

Consultation Paper No. 15/2006



Telecom Regulatory Authority of India

Consultation Paper
on
Unsolicited Commercial Communication

20 November 2006

TRAI House
A2/14, Safdarjung Enclave,
New Delhi - 110029

Preface

The growth of telecommunications services in India has been rapid, and there are now more than 170 million telephone subscribers. As telephones have become a ubiquitous communications medium, there has been a sharp increase in marketing and advertising activities through the telephone, a process colloquially referred to as 'telemarketing'. A significant share of telemarketing is unsolicited, where the called subscriber has not given explicit prior consent to the calling party. A large number of subscribers find that such calls are a nuisance and inconvenient since they encroach on the called party's time and often interfere with the called party's activities. Additionally, such calls disturb the privacy of the subscriber.

Over the past year, commercial unsolicited calls have engaged the time and attention of the Hon' Rajya Sabha, the Hon' Supreme Court of India, the Hon' High Court of Delhi, the Reserve Bank of India, and the State Commission (Consumer) of Delhi. Further, the Authority has received numerous subscriber and consumer complaints about unsolicited calls and SMSs. The consumer resentment and dissatisfaction has been very loud and have found expressions at various fora. Therefore, the Telecom Regulatory Authority of India has initiated this consultation process to seek the views of all stakeholders for a comprehensive solution that prevents the bulk of such unsolicited commercial communications to address this widely shared grievance.

It is essential to maintain the privacy of and reduce the inconvenience to subscribers who do not wish to receive such calls or messages, yet not ban the activity of telemarketing itself. The Authority is seeking public response and comments on the issues related to institution of a do-not-call registry and possible solutions involving telemarketers, service providers, and subscribers. The Authority is conscious of certain limitations it has voluntarily adopted. It aims for a technologically simple, low cost, and immediate relief-giving solution with the hope that an advanced version may replace it in the future, if necessary.

"Let's see something happen now. You can break that big plan into small steps and take the first step right away."

Indira Gandhi

Please submit written comments on the issues raised in this paper to the Secretary, TRAI by 8 December 2006. For any further clarification on the matter, please contact Secretary, TRAI (Telephone: 011-26167448) or Advisor (MN) on sgupta09@gmail.com (Telephone: 011-26106118). The fax number of TRAI is 011-26713442.

(Nripendra Misra)
Chairman, TRAI

Table of Contents

Chapter 1. Introduction	1
Chapter 2. International experiences.....	10
Chapter 3. Alternate solutions	16
Chapter 4. Consultation questions	27

Chapter 1. Introduction

- 1.1 The growth of telecom services in India has led to an increase in the use of such services for advertising, marketing, and direct sales to reach potential customers. Such commercial communication conveys information about products and services to potential customers in the form of phone calls and text messages. This activity, comprising of informing about, or selling a commercial service or product over a telephone, or other telecom network, is colloquially referred to as telemarketing, and the person(s) who engage in telemarketing as telemarketers. A large industry comprising of call centres and business process outsourcing centers has grown in recent times to cater to business' need of telemarketing.
- 1.2 **Commercial communications can be solicited or unsolicited.** If any person(s) initiates a commercial communication to promote and/or sell his or her product or service where there is no prior commercial relation with, or explicit consent of, the called party, the communication can be termed an unsolicited commercial communication (UCC). In general, UCC is any commercial message that the receiving party was not expecting. In many cases, the receiving party does not want to receive such calls or messages.

Cause for regulatory action

- 1.3 **A PIL has been filed in the Hon' Supreme Court** (WP35/2005 Harsh Pathak Vs/Union of India & Others) on the issue of telemarketing calls. Some of the grounds raised in this PIL are quoted below:
- “That the mobile telephony service providers and telemarketers are violating the law by using the personal data of the subscriber for their business purpose through their telecommunication services. They are not allowed to do so in the light of the Section 427 and 513 of The Indian Telegraph Rules,1951 read as under:
 - *Sec. 427: Illegal or improper use of telephone* - A subscriber shall be personally responsible for the use of his telephone. No telephone shall be used to disturb or irritate any persons or for the transmission of any message or communication which is of an indecent or obscene nature or is calculated to annoy any person or to disrupt

the maintenance of public order or in any other manner contrary to any provision of law.

▪ *Sec 513: Illegal or improper use -*

1. No telex connection shall be used for the transmission of any message or communication which is of an indecent or obscene nature or calculated to annoy any person disrupt the maintenance of public order or in any other manner contrary to any provision of law.
2. No telex connection shall be used for sending or receiving messages other than those originating from, or meant for, a subscriber, subject to the fact that messages of associates or subsidiaries of a subscriber-firm may be sent or receive with the previous permission of the telegraph authority:

PROVIDED that the failure to obtain the previous permission of the telegraph authority shall be construed to be a violation of this rule and the subject to the provisions of Rule 511.¹

1.4 The **PIL petitioned that the use of telephone is a personal and private affair of the subscriber** and any unsolicited intervention is an intrusion of the subscriber's privacy. The Supreme Court held in *People's Union For Civil Liberties (PUCL) versus Union of India and Another* [(1997) 1 SCC 301] that the right to privacy is allied to the fundamental rights under Article 19 and 21 of the Constitution of India. The Court issued instructions to the Reserve Bank of India (RBI) to institute measures to reduce such unsolicited calls.

1.5 In its April 2005 report, the **RBI's Working Group on Regulatory Mechanism for Cards** noted that it might not be advisable to ban all marketing calls, since they are an important marketing tool and a number of people (both existing and potential customers) are in favour of receiving calls regarding new products/information updates on existing products. However, for members of the public who did not wish to receive such calls, the Group noted that banks should introduce a mechanism to protect their privacy. In November 2005, the RBI issued guidelines where they asked banks to follow

¹ Disconnection of telex connections, Indian Telegraph Rules, 1951 §511

do-not-call requests, made to individual banks, when making calls to solicit credit card applications from consumers.

