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The Hon Howard Young
Chairman of the Bills Committee on the Unsolicited Electronic Messages Bill
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Howard

Comments on the Unsolicited Electronic Messages Bill

Further to the Chamber's previous comments on the Unsolicited Electronic Messages Bill, we have, in consultation with our members, examined the latest revisions to the Bill. We have prepared a paper outlining the concerns of Chamber members on the latest draft legislation, as attached.

I hope you will find the Chamber paper useful in the further deliberation on the Bill.

Yours sincerely

Alex Fong
CEO

Encl.

Unsolicited Electronic Messages Bill
Further Views by the Hong Kong General Chamber of Commerce
April 2007

Introduction

1. The Chamber notes the passage of the Unsolicited Electronic Messages Bill (the Bill) in the Legislative Council. We have considered the paper prepared by the Administration on "Proposed Regulation to be Made Shortly After the Passage of the Unsolicited Electronic Messages Bill", the paper entitled the "Administration's response to the views submitted by the Hong Kong General Chamber of Commerce", as well as the revised Bill itself. While we support the timely enactment of the law against spamming, we observe that the latest provisions of the Bill have raised some issues which need to be tackled before the Bill becomes Ordinance. These are issues related to implementation of the Ordinance, as follows.

Enforcement Action

2. The Bill gives considerable power to the Telecommunications Authority (TA) in operating and enforcing the scheme to be established under the Ordinance. In particular, Section 33 empowers the TA to issue directions to telecommunications service providers to help implement the Ordinance, and Section 36A gives it power to impose penalties for non-compliance. However, there is little in the Bill on details of implementation. By means of directions, the TA has a broad power to instruct the related telecommunications service providers to assist him to administer the Bill, but there is no provision for compensating the operator for the costs incurred as a result of that investigation; by contrast, s.36A provides for substantial financial penalty. While we appreciate that the Ordinance is not always the place to specify implementation details, we expect that the Government would be well-prepared to roll out the necessary administrative measures once the Bill becomes law. Such administrative measures – or at least a general idea of them – should be shared with the business sector and the community for assessment before the passing of the Bill. In the absence of information on implementation, the Bill as drafted raises a number of issues that need to be answered.

Complexity of Implementation Institution

3. There is a question of how complex the implementation scheme to be operated by the TA would become? One key element in the implementation of the Ordinance, for instance, is that of the "do-not-call register" established under Section 30. There is no indication – whether in the Bill or by the Administration – as to how the register is to be administered, how simple or complex the system will be, how much it is likely to cost, and from whom the cost will be recovered? If the register were to be a free-for-all scheme, it might encourage many people to apply to be put on the register first and then reserving the right to receive emails of their choice in future – thus effectively rendering the system an opt-in rather than the opt-out arrangement as originally envisaged. It could also make the system very complex and costly.

4. This relates to another question, namely, how would the cost be recovered: whether it would be absorbed by the TA or recovered from users. Section 30A(1)(e) provides for the TA to charge fees in relation to the do-not-call register, and Section 31(3) also enables the TA to charge fees for access to information on the register – suggesting that the TA 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?

TA Directions

5. Another issue has to do with compliance with TA directions issued under Section 33. As presently drafted, the TA has extensive power to give directions to "any person" (including telecommunications service providers) for the purpose of implementing the scheme under the Ordinance. In the absence of information on how the scheme under the Ordinance will be implemented, there is no indication as to how these directions will be drawn up which in turn makes it difficult to ascertain the effect of such directions and how they will impact on the business community.

Codes of Practice

6. Under the Telecommunications Ordinance (TO), the TA may issue codes of practice after consultation with industry. Unlike the TO, the Bill does not include any mention of industry consultation (such as that required under section 3 of the Broadcasting Ordinance Cap.562) which could lead to the introduction of codes of practice prepared without consultation, rendering the resulting codes potentially untenable.

Compliance Issues

7. Users and industry practitioners are ready to comply with the Ordinance, but certainty in compliance depends very much on quality of regulation. Instead of a matter of course, compliance may become a matter of concern if implementation details continue to be lacking. Meanwhile, the relevant parties would not be in the position to assess whether or not the fine imposed under new Section 36A (let alone the level of penalty) is appropriate.

Conclusion

8. In conclusion, a good piece of law must be accompanied by due enforcement: government's regulatory attitude is as important if not more important than the legislation itself. For a modern everyday issue like spamming, one would imagine a light-handed regulatory approach would have been sufficient (instead of a bureaucracy with onerous compliance burden), and a clarification from the government in this regard is welcomed.