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The Singapore Do Not Call Register and the Text and Fax Exemption Order

By Warren B. Chik

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The introduction of a text and fax exemption to the general “opt out” effect of the Do Not Call Registry have led to a debate over the effectiveness of the Registry in filtering out unwanted communication to telephone users. This article provides the background for the Registry and the reasons for the backlash as well as for the exemption. It will explain why the exemption is consistent with the existing policy towards, and legal treatment of text-based messages, but nevertheless question whether the distinction between voice and text-based messages is justified given the overall objective of the Personal Data Protection Act and the Do Not Call regime.

Background

The Singapore Personal Data Protection Act (Act 26 of 2012) (“PDPA”) entered into effect on 2 January 2013, after several years of consultations and a decade of study by the relevant government agencies. The Personal Data Protection Commission (“PDPC”) was set up by the Ministry of Communications and Information (“MCI”) on the same date with a Data Protection Advisory Committee, pursuant to the Act, to administer the Act in accordance with the mandate as provided therein.

The Do Not Call (“DNC”) provisions came into effect on 2 January 2014, earlier than the Data Protection (“DP”) provisions, which will come into effect on 2 July 2014. The Exemption Order (“EO”), which is applicable to tax and fax messages, was released on 26 December 2013.¹ The backlash against the EO, which was especially strong on social media and from consumer rights groups,² was swift and should have been expected. This short article seeks to explain the reasons behind the strong negative reaction to the exemption within the context of the DNC regime. It will explain that the approach, although unfortunate, is actually logical and consistent with government policy (with its pro-business approach) and the existing spam control regime. It can also be reconciled with the purpose of the PDPA as set out in s 3 of the Act – balancing the interests of individuals and organisations. However, from a wider perspective, the argument could still be made that the treatment of written or text-based messages as a whole should not be treated any differently from voice messages.

Reasons for the Backlash to the Exemption Order

The DNC is of greater immediate interest and concern to Singaporeans as it has a more direct and noticeable effect on their daily lives, especially with the increasing reliance on personal smart devices and the more aggressive digital marketing strategies taken by many organisations. Hence, the DNC was the feature of the PDPA that most Singaporeans were anticipating and expectations were raised earlier on. Thus it should not have been a surprise that the EO, which was made only **after** extensive consultations leading to the enactment of the PDPA would be a disappointment to them.

The DNC Registry provides for registration to “opt-out” of voice calls, text messages and/or fax messages.³ There is a choice to select which form of communication to opt out from via the various avenues of registration. There was initially no distinction to the treatment of all three methods of communication within the Act or when the register was first opened for signature. It was only after the register was opened, and after the PDPC garnered overwhelming response,⁴ that the exemption order was made; apparently after concomitant and ongoing consultations with businesses only. This lack of

consultation on the EO with society at large, after raising the expectations of consumers (especially those that had clearly, deliberately and specifically opted out of receiving text and fax messages on top of voice messages) only caused greater unhappiness over the new measure.

When registrants decide to “opt-out” specifically from text and fax messages (which they are given the option to do in the registration process), it is likely that many of them are in fact deciding to refuse **all** messages whether or not from an ongoing relationship, especially relating to marketing of related products and services. Perhaps registrants should have been given the additional choice of whether to opt out of all texts and fax messages: (i) without the exception; or (ii) with the exemption.⁵ This may have addressed the objectives of the DNC registry in a more balanced and equitable way (ie the interests of businesses, which is mainly to reach an interested audience and not alienate the general public, as well as the interest of registrants).

The Rational Basis for the Exemption

However, leaving aside the unfortunate circumstances and chronology of events leading to (and the timing of) the exemption, there is actually a rational basis for the EO itself. In fact, it may be argued that the exemption renders the DNC regime more consistent with the purpose of the Act and with the data protection regime as well as the spam control regime under the Spam Control Act (Cap 311A) (“SCA”).

