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2869 9216
2877 5029

Secretary for Commerce, Industry and Technology
(Attn: Mr Tony LI, PAS(Communications and Technology)B
Communications and Technology Branch
Commerce, Industry and Technology Bureau
2/F Murray Building
Garden Road
Central
Hong Kong

1 September 2006

BY FAX
Fax No. : 2511 1458

Dear Mr Li,

Unsolicited Electronic Messages Bill

We are scrutinizing the above Bill with a view to advising Members and should be grateful if you could clarify the following matters:

Clause 2 – Proposed definition of "business"

According to paragraph 8 of the LegCo Brief, the policy intent of the Bill is to regulate the sending of electronic messages of a commercial nature only, and communications not offering or promoting goods or services for the furtherance of business would fall outside the scope of the Bill. However, as "business" is defined in non-exhaustive terms, it is possible that the word may be interpreted in its general sense. As you are aware, "business" carries both a general and narrow sense. It may, in the narrow sense, refer to commercial transactions or in the general sense, to activities. If it is intended that the narrow sense of the word should apply, would the Administration consider amending the definition by adding "but excludes business conducted otherwise than for profit".

Clause 2 – Proposed definition of "commercial electronic message"

(a) Government departments, statutory bodies, charitable organizations and non-profit-making organizations may need to advertise or promote their services through sending electronic messages in the course of their business (if "business" is interpreted in its general sense). Moreover, some charities and religious organizations may solicit for donations through the sale of goods or services. In this case, it seems that such electronic messages would fall within paragraph (a) or (c) of the proposed definition of "commercial electronic message". If it is intended that such messages should be excluded from the application of the Bill, please consider the need to provide for an express

exclusion provision. In fact, this is the approach adopted in Australia's Spam Act 2003 and Singapore's proposed Spam Control Bill. Should the same approach be adopted in this Bill? Alternatively, the Administration may consider the approach adopted in the US legislation where reference is made to "commercial advertisement or promotion of a commercial product or service".

(b) In Australia's Spam Act 2003, which defines "commercial electronic message" in similar terms as in this Bill, the words "goods", "investment" and "services" are defined. Is there any reason for not defining these words in the Bill?

(c) If the goods, services, land, interest or opportunity does not exist or it is not lawful to acquire the goods, facilities, land, interest or opportunity in question, is the electronic message advertising or promoting such goods, facilities, etc. regarded as a commercial electronic message for the purposes of the Bill. In Australia's Spam Act 2003 and Singapore's proposed Spam Control Bill, there are provisions which provide that it is immaterial whether the goods, facilities, etc. exist and whether it is lawful to acquire the goods, services, etc. Would the Administration consider including similar provisions in this Bill?

Clause 2 – Proposed definition of "organization"

Is it intended that "organization" is to be confined to organizations which are formed or incorporated for the purpose of or with a view to gaining profit? If so, it seems that this intention has to be reflected more clearly in the proposed definition. The way "organization" is defined would appear to be wide enough to cover political parties registered as companies under the Companies Ordinance (Cap. 32), bodies corporate established under various Ordinances such as those relating to universities, and religious and charitable organizations, owners' corporations and owners' committees, etc.

Clause 4

In clause 4(4) and (5), is it intended that an evidential burden instead of a legal burden is required to rebut the relevant presumption? If so, instead of using the expression "unless the contrary is proved", would it be more appropriate to use "unless there is evidence to the contrary" or "in the absence of evidence to the contrary"? As you know, in clause 29(3) where a presumption is provided, the reference "in the absence of evidence to the contrary" is used.

Part 2 – Rules about sending commercial electronic messages

(a) The clauses under Part 2 provide for rules about sending commercial electronic messages under which certain conduct is prohibited. Clauses 7 to 10 contain a provision ("the non-application provision") providing that the prohibition concerned will not apply if the person sent the commercial message by mistake, or did not know, and could not with reasonable diligence have ascertained, that the message had a Hong Kong link. If there is an

alleged contravention of the relevant rule, who will bear the burden of proving the relevant matter under the non-application provision and what is the required standard of proof? As you know, in Australia's Spam Act 2003, which contains a provision similar to the non-application provision, there is an express provision to the effect that a person who wishes to rely on the matter under the non-application provision bears an evidential burden in relation to that matter. Is it necessary to include a similar provision in this Bill?

(b) In clauses 7 and 8, what is meant by "recipient"? Does it mean the registered user of an electronic address to whom the message is sent? Is it necessary to define the word?

(c) In clause 8(1), if the unsubscribe facility is an electronic address other than a telephone number or facsimile number, is the address required to be allocated or assigned by the Telecommunications Authority ("TA") in the same way as a telephone number or facsimile number? If so, should this requirement be stipulated in the clause?