- 1.6 In **Telecom Regulatory Authority of India's (henceforth TRAI or 'the Authority') May 2005 recommendations on Publication of Telephone Directory & Directory Enquiry Services**, it was noted that the Government might consider if necessary, taking appropriate steps for addressing issues relating to spam/telemarketing calls. Specifically, the Authority, considering international experiences, recommended that, "issues relating to privacy and unwanted telemarketing calls could be addressed through the provision of exclusion of the numbers of those customers who do not want their telephone numbers listed in the directory services and **through appropriate legislative and other measures.**"²
- 1.7 In May 2006, the **Hon' MP Mr. B J Panda of Orissa** presented a private bill on the 'Prevention of Unsolicited Telephonic Calls and Protection of Privacy Bill' in the Hon' Rajya Sabha. One objective of this bill is "to prohibit unsolicited telephone calls by business promoters or individuals to persons not desirous of receiving such calls." Specifically, the bill prohibits unsolicited telephone calls for promoting business interests, for other purposes, or for harassment. The bill also proposes a punishment for any violator of imprisonment not less than two years but may extend to four years and also a fine, which may extend to two lakh rupees.
- 1.8 Following a complaint (Complaint Case No. C-09/2006, Sharma versus M/s Bharti Tele-Venture & Others), the **State Commission Consumer Protection, Delhi**, through its interim order on 1 May 2006 and final order on 27 September 2006, directed service providers to inquire with subscribers about whether they wanted to be on a do-not-disturb list for calls and messages. The Commission also directed banks, financial institutions, or any other kind of agency to avoid sending unsolicited calls or messages to consumers with whom they have no contact of any kind. The Commission asked Chairman, TRAI to regulate telephone numbers of senders of unsolicited messages and

² TRAI Recommendations on publication of Telephone Directory & Directory Enquiry Services, May 5, 2005 ¶4.3, emphasis added

seek registration of the telephone numbers from which such calls are made. The Hon' High Court of Delhi has stayed this order as of November 6, 2006.

- 1.9 On November 10, 2006, the **Hon' High Court of Delhi** asked two private banks to disclose the source of information based on which telemarketing calls were being made on their behalf.
- 1.10 The Department of Telecommunications (DoT) has also recently begun investigating methods to overcome the problem of unsolicited telemarketing calls (Lr. No. 842-568/2005-VAS/15 dated 24 March 2006).
- 1.11 The Authority has been receiving a large number of complaints about unsolicited calls by telemarketers. The Authority has also received a number of complaints from consumers that they receive many unsolicited SMSs from their service providers regarding promotional offers, value added services/premium rate services such as ring tones, quizzes, televoting, and so on.
- 1.12 In response to these actions and orders, some banks and service providers have instituted their own do-not-call registries where subscribers can sign up if they do not want to receive calls *from those specific firms or agencies*. However, this approach does not prevent telemarketers not affiliated to these agencies from calling subscribers.
- 1.13 The approach till now has not been comprehensive and mostly comprised of judicial orders and directions. This has led to fragmented and inconvenient options for consumers. Presently, the subscriber has to register with different agencies (banks, telecom operators) to ensure that none of them makes unsolicited calls to their telephone(s). **This process places a significant burden on subscribers because it requires multiple registrations.** It also does not end the problem where telemarketers not connected to these institutions can make unsolicited calls. **The Authority believes that a comprehensive solution may be engineered to end the problem and protect the public interest.**

Privacy issues

- 1.14 The use of telephone is a personal and private affair for subscribers. **Any unsolicited intervention in their personal life is an intrusion of the subscriber's privacy and imposes a cost on the called party in terms of time and effort to respond to the call.**

- 1.15 Argument against the case for privacy with respect to telemarketing is that advertising and commercial solicitation has always been a major business activity across different communication media. Opponents of the privacy argument argue that businesses promote their products and services, and inform customers through various communication media, e.g. newspapers, TV, pamphlets, and street hoardings, and similar activity via telephone may cause inconvenience but does not breach a person's privacy. Further, **some customers might seek information about different products and services in the market, and halting telemarketing completely might unfairly end this process.**
- 1.16 Advertising through newspapers, TVs, pamphlets, and hoardings, however, are not made directly to a consumer, and therefore the consumer bears no cost (in time or effort) to ignore them. **This is not the case in unsolicited telemarketing calls.**

Network impacts

- 1.17 Telemarketing also imposes a significant burden on the functioning of telephone networks. For example, according to information gathered in the USA during the Federal Trade Commission's rulemaking on telemarketing, respondents submitted that, "commercial telemarketers complete over 16 billion calls a year."³ This is across about 270 million fixed line telephones, which comes to about 60 calls per phone per year.
- 1.18 If one assumes a similar level of telemarketing in India, given 170 million telephone subscribers, there could be **approximately 10 billion telemarketing calls in India** annually.⁴ In an environment where consumer spending is increasing, the telephone is becoming ubiquitous as a communication medium, and the marketing industry is growing, telemarketing will only increase. Given the need to ensure that service providers do not have to use network resources to carry unwanted calls, **there is a case from the perspective of promoting efficiency in the operation of telecommunication services in restricting unsolicited calls.**

³ Consolidated opening brief of appellant Federal Trade Commission, respondent Federal Communications Commission, and respondent-intervenor United States of America in *Mainstream*, 10th Circuit Court of the USA

⁴ In addition, the USA follows RPP for cellular calls, and hence telemarketing calls are almost nil on mobile phones. However, since India has CPP for cellular calls, telemarketing calls are as likely on cellular phones and they are on fixed phones.

