

Wharf T&T Limited
Submission
In response to the Public Consultation On
“Unsolicited Electronic Messages Bill”

20 October 2006

1. Introduction

- 1.1 Wharf T&T Limited (“WTT”) is pleased to respond to the Consultation Paper on Unsolicited Electronic Messages (“UEMs”) Bill introduced into the Legislative Council on 12 July 2006 (the “Bill”). The Bill demonstrates Hong Kong’s seriousness in dealing with the problems of UEMs and to cope with the international development in many other countries including the EU, USA, Australia, Korea, Japan and other countries around the globe.
- 1.2 WTT agrees that there is a need to strike a balance between respecting the right of a recipient to refuse further UEMs and allowing electronic marketing to develop in Hong Kong as a legitimate promotion channel as advocated by various business entities including the small and medium enterprises.
- 1.3 We agree that the Bill should adopt a targetted approach by regulating the sending of electronic messages of general commercial nature, i.e. the content of the message is about offering or promoting goods or services for furtherance of business. We maintain that certain flexibility should be allowed in order to exempt certain commercial electronic messages from compliance, i.e. bills or invoices from a business entity should fall outside the scope of the Bill.
- 1.4 WTT agrees that the Bill should not be applicable to person-to-person messages given that they are far less intrusive than machine generated messages.

2. Rules about Sending Commercial Electronic Messages

Opt-out Regime

- 2.1 According to Clause 8 of the Bill, commercial electronic messages must contain unsubscribe facility unless the message was sent by mistake or the person did not know and could not with reasonable diligence have ascertained that the message had a Hong Kong link. Clause 9 stipulates a period of 10 working days for the individual or organization to process the

unsubscribe request and Clause 10 mandates that a sender shall cease to send further messages once the electronic address is listed in a do-not-call register.

- 2.2 We believe the above measures are a good start to combat spamming. However, while the Bill does not immediately call for the establishment of the do-not-call register, WTT does not support its establishment as it would not only be costly to maintain and increase undue financial burden to legitimate marketers, but it would also increase the chances of spammers to abuse the information consolidated under the proposed register. It would be better to prevent the abuse from the start than relying on Clause 32 to prosecute spammers engaging in offences relating to misuse of information prescribed by the do-not-call registers established by the Telecommunications Authority (the “TA”).

3. Rules about Address-Harvesting and Related Activities

- 3.1 We do not have concern that the Bill seeks to prohibit the supply, acquisition and use of address-harvesting software and harvested-address lists for sending commercial electronic messages without the consent of the registered users of the electronic addresses and prescribe the penalty for the offences.
- 3.2 Spammers are notorious for harvesting email addresses off the internet or generating email addresses by automatic means and trading email lists between the ISPs without the email addressee’s permission. These acts should be prohibited.
- 3.3 WTT agrees that under Clause 4(4), for the purposes of any legal proceedings, a telecommunications services provider who merely provides a service that enables a commercial electronic message to be sent, shall unless the contrary is proved, be presumed not to have the message and not to have authorized the message to be sent.
- 3.4 Clauses 13 to 19 have already covered a wide range of prohibiting measures in order to stop the means of dispatching bulk UEMs. WTT believes it would be better to reduce the opportunities for the sender to get hold of the recipient’s contacts to reduce spamming. Hence, WTT agrees that these contraventions should not be subject to the enforcement notice regime

but would be prosecuted in court and subject to heavier fines and penalties in order to effectively deter spammers from using harvested-address lists to conduct wide scale spamming. Unlike telecommunications licensees, spammers use spamming software to freely harvest subscriber information from unknowing subscribers, the former would use known data bases including previously assigned number blocks and their existing lists for legitimate marketing activities.

4. Fraud and other Illicit Activities related to Transmission of Commercial Electronic Messages

- 4.1 For fraud and related activities in connection with spamming, WTT supports that the Hong Kong Police Force should be responsible for enforcing these fraud and related offences. WTT believes the Bill should be adopted to protect the public by legally eliminating a growing channel in which fraudulent and deceptive practices can be harboured.
- 4.2 We note in Clause 11 of the Bill, which prohibits misleading subject headings in commercial e-mail messages and Clause 12 prohibits the senders to withhold or to conceal the calling line identification information of the telephone or facsimile number from which the commercial electronic message is sent. We agree with these prohibitions in order to deter the would-be offenders from engaging in fraudulent and deceptive activities.

5. Administration and Enforcement

- 5.1 Clauses 28 and 29 empower the TA to approve the codes of practice and prescribe the consequences for failure to observe the codes of practice. Clauses 30 to 32 empower the TA to establish, maintain and operate do-not-call registers of different types of electronic addresses and prescribe conditions for making available information in the registers and prescribe an offence for abusing the use of those information.
- 5.2 Clause 33 of the Bill stipulates the power of the TA to issue directions to telecommunications service providers requiring them to take such actions as the TA considers necessary to facilitate the telecommunications service provider's compliance of the legislation or to enable

the TA or an authorized officer to perform any function under the proposed legislation. We submit that telecommunications service providers should not be singled out given the uncertainty of the extent of the possible measures under the Bill and the consequences for failure to observe the TA's stipulations.

