

10 August 2017

Honourable Dr Mathole Motshekga
Chairperson
Portfolio Committee on Justice and
Correctional Services
National Assembly
Parliament of the Republic of South Africa
P. O. Box 15
Cape Town
8000

Doc Ref: RAKSHAS/#228132_V1
Your ref:
Direct ☎: (011) 645 6714
E-✉: rakshas@banking.org.za

Attention: Mr V Ramaano

Committee Secretary: Portfolio Committee on
Justice and Correctional Services

National Assembly

Per e-mail: vramaano@parliament.gov.za

Dear Hon. Dr Mathole Motshekga

BASA comments on the Draft Cybercrimes and Cybersecurity Bill [B6 – 2017]

The Banking Association South Africa (BASA) would like to thank you for the opportunity to comment on the above-mentioned Bill. We believe that the comments and our proposed amendments below will enhance the Bill and make it more effective in achieving its objects.

With respect to this version of the Bill, as introduced in Parliament and referred to your respective Committee, we would like to put forward the following additional comments for consideration:

Section 1 Definitions

Registration Number : 1992/001350/08 A non-profit company under the Companies Act 2008
Directors : Ms M Ramos (Chairman), C Coovadia (Managing), MWT Brown, JP Burger, GM Fourie, M Ismail, S Koseff, KR Kumbier, SK Tshabalala, VSK Khandelwal (*Indian*)
Company Secretary : Ms BM Reyneke

The definition of a 'person' in this Bill means a natural or juristic person, whereas the definition in the Financial Sector Regulation Bill, B34-2015, ("FSR Bill") specifically includes "*an organ of state*".

It is recommended that the definition in the Bill is aligned with the FSR Bill definition to apply to organs of state as well, as the effects of cybercrime and cybersecurity also impact state institutions. The suggested definition is then to read (insertions underlined).

"Person" means a natural person or a juristic person, and includes an organ of state."

In the definition of 'seize', a comma should appear after the words 'render inaccessible' in sub-section (a), to ensure consistent legal interpretation that the "render inaccessible" applies to the whole of sub-section (a).

The sub-section is then to read –

render inaccessible, data, a computer program, a computer data storage medium or any part of a computer system in order to preserve evidence;

Clause 20

"Electronic communications service provider or person in control of computer system to furnish particulars to court"

This clause makes reference to an "*electronic communications identity number*" which is not defined in the Bill.

It is suggested that for the purposes of electronic communications service providers, a definition of an "*electronic communications identity number*" be provided.

Clause 32

"Assisting member of law enforcement agency or investigator"

It is submitted that the requirement to provide assistance is broad and should be narrowed to take into account what may be limited circumstances on the part of the person required to provide the assistance. The request by a police official or investigator may be beyond the means of the person being requested to assist or unreasonable.

The following revision is proposed (insertions underlined): -

"subject to a search warrant in terms of section 27 (1) must , if required, and to the extent that is reasonable to do so, provide –

- (a) Technical assistance; and*
- (b) Such other assistance as may be reasonably necessary for the specific investigation,"*

Clause 37

"Prohibition on disclosure of information"

We refer to clause 37(1) (e) and to possible circumstances where a competent authority may require disclosure of information before criminal proceedings are initiated. It is proposed that the provision is amended to read as follows: -

"(e) to any competent authority which requires it for the institution of criminal proceedings and the use of such information for evidentiary purposes in court proceedings.."

Alternatively, we are of the view that disclosure of information is sufficiently covered in Clause 37 (1) (c) as it reads *"if it is information which is required in terms of any law or as evidence in any court of law"* Clause 37(1) (e) should then be deleted.

Clause 39

"Expedited preservation of data direction"

Sub-clause (2) applies to *"archived communication-related information which an electronic communications services provider is no longer required to store due to the fact that the period contemplated in section 30(2)(a)(iii) of the Regulation of Communications and Provision of Communication-related Information Act, is due to come to an end."*

If the information is no longer required to be stored in terms of RICA, the Bill purports to extend the required retention time, however this is not explicitly set out but is implied in the wording of the clause. For certainty and clarity, we suggest inclusion of an express provision requiring an extended retention period for this information by electronic communication service providers.

Clause 43

"Search for, access to and seizure of data where no authorization is required"

Clause 43 requires some clarification as the wording is not clear and raises certain concerns.