Definition of unsolicited commercial communication

- 1.19 Based on the foregoing, the Authority has attempted to define unsolicited commercial communication (UCC) as: *any message⁵ through a telecommunications service⁶ that is transmitted for the purpose of informing about, or conducting a commercial transaction related to, goods, investments, services, or ideas where the receiving party has not explicitly indicated that it wants to receive such a message.*
- 1.20 The above definition of UCC covers **telephone calls on fixed or mobile phones, SMS, MMS, video or voice mail**, and any other form of electronic communication via a telecommunications service.
- 1.21 From a customer perspective, UCC over the telephone are an inconvenience and nuisance. They create nuisance because unlike other communication media, the telephone generally demands immediate attention because people do not want to miss important or emergency messages. Further, the called party has to respond to UCC to ensure that they do not miss important calls. This process inconveniences called parties because they have to respond to an unwanted call, which takes time and effort. Since India has a calling-party-pays (CPP) regime for both fixed and mobile phones, telemarketers call indiscriminately. Given that mobile phones are usually with the called party, a subscriber's privacy can be disturbed in both the home and elsewhere.
- 1.22 Apart from UCC, there might be other types of unsolicited calls. Such calls do not fall under the scope of this discussion because they are not for commercial purposes. Further, they might not be very common. Some examples include:
- Informative calls/messages about health or social campaigns
 - Fund raising or campaign awareness for non-profit or non-government organizations
 - Harassment from a person/organization: there are provisions in the service provider license conditions and Indian Penal Code to deal with such calls

⁵ 'Message' means any communication sent by telegraph. [Indian Telegraph Act 1885 ¶3 (3)]

⁶ 'Telecommunications service' means service of any description... which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, visual or other electromagnetic means. [TRAI Act 1997 (Amended) ¶2 (1) (k)]

Issue of specific concern

- 1.23 **The Authority primarily aims to identify the measures it should take to stop the bulk of unsolicited commercial communications to those who do not want it.**
- 1.24 **It is understood that a long term and fully effective solution will require legislation. However, in order to give immediate relief to subscribers and check most of unwanted UCC, the Authority feels it is important to begin a consultation on this issue leading to well laid regulations.**

Cause for this consultation

- 1.25 As per section 11 (1) (a) of the TRAI (Amended) Act of 2000, the Authority shall make recommendations, either *suo moto* or on a request from the licensor, on:
- Measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;
 - Technological improvements in the services provided by the service providers;
 - Measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general;
 - Efficient management of available spectrum.
- 1.26 As per section 11 (1) (b) of the TRAI (Amended) Act of 2000, the Authority shall discharge the following functions:
- Ensure compliance of terms and conditions of license;
 - Lay down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication services.
- 1.27 Based on the network impacts of telemarketing and other unsolicited commercial communications (UCC), which consume network resources and scarce spectrum, the Authority believes it is necessary to promote efficiency in the operation of telecommunication services and in the use of spectrum by reducing the number of such calls. The Authority also seeks public responses about possible technological improvements in networks that can reduce the number of UCC. Further, UCC impinges

on the privacy of the consumers of telecommunication services, and diminishes the consumer interest. Hence, the Authority believes it has sufficient reason to seek consultation on the issue of unsolicited commercial communication and its reduction to protect the consumer interest, and improve efficiency in the working of telecommunications services and spectrum use.

Promotional SMSs

- 1.28 In addition to telemarketing calls, the Authority has received a number of complaints from consumers that they receive many unsolicited SMSs from their service providers. Both unified access service licensees (UASLs) and cellular mobile service providers (CMSPs) send messages to consumers about promotional offers, value added services/premium rate services such as ring tones, quiz, and tele-voting, and these messages cause unnecessary disturbance to them during work and at odd hours in the day and night.
- 1.29 The Authority has considered issues related to this matter and is of the view that these unsolicited messages do create unnecessary disturbance to consumers. The consumer is also forced to read and scroll through these messages to locate important messages that results in unnecessary wastage of time and effort. These messages also consume the storage memory in the consumer's handset leading to non-receipt of wanted and important messages. To avoid such an eventuality a consumer is again forced to go through the messages promptly and delete unsolicited messages.
- 1.30 The definition of UCC (para (¶) 1.19) covers all messages on telecommunications systems, and hence, by extension, covers SMSs. The Authority is of the view that the service providers have the capability to restrict sending such unsolicited messages to those consumers who do not wish to receive such messages, and seeks to determine the measures to be taken to reduce the number of promotional SMSs.

Other issues

- 1.31 Calls generated from a call center with **automatic dialing** make the scenario worse for the called party. Even if a customer disconnects a call, the autodialing mechanism repeats dialing many times.

- 1.32 **Automatic scanning**, where an automatic dialer calls subscribers to verify if they are active or not, irritates subscribers and might result in anxiety because it is a blank or silent call.
- 1.33 The inconvenience is particularly intense for mobile phone service customers who are **roaming** because such calls consume their chargeable airtime. The loss could be even greater if a customer is traveling and roaming overseas. The Authority has already asked operators to allow subscribers the freedom of setting caller ring back tones (CRBT) to inform incoming callers that they are roaming internationally.⁷

Questions for consultation

- Q.1. Do you agree with the definition of UCC as mentioned in ¶1.19? If not, please give your definition and explain it.
- Q.2. How have the measures thus far (by the RBI or other agencies, banks, and service providers) been effective in reducing the number of unsolicited messages and calls?

⁷ TRAI Letter No. 101-31/2006-MN dated 31 October 2006

Chapter 2. International experiences

- 2.1 Many countries around the world have implemented, or are in the process of implementing solutions to reduce unsolicited commercial communications. Countries such as USA, UK, and Ireland have implemented a do-not-call (DNC) registry. By enlisting on such a registry, subscribers opt-out of receiving telemarketing or sales calls. Australia has recently begun the process of setting up its DNC service. In Hong Kong, a telemarketer has to seek permission of the called party and if denied, cannot call again.
- 2.2 In almost all these countries, there has been a combination of industry effort, regulatory intervention, and even legislation to curb telemarketing activity. The DNC registers are often set up by the regulator or government, with telemarketers paying to access the register and scrub their calling lists to keep them up-to-date and avoid calling listed subscribers. In the case of infractions, subscribers in the USA complain to the regulator or file suit in court, while in UK they complain to the Information Commissioner. Heavy fines are imposed on violators. In Hong Kong, on the other hand, subscribers complain to their service provider, and the telemarketer can be disconnected if found to be in violation of the rules. Details of different international practices are given below.

