Microsoft

Submission in response to the proposed Spam Control Bill

1 Introduction

1.1 Microsoft welcomes the proposed Spam Control Bill

Microsoft welcomes the Spam Control Bill proposed by the Infocomm Development Authority of Singapore (IDA) and the Attorney-General's Chambers of Singapore (AGC). The Bill proposes to implement a robust opt-out framework that contains strong anti-fraud measures and a broad private right of action for those affected by spam. In addition, the Bill draws guidance from enacted anti-spam regimes in the United States and Australia, which signifies a promising step toward harmonisation of anti-spam laws in the Asia-Pacific region.

However, if the Bill is enacted in its present form, Microsoft is concerned that the strength of the above framework will not be fully realised. This is because some of the Bill's provisions cannot be reconciled with the stated rationale for the opt-out framework adopted by the IDA and AGC: the promotion of the responsible use of electronic messages as a means of conducting legitimate business.[1] In some parts of the Bill, the conflict between the rationale for the framework and its implementation arises because the Bill does not provide regulated persons with sufficient certainty to use electronic messages to conduct their legitimate businesses with impunity. And in other respects, the Bill imposes obligations on senders that are incommensurate with the contribution that these measures make to reducing overall spam volumes.

These concerns and the context in which they arise are discussed in sections 2 - 9 below, along with recommended solutions to strengthen the proposed legislation.

1.2 Microsoft's perspective on spam regulation

Microsoft offers a unique perspective to the debate about effective spam regulation. This is because Microsoft engages with the spam issue in a number of different capacities. As a supplier of goods and services, Microsoft enjoys the benefits of electronic messages as a cost-effective means to communicate responsibly with its customers. But, as an email service provider, Microsoft bears the burden of bandwidth, storage and software costs associated with processing significant volumes of spam. And as a developer

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[1] As stated on page 15 of IDA-AGC Consultation Paper on the Proposed Spam Control Bill.

of filtering and other anti-spam technologies such as Sender ID,[2] Microsoft understands the technical difficulties associated with locating spammers and holding them to account.

With the benefit of this multi-faceted outlook, and Microsoft's experience in other jurisdictions that have enacted anti-spam legislation, Microsoft looks forward to working with the IDA and AGC to refine the proposed Spam Control Bill to ensure its successful implementation.

2 Definition of "unsolicited" should exclude messages sent in furtherance of pre-existing business relationships

2.1 Issue

Section 5 of the proposed Bill provides that an electronic message is unsolicited if the recipient did not (i) request to receive the message or (ii) consent to the receipt of the message. Other than stating that a recipient does not solicit an electronic message merely by giving out his or her electronic address (such as by handing out a business card) or by publishing it (on a website, for example), the Bill offers no further guidance as to what amounts to a "request" by a recipient to receive an electronic message, or what types of "consent" are sufficient to render a commercial electronic message solicited pursuant to the Bill.

This lack of guidance gives rise to a particular difficulty in relation to transactional or relationship messages - commercial electronic messages sent in furtherance of pre-existing business relationships. Given that these messages result from voluntary relationships entered into between the sender and recipient as business partners, there is a strong case for arguing that transactional or relationship messages should not be considered "unsolicited" under the Bill. This case is further strengthened when one considers the administrative burden and limited benefit (in terms of reducing overall spam volumes) that accrues from adhering to the proposed '<ADV>' labelling requirement in respect of messages of this kind.

If the current drafting of the Bill is not amended to provide regulated persons with sufficient certainty as to the treatment of transactional or relationship messages under the proposed regime, then it is likely that costly and time-consuming judicial guidance will be necessary. As a matter of legislative drafting, it is undesirable to leave such a fundamental aspect of the proposed regime open to judicial interpretation, and it appears to be unfair to impose the cost of achieving certainty on those persons regulated by the Bill.

2.2 Recommended approach

Microsoft strongly believes that the definition of "unsolicited" in section 5 of the proposed Bill should be amended to expressly exclude commercial electronic messages where the sender:

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[2] The Sender ID Framework is an e-mail authentication protocol that helps address the problem of spoofing and phishing by verifying the domain name from which e-mail is sent. The Sender ID Framework is the product of an industry initiative led by Microsoft.