It is Consistent with the Purpose of the Act and Government Policy

The exemption reinforces the need to balance business and individual interests, an approach that the Government promised during the preparation stages of the PDPA and that is explicitly stated in s 3 of the Act. Such an approach necessitates the constant adjustment of the allocation of rights, even after the Act is enacted; and that is one of the main task that the PDPC was set up to perform. In fact, it is predicted that the balance will largely be recalibrated in favour of businesses in time to come, given the economy-centric policies of the Singapore government over privacy interests.

It Takes Into Account the Interests of Local Businesses vis-à-vis Foreign Ones

One of the main concerns that the exemption was meant to address was that if it were not made, the irony would be that local businesses diligently observing the requirements of the Act (and in compliance with it) will be disadvantaged as compared to foreign ones. The counter-argument is that, unlike the case of electronic mail (“e-mail”), senders of voice and text-based messages (such as SMS and faxes) do incur greater costs and hence the “threat” of such messages originating from overseas is, relatively, less likely to be a problem to consumers and is also less likely to put the local businesses at a competitive disadvantage.

It can also be argued that text-based messages are less invasive to the individual than voice messages, especially if it is restricted to one based on an “ongoing relationship”. It is also not fair to say that there is no justification for the exemption as it currently stands. The restriction to “ongoing relationship” also has an arguably rational basis, which will be further explained later.

It is Not Worse than Most Other Foreign DNC Regimes

In fact, the Singapore DNC framework that extends the “opt-out” mechanism beyond voice calls to text-based messages goes beyond the coverage of most other foreign DNC regimes (or its equivalent). For example, the UK’s Telephone Preference Service (“TPS”) only applies to voice calls with an “ongoing relationship” exception; and the US’ National Do Not Call Registry focuses on telemarketing calls and

provides for an exception for those in an “existing business relationship” for up to 18 months.⁶ The “backtracking” by the EO merely serves to realign the local regime with most foreign DNC regimes (and global trends), while still maintaining a stronger protection for users of smart devices.

It Reconciles the DNC Regime with the DP Regime: “Ongoing Relationship”, Objective “Consent” and “Reasonable” Practice

The EO actually renders a more consistent treatment of the consent requirement under both the DP and the DNC regimes. If the “ongoing relationship” requirement is read as one that is based on prior implicit consent to the continual receipt of messages despite a one-time registration with the DNC Register against text-based messages, then that requirement is actually consistent with the consent provisions under ss 19 and 47(4) and (5) of the Act for the DP and DNC regimes respectively (which refers to some form of ongoing consent) as well as s 15 of the Act on deemed consent (which need not be actual consent). The commonality is based on the purpose of these provisions, which is to make compliance easier for businesses and organisations, and to provide a leeway for “reasonable” practices that can be based on a form of “ongoing relationship” between the parties and/or objectively determined consent.

The rationale that was given by the PDPC for the exemption was that it: (i) served a purpose other than a “fishing expedition” form of marketing; (ii) can benefit customers that may want to continue receiving updates and related information; (iii) provided “greater flexibility for organisations to serve their customers in a minimally intrusive manner”;⁷ and (iv) was (on a balance of interests analysis) more beneficial than detrimental as a whole to society. What was implicit in the “ongoing relationship” condition for the sending of such text (and fax) messages is that there was some form of consent given at an earlier point in time by the recipient. Hence, one of the justification made was that it “provides more options for consumers”, avoids an “all-or-nothing approach” and allows consumers to get relevant marketing information, arising from a pre-existing transaction, that they may actually want (eg promotions, warnings, updates, etc).⁸

The definition of an “ongoing relationship” is one that is based on a pre-existing transaction (“arising from the carrying on or conduct of a business or activity (commercial or otherwise)”⁹). Other than these cases, specified text and fax messages are still not permitted to be sent to registered numbers. That is, it is a partial, and not a full, exemption, and it does not render the registration against text or fax messages totally useless. This consent may not rise to the level of consent as that required for specified voice messages sent to a Singapore telephone number **in spite of** the general “opt-out” through the DNC listing, which is one that must be obtained by the recipient with his/her “clear and unambiguous consent” (ie actual and informed permission),¹⁰ whether prior to or even **after** the same person had placed his/her number on the register.¹¹

