



22 March 2006

Our ref.: LG83689A

Communications and Technology Branch  
Commerce, Industry and Technology Bureau  
2/F Murray Building  
Garden Road  
Hong Kong  
(Attention: Assistant Secretary (B))

By Fax 2511 1458 and Post

Dear Sir,

**Re : Consultation Paper on Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages**

We refer to above consultation paper issued by the Commerce, Industry and Technology Bureau in January 2006. We are pleased to submit our response in the enclosed paper.

Thank you for your kind attention.

Yours sincerely,  
For and on behalf of  
SmarTone Mobile Communications Limited

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Encl. 9 pages

**SUBMISSION TO  
CONSULTATION PAPER ON  
LEGISLATIVE PROPOSALS TO CONTAIN THE PROBLEM OF  
UNSOLICITED ELECTRONIC MESSAGES**

**1. SUMMARY OF MAIN POINTS**

1.1 SmarTone Mobile Communications Limited (“SmarTone-Vodafone”) supports the Government’s initiatives to introduce a legislation to contain the problem of spamming. The following sets out our comments on the major issues of the consultation paper entitled Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages issued by the Commerce, Industry and Technology Bureau on 20 January 2006 (the “Consultation Paper”):

- **The Unsolicited Electronic Messages Bill (the “Bill”) should also regulate person-to-person “cold call”, not just electronic messages** – Spamming calls generated by machine or by person both constitute nuisance calls to the recipient. We do not see any difference between these calls and the rationale of regulating machine-generated and person-to-person calls under two different regimes as both have the same impact on the recipient.
  
- **Special prefix for all unsolicited commercial messages and telemarketing calls** – The Bill should require all direct marketers to use a special prefix (e.g., 18xx) if they want to send unsolicited commercial messages or to make unsolicited direct marketing call. It would facilitate the recipients to identify the nature of these messages or calls without opening the messages or answering the calls. Network operators will also be able to identify all unsolicited commercial messages or calls with such prefix. Upon customer request, operators can block all such unsolicited promotional messages or calls. To ensure that network operators can block these calls, it is proposed that section 24 of the Telecommunications Ordinance should be amended accordingly.

- **An opt-in approach is preferred as the onus of securing customers' consent to send these commercial messages and make telemarketing calls should lie with the marketers as they are the ones that are gaining the commercial benefits – Telemarketers should take up the responsibility and cost of complying with the requirements under the Bill as they derive commercial benefits from these spamming activities. As such, telemarketers should be solely responsible for the set-up and maintenance of their own opt-in database and all costs relating thereto. The opt-in approach has been adopted by the majority of legislators in jurisdictions such as European Union, United Kingdom, Australia and New Zealand. The Hong Kong anti-spamming law should harmonize with the majority of the international community in respect of anti-spamming legislation. If an opt-out approach is adopted, the burden and cost of tackling spamming will be borne by the consumers and network operators, which is highly unfair.**
- **The current unfair fixed/mobile interconnection arrangement should be changed to "calling party pay" to eliminate the subsidy by mobile operators to spammers and fixed network operators – Under the existing asymmetrical fixed/mobile interconnection arrangement, the mobile operator pays an interconnection charge to the fixed operator for every call between a fixed network and a mobile network regardless of from where the call originates. Such regime has provided an economic incentive for spamming to mobile customers originated from fixed line. It is not surprising that some fixed line operators view providing such spamming service to telemarketers as a profit-making operation.**

## **2. COMMENTS ON MAJOR ISSUES**

### **Scope of the Bill should also cover person-to-person "cold call"**

- 2.1 It is noted that the applicability of the Bill has included voice telephony calls, but person-to-person marketing calls are excluded and fall outside the ambit of the Bill. The reasons as stated in the Consultation Paper is that person-to-person cold calls are generally accepted practice in Hong Kong and the business entity undertaking "cold call" promotion needs to devote substantial manpower resources and time to the promotion. The Consultation Paper therefore considered

that person-to-person cold call is normal and legitimate marketing activities and should not be subject to the Bill.

