

立法會
Legislative Council

LC Paper No. LS93/05-06

**Paper for the House Committee Meeting
on 21 July 2006**

**Legal Service Division Report on
Unsolicited Electronic Messages Bill**

I. SUMMARY

1. **Object of the Bill** To introduce a statutory framework for regulating the sending of unsolicited electronic messages of a commercial nature.

2. **Comments**
 - (a) The Bill is to apply to all forms of commercial electronic messages which purport to offer, advertise or promote the supply of goods, services, etc. in the furtherance of business, except person-to-person voice or video messages without any pre-recorded elements.

 - (b) Commercial electronic messages originating from Hong Kong as well as those sent from overseas to a Hong Kong electronic address will be regulated.

 - (c) Rules are proposed to regulate the sending of commercial electronic messages including rules requiring such messages to include accurate sender information and an unsubscribe facility.

 - (d) For enforcement purposes, the Bill creates a number of offences, and confers investigation and enforcement powers on the Telecommunications Authority

3. **Public Consultation** A two-month public consultation exercise was launched on 20 January 2006 on the detailed legislative proposals.

4. **Consultation with LegCo Panel** The Panel on Information Technology and Broadcasting was consulted on the legislative proposals at its meeting on 17 March 2006.

5. **Conclusion** Members are recommended to form a Bills Committee to study the Bill in detail.

II. REPORT

Object of the Bill

To introduce a statutory framework for regulating the sending of unsolicited electronic messages of a commercial nature.

LegCo Brief Reference

2. File Ref.: CTB(CR) 7/5/18(06) issued by the Communications and Technology Branch of the Commerce, Industry and Technology Bureau on 5 July 2006.

Date of First Reading

3. 12 July 2006.

Background

4. At present, there is no general legislation in Hong Kong regulating unsolicited electronic messages (“UEMs”) which are commonly referred to as “spam”. Certain acts that may facilitate or lead to spamming, or certain criminal acts supported by spamming activities are prohibited under existing provisions in the Telecommunications Ordinance (Cap. 106), Crimes Ordinance (Cap. 200) and Theft Ordinance (Cap. 210). For example, if the sending of UEMs involves unauthorized access to programs or data held in a computer, it may be punishable as an offence under section 27A of the Telecommunications Ordinance.

5. On 25 June 2004, the Office of the Telecommunications Authority issued a public consultation paper on “Proposals to Contain the Problem of Unsolicited Electronic Messages”. The paper examined the problem caused by various forms of UEMs, the effectiveness of existing anti-spam measures and sought views on the possible ways to combat the problem. Between March and June 2005, the Administration sought the views of representative stakeholders on the subject. Based on the views received in 2004 and 2005, and having regard to the practice of advanced economies such as the United States, the European Union and Australia, the Administration considers that a dedicated piece of anti-spam legislation should be introduced in Hong Kong to address concerns about the impact of UEMs on the effectiveness of electronic communications and the costs to end-users. The Administration has since drawn up the detailed legislative proposals which are set out in a consultation paper on “Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages” issued by the Commerce, Industry and Technology Bureau (“CITB”) in January 2006 (LC Paper No. CB(1)1071/05-06(03)).

Comments

6. The Bill seeks to introduce a statutory framework for regulating the sending of UEMs of a commercial nature. Most of the proposals in this Bill are based on the legislative proposals set out in the consultation paper issued by CITB in January 2006.

Scope of application

7. The Bill proposes to regulate commercial electronic messages only. Commercial electronic messages are defined in the Bill as messages the purpose of which is to offer, advertise or promote the supply or provision of goods, services, facilities, land or a business or investment opportunity, etc. in the furtherance of any business. Electronic messages which do not have such a commercial purpose are outside the scope of the Bill.

8. It is proposed that the regulatory framework will apply to all forms of electronic communications, including e-mails, short messaging service, fax, voice or video calls. However, in order to leave room for normal and legitimate marketing activities, the Administration proposes to exclude person-to-person voice or video messages without any pre-recorded elements. Transmission of sound and video materials on broadcasting channels which are already regulated under the Telecommunications Ordinance and Broadcasting Ordinance (Cap. 562) will also be excluded from the application of the Bill.

9. Given the cross-boundary nature of UEMs, it is proposed that the Bill should have extra-territorial application in that it will regulate UEMs originating from Hong Kong as well as those sent from overseas to a Hong Kong electronic address.