USA⁸

- 2.3 The Telephone Consumer Protection Act (TCPA) of 1991 was created in response to consumer concerns about the growing number of unsolicited telephone marketing calls to their homes and the increasing use of automated and prerecorded messages. In 2003, the FCC revised its rules implementing the TCPA and established, together with the Federal Trade Commission (FTC), a national do-not-call registry. The FCC also adopted restrictions on the number of abandoned calls⁹ that are permissible. The FCC and FTC have established a National Do-Not-Call Registry. The registry applies to all telemarketers with the exception of certain non-profit organizations. Commercial

⁸ Consolidated opening brief of Appellant Federal Trade Commission, Respondent Federal Communications Commission, and Respondent-Intervenor United States Of America, *Mainstream V. FCC and FTC*, United States Court Of Appeals For The Tenth Circuit, October 2003

⁹ Abandoned (or silent) calls are calls made by automatic dialers where the call is connected, but no operators are ready to continue the call. Hence, the call is connected, the receiving party lifts the telephone, but the opposite side is silent. Such calls cause anxiety and might disturb receivers who might not be sure about who is calling.

telemarketers cannot call a subscriber if that number is on the registry. As a result, consumers can reduce the number of unwanted phone calls to their homes. Subscribers may register their residential telephone numbers, including wireless numbers, on the National Do-Not-Call Registry by telephone or by Internet and at no cost. In addition, there are do-not-call lists at the company and state levels, which allow consumers to block specific calls while allowing others. **According to the FCC's Annual Report on the DNC registry, 88 million telephone subscribers have signed up between June 2003 and September 2005.**¹⁰

- 2.4 For the companies who continue to call subscriber after they have requested to be placed on a "do not call" list, some states permit consumers to file lawsuits against violators. Courts can award damages or actual monetary loss, whichever is greater, and increasing if the complainant can show that the caller willfully and knowingly violated do-not-call requirements. States themselves may initiate a civil suit in a federal district court against any person or entity that engages in a pattern or practice of violations of the TCPA or FCC rules.

Canada¹¹

- 2.5 The government of Canada announced on December 13, 2004 that they would introduce legislation to create a Canadian Do Not Call Registry. Bill C-37 introduced Canada's proposed do-not-call legislation in December 2004. An Act to amend the Telecommunications Act that followed this announcement received royal assent on November 25, 2005. It gives the Canadian Radio Television and Telecommunications Commission (CRTC) authority to establish a national do not call list, to establish procedures to administer the Act and to levy penalties for violations.
- 2.6 Amending the Telecommunications Act, Bill C-37 allows the CRTC to establish a national bilingual do-not-call list to which individuals not wishing to receive unsolicited calls could add their telephone numbers. Telemarketers who call individuals on the national registry will be committing an offence and subject to monetary fines.

¹⁰ http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-2056A1.pdf

¹¹ http://www.crtc.gc.ca/eng/INFO_SHT/T22.htm

- 2.7 Callers must identify the person and the organization calling. When an agent is calling on behalf of a client, the caller is required to identify himself/herself, the name of the agency, as well as the client for whom they are calling. The caller must provide this identification before any other communication and before asking for a specific individual. Upon request, callers must provide the telephone number, name, and address of a responsible person the called party can contact. In all cases, whether the called party requests it or not, the caller must provide a toll free telephone number where a representative of the company can be reached for questions or comments about the call. The caller must provide this information before any other communication and before asking for an individual. The toll-free telephone number provided must be staffed during business hours with an after-hours interactive voice mail back up.
- 2.8 The calling party has to maintain do not call lists that remain active for three years. If, during the call, the called party asks to be put on a do not call list, the do not call request must be processed without requiring the called party to do anything further. If the call is made by an agent calling on behalf of a client, the agent must ask the called party if it wishes to have its name on the agent's do not call list, the client's do not call list or both do not call lists. As of October 2004, the caller must give a unique registration number to each called party who request to be added to the do not call list. Names and numbers of called parties must be added to the do not call list within 30 days of the called party's request. Sequential dialing is not permitted. Calls are not permitted to emergency lines or healthcare facilities. The call must display the originating calling number or an alternate number where the caller can be reached (except where the number display is unavailable for technical reasons).
- 2.9 Telephone service to all lines used in connection with calls that contravene these rules may be suspended or terminated two business days after notice from the telephone company.

United Kingdom¹²

- 2.10 The Telephone Preference Service (TPS) is a central opt out register whereby individuals can register their wish not to receive unsolicited sales and marketing telephone calls.

¹² <http://www.tpsonline.org.uk/tps/what>

The original legislation was introduced in May 1999. It has subsequently been updated and now the relevant legislation is the Privacy and Electronic (EC Directive) Regulation 2003. The Government receives no money to run TPS. Instead, the direct marketing industry pays for it. The UK Information Commissioner's Office enforces the TPS.

Ireland¹³

- 2.11 The rules came into force in Ireland in November 2003, setting out restrictions on unsolicited direct marketing by phone, fax, and automated calling systems, email, SMS and MMS. The provisions of Statutory Instrument, Electronic Communications Networks and Services Data Protection and Privacy Regulations 2003 made the sending of unsolicited faxes or the making of unsolicited calls from within the Republic of Ireland for the purpose of direct marketing has, in certain situations, an offence. The launch of the National Directory Database (NDD) as a national marketing opt-out database has increased the protection of telephone subscribers. Enforcement is the joint responsibility of the Data Protection Commissioner and the Commission for Communication Regulation (ComReg).
- 2.12 Similar regulations are in force or being enacted in other countries within the European Economic Area.

