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To,
Sh. Jaipal Singh Tomar,
Advisor (QoS-II),
Telecom Regulatory Authority of India,
Tower-F, World Trade Centre,
Nauroji Nagar, New Delhi - 110029

Subject: MediaNama's counter comments on TRAI's Consultation Paper on "Review of the Telecom Commercial Communications Customer Preference Regulations, 2018".

Sir, please find attached our response to the comments made by stakeholders on paper on **TRAI's Consultation Paper on "Review of the Telecom Commercial Communications Customer Preference Regulations, 2018"**.

We're a media publication that focuses on Technology and Technology Policy, and have participated in TRAI Open House Discussions and Consultations since 2006. Our focus is on enabling an open, fair, competitive and global Internet in India.

Thanking you,
Nikhil Pahwa,
Founder and Editor,
MediaNama
<https://www.medianama.com>

MEDIANAMA's Response

We'd like to commend the TRAI for having the most open, public and transparent regulatory process in India, and it's a shame that other entities, including the Ministry of Electronics and IT, Reserve Bank of India, Ministry of Information and Broadcasting are opaque in their consultation processes, and do not allow publishing of comments and counter comments, nor do they hold open house discussions.

Having participated in several consultations across regulatory bodies over the last 16 years, we deeply appreciate the TRAI's commitment to a process of openness and transparency, and thank the authority for setting the gold standard for policymaking in the country. We're

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responding in the counter comments stage to address some false claims made in the comments stage.

However, we'd like to begin with some broad observations before addressing counter comments. These include:

- A. Understanding the telecom operator regulatory playbook
- B. The role of telecom operator business models in spam
- C. TRAI's failed attempts to address spam on telecom networks
- D. How online services address spam

A. Telecom Operator regulatory playbook

Having read several telecom operator submissions over the past 18 years, we request the TRAI to take into account their standard regulatory playbook that is in almost every submission, including submissions made to this consultation. These are regularly copy-pasted (and edited lightly), consultation after consultation. The playbook:

1. **Unfair treatment compared to the Internet:** Telecom operators invariably complain about unfair treatment as compared to the Internet, in order to avoid any restrictions or punitive actions, even as they operate as a cartel on certain issues, as oligopolies with far greater control over resources such as spectrum, compared to the Internet, where dominance is largely earned by providing better services to customers, and greater customer-centricity in an environment of infinite competition. They use the "Same Service Same Rules" and "level playing field" arguments despite this having been debunked repeatedly, especially because OTT players do not have licenses for exclusive access to spectrum, so there can never be a level playing field.
2. **Seek special treatment because they paid for licensing spectrum:** Telecom operators benefit from spectrum auctions which allows them exclusivity in terms of usage of spectrum and provisioning of access, but they invariably complain of having to pay too much, and having paid, of seeking preferential treatment.
3. **An appeal to fear, regarding privacy and national security:** Telecom operators appeal to fears regarding privacy and national security, and highlight concerns about unlicensed sectors, including the Internet. This is a mechanism for trying to get regulatory parity with the Internet, even though telecom operators have licensed exclusivity, unlike Internet companies and users, and the fact that telecom operators require greater scrutiny because of the higher surface area of risk with telecom operators being the only mode of communications or internet access in the country.

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4. **Concerns about bankruptcy:** telecom operators have been voicing worries about bankruptcy and debt for over 16 years, despite many of them being profitable and sustainable. Airtel, Vodafone and Idea shared the same concerns in 2014, 2015, 2016. We've highlighted in the past, completely contradictory statements made to the TRAI versus statements made to investors in earnings conference calls, including those by Bharti Airtel.
5. **An appeal to emotions about benefiting society,** including comments on impact on farmers, impact on education, fishermen in Kerala, whereas their primary responsibility is to investors.

B. The role of telecom operator business models in spam

Firstly, we would like to commend the TRAI for directing telecom operators to shut down several numbers for violation of the TRAI's SMS guidelines. There appears to be a perceptible reduction in spam, even though it has not been eliminated entirely after such action was taken.

This means that if the Telecom Operators had the *intent* of addressing spam, they would have taken these measures themselves, but chose not to because they benefit financially from enabling spam on their networks. We would like to direct your attention towards a business model shift in telecom in 2010 that led to the increase of SMS spam in India:

Why spam increased in India in 2010

To understand why there is an increase in Spam in India, one needs to understand the business model changes that took place. **In 2010, [we had reported the business model changes that led to the growth of Spam](#):**

“Earlier, Bulk SMS of between 1-5 crore in number were being bought from Telecom Operators on a per SMS basis, between Rs. 0.05-0.10 per SMS, and these were sold to marketers. Two years ago, one Bulk SMS company convinced a telecom operator circle – according to multiple VAS executives we spoke with, Airtel Karnataka – to allow them to purchase Bulk SMS on the basis of a new metric – bandwidth.”

