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Legislative Council

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**Background brief on the
Unsolicited Electronic Messages Bill**

Purpose

This paper sets out the background of the Unsolicited Electronic Messages Bill (the Bill) and summarizes the major views and concerns expressed by Members when the proposed legislative framework and the subsequent detailed legislative proposals to tackle unsolicited electronic messages (UEMs) were deliberated at the meetings of the Panel on Information Technology and Broadcasting (the Panel).

Background

2. The subject of spamming has been receiving ongoing attention by Members. Questions have been raised from time to time at Council meetings on issues such as statutory measures and/or industry self-regulation to prevent email spamming, junk faxes and unsolicited advertisements via fax or other electronic medium.

3. On 25 June 2004, the Office of the Telecommunications Authority issued a consultation paper on “Proposals to contain the problem of unsolicited electronic messages”. That paper examined the problem caused by various forms of UEMs, the effectiveness of existing anti-spam measures and sought views on a range of possible ways to combat the problem, including the need for anti-spam legislation. On 24 February 2005, the Administration announced the launch of a campaign entitled “STEPS” to fight UEMs in collaboration with the industry and the community. “STEPS” stands for Strengthening existing regulatory measures, Technical solutions, Education, Partnerships and Statutory measures. A new piece of anti-spam legislation was one of the measures proposed under that campaign.

4. At the Council meeting held on 29 June 2005, Members passed a motion on enhancing the regulation of commercial marketing practices urging the Administration to, inter alia, establish a system for blocking promotional calls, define the term “spam” and consider requiring telecommunications companies to

provide customers with services to filter spam promotional calls or short messages.

5. Between March and June 2005, the Administration engaged representative stakeholders to seek their views on the guiding principles and key aspects of the framework for the proposed anti-spam legislation. Following those informal consultations, a draft framework was presented to the Panel in July 2005. Taking into account the views expressed at the Panel as well as the latest developments in anti-spam legislation in other jurisdictions, the Administration developed detailed legislative proposals for the Bill and launched a 2-month public consultation exercise on 20 January 2006. The Panel discussed the proposals with the Administration and deputations at the meeting on 17 March 2006.

The Bill

6. The object of the Bill is to set up a scheme for regulating the sending of UEMs of a commercial nature originating from Hong Kong or sent from overseas to a Hong Kong electronic address. The Bill was gazetted on 5 July 2006 and introduced into the Legislative Council on 12 July 2006. At the House Committee on 21 July 2006, Members agreed to form a Bills Committee to study the Bill in detail.

Discussions at the Panel

7. The Panel was briefed on the proposed legislative framework in July 2005, and the detailed legislative proposals in March 2006. The major views and concerns expressed by members and deputations are summarized below.

Extra-territorial application of the legislation

8. It was suggested in the draft legislative framework presented to the Panel in July 2005 that the Bill should be applicable to the sending of commercial electronic messages if the person involved is physically present in Hong Kong, irrespective of where the commercial electronic messages are sent to. Some members queried the effectiveness of this proposed legislation in view of the extra-territorial nature of the spamming problem and the fact that many spam electronic messages originated from overseas. The Administration has subsequently revised the approach and now proposes that the legislation 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.

Safeguarding freedom of speech and expression

9. Members were concerned how the Administration could uphold freedom of speech and expression while regulating the transmission of commercial UEMs. The Administration explained that it aimed to target the proposed legislation at UEMs of a commercial nature only because they caused the most problems. It acknowledged the rights of the sender to disseminate information on its products and services, but such rights should be subject to reasonable limits. The proposed “opt-out regime” was an arrangement which would not prohibit the transmission of commercial electronic messages altogether, and at the same time safeguard the recipients’ freedom in deciding whether to receive or refuse such commercial information.

“Do-not-call registers”

10. There was the concern that the “do-not-call registers” of telephone numbers would be abused by overseas spammers who would make unsolicited calls to Hong Kong through IP telephony to those registered numbers. Notwithstanding the extra-territorial application of the proposed Bill, there would be enormous difficulties in enforcement. Some deputations suggested the Administration consider employing the cryptographic hash function to protect the “do-not-call registers” from being abused. A deputation also recommended the adoption of a scheme similar to the “national do-not-call registry” run in the United States, under which e-marketers were required to first register online with the “do-not-call registry” to give their identifying information to assist in future enforcement.

11. The Administration pointed out that with the high penetration of telephone services in Hong Kong, the probability of connecting to a valid telephone number at random was very high. Therefore, spammers might not need to resort to accessing the “do-not-call register” of telephone numbers in order to reach the recipients. The Administration however took note of deputations’ suggestions for consideration.

12. On the concern that telephone numbers might be maliciously included in the “do-not-call registers” without the knowledge of the user, the Administration indicated that it would request the telecommunications operators to verify the identity of the person who had applied to place a telephone number onto the “do-not-call registers” so as to confirm that the person was the current user of that number. In this connection, a member suggested that the Administration could seek the cooperation of telecommunications operators to include in their mobile phone service application form an option for users to join the “do-not-call registers”.

13. Noting that the Administration did not intend to set up a “do-not-call register” for email addresses, a member suggested setting up such a register as the problem of email spamming was very serious.

Non-statutory measures

14. Considering that most mobile phone recipients of commercial UEMs were concerned about the unfairness of charges being incurred on them as a result of answering the calls, there was a suggestion of adopting a “calling party pays” option under which senders of commercial UEMs, instead of the recipients, would pay the airtime/roaming charges thus incurred. The Administration explained that telecommunications operators could not ascertain the nature of the calls and re-direct the charges to the caller.

