

LEGISLATIVE COUNCIL BRIEF

ELECTRONIC TRANSACTIONS ORDINANCE (AMENDMENT OF SCHEDULE 3) ORDER 2009 ELECTRONIC TRANSACTIONS (EXCLUSION) (AMENDMENT) ORDER 2009

INTRODUCTION

On 7 April 2009, the Secretary for Commerce and Economic Development (the Secretary) made the Electronic Transactions Ordinance (Amendment of Schedule 3) Order 2009 set out in Annex A under Section 50 of the Electronic Transactions Ordinance (Cap. 553) (ETO) to add a provision to Schedule 3 to the ETO.

2. On 6 April 2009, the Permanent Secretary for Commerce and Economic Development (Communications and Technology) (the Permanent Secretary) made the Electronic Transactions (Exclusion) (Amendment) Order 2009 set out in Annex B under Section 11(1) of the ETO to repeal certain exemptions from the Electronic Transactions (Exclusion) Order (the Exclusion Order).

JUSTIFICATIONS

Background

3. The ETO was enacted in January 2000 and came into full operation in April 2000. Subject to certain requirements set out in Sections 5 to 8 of the ETO and limitations on operation of Sections 5 to 8 of the ETO set out in provisions under Part IV of the ETO, the ETO gives electronic records and electronic/digital signatures used in electronic transactions the same legal status as that of their paper-based counterparts as follows –

- (a) Section 5 of the ETO provides that if a rule of law requires or permits information to be or given in writing, the use of electronic records satisfies the rule of law;
- (b) Section 5A of the ETO provides that if a rule of law under a statutory provision specified in Schedule 3 to the ETO requires or permits a document to be served on a person by personal service or by post, the service of the document in the form of an electronic record satisfies the rule of law;
- (c) Section 6(1) of the ETO provides that if a rule of law requires a signature of a person on a document and neither the person whose signature is required nor the person to whom the signature is to be given is or is acting on behalf of a government entity, an electronic signature satisfies the requirement;
- (d) Section 6(1A) of the ETO provides that if a rule of law requires a signature of a person on a document and the person whose signature is required and/or the person to whom the signature is to be given is/are acting on behalf of a government entity/entities, a digital signature satisfies the requirement;
- (e) Section 7 of the ETO provides that if a rule of law requires certain information to be presented or retained in its original form, that requirement is satisfied by presenting or retaining the information in the form of electronic records; and
- (f) Section 8 of the ETO provides that if a rule of law requires certain information to be retained, that requirement is satisfied by retaining electronic records.

Schedule 3 to the ETO

4. Certain statutory provisions contain requirements of serving documents on the parties concerned by post or in person. These statutory provisions were enacted at the time when electronic transactions were not prevalent. In some cases, there are now no justifications to

exclude the electronic means for serving the documents and such statutory provisions, if remain unaltered, will become an impediment to electronic transactions and to the implementation of e-Government.

5. To remove such unnecessary impediments, Section 5A of the ETO and Schedule 3 to the ETO were introduced through the Electronic Transactions (Amendment) Ordinance 2004 enacted in June 2004. Section 5A provides that for documents that are required or permitted to be served by post or in person under the provisions set out in Schedule 3, the service of the documents in the form of electronic records satisfies the requirement. When Schedule 3 to the ETO was introduced, it was noted that the schedule would be expanded over time through an ongoing review process. Section 50 of the ETO provides that the Secretary may by an order published in the Gazette amend Schedule 3 to the ETO. Since 2004, three amendments have been made to Schedule 3 for inclusion of relevant statutory provisions.

The Exclusion Order

6. Government departments took the lead in setting a good example in adopting electronic transactions by accepting electronic submission under the bulk of the statutory provisions in the laws of Hong Kong. However, for some specific statutory provisions concerning the operation of individual Government departments, there is a genuine and practical need to exclude electronic submissions/transmissions because of operational, technological or other reasons. To ensure that the Government departments concerned would continue to operate smoothly, the Permanent Secretary¹ has been given the power under Section 11(1) of the ETO to exclude by order published in the Gazette specific statutory provisions from the application of Sections 5, 6, 7 or 8 of the ETO. The Exclusion Order was published in the Gazette on 3 March 2000 and came into effect on 7 April 2000 after negative vetting by the Legislative Council.

