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Telecom Regulatory Authority of India
Mahanagar Door Sanchar Bhawan
Jawahar Lal Nehru Marg (old Minto Road)
Next to Zakir Hussain College
New Delhi – 110 002

Ref.: Consultation Paper No.7 of 2012, Press Release No. 64 of 2012 & Press Release No.66 of 2012

Sub.: Discovery Communications India's ("DCIN") Preliminary Response to Telecom Regulatory Authority of India's ("TRAI") Consultation Paper dated 16.03.2012 on issues related to Advertisements in TV Channels ("Consultation Paper dated 16.03.2012")

Dear Sir,

1. At the outset, we appreciate and thank TRAI for affording us with an opportunity to comment on the important issues relating toAdvertisements in TV Channels as raised in the Consultation Paper dated 16.03.2012. Further, in view of the paucity of time to evaluate and respond to the proposed issues raised for consultation (hereinafter "Proposed Stipulations"), we are by way of the present Preliminary Response placing on record our concerns regarding the said Consultation Paper.

2. With respect, we state that the Proposed Stipulations as contained in Consultation Paper dated 16.03.2012 are restrictive, misguided and ill-founded, and it appears that the complete exercise is being done in haste. Further, it also appears that TRAI has arrived at foregone conclusion in introducing the Proposed Stipulations.

3. By way of this response, we wish to inform you that we are not in favor of any further regulation and/or reduction in maximum allowable advertisement in Pay channels. This is so, primarily because of the following reasons:

(a) For the protection of subscribers interests, there are sufficient safeguards contained in Rules 7(6), (10)& (11) of the Cable Television Networks Rules, 1994 (as amended) (hereinafter "Cable Rules"), and at best, these Rules need to be properly enforced. Rules 7 (6), (10) & (11) recite as under:

> *"… … …*
>
> *(6) The picture and the audible matter of the advertisement shall not be excessively 'loud;*
>
> *… … …*
>
> *(10) All advertisement 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 12 minutes per hour, which may include up to 10 minutes per hour of commercial advertisements, and up to 2 minutes per hour of a channel's self-promotional programmes."*

From the above, it can be seen that the subject matter dealing with regulating advertisements is an area that is already being regulated by MIB and notwithstanding this, TRAI has by its Consultation Paper redundantly, and outside the remit of its authority, sought responses from stakeholders on various issues, including limiting advertisements to 6 minutes on Pay channels, which are fully covered and Regulated under the Cable TV Act & Rules.

We state that the subject matter of consultation not only falls outside the purview of the Telecom Regulatory Authority of India Act, 1997 (as amended) (hereinafter "TRAI Act") but, is also inconsistent with the Cable Rules passed under the Cable Television Networks (Regulation) Act 1995t (as amended).

We are of the view that TRAI has no power under the TRAI Act to regulate advertisements in any form. Thus, the issues for consultation are beyond the TRAI's inherent subject matter jurisdiction. Further, TRAI, being a Statutory Authority, should note its Constitutional; obligations to maintain the distinction between the TRAI Act and the Cable Act which operate in separate and distinct fields, their ambit, scope and subject matter being different. This distinction is vital while framing issues for consultation.

(b) Any departure from the existing stipulations contained in Rule 7 (11) of the Cable Rules will adversely impact the niche channels (whether Pay or FTA).

(c) The Proposed Stipulations would result in reduced revenue which would serve as a disincentive to investors to invest in quality content.

(d) Revenue from Advertisement Sales helps in cross-subsidizing low subscription revenues. Any further restriction on advertising time will severely hamper the growth and competition in the broadcasting industry. Save in the case of "Discovery HD World Channel", an advertisement free channel, on which there is total reliance on subscription revenues, all our other channels (including Discovery Channel Tamil, India's first regional infotainment channel) rely both on advertising revenues as well as subscription revenues.

