

07 October 2024
Hong Kong

Shri Sanjay Jaju
Secretary
Ministry of Information and Broadcasting (MIB),

Via email: secy.inb@nic.in

Dear Sir,

Request for Meeting on Submission to the Ministry of Information and Broadcasting (MIB) on the draft Rules for the Cigarette and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2024

The Asia Video Industry Association (AVIA) is the trade association for the video industry and ecosystem in Asia Pacific. It serves to make the video industry stronger and healthier through promoting the common interests of its members. Our membership consists of a combination of local, regional and multi-national companies, many of which are substantial cross-border investors; creating and purchasing video content to meet rapidly expanding consumer demands and investing in India's communications and creative industries.

We note that Ministry of Health and Family Welfare ("MoHFW") has, on 13 September 2024, issued the Draft Cigarette and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Amendment Rules 2024 ("Proposed 2024 Amendments") in exercise of the power conferred under Section 31 of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (34 of 2003) ("the **Act**") providing thirty (30) days' time to stakeholders to send their inputs on the Proposed 2024 Amendments. We and our members remain steadfast in our commitment to collaborate with the Government on enabling measures to tackle the crucial public health issue of tobacco consumption. However, we are deeply concerned about the practicality, legitimacy and implications of the Proposed 2024 Amendments.

Therefore, we would like to request an industry-level meeting on either October 8th or October 9th. The meeting will be attended by AVIA's Executive Director in India, Anjan Mitra, who's based in New Delhi.

The Proposed Draft Amendments, in their current form, have come as a shock, particularly given our ongoing discussions on challenges with respect to the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Amendment Rules 2023 dated 31 May 2023 ("**2023 COTPA Rules**"), where we had extensively detailed the concerns and challenges associated with the implementation of the 2023 COTPA Rules.

By way of this communication, we request the Ministry of Information & Broadcasting ("**MIB**") to kindly consider our concerns with respect to the Proposed 2024

Amendments (as well as the 2023 COTPA Rules) and call for a meeting with OCCP industry to enable them to explain and discuss their concerns.

We kindly request the MIB to consider the points made herein which will form an integral part of our clause-wise submissions (to be submitted at a later date).

1. We note and appreciate that the MoHFW has sought to address some of the challenges, as were specified in the 2023 COTPA Rules. However, some of the crucial concerns and fundamental issues with the 2023 COTPA Rules remain unaddressed, the MoHFW has now introduced the Proposed 2024 Amendments, which are even more stringent and overreaching. We also take this opportunity to reiterate the uniqueness of platforms of online curated content publishers (“**OCCP**”), which are pull-based libraries and primarily accessed on small mobile phone screens. This is quite different from other platforms, such as cinema or television.
2. It may also be useful to note that on World No Tobacco Day, a report titled "The Effectiveness of Tobacco Disclaimers on OTT Content Services: A Behavioural Appraisal,"¹ was published wherein a survey was conducted between March and April 2023 across 350 locations in India and with 1,896 online users. The study offered compelling insights into the habits of consumers between the ages of 18 and 35. According to the study, 66.6% of viewers remained indifferent to the depiction of smoking on OTT content services. Several other factors such as peer pressure and mental stress were identified as the more relevant and significant drivers of smoking habits in India. The report also emphasized that people primarily consume OTT content for recreational and entertainment purposes and found minimal evidence to support a direct causal relationship between consumption of OTT content and behavioural changes.
3. There has also been extensive research examining the effects of repeated exposure to pictorial and threatening warnings associated with tobacco - as per which, repetition or overexposure to such warnings may decrease emotions such as fear or disgust, thereby significantly diminishing the effect of such warnings on people's intention to quit or reduce cigarette consumption.² This is also commonly referred to as the 'wear out effect', i.e., decrease in the intended effect or influence of certain messaging over time as the viewer tends to get used to it, due to excessive and repeated exposure thereto.
4. While we plan to reiterate our submissions with respect to the 2023 COTPA Rules in the context of the Proposed 2024 Amendments, we further state the following:
 - (a) The proposed mandates to insert non-skippable anti-tobacco health advisories when the viewer / user opens an OCCP's platform, and thereafter each time they start a program, would significantly add to viewer frustration, thereby creating an overall unsatisfactory experience for them. Considering the pull