Australia¹⁴

- 2.13 On 22 June 2006, the Minister for Communications, Information Technology and the Arts announced that legislation to establish national telemarketing standards and a Do Not Call Register (the Register) had passed through Parliament. The Do Not Call Register Act 2006 (DNCR Act) and the Do Not Call Register (Consequential Amendments) Act 2006 make the Australian Communications and Media Authority (ACMA) responsible for the setting of the telemarketing standards and establishing the register on which people can register their telephone numbers to enable them to opt out of receiving unsolicited telemarketing calls. Budget funding of AU\$33.1 million has been provided over four years for the arrangements, with industry anticipated to contribute AU\$15.9 million over that period through the payment of fees to access the Register.

¹³ <http://www.dataprotection.ie/viewdoc.asp?DocID=72>

¹⁴ ACMA, Discussion paper on industry standard for making telemarketing calls, August 2006

- 2.14 The standards apply to all telemarketing calls, including voice calls, made to an Australian number to market, advertise or promote goods and services, conduct opinion polling and to carry out standard questionnaire-based research. The standard will not apply to non-telemarketing calls, including non-telemarketing calls by persons that also carry out telemarketing activities (for example, non-telemarketing calls from charities). The ACMA recently released a discussion paper inviting comments on the central issues addressed in the telemarketing standard.
- 2.15 ACMA will be responsible for the enforcement of the legislation and a range of penalties will be available depending on the nature of the breach. ACMA will be able to issue formal warnings or infringement notices or commence court proceedings. Federal courts will be able to impose fines ranging from \$1,100 to \$1.1 million, with the highest penalties targeted at entities that recurrently breach the legislation.

Hong Kong

- 2.16 In Hong Kong, Personal Data (Privacy) Ordinance and the Guidelines on Cold-Calling issued by the Office of the Privacy Commissioner for Personal Data require that a data user (e.g. tele-calling agency) on the first occasion should take consent of the called party to use his or her personal data for direct marketing purposes. If the individual denies permission, the data user should cease to use the data concerned. In case the caller does not stop the call even after the “opt-out” request, the case may be reported to the Office of the Privacy Commissioner for Personal Data.
- 2.17 Further, there are provisions under the Telecommunications Ordinance prohibiting unsolicited promotional telephone calls generated by machines (“junk calls”). Understanding that such calls may cause great nuisance to telephone users, OFTA issued a Code of Practice on Handling Complaints about Inter-operator Unsolicited Promotional Telephone Calls generated by Machines (“the CoP”) on 5 June 2006 for telephone service providers to follow on a voluntary basis. Under the Code of Practice (CoP), if a telephone service provider (“provider A”) receives two or more complaints against the same junk call sender within 5 days from its customers, it will refer the complaints to the telephone service provider (“provider B”) of the sender for investigation. Provider B could suspend or terminate the junk call sender’s telephone service under the terms and conditions of the service contract if the complaints are

substantiated. CoP does not apply to unsolicited promotional telephone calls made by persons or of non-commercial nature. This CoP applies to all inter-operator Unsolicited promotional Telephone calls generated by machines (UTC-M) originating and terminating at either fixed or mobile networks. This CoP does not apply to UTC not generated by machines or UTC-M that does not contain any recorded voice message.

Analysis

2.18 From the above international experiences, we can derive the following lessons about how India might be able to reduce or stop unsolicited commercial communications.

- India will need **some type of registry** that subscribers can join and consequently express their preference about whether they want to receive UCC or not. Such registries, called 'do-not-call' or 'do-not-disturb' registries are already in place with some service providers and banks in India.
- There is typically **national legislation** that is enacted to deal with unsolicited commercial communications. In some cases, specific agencies and departments within regulatory bodies are established to enforce these laws and regulations.
- There are **different types of penalties** – including fines and disconnection to discourage violation of telemarketing rules.
- The solution to telemarketing calls and communications requires the **joint participation** of the marketers, service providers, regulator, government, and consumers.
- The introduction of measures to reduce unsolicited commercial communications does **not necessarily lead to reductions in business** for telemarketers or their contractors. In fact, the efficiency of telemarketing might increase because the volume of calls made to unwilling or uninterested subscribers will significantly reduce.

2.19 Based on these experiences and lessons learnt, the Authority has proposed specific solutions in the following chapter.

Chapter 3. Alternate solutions

3.1 As per the available estimates, the unsolicited commercial communications are mainly from call centers, which are registered with the DoT as Other Service Providers (OSP). There is another group of callers viz. Direct Sales Associates (DSAs) or a Direct Sales Teams (DSTs), who are associated with business entities. A number of local salespersons and retailers use DSAs and DSTs to contact potential customers through the telephone. They are not registered with the DoT, but are subject to their service provider's terms and conditions. Thus, there is a need for a solution that addresses both these groups of callers.

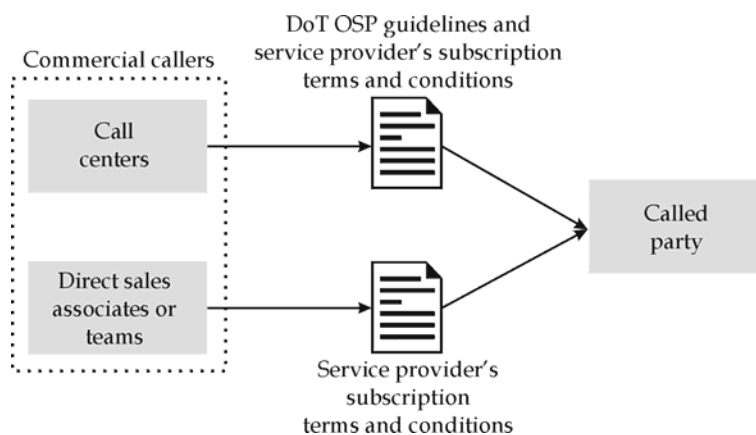


Figure 1: Both call centers and DSA/DSTs initiate commercial calls

3.2 Both OSPs and direct callers cause UCC. The OSPs follow the DoT's OSP guidelines terms and conditions and hence, the Authority also plans to seek the cooperation of the DoT on how OSPs should reduce the number of UCC. On the other hand, reducing UCC from direct callers will need a degree of self-restraint and joint compliance of the service providers playing a role in reducing UCC.

