

WHARF T&T LIMITED

SUBMISSION TO THE COMMERCE, INDUSTRY AND TECHNOLOGY BUREAU ON THE CONSULTATION PAPER ON LEGISLATIVE PROPOSALS TO CONTAIN THE PROBLEM OF UNSOLICITED ELECTRONIC MESSAGES OF JANUARY 2006

Introduction

1. Wharf T&T Limited welcomes the opportunity to respond to the Consultation Paper on the Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages (the “Consultations Paper”).
2. The Consultation Paper seeks the views of the public on the detailed legislative proposals for the Unsolicited Electronic Messages Bill (“UEM Bill”).

Objectives and Guiding Principles

3. We are in agreement with the six guiding principles for the UEM Bill, which we believe strike a balance among the interests of different stakeholders.

Scope of Application

4. We agree that only commercial electronic messages should be regulated and that UEM Bill should cover generally all forms of electronic communications unless it is specifically excluded, so as to cater for future developments in technologies and services.
5. We are generally in support of the legislative proposals for defining the scope of application of the UEM Bill. However we suggest that to allow for flexibility the SCIT may exempt certain electronic messages from compliance.

Rules about Sending Commercial Electronic Messages

6. We are concerned that the rules may be too prescriptive to be set out in the legislation. These rules concerning for instance the identity and details of senders, details of functional unsubscribe facility and length of record keeping as well as enforcement notices could be left to suitable code of practices, which would allow greater flexibility for changes.
7. We have doubts on the effectiveness of the “Do-not-call registers”. In our experience with the “Do-not-fax registers”, the lists can get very long and people do not comply with them.

- 8 We do not support the empowerment of the establishment of the “Do-not-call registers” with the Telecommunications Authority (“TA”). We also do not support to entrust the TA with the investigative and enforcement power. We will discuss further in the later part of our submission concerning the role of the TA in the UEM Bill.

Rules About Address-Harvesting

- 8 We query how the proposed legislation could be effectively enforced. We submit that any penalty proposed should be proportionate taking into account the harm such wrongful activities would actually cause.

Offences Relating to the Sending of Commercial Electronic Messages

- 9 We note the proposed penalty for each contravention and submit that any penalty proposed should be proportionate taking into account the harm such wrongful activities would actually cause.

Compensation

- 10 We note the proposal that a person who contravenes any of the provisions in the UEM Bill shall be liable to compensation by way of damages to the claimants for the pecuniary loss sustained by them as a result of the contravention in circumstances where it would be fair, just and reasonable to do so. We are concerned that this would not be practical and not realistic for claimants. The compensation may not be proportionate to the damage that would be done to the claimants. This may also possibly open up a floodgate of claims.

Powers for Investigation

- 11 We agree with the proposal for prescribing powers for investigation. However we do not support the proposal that the TA be given the responsibility for enforcing the UEM Bill. We do not believe the TA is the appropriate body to do so and we are not sure if indeed it has the expertise to do so. We are also concerned that this additional responsibility would distract the TA from its current responsibility in the telecommunications sector.
- 12 The Government has announced on 3 March 2006 a proposal for the establishment of a Communications Authority to replace the TA and the Broadcasting Authority. Once the Communications Authority is set up, it would then proceed to review and rationalize the 2 existing legislations i.e. the Telecommunications Ordinance and the Broadcasting Ordinance. This is expected to be a complex process and there would no doubt be a lot of debate on the new legislation, which would replace the existing legislations. With such complex task ahead on the merger of the telecommunications and broadcasting authorities and the uncertainty this would bring, we do not believe we should add

further complications by introducing further responsibilities to the TA. This is particularly so when the enforcement responsibilities required by the UEM Bill would be very onerous.

Other Provisions

- 13 As we indicated above we do not support the proposal that the TA be entrusted with the enforcement responsibility. Similarly we do not support the revision of the Telecommunications Ordinance to provide for the powers of the TA to support the implementation of the UEM Bill.
- 14 We object to the proposal that the TA be given the power to require licensees under the Telecommunications Ordinance to implement measures or take steps in support of the TA's functions under the UEM Bill. We query why licensees under the Telecommunications Ordinance have been singled out to implement measures or take steps in support of the TA's functions under the UEM Bill and to what extent they must do so and what consequences the licensees would face if they fail to implement measures or take steps as directed by the TA. At this stage we do not even know precisely what measures and steps are required to be implemented, and whether they would be consulted on any proposed measures.
- 15 Whilst we agree with the proposed defence for employer and director of company, other body corporate or partnership, we are concerned with the presumption of wrongdoing before proven. We submit that any act done or practice engaged in by a person in the course of his employment would be treated for the purposes of the UEM Bill as done or engaged in by his employer as well as by him if such act or practice were done with the employer's knowledge or approval. In the case of agent, the principal would also be held liable if the act is done with the principal's knowledge or authorization. In the case of company's director, again knowledge or approval must be proven.
- 16 We agree that a telecommunication service provider who merely provides a service that enables a commercial electronic message to be sent shall not be taken to have sent or caused to have sent the message.
- 17 We do not agree to the proposed amendments to: (a) sections 6A sub-sections (1) and (3) of the Telecommunications Ordinance; and (b) Schedule 1 to the Office of the Telecommunications Authority Trading Fund Resolution (Cap. 430 sub. Leg. D), for the reasons as stated in the foregoing paragraphs.

Conclusions

- 18 We generally support the proposal to contain the problem of unsolicited electronic messages, but we caution against setting too prescriptive rules in the proposed legislation.

- 19 We express concerns on the effective implementation of the UEM Bill, particularly if the spam originated from overseas jurisdictions without any anti-spam laws. We also urge the Government to provide further information as to its collaboration with overseas jurisdictions on this subject matter.
- 20 We do not support that the TA be given the power and responsibility to enforce the UEM Bill for the reasons we set out in this submission.

Thank you.

Submitted by Wharf T&T Limited