(e) With more than 825 channels permitted to be downlinked in India, of which some 670 channels are already operational, 'market forces' will have an adverse effect, and act as a deterrent against excessive advertising.In other global markets, programming is ad-free during periods of low viewership and ramp up advertisements during periods when they expect viewership to be higher. In India, market dynamics are already playing its role and advertisement break patterns have started to change to reflect this. This is evident from the fact that more and more channels have started putting OSD (On Screen Displays) providing information of the duration of advertisement breaks with an aim to retaining viewers. There are broadcasters who transmit 'break-free' movies. That being so, TRAI should allow the market to self-correct instead of issuing regulations.

(f) Broadcasters are fuly aware that excessive advertising is in itself counter-productive and can lead to loss of viewership and (in a digital addressable environment) loss of subscription for the channel.

(g) TRAI has itself acknowledged that in most of the countries the general limit on advertisement time is in the range of 10-12 minutes per hour which is at par with the current stipulation contained in Rule 7 (11) of Cable Rules. In its Recommendations dated 01.10.2004 on 'Issues relating to Broadcasting and Distribution of TV Channels' (hereinafter "Recommendations dated 01.10.2004"), while citing the example of Thailand where there is complete ban on advertising on Pay channels, TRAI noted that since the only source of revenue for Thailand's Pay TV services is subscription fee, the Average Revenue Per User ("ARPU") in Thailand was very high at US$ 32 per month (i.e. approx. Rs.1,600/-). This ARPU is very high even when compared with prevailing Indian standards where the ARPU is about US$ 3.4 (i.e. Rs.170/-). It is clear that advertising revenues play an important role in managing and reducing subscription rates for consumers.

4. We also oppose the proposed Stipulations on the following grounds:

<u>Reliance on Advertisement Revenues</u>:

5. In Clause 8.7 its Recommendations dated 01.10.2004, TRAI observed that in India, Pay channels derive 70% of its revenue from advertisements, thereby implying that advertising revenue is the primary source of funding for the industry and investment in new and existing programming. In Clause 1.17 of its Consultation Paper dated 16.03.2012, TRAI noted advertisement revenue as a percentage of total revenue for the Pay channels stands at 71.97%. As such, while the percentage levels may appear to have reduced by meager 5% from the 2007 levels , they increased by 2% when compared with 2004 levels. This does not in any way reflect a decline in reliance on advertisements by the Pay TV industry in India. Any further reduction of advertisement airtime from the current 12 minutes prescribed by Rule 7 (11) of theCable Rules will be counter-productive and lead to a situation where Pay channels may be compelled to turn to FTA transmission and/or shut shop.

6. TRAI ought to approach this issue in a more holistic manner by undertaking a complete profitability analysis of Pay and FTA channels based on their total cost of

operations to determine the appropriateness of the current advertising limits, and the impact of any change.

7. The Consultation Paper dated 16.03.2012 mentions that the quality of experience offered by both Pay and FTA channels needs to be more superior. A superior television-viewing experience is predominantly derived from superior quality of content and not just advertising spots. Superior content costs money.

8. Discovery Channel in India ("DCIN") delivers high quality non-fiction entertainment channels, and rely on both advertisement revenue and subscription fees. DCIN is committed to its mission of satisfying curiosity and making a difference in people's lives by providing the highest quality content, services and products. In this regard, from its vast library of high-quality programming, DCIN has presented viewers of its channels in India with a variety of genres (including nature, history, wildlife, space, astronomy, adventure, science and technology). From the launch of Discovery Channel in India in 1995, DCIN has progressed to widen its appeal and fulfill the promise of serving knowledge-based entertainment. Today, DCIN operates Eight (8) TV channels in India [i.e. Discovery Channel, Animal Planet, TLC, Discovery Science, Discovery Turbo, Discovery Channel Tamil (India's First regional entertainment Channel), and Discovery HD World (India's First advertisement free gold standard high definition channel)]. Further, in view of the keen interest and appreciation of its content by viewers in India, DCIN introduced new language feeds (such as, Hindi, Bangla and Telugu) for its programmes and produced path-breaking India programmes. DCIN is the first broadcaster in India to broadcast in its channels in dual language.

