



9 October 2006

Ms. Anita Sit
Clerk to Bills Committee
Legislative Council
Legislative Council Building
8 Jackson Road, Central
Hong Kong

Dear Ms. Sit,

Views on Unsolicited Electronic Messages Bill

The Civic Party welcomes the opportunity to express our opinions on Unsolicited Electronic Message Bill (“Bill”), as well as the major principles that underlies the Bill, and we now submit our comments as follows:

1. Definition of Business under section 2

The government had stated in the bills committee meeting on September 27 had that the bill will only regulate messages aiming at soliciting business. It is, however, important to note that most organizations in Hong Kong, including political parties, non-governmental organizations and charitable organizations are registered under Companies Ordinance, registered under the Business registration Ordinance and regarded as carrying on a business, it would be quite possible, therefore that these organizations might be caught under the current Bill when promoting their activities using electronic messages. We therefore consider it necessary to make it clear by defining “commercial” or “business”, as not including the aforesaid organizations.

2. We support the regulation of real time human to human messages.

In the current bill, any messages on human to human basis (i.e. real time communication), would not be subject to the regulation of the bill according to schedule 1 for the reason that it would hinder normal courses of business. However, we are very concerned about the rights of the recipients because unsolicited electronic messages would cause annoyance and disturbance to the users of electronic

communication devices, regardless it being human to human or pre-recorded. Thus, we submit that the bill should also regulate human to human, instant/real time communication, particularly to comply with sections 7, 8, 11 and 12, that the callers would have to contain their accurate identity (sections 7 and 12), an option that allows the recipients to choose not to receive any unsolicited electronic messages again (section 8), and the message must not contain misleading title or subject.

3. We suggest a very short, mandatory introduction to electronic voice messages.

As it would be easier and incur less costs for one to distinguish unsolicited messages by means of fax, email, or short text message (commonly known as SMS), while for phone calls, it would be very difficult for recipients to distinguish the nature of calls that they are going to receive, and as the recipients pick up the calls, airtime would already be incurred, and in order to minimize the loss on the part of recipients, we suggest that there should be a short introduction before the message begins, so that the recipients would know the nature of the call, and would be able to take appropriate actions in regard to the message.

4. We suggest that the coverage of the bill should not be expanded to cover calls on polling.

The major principles of the current bill suggest that the bill should only cover unsolicited electronic messages of commercial nature, however it is possible that some businesses, such as polling agents, would also be regulated by the proposed bill. As polling has been an important element for the daily operation of the mass media, as well as to the development of civil society and for various participants in the political scenes of Hong Kong, be it the government, political parties or other interest groups, therefore we suggest that polling should not be regulated under the proposed bill.

5. Imposing Strict Liability upon Part 2 offences as an alternative

At the moment, if any person who is in breach of any sections under Part 2 is guilty of an offence. The Telecommunications Authority (“TA”) first needs to be aware of such breach (normally by way of complaints from complainants). Once TA notices the breach, TA will investigate the matter and form an opinion. Once TA has formed an opinion, TA may issue an enforcement notice under section 35 of the Bill. The offender may either comply with the notice or may contest the notice by appeal to the Appeal Board under Part 6 of the Bill within 14 days after the notice is served (section 44(2) of the Bill). If appealed, the Appeal Board will take time to consider the appeal and decide the case. The Appeal Board may refer the matter to the Court of Appeal if this is a matter of law. When the Appeal Board upholds the enforcement notice and the enforcement notice is not

followed by the offender only then will the offender be in breach of the enforcement notice. If the offender commits an offence under section 36 of the Bill, the offender will then be liable to a fine. Civic Party believes the whole process is likely to take more than half a year before the enforcement notice becomes effective. This arrangement is ineffective against offender. We therefore believe, a straight liability offence will be a better way to combat against offender in relation to an act described under sections 9, 10, 11 and 12 of the Bill.

6. Unsubscribe Request under section 9 of the Bill

It is understood that recently the Privacy Commissioner has successfully prosecuted Wharf T & T. Wharf T&T has been charged with an offence under section 34 of the Personal Data (Privacy) Ordinance, which requires data users to cease further contact with the individual if the individual chooses to opt-out. Contravention of section 34 of the Ordinance is an offence under section 64(1) of the Personal Data (Privacy) Ordinance).

If a person has placed an unsubscribe request, will that automatically mean that that person has also placed an opt-out request under section 34 of the Personal Data (Privacy) Ordinance? If so, shouldn't there be consequential amendments to the Personal Data (Privacy) Ordinance? If not, this is simply creating unnecessary bureaucracy and unnecessary burden on the victim, as s/he needs to send 2 different requests to 2 different regulators (one to TA and one to Privacy Commissioner).

7. The schedule and the effective date of the Do-Not-Call register under section 30 of the Bill

Civic Party welcomes the setting up of the Do-Not-Call register as it allows potential recipients a chance to minimize disturbance caused by unsolicited electronic messages. However, the Bill has only provided a framework of such register, while the details concerning the date of commencement of the Do-Not-Call register, which would be very crucial to the effectiveness of the Bill. We hope that the government would provide further data to the public on this point, and also that the register would be effective as soon as possible.

8. Claims for loss or damage under section 52 of the Bill

Although the Bill allows the victim who suffers loss or damage by reason of a contravention of any provision of the Bill to bring a claim before a Small Claims Tribunal or District Court seeking a monetary compensation, it is difficult for the victim to show the quantum of the claim. Moreover, it may not be economical for the victim to bring the

claim if his loss or damage is insignificant. As a result, it is doubtful how this section is useful to ordinary citizens. Besides, it might also bring along a flood of cases for which Small Claims Tribunal would have to tackle, which would create a very heavy yet unexpected burden upon the Tribunal. The Civic Party suggests that there should perhaps be fixed amounts recoverable under this head.