Rules about sending commercial electronic messages and the enforcement of rules

10. An “opt-out” regime is proposed in the Bill whereby a sender may send electronic messages to recipients, but must provide a functional unsubscribe facility through which a recipient can send a request to stop receiving further electronic messages at his electronic address. According to the Administration, an “opt-out” scheme would provide small and medium enterprises (“SMEs”) and start-up enterprises in Hong Kong with room to promote their products or services using low cost means.

11. To support the “opt-out” regime, the Bill proposes to empower the Telecommunications Authority (“TA”) to establish “do-not-call” registers to provide registered users of electronic addresses with a means by which they may notify senders of commercial electronic messages that they do not wish to receive such messages. If an electronic address is listed in a “do-not-call” register, commercial electronic messages are not allowed to be sent to that electronic address unless the registered user of that electronic address has given consent.

12. Other proposed rules relating to the sending of commercial electronic messages include rules requiring such messages to include accurate sender information and those prohibiting misleading subject headings in the messages.

13. To enforce the above rules, the Bill proposes to adopt an enforcement notice regime under which TA may, if he forms the opinion that a person has contravened the rules, issue an enforcement notice to the person to specify the steps required to remedy the contravention. Failure to comply with the enforcement notice will be an offence punishable by a fine at level 6 (\$100,000) for the first conviction, and a fine of \$500,000 for the second or subsequent conviction.

Offence provisions

14. Apart from the offence relating to enforcement notices, the Bill also proposes a number of new offences which include:

- (a) offences relating to the supply, acquisition and use of address-harvesting software or harvested lists of electronic addresses for sending commercial electronic messages without the consent of registered users of electronic addresses; and
- (b) offences to prevent fraud and other illicit activities related to the transmission of commercial electronic messages.

15. The maximum penalty proposed for the offences relating to address-harvesting is a fine at level 6 (\$100,000) on summary conviction, and a fine of \$1,000,000 and imprisonment for five years on conviction on indictment. As for fraud and related activities in connection with spamming, the Bill proposes a heavier penalty, that is, a fine of any amount to be determined by the court and imprisonment for 10 years.

Liability of directors, partners, etc.

16. Under clause 54 of the Bill, if a company or partnership has committed an offence, a director of the company or a partner of the partnership at the time the offence was committed shall be presumed also to have done the act that constituted the offence unless he proves that he did not authorize the act to be done. Clause 54(3) provides that a director or partner is taken to have proved that he did not authorize the act in question to be done if sufficient evidence is adduced to raise an issue with respect to that fact and the contrary is not proved by the prosecution beyond reasonable doubt.

Other provisions

17. Other provisions deal with TA's investigation and enforcement powers, the setting up of an appeal mechanism relating to TA's issue of enforcement notices, conferring a right of action on persons who suffer loss or damage by reason of the

contravention of the Bill to bring civil proceedings against the person who committed the contravention, and consequential amendments to other Ordinances.

18. If enacted, the Bill will come into operation on a day to be appointed by the Secretary for Commerce, Industry and Technology by notice published in the Gazette.

Public Consultation

19. The Administration launched a two-month public consultation exercise on 20 January 2006 on the detailed legislative proposals for the Bill. According to the LegCo Brief, there was strong support for the Government to introduce a piece of anti-spam legislation, and the Administration has considered the specific comments received on the detailed legislative proposals and incorporated those comments in the Bill where appropriate.

Consultation with LegCo Panel

20. The Administration consulted the Panel on Information Technology and Broadcasting on the legislative proposals at its meeting on 17 March 2006. Deputations were also invited to attend the meeting to give views on the proposals. In general, members of the Panel agreed with the guiding principles of the Bill, including the need to strike a balance between safeguarding the freedom of individuals in deciding whether to receive certain commercial information and ensuring that freedom of expression is not impaired. To prevent abuse by spammers, members and deputations suggested the use of cryptographic technology in publishing “do-not-call” registers. Concerns were expressed on the effectiveness of the proposed enforcement regime based on the use of enforcement notice and the implications of the Bill on SMEs which rely heavily on e-marketing to promote their products and services.

Conclusion

21. This Bill introduces proposals that could impact on many stakeholders in the community, including SMEs, e-marketers, Internet Service Providers and consumers. Members are recommended to form a Bills Committee to study the Bill in detail.

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