9. DCIN's differentiated and indigenous language approach led to the launch of the made-in-India network Discovery Channel Tamil. DCIN will continue to invest in India by bringing new networks to cater to viewer's demand for high quality and specialized knowledge-based entertainment segments.DCINrecently announced its entry into children programming, with the launch of Discovery Kids on 1st April 2012. This fresh and new entry is dedicated to igniting the curiosity of the next generation. Discovery is looking to launch other new channels such as Discovery Home & Health, Discovery 3D Net, Investigation Discovery and Military Channel.

Consumer Interest:

10. From the Consultation Paper dated 16.03.2012, it is seen that the primary objective of the proposed Stipulations is to give consumer choice and good quality service at affordable prices. In this regard, TRAI has already (over) regulated the subscription fees of TV channels for Conditional Access Systems ("CAS") notified areas, non-CAS areas and addressable systems. Any further regulation and/or reduction on the advertisement time will not only result in corresponding adverse effect on the revenues for broadcasters but will also hamper the growth and competition in the broadcasting Industry. Further, in view of the Hon'ble Supreme Court's Judgment dated 17.12.2002 in the matter of Cellular Operators Association of India & Ors. *vs.*Union of India & Ors., it is impermissible for TRAI to singularly adopt the consumer centric approach (at the cost of all the other stakeholders). In its Judgment, the Hon'ble Supreme Court held thatconsumer interest is only one of the relevant factors, and cannot by itself be the deciding factor.

Ramification of over-advertising:

11. Broadcasters who dedicate sizeable amount of airtime to advertisements lose the goodwill of its viewers leading to a drop in viewership, which is detrimental to the broadcaster. This loss of viewership translates into loss of revenue and drop in ratings. This will in turn impact the broadcaster's ability to attract advertisements. We should have sufficient faith that the market has self-correcting mechanisms that will serve as intrinsic restraint on over-advertising.

Impact of proliferation of addressable cable TV systems & Gross Under-declaration of subscriber base:

12. In its Consultation Paper dated 16.03.2012, TRAI has observed that with the proliferation of the addressable cable TV systems in the country, the dependence of the broadcasters of Pay channels on advertisement revenue would go down (since, there would no longer be gross under-declaration of subscribers). Mere introduction of Digital Addressable Systems does not by itself guarantee placement of channels in basic tier of addressable systems and/or subscription of all channels by subscribers. We have seen that historically, on account of the whimsical packaging ofchannels by addressable platforms (such as DTH Operators, etc.) addressability has not translated into increase in

subscriber numbers. There is little merit in the suggestion that advertisement revenues should go down merely because the industry is now in a position to better take stock of its subscribers. Improved addressability merely rectifies a long-standing injustice. The suggestion that advertising revenue should go down because we are now able to properly derive our dues from cable operators is flawed.

13. In the absence of there being any clarity on the regulatory regime for Digital Addressable Systems for phased implementation of mandatory CAS, we feel that it is premature to assume that with the proliferation of the addressable cable TV systems in the country, the dependence of the broadcasters of Pay channels on advertisement revenue would go down.

<u>Haste & Non-disclosure</u>:

14. We feel that the existing consultation exercise in terms of Section 11 (4) of the TRAI Act is being done in haste. A meaningful consultation should afford all stakeholders adequate time to evaluate the issues and proposals raised in the consultation, verify information referred to in the consultation, and gather further/other information and/or material relevant to the consultation, so as to be in a position to respond fully to the consultation. TheConsultation Paper dated 16.03.2012 appears to be more concerned with conclusion than debate.