“Instead of buying 1 crore SMS for Rs. 0.05 each, they bought SMS capacity on a monthly rate, on the basis of transactions per second (TPS). It was like moving from dialup to

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broadband. Today, Bulk SMS providers can buy 100 TPS (with 100 messages being sent per second) for anything between Rs. 45 lakh per month, and Tata Teleservices has taken the lead with this model. One VAS company executive sent us the following rates that they're paying

15 TPS at around Rs. 6 Lakhs* + Taxes

20 TPS at around Rs. 8 Lakhs* + Taxes

This works out to around Rs. 0.02-Rs. 0.04 per SMS, given a 12 hour window, since most service providers don't allow SMS' to be sent late night. For 100 TPS, it can be Rs. 45-50 Lakhs, but it brings down the rates significantly for a buyer. **There are companies who are paying, from what we were told, as low as Rs. 0.0085 per SMS."**

C. TRAI's failed attempts to address spam

Solutions deployed by TRAI during 2010-13:

- In 2010, the TRAI [tried to address this by:](#)
 - [Adding an additional charge of Rs. 0.05 on bulk SMS,](#)
 - [limiting the number of SMS's that individual users can send to 100,](#)
 - Restricted time for commercial communications (9AM to 9PM),
 - Limiting Bulk SMS to registered telemarketers,
 - Creating a blacklisting mechanism for telemarketers
 - Created a complaints mechanism for consumers, and
 - Forcing telemarketers to adopt an alphanumeric code.
- In 2013, [the TRAI began](#)
 - [Fining Telecom Operators Rs 5000 per complaint and](#)
 - [banning spammers.](#)

This enforcement forced many companies to stop spamming and seek more legitimate customer acquisition methods.

We covered changes in Club Mahindra's customer acquisition tactics in 2014 [here.](#)

The failure of TRAI's Do Not Call registry lies with telecom operators and with the TRAI:

- **Where telecom operators are at fault:** When telecom operators have acted against spam, it has been effective. In their drive to increase user base, and not exercising adequate control over their vendor ecosystem, and allowing bulk purchases of SIM

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cards, or access to telecommunications resources to bulk SMS agencies without adequate checks and balances, **they have allowed spam to increase because they benefit financially from it.**

- **Where the TRAI is at fault:**
 - **DND App failures:** The TRAI's DND application has rarely worked, and it proves the point that the regulator should not be running applications or technology when it doesn't have the capacity or capability to do this.
 - **Lack of adequate enforcement against telecom operators:** Telecom operators have been allowed to cartelise and pass the buck to each other, including denying complaints by saying that the message complained against was never on their network.

Thus:

1. Telecom operators benefit financially from delivering SMS spam, and thus have little incentive to not send spam. Only punitive actions, or the threat of punitive actions work. Spam cannot be eliminated unless telecom operators are acted upon.
2. Punitive measures against telecom operators, telemarketers and spamming companies can help address this issue. TRAI has not done enough, in terms of enforcement against telecom operators.
3. When organisations such as banks find that their resources are shut down, they respond by choosing less intrusive mechanisms of marketing.

D. How the Internet deals with spam

The Internet deals with spam using the following mechanism. For example:

- **Use signals for determining spam**, and develop a trust score for each marketer/email address: Email spam filters determine spam by attributing a trust score to messages, by
 - analysing headers, text content, reference to a publicly available IP address and domain name filters, and determining spam using algorithms. [\[source\]](#)
- Use verification to identify trustworthy businesses: Social Media Networks use verification systems to identify trustworthy marketers. Verified users have a tick mark next to their IDs.
- WhatsApp uses the following techniques:
 - For user created accounts [\[source\]](#): WhatsApp has three checkpoints for checking for spam: at registration, during messaging and in response to user complaints.