<blockquote>

(i)   has an established business relationship with the recipient; and

(ii)   the recipient has not submitted an unsubscribe request to the sender in respect of the kind of electronic messages proposed to be sent.

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By "established business relationship" Microsoft means "a prior or existing relationship formed by a voluntary communication between a person or entity and the recipient with or without an exchange of consideration, on the basis of an inquiry, application, purchase or use by the recipient regarding products or services offered by such person or entity."

3   Opting-out on a business-unit or product-line basis should be accommodated

3.1   Issue

Section 9(3) of the proposed Bill outlines the obligations of senders (and others) when a recipient submits an unsubscribe request - a request to the sender or the person who authorised the sending of the message to cease sending any further electronic messages to the recipient's electronic address. Read together with the definition of "sender" in section 2, the proposed regime only accommodates opting-out on a company-wide basis, that is, unsubscribe requests can only be directed to the company (and not the responsible business unit) that sent or authorised the sending of the message. In practice, this means that an unsubscribe request sent to Microsoft Corporation in respect of an email advertising Xbox products will operate to prevent Microsoft Corporation sending the same recipient an email advertising the Office suite of products.

As emphasised in Microsoft's earlier submission to the IDA and AGC,[3] a regime that only permits opting-out on a company-wide basis is likely to be impracticable for businesses with multiple business-units and/or product-lines that operate on an independent basis. Structures of this kind are not uncommon even among small and medium-sized enterprises. As such, the proposed regime appears to unfairly, and without justification, disadvantage entities that structure their business on a business-unit or product-line basis, when compared to those who establish separate controlled entities.

3.2   Recommended approach

Microsoft recommends that the definition of "sender" in section 2 of the proposed Bill be amended to mirror the approach embodied in section 3(16) of the US CAN-SPAM Act of 2003. That section permits identification of the "sender" with a particular line of business or division in certain circumstances.

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[3] Microsoft Submission in Response to the Proposed Legislative Framework for the Control of E-mail spam in Singapore. Available at: http://www.ida.gov.sg/idaweb/pnr/infopage.jsp?infopagecategory=infoecon:pnr&versionid=6&infopageid=I2883 (27 July 2004).

4 Courts should be required to award aggravated and reduced statutory damages in certain circumstances

4.1 Issue

Pursuant to section 15 of the proposed Bill, the courts are empowered to grant statutory damages to litigants that have (i) elected to recover them and (ii) established a contravention of certain sections of the proposed Bill. In determining the quantum of statutory damages recoverable by the litigant (up to the capped maximum), the court is obliged to consider a number of factors. These factors include the amount of loss that the litigant has suffered or is likely to suffer, any benefit that has accrued to the spammer by reason of their spam activity and the need to deter similar spam activity.

Although this regime accords with the approach to statutory damages in Singapore's Trade Marks Act, it does not defer to the need for judges to take account of the notion of proportionality when determining the quantum of statutory damages for spam activity. Proportionality of penalty is important in the spam context because there is a real possibility that good actors may inadvertently contravene the anti-spam regime, while bad actors may deliberately act in contravention of it.

Unless the courts are required to adjust the quantum of statutory damages in accordance with the wilfulness of the contravening conduct or to reflect the implementation of measures to avoid contravention, there is a significant risk that the statutory damages regime will not operate to impose the most severe penalties on those that are responsible for the lion's share of the spam problem. In this way, the current drafting of section 15 does not adequately reflect the policy objective of deterring potential spammers.[4]

4.2 Recommended approach

Sections 7(f) and 7(g) of the US CAN-SPAM Act of 2003 empower the courts to adjust the quantum of statutory damages in certain circumstances. Aggravated damages - calculated at three times the usual statutory damages - are available where the defendant committed the contravention wilfully and knowingly. Reduced damages, on the other hand, are available where the defendant demonstrates that it has implemented commercially reasonable practices and procedures to prevent violations of the enacted regime, but that a contravention has resulted nonetheless. This model provides appropriate incentives for good behaviour as well as disincentives for 'bad' behaviour.