¹ https://www.koanadvisory.com/wp-content/uploads/2023/05/Tobacco-Disclaimers-Report_Koan.pdf

² Badie, L., Sophie & Morvan, G., Karine & Droulers, Olivier & Lajante, Mathieu. 'How do smokers respond to pictorial and threatening tobacco warnings?' Journal of Consumer Marketing (2019); accessible at: https://www.researchgate.net/publication/330081717_How_do_smokers_respond_to_pictorial_and_threatening_tobacco_warnings

nature of VOD content made available by OCCPs, it is found that a viewer browses through, typically, five or six different titles before deciding on one. Each time they start a title, they would be subjected to a compulsory viewing of un-skippable and repetitive health warnings for each title. This would impose an undue burden on the viewer, induce viewer fatigue, hinder the content discovery process and significantly undermine the unique allure that OCCPs hold for their users / viewers over, above and distinct from theatres and televisions. Such measures will inevitably lead to user frustration, decreased engagement, and potential subscriber churn from digital platforms of OCCPs. This will not only have severe adverse consequences for the industry but will also be a huge setback to the Government of India's ambition to revitalize India's creative economy and make it a global content hub/powerhouse for the world. Besides, this is not only arbitrary and without basis, but excessive and having no rational nexus to / not serving the intended purpose or object of the COTPA Rules or the parent act. In fact, it is not technically feasible for OCCPs to insert static disclaimer messages at the bottom of the screen when tobacco products or their use are shown in a live programme incidentally, e.g., during award shows, live interviews, sports events, etc.

- (b) At present, viewers of online curated content exercise complete discretion and judgement in the choice to view any content on the platforms provided by OCCPs. However, the Proposed 2024 Amendment proposes to mandate the inclusion of a minimum of 50 (fifty) seconds of non-skippable health spots and disclaimers, upon opening the platforms of OCCPs which may include anti-tobacco warnings / messages. The prescriptive nature of the Proposed 2024 Amendments is an affront to the viewer discretion inherent in the "pull" mode of viewing content, which is intrinsic and fundamental to the very functioning of OCCPs. As such, the Proposed 2024 Amendment unjustifiably and excessively trammel upon this inherent viewer discretion and hampers the basic functionality of an OCCP.
- (c) The proposed format is greatly overreaching by subjecting the entire platform, and a large subset of the consumers that are not intending to consume the content targeted by the COTPA Rules or may not even be vulnerable to the harms being addressed, to repetitive warnings. Additionally, these platform warnings may expose minors or other vulnerable groups to depictions of tobacco use which they would not otherwise have encountered, for instance, exposing a young child, accessing a OCCPs service to view a cartoon series, to graphic anti-tobacco health warnings without any contextual relevance. Resultantly, the mandate would fail to meet the intended impact of the messaging behind this warning.
- (d) It is unfortunate that the Proposed 2024 Amendment ignores the above research and studies and renders futile the effective measures already implemented by OCCPs by incurring substantial costs and through painstaking efforts. The prescriptive amendments fail to accordingly justify the mandatory inclusion of repetitive pictorial and threatening warnings which are unlikely to achieve their intended objective. In doing so, this proposed amendment, far from achieving the Act's intended objective, is likely to dilute and render inefficacious the critical messaging of discouraging tobacco consumption by causing 'wear out' and viewer fatigue.