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- At registration: it uses the phone number to verify coordinates. Algorithms use information like device details, the IP address of the device, and information from mobile operators to catch malicious accounts. If a computer tries to create accounts in bulk, or a phone number similar to one which was misused recently tries to register more accounts, it blocks these accounts. In 2019, this meant that 20% of the 2 million accounts each month were prevented at registration
- It uses the [Facebooks Immune System](#) model, which suggests to perform real-time checks on every read or write action to define abusive behavior and train its machine learning systems.
- It checks for frequency of messages, like “100 messages in 10 seconds within five minutes of registering”
- Allowing reporting of messages and groups by users, and enabling control over how you’re added to groups.
 - For business accounts: I found guidelines on WhatsApp’s pages: [here](#) and [here](#), and it mandates both an opt-in, and ensures a clear opt-out, while also acting against user complaints.
- Discord has the following mechanism for addressing spam, though it appears to be struggling with crypto-spam and scam still. Details [here](#)
- Telegram’s approach to dealing with spam is detailed [here](#)..

Countercomments

1. On TRAI’s jurisdiction over OTT services: The OTT referred to here is the Internet, and the TRAI has no jurisdiction over the Internet, except in terms of regulation of pipes – i.e. access service providers like telecom operators. Thus, while the TRAI can regulate access service providers from a net neutrality perspective, it cannot legally exercise any control over the Internet. The Telecom Operators complaints regarding Same Service Same Rules are old, and have been debunked adequately in previous consultations, and should be ignored entirely. Please refer to point A.1 in the telecom operator playbook highlighted above.

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2. On Cost disadvantage of traditional telecom services compared to OTT platforms:

Telecom Operator claims:

- **Comments by Vi:**

- "As the SMS are charged based on volume, increasing the content of SMS by involving opt-out mechanism will increase the cost of a transactional SMS for the PEs and hence, will make it less attractive to them as compared to OTT platforms."
- "Sending of an SMS after every successful transactional call is not technically feasible and detailed deliberations would be required for the same. Even if somehow a solution is arrived upon, it would certainly involve huge resources, development, costs and efforts, despite which there would not be any benefits linked with sending an SMS after each and every transactional call. This will also lead to significant increase in costs for making transactional calls and hence, will make traditional telecom resources less attractive as compared to OTT platforms. This may also lead to failure in sufficient uptake of 160xx series meant for transactional/service calls. We strongly urge that there should not be any mandatory requirement of presenting opt-out mechanism in every transactional/service SMS or after every transactional/service call

- **Comments by BSNL:**

- "It is fact that A2P SMS business is being captured by OTT players like WhatsApp etc."
- "All commercial messaging services through OTT applications are being offered at very competitive rates than conventional TSPs. The TSPs are not able to compete with OTT platforms because of the charges @0.05 paise on each promotional and service message. Also, till now industry is struggling to distinguish between the Transactional and Service Messages because of this transactional messages are still being charged @0.05 paise by TAPs. However, no such charges are prescribed for Transactional SMS in TCCCPR 2018. Therefore, to address the above issue of charging and competition with OTT services, it is suggested that the charges on all type of messages (Promotional/ Service and

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Transaction) be withdrawn uniformly. There might be only termination charges which are being governed by separate regulation at present.”

MEDIANAMA's response:

- **On opt-out:**
 - a. Charging per SMS or call is an industry construct and a monetization mechanism, because the cost for a telecom operator is purely in terms of spectrum and network infrastructure, and operating expense per message or call is negligible.
 - b. SMS lengths and call durations are artificially created by telecom operators, given that SMS's and calls are delivered over internet protocol, and thus technically, there is negligible additional cost for extra calls or additional SMS' or an increase in SMS length, just has it doesn't cost you more to send an extra message or make an extra call over the Internet. Telecom operators sell Bulk SMS on the basis of “transactions per second”, not on the basis of a per-message cost (Ref: **Why spam increased in India in 2010**, detailed above).
 - c. **Thus, introduction of an opt-out should be mandated with each call or message. Telecom operators can choose not to charge their customers because of the low marginal operating cost of an additional message.**
 - d. **TRAI should demand marginal operating (OpEx) cost data from Vi in order to validate their claims regarding an increase in expense. They're bluffing.**
- **On BSNL saying A2P businesses shifting to OTT:**
 - a. Online marketing has existed since the advent of the Internet, including even on BBS systems, and thus there is no shift to online marketing. There can be a reduction in usage of a medium that consumers and now businesses have rejected.
 - b. The Internet is a different medium from telecom, with **infinite and global competition** for commercial communications, and

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this drives prices down. Telecom operators unwilling to compete with their prices are only looking at profiteering.