5 The commercial purpose of an electronic message should be clear, not incidental

5.1 Issue

Section 3 of the proposed Bill defines "commercial electronic message" as an electronic message where its purpose, or *one* of its purposes, is specified in paragraphs 3(1)(i) - (xii) of the Bill. The inclusion of the words "or one of the purposes" means that an electronic message which has an *incidental*

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[4] As stated on page 15 of IDA-AGC Consultation Paper on the Proposed Spam Control Bill.

commercial purpose - such as an electronic message that contains a product recall notice coupled with an offer to provide a replacement product - will be covered by the Bill. Another example is an electronic message that contains a renewal notice, the incidental commercial purpose of which is to elicit a renewal transaction. It strains an ordinary understanding of the nature of this type of message to say that it is "commercial in nature" - one of requisite features of spam outlined in the IDA-AGC Consultation Paper on the Proposed Spam Control Bill.[5] Thus, to the extent that the definition of "commercial electronic message" covers electronic messages that merely have an *incidental* commercial purpose and therefore cannot be said to be "commercial in nature", there is a lack of precision between the policy recommendations made by the IDA-AGC and the definition of "commercial electronic message" in section 3 of the proposed legislation. This lack of precision will serve to undermine the framework objective of promoting the responsible use of electronic messages as a means of conducting legitimate business.

5.2   Recommended approach

Microsoft recommends that the definition of "commercial electronic message" is amended to only cover electronic messages where their "primary purpose" is one specified in paragraphs 3(1)(i) - (xii) of the Bill. This approach accords with that found in section 3(2)(A) of the US CAN-SPAM Act of 2003.

Alternatively, Microsoft supports a definition of "commercial electronic message" that only covers electronic messages where their "purpose" is one specified in paragraphs 3(1)(i) - (xii) of the Bill.

At minimum, both of these approaches necessitate deletion of the words "or one of the purposes" from section 3(1) of the proposed Bill.

6   The application of Part II of the proposed Bill should be broadened

6.1   General Issue

By virtue of section 8, Part II of the proposed Bill only applies to *unsolicited* commercial electronic messages transmitted in bulk. In respect of these messages, Part II requires the inclusion of:

(a)   an unsubscribe facility;

(b)   '<ADV>' labelling in the subject line;

(c)   subject line and header information that is not false or misleading; and

(d)   an accurate and functional electronic mail address or telephone address by which the sender can be readily contacted.

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[5] As stated on page 7 of IDA-AGC Consultation Paper on the Proposed Spam Control Bill.

In Microsoft's view, each of these Part II requirements, other than the '<ADV>' labelling one, should apply to *all* commercial electronic messages irrespective of whether they are unsolicited. This approach will give effect to the scenario considered in section 5(3) of the proposed Bill whereby an unsubscribe request is submitted in respect of a solicited commercial electronic message that the recipient no longer wishes to receive. Furthermore, recipients should be afforded the protection of accurate subject lines, header and contact information even where messages are solicited by virtue of a pre-existing business relationship or otherwise.

Microsoft's current practices accord with the approach suggested above.

6.2   '<ADV>' labelling

In the past, '<ADV>' labelling has been heralded as an efficient method of reducing spam volumes due to the ease with which messages labelled as such can be filtered. However, filtering technology has since evolved and labels are no longer critical, or even central, to the effectiveness of filtering technology.

Microsoft is also conscious that as more and more jurisdictions seek to enact anti-spam legislation, the compliance burden for businesses trading internationally will increase if these laws are not harmonised. We should not lose sight of the overall objective of anti-spam legislation, namely to reduce substantially the quantum of spam that originates largely from unscrupulous operators rather than legitimate businesses. Without harmonisation, we run the risk of unfairly penalising legitimate businesses engaged in international trade, but having little impact on unscrupulous spammers.

In the case of '<ADV>' labelling, this is not a requirement which has been imposed by other jurisdictions such as the United States and Australia. Furthermore, the European Union Directive on Privacy and Electronic Communications does not require '<ADV>' labelling of unsolicited commercial electronic messages, nor does the proposed Hong Kong and New Zealand anti-spam legislation. Microsoft is concerned that if Singapore is to enact legislation requiring '<ADV>' labelling for unsolicited commercial electronic messages, Singapore will be out of step with its major trading partners.