(d) In clause 8(1), should any language requirement be imposed on the statement relating to the unsubscribe facility to make sure that the recipient would be able to understand the statement and hence be able to exercise his right to send the unsubscribe request?

(e) In clause 9(5), since "unsubscribe facility" is not a defined term under clause 8, is the reference ""unsubscribe facility" has the same meaning as in section 8" appropriate?

<u>Part 3 – Rules about address-harvesting and related activities</u>

(a) It is noted that in respect of the act referred to in clause 14(1), 15(1), 16(1), 17(1) or 18(1), two offences are created, one of which makes express provision to the *mens rea*, namely, knowingly or recklessly, while the other is silent on the *mens rea*. Would this have the effect of making the latter offence, that is, the offence under clause 14(2), 15(2), 16(2), 17(2) or 18(2) strict liability offences? Is it the Administration's intention to make the offences under the said clauses strict liability offences?

(b) What is the nature of the offence under clause 19(2)? Is it intended to be a strict liability offence?

(c) It is noted that statutory defences are provided for the offences under clauses 14(2), 15(2), 16(2) and 17(2), but there are no similar defences provided for the offences under clauses 18(2) and 19(2). Is there any reason for this difference? If the offences under the latter two provisions are intended to be strict liability offences, what defence, if any, can be raised by the person charged?

(d) Under clause 14(5), it is a defence to the offence relating to the supply of address-harvesting software or harvested-address list for the person charged to prove that he took all reasonable precautions and exercised due diligence to avoid the commission of the offence. A similar defence is provided for the offences under clause 15(2), 16(2) and 17(2). Since the defence is drafted in wide and general terms, could the Administration give some illustrations on what the person charged need to prove in order to establish the defence concerned? It is noted that this defence provision is modelled on some existing statutory provisions, such as section 20G(1) of the Waste Disposal Ordinance (Cap. 354) and section 26(1) of the Dumping at Sea Ordinance (Cap. 466). As you are aware, specific examples are given under those provisions on how a person charged can rely on the defence. Would the Administration consider adopting the same approach in this Bill?

(e) Who is to bear the burden of proving the matter set out in clause 18(4)(a) or (b)? What is the standard of proof required? Is it necessary to provide for these matters in clause 18?

Part 4 – Fraud and other illicit activities related to transmission of commercial electronic messages

It is noted that the provisions in this Part are modelled on the US legislation relating to control of spam. In the US legislation, the words "procure" and "recipient" which appear in the definitions of "initiate" and "routine conveyance" respectively are defined. Is it necessary to do the same in this Bill?

Part 5 – Administration and enforcement

(a) While clause 28(10) provides that a code of practice approved under clause 28(1) is not subsidiary legislation, there is no provision stipulating the nature of the notice published in the Gazette under clause 28(3) or 28(7). Please consider the need to include an express provision on whether the Gazette notice is subsidiary legislation. Further, how is the code of practice to be made available to the public? Will it be published in the Gazette? If it is intended that the contents of the code of practice will be set out in the Gazette notice published under clause 28(3) or (7), is it appropriate to refer to "identify the code" which may simply mean mentioning the code by name?

(b) Regarding the do-not-call registers referred to in clauses 30 and 31, how can a registered user of an electronic address ascertain whether his electronic address has been included in the register? Will he be notified of such inclusion? Is it necessary to provide for this?

(c) Is the offence under clause 32(3) intended to be a strict liability offence? Please consider whether provisions should be included in clause 32 to cover how an accused can establish or rely on the defence provided in clause 32(5).

In this regard, please refer to my previous comments on a similar defence provision in clauses 14 to 17.

(d) In clause 33, how can TA ensure that the relevant service provider will comply with the directions? If a telecommunications service provider fails to give effect to the directions issued by TA, could TA impose any sanction?

(e) In clause 34(2), what factors will TA take into consideration in deciding whether the notice should be withdrawn or remain in force? Will reasons be given for TA's decision? Should these matters be stipulated in the Bill?

(f) In the proceedings before a magistrate under clause 34(3), does the affected person have the right to be heard? If so, should this right be provided expressly?

(g) In clause 34(5), why is it proposed that disclosure of information may be allowed generally for the prevention or detection of crime? As you know, in existing legislation where disclosure of information is allowed, it is usually confined to disclosure for the purpose of, or with a view to the institution of, criminal proceedings in Hong Kong or any investigation in connection with such proceedings. Examples of this are section 46 of the Electronic Transactions Ordinance (Cap. 553) and section 27(2) of the Broadcasting Ordinance (Cap. 562). The way clause 34(5)(b)(i) is drafted appears to be wider in scope than that provided in existing legislation.