However, it can be consistent with the “deemed consent” provision under the PDPA,¹² which is similarly more business interest friendly and can be perceived as a type of/built in exemption to what would otherwise be a very strict default actual and informed consent requirement. It is also consistent with the leeway given to specific consent given without distinction (ie **before** and **after**) as to the date vis-à-vis the date of registration of the Singapore telephone number (and individual) concerned. The rationale is also similarly based on business practicability and relates to the product/service concerned (ie that the business transacted with the individual and the use of the information relates to the processing of the transaction, post-sale services, etc).¹³ See Table 1. These practices are objectively reasonable but may not necessarily involve informed or actual consent, hence they are “deemed” (ie constructive) consent under the circumstances and under the relevant provision/order (analogous to, for instance, the “business efficacy” test that is applied to read in implied terms into legal agreements under contract law).

Table 1

Exempt Message Paras 2 & 3 of the EO	Deemed Consent Provision	Grandfathering Provisions
<p>Para 3(1) of the EO states that, subject to an organisation meeting the specific “opt-out” conditions under para 4 of the EO (see also Table 2, Column 1), a sender or his agent can continue to send specified text or fax messages to a Singapore telephone number of a recipient (“subscriber” or “user”) with whom he has an “ongoing relationship” (“at the time of the transmission”),¹⁴ and the purpose of the specified message is related to the subject of the ongoing relationship.¹⁵ This exemption will expire to a specific Singapore telephone number if the subscriber or user withdraws consent specifically in accordance with s 47(1) of the PDPA, specifically “opts-out” in accordance with para 4 of the EO or in any other way clearly and effectively withdrew his consent.¹⁶</p>	<p>Section 15(1) of the PDPA addresses one of two situations in which an individual may be treated as having given consent even if he has not actually given his consent. That is, where he voluntarily provides his personal data to an organisation for that purpose and it is reasonable that the individual would do so. It should be noted that the data need not be provided directly by the data subject and that the deemed consent can be due to a loosely worded clause (eg “use by a corporate group”).</p>	<p>Section 19 provides that organisations can continue to use personal data collected before the appointed day for the same purposes for which the personal data was collected without obtaining fresh consent, unless the individual has withdrawn consent (whether before on, or after the appointed day). It should be noted that this only applies to reasonable existing uses of personal data collected before the appointed day.</p> <p>Similarly, s 47(4) and (5) provides that a person¹⁷ can continue to send specified messages to a Singapore telephone number if specific consent was given before, on or even after the commencement of the DNC regime and registration of the number (ie overriding the general “opt-out” by registration).</p>

As stated, the reason for the provision and its objective is very similar to that for the DNC exemption order: To provide businesses with some leeway for sending text or fax messages despite the general requirement of specific consent, provided that it is “reasonable” to do so, taking into consideration the interests of the recipients and the level of invasiveness of such messages as opposed to constant requests for permission (in the DP context) or “cold texting” (in the DNC context), which may be even more annoying to the individual/customer (as the case may be). The reference to a practical approach and the usefulness of the “reasonableness” test is based on the application of the said test in various key provisions of the Act, for example, to determine deemed consent,¹⁸ the limitation of purpose and extent,¹⁹ and provisions relating to consent.²⁰ Reasonableness is also used as a barometer to determine legally acceptable behaviour under the purpose provision under s 3 and general rules of compliance with the Act on the protection of personal data under s 11(1), both of which refers to what “a reasonable person would consider appropriate in the circumstances”.

Finally, the EO in relation to the DNC regime can be compared to the function of the Scheduled statutory exemptions for DP regime (which also means that it could be expanded or narrowed over time). Opponents could argue that it is more consistent with direct exemptions than the abovementioned measures of consent. In reality, the “ongoing relationship” test will yield results that can fall within both the “consent” and “exempt” categories depending on one’s perspective.

It Greater Harmonizes the Treatment of Text-Based Messages

The EO reconciles the treatment of text messages under the DNC regime with the treatment of electronic mail and text messages under the SCA, and further distinguishes them from the treatment of voice calls. In fact, it is to be noted that even the title of the DNC regime refers to “calls” and not “texts” or “faxes” (through the use of broader terms such as “contact”, “message” or “communicate”). It reinforces the need to reconcile the treatment of all forms of text-based communications, regardless of the type of service concerned.