15. In the Consultation Paper dated 16.03.2012, TRAI relied *inter alia* on **(a)** FICCI-KPMG India Media and Industry Report 2011,**(b)** Asia Pacific Pay TV and Broadcast market, 2011 published by Media Partners Asia, **(c)** report / study conducted by Centre of Media Studies, New Delhi. These studies and/or reports do not form part of the Consultation Paper dated 16.03.2012 thereby, making it difficult for stakeholders to fully evaluate and respond. We seek TRAI's cooperation in making available the aforesaid documents so as to have a meaningful and purposeful consultation process. We also call on TRAI to provide more information and details regarding the complaints received from "different quarters" (barring consumers) referred in the Consultation Paper dated 16.03.2012.

16. There is no financial viability analysis undertaken by TRAI to back-up the proposed Six (6) minute per hour of advertising suggestion for Pay channels. Isolated analysis of revenue dependence on advertising revenues and its growth are not adequate to make recommendations on reduction of advertising spots. TRAI needs to conduct two types of research –

(a) Consumer Analysis – a rigorous pan India consumer survey covering all audience segments, genres and viewership patterns and the key factors affecting the viewership patterns. This exercise would need to determine the sensitivity of viewership patterns to both change in advertising spots and a corresponding change in subscription charges. Post that TRAI needs to project a statistically stable demand forecasting mechanism to evaluate the potential impact on the consumer due to change in advertising spots & revenues and the resulting impact on the subscription charges. **As a part of this assessment it is essential for TRAI to determine whether the implementation of the 20% advertising time is more important to the consumer or reduction of advertising time which will almost certainly increase the subscription revenues. A consultation without this assessment is a disservice to the consumers.**

(b) Financial Viability – a complete Financial viability analysis of the broadcast channel(s) due to reduction in advertising revenues, the permissible corresponding change (if any) in subscription revenue and its net impact on it viewership & subscription. **TRAI ought to base this projection on scientific models created with reliable data**. This needs to be based on extensive industry surveys with advertisers and broadcasters to understand the advertising market and potential changes in business structures before determining the full financial impact. This will need to be carried out across all genres and all languages.

In this regard, we are also enclosing herewith typed-copy of Press Report that appeared on 28.03.2012 in the New Delhi edition of the Business Standard newspaper. We feel that the issues highlighted in the said report merit proper consideration of TRAI.

<u>Analysis of Data in an isolated manner</u>:

17. In arriving at its opinion / conclusion for introduction of Proposed Stipulations TRAI relied and looked at data in isolation. In Clause 1.4 of the Consultation Paper dated 16.03.2012, while relying on the alleged growth figures of advertisements from the years 2007 to 2010/11, TRAI failed to deal with the increase in the total number ofchannels in the country from 2007 to 2010/11. TRAI has also failed to consider the number of Pay channels in existence in 2007 and those in existence in 2010/11 in India.

18. Similarly, in Clause 1.5 & 1.6 of the Consultation Paper dated 16.03.2012, TRAI attributed non-addressable nature of cable TV networks to be the prime reason for broadcasters dependency on advertisement revenues. We feel that this observation of TRAI is erroneous since, addressable nature of cable TV networks by itself does not translate in to increase in viewers. This is so because, the Operators operating on addressable platforms tend to charge huge carriage or placement fees from the Broadcasters for placing their channels in basic tier.

<u>Aberrations (if any) limited to News Channels & Restricted earning potential</u>:

19. From the Consultation Paper dated 16.03.2012, it is seen that aberrations (if any) from not complying with the provisions of Rule 7 (11) of the Cable Rules is restricted to the genres relating to – News channels, Sports Channels and Hindi General Entertainment channels ("Hindi GECs"). Further, no instance has been highlighted*qua* the following genres – English (General Entertainment Channels) ["English GECs"], Movies (English / Hindi), News (English/Hindi), Infotainment, Kids, Music, Lifestyle and Regional channels.

