

Bills Committee on the Unsolicited Electronic Messages Bill

Administration's response to the views submitted by Hong Kong General Chamber of Commerce

(I)	Part 1 - Interpretation and meaning of terms, exclusions		
(1)	Definition of "Commercial Electronic Message"		
	Organisations / Individuals	Views / Concerns	Administration's Response
1.1.1	HKGCC	Welcome messages issued by local mobile operators to inbound roamers should be excluded from the scope of application of the Bill. Such welcome messages are sent to inbound roamers offering contact details for assistance when they connect to mobile carrier's network for the first time.	Our preliminary view is that such welcome messages to roamers who have subscribed to roaming services with their service providers would be considered messages to deliver services that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to and hence fall within the proposed item 2 of Table 2 of Schedule 1, and be excluded from the application of Part 2 of the Bill.
(II)	Part 2 - Rules about sending commercial electronic messages		
(1)	Other views/concerns on rules about sending commercial electronic messages		
	Organisations / Individuals	Views / Concerns	Administration's Response
2.1.1	HKGCC	Legitimate business messages of a pre-existing commercial relationship between sender and its customers should not be the target of the current Bill as they are already regulated under s.34 of the Personal Data (Privacy) Ordinance. The effect of the Personal Data (Privacy) Ordinance is that in	The UEM Bill and the Personal Data (Privacy) Ordinance focus on different aspects. The former concerns the act of sending messages, while the latter concerns the use of personal data for direct marketing. The UEM Bill prescribes some requirements that enable the recipient of a commercial electronic message

		<p>practice, many e-marketing practices are already taking place between senders and their existing customers, with an opt-out arrangement built-in. The Bill should not overlap with the Personal Data (Privacy) Ordinance in this respect.</p>	<p>to know who sent the message, how the unsubscribe facility should be provided and the effective date of unsubscribe requests. We consider that the UEM Bill complements the Personal Data (Privacy) Ordinance even in cases where the latter is applicable. Furthermore, with the proposed items 2 to 4 in Table 2 of Schedule 1, transactional, service-related or employment-related messages would be excluded from the application of Part 2 of the UEM Bill. Hence, those types of messages between the sender and its customers, likely to involve personal data and regulated under s.34 of the Personal Data (Privacy) Ordinance, would be excluded from the application of Part 2 of the UEM Bill.</p>
(III)	Part 3 – Rules about address harvesting and related activities		
(1)	<i>Other views/concerns on rules about address harvesting and related activities</i>		
	Organisations / Individuals	Views / Concerns	Administration’s Response
3.1.1	HKGCC	<p>While it is agreed that fines should be the main penalty for spamming activities, and that practices with fraudulent and deceptive intent should be subject to criminal sanctions including a suitable custodial sentence, it is</p>	<p>We do not agree that address harvesting or dictionary attacks are business practices engaged in by legitimate e-marketing businesses. We consider them to be deliberate acts that abuse the ease of searching for electronic addresses on the</p>

		<p>not certain that the penalties provided are commensurate with the offence, especially for address harvesting or dictionary attack. These refer to spamming activities which are questionable as a business practice, but for which criminal or malicious intent may not be easy to establish. The principle should be maintained that criminal sanction is a very serious matter and should be applied to business behaviours only when criminality can be unambiguously established.</p>	<p>Internet and/or the extremely low incremental costs for sending a huge number of e-mails to harvested or synthesised addresses with an expectation of very low success rates. Such acts would effectively transfer the costs of processing such commercial electronic messages to the telecommunications service providers and the recipients for the senders' own gains. Those techniques are also used frequently by illicit spammers to maximise the reach of their messages. We consider that such abuse of the telecommunications networks and services should be prohibited and the proposed penalty are proportional.</p>
(IV)	Part 7 – Miscellaneous provisions		
(1)	<i>Directors' liability</i>		

4.1.1	HKGCC	<p>The presumption of liabilities of directors and partners amounts to having them “presumed guilty unless proven innocent” – a matter of much concern to the business sector. As in the case of copyright law, as far as criminal sanctions are concerned, the burden of proof must lie firmly with the prosecution.</p>	<p>Clause 54 is intended to make clear the responsibilities of managing directors and partners in relation to the acts of their companies or partnerships. It does not relieve the prosecution of proving an offence beyond reasonable doubt in accordance with normal common law principles. Clause 54(3) makes it clear that a managing director, managing partner or other manager who is charged with an offence under the Bill bears only an “evidential” burden to displace the presumptions created by clauses 54(1) and 54(2). The person charged is not required to disprove a critical element of the offence. Drawing reference to the proposed CSAs to similar provisions of Copyright (Amendment) Bill 2006, we have proposed amendments to this clause to clarify that only evidential burden will be imposed.</p>
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