

**For information
On 14 March 2005**

**Legislative Council Panel
on Information Technology and Broadcasting**

Proposals to Contain the Problem of Unsolicited Electronic Messages

Purpose

This paper informs Members of the result of the consultation on proposals to contain the problem of unsolicited electronic messages (UEMs) in Hong Kong and the planned course of action.

The Consultation

2. On 25 June 2004, the Office of the Telecommunications Authority (OFTA) issued a consultation paper on “Proposals to contain the problem of Unsolicited Electronic Messages” (the Consultation Paper) with a view to ascertaining the size of the UEM problem and soliciting views from stakeholders on how the problem should be tackled. The consultation ended on 25 October 2004 with 42 submissions received. A summary of the submissions is given in **Annex**.

3. From the statistics provided in the submissions, we conclude that fax and emails are the main problem areas at the moment. We note that UEMs transmitted through short messaging service (SMS) and multi-media messaging service (MMS) on mobile phones are not yet a major nuisance, probably because of the costs involved in sending such messages. However, if the costs for transmitting such messages come down in future, they could become a bigger problem.

“STEPS” Campaign to Tackle the Problem of UEMs

4. Drawing on the views and ideas in the submissions and recent developments, on 24 February 2005, the Secretary of Commerce, Industry and Technology announced the launch of a campaign entitled “STEPS” to join hands with the industry and the community to fight UEMs.

“S” – Strengthening Existing Regulatory Measures

5. In conjunction with relevant industry associations and service providers, the Government will start work in two areas – fax and SMS and MMS.

6. For fax, the Government will work with fixed telecommunications network service providers to penalise advertisers who continue to spam recipients on the “not-to-call” list by reducing the timeframe required to cut off their access to telecommunications services, which is their means to send out fax advertisements.

7. For SMS and MMS, the Government plans to work with the industry to extend the existing code of practice for mobile network operators to cover both inter-operator and intra-operators SMS and MMS unsolicited promotional messages.

“T” – Technical Solutions

8. The Government will collaborate with the industry to organise seminars, conferences and exhibitions to promote the latest anti-spam technical solutions.

“E” – Education

9. The Government will work with industry organisations to develop an information campaign on spam to raise the level of awareness and provide accurate information and useful resources to consumers. We will also feature spamming as a topic in the Government’s regular promotion and user education events, and develop user tips for education purposes.

“P” – Partnerships

10. One possible partnership is the development of a common blacklist to filter spam at the local Internet Service Provider (ISP) level. The Government will work with industry organisations to facilitate the process and liaise with relevant authorities to ensure that the sharing of information and maintaining the common blacklist complies with relevant laws, such as the Personal Data (Privacy) Ordinance.

11. On global partnership, the Commerce, Industry and Technology Bureau has become one of the Founding Signatories of the Seoul-Melbourne Multilateral Memorandum of Understanding on Co-operation in Countering Spam

(Anti-spam MoU). The Anti-spam MoU is geared towards cooperation and information sharing on technological, policy and educational solutions to spam and provides a platform for working level cooperation and information exchange among anti-spam agencies of Asia-Pacific signatories.

“S” – Statutory Measures

12. One key area of the “STEPS” campaign involves the enactment of an anti-spam legislation. Such a piece of legislation would prevent Hong Kong from becoming a safe haven sheltering illicit spammers. It would facilitate co-operation with overseas jurisdictions with similar legislation in investigation and enforcement work against spammers.

13. The Government notes that the views in the submissions to the consultation exercise were divided on several aspects of legislation. For instance, some consider that legislation should be technology neutral and hence should cover all forms of UEMs. But some prefer to confine the scope of the legislation to areas where UEMs are more serious. Other aspects of the legislation where different views are presented in the submissions are set out below –

- (a) **whether the legislation should cover commercial UEMs only** (on the ground that they cause the most problems), **or all UEMs** (since all UEMs are unsolicited irrespective of their nature);
- (b) **whether the legislation should cover cold calls and automatically generated voice/video electronic messages:** Some opine that section 20 of the Summary Offences Ordinance (Cap. 228) already covers “cold call” situations. Therefore, only automatically generated messages should be covered as these can cause nuisance to a lot of people;
- (c) **whether the legislation should stipulate “opt-in” (i.e. UEMs can be sent only with the recipient’s prior consent) or “opt-out” (i.e. UEMs may be sent without the recipient’s prior consent, but such UEMs should stop upon the recipient indicating unwillingness to receive further UEMs) options for recipients of UEMs:** The former gives greater protection to recipients while the latter provides more room for marketers to access their potential customers;
- (d) **whether the legislation should mandate e-mail header labelling**

requirements: This concerns consumers' right to know through clear identification of messages in e-mail headers. Some people are however concerned about e-mail senders' compliance burden;

- (e) **whether the legislation should restrict e-mail address harvesting and other practices:** Some suggested that the conduct of harvesting e-mail addresses from websites, generation of e-mail addresses by automatic means and trading e-mail lists without e-mail addressees' permission should be prohibited. Others question why manual harvesting needs to be prohibited; and
- (f) **whether offences should be civil or criminal:** While criminal penalties would provide stronger deterrent effect, we need to consider whether the penalty is proportionate to the misconduct.

