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30 April 2007

Mr. Tony Li
Principal Assistant Secretary
Communications and Technology Branch
Commerce, Industry and Technology Bureau
2/F Murray Building
Garden Road
Central
Hong Kong

Dear Tony

Unsolicited Electronic Messages Bill (“Bill”)

We refer to the meeting held by the CITB at its offices on 26 April 2007 attended by OFTA and various telecommunications service providers.

As indicated at the meeting, the telecommunications service providers listed in the attached Annex are generally supportive of the intent of the Bill to decrease electronic spam, however we do have concerns with respect to recent amendments to the Bill (as set out in version CB(1)1348/06-07(05) of the Bill). The purpose of this letter is to set out those concerns. Unless otherwise specified, terms used in this letter which have been defined in the Bill will have the same meaning as used in the Bill.

Stated purpose of Section 33 of the Bill

During the meeting, it was explained by OFTA that the purpose of section 33 of the Bill is to enable the Authority (“TA”) to administer the do-not-call registers. In response to concerns that were raised as to the nature and extent of the directions that the TA might make under section 33, representations were made by OFTA that the directions would generally require simple administrative actions on a small scale designed to provide assistance and information readily available to the telecommunications service providers. An example given was the provision of terminated numbers (or numbers to be reassigned to new subscribers) on a

regular basis. It was also explained that the provisions of the newly inserted section 36A (Authority may impose financial penalties) were borrowed from Section 36C of the Telecommunications Ordinance (Cap.106).

Inappropriate to impose a penalty regime borrowed from the Telecommunications Ordinance

The direction making power in section 36B of the Telecommunications Ordinance specifically lists out the subject areas where the Authority may make directions. Among other matters, they include compliance with the terms and conditions of a license or the Telecommunications Ordinance, or in relation to any interconnection. These issues are fundamental to the working of the telecommunications industry and accordingly the fines listed in section 36C of the Telecommunications Ordinance are commensurately high. Such levels of fines are totally inappropriate in the context of section 33 of the Bill where the TA is simply seeking the telecommunications service providers to provide administrative and informational assistance for updating the do-not-call registers. Additionally, the Government has failed to demonstrate any proper policy rationale or basis for the application of a similar level of fines under the Bill as those contained in the Telecommunications Ordinance.

Inappropriate to convey such wide power on the Authority under Section 33

Section 33(1)(a) refers to facilitating the telecommunications service provider's compliance with the Ordinance and regulations. The Bill already includes a comprehensive enforcement notice regime under section 35 applicable to "any person" with built-in procedural safeguards. Such overlap creates ambiguity and is unfair on telecommunications service providers who could, for example, receive a direction under Section 33 for non-compliance of the Ordinance, thereby missing out on the opportunity to appeal the merits of the decision to the Appeal Board.

Section 33(1)(b) is too widely drafted given the TA is simply requiring assistance to administer the do-not-call registers. As presently drafted, the TA could require the telecommunications service providers to undertake onerous duty such as designing and building the do-not-call registers for the TA and maintaining customer data or traffic data for the TA indefinitely.

Section 33(3) shows that section 33 will, in some circumstances, overlap with section 34 which deals with the powers of the Authority to obtain information relevant to an investigation. Section 34 is carefully structured to provide a two-stage process so that a person required to provide information will only become subject to fines upon an order being made by a magistrate before which such a person will be afforded due process. This overlap also creates ambiguity.

It is not clear why a direction making power is needed at all and instead for consistency and fairness a notice regime with a two stage process for non-compliance must be adopted.

Wrong assumption

During our meeting we noted that the Administration had wrongly assumed that the telecommunications service providers hold all customer data. It was pointed out to the Administration that the telecommunications service providers do not currently keep any customer data in the case of customers using pre-paid phone cards. It was further pointed out to the Administration that if the telecommunications service providers received a direction to disclose customer data of prepaid customers, then they would not currently be able to comply.