20. Clause 1.10 of theConsultation Paper dated 16.03.2012 also shows that the alleged aberrations noted in Centre of Media Studies' Report was restricted to News channels only and that too during the prime time (i.e. 1900 Hrs. to 2300 Hrs.). This not only shows heavy reliance ofchannels on advertisement revenues but, also the limitation of earning potential. We feel that this aberration can be cured if TRAI were to remove ceiling on pricing of Channels.

<u>No straightjacket rules in view of differential genre-wise price restriction on channels</u>:

21. In view of TRAI's genre-wise restriction on pricing of channelswhereby Infotainment channels, Kids channels and Lifestyle channels cannot be priced more than Rs.16.50, Rs.13.40 and Rs.9.63 respectively [vis-à-vis Hindi GECs and Sports Channels that cannot be priced at Rs.22/- and Rs.35.31 respectively], TRAI ought not stipulate a straitjacket rule for all genre of channels. This is necessary since infotainment channels do not get subscribed in those many numbers as Hindi GECs and/or Sports channels. Further, the subscription revenue generated by infotainment channels is not even close to that of Hindi GECs and/or Sports channels. As such, any further reduction in advertisement time can and will have crippling effect on Broadcasters of infotainment channels.

<u>International Scenario</u>:

22. In view of the paucity of time to respond to the Consultation Paper dated 16.03.2012, we are presently unable to fully evaluate the provisions / practices cited by TRAI in Clause 1.11 read with Annexure 1 to the Consultation Paper dated 16.03.2012. As such, we would be adopting CASBAA's (Cable & Satellite Broadcasting Association of Asia) response to the Consultation Paper dated 16.03.2012, wherein CASBAA has inter-alia – (a) highlighted a few discrepancies in TRAI's study regarding television advertisements in major international markets, and (b) submitted the summary of regulations for Pay TV channels to TRAI.

23. In any event, the existing provisions regarding duration of advertisements should not be tinkered with since, they are at par with 'overall' international standards. In this regard, reference is made to Clause 1.11 i. of the Consultation Paper dated 16.03.2012, which recites as under:

> *"i. The overall duration of advertisements in most of the markets is around 20% of the total programme time i.e. 12 minutes per hour."*

24. Even if it were otherwise, TRAI ought not look at 'international scenario' in isolation and should evaluate and examine – (a) the ARPU of Pay channels in the countries specified in Annexure – 1 to the Consultation Paper dated 16.03.2012; (b) payment of Carriage and Placement Fees by Broadcasters (of Pay as well as FTA channels) to various distribution platforms in the countries specified in Annexure – 1 to the Consultation Paper dated 16.03.2012; and (c) genre-wise rates of advertisement slots of Paychannels and FTA. Further, calculation of minute-age of advertisements per hour on TV channels should be continued to be done on One (1) Calendar day basis (instead of the proposed hourly basis) since, it is a standard practice followed in other markets as well.

Foregone Conclusion:

25. The tone and tenor of the Consultation Paper dated 16.03.2012 (and the Proposed Stipulations for consultation) creates the impression that TRAI had predetermined the Proposed Stipulations and wants to roll-out the Proposed Stipulations, without full and meaningful discussion. We urge TRAI to issue a fresh Consultation Paper after evaluating the various issues highlighted above and others raised by other stakeholders, who should be given more time to respond to the same.

<u>Jurisdiction</u>:

26. The Regulator must consider the subject matter of consultation in relation to the powers and functions prescribed under TRAI Act in a manner which is consistent with Constitutional Principles and Judgments of the Supreme Court.

27. We state that the Notification dated 09.01.2004 refers to giving recommendations for regulating maximum time for advertisements, it cannot confer power to TRAI, in the absence of such power in TRAI Act itself. TRAI being a creature of Statute, is bound by the TRAI Act and must act within its four corners/parameters setout therein. Without prejudice to the foregoing, at the highest, TRAI under the provisions of Section 11 (1) (a), can only make Recommendations to the Government, it cannot take a<u>decision</u> in this regard.