14. The Government has an open mind on the exact form and content of the legislation. Our aim is to work out a legislative framework which is largely acceptable to different stakeholders by striking the right balance between the need to discourage spamming and to enable legitimate e-marketing activities to develop properly. We will, in due course, brief Members on the draft legislative framework before proceeding to draft the bill. Our target is to introduce the bill into the Legislative Council some time in 2006.

**Communications and Technology Branch
Commerce, Industry and Technology Bureau
March 2005**

Summary of Submissions to the Consultation Paper on Proposals to Contain the Problem of Unsolicited Electronic Messages

A total of 42 submissions were received. They have been published on the website of the Office of the Telecommunications Authority (OFTA) at <http://www.ofta.gov.hk/report-paper-guide/paper/consultation/20041102/table.html>.

2. The list of companies, organisations and individuals making submissions are –

Companies

- Axisoft
- China Resources Peoples Telephone Company Limited (Peoples)
- CompTIA Hong Kong Limited (CompTIA)
- DoubleClick
- EDIasia
- Hong Kong Broadband Network Limited (HKBN)
- Hong Kong CSL Limited (HKCSL)
- Hutchison Global Communications Limited (HGC)
- Hutchison Telephone Company Limited and Hutchison 3G HK Limited (HT)
- Mail Prove Limited (Mail Prove)
- MessageLabs
- Microsoft
- Outblaze Ltd (Outblaze)
- PCCW-HKT Telephone Limited (PCCW-HKTC)
- SmarTone Mobile Communications Limited (SmarTone)
- Tiglion Consultancy Company Limited (Tiglion)
- Yahoo! Holdings (Hong Kong) Limited (Yahoo!)

Organisations

- The American Chamber of Commerce in Hong Kong (ACC)
- Anti-Spam Technical Alliance (ASTA)
- Asia Digital Marketing Association (ADMA)
- Belgium-Luxembourg Chamber of Commerce in Hong Kong (BLCC)
- Business Software Alliance (BSA)
- Consumer Council (CC)
- The Dutch Business Association (DBA)
- Hong Kong Anti-Spam Coalition (HKASC)
- The Hong Kong Austrian Association Limited (HKAA)
- Hong Kong Christian Service (HK Christian Service)

- Hong Kong Computer Emergency Response Team Coordination Centre (HKCERT)
- Hong Kong Computer Society (HKCS)
- Hong Kong Direct Marketing Association (HKDMA)
- Hong Kong General Chamber of Commerce (HKGCC)
- Hong Kong Internet Service Providers Association (HKISPA)
- Hong Kong Telecommunications Users Group (HKTUG)
- Hong Kong Trade Development Council (HKTDC)
- Office of the Privacy Commissioner for Personal Data (PCO)
- Professional Information Security Association (PISA)

Individuals

- Ben Ng
- Horace Cheng
- Jacq
- Leung Sik Hung
- Samuel Chan
- Legislative Councillor Hon SIN Chung-kai, JP

3. Their views on various issues are summarised below –

Size of the UEM Problem

Fax

4. PCCW-HKTC reported that on average, it receives around 5 500 cases of complaint regarding junk faxes each month through a variety of channels, including telephone, fax and mail and it requires 3 staff to handle these complaints, costing a total of HK\$ 45,000 per month.

5. In 2004, OFTA received 171 complaints on junk fax. According to the returns from the local FTNS operators, 36,626 complaints were received during the same period. These complaints contained sufficient information for the FTNS operators to take actions. Out of these complaint cases, 19,274 were lodged by customers who have already registered their telephone numbers in the “not-to-call” list.

6. Individual respondent complained of receiving junk faxes at late hours with no currently available measures to deal with the problem.

Email

7. Outblaze, BLCC, HKAA, and DBA pointed out the increased potential for deceptive practices enabled by spam and emphasised the need for special attention be paid to “phishing” and all forms of identity theft.

8. Axisoft, a domestic software supplier which provides anti-spam and anti-virus managed service identified an average of 46% of incoming mails as spam mails and 23% of network traffic as spam traffic. MessageLabs, a global provider of Internet security solutions submitted that in September 2004 they had scanned more than 1.45 billion e-mails worldwide for spam, of which over 1.05 billion or 72.14% were stopped as spam.

9. PCCW-HKTC estimates that roughly 80% of the e-mail traffic it handles each day relates to unsolicited bulk e-mail and that around 15 to 20 man-days each month are expended to deal with spam.