- c. Telecom operators have failed to provide a spam-free or even a low-spam experience for consumers for almost 15 years. Consumers have shifted to online platforms because of:
 - i. Better product and a richer interface
 - ii. Better experience
 - iii. More control over messaging (including blocking of spammers), including mandatory opt-out options
 - iv. Measures to control spam, including easy blocking and reporting
- d. Businesses have adopted online and OTT based messaging and marketing (as illustrated by the Club Mahindra example) and communication because:
 - i. Their customers are online.
 - ii. There is greater accountability for businesses regarding the metrics and tracking of messaging
 - iii. Better receptiveness by customers because customers have better control over the environment
 - iv. More likely to be read by customers because of network effects on online messaging
- e. Businesses choose this environment despite the fact that online players have more stringent mechanisms for spam control at scale, and completely block out spammers from the system, including threats of companies getting banned for repeat violations. They tend to focus on transactional messaging and opt-in offers over merely sending promotional messaging.
- f. Businesses are choosing online marketing despite the fact that telecom operators have an exclusive user base with high switching costs that only they can monetize, as compared with an environment of infinite competition in online marketing.

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- g. The same business that may spam using SMS may choose to be more careful in case of online messaging because of better enforcement.
- h. There is no data to indicate that businesses don't use both SMS and OTT messaging. The point made by BSNL and others about switching, that businesses exclusively choose one medium for ALL communication is not proven. They may use different platforms for different messages: for example, use SMS for transaction messaging and spam, and OTT services for customer service, and delivering rich information like movie tickets or flight tickets and relevant information.
 - a. **Thus, online services and OTT's are likely to be preferred because of better consumer experience and customer experience, including with rich media, despite more stringent controls.**
 - b. **Please seek proof from telecom operators including BSNL that there is actual cannibalisation, and not that customers are using both media.**
 - c. **Please illustrate how any regulation of online messaging will not impact messaging platforms like email, Slack, Basecamp, Discord, as well as direct messaging on social media services. How do you create a distinction between different types of messaging services?**
 - d. **Please seek proof from Reliance Jio that online messaging services are illegal in India.**
 - e. **Any regulation of online spam must address the concerns raised by the Supreme Court in *Shreya Singhal vs Union of India*, regarding censorship of free speech, and the TRAI does not have jurisdiction over speech online.**

3. Lack of regulatory oversight over OTT and online

- **Comments by Bharti Airtel:**

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- “OTT platforms currently do not operate under any regulatory framework in respect of SPAM.”
- **Comments by Reliance Jio:** “By not regulating these channels, a legal and controlled SMS channel is being cannibalized openly by illegal services running without any regulatory oversight.”

MEDIANANA’s Response

- **On Reliance Jio saying online messages are illegal:** Online marketing has existed since the advent of the Internet, including even on BBS systems, thus there is no illegality here. Direct marketing is an established online industry. Reliance Jio’s contention that online messaging services are illegal is ridiculous. Are they saying that email, digital payments, SMS’s or any other form of online messaging, including email marketing and bulk online messaging is illegal in India? They cite no law or regulation to illustrate this, and their submission regarding online services should be ignored.
- **On Airtel saying that OTT’s do not operate under a regulatory framework:**
 - Online services are governed by the IT Act, and not the TRAI Act or the Telecommunications Act.
 - **Online spam is regulated.**
 - i. For example, Section 66D of India’s IT Act addresses some part of online scams, stating:

Punishment for cheating by personation by using computer resource. -

Whoever, by means for any communication device or computer resource cheats by personating, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees.
 - ii. Section 66A of India’s IT Act governed online spam, but was declared unconstitutional by the Supreme Court of India

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because it was being used by the Indian government to clamp down on free speech.

4. On the disparity of regulatory frameworks

- **Comments by Bharti Airtel:**

- "The disparity in regulatory frameworks means that OTT platforms do not face the same scrutiny or accountability for spam generation as TSPs."
- "There needs to be a level playing field where all communication platforms, whether TSPs or OTTs, are held to the same standards and regulatory oversight."
- "TRAI could introduce specific guidelines for consent on OTT platforms, ensuring that businesses and TMs cannot send unsolicited messages and calls without obtaining prior approval from users. The OTT platforms should work with regulatory bodies to ensure that PEs (businesses or advertisers using the platform for commercial purposes) are held accountable for sending spam. This would involve mandatory registration of businesses with the OTT platform, similar to how businesses must register with TSPs to send commercial SMSs."
- "A clear deterrent penalty framework should be introduced for businesses that engage in unsolicited communication on OTT platforms, just as it is applicable in case of sending spam via traditional telecom channels. Regulatory authorities should mandate that OTT platforms report spam statistics to ensure there is proper oversight and that enforcement actions are being taken against spammers. Eventually, the OTTs should be brought under the regulatory licensing regime to ensure a level playing field."