- 2.2 SmarTone-Vodafone takes the view that as all form of commercial electronic messages are to be regulated by the Bill, person-to-person cold calls should also be regulated in the same manner under the Bill. We do not agree that person-to-person cold calls are generally accepted practice in Hong Kong. From the recipient's perspective, there is no difference between an unsolicited call made by automated machine or by person. Both types of calls are nuisance to the recipients. The recipients should have the right to reject both types of calls. If the Bill only regulates spamming calls generated by machine, the likely consequence is that tele-marketers will increasingly use cold calls after the enactment of the Bill. This will just shift the problem of unsolicited promotional calls from machine-generated calls to person-to-person calls rather than addressing the problem for the consumers.
- 2.3 Direct marketing calls or person-to-person cold calls are also subject to regulation in a number of overseas jurisdictions. The European Union (EU) has issued a Directive on Privacy and Electronic Communications<sup>1</sup> (DPEC) which requires the EU Member States to require direct marketer to either obtaining prior consent from recipient or giving recipient the right to opt-out for unsolicited direct marketing method such as person-to-person voice telephony calls<sup>2</sup>. This provision of the DPEC has been implemented in the UK as the Telephone Preference Service, which allows individual users to opt-out of unsolicited direct marketing phone calls by registering with the Telephone Preference Service. The system is run under the supervision of Ofcom and funded by the direct marketers<sup>3</sup>. SmarTone-Vodafone suggests that Hong Kong should follow overseas practice in regulating person-to-person cold calls given the Hong Kong community has expressed great concern about the nuisance caused by unsolicited promotional calls to telephone users in particular mobile phone customers.

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<sup>1</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector

<sup>2</sup> Ibid, article 42

<sup>3</sup> More details of the Telephone Preference Service is available at <http://www.tpsonline.org.uk/tps/>

### **Special prefix for all unsolicited commercial messages and telemarketing calls**

- 2.4 SmarTone-Vodafone suggests that all unsolicited promotional messages and telemarketing calls should be required to use special service prefix (e.g., 18xx). The Bill should make it an offence if a telemarketer is not using the special prefix when sending unsolicited messages or making unsolicited promotional calls.
- 2.5 Currently, spammers are not required to use any special service prefix when sending unsolicited messages or making unsolicited telemarketing calls. Spammers are using normal telephone numbers (e.g., 2X or 3X numbers) or even withholding their telephone numbers. Recipients cannot identify the nature of such calls until they open the messages or answer the calls. Network operators are also unable to identify these calls and block them. For mobile service customers, such calls would be chargeable airtime and also charged at roaming rates if the recipient happens to be overseas. Mobile operators are placed in a difficult position as there is no effective way to stop such calls at the moment. Further, mobile operators are blamed by their customers for being helpless in eradicating the problem of nuisance calls.
- 2.6 It should be noted that the practice of using dedicated prefix for certain special services has been widely adopted in Hong Kong. According to the "Numbering Plan for Telecommunications Services in Hong Kong" as published by OFTA, the special service code 18xx has been assigned to services of high volume of traffic such as telemarketing and telebetting. Also the information service providers are required to use 900x numbers for their Infoline services. The fourth digit of the Infoline number is a service indicator to show the nature of the information provided (e.g., 9002x is for information services for children and 9004 is for interactive information services). The prefix 30X has been assigned to Public Non-Exclusive Telecommunications Services (PNETS) providers for interconnection charging purpose.
- 2.7 By implementing the special prefix requirement, the recipient will be able to identify the nature of these calls and decide whether to answer the calls. This will not only minimize the annoyance of spamming calls but also the costs arising from such calls. Network operators will also be able to block all such unsolicited

promotional messages or cold calls originated from the special prefix upon customer request.

