal of this Consultation Paper, which is to regulate content on television channels, will be defeated if the recommendations are implemented. We believe that it is not only an attempt of regulatory over-reach but also an example of regulatory oversight without involving the views of the stakeholders. Lastly, the regional broadcasters play a pivotal role in the following

- contributing significant sums to Income tax and Service Tax,
- employment generation (technical, managerial)
- Providing a cost effective source of entertainment for the viewers
- growth of allied industries like Production Houses, Media Process Outsourcing Companies, Ad agencies, Talent, Movie Industry, Equipment manufacturers
- Providing a cost effective marketing platform for advertisers and thereby helping their business

Hence any move to de-stabilize the business model of regional broadcasters will have far reaching consequences on the entire eco-system

### **THE EXISTING REGULATORY REGIME**

The parliament has already put in place legislation to regulate advertisements in TV channels through the section 6 of the CTN Act and the Rules 7 of the CTN Rules which are reproduced below:

#### **Section 6 of Advertisement Code of the Cable Television Network (Regulation) Act 1995.**

*“No person shall transmit or re-transmit through a cable service any advertisement unless such advertisement is in conformity with prescribed advertisement code”.*

#### **Advertisement Code Rule 7:-**

*...(6): the picture and the audible matter of the advertisement shall not be excessively ‘loud’.*

*(10): All advertisements should be clearly distinguishable from the programme and should not in any manner interfere with the programme viz., use of lower part of screen to carry captions, static or moving alongside the programme.*

*(11): No programme shall carry advertisements exceeding twelve minutes per hour, which may include upto ten minutes per hour of commercial advertisements, and up to two minutes per hour of a channel’s self-promotional programmes.*

A bare perusal of these provisions is enough to show that the factors that the Authority is trying to regulate are already covered under existing law. It is surprising that though the TRAI has admitted in the consultation paper (at pg. 5 para iv), that there are extant provisions that regulate the duration and format of advertisements in the TV channels it has refrained from referring to the specific provisions or to Cable Television Networks (Regulation) Act 1994 and rules made thereunder despite it being among other things the principal legislation enacted by the Parliament to regulate advertisements in TV channels. In light of the above, we humbly submit that, the exercise proposed to be undertaken by the authority is nothing but a Colourable exercise of jurisdiction wherein authority it is trying to overreach its jurisdiction and trying to exercise power not vested in it.

### **TRAI’S STATED POSITION**

It is pertinent to mention over here that the authority, in its affidavit submitted to TDSAT on 22.02.2011 in the matter of *Utsarg v. Union of India & Ors* Petition no. 34(C) of 2010, impleading TRAI and all the broadcasters on the issue of non-adherence to advertisements related regulations by broadcasters; and the authority has taken following stand,

*“...a policy framework and audit mechanism....is already in place under the provisions of Cable Television Networks (Regulation) Act, 1995 and the rules made thereunder.....[T]hat the answering respondent (TRAI) has no role to play in relation to the Cable Television Networks (Regulation) Act, 1995.”*

Thus the admitted position of authority is that it has no role to play in relation to any violations of Cable Television Networks (Regulation) Act, and rules made thereunder. The authority has further stated in the affidavit that there is an authorized officer entrusted for ensuring compliance of any violation of advertisement code hence there is no need for the authority to intervene in any manner whatsoever.

Even otherwise the stand of TRAI since 2004 with respect to regulating the mintage /duration of advertisements in TV channels was:<sup>1</sup>

*(i) There should be not be any regulation, present, on advertisement on both FTA and Pay Channels.*

*(ii) The Cable Act should be suitably modified so that powers are available with the government to regulate this if found necessary at a later stage. Broadcasters would also be required to give information on advertising time to TRAI and the Government. This would also be made available to the public through the TRAI web site.*

*(iii) The authority has failed to show, in the Consultation Paper, any change in circumstances which has necessitated the issuance of the present consultation paper and change its earlier stand.*

Our response to specific issues in the Consultation Paper are as follows:

- A.** *Suo moto* cognisance by TRAI, without reference from the MIB, based on consumer complaints with regard to advertisements.

**RESPONSE:** It is submitted that authority does not have or the mandate or the power to delve into this issue and make any stipulation, regulation or even recommendations regarding the same. Such a stipulation by authority is unthinkable being outside the purview of the Authority's jurisdiction.