10. HKISPA conducted three surveys (by surveying 11 ISPs serving over 90% of Internet users in Hong Kong and aggregating their results) for the purpose of ascertaining the extent of the spam problem in Hong Kong. The latest (October 2004) survey results indicate that spam has risen from 50% of all e-mails to around 60%, with some ISPs experiencing as much as 90%. It has also estimated the likely costs of spam to Hong Kong ISPs could approach HK\$ 5.9 million per month.

11. Microsoft, HKBN, ACC, BSA, HKASC relied on the survey conducted by the Hong Kong Internet Service Providers Association (HKISPA) in January 2004 (gathering data from 11 ISPs that serve over 90% of Internet users in Hong Kong) which revealed that roughly 50% of the e-mails received in Hong Kong is spam and spam costs consumers and businesses in Hong Kong about HK\$10 billion a year. On the other hand ADMA, representing digital marketers in Asia, relied on a research carried out by Jupiter Research which revealed that in 2003, marketers in the world lost US\$ 230 million from spam filters blocking genuine messages which were sent with the permission of the recipients. The research further estimates that spam is expected to cost online marketers US\$ 419 million in 2008.

12. Individual respondent complained that the spam problem has resulted in the need to pay additional charges for subscribing spam-filtering service. Hon SIN Chung-kai reported that his office had conducted a survey in November 2003 to reflect the scope the problem of unsolicited electronic messages in Hong Kong. Of the 4 types of unsolicited e-messages, namely e-mail, fax, SMS and phone calls e-mail was identified as the most prevalent form of unsolicited e-messages activity. Over 80% of the respondents in that survey considered receiving unsolicited electronic messages annoying and over 70% of the respondents had already used some sort of anti-spam measures such as filtering software.

SMS

13. Peoples submitted that there were 17 complaints related to unsolicited/promotional SMS received during the period October 2003 to September 2004, whereas the number of “opt-out” requests related to promotional SMS as of 30 September 2004 totalled 11 625, representing less than 1.5% of Peoples’ subscriber base. Likewise, HKCSL and HT do not consider unsolicited SMS to be a major problem.

Possible Solutions to UEM Problem

Industry co-operation

14. Respondents are generally supportive of strengthening industry co-operation. To this end, PCCW-HKT submits that compliance with codes of practice should remain on a voluntary basis provided that there is more rigorous legislation to deal with the problem of unsolicited electronic messages. Microsoft believes that the Government should generally maintain a laissez-faire approach to regulating Internet and technology development, while at the same time should introduce a legislation to deal with the spam problem in particular. HGC and HKBN submit that there is no need to impose any mandatory obligation on industry players to adopt additional codes of practice for handling unsolicited electronic messages. While actively encouraging and participating in industry cooperation, HKISPA and HKASC do not support mandatory adherence to codes of practice.

15. On the other hand, PISA considers that some of the provisions of the Anti-Spam Code of Practice developed by HKISPA should be made mandatory and the OFTA as the regulatory body should monitor and enforce compliance. Outblaze, BLCC, HKAA, and DBA are of the view that anti-spam measures must be compulsory and backed by punitive provisions in order to have the necessary effect. HKCS also submits that the codes of practice should be made mandatory. Individual respondents tend to be supportive of the idea of mandating the existing voluntary codes of practice.

16. Hon. SIN Chung-kai suggests that in addition to the “Not-to-call” list for fax, the Government should set up a “Not-to-send” list for e-mails, a “Not-to-call” list for cold calls, and a “Not-to-send” list for SMS. All these lists should be grouped together as a “Not-to-receive-electronic messages” database and centrally administered.

17. Outblaze emphasises the importance for businesses to select adequate and professional block lists, and that ISPs should work directly with responsible block list operators to receive early warnings about spam on their networks. HKCSL considers that the compilation of a common blacklist of spammers will

not meet the intended objective of preventing or stopping unsolicited electronic messages as spammers will merely keep changing its origination source or identity to get around a blacklist. On the other hand, PCCW-HKT supports the idea that industry players should jointly compile and make use of a common blacklist of spammers. Likewise, HKGCC and HKISPA consider a joint blacklist a viable possibility.

18. DoubeClick expresses doubt on the feasibility of forcing marketers across a variety of business models to follow a set of best practices. On the other hand, ADMA and HKTDC are supportive of promoting global best anti-spam practices as part of the solution in fostering effective industry self-regulation.

19. In respect of SMS and MMS, SmarTone, Peoples and HKCSL consider that the current voluntary code of practice governing the sending of promotional SMS among mobile operators has been effective in dealing with the problem. On this basis, there should be no need to make any mandatory code of practice for SMS and MMS at the moment. HT also believes that the way forward in regulating SMS and MMS spamming is to allow the mobile operators to develop and strengthen their own measures and campaigns and to deploy anti-spamming solutions and tools on a voluntary basis.

User education

20. Respondents are generally