



BY EMAIL, SPEED POST AND COURIER

05 April 2012

Telecom Regulatory Authority of India,
Mahanagar Door Sanchar Bhawan,
Jawahar Lal Nehru Marg, (Old Minto Road),
New Delhi – 110 002.

Kind Attention: Mr. Wasi Ahmad, Advisor (B & CS)

Dear Sir,

Please find enclosed our response to the consultation paper no. 7/2012 on "Issues related to advertisements in TV channels" dated 16 March, 2012, on which comments have been sought from stakeholders.

Please note that this response is without prejudice to any rights or contentions we may have with regard to any of the matters discussed. We reserve the right to furnish comments/ counter comments for the purpose of further clarifying our position on the proposals set out in the consultation paper.

Yours faithfully,

For ESPN Software India Pvt. Ltd.

A handwritten signature in black ink, appearing to read "Vijay Rajput", is positioned below the typed name.

Vijay Rajput
Chief Operating Officer

Encl: Detailed response to the consultation paper on "Issues related to Advertisements in TV Channels" dated 16 March, 2012



05 April 2012

Submissions of ESPN Software India Pvt. Ltd. ("ESI") to Telecom Regulatory Authority of India ("Authority") in response to the Consultation Paper on "Issues related to Advertisements in TV channels" dated 16 March, 2012 ("Consultation Paper")

INTRODUCTION:

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 under the *Cable Television Network Regulation Act 1995* and rules framed thereunder ("**Rules**") which has not been faulted in its essence.

The Authority itself has in its "Recommendations on Issues relating to Broadcasting and Distribution of TV channels" of 1 October, 2004 in paragraph 8.12 of Section 8 stated as follows.

"Broadcasters that put sizeable amount of time on advertisement loses viewership which is detrimental for a TV channel as such loss of viewership would mean loss of revenue. This shows that the market has a means of correcting "overadvertising". This is corroborated by a report provided by Edeilweiss Capital on Zee Telefilms. Moreover for sports, advertisements can be inserted only during the natural breaks like between overs in a cricket match or during lunch/tea time."

The Authority concluded in paragraph 8.15 of the same report that "[t]here should not be any regulation at present on advertisement on both FTA and Pay channels," clearly favouring self-regulation driven by market forces. This approach was also endorsed by the Authority as recently as in February, 2011 when the Authority reiterated its stance through an affidavit filed before the Hon'ble Telecom Disputes Settlement and Appellate Tribunal in *Utsarg v. Union of India* (Petition No. 34(C) of 2011).

It is in that context that can see that there is no basis or data in the Consultation Paper that would provide sufficient grounds for the Authority to overturn its existing position on this issue. In order to justify the draconian measures being proposed in the Consultation Paper, the Authority relies heavily on the Centre for Media Studies report, which draws some questionable conclusions that appear highly subjective and are presented without any scientific basis. The failure of the Authority to provide access to the relevant reports and data amounts to a violation of section 11(4) of the *Telecom Regulatory Authority of India Act 1997*, which requires the Authority to exercise its powers in a transparent manner.



Further, the mandate relied on by the Authority in the form of the notification dated 9 January 2004, does not appear to offer the requisite legitimacy or scope of authority for the nature and extent of proposals put forth in the Consultation Paper which seem to extend far beyond "*parameters for regulating maximum time for advertisements in pay channels as well as other channels*" and also appear to encroach on prevailing laws enacted by the Parliament, particularly in relation to stipulations on placement of advertisements during sporting events, content of tickers that may be run by News channels or even audio quality. The Authority has singled out sports and news programs and proposed changes that would not only negatively impact the business models of channels in those two genres, but also impose intrusive and unnecessary rules regarding content appearing on the channels. A good example is the proposed mandating of whole screen advertisements and the proposed restriction on the number of tickers appearing on the screen. We believe that it is wholly inappropriate for a regulator such as the Authority to dictate to broadcasters the look and feel of their channels, particularly in the absence of any compelling evidence of consumer detriment. Indeed, the use of squeeze backs during live sporting events allows consumers to enjoy the uninterrupted action when there are no natural breaks.