First, the SCA only covers electronic text messages, and although it was originally intended to cover electronic mail, it was expanded to cover other forms of text-based messaging other than “voice calls made using a telephone service”²¹. Because other forms of text messages are included in the SCA regime, there is an overlap with text messages sent via a “telephone service”; or in the case of the PDPA, “specified message addressed [and sent] to a Singapore telephone number”. For example, an unsolicited commercial electronic advertisement sent in bulk via SMS or WhatsApp to potential customers. This creates a situation where there are potentially two different sets of requirements that a sender has to adhere to in order not to fall foul of both the SCA and DNC requirements. This can cause confusion for all the parties concerned and complicate things unnecessarily for senders. The recipient is also not concerned with whether a telephone number is involved or whether the message is also sent to many other parties – the effect on him remains the same. Hence, if the objective is to provide a solution to salve the frustrations of the recipient, the requirements under both regimes should be consistent.²²

Due to the EO, the similarity is that text messages (including faxes) can still be sent, on condition of an “ongoing relationship” between sender and recipient, rendering this category of text-based messages one that is effectively based on a specific “opt-out” regime (as argued earlier), which is similar to the SCA regime, and differentiating it from the one-time and general “opt-out” option provided by the Register. This is only a partial harmonisation in treatment due to the “ongoing relationship” condition, but nevertheless a significant one. In other words, recipients of text (and fax) messages still enjoy greater protection under the PDPA for text and fax messages due to the “ongoing relationship” requirement vis-à-vis **unsolicited** commercial electronic messages sent in bulk under the SCA. The coverage of the DNC regime is potentially wider as it covers “activity (commercial or otherwise)”²³ sent by the sender, although this may be constrained when read with (and by the definition of) “specified message”.²⁴ The SCA, on the other hand, refers to “commercial electronic message”.²⁵

Another similarity is that the EO provides for an “opt-out” mechanism that is similar to, but not as comprehensive as, that put in place for unsolicited commercial electronic messages. Table 2 provides a comparison of the “opt-out” requirements under both regimes.

In fact, if unsolicited commercial electronic mail is based on an “opt-out” model of operation, then a stronger case can be made for a similar model for text and fax messages since they entail costs for senders (and disadvantages local companies less), and hence is arguably less of a problem than spam.

Table 2

Personal Data Protection Act Exemption Order Paragraph 4 Conditions of Exemption	Spam Control Act Second Schedule and Section 11 Requirements for Unsolicited Commercial Electronic Messages
<p>The exempt message must come with a statement informing the recipient of the “right” and power to “opt-out” of future messages from each sender.²⁶</p> <p>The provision of a fully functioning opt-out facility with each exempt message. The opt-out facility may be provided via a Singapore telephone number or short code (for a specified text message), or a facsimile number (for a specified fax message).²⁷</p> <p>The identity of the sender and contact information is also a consequence of the above requirements.</p> <p>Ensuring that the facility is not cost prohibitive,²⁸ is user friendly and clear (which is also implied from the requirements under para 4 of the EO).</p>	<p>Requiring the business to inform the recipient of the “right” and power to unsubscribe.</p> <p>The provision of unsubscribe facility with the message.</p> <p>The identification of the sender and contact information.</p> <p>Ensuring that the facility is user friendly, not cost prohibitive and clear.</p> <p>Labelling and other requirements.</p>

Going Forward

This incident was a lesson on the failure of the relevant authorities to manage expectations wisely or to foresee the repercussions of a retreat from privacy protection – the same of which can be expected, but perhaps on a lesser scale, in the case of any further exemptions or exceptions that will be made to the data protection regime. The PDPC will have to rebuild trust and confidence amongst its stakeholders, and it can do so by taking a page from the HK Privacy Commissioner, which have a stronger and more independent pro-privacy stance, a pro-active approach to complaints and that have successfully created awareness of privacy and data protection rights under the HK Privacy Ordinance.