First, "confidentiality and limitation of use" is used in this clause (as well as a number of other clauses relating to granting a police official access to data). Will this not have an effect on other pieces of legislation, for example, certain provisions of the Promotion of Access to Information Act, 2000 or the Protection of Personal Information Act, 2013, if it does have an effect, It is suggested that "confidential and limitation of use" be defined in the Bill.

Secondly, sub-clause (a) states that it applies "regardless of the geographical location of the data". Will this not be viewed as contravention of foreign law and also having cross border implications?

Lastly, sub-clause (b) states that disclosure is voluntary. Does this mean that a request for access to information can be declined and if so, what are the implications for such a decline?



Clause 52

"Obligations of electronic communications service providers and financial institutions"

Clause 52(4) of the Bill does not place an obligation on electronic communications service providers or financial institutions to do continuous monitoring of data, however, in terms of the BIS Guidance on Cyber resilience referenced by the recently issued SARB Guidance Note 4/2017, Financial Market Infrastructures (including financial institutions) are required to do continuous monitoring in order to detect anomalous activities and events.

The BIS Guidance on Cyber resilience addresses the aspect of detecting a cyber-attack and continuous monitoring which requires an FMI to establish capabilities to continuously monitor (in real time or near real time) and detect anomalous activities and events. One practice that may help to accomplish this is to set up what is commonly referred to as a "Security Operations Centre". These capabilities should adaptively be maintained and tested.

It is suggested that the SARB Guidance Note be aligned to the Bill (Section 52) and clarity be provided on which one takes precedence.

Clause 57

"Protection of critical information infrastructure"

It is noted that a financial sector regulator is not referenced in sub-clause 57(7) (a). It is however referenced in sub-clause 57(7) (e) relating to the choice of body for the resolution of the dispute, the financial sector regulator should also be referenced in sub-clause 57(7) (a) as well, to have the option to dispute the decision of the Cabinet member responsible for State security, as it relates to a financial institution as contemplated in sub-section 3(h).

With regard to the proposed directives in clause 57(4)(b), it is noted that the provisions that specify requirements of storing and archiving of data held by critical information infrastructure should be aligned with any other law that provides for retention and storage of data.

There is no reference to a "*financial institution*" in sub-clause 57(7) (i) to have the option to appeal the decision of the arbitrator to the High Court. We note this as a concern since the financial institution could be the subject of the dispute in terms of sub-clause 7(a). The financial institution should therefore have the option to appeal to the High Court.

It is also that our critical infrastructure may be considered as being critical when clause 57(2) (d) and (e) deals with loss, damage, disruption and immobilization to an infrastructure which may (d) "*cause a major economic loss*" and or (e) "*cause destabilization of the economy of the republic*".

Clarity is sought with regard to the remainder of Clauses 57 and 58 which respectively addresses the requirements in respect of auditing, controlling, monitoring and the implications (penalties) of failing to do so.

Consequential considerations: FSR Bill

We refer to clause 76(1)(d)(vii) and (e) of the FSR Bill and the provision regarding cooperation and collaboration between financial sector regulators and the South African Reserve Bank and reference to data collection measures 76(1)(d)(vii); and by establishing and using, where appropriate, common or shared data bases and other facilities 76(1)(e). It is recommended that the applicable sub-clauses of clauses 57 and 58 in this Bill are taken into consideration when applying clause 76 in the FSR Bill to ensure that where possible, consistency is maintained in the application of the provisions of this Bill, by financial sector regulators and the South African Reserve Bank.

FSR Bill: Clause 108(1) (i) Additional matters for making standards

It is further recommended that when standards in terms of clause 108(i) are drafted, the applicable sub-clauses of clause 57 and 58 of this Bill are reviewed and that either or both the Prudential Authority and the Financial Sector Conduct Authority, dependent on which authority will make such standards, to ensure consistency and to provide guidance for the manner and form in which these provisions in this Bill, if at all, will be dealt with in the standards made in terms of the FSR Bill.

Conclusion

BASA wishes to thank you and the Committee for the opportunity to provide comments on this Bill. In this regard, we humbly request that our comments and proposals are kindly afforded due consideration as the Committee's undertakes its processes and deliberations on this Bill.

Kindly do not hesitate to contact us should you have any queries or questions regarding our submission.

Thanking you in advance and with appreciation.

Yours Sincerely



Raksha Singh Semnarayan
Senior General Manager:
Market Conduct