3.3 The solution that is enacted should follow the principles outlined below:

- It protects the subscriber's **privacy and right to live a peaceful life**
- It **does not impose any significant cost** in terms of time, effort, or money, on subscribers or service providers
- It is **easy for the subscriber** to avoid getting such calls

- It should **allow the subscriber to make a range of informed choices** about whether they want to receive unsolicited commercial communications or not
- It **should not ban telemarketing**, but it should provide a mechanism for a subscriber to stop unwanted commercial communications to her or his telephone

Solutions vary with the parties involved

3.4 A typical unsolicited commercial communication passes through the telemarketer (and their employer/contractor, if any) followed by the originating service provider, terminating service provider, and finally the receiving party. The responsibility for a solution could focus on one or two of the entities but the implementation of any workable solution needs the participation of all the entities concerned.

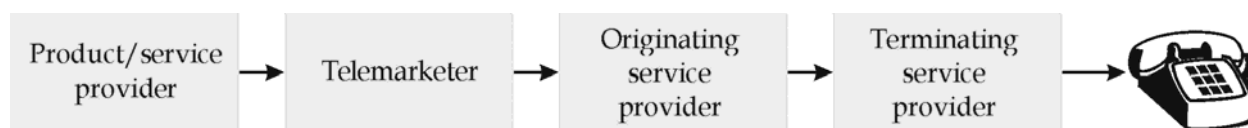


Figure 2: The telemarketing chain

3.5 The basic requirements of the majority of solutions enacted around the world to address the issue include:

- Identifying subscribers who do not want to receive unsolicited commercial communications. This requires establishing and maintaining some type of **do-not-call (DNC) register**. By listing on the DNC register, a subscriber opts-out of receiving UCC, and makes an indication of this to any telemarketer.¹⁵ There is an apprehension that introduction of a DNC register will affect the call center/marketing industry. However, most of these businesses engage with international clients. The DNC rules will apply only to domestic calls and therefore will not influence the industry in the long-run. Another option is to have a ‘do-call’ register. In this case, the subscriber can only be called if they opt-in to the ‘do-call’ register, and allow UCC. This ‘opt-in’ solution will be more beneficial to the subscriber, but may affect the call center/marketing industry adversely, which is not in line with the principles in ¶3.3.

¹⁵ **Opt-in vs. Opt-out:** An opt-in list is one where a subscriber chooses to receive calls if she or he adds their name to a list. Opt-in lists hence seek prior permission for commercial calls. An opt-out list is one where subscribers on the list choose not to receive unsolicited commercial calls. With an opt-out list, the sender will need specific permission from the recipient before hand because the recipient has chosen not to receive future messages.

- Ways for desiring **subscribers to list their number on the DNC register** easily.
- Having **all subscribers, including telemarketers, to follow the DNC register** when making unsolicited commercial communication.

Solution 1: Telemarketer oriented

- 3.6 All service providers maintain a DNC register of their own subscribers who do not want to receive any unsolicited commercial communication (UCC). Subscribers should have an inexpensive and easy method to register or deregister from this list: through SMS, phone call to the customer care center, or through the Internet.
- 3.7 This is an opt-out do-not-call list, i.e. subscribers on the DNC list automatically opt-out of receiving any UCC. The service provider is responsible to execute the request of the subscriber after authentication by updating the DNC register maintained on their website.
- 3.8 In order to identify telemarketers, when subscribing to a telephone service, all customers must specify if they would be using the phone to transmit unsolicited commercial communications or not. The service provider should take an undertaking from all subscribers, including existing subscribers, that they will not make unsolicited commercial communications to subscribers listed on any operator's DNC register. Service providers should also execute an agreement specifying a stringent penalty clause for sending UCC to a subscriber listed on a DNC register.
- 3.9 Any subscriber who wishes to make commercial calls to any other subscriber must adhere to the DNC register. They should not transmit any unsolicited commercial messages to subscribers listed on a DNC register.
- 3.10 In spite of the "opt-out" of telemarketing option available to the subscribers, anyone making commercial communications to even those subscribers not listed in any DNC register must make an announcement before start of conversation that, "This is a telemarketing call, if you do not want to receive further calls, please register with your service provider's do-not-call list." The caller must make this announcement in the language the caller expects to carry out the call in.

3.11 In this system, subscribers have a variety of options for managing unsolicited communications. They may (1) place their number on the service provider's do-not-call list; and/or (2) provide specific companies or callers with prior explicit permission to contact them. This solution puts the responsibility on the telemarketer to avoid sending UCC. This is justifiable since the telemarketer generates such communications. Further, this solution does not burden operators greatly, and provides flexibility to subscribers to decide the level of privacy. **The proposed solution can be implemented by a Direction or a Regulation issued by the Authority. Since a major portion of unsolicited communications originates from call centers, which are operating under the Other Service Provider (OSP) category, the cooperation of the DoT will be needed in ensuring that they follow the rules as instituted.**

3.12 It is possible that individuals/organizations who are not registered as OSPs might still violate the DNC rules. Consequently, **specific legislation might be needed to address this problem.**

3.13 Strengths

- Subscribers have to make only one-time decision about joining the do-not-call list
- Networks are not burdened by having to stop or allow calls from telemarketers
- Does not need any change in the network design or architecture
- Flexibility makes sure that the regulation only curtails those calls that are unwanted, and does not place a burden on other calls, commercial or otherwise.