In the meantime, the parameters of the “ongoing relationship” requirement²⁹ should be clear and should not be interpreted too broadly.³⁰ What type of messages that this relationship permits in spite of the recipient opting out of text or fax messages should also be limited to what is “reasonable”.³¹ Currently, the illustrations given in the PDPC Factsheet on the EO allow organisations to advertise the following: The same or similar products or services, rewards and offers, events and promotions.³² It is arguable which of these can be considered “reasonable” and which defeat the purpose of extending the general “opt-out” mechanism to text and fax messages in the first place. Other types of messages that should perhaps be included are product and service updates and contract renewal notices.³³ In fact, these types of messages may be more reasonable than those illustrated in the Factsheet. In short, the parameters of the EO must be further defined and confined, through the “ongoing relationship” requirement, in such a way that it does not weaken the overall “opt-out” regime for text-based messages under the DNC regime. At a certain point, the SCA should be reviewed with a view to bringing the spam control regime under the auspices of the PDPA and under the supervision of the PDPC.

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Notes

1 See the PDPA Media Release; available at: [http://www.pdpc.gov.sg/docs/default-source/media/media-release---new-advisory-guidelines-issued-for-do-not-call-registry-\(261213\).pdf?sfvrsn=8](http://www.pdpc.gov.sg/docs/default-source/media/media-release---new-advisory-guidelines-issued-for-do-not-call-registry-(261213).pdf?sfvrsn=8). The power to exempt is provided for under section 62 of the PDPA.

2 The Consumer Association of Singapore was cited as saying that it constituted a “back-peddalling of the law”, see Imelda Saad, “New Exemption Order Under Do Not Call Registry”, *ChannelNewsAsia* (26 December 2013); available at: <http://www.channelnewsasia.com/news/singapore/new-exemption-order-under/934376.html>.

3 See the DNC Registry website at: <http://www.dnc.gov.sg>.

4 Approximately 350,000 within a month, see *Saad* (note 2 above); and 380,000 by the end of 2013, see *Shiao* (note 8 below). Further reports have increased the number of registrants to almost half a million.

5 The main argument against this is probably based on the increased administrative burden on the organisations and also potential confusion for registrants.

6 However, it should be noted that text-based messages may be dealt with under separate laws in some of these countries. For example, there are existing US federal laws and regulations prohibiting the sending of unsolicited faxes.

7 See Eileen Yu, “Singapore Adds Do-Not-Call ‘Exemption’ for Firms with Existing Customers”, ZDNet (26 December 2013) (citing a statement by Leong Keng Thai, Chairman of the PDPC); available at: <http://www.zdnet.com/sg/singapore-adds-do-not-call-exemption-for-firms-with-existing-customers-7000024637/>.

8 Citing Leong Keng Thye, the PDPC Chairman, see Vivien Shiao, “Do Not Call Unit Again Defends Exemption”, *Singapore Law Watch* (31 December 2013); available at: <http://www.singaporelawwatch.sg/slw/index.php/headlines/35164-do-not-call-unit-again-defends-exemption>.

9 Para 2 of the Exemption Order (“EO”). This is as opposed to a one-off transaction between the parties.

10 See DNC AO1 (infra.) at para 7.4, which sets out some examples of ways to obtain such consent. It is to be noted that all of the examples are clear expressions of consent (ie some form of action rather than omission (eg not un-ticking a pre-ticked check box)).

11 Check and cite. See s 43(3) of the PDPA. See also, the advisory guideline on the “Requirement to Obtain Clear and Unambiguous Consent in Evidential Form (Chapters 5 to 7)” (hereinafter referred to as “DNC AO1”); available at: [http://www.pdpc.gov.sg/docs/default-source/advisory-guidelines---dnc/requirement-to-obtain-clear-and-unambiguous-consent-in-evidential-form-\(chapters-5-to-7\).pdf?sfvrsn=0](http://www.pdpc.gov.sg/docs/default-source/advisory-guidelines---dnc/requirement-to-obtain-clear-and-unambiguous-consent-in-evidential-form-(chapters-5-to-7).pdf?sfvrsn=0) (the PDPC is given the power to issue written advisory guidelines in their interpretation of the provisions of the Act under section 49(1) of the PDPA).

