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Sub.: Response to the Draft Telecom Commercial Communications Customer Preference Regulations, 2018

Dear Mr. Gupta,

Thank you for giving us the opportunity to provide our comments on the draft **Telecom Commercial Communication Customer Preference Regulation, 2018** notified by TRAI 29 May, 2018.

As you are aware, Indian Cellular Association (ICA) is the apex body of the mobile industry comprising manufacturers, brand owners, technology providers, VAS application and solution providers, distributors and retail chains of mobile handsets. Since its inception in the year 2002, ICA has been tirelessly working towards fuelling the growth of the industry, improve competitiveness, to help create a legal and ethical market and regulatory environment and to take the benefits of mobile connectivity to the masses of the country.

We are providing below specific comments to the draft Regulation, but also wish to point out that the precedent that will be created via this draft Regulation, notwithstanding TRAI's best intentions, is dangerous and unprecedented for the sector as a whole.

Specific Comments on TRAI's Draft Regulation:

1. Regulating Devices and Device Manufacturers via Telecom Operators is Infructuous.

While ICA appreciates the importance of regulating unsolicited commercial calls/ SMSes and the inconvenience that it causes to customers, we do not believe that the TRAI should allow telecom service providers/ licensees to regulate device manufactures or devices, or customers who possess such devices. Such action, even if well-intentioned, will lead to a bad precedent. This is because a telecom operator is a "third party" when it comes to the relationship that a device manufacturer has with its customer/ user. The use of the telecom network is important, but incidental to this core relationship. It would be patently wrong to give any powers in the hands of telecom operators to start judging which device should continue and which should be "derecognized from its telecom network".

Quite apart from the above, this is a subjective and cumbersome process wherein telecom service providers should not be placed in the middle of the relationship enjoyed by device

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manufacturers and their customers. We also believe that telecom operators have no authority whatsoever to either make such judgments or undertake such drastic actions under their license terms. To give them a power that is denied in their license would be plain, simple wrong.

2. TRAI has no jurisdiction over Device Manufacturers

Section 34 of the draft Regulation intends to regulate devices and operating systems via Licensed Telecom Access Service Providers to ensure the functionality of Mobile Apps in a specific manner across various devices/operating Systems.

Even though ICA appreciates the intentions of TRAI in this regard, it is clear from the TRAI Act that the powers conferred to the Hon'ble Authority under the said Act are limited to regulating telecom service providers or licensees. There has been no precedent in the past wherein the TRAI has attempted to regulate device manufacturers, simply because the Authority realises that its powers in this regard are limited by the statute.

If such powers (of regulating device manufacturers and devices) were to be read into the Act, then that would require an explicit amendment to the current legislation. In regulating devices, and by definition, device manufacturers, the TRAI is attempting to do "indirectly" what it is prohibited from doing "directly".

In the case of MTNL Vs TRAI (January 17, 2000), while citing various judgments of Hon'ble Supreme Court, the Delhi High Court observed that "***the power to issue regulations cannot be used to subvert the provisions of the said Act and to assume powers and functions not conferred by the said Act.***"

The TRAI Act 1997 was a good step to towards setting up of an Independent regulator for regulating Telecom and Internet access in India. Devices are currently manufactured under standards formulating, with much deliberation and several consultations with MeitY, TEC, WPC - Department of Telecommunications. A sudden departure from the existing procedure for cellular device manufacturers towards inclusion of third parties vide a service regulation incurs uncertainty in the cellular devices space.

3. The draft Regulation places consumers in harm's way

Even though ICA realises the good intentions of the TRAI, the direction under Section 34 of the draft Regulation "*to derecognize from its telecom networks such devices that do not permit functioning of such apps as prescribed in Regulations 6(2)e and Regulations 24(2) or violates the provisions of these regulations*", within a six-month period, has the unintended consequence of placing millions of customers in harm's way. This because the customers may simply not want to have such an App on their devices, or they may be on a platform that does not support the functionality in the manner in which TRAI is describing it.

In such instances, unsuspecting and innocent customers will have to be "derecognized", if the TRAI draft Regulation is to be followed. Clearly, such an outcome is not desirable or intended.

4. Millions of existing Device holders could become unintended victims of such a Regulation

While TRAI is hoping to provide beneficial apps to protect consumer interest, it is equally possible that several million customers on an existing platform may not wish to upgrade their current devices to the next level of platform, which in turn, could become a precondition for installing such Apps as described in the TRAI draft Regulation. In such cases, where the consumer chooses not to upgrade to the next generation of software release by choice, and therefore, decides not to install the said application, the operators will be forced to "derecognize" the device without examining the choice (for not upgrading their devices) made by customers. Clearly, this would place millions of customers in harm's way, since the functionality and the upgrade of each device is dependent upon the customers, rather than any other actor. E.g. device manufacturer or service provider etc.

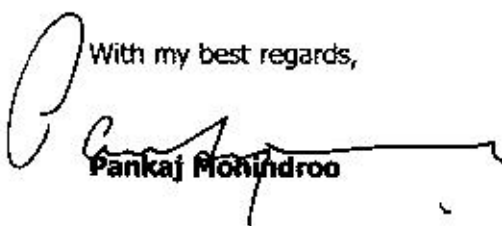
5. An additional mandate unnecessary when multiple options to report UCC complaints are already available

There are many choices for consumers to report complaints in cases of violation of UCC regulations, through Voice calls, SMS, Online portals of Licensed Access Service Providers, Email and Mobile applications. Mobile applications, which are in billions, should not be allowed to reverse govern operating systems Indirectly through regulations on services. ICA supports good Privacy regulations that help all users who knowingly or unknowingly fall prey to intrusive mobile applications. Any permission on an operating system has the power to open by default an intrusion into the security and privacy of billions of users which can be misused by billions of mobile applications. In that, our compliance directives should not be prescriptive of the specific type of functionalities which may make users vulnerable - however well-intentioned functionalities for apps may be.

For all the above reasons, the TRAI is requested to kindly reconsider their current draft Regulation which, under Section 34, requires service providers *"to derecognize from its telecom networks such devices that do not permit functioning of such apps as prescribed in Regulations 6(2)e and Regulations 24(2) or violates the provisions of these regulations"*.

We also respectfully submit that the Authority refrain from making any such regulations that go beyond its statutory jurisdiction, places devices and device manufacturers at the mercy of service providers and has the potential of causing greater harm to public interest than the benefit that it is intended to provide. We request the TRAI to instead work with device manufacturers and find ways to meet its objectives, even if it takes additional time.

With my best regards,


Pankaj Mohindroo