The TRAI has not disclosed the consumer complaints, which form the basis of the Consultation Paper. The authority has also not justified as to how it has the power to regulate advertising, on the basis of a 2004, in the presence of the CTN Act and Rules which are laws passed by the Parliament which have been made after the said notification and thus post-date it. It is submitted that if there are relevant regulations in place, the lack of effective enforcement does not provide for TRAI to revisit the existing regulatory mechanisms and take up the present exercise. The focus should be on effective enforcement of existing regulations which address all the issues under consideration in the present consultation paper.

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<sup>1</sup> Recommendations on Issues relating to Broadcasting and Distribution of TV channels (October 1, 2004)

**B.** Reference to a CMA study to highlight its case for a need for regulating advertisements.

**RESPONSE:** The study has not been made available to the stakeholders,

Authority is mandated under the Act to maintain complete transparency while discharging any of its function same has been upheld by TDSAT. The Authority not providing the study relied upon or annexing same along with consultation paper is an act of non-transparency.

Even otherwise the study so relied upon by the authority as it appears is only with respect to cluttering of television screen by various content and advertisement been one of them. Hence applications of study out its context vitiate this entire exercise been carried out by the authority. The study relied upon by the Authority to this conclusion takes into account cluttering of screens by captions, Graphics etc. the consultation paper does not indicate any specific data with respect advertisement cluttering the screen and the amount of distress been caused by such advertisement to the subscriber's. Moreover this study as it appears is primarily based on NEWS channels, majority of them are Free to Air Channels. Hence it is not understood that how authority is applying the conclusions derived from Free to Air & News Channels to Pay & General Entertainment Channels.

Further as derived from the extracts provided by the TRAI, the study focuses only on news channels. News channels in India are largely free to air and the tickers and Astons on the screen are used mostly to supply information that viewers desire. The authority has failed to make a case as to how, using only news channels as reference, it has painted all broadcasters in the same colour.

**C.** Assertion by TRAI that television broadcasting should not become a medium for advertising

**RESPONSE:** 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 which includes education consumers, propagation of socially relevant messages, eg. campaigns like the "Jago GrahakJago" which reaches out to millions of illiterate Indians, the fact that advertisements being the principal source of revenue for broadcasters enables them to provide superior and differentiated content, that by increasing sales of goods and services advertisements contribute to the growth of the economy. The authority has also overlooked its earlier recommendations dated October 2004 wherein it has asserted that reducing advertisements would increase channel costs and thus burden the consumers.

Therefore, even as advertisements are important to the broadcasters as an important revenue stream, it is also equally important for the advertiser's for showcasing their products to end consumers and also in

exploring new markets and at same time enabling the consumer to make informed choice. Therefore Authority preconceived notion that display of advertisement on television is “a mere tool for marketing”, but serves no socio-economic interests of the masses is absolutely unfounded and baseless. Any regulation or recommendation based on such preconceived baseless parameters will be in violation of the mandate of the Authority.

As explained above, television as a mass media is an important tool for advertiser’s to quickly generate awareness of their products and services among the targeted audience and equally for the consumers to make a informed choice. Limiting the meaning of mass media to only “entertainment, viewing experience, education and communication” will be a myopic perception of television’s role as mass media.

**D.** Revenue ratio of broadcasters which is currently in favour of advertising will become balanced with the implementation of digitisation.

**RESPONSE:** The fallacy of this argument given by the authority can be gauged from the fact that the authority is presuming that four years down the line digitisation will be successfully implemented and thus wishes to start regulation advertisements in the present on the basis of future predictions. Though we as broadcasters wish that digitisation is successfully implemented the current actions of the authority is an example of putting the cart before the horse. Thus we believe that the correct time to talk of the effects of digitisation would be once it is fully implemented. In the current Analogue system FTA channels, which rely solely on ad-revenues, they have to become a part of a larger bouquet of channels wherein the cost of running the FTA channel, gets subsidised by the other more profitable pay channels of the bouquet. Pay channels continue to depend on advertisement streams and will continue to do so to a great extent during the transition phase. Certainty will settle only after few years post-digitalization regarding the extent of contribution of subscription fees to a broadcaster’s revenue. The belief that proliferation of digital addressable systems will automatically of its very own process result in improved contribution of subscription revenue is at best an irrational assumption.