¹ The power to amend the Exclusion Order under Section 11(1) of the ETO has been transferred from the then Secretary for Commerce, Industry and Technology to the then Permanent Secretary for Commerce, Industry and Technology (Communications and Technology) through the Electronic Transactions (Amendment) Ordinance 2004 which has become effective from 30 June 2004. Since the re-organisation of policy bureaux with effect from 1 July 2007, the power has been transferred to the Permanent Secretary for Commerce and Economic Development (Communications and Technology).

7. The statutory provisions covered by the Exclusion Order can be classified into the following four categories –

- (a) provisions which have to be excluded due to the solemnity of the matter or document involved, e.g. provisions concerning the electoral process;
- (b) provisions which have to be excluded on operational grounds, e.g. provisions concerning the production of documents to Government authorities on the spot;
- (c) provisions which have to be excluded due to the involvement of voluminous submissions and complex plans which would be difficult to handle electronically at present, e.g. provisions concerning submission of documents and plans to the works departments; and
- (d) provisions which have to be excluded because of international practices, e.g. provisions concerning documents to be kept by the flight crew for air navigation purposes.

8. When the Exclusion Order was first made in 2000, the Government made a commitment to withdrawing the exemptions where appropriate, while noting the need to make new exemptions with the enactment of new legislation where circumstances so merit. So far, seven amendment orders have been made to amend the Exclusion Order to withdraw exemptions that were no longer necessary and to provide for new exemptions with the enactment of new legislation.

Proposals

9. We propose the following amendments to Schedule 3 to the ETO and the Exclusion Order:

- (a) inclusion of one additional provision into Schedule 3, relating to the serving of schedules for the purpose of statistical inquiry; and

(b) withdrawal of two currently exempted provisions from the Exclusion Order, relating to submissions of applications and issues of environmental permits.

10. Details of the amendments proposed in paragraph 9(a) and (b) above are set out at Annex C and Annex D respectively.

THE ORDERS

11. The Electronic Transactions Ordinance (Amendment of Schedule 3) Order 2009 at Annex A sets out the specific statutory provision to be added to Schedule 3 to the ETO, as proposed in paragraph 9(a) above.

12. The Electronic Transactions (Exclusion) (Amendment) Order 2009 at Annex B sets out the specific statutory provisions to be repealed from the Exclusion Order, as proposed in paragraph 9(b) above.

LEGISLATIVE TIMETABLE

13. The Electronic Transactions Ordinance (Amendment of Schedule 3) Order 2009 and the Electronic Transactions (Exclusion) (Amendment) Order 2009 will be gazetted on 30 April 2009 and will be tabled before the Legislative Council on 6 May 2009. The target commencement date of the two orders falls on 24 June 2009.

IMPLICATIONS OF THE PROPOSAL

14. The proposals are in conformity with the Basic Law, including the provisions concerning human rights. Allowing the service of certain documents in the form of electronic records and repealing exemptions that have become unnecessary do not give rise to any financial or staffing implications.

PUBLIC CONSULTATION

15. The proposed amendments will give the Government and the public the option of satisfying the requirements under certain statutory provisions by electronic means, in addition to the existing option of using the paper form. Moreover, the principles for making exclusions from the electronic process set out in paragraph 7 above were noted by the Legislative Council when the Exclusion Order was first made, and the proposed repeal of existing exemptions follows these established principles. No special public consultation is therefore considered necessary.

PUBLICITY

16. We will publicize the new provision added to Schedule 3 to the ETO and the provisions repealed from the Exclusion Order through the relevant Government websites and other publicity materials relating to the concerned provisions.

ENQUIRIES

17. Any enquiries on this brief should be addressed to Mr. Dennis Pang, Head of Digital Economy Facilitation, at 2582 4501 or by facsimile at 2802 4549.

**Office of the Government Chief Information Officer
Commerce and Economic Development Bureau
April 2009**

**ELECTRONIC TRANSACTIONS ORDINANCE
(AMENDMENT OF SCHEDULE 3) ORDER 2009**

(Made by the Secretary for Commerce and Economic Development under section 50 of the Electronic Transactions Ordinance (Cap. 553))

1. Commencement

This Order comes into operation on 24 June 2009.