In addition, it is also important to highlight a few areas of concern before we discuss the specific stipulations that have been proposed, as follows –

1. The proposals of the Authority assume that digitization, which is expected to commence in June 2012, will solve the issue of the prevalent gross under-declaration by increasing subscription fees to the broadcasters, thus reducing reliance on advertisement revenues. While it is the hope of the industry as well that digitization would address under-declaration, this is an assumption that needs to be tried and tested and while the exercise is expected to commence in June, 2012, there are a total of four phases to be completed by the end of 2014. Further, 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 provide the hoped-for benefits would be premature at this stage.

In fact, with the Authority currently consulting in relation to important questions regarding the revenue models and share in a digitized regime, it is not possible to embark on a realistic assessment of the actual business impact that may manifest as a result of such radical changes.

2. The Consultation Paper suggests a generic approach towards general entertainment channels and sports channels without detailing the unique differentiators and constraints of sports broadcasters 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 sports channels which are *niche* channels which operate differently due to unique and periodic content availability, limited shelf life, mandatory sharing requirements, limited advertisement opportunities and huge content costs. 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 broadcasting industry at large which leads us to the conclusion that the Authority has not carried out the kind of comprehensive study necessary to make the changes proposed.



3. The international practices that have been cited need to be viewed in the context of the larger frameworks within which they operate and cannot be viewed in isolation. There are also some factual difficulties, which are documented in the submission of CASBAA. The fact that most of the jurisdictions covered do not operate under regimes where prices ceilings prevail and thus allows broadcasters far more options even if advertisements are subject to regulation, is a critical factor which cannot be ignored. Given that context, the question to be considered is perhaps that if the maximum time limits are in the prescribed ranges in markets without price regulation, then should not the time limits be even higher in a market with price regulation such as India in order to compensate the logical revenue impact.

The recognition of the impact of the prevailing price ceiling regime in India would also explain to some extent the difference in revenues earned from advertisements and subscription that has been observed by the Authority along with the historical challenges like under-declaration.

4. 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. In any event, there is an existing and active body in the form of the Advertising Standards Council of India which is seized of the matter of addressing and serving consumer interests *vis-à-vis* advertisements through different media on the basis of the existing laws.

With the above preface to contextualize our comments and submissions, please note our responses to the specific stipulations proposed below.

RESPONSE TO PROPOSED STIPULATIONS

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, primarily due to the following reasons.

1. The Authority provides no basis or data in the Consultation Paper to support the benefit to consumers or the negative impact on the industry of such a stipulation.

2. A change in the existing laws prescribed by the Rules, as amended, would not serve the consumers as viewership patterns differ throughout the day due to which a clock basis approach that would apply universally to all hours would not be logical.

3. Such a proposal demonstrates the inherent deficiency where *niche* channels such as sports broadcasters have not been considered. A clock hour basis measure would not suit this *genre* of channels where live content is seasonal, limited to a specific period and the natural breaks where advertisement would be appropriate would vary from sport to sport. There cannot be a universal measure when the sports could be as varied as a test, one day of T20 cricket match, a Formula 1 race or a soccer match.



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

Response – As the Authority has noted, the extant provisions concerning the duration and format of advertisements in the TV channels prescribe a limitation not exceeding 12 minutes per hour regardless of whether the channel is FTA or pay channel. Therefore, the proposal for a differential treatment without sufficient or appropriate basis or justification appears to be discriminatory and unfair and has not been justified on the data provided. In this regard, it is also relevant to note as follows.

1. The proposed stipulation does not recognize the basic and inherent differential factors that characterize sports channels to which a universal and generic guideline that may suit general entertainment channels cannot apply. Factors such as unique and periodic content availability, limited shelf life, mandatory sharing requirements and huge content costs that have been stressed above merit repetition in this context. There has to be a difference in approach in dealing with live sporting content and recorded general entertainment programming.