(h) In clause 34(5)(b)(iii), what are the obligations under the relevant international agreement applicable to Hong Kong? Could some examples be given?

(i) What will trigger off TA's power to issue enforcement notices under clause 35? Does TA have to act on complaint? Can a registered user of an electronic address make a complaint to TA if there is a contravention of any of the rules about sending commercial electronic messages? If so, is there any mechanism for dealing with the complaint? Should these matters be covered in the Bill?

(j) What is the nature of the offence under clause 36? Is it intended to be a strict liability offence? In the defence under clause 36(3), could the Administration illustrate by examples as to how the defence could be established.

(k) Under clause 38, a magistrate may issue a search warrant if he is satisfied that there are reasonable grounds for "suspecting" that there is, or is likely to be, in or on any premises or place evidence of the commission of a specified offence. In a similar context in clause 34(3)(a) in respect of issuing an order for giving information, a magistrate needs to be satisfied that there are reasonable grounds for "believing" that the person concerned is, or is likely to be, in possession of information relevant to TA's investigation. By using "suspecting" and "believing" in the above clauses, does the Administration

intend that different thresholds should apply in the proceedings before the magistrate under those clauses, and if so, why?

Clause 52 – Claims for loss or damage

(a) In clause 52(1), does the right to bring proceedings to recover loss or damage apply to contravention which does not amount to an offence under the Bill. For example, if there is a contravention of the rules about sending commercial electronic messages under Part 2 of the Bill, can the affected person bring proceedings under clause 52(1)? It seems that the reference to "(whether or not he has been convicted of an offence in relation to the contravention") in clause 52(1) might give the impression that the contravention in question should be an offence in the first place. If it is intended that clause 52(1) is to apply to any contravention, whether or not the contravention is itself an offence under the Bill, should this intention be reflected more clearly in the Bill?

(b) What factors will be taken into consideration by the Court in hearing a claim for loss or damage under clause 52? In Australia's Spam Act 2003, certain matters that the court may consider in determining whether a person has suffered loss or damage, and in assessing the amount of compensation payable are set out expressly (section 28(2)). Will the Administration consider adopting a similar approach in this Bill?

Clause 54 – Liability of directors, partners, etc.

In clause 54(1) and (2), the reference to "unless he proves that he did not authorize the act" appears to impose a legal burden on the accused. To make it clear that the statutory presumption only imposes an evidential burden on the accused, would the Administration consider replacing the said reference by "unless there is evidence to the contrary that he did not authorize the act"? As you are aware, in a similar provision (i.e. section 7(3B)) of the Broadcasting Ordinance (Cap. 562), the latter reference is used.

Clause 56 – Regulations

In clause 56(a), what does "contemplates" refer to? Which are the provisions of the Bill that contemplate the making of regulations?

Schedule 2 – Proposed amendment to the Telecommunications Ordinance (Cap. 106)

(a) Under section 24 of the Telecommunications Ordinance (Cap. 106), it is an offence for a telecommunications officer or any person who has official duties in connection with a telecommunications service to commit certain acts, including wilfully destroying, altering and detaining any message intended for delivery, and disclosing any message to any person other than the person to whom the message is addressed. The effect of the proposed section 24(2) is

to make these acts not unlawful if those acts are done for certain purposes. Would the Administration explain why the proposed section is necessary as a result of the enactment of the Bill?

(b) In the proposed section 24(2)(a) of Cap. 106, what other law is contemplated for the purpose of the section? Since this is supposed to be an exception provision, the scope of its application should be clearly defined. Would the Administration consider narrowing its scope by, for example, prescribing all the law or Ordinances that are to be covered in the proposed section?

(c) Could the Administration illustrate by examples as to the circumstances under which the proposed section 24(2)(b) and (c) of Cap. 106 could be invoked?

Drafting matters

It is noted that a new drafting style is adopted in this Bill in that the heading of a section is included whenever a cross reference of the section is made in another section. For example, in clause 32(1), where a cross reference is made to section 8, instead of referring to the section as such, reference is made to "section 8 (*"commercial electronic messages must contain unsubscribe facility"*), with the heading of section 8 included in italics. Is there any reason for adopting this new drafting style in this Bill and will this style become the norm for future bills?

Chinese text

We are scrutinizing the Chinese text at the moment and will write to you separately, if necessary.

We would appreciate it if you could let us have the Administration's reply in both languages *on or before 22 September 2006*.

Yours sincerely,

(Connie FUNG)
Assistant Legal Adviser

c.c.: DoJ (Attn: Mr Jeffrey GUNTER, SALD and Miss Leonora IP, SGC)
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