2. Service of documents

Schedule 3 to the Electronic Transactions Ordinance (Cap. 553) is amended by adding –

“10. Census and Statistics Ordinance (Cap. 316) Section 12(3)(a)
and (b)”.



Secretary for Commerce and
Economic Development

7 April 2009

Explanatory Note

This Order adds a provision to Schedule 3 to the Electronic Transactions Ordinance (Cap. 553). The effect is that a document permitted to be served on a person by personal service or post under that provision may be served in the form of an electronic record. The electronic record must be served to an information system designated by the person, and the information in it must be accessible so as to be usable for subsequent reference.

**ELECTRONIC TRANSACTIONS (EXCLUSION)
(AMENDMENT) ORDER 2009**

(Made by the Permanent Secretary for Commerce and Economic Development (Communications and Technology) under section 11(1) of the Electronic Transactions Ordinance (Cap. 553))

1. Commencement

This Order comes into operation on 24 June 2009.

2. Provisions excluded from application of section 5 of Ordinance

Schedule 1 to the Electronic Transactions (Exclusion) Order (Cap. 553 sub. leg. B) is amended, in item 52, by repealing “, 10(1)(a), 12(1) and (2)”.



Permanent Secretary for Commerce
and Economic Development
(Communications and Technology)

6 April 2009

Explanatory Note

Section 5 of the Electronic Transactions Ordinance (Cap. 553) (“the Ordinance”) provides that if a rule of law requires or permits information to be or given in writing, the use of electronic records satisfies that rule of law. The statutory provisions excluded from the application of section 5 of the Ordinance are listed in Schedule 1 to the Electronic Transactions (Exclusion) Order (Cap. 553 sub. leg. B) (“the principal Order”).

2. This Order deletes sections 10(1)(a) and 12(1) and (2) of the Environmental Impact Assessment Ordinance (Cap. 499) from Schedule 1 to the

principal Order. Those provisions will no longer be so excluded and electronic records can be used for the purposes of section 5 of the Ordinance.

Provision Proposed to be Included in Schedule 3 to the ETO

Details of the provision containing the permission of serving documents by post or in person which is proposed to be included in Schedule 3 to the ETO are set out below.

Serving of schedules for the purpose of statistical inquiry

2. Under Section 12(3)(a) and (b) of the Census and Statistics Ordinance (Cap. 316), for the purpose of carrying out a statistical inquiry, delivery of a schedule to a specified person for completion may be effected personally by a census officer or by being sent by post to the last known postal address of such specified person. As the Census and Statistics Department is going to provide an option for delivery of schedules to a specified person in electronic form, it is proposed that Section 12(3)(a) and (b) of the Census and Statistics Ordinance (Cap. 316) be added to Schedule 3 to the ETO so that such schedules can be served upon the specified person in the form of electronic record.

Exemptions Proposed to be Withdrawn from the Exclusion Order

Details of the provisions proposed to be withdrawn from the Exclusion Order are set out below.

Application for environmental permit and further environmental permit

2. Under Section 10(1)(a) of the Environmental Impact Assessment Ordinance (Cap. 499) (EIAO), a person who wishes to have constructed, construct or operate a designated project listed in Part I of Schedule 2 or to decommission a designated project listed in Part II of Schedule 2 of the EIAO shall apply to the Director of Environmental Protection (DEP) for an environmental permit in the form approved by the DEP. Section 12(1) provides that where responsibility for a designated project for which an environmental permit has been issued changes while the environmental permit is still in force, the person who assumes responsibility of the designated project shall before he assumes the responsibility apply for and obtain an environmental permit for the whole or a part of the project. Section 12(2) further provides that a person applying for a further environmental permit under this section is not required to submit an environmental impact assessment report where he satisfies the DEP that there has been no material change to the designated project since the previous environmental permit was issued. Pursuant to the completion of an Electronic Transaction System to process the concerned electronic applications, the exemption of Sections 10(1)(a) and 12(1) and (2) of the EIAO from Section 5 of the ETO can be withdrawn.