- (e) Implementing the required changes to accommodate the Proposed 2024 Amendments poses a significant challenge for OCCP platforms, requiring substantial investments in time, resources, and infrastructure. Prescribing such compliances will increase the regulatory burden and create significant barriers to entry, disproportionately impacting smaller and emerging OCCPs. Moreover, it will discourage investment coming into the Indian OCCP sector, hindering job creation and economic growth in this sunrise sector.
- (f) While other countries have introduced tobacco control measures, they are not as disruptive and are more in line with consumer interest than the Proposed 2024 Amendments. Prior to implementing such prescriptive measures, it would be beneficial for viewers, the industry, and government to explore more viable messaging that achieves the intended objectives. There is no data to support the effectiveness of the measures in the Proposed 2024 Amendments.
- (g) In selectively making the Proposed 2024 Amendments applicable only to a subset of the content available online, an artificial distinction is being created which disadvantages only the OCCPs for content consumption. Consumers have access to different types of content on multiple platforms. Digital platforms of OCCPs differ significantly from other digital platforms that do not fall within the definition of OCCPs. We note that the MoHFW is proposing selective applicability of the Proposed 2024 Amendments to OCCPs. This selective targeting of OCCPs appears arbitrary and unjustified as tobacco-related content goes undetected on other platforms.
- (h) The Proposed 2024 Amendments, with their onerous and disruptive anti-tobacco messaging requirements, pose a serious threat to user satisfaction and retention, potentially leading to significant subscriber churn from OCCP platforms to other digital platforms. Further, the Proposed 2024 Rules could potentially infringe upon fundamental rights related to freedom of speech and expression, right to carry on trade / business and equality before the law.
- (i) It is submitted that requiring private players to mandatorily implement such warnings is inadvisable for several reasons such as, it disrupts the natural functioning of the OCCP platforms and user experience on such platforms, as well as placing undue burden on private businesses.
- (j) The government should prioritize utilizing its own well-established mediums for public interest communication, while respecting the autonomy and commercial interests of the private sector. This approach fosters a healthy and balanced relationship between the government and private enterprise, promoting both public welfare and economic growth. The government, when seeking to execute a public interest campaign, possesses the capability to do so independently, leveraging its own resources and platforms. The government has the capacity to conduct public outreach without relying predominantly on the private sector.
- (k) The amount of content licensed from around the world and being commissioned in India is very high across OCCPs and thus there is a practical difficulty associated with reviewing and including warnings across thousands of hours of library content as provided by the Proposed 2024 Amendments. Additionally, the six-month timeframe is inadequate for implementation of any

warnings that may be agreed upon, particularly considering platforms may host thousands of hours of content. As such, an adequate time of 12 months should be given to OCCP platforms to make adequate changes that may be agreed upon in their systems. A further period of twelve months, after establishing systems, should be granted to achieve compliance of agreed warnings in a progressive and graded/phased manner.

- (l) OCCP content is pulled by the subscriber at such times on such devices as may be convenient to them and may or may not be watched in continuation. Thus, display of anti-tobacco health spots, of minimum thirty seconds duration each at the beginning and middle of the film are unwarranted inter-alia in view of 'pause' and 'rewind' functionalities offered by OCCP platforms and as such any reference to middle must be completely omitted.
- (m) Almost 90% of content is viewed on smartphones which are 2000X smaller than a theatre screen. While viewing content of other languages, consumers read sub-titles, alongside the video viewing. Various OCCPs offer subtitles and dubbing of their content in multiple languages (including Indian regional languages and up to 35 other languages), for making content more accessible. Including some additional text/imagery on the 'small screen experience' will not meet any objective, apart from viewing disruption.
- (n) By imposing such harsh requirements which are antithetical to the optimal viewer experience which OCCPs strive to provide, the Proposed 2024 Amendment may also inadvertently result in increased dissemination of pirated content not carrying such excessive warnings. Thus, any additional stringent implementation as envisaged under the Draft 2024 Amendments could lead to diluting the purpose of the Act itself, cause a significant drop in viewers on OCCPs platforms, and contribute to increase in piracy stemming from a demand for content containing fewer or no warnings.
- (o) The intention of the Act and the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2004 ("COTPA Rules") is evidently to restrict the advertising of tobacco products, primarily targeted at those who are engaged directly in the production, supply, or distribution of tobacco products. However, the Proposed 2024 Amendments significantly broadens the scope of the Act and the COTPA Rules, while impinging on the fundamental right to freedom of speech and expression, in as much as it conflates the promotion or advertising of tobacco products with the mere depiction of smoking / tobacco consumption as part of a larger narrative (with appropriate context and warnings) in cinematograph films and other content made available by OCCPs. Therefore, the Proposed 2024 Amendments arbitrarily restrict the freedom of speech and expression of content creators and is evidently without a reasonable guiding principle, hence falling outside the scope of reasonable restrictions provided under Article 19(2) of the Constitution.
- (p) The Proposed 2024 Amendments also do not account for the change in technology and current requirements for OCCPs under the IT Rules 2021 which recognized self-regulation mandates in the form of content ratings, content descriptors, parental controls, etc. as a more effective way to regulate