For any channel to remain viable, Most important thing is that content/program of the channel is attracting subscribers. Irrespective of the fact that whether the channel is FTA or Pay. In proposed digitised addressable world this competition for content is going to be more fierce as the consumer can exercise choice to subscribe to only those channel which he likes. Thus the market will on its own correct any anomalies that may creep in due to over advertising.

**E.** Reference to International Markets

**RESPONSE:** TRAI has made fundamental errors in comparing the nascent Indian broadcasting industry with far more established markets of Europe and the America’s. the authority has shown no reasons which would

establish parity between the under declared and rate regulated Indian market with that of fully digitised markets which do not have rate regulations.

In most countries, content is completely consumer driven and Pay TV channels enjoy better ARPU rates as compared to broadcasters in India. Television in India is characterized by one of the lowest ARPUs in the world. Most importantly, vertical integration in most countries is a norm which not only helps stakeholders in the value chain to exploit vertical efficiencies but also enables the broadcaster to be connected directly with the consumer, whereas in the case of India the broadcasting value chain suffers from fragmentation. Therefore the broadcasting sector in India has its own peculiar issues and concerns and hence reference to advertisement regulations in other countries is utterly irrelevant. TRAI by citing advertisement regulations as existing in different countries without providing them within a relevant context has only succeeded in giving dry examples without much force or persuasive value.

**F. Differential timing for FTA and Pay channels**

**RESPONSE:** The authority has not provided any cogent arguments to its assertions on different ad minutage for FTA and pay channels. This assumes significance in the Indian market where no channels are free to the consumer and where in the analogue market the consumer is unaware of the difference between a FTA or a pay channel. The authority has not referred to its failures at consumer education and its inability to enforce the QoS regulations in relation to billing by LCO's which has led to the consumers being unaware of the nature of the payments they make for different channels. This proposed stipulation does not recognize the basic and inherent differential factors that characterize regional channels to which a universal and generic guideline that may suit other channels cannot apply. Factors such as huge content costs, carriage costs in excess of pay revenues, price sensitive retail advertising sector that have been stressed above merit repetition in this context. 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.

If the dependency of pay channels on advertisement revenue declines, which, if further brought down owing to digitalization, will by its very fact, become a strong incentive for pay channels to telecast even lesser advertisements as and when their revenue streams start becoming more significant from the subscription side. But before that actually happens, proceeding on such beliefs are merely pre-emptive assumptions. Moreover, proposing a regulation as above ignores the fact that the industry is at the cusp of undergoing a revolutionary transition, but about which there is presently a lack of clarity regarding enforcement and ground level implementation. Also, in its Recommendations dated 1<sup>st</sup> October 2004, Authority had admittedly stated that, "*besides regulating subscriptions, regulation on the advertisement time and its*

*corresponding effect on the revenues for broadcasters may hamper growth and competition in the broadcasting industry.”* Therefore such a proposal, if implemented even before the actual benefits of digitalization accrue to the stakeholders, will act as an impediment to broadcasters in their ability to earn revenues even as they currently reel under heavily regulated tariffs.

Further, usage of a mere assumption that digitalization will result in reduced dependency of pay channels on advertisements, for proposing 6 minutes-per-hour advertisement time for Pay Channels is arbitrary, irrational and lacks sound logic and justification. Neither does TRAI provide any sort of metric, criteria or rationale for reducing the maximum per hour advertisement time from 12 minutes, in case of FTA channels to exactly its half, in case of pay channels. The authority prescribing criteria from nowhere has been subject matter of judicial contest between stakeholders and the authority. Without prejudice to the above it is submitted that TRAI has not taken into account the fact that there exists a market based mechanism for determining the frequency of advertisement. It is logical for any broadcaster to design his programming in such a way that it gets maximum viewership. It is very critical in the broadcasting business model to keep the viewership high, as the same is the sole yardstick for the successfulness of any program. A broadcaster will always try to maintain a balance between ensuring its advertisement revenues as well as the interests of its viewers to ensure high viewership which necessary will transform into better advertisement revenues.