- 2.8 To ensure that network operators can effectively implement the aforementioned call blocking, SmarTone-Vodafone proposes to amend section 24 of the Telecommunications Ordinance to allow network operators to block all unsolicited commercial messages or cold calls with the special prefix upon customer request.

**An opt-in approach should be adopted as the onus of securing customers' consent to send these commercial messages should lie with the marketers**

- 2.9 Under the proposed opt-out approach as stated in the Consultation Paper, a sender is allowed to send unsolicited commercial electronic messages until the sender receives an opt-out request from the recipient. This approach is not supported by SmarTone-Vodafone for the following reasons:

- Marketers should take up the responsibility and cost of complying with the Bill as they derive commercial benefits from spamming activities. The onus of addressing the issue of consent should lie with those wishing to send commercial messages or make cold call. The onus should not be placed on the consumers who will be required, under the opt-out approach, to take action to opt-out by sending opt-out requests to individual marketers or by registering with the "do-not-call" registers.
- The cost of implementing an opt-out approach will be much higher than that of an opt-in approach. For instance, it is envisaged that there would be substantial on-going maintenance costs of the centralized opt-out database, not to mention the time and efforts that would be incurred by the industry in the initial set-up of such database. Network operators should not be required to bear the costs of setting up and maintaining the system (either directly or indirectly via the OFTA Trading Fund as further explained in paragraphs 3.3 to 3.4 below) as these costs would be ultimately borne by the end-users of telecommunications services.

- 2.10 It is noted that the Consultation Paper has proposed to establish do-not-call registers to supplement the opt-out regime. However, the Consultation Paper only



states that the Bill will empower the TA to establish and maintain the registers, without providing further details about the set-up and logistics of the registers. This creates uncertainty as to how the registers will be set up and whether network operators will be required to support the set-up and maintenance of the registers. We also note the point as stated in paragraph 45 of the Consultation Paper that such registers could be counterproductive as it may even increase the amount of spam received by consumers according to a US Government's report. In any event, it is envisaged that the setup of a centralized do-not-call database would involve a lot of logistics and cost issues, which at the end would become a burden to be borne by the consumers and the community as a whole.

2.11 In contrast to the opt-out approach, the opt-in approach places the burden of obtaining the consent to distribute commercial messages or making direct marketing calls on the marketers. Marketers should ensure that they have received the consent of the recipients before they send promotional messages or make direct marketing calls. In fact, this is an approach favoured by a large number of legislators overseas. The opt-in approach is adopted by the European Union, United Kingdom, Australia and New Zealand.

2.12 The opt-in approach has the following merits:

- The burden and costs of compliance should be borne by the message senders, not by the consumers nor mobile operators. The telemarketers should be responsible for the cost of compliance with the regulation because they derive commercial benefits from spamming activities, whereas the consumers and mobile operators are the victims of spam.

The implementation of the opt-in approach is simpler because it is not necessary to establish any centralized opt-out database of which the implementation and maintenance is likely to be time-consuming and costly. Also under the opt-in approach the consumers will not be required to take any action if they do not want to receive any promotional messages.

For telemarketers, the cost of compliance is also lower under an opt-in regime as a telemarketer will only have to maintain its own database which contains the recipient's prior consent. However, under an opt-out regime, the telemarketer will not only be required to check its own opt-out database but also the centralized "do-not-call" database.

- The Hong Kong anti-spam law should harmonize with the major overseas jurisdictions in order to achieve the stated objective of the Bill which is to prevent Hong Kong from becoming a safe haven and base of operation of illicit spammers (paragraph 11 of the Consultation Paper).