Enforcement

15. On enforcement, members noted that under the proposed enforcement mechanism, if the Telecommunications Authority was of the opinion that a contravention of the rules under the “opt-out regime” had taken place, he would issue an enforcement notice to the organization in breach specifying the steps to remedy the contravention. Failure to comply with the enforcement notice would be an offence punishable by fine. A deputation considered the proposed two-tier enforcement mechanism ineffective because spammers might make use of the first-tier leeway where no prosecution could be taken out.

Accurate sender information

16. There was concern on whether the proposals would require mandatory display of senders’ telephone numbers so that recipients could decide whether to answer the calls or not. The Administration confirmed that senders of machine-generated unsolicited marketing calls must display their telephone numbers.

Small and Medium Enterprises (SMEs)

17. A member considered that there was a need to ensure that the proposed Bill would not have an adverse impact on the operation of SMEs. The Administration explained that it had proposed to adopt an “opt-out regime”, rather than an “opt-in regime” in order to address the concern about the impact on the operation of SMEs. Moreover, it was the Administration’s plan to commence different parts of the Bill on different dates to allow time for SMEs to prepare themselves for compliance with the legislation, set up the necessary system, gear up their equipment and train up their staff. According to the experience of New Zealand, it took a company about several thousand Hong Kong dollars to enhance the existing system to comply with the requirements under the proposed legislation.

Relevant papers

18. A list of relevant papers is at the **Appendix**.

Council Business Division 1
Legislative Council Secretariat
22 September 2006

Unsolicited Electronic Messages Bill

List of relevant papers

Council/Committee	Date of meeting	Paper
Panel on Information Technology and Broadcasting (ITB Panel)	14 March 2005	<p>Consultation paper on “Proposals to contain the problem of unsolicited electronic messages” on 25 June 2004 (LC Paper No. CB(1)2316/03-04) http://www.legco.gov.hk/yr04-05/english/panels/itb/papers/itbcb1-2316-e.pdf</p> <p>Information paper on “Proposals to contain the problem of unsolicited electronic messages” provided by the Administration (LC Paper No. CB(1)1052/04-05(06)) http://www.legco.gov.hk/yr04-05/english/panels/itb/papers/itb0314cb1-1052-6e.pdf</p> <p>Press release on “Government to Take ‘STEPS’ against Spamming” on 24 February 2005 (LC Paper No. CB(1)1005/04-05(01)) http://www.legco.gov.hk/yr04-05/english/panels/itb/papers/itbcb1-1005-1e.pdf</p> <p>Minutes of meeting (LC Paper No. CB(1)1197/04-05) http://www.legco.gov.hk/yr04-05/english/panels/itb/minutes/itb050314.pdf</p>
Council meeting	29 June 2005	<p>A motion moved by Hon CHAN Kam-lam on enhancing the regulation of commercial marketing practices was passed with amendment (Hansard) http://www.legco.gov.hk/yr04-05/english/counmtg/hansard/cm0629ti-translate-e.pdf</p>

Council/Committee	Date of meeting	Paper
ITB Panel	11 July 2005	<p>Information paper on “Draft framework of proposed anti-spam legislation” provided by the Administration (LC Paper No. CB(1)1985/04-05(01)) http://www.legco.gov.hk/yr04-05/english/panels/itb/papers/itb0711cb1-1985-1e.pdf</p> <p>Background brief on proposals to contain the problem of unsolicited electronic messages prepared by the Legislative Council Secretariat (LC Paper No. CB(1)1978/04-05) http://www.legco.gov.hk/yr04-05/english/panels/itb/papers/itb0711cb1-1978e.pdf</p> <p>Minutes of meeting (LC Paper No. CB(1)2275/04-05) http://www.legco.gov.hk/yr04-05/english/panels/itb/minutes/itb050711.pdf</p>
ITB Panel	17 March 2006	<p>Consultation paper on legislative proposals to contain the problem of unsolicited electronic messages (LC Paper No. CB(1)1071/05-06(03)) http://www.legco.gov.hk/yr05-06/english/panels/itb/papers/itb0317cb1-1071-3e.pdf</p> <p>Press release on 20 January 2006 on proposed anti-spam legislation (LC Paper No. CB(1)772/05-06(02)) http://www.legco.gov.hk/yr04-05/english/panels/itb/papers/itb0711cb1-772-2e.pdf</p> <p>Background brief on proposals to contain the problem of unsolicited electronic messages prepared by the Legislative Council Secretariat (LC Paper No. CB(1)1072/05-06) http://www.legco.gov.hk/yr05-06/english/panels/itb/papers/itb0317cb1-1072-e.pdf</p>

Council/Committee	Date of meeting	Paper
		Minutes of meeting (LC Paper No. CB(1)1382/05-06) http://www.legco.gov.hk/yr05-06/english/panels/itb/minutes/itb060317.pdf
Council meeting	12 July 2006	Unsolicited Electronic Messages Bill (LC Paper No. CB(3)735/05-06) http://www.legco.gov.hk/yr05-06/english/bills/b0607071.pdf Legislative Council Brief on “Unsolicited Electronic Messages Bill” issued by the Commerce, Industry and Technology Bureau (Ref: CTB(CR)7/5/18(06)) http://www.legco.gov.hk/yr05-06/english/bills/brief/b35_brf.pdf
House Committee	21 July 2006	Legal Service Division Report on Unsolicited Electronic Messages Bill (LC Paper No. LS93/05-06) http://www.legco.gov.hk/yr05-06/english/hc/papers/hc07211s-93-e.pdf