Unfair for telecommunications service providers to have to meet the costs of enabling the Authority to perform its functions related to the do-not-call registers

The establishment and operation of the do-not-call registers is for the benefit of those who choose to register their numbers and for Hong Kong as a whole. In many situations the assistance sought by the Authority could be obtained by others or by other means. For example, a condition of registration could be that those who list their numbers need to advise OFTA when they terminate thereby avoiding the need for the telecommunications service providers to provide this information. We do recognize that in many cases, the telecommunications service providers represent a convenient avenue of assistance for OFTA. However, it is unfair that telecommunications service providers should have to suffer financially to assist the Authority with its responsibilities under the Bill particularly where there has been no contravention or suspected contravention of the Bill. In these circumstances, financing arrangements should be put in place so that the reasonable costs and expenses of the telecommunications service providers are met. We assume this would be managed by the Authority and accordingly, the Bill should provide that the Authority will reimburse.

We would also ask how the cost of administering the do-not-call register by the Authority is to be recovered. Is it to be absorbed by the Authority or will it be recovered from users? Section 30A(1)(e) allows for the Authority to charge fees in relation to the do-not-call register, and Section 31(3) also allows the Authority to charge for access to information on the register. This would seem to suggest that the Authority may seek to recover the cost of the system by imposing a charge on users. What would be the charging principle? Would end users or telecommunications service providers be the prime target of charging? If the Authority is to charge for the use of the do-not-call registers then this is another reason why the telecommunications service providers must be reimbursed for their costs and expenses of assisting the Authority.

Requested drafting changes

For the reasons stated above, we request the CITB to submit to the Bills Committee the following changes to the Bill:

1. The direction making power in section 33(1) to be replaced by a power to serve a notice on a telecommunications service provider;
2. Reference to "such action" in section 33(1) to include a reference to "such action or provide such information". Section 33(3) can then be deleted;
3. Section 33 include provisions that the notice should prescribe a reasonable time for undertaking the action or providing the information and include the other safeguards similar to those referred to in section 34(1) and (2) of the Bill;
4. Section 33(1)(a) be deleted;
5. The words "related to the do-not-call registers" to be inserted after the word "function" in Section 33(1)(b);
6. Section 33(2) reference "notice" and not "direction";
7. A new section 33(3) to be inserted specifying that if the Authority is obtaining information or documents relevant to an investigation of a contravention or suspected contravention of a provision of the Ordinance then section 34 shall be applicable and the Authority shall have no power to serve a notice under section 33;
8. A new section 33(4) to be inserted providing that if a telecommunications service provider does not comply with a notice under section 33 in accordance with its terms then the Authority may issue an enforcement notice under section 35;
9. A new section 33(5) to be inserted providing that where the Authority serves a notice on a telecommunications service provider under section 33, he will pay such telecommunications service provider its reasonable "costs and expenses" incurred in complying with the notice. Provision should also be made that "costs and expenses" may include without limitation, staff costs and expenses, system development costs and capital expenditure;
10. Consequential amendments should be made to Section 35(1) by adding a new subsection 35(1)(c) that deals with the situation when a telecommunications service provider does not comply with a notice under section 33;
11. A new subsection for Section 36 to prescribe that contravention of an enforcement notice originating from failure to comply with a section 35(1)(c) enforcement notice shall result in a financial penalty of \$10,000 but it does not carry any criminal liability; and
12. Section 36A of the Bill to be deleted.

Authority should consult with affected parties before issuing a code of practice

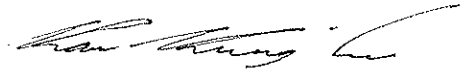
The use of approved codes of practice in legal proceedings is described in section 29 of the Bill. In addition, failure to comply with a code of practice can result in bad publicity. There may be significant costs in complying with a code of practice. In these circumstances, it is fair that the Authority consult with those to which a code of practice is to apply before approving and issuing the code of practice.

Follow up meeting

We also request that the Bill be redrafted in accordance with this letter and returned to us to distribute to the telecommunications service providers before the next proposed meeting with you on Wednesday, 2 May 2007.

Yours sincerely

COMMUNICATIONS ASSOCIATION OF HONG KONG

A handwritten signature in black ink, appearing to read 'Hubert Chan', with a long horizontal flourish extending to the right.

Hubert Chan
Chairman

Annex

China Mobile Peoples Telephone Company Limited

China Unicom International Limited

Hong Kong CSL Limited

Hutchison Global Communications Limited

Hutchison Telecommunications (Hong Kong) Limited

New World PCS Limited

New World Telecommunications Limited

PCCW companies licensed under the Telecommunications Ordinance

SmarTone Mobile Communications Limited

Wharf T&T Limited