**A multi-pronged approach to tackle spam should include the review of the fixed/mobile interconnection charging arrangement**

- 2.13 Although the Government recognized that legislation is not a panacea of the spamming problem and a multi-faceted strategy is needed to effectively address the problem (paragraph 10 of the Consultation Paper), and the Government has launched the STEPS campaign in 2005 announcing a package of measures, to tackle the problem of spamming, little attention has been given to the economic aspect of tackling spamming, in particular for calls made from fixed network to mobile network (**Mobile Spamming**).
- 2.14 Under the current regime, if a spamming call is made from the fixed network to the mobile network, the incremental cost to the marketers for making the call is close to nil given the flat fixed-tariff charge prevailing in Hong Kong (as pointed out in Paragraph 21 of the Consultation Paper). The mobile operator also needs to pay the corresponding fixed operator an interconnection charge for terminating the spamming call on the mobile network under the asymmetrical fixed mobile interconnection charge principle. Hence, the cost of using fixed line to generate spamming call to mobile network is very low and there is even an economic incentive for the spammers or the fixed network operators to facilitate Mobile Spamming. This explains why the problem of Mobile Spamming has been increasing at an alarming rate in Hong Kong. The problem caused to mobile phone users by spamming is amplified by the physical closeness and personal attachment of the mobile phone to the users. Mobile operators are also suffering as spamming has increased customer complaints and spamming traffic has impeded the efficient use of network resources.
- 2.15 Since spamming is an economic activity for the promotion of goods and services, we must make sure that the telemarketers and the fixed line operators bear the full underlying cost of such economic activity. Currently, mobile operators as well as



the customers of mobile services in Hong Kong are subsidizing the telemarketers and fixed line operators in Mobile Spamming.

- 2.16 For these reasons, SmarTone-Vodafone would like to reiterate the importance and urgency of the Fixed Mobile Convergence Review. The current unfair fixed mobile interconnection charge regime should be changed to "calling party pay" so that the unfair subsidy paid by the mobile operators, which ultimately borne by the mobile service customers, should be put to an end. It is important to make sure that spammers bear the full cost of Mobile Spamming.

### 3. OTHER COMMENTS

#### TA's powers for investigation

- 3.1 The Consultation Paper proposes the TA would be responsible for enforcing the Bill, except for fraud and related activities in connection with sending commercial electronic activities which will be enforced by the Hong Kong Police Force. It has been proposed that the TA may request any person to give information to the TA for the TA's investigation under the Bill if the TA has reasonable grounds to believe such person is in possession of such information.
- 3.2 It is noted that a person who knowingly gives information that is false or misleading to the TA will commit an offence (paragraphs 85 and 87). The use of the word "misleading" may create some uncertainties as there may be different interpretation as to what constitute misleading information. Clarifications or guidance should be provided in advance as the consequence of such offence is very serious.

#### Amendment to the resolution for the OFTA Trading Fund

- 3.3 The Consultation Paper (paragraph 99) suggests that the resolution for the establishment of the OFTA Trading Fund needs to be revised to expand the scope of the services so as to encompass the TA's work under the Bill.

- 3.4 Currently, the major source of revenue to the OFTA Trading Fund is from licence fee, which accounts for 88% of the total revenue of the Fund<sup>4</sup>. Hence by expanding the scope of the OFTA Trading Fund to cover the TA's work under the Bill, it means that the cost of tackling spamming will be mostly borne by the telecommunications licensees. SmarTone-Vodafone considers that this is not an appropriate approach, as the cost of tackling spamming should be paid by telemarketers or spammers. The proposal will send a wrong signal to the spammers that they are not responsible for the cost of regulating spamming activities. Also the consumer of telecommunications services will ultimately bear such costs which is also unfair. The TA should consider alternative ways of financing the cost of regulating spamming activities, whereby spammers will bear the full costs of regulating such spamming activities.

#### Further consultation

- 3.5 SmarTone-Vodafone considers that the Bill is an important piece of legislation which has far-reaching implications to the community of Hong Kong. We therefore submit that there should be further consultation on the details of the Bill, in particular the draft wording of the Bill should be made available for consultation.

SmarTone Mobile Communications Limited  
March 2006

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<sup>4</sup> OFTA Trading Fund Report 2004/2005