- 5.3 Similarly, Clauses 34, 37 and 38 of the Bill prescribe the powers of the TA to obtain information and subject to search warrants from a magistrate, enter and search premises. WTT submits that instead of the TA, the Hong Kong Police Force should be prescribed with such investigative powers and to issue enforcement notices for contravention of rules of sending commercial electronic messages and prescribe the offence for contravening an enforcement notice under Clauses 35 and 36 of the Bill in the same vein instead of the TA.
- 5.4 WTT does not agree that the TA should be the designated Authority to administer and enforce the provisions under the Bill. The functions and powers of the TA are as set out in the Telecommunications Ordinance; namely, to do all things necessary to be done to perform his functions under the Telecommunications Ordinance. These functions include the issuing of telecommunications licences, control over telecommunications services providers or carriers over the terms of the licence and various market conducts, economic regulations, technical regulation relating to numbering plan, spectrum. These functions do not necessarily make the TA qualified to administer the Bill, who essentially controls the sending of commercial electronic messages by anyone to the general public.
- 5.5 Further the telecommunications service providers would effectively be funding the various activities to be undertaken by the TA to administer and enforce the provisions under the Bill, as the TA is being funded and operated with funds primarily from licence fees. Given the direct access by the TA to the telecommunications service providers, the TA would attempt to push through various codes of practices through the telecommunications service providers thereby increasing the burden of the telecommunications service providers. Telecommunications service providers should not be singled out given the uncertainty of the extent of the possible measures under the Bill and the consequences for failure to observe the TA's stipulations.

5.6 Finally given the uncertainty over the future of the TA in view of the Government's proposal to merge the Broadcasting Authority and the TA, we submit that the administration and enforcement of the Bill should not be entrusted with the TA. We believe the Hong Kong Police Force is better placed to administer, or alternatively the Privacy Commissioner.

5.7 In terms of recouping the costs of investigation from a party convicted by the court of an offence under Clause 40 of the Bill, WTT submits that should follow the existing criminal procedures as stipulated by the courts.

6. Unsolicited Electronic Messages (Enforcement Notices) Appeal Board

6.1 WTT supports the establishment of the subject Appeal Board.

6.2 WTT also agrees that for the purposes of an appeal under Clauses 46 and 50, all the parties concerned shall have the same privileges in respect of the disclosure of any material as if the proceedings before the Appeal Board were proceedings before a court and the witnesses before the Appeal Board shall be entitled to the same privileges and immunities as if he were a witness in civil proceedings in the Court of First Instance.

7. Miscellaneous

7.1 WTT has serious concerns as to the statutory presumption under Clause 53 of the Bill that any act done or conduct engaged in by a person in the course of his employment or agency shall be treated as done or engaged in by his employer or principal as well as by him whether or not the employer or principal has knowledge or approval. Even though it is sufficient defence for the employer or principal to prove that he took such steps as were practicable to prevent the employee or agent from doing the act or engaging in the conduct in the course of his employment or authority, the employer or principal still bears the heavy burden to rebut the presumption.

7.2 WTT believes the presumption of innocence should prevail and the burden of proof should remain on the prosecution to prove beyond reasonable doubt that the employer or principal

has engaged in such blameworthy conduct. Article 87(2) of the Basic Law and Article 11(1) of the Bill of Rights protects the presumption of innocence and the derogation of the presumption would only be justified if there (a) is a rational connection with a legitimate societal objective (the rationality test); and (b) was no more than was necessary to achieve that societal objective (the proportionality test). WTT does not purport the derogation of such principle, as the crime in question is not so serious as to warrant such derogation.

- 7.3 Despite the attempts under Clause 54 to clarify the liability of the directors and partners in case of contravention, WTT shares similar concerns as to the presumption of liability unless the directors and partners could prove otherwise that they have not authorized the act to be done or the conduct to be engaged in. Such evidential and/or persuasive burden imposed on the directors and partners does not seem to be consistent with the intention of the legislature, i.e. to criminalise the directors and partners on the basis of vicarious or strict liability as criminal intent of the particular individual should be the essence of the offence.
- 7.4 Convicting the innocent is far more abhorrent than letting the guilty go free. The Bill should strike a fair balance between the several interests of the community in the realization of a legitimate aim and the protection of the rights of individuals and were proportionate in that they went no further than was necessary to achieve the legitimate aim, i.e. to combat spamming and to reduce nuisance versus the development of legitimate electronic marketing.
- 7.5 WTT also has serious concerns and reservations regarding the heavy penalties imposed by the Bill in relation to the various offences when compared to the penalty prescribed under the Personal Data (Privacy) Ordinance (the “PDPO”). For example, Clause 39(2) of the Bill stipulates that *“without prejudice to any other Ordinance, a person who makes a statement that he knows to be false or does not believe to be true, or otherwise knowingly misleads the [Authority], an authorized officer or any other person in the performance of his functions under the [Ordinance] commits an offence and is liable on summary conviction to a fine at level 5 and to imprisonment for 2 years.”* However, for offence of a similar nature under Sections 14 and 15 of the PDPO, if a data user who knowingly or recklessly supplies any information, which is false or misleading to the Privacy Commissioner, the penalty imposed upon conviction is a fine at level 3 and to imprisonment for 6 months only. We would like to

understand the justification for the disparity and we are concerned that the penalty proposed might be out of proportion.

7.6 WTT believes individuals and the overall Hong Kong community are comparatively more vulnerable to the problems associated with the offences under the PDPO when compared to the problems and inconvenience caused by UEMs. WTT maintains that there is a need to strike a balance between respecting the right of a recipient to refuse further UEMs and allowing electronic marketing to develop in Hong Kong as a legitimate promotion channel as advocated by various business entities including the small and medium enterprises. In this light, the penalty for the various offences should be proportional to the nature of the offences under the Bill to avoid harbouring unfair, prejudicial and excessive penalties in dealing UEMs.

Conclusion

Whilst WTT believes legislation is an essential tool to combat UEM, to control UEMs requires industry and international cooperation, user education and technical solutions. To achieve the aims of the Bill requires strong and effective administration and enforcement body, we do not however believe the TA is best placed to handle such tasks as it does not possess the required legal and investigative skills to carry out the functions as required under the Bill.

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