28. It is also important to note that the Supreme Court in Tata Press Ltd. *vs.* MTNL, reported in 1995 (5) SCC 139 has held that –"*Commercial speech and expression are guaranteed under Article 19 (1) (a) of the Constitution*". The basis of Supreme Court Order was that advertisement is the corner stone of the economic system and, therefore, is commercial speech.

29. In view of the foregoing, TRAI does not have the powers to regulate advertisements on TV channels.

30. Further, in view of Central Government's notification No. S.O.45(E) dated 09.01.2004, TRAI has been empowered only to make 'recommendations' specifically in relation to parameters for maximum time durations for advertisements. Also, in view of the fact that the said Notification was issued by Ministry of Communications & IT ("MCIT") [and not by Ministry of Information& Broadcasting ("MIB")] therefore, the recommendations, at best, can be made only to MCIT, which had sought them from TRAI. It is further submitted that the Programming Code and the Advertising Code as specified in Sections 5 and 6 of the Cable Act,allows only the MIB to formulate (and amend) the said two Codes, which MIB has been doing. In this regard, TRAI's attention is invited to the provisions of Rules 7 (6), (10) &(11) of the Cable Rules.

31. We state that the issues pertaining Jurisdiction go to the root of the matter and as such, they should be considered by TRAI at the threshold/outset.

<u>No power to issue Regulations on the subject matter</u>:

32. Notwithstanding the foregoing, since from the Consultation Paper dated 16.03.2012, it appears that TRAI intends to introduce Regulations containing proposed Stipulations therefore, we wish to bring it to TRAI's attention that TRAI does not have powers to issue Regulations on the subject matter. This is so, because Regulations under the provisions of Section 36 of the TRAI Act can be issued only for the purposes specified in –

- ⇒ Section 8 (1) & (4);
- ⇒ Section 11(1)(b) (vii)& (viii); and
- ⇒ Section 11 (1)(c) of the TRAI Act,

and none other.

<u>No need for deviation from TRAI's own Recommendations dated 01.10.2004</u>

33. In view of the above background, we feel that there should not be any further regulation on advertisement on both, FTA and Pay channels. In this regard, we wish highlight that in its Recommendations dated01.10.2004, while recommending that –

(a) There should not be any regulation, at present, on advertisement on both FTA and Pay channels.

(b) 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.

(c) Broadcasters would also be required to give information on advertising time to TRAI and the Government and this would also be made available to the public through TRAI website.

(d) Broadcasters should be free to decide which channel should be FTA and which should be pay.

TRAI had itself noted that –

(a) Most countries have regulation on advertisement time and the nature of regulation varies. The time limit on an average is in the range of 10-12 minutes per hour. But globally, in most of the countries the percentage of revenue from subscription is on even balance in relation to advertisement revenue. In India the ratio is in favor of revenue from advertisement and not from subscription. The former constitutes 100% in FTA channels and it is about 70% in the case of Pay channels.

(b) The average time reported by Broadcasters to TRAI on advertisement is seen to be within the global scenario.

(c) Regulation of advertisement time can adversely impact the subscription fees, as broadcasters would attempt to neutralize the revenue loss. This may be against the objective of providing affordable prices.

(d) Excessive advertisement by itself is detrimental to the service providers as it may result in loss in viewership and the market has a self-correcting mechanism.

(e) The recommendation on CAS and Traps providing a choice not to view Pay channels may have an impact on viewership of Pay channels and in this background, regulation of advertisement time may push up subscription rates.

34. **Further, the conclusion that ought to be reached is that market forces will be more effective in promoting competition in the broadcasting sector and thereby protecting consumer interests rather than any of the proposals put forward for restricting advertisements in TV channels.**

Thanking you.

Yours truly,
for Discovery Communications India

Rahul Johri