



GUIDANCE ON ESSENTIAL CONTRACT TERMS FOR CLOUD COMMUNICATION SERVICE PROVIDERS

***Disclaimer:** This note is meant for general guidance only. No responsibility for loss arising to any person acting or refraining from acting as a result of any material contained in this will be accepted by NASSCOM. It is recommended that professional advice be sought based on the specific facts and circumstances. This guidance does not substitute the need to work with legal experts to incorporate the suggested provisions.*

A. BACKGROUND

Cloud telephony services face the danger of disruptions arising from the 13th amendment in the TCCCP, due to the following reasons

1. A cloud telephony service provider is unaware when their clients is initiating an illegal SMS campaign which maybe publishing the numbers which the cloud telephony company has actually subscribed to and has assigned it to the particular client.
2. Therefore, “*Telephone number on which the commercial transaction is solicited*” included in the 13th amendment, can potentially put at rest the entire telecom resources of the cloud telephony operator without their knowledge and/or control.
3. As a service provider, they have no knowledge and little control on the messages that are being sent by the clients and they are not a direct beneficiary of such call back requests.

The TRAI believes that companies should draft robust contracts which clearly prohibit any unlawful action and also have provisions for penalty.

A contractual obligation along with efforts to make clients aware of the consequences has yielded results and ensured regulatory compliance of TRAI for sectors like banks and insurance.

The guidance note therefore suggests certain provisions that maybe incorporated in the service contract that will deter clients from undertaking unlawful activities like unauthorized bulk sms for marketing.

The guidance note is based on the provisions in existing contracts and suggestions from TRAI, and will be essential in case of client agreements. The provisions and the action points as suggested will not only allow companies to take planned action but will also help in demonstrating their intent to prevent any transgression of TRAI regulations.

B. GUIDANCE NOTE

User responsibility

1. The User shall use the Services for lawful purposes and the usage of the services will be in compliance with applicable laws and regulations. The User further understands and agrees that:
 - 1.1. They shall be solely liable for any transmissions sent through the Service that Service provider has no control over the content of any transmission. Therefore they shall be solely responsible for all acts or omissions that occur including the content of transmissions through the Service
 - 1.2. In case the User becomes aware of any unauthorized use of the whole or any part of the service by any person the User shall forthwith notify Service provider of the same. The Service Provider shall not be responsible for the said unauthorized use under any circumstances whatsoever
 - 1.3. User will abide by all applicable agreements, policies and procedures from time to time.
 - 1.4. User shall not attempt to gain unauthorized access to the service, other accounts, or computer systems or networks connected to the Service, through password mining or any other means.
 - 1.5. User shall not interfere with other customers' or third-parties' use of the Service or use the Service in any manner which disrupts, prevents or restricts any other customer from using the Service.
2. User shall not use the Services for purposes that is unlawful or prohibited by the Agreement or the policies of the Service provider. User may not use the Services in any manner that may damage, disable, overburden, or impair the Services, telephonic numbers. Additionally, the User shall be responsible at all times to ensure that the Services shall not be utilized in any manner related to prohibited use. These prohibited uses include, but are not limited to the following:
 - 2.1. in connection with conducting any surveys, contests, chain letters, or any duplicative or unsolicited messages (commercial or otherwise);