- **Comments by Reliance Jio:** "TRAI could introduce specific guidelines for consent on OTT platforms, ensuring that businesses and TMs cannot send unsolicited messages and calls without obtaining prior approval from users. The OTT platforms should work with regulatory bodies to ensure that PEs (businesses or advertisers using the platform for commercial purposes) are held accountable for sending spam. This would involve mandatory registration of businesses with the OTT platform, similar to how businesses must register with TSPs to send commercial SMSs. A clear

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MEDIANAMA's response:

- **Market failure in telecom wrt spam:** There is a market failure in telecom when it comes to spam, which is why there is a need for regulation. **There is no market failure in spam online/OTT**, and thus there is no need for regulatory action, which anyway the TRAI does not have jurisdiction over.
- **OTTs and telecom operators are not the same market, and there is no level playing field: Reference point A.1:** “They use the “Same Service Same Rules” and “level playing field” arguments despite this having been debunked repeatedly, especially because OTT players do not have licenses for exclusive access to spectrum, so there can never be a level playing field.”
- **Prescriptive regulation for online spam is counter-intuitive in a competitive market with differentiated products and no market failure:** It's clear that there is no single solution for dealing with spam online. As illustrated in the initial comments, there's a different approach taken for email, social media and online messaging. Even among online messaging platforms, there is a differential approach, and thus differing degrees of success. Discord and Telegram, as examples, are inundated with cryptocurrency related spam. On Social Media, so is Twitter, but LinkedIn and Facebook are not. Each platform has its unique design, features, messaging structure, spam filtration mechanisms. There is singular type of OTT platform. This is because there is competition on the Internet, and platforms compete to deliver the best user experience to consumers. This means that people might give up twitter and move to Mastodon or Instagram because of a poor user experience. **Thus there is a clear incentive for platforms to address spam in order to retain users**, and they deploy more sophisticated technology in order to detect and remove spam. They will lose users and revenue because people will move to a better platform, **because the switching cost is zero.**
- **There is limited product based competition for users in telecom:** Telecom operators provide the same product/service, with the only competition related to network speeds and network quality. They have a captive audience, similar services

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and thus problems across operators, and limited competition in an oligopolistic market with a high switching cost.

- **There is limited innovation in addressing spam from telecom operators:** telecom operators have begun implementing AI based machine learnings solutions to address spam only recently despite such technology having been around for decades. In fact, companies like Truecaller have made a business of using machine learning algorithms to address spam because of the lack of action from telecom operators. If it weren't for a push from the TRAI, telecom operators would not have tried to address spam using AI.
- **Telecom operators benefit financially from spam, online players don't:** Telecom operators benefit from selling more messaging bandwidth (transactions per second) to bulk SMS providers because of high switching costs for users and an oligopolistic market. Thus, given that they have quarter on quarter targets, and focus on revenue maximisation rather than long term user benefit. On messaging platforms, users have zero switching costs and high competition, which is why they try to retain customers, without a quarter-on-quarter mindset. Users blocked on telecom services return from different numbers. Messaging apps exercise greater control and can ban companies forever so they behave better.

5. On explicit consent:

- Exotel says that: "With new age technologies like Gen AI capable of handling large number of calls without the need for a human agent, we submit that explicit consent should not be made mandatory"

MEDIANAMA's response:

- **No correlation between AI and explicit opt-in:** Automated dialers and the usage of AI for handling large number of calls is not new. Exotel itself has been providing automated dialers for a long time. The availability of technology for messaging has nothing to do with the right of a user to not be spammed or inundated with automated unsolicited commercial communication.
- **Opt-in should be mandatory:** Explicit consent is the basis of all data protection frameworks, and essential for preventing spam. Explicit consent is the only means of ensuring that the communication is sought by the user. We should start with Opt-in instead of starting with opt-out.
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Lastly:

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- We endorse Hindustan Unilever's suggestion that there should be a separation of transaction messages from promotional messages. This was a framework previously adopted by the TRAI, except that telecom operators failed to address the misuse of the transactional pipe for promotional messages. With the usage of AI, perhaps that will improve.
- Consumers must be given 7 days to file complaints
- Usage of AI for marking consumers as suspected spammers may be treated as algorithmic discrimination, and be covered under the India's Digital Personal Data Protection Act. There should be safeguards considered, especially when it comes to the signals looked into for spam detection.
- In the past, telecom operators have disclosed complainant details to telemarketers. The author of this response was the recipient of a call from a telemarketer who sought to ask us to withdraw the complaint. The privacy of the data of the consumer must be protected and not disclosed to telemarketers.