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Sub: Counter-comments on Review of the Telecom Commercial Communications Customer Preference Regulations, 2018

Dear Sir,

Kindly find attached herewith counter-comments on Review of the Telecom Commercial Communications Customer Preference Regulations, 2018 for your kind consideration.

For AA Plus Consultants

Praveen Sharma



CEO

AA Plus Consultants Counter Comments

Statutory Issues:

- **TRAI power to impose financial disincentive under a subordinate legislation:** In so far as Regulation making power of TRAI is concerned, Statute imposes the conditions that the Regulations have to be consistent with the Act & rules made thereunder to carry out the purposes of the Act. Regulations are to be made by notification. Section 29 of the Act also prescribes TRAI power to impose penalty for contravention of directions of Authority. In our view it may be erroneous to argue that TRAI's exercise of levying penalty, under a subordinate legislation, is arbitrary since TRAI does not have adjudicatory powers under the TRAI Act.
- **No adjudicatory powers with TRAI:** It has been stated by some of the stakeholders that TRAI draft Regulation particularly Regulation 25 (6) & Regulation 33(2) provide for filing of Appeal before the Authority and since TRAI does not have adjudicatory power these provisions may be bad in law. Regulation 29 has also been cited by one other stakeholder. It may however be noted that exercise under Regulation 25(6), 29 & 33(2) is more in the nature of administrative review and does not impinge either upon the jurisdiction of TDSAT as per Section 14 of the Act nor does it seek to overtake new adjudicatory powers of the Government under the Telecommunications Act 2023.
- **DoT has the power under the new Telecommunications Act, 2023:** It has been suggested by some of the stakeholders that reception of spam is not a QoS issue therefore has no or limited legal validity and that Section 28 of the new Telecommunications Act, 2023 specifically provides for measures for protection of users therefore TRAI must review and align the TCCPR regulations with section 28 of 'The Telecommunications Act, 2023. This is not tenable as reception of undesirable calls do degrade the quality of services irrespective of the definition of QoS provided for in the existing QoS regulations so legal validity of earlier TCCPR regulations is on firm ground in our view. Secondly the language of Section 28 of the Telecommunications Act 2023 particularly subsection 2 of Section 28 states that Central Government may by rules provide for measures for protection of users, **in consonance with any regulations notified by the Telecom Regulatory Authority of India from time to time**, including measures such as prior consent of users, preparation and maintenance of one or more registers, to be called as Do Not Disturb register & the mechanism to enable users to report any malware or specified messages received. Thus, the measures to be prescribed by Rules by the Central Government have to be in consonance with regulations notified by TRAI from time to time. Clearly this is not the case where jurisdiction of TRAI has been totally ousted as has been sought to be argued by some of the stakeholders.
- **Safe harbor provisions of Section 79 under IT Act 2000 as amended:** This would apply to the TSPs as intermediaries and same would therefore in our view give them immunity from any action by the Authority/Government for any contravention by its users/customers. As per the Section 79 of the Information Technology Act, TSPs are merely intermediaries (and therefore, exempted from liability), hence, TSPs cannot be held accountable or penalised for unsolicited communication being done using their network.

Factual Issues

- **Regulate all stakeholders and not TSPs alone:** It is a fact that attempts to control spam has started in the year 2007 with the first Regulation, thereafter the second one came in 2010 and last one in 2018. Despite huge investments by TSPs in complying with 2018 Regulations including follow-on directions and orders there has not been desirable results in terms of controlling the spam. Root Cause Analysis for the same needs to be done to understand reasons of failure. With the growth of the telecom network and rise of commercial activities coupled with economic growth the problem of spam has continued to plague the country and has assumed the proportion of becoming a menace. In a multi stakeholder environment, efforts will bear fruit only if all the stakeholders assume responsibility or are obligated to act in accordance with the law. So, it would be in the fitness of things if the Telemarketers and the Principal Entities controlling them are also strictly regulated.
- **Tackling menace of Unregistered TMs:** There is a requirement to tackle the issue of unregistered Telemarketers as they not only violate the terms and conditions for use of telecom services as contracted by the TSPs but also create public nuisance by discomfoting general public by spamming them. Differential tariff for SMS and Voice calls beyond a certain limit should be introduced to disincentivize UCC through UTMs. High tariffs would make it unprofitable to use P2P telecom resources for Telemarketing purposes. This can also be done by including penal provisions in the contract for services if a user is acting as a UTM and for wilful repeated violation, there can be other penal provisions including termination of services and debarring from taking services. Some innovative out of box approach is required for dealing with the issue of UTMs.
- Suggested definition:
“Transactional Message
Transactional message means a message sent by a Sender to its customer or subscriber in response to customer initiated transaction or under any existing relationship between the customer and the sender relating to any product or service such as OTP from banks, non-bank entities like e-commerce, apps login etc, transaction confirmations, balance alerts, travel reminders, rescheduling notification, refund information, to provide product/warranty information, software upgrade alerts, safety or security information for the commercial product or service used or purchased, etc. and such messages **are transactional and are not promotional in nature** and does not require explicit consent:
Provided that the sender shall give an option to the recipient, in the same message, to opt out or block such messages.”
“Transactional Voice Call
Transactional voice call means a voice call made by a Sender to its customer or subscriber in response to customer initiated transaction or under any existing relationship between the customer and the caller relating to any product or service such as call from banks, non-bank entities like e-commerce, apps login etc, transaction confirmations, balance alerts, travel reminders, rescheduling notification, refund information, to provide product/warranty information, software upgrade alerts, safety or security information for the commercial product or service used or purchased, etc. and such calls **are transactional and are not promotional in nature** and does not require explicit consent:
Provided that the caller shall provide a mechanism, through a SMS or any other means, to the recipient to opt-out from receiving such calls.”

- Current facilities extended by the Service providers through Apps, Website and Call Centres for handling UCC complaints are accessible and consumer-friendly. Addition of preference registration by way of an online form during the issuance of a new SIM would make it very easy and convenient for customers to register whether they prefer to receive any promotional communication and if they do, what are the days or time they would like to receive the same. They may also choose the type of commercial/promotional communication they wish to receive.
- Proactive actions needed to stop further communications of messages or calls identified as spam through UCC detect systems: -
A SMS warning to the Sender of UCC shall be sent stating “Unusually high outbound calls/SMS from your number has been noticed. Your number has now been placed under the following increased tariff until further notice.
Outbound Calls: ___/minute
Outbound SMS: ___/Message”
If the Sender detected by UCC detect system turns out to be an UTM, their services may be permanently adjourned. If the Sender turns out to be a RTM and is sending UCC, they may be placed under Usage Cap. If the Sender was a false positive from the UCC Detect System, their services shall be resumed with normal charges.
- No need to review five paisa exemptions accorded to transactional messages and bring them at par with other commercial messages.