- 2.2. advertise or offer to sell or buy any goods or services or use the Services for tele-marketing including contacting persons registered on the “Do Not Disturb” list, without obtaining appropriate permissions under the Telecom Commercial Communication User Preference Regulations, 2010 or any amendments thereto;
 - 2.3. defame, abuse, harass, stalk, threaten or otherwise violate the legal rights of others; publish, post, distribute or disseminate any inappropriate, profane, defamatory, obscene, indecent or unlawful topic, name, material or information
 - 2.4. sending unsolicited and/or bulk messages or advertisements, including voicemails or facsimiles.
 - 2.5. harvesting or otherwise collecting information about others without their consent.
 - 2.6. creating a false Caller ID identity (“ID spoofing”) or otherwise attempting to mislead others as to the identity of the sender or the origin of any communication made using the Services.
 - 2.7. pretending to be anyone, or any entity, you are not, including impersonating or misrepresenting yourself as another person (including a celebrity), entity, or a civic or government leader, or otherwise misrepresenting your affiliation with a person or entity.
 - 2.8. transmitting any material that may infringe the intellectual property rights or other rights of third parties.
 - 2.9. violating any TRAI regulations regarding the transmission of technical data through the Service.
 - 2.10. violation or non-adherence to any extant laws of the land governing the business associated with this agreement.
3. Use of the Service is subject to all applicable local, state, national and international laws and regulations (including without limitation those governing account collection, export control, consumer protection, unfair competition, anti-discrimination, securities laws, and false advertising). User understands and agrees that at any time, and without additional notice terminate, modify, suspend, disconnect, discontinue, or block access to some or all of the features of the Services if they indulge in prohibited uses as listed above and other similar acts.

User obligations towards TRAI regulations

The User is obliged to follow all TRAI regulations.

If a complaint arises from the numbers being used by the User, the Service Provider will take all steps to protect its communication resources and will provide all information of the User to TRAI to take appropriate action.

Penalty

In the event the User is deemed to have utilized the Service for any unlawful use or in a manner as provided above, then the Service provider has the right to

- ***Execute and Realise the payments due from the Indemnity Bond and***
- ***To immediately terminate use of the Services, without prior notice to the User.***

In the event any penalty is levied on the Service Provider for unlawful/prohibited usage of the Services by the User or for utilizing the Services in the manner detailed above as prohibited use then, the User shall be liable to pay the penalty to the Service provider along with any claims made by any third party against the Service provider.

Upon termination of the services or agreement, Service Provider may immediately deactivate or delete any User account and all related information and files in said account and/or bar any further access to such files, information, or the Services. Service Provider shall not be liable to User or any third party for any reason for terminating any use or access to the Service as per the standard terms mentioned above.

Indemnity

Service provider will file police complaint against the persons who have indulged themselves in unsolicited commercial communications.

The User agrees to defend and indemnify the Service Provider and his/her/its officers and directors, employees, agents, and representatives from any and against all losses,

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claims, costs, liabilities, or expenses incurred, whether based in claims of tort or contract (including court costs and attorney fees) incurred or sustained due to related to or arising out of utilizing cloud communication services including IVR services, call forwarding, call recording and voice-mail services or sending and receiving fax, making unsolicited commercial calls (UCC) or any material that is appropriate and, when applicable, related to the Service, collection of data, usage of data, or breach of any of the terms hereof any negligence, or any fraud, violation of rules and regulations of the TRAI and DOT or breach of confidentiality, leading to a third party claim.

Draft undertaking cum declaration for lawful usage of the services

I/ We understand and agree to use the service only for lawful purposes and at any time, shall not use the Service for any illegal, fraudulent, improper or abusive purpose or in any way, which interferes with the Service providers ability to provide the Service to other customers, prevents or restricts other customers from using the Services, or damages any Service provider's or other customer's property.

The User hereby agrees to indemnify the Service Provider to an amount of Rs.(Rupees Lakhs), as Indemnification Due upon legal claims due to violations committed by the User upon Use of the Services.

Service Review

Service provider would have every right to monitor, peruse, and analyze (joint and severally called "Review") the communication between the third party and the User with the prior permission of User per instance of such review.

Provided if any communication or part thereof is found to be apparently objectionable per TRAI regulations, Service provider can withhold its services till proper explanation is furnished by the Client.

Service provider shall not be responsible for any loss sustained by the User during the intervening period.

C. ACTION ITEMS

To demonstrate that cloud communication service providers are not willful offenders, the companies may consider the following:

- 1. Issue strict and periodic instruction to clients to not indulge in UCCs in the form of SMSs or voice calls on behalf of the company without the knowledge and authorization of the company.*
- 2. Increase awareness and educate the employees, sales and marketing team about the TRAI regulations and resultant repercussions in case of non-conformity.*