**G. Regulation of the timing and length of advertisements.**

**RESPONSE:** There should not be a reduction in advertisement time on pay channels. Broadcasters struggle to recover even 20% of the cost of a movie in the first year of telecast with no restrictions on ad duration. If the “3 break per movie” is implemented, it will become unviable for broadcasters to acquire C&S rights and thereby this will cause a domino effect on the entire movie industry (C&S rights account for almost 30% of the cost of production of movies).

The authority has ventured into a domain wherein by any stretch of imagination the authority can prescribe any parameters this function does not and cannot be within its present power or authority or functions delegated to the Authority, regulate or even suggest recommendations regarding content related aspects as aforementioned. It is a matter of programme presentation by the broadcaster to generate and sustain user attention through appropriate advertisement breaks in the story line.

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

**RESPONSE:** These issues are out of the purview of TRAI and it is not empowered to recommend or 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.

- I. 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.

**RESPONSE:** 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.

- J. There shall only be full screen advertisements. Part screen advertisements will not be permitted. Drop down advertisements will also not be permitted.

**RESPONSE:** 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.

**CONCLUSION:**

TRAI is not legally empowered or has the authority, to suggest stipulations regarding enforcement of advertisements on a clock hour basis, more so when the rule 7(11) of the Cable Television Networks (Regulation) Rules, 1994 already provides for the same.

TRAI in the proposed stipulation sought to bring out a difference in its treatment of Pay and FTA channels for regulating maximum advertisement time on those channels. However, TRAI has not established a cogent nexus between its objectives as stated in the Consultation Paper and its attempt to create a distinction between the two types of channels. TRAI has also failed to show how its objectives as stated in the Consultation Paper will be better achieved through creation of such a distinction between the two types of channels. Further, TRAI has not provided any sort of standard, metric or parameter on the basis of which the Hon'ble Authority has arrived at a figure of 6 minutes in respect of Pay Channels. Moreover, Rule 7(11) of the Cable Television Networks (Regulation) Rules, 1994 provides a clock hour basis regulation of maximum advertisement time in respect of *all* T.V channels. The instant rule does not provide for any distinction

between a Pay channel and an FTA channel when it comes to regulating maximum advertisement time on either. It is submitted that TRAI's stipulations as proposed cannot in any manner be contrary to an express and specific legal provision. Therefore, TRAI's attempt to create a distinction between Pay channel and an FTA channel in respect of maximum advertisement time is wholly irrational, arbitrary and contrary to established principles of law in the country. The proposal regarding the number of advertisement sessions per hour and the stipulation that a programme shall run continuously for 12 minutes, are utterly impermissible as TRAI does not have the authority or the legislative sanction to make the same. This is so because it directly interferes with how content and programmes are to be shown on television, which at all, can be done only by the Ministry of Information & Broadcasting. Therefore it is submitted that, TRAI is not empowered legally in any manner to propose the same.

In view of an express provision in the Cable Television Networks (Rules), 1995 as per rule 7(10), whereby it is mandated that all advertisements should be clearly distinguishable from the programme and should not in any manner interfere with the programme, the stipulation as proposed by TRAI, wherein 10% of the screen space is to be allowed for carrying non-commercial scrolls, tickers etc., on News and Current Affairs, stands at cross-purposes with the former. Where rule 7(10) does not permit any manner of interference with the programme by the advertisement, it is not understood how authority has assume function of regulating content and making stipulation of allowing only 10% of the screen space to be utilized for carrying non-commercial scrolls, tickers etc.

it is submitted that the regulation on advertisement time may push up subscription fees. If advertisement time is regulated (thus the revenue from advertisement), the broadcaster would try to compensate the revenue loss with increased subscription fees. The Average Revenue Per User (ARPU) would be high in such case. Thus a regulation in advertisement would eventually lead to heightened subscription fees, which burden may have to be ultimately borne by the consumer. Additionally, this could lead to further reduction in the quality and variety of content, thus leading to the commodification of the entire content industry. Authority admittedly in its Recommendations dated 1st October 2004 (pp. 100-101) had referred to the example of Thailand, where advertising is banned on Pay TV. Therein TRAI had noted that, due to the ban on advertisement on Pay TV channels in Thailand, the ARPU touched very high levels at US \$32 per month.

Therefore, it is submitted that the positioning adopted by TRAI in the recommendations of 1st October 2004, on the basis of market situations prevailing then, still holds valid even in present circumstances as the market situation currently is no better than in 2004, if not worse.