6.3   Recommended action

Part II of the proposed Bill should be amended to apply to all commercial electronic messages transmitted in bulk. As an exception to this general position, should the Singapore government decide to proceed with an '<ADV>' labelling regime, the '<ADV>' labelling requirement in section 10(b) of the proposed Bill should only apply to *unsolicited* commercial electronic messages transmitted in bulk (where 'unsolicited' is amended as recommended in paragraph 2.2 above).

If Part II of the proposed Bill is amended to apply to all commercial electronic messages transmitted in bulk, section 9(1)(c)(ii) should also be amended to require unsubscribe statements to be presented in English or any other language that a recipient has requested and the relevant sender has agreed to.

7 The government should play a role in enforcing the proposed anti-spam regime

7.1 Issue

It appears as though the IDA and AGC have decided against government enforcement of the proposed anti-spam regime. The reasons for this decision are not known.

Microsoft wishes to reiterate its view that government action is an essential element of any effective anti-spam regime. It is unreasonable to place the entire burden of enforcing the proposed anti-spam regime on ISPs, email providers and others affected by the transmission of spam. For many of these private entities and individuals, the prospect of recovering their legal costs if they bring a successful action is not a sufficient incentive to initiate civil proceedings in the first place. Government action also sends a signal to the public that conduct is not acceptable far more effectively than private action. In these situations, government enforcement of the regime is crucial in order for it to retain its legitimacy.

7.2 Recommended approach

Both the US CAN-SPAM Act of 2003 and Australia's federal Spam Act 2003 contemplate a role for government enforcement of the regimes contained therein. If neither of these approaches is adopted in the proposed Bill, then Microsoft strongly recommends that this issue is reconsidered in the review of any enacted anti-spam regime that has been proposed by the IDA and AGC in their Consultation Paper on the proposed Bill.[6]

8 Sender contact mechanisms should not be limited to email addresses and telephone numbers

8.1 Issue

Section 10(1)(d) of the proposed Bill obliges senders to include an accurate and functional electronic mail address or telephone number in all unsolicited commercial electronic messages.

Restricting the contact mechanism to an email address or a telephone number presents a number of difficulties. In the first place, Microsoft's experience is that providing an accurate and functional email address for the sender of an unsolicited commercial electronic message simply invites spam to be sent to that email address. As a result, it is not always easy to distinguish between genuine attempts to contact the sender and spam activity. Secondly, it is difficult for multi-nationals such as Microsoft to provide generic telephone numbers that can be readily accessed from all jurisdictions in which it operates.

In addition, restricting the contact mechanism to an email address or telephone number arbitrarily excludes other contact mechanisms by which senders can be readily contacted. For example, web-based submission forms.

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[6] As stated on page 3 of IDA-AGC Consultation Paper on the Proposed Spam Control Bill.

8.2 Recommended approach

Microsoft recommends that section 10(1)(d) of the proposed Bill is amended to read: "an accurate and functional electronic mail address or telephone number, *or details of any other mechanism* by which the sender can be readily contacted."

9 Intermediaries' right to combat spam should be expressly preserved

9.1 Issue

ISPs and email service providers are at the forefront of the fight against spam. These intermediaries employ a range of tools, including filtering technology, to reduce the prevalence of spam messages. Microsoft believes that the Singapore government should make it clear that the legislation is not intended to give senders of commercial electronic messages rights of carriage that they do not have in the current environment. This approach will provide intermediaries with the certainty that they need to continue using their tools to effectively combat spam.

9.2 Recommended approach

Microsoft supports the inclusion of a provision in the proposed Spam Control Bill that makes it clear that it does not:

- impose an obligation on ISPs, email service providers and other intermediaries to block or carry commercial electronic messages; or

- impair an intermediary's ability to enforce its anti-spam policies.

Section 8(c) of the US CAN-SPAM Act of 2003 provides useful drafting guidance for such a provision.

10 Conclusion

Microsoft thanks the IDA and AGC for their consideration of this submission, and welcomes the opportunity to discuss the points we have raised. To do so, please contact Wee Choo Hua, Director of Corporate Affairs, ph 6882 8615 or email chwee@microsoft.com.