Sports broadcasters typically invest huge amounts towards content acquisition which has to be recovered within a very limited period of time on a seasonal basis and even under the current laws, there are very limited advertisement opportunities. Therefore, an additional restriction linked to timing that is far more excessive and does not respect the nature of the content would challenge the business models on which such channels operate. In a price regulated market, advertising plays a crucial role in enabling broadcasters to offer varied and quality content to viewers.

It is quite usual for content holders to stipulate certain minimum advertisement revenues based on which they grant broadcast rights and any prescription that is so substantially different from prevailing norms within the country and outside for pay channels could compromise contractual commitments and attract consequences under existing rights agreements. Needless to mention the losses which will be suffered by broadcasters who have entered into multi-year agreements based on such estimates. In fact such extreme guidelines could restrict the ability of broadcasters to acquire content going forward and will also limit sponsorship avenues for sports broadcasting in India due to the limited exposure that can be assured to the advertiser. This would be a great disservice not only to the audience but also to the growth and development of sport in the country.

Furthermore, sports broadcasters are also subject to the rigorous requirements of the *Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act 2007 ("Act")* under the terms of which our ability to earn revenues through telecast of notified events are curtailed by the content sharing requirements and revenue sharing arrangements with the national broadcaster, thereby being subject to an additional burden that is not applicable to the general entertainment channels. The practice of sharing the signals provided under the Act on an unencrypted basis by the national broadcaster also leads to and facilitates large scale piracy of sports content throughout the country and beyond, thus resulting in considerable business impact and revenue loss.

Please also refer to our comments in response to proposed stipulation (iv) for further details on challenges faced by sports broadcasters.



2. There appears to be no logical reasoning to propose a timeline of 6 minutes which is half the timeline that is currently permitted and that will continue to be available to FTA channels. It is also not clarified as to what the allocation of time towards the different categories of advertisements (commercial, self-promotional and educational) would be if there was indeed a prescription of 6 minutes for pay channels. This renders the proposal incapable of a proper response in any event due to lack of clarity or transparency. In fact, given that the Authority has recognized that there are three categories of advertisements, the consideration, if at all, ought to be to increase the timeline upwards from 12 minutes as the current laws prescribing this limit allow for 10 minutes of commercial advertisements and 2 minutes of self-promotion without an allocation for educational advertisements.

3. 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 would not really derive any benefits, assuming viewership is influenced by the content of each channel as much as the frequency of advertisements.

4. The international scenarios envisaged in Annexure I also do not seem to reveal a practice of discriminating between FTA and pay channels in this respect. To the contrary, the international practice in this regard in fact points to a universal prescription that averages around 15 minutes per hour and a prescription of 6 minutes per hour would be unprecedented.

5. The historical fact of price fixation that is referred to in the Consultation Paper also evidences that the prices for all 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.

6. As explained above 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 and 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, would be sufficient justification to curb advertisement revenues.

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.

7. 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.

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.



iii. **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.**

Response – In furtherance of our submissions in responses above proposing that there should not be a reduction in advertisement time on pay channels and that sports channels are *sui generis* in nature due to various factors including unique and periodic content availability, limited shelf life, mandatory sharing requirements and huge content costs, we reiterate that a generic guideline of the nature proposed in this stipulation would not be appropriate or logical for sports channels. Please also refer to our response to proposed stipulation (iv) below for further details.

iv. **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.**

Response – We submit that the nature of sporting events is too diverse and distinct to prescribe a generic guideline aimed at limiting advertisements to 'interruptions' in the sporting action where the notion of 'interruption' itself is not defined, other than a couple of incomparable illustrations.

It may be more appropriate to stipulate a norm based on 'natural breaks' in an event where the game is not in play without any intervention by the broadcaster. This would of course be unique to each sport and must be assessed accordingly. The Authority itself has recognized this notion in paragraph 8.12 of Section 8 ("Advertisement") of its "Recommendations on Issues relating to Broadcasting and Distribution of TV channels" of 1 October, 2004 where it has identified over changes and other breaks as 'natural breaks'.