12 Section 15(1) of the PDPA.

13 Taking a holistic approach, a transaction does not end at the legal completion of a contractual agreement but can extend beyond it to the processing chain (eg payment processors) and beyond (post-sale services, updates, product recall, warnings, etc).

14 Para 3(1)(a) of the EO.

15 Para 3(1)(b) of the EO.

16 Para 3(2)(a)(b) & (c) of the EO.

17 As opposed to an “organisation” under the DP regime. Explain and render consistent.

18 Section 15(1)(b) of the PDPA.

19 Section 18(a) of the PDPA.

20 Section 14(1)(2)(a) and s 46(1) of the PDPA relating to the DP and the DNC regimes respectively.

21 Section 4(3) of the SCA.

22 As an aside, this author has also proposed the expansion of the DNC regime to a wider range of messages (type) and to messages not sent to a Singapore telephone number.

23 Para 2 of the EO.

24 Section 37 of the PDPA.

25 Section 2 of the SCA.

26 After that, the sender concerned cannot rely on the exemption and must stop sending messages to that Singapore telephone number 30 days after the day the individual opted out. Para 4(a) states that: “[A]n exempt message addressed to a Singapore telephone number must contain a statement, clearly displayed and in the English language, to inform the subscriber or user that he may opt out from receiving via that Singapore telephone number any exempt message from the sender in future by submitting to the sender an opt-out notice”.

27 Para 4(b) states that: “[T]he telephone number or short number code facility ... or the facsimile number ... must be valid and capable of receiving the opt-out notice from the subscriber or user, if any, at all times for a period of 30 days after the date on which the exempt message is transmitted by the sender or his agent”.

28 Para 4(c) states that: “[T]he use of the telephone number or short number code facility ... or the facsimile number ... does not result in the subscriber or user incurring any cost additional to the cost normally incurred in sending a text message or a facsimile message”.

29 Referred to as the relationship between an organisation and its user or subscriber of a Singapore telephone number such as “an on-going membership or subscription relationship”. See the PDPC Factsheet entitled “Advisory Guidelines on Selected Issues Relating to the Do Not Call Provisions” (26

December 2013); available at: [http://www.pdpc.gov.sg/docs/default-source/media/factsheet-for-dnc-advisory-guidelines-and-exemption-order-\(261213\).pdf?sfvrsn=4](http://www.pdpc.gov.sg/docs/default-source/media/factsheet-for-dnc-advisory-guidelines-and-exemption-order-(261213).pdf?sfvrsn=4).

30 It is to be noted that although the PDPC is empowered to provide advisory guidelines that includes interpretation of the PDPA provisions pursuant to s 49(1) of the PDPA, they are not necessarily the legal interpretation that the Courts may make and are not legally binding (and do not constitute legal advice).

31 Consistent with the “reasonable person” test under the general compliance provision that is s 11(1) (which applies to the entire Act); and also relating to consent to receiving specified messages to what is “reasonable” under s 46 (which specifically refers to the DNC regime). The equivalent section for the DP regime is s 14(2)(a). The “reasonableness” test also appears in s 15(1)(b) (Deemed consent) and other provisions of the Act and is applied to the both individuals (eg effective withdrawal of consent) and organisations (deemed or actual consent to the collection, use or disclosure of personal data).

32 That is anything “related to the subject of the ongoing relationship” (see para 3(1)(b) of the EO). See the table in the EO Factsheet (26 December 2013); available at: [http://www.pdpc.gov.sg/docs/default-source/media/factsheet-for-dnc-advisory-guidelines-and-exemption-order-\(261213\).pdf?sfvrsn=4](http://www.pdpc.gov.sg/docs/default-source/media/factsheet-for-dnc-advisory-guidelines-and-exemption-order-(261213).pdf?sfvrsn=4).

33 In fact, these examples, and some other more reasonable types of messages pursuant to an “ongoing relationship” between a sender and recipient, are already exempted generally for all “specified messages” irrespective of the mode of communication under the Eighth Schedule of the Act at para 1(d) and (e).