3.14 Weakness

- Will need enforcement to ensure that telemarketers do not flaunt the rules or the do-not-call list.

Option 2: Service provider oriented

3.15 Service provider oriented solutions could be imposed on either originating or terminating networks.

Solution 2.1: Originator network focused

3.16 All service providers should share the data identifying telemarketers on a monthly basis. They should also share and update the data of DNC register of each service provider. The originating service provider should block the calls originated from telemarketer that are dialing numbers on the DNC of any service provider.

3.17 Strengths

- Automated process
- Minimum burden on signaling resource.

3.18 Weaknesses

- Needs upgrading of originating network to handle intelligent services - extra cost
- Extra burden on originating service provider to download the DNCs of all other service providers
- Practically difficult to implement because the service provider-telemarketer relationship is commercially sensitive and service providers might not be willing to share this information with their competing operators.

Solution 2.2: Terminating operator focused

3.19 All service providers should share on monthly basis the data regarding telemarketers. The terminating service provider should block the calls meant for these numbers listed in their DNC register.

3.20 Strengths

- Automated process.

3.21 Weaknesses

- Needs upgrading of terminating network, which will be at extra cost
- Extra burden on network resources
- Practically difficult to implement because the service provider-telemarketer relationship is commercially sensitive and service providers might not be willing to share this information with their competing operators.

Solution 2.3: Involving both operators

3.22 The service providers will identify the telemarketers associated with them. Originating networks categorize telemarketers using flags passed from originating to terminating networks while setting up the call. The terminating service provider will connect only to the non-DNC subscribers upon receiving the category information.

3.23 Strengths

- Little risk of failure
- Telemarketers are not responsible for sticking to the DNC list.

3.24 Weaknesses

- Network are not technically capable at present
- Upgrading network will be costly
- Burden on the network resources
- Not practical because of commercial sensitivities of operator-telemarketer relationship.

Option 3: Customer oriented

Solution 3.1: Based on CLI

3.25 Presently, the service providers do not have a fixed scheme to allocate specific levels or blocks of numbers to telemarketers or commercial callers. However, it is possible that operators assign numbers only within specific blocks or levels to telemarketers. Thus, when a telemarketer calls, the called party can choose to receive or disallow the communication based on the calling line identification (CLI).

3.26 Strengths

- The customer has full freedom to accept calls
- Telemarketers have an equal opportunity to sell their product or service.

3.27 Weaknesses

- Needs revision in the national numbering plan

- Needs the attention and effort by receiving subscribers to accept or reject calls. This solution does not reduce the disturbance to the receiving subscriber and shifts the onus of responsibility away from telemarketers
- Though CLI provision is available in fixed network, the feature of CLI presentation is not available in the majority of fixed telephone sets. The benefit will not pass on to the fixed subscribers.
- Requires continuous engagement of the subscriber in decisions about stopping telemarketing calls
- Will be a burden on network resources because the call passes through all networks.

Solution 3.2: Individual phone number blocking

3.28 The customer should find a mechanism to block the UCC by using the blocking function on their phones.

3.29 Another option is to use a value added service from the service provider to block/allow certain numbers as per subscriber requirements.

3.30 Strengths

- Useful option in case of roaming subscriber
- Flexibility with the subscriber.

3.31 Weaknesses

- Needs IN up-gradation by the service provider
- Burden to the subscriber
- Cannot guarantee to block all the telemarketer/subscriber, only the selected telemarketer can be blocked/allowed.

Evaluating the options

3.32 Based on the principles in ¶3.33.2, and the foregoing discussion, we can evaluate the various options as below:

Parties involved in the solution	Telemarketers	Service providers			Subscribers	
		Originatg	Terminatg	Both	By CLI	By blocking
Principles to evaluate mechanism						
Protects the subscriber’s privacy	✓	✓	✓	✓	✗	✗
Easy for subscriber to avoid UCC	✓	✓	✓	✓	?	✗
No cost to subscriber (time/effort/money)	✓	✓	✓	✓	✗	✗
No cost to SP (time/effort/money)	✓	✗	✗	✗	✓	✓
Range of choices for subscriber about UCC	?	?	?	?	✓	?
Not ban telemarketing	✓	✓	✓	✓	✓	✓
Overall suitability of solution to principles	✓	?	?	?	✗	✗

3.33 The telemarketer or service provider oriented solutions make it easy for the subscriber to avoid UCC at the least cost, and protects their privacy. This has been the central concern in the different actions taken by courts and other agencies for the protection of the customer interest. A choice will have to be made about which of these solutions will be used in the Indian environment.

Penalizing violators

3.34 The preceding discussion focuses on the different solutions that will help in reducing the number of unsolicited commercial communications. However, there will be incidents when there will be infractions by parties who might still send messages or call people who are on a do-not-call list, and have not given prior permission. Violations have been recorded in the USA, for example, where the FCC has cited a number of major banking and telecom firms, as well as smaller telemarketing agencies for not following national do-not-call rules.¹⁶ Individual violations are each fined at a maximum of \$11,000. In some cases, fines or settlements have been upwards of US\$770,000 (Rs. 3.5 crores).¹⁷ Recently, the US Federal Trade Commission (FTC) has fined satellite TV provider DirectTV \$5.3 million (Rs. 23.85 crores) for violating do not call rules.¹⁸ The Information Commissioner in the UK has also cited companies for making telemarketing calls to