content. Under the IT Rules, OCCPs are required to display content ratings as well as an explanation of relevant content descriptors at an appropriate place, so that viewers can make informed decisions before accessing any content. Such content descriptors must also inform users about the depiction of any harmful substances (which includes smoking and tobacco consumption). Additionally, films or serials portraying a misuse of tobacco or smoking qualify for and have to be accorded a higher category of content classification. Thus, the special law governing and regulating OCCPs provides adequate and sufficient measures to ensure that viewers are at all times well aware of the nature of content and warned about the depiction of any smoking or tobacco use scenes. However, the Proposed 2024 Amendments, in their present form, conflicts with such adequate and proportionate measures, and creates overlapping obligations on OCCPs vis-à-vis the IT Rules 2021. In doing so, the Proposed 2024 Amendments also creates jurisdictional ambiguities and overlaps between the Health Ministry on the one hand and the Ministry of Information and Broadcasting on the other, thereby causing regulatory uncertainty and potentially resulting in double jeopardy for any non-compliant OCCPs.

5. We also take this opportunity to highlight that, given the complex jurisdictional and rights issues involved, and with an aim to make progress, we are proposing an alternate approach, which would address the concerns at hand without creating unnecessary contentions or undermining the rights and interests of the stakeholders involved.
6. It is reiterated that the Government could achieve better results through public awareness campaigns, educational initiatives promoting healthy lifestyles and partnerships with OCCP platforms *inter-alia* to create compelling content highlighting the negative consequences of tobacco use. Further, encouraging age-rating mechanisms, parental controls, and other content moderation measures offer better solutions to protect young audiences and address tobacco promotion, minimizing disruptions to user experience. Some of our suggestions to address subject matter of 2023 COTPA Rules as well as the Proposed 2024 Amendments are as under:
 - (a) Inclusion of Tobacco Use/Drug or Substance Abuse in the Content Descriptor.
 - (b) Display of Disclaimer Text at the Beginning of the relevant content wherein tobacco products or its use is displayed.
 - (c) Appropriate rating for content wherein tobacco products or its use is displayed.
 - (d) Access controls and collaboration with Ministries to create awareness of such technical solutions available on OCCPs in order to assist parents to be responsible in ensuring that their children watch age-appropriate content, thereby ensuring effective implementation of COTPA Rules.
 - (e) Ensure that the marketing material for Titles launched on or after September 1, 2024 does not contain any depiction of tobacco in such marketing material. If the marketing material contains any depiction of tobacco, then the same shall be accompanied with suitable disclaimer e.g., smoking kills.
 - (f) No Advertisement of Tobacco Brands.

In view of the above, we urge the MIB to kindly consider our concerns and submissions herein. We further request the Ministry to call for a meeting with OCCPs and their associations to enable them to explain and discuss their concerns with respect to the Proposed 2024 Amendments (as well as the 2023 COTPA Rules).

We propose and reiterate a collaborative approach where the OCCP industry and the Government work together to explore effective and efficient measures that address public health concerns without compromising user experience or stifling industry growth. We believe that through open dialogue and cooperation, we can achieve a balanced and effective solution that respects both public health goals and the creative freedom of the OCCP industry.

Yours faithfully,



Clare Bloomfield
Chief Policy Officer