For instance, in a match of cricket, such natural breaks would occur during the time between the ball being dead and alive, which would include end of an over, injury time, lunch/drinks break, fall of a wicket, ball crosses the boundary, ball is lost or stuck (such as in a helmet) and other situations when the ball is not in play. When no sporting action is ongoing, the host broadcaster producing the live feed of the matches typically moves the camera to a static frame and commentators pause until cued by the producer. These are times when the game is not in play and there is no sporting action taking place. Therefore, using this time for advertisement does not in any manner adversely affect the viewership experience. To the contrary, viewers may prefer to watch advertisements regarding products/services or other options rather than watch still frames. These norms are also recognized by international bodies regulating sports such as the International Cricket Council. It is pertinent to note that the national broadcaster, Doordarshan, also follows the same approach.

Therefore, we cannot stress enough on the importance of adopting a customized approach that recognizes the uniqueness of each sport which precludes the viability of a generic guideline across sports. It is reiterated that 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 sports channels which are *niche* channels which operate differently due to unique and periodic content availability, limited shelf life, mandatory sharing requirements, limited advertisement opportunities and huge content costs. These unique factors must be emphasized given the defining impact they have on the earning ability of sports channels as opposed to general entertainment channels.



Restriction of advertisements to lunch/drinks break only during a cricket match would mean serious and far reaching impacts when one considers that such timings are when the audience also may not be committed and advertisers willing to procure spots during such time will be very limited.

It is important to revisit the approach suggested by the proposed stipulation and move to an approach that relies on natural breaks for other reasons as well. If the norms do not respect the unique nature of each sport and attempt to prescribe generic guidelines, it could have serious impacts on the ability of broadcasters to attract sponsors for events, which in turn will have a ripple effect that will ultimately affect the development and visibility of sport. Sponsorship is of utmost importance in sports broadcasting where content costs are huge and it would be naïve to assume that ticket sales alone will allow a broadcaster to recoup the investment made. Without sponsorship, the quality of athletes and production of events for television would not have reached the global standards they have attained, the ultimate benefit of which accrues to the viewer.

Further, the rights agreements under which sports content is procured generally prescribe the advertisement norms and restrictions that are in accordance with international practices in sports broadcasting. This in itself is the biggest regulator and also assures parity with international norms.

In light of the above, we submit that there ought to be no further regulation with respect to advertisements during live sporting action as it is uniquely dependent on the nature of each sport, is sufficiently governed and regulated by existing market forces and there is no data or basis that has been shared to justify changes that would effectively overhaul the *status quo*. If at all a consideration is attempted, it must to remove the generic time limits that are currently prevalent and to allow for advertisements during natural breaks of each sporting event which would be a more meaningful and productive approach.

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

Response – In this regard, it is pertinent to clarify the articulation of the objective of such a requirement in relation to sports broadcasters, which is presumably to ensure that the viewer is not deprived of the sporting action on the field and there should not be any interference with or interruption of the visuals of the telecast of the sporting action. If that be so, then the only stipulation ought to be that the play onscreen is clearly visible and distinguishable from the advertisement which should not interfere with or cause any impediment in viewing and enjoying the telecast of a match. To mandate that part screen advertisements are altogether prohibited to achieve this objective would be a disproportionately excessive measure.

Further, Rule 7(10) of the Rules 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.



vi. **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.**

Response – 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 Rules 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.

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

Response – We submit that this proposed stipulation over reaches the mandate of making recommendations on maximum time for advertisement and encroaches on the legislative privilege of the Parliament given that there is an existing regulation on this point in rule 7(6) of the Rules which require that the audio level of advertisements should not be excessively loud. Furthermore, 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.

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 also submitted that any attempts to facilitate or recommend such extreme and unwarranted measures to address only few practices that may be currently prevalent would not enable the evolution of a mature market where self-regulation and market forces would govern effectively.

Further, it is also reiterated that sports broadcasters have to be considered as a group whose constraints and concerns also deserve due consideration regardless of historical practice. It is perhaps a more urgent need of the hour to rectify such historical anomalies than usher in more generic guidelines.