¹⁶ <http://www.fcc.gov/eb/tcd/DNCall.html>

¹⁷ http://www.fcc.gov/eb/News_Releases/DOC-257062A1.html

¹⁸ <http://www.ftc.gov/opa/2005/12/directv.htm>

people listed on their do-not-call (Telephone Preference Service) list.¹⁹ The proposed Australian do-not-call act allows for fines ranging from A\$1,100 to A\$1.1 million (up to Rs. 3.85 crores), with the highest penalties targeted at entities that recurrently breach the legislation.²⁰

- 3.35 **Given that the Authority seeks to discourage violations of the do-not-call list, and that subscribers might seek compensation for disturbance of their privacy by telemarketers, there needs to be a mechanism in place to penalize violators, i.e. the parties who transmit UCC to subscribers on a DNC register. From the international experiences, some type of monetary fine is the standard practice.**
- 3.36 If this is the solution used in India, the issue of how this fine (or other penalty) should be enforced arises. This is because the receiving subscriber is on the terminating network that might not be the same as the network on which the sender of the UCC is located. However, the receiving subscriber will complain to his or her own service provider who will then have to coordinate with the originating service provider to seek compensation for the DNC register violation. In Hong Kong, for example, a called subscriber needs to register a complaint with their service provider, who then takes the matter up with the originating service provider. The originating provider could suspend or terminate the sender's telephone service under the terms and conditions of the service contract if the complaints are substantiated (§2.17).
- 3.37 A related issue that will need public input and comment is about the type and level of the penalty. Penalties include fines equivalent to a few lakhs of rupees per violation, or even service disconnection. Hence, there are varieties of measures that are possible, and the Authority seeks inputs on the possible fines. Penal provisions in the tariff framework can be enforced, such as charging telemarketers a higher rate for calls or messages sent to subscribers listed on a DNC register.
- 3.38 **The Authority does not have adequate and effective power in enforcing and penalizing violators. It has formally proposed to the DoT for a comprehensive amendment in the TRAI Act to strengthen powers of the Authority in terms of**

¹⁹ http://www.ico.gov.uk/what_we_cover/privacy_and_electronic_communications/enforcement%20notices.aspx

²⁰ <http://www.caslon.com.au/donotcallnote2.htm#enforcement>

penalty as provided in most of the countries. Specifically, the proposed regulations will cover Other Service Providers (OSPs) – who constitute the majority of telemarketing call centers and who come under the jurisdiction of the DoT. Hence, the Authority will need the assistance of the DoT to enforce the do-not-call rules and to penalize violators.

- 3.39 Around the world, penalties and enforcement are embedded in powers granted by legislation to enforcement agencies such as regulators or consumer protection agencies. The Authority realizes that the proposed solutions and penalization mechanisms are regulatory moves, and will not be complete solutions. However, these measures will provide immediate relief to the majority of subscribers.

Location and management of the DNC register

- 3.40 Another issue is whether the DNC register should be located at a single place, or if service providers and telemarketers could maintain it as per their requirements. A common register maintained by one party will be ideal for telemarketers to keep track of changes in the DNC register.
- 3.41 However, since service providers are already maintaining their own DNC registers, it would be easy to continue with this practice and have DNC registers located with each service provider. In this case, the telemarketer will have to gather these different lists and compile them. The problem here is that since there are more than 130 different service providers across all 23 circles and metro areas in the country, having individual lists might make it difficult for telemarketers to collect the information regularly. Many service providers have or plan pan-India coverage, therefore we expect that they could have their DNC registers circle-wise at a common location. An advantage in this solution is also that telemarketers who focus on one area of the country can download only those circles' DNC registers and not have to deal with very large databases of information.
- 3.42 Another possibility in the multi-location DNC registers is that an entrepreneur can step in and consolidate the different lists. This is a market-based approach. It will spontaneously come about if the telemarketers see the need for it, or if someone sees a demand for such a service.

- 3.43 In order to have certainty about when telemarketers should download and compile the different DNC registers, it might be necessary to have a set date on which all service providers must update their DNC registers. Thus, say once a month, all telemarketers must download the different DNC registers, compile them, and scrub their calling lists against the numbers listed on any DNC. A decision needs to be made about providing sufficient time to telemarketers to compile and update their lists.
- 3.44 A related point is that since the DNC register will be publicly available, it should contain the phone numbers only with area codes, of the subscribers who have chosen to list their numbers.

Issues for Consideration

- Q.3. Which of the suggested proposals will be appropriate for India? Please suggest alternate proposals, if any.
- Q.4. Should TRAI consider a centralized DNC register or go for a distributed approach in which each service provider has their own DNC register where subscribers can list? Should the development of a centralized DNC register be left to market forces?
- Q.5. In case the telemarketer-oriented approach is followed, what action should be taken against a telemarketer either by service provider or the Government that makes an unsolicited commercial communication to subscriber listed on any DNC register?
- Q.6. If any of the service-provider oriented approaches are followed, what should be the action taken against service providers (originator/terminator) that allow unsolicited commercial communications to reach subscribers on any DNC register?
- Q.7. With reference to the problem posed in ¶3.12, what additional measures are needed to be implemented?
- Q.8. Should a subscriber who receives UCC calls in spite of being listed on a DNC register be compensated? If yes, how should this be done for the solution you recommend? What should be the level of compensation?

Chapter 4. Consultation questions

- Q.1. Do you agree with the definition of UCC as mentioned in ¶1.19? If not, please give your definition and explain it.
- Q.2. How have the measures thus far (by the RBI or other agencies, banks, and service providers) been effective in reducing the number of unsolicited messages and calls?
- Q.3. Which of the suggested proposals will be appropriate for India? Please suggest alternate proposals, if any.
- Q.4. Should TRAI consider a centralized DNC register or go for a distributed approach in which each service provider has their own DNC register where subscribers can list? Should the development of a centralized DNC register be left to market forces?
- Q.5. In case the telemarketer-oriented approach is followed, what action should be taken against a telemarketer either by service provider or the Government that makes an unsolicited commercial communication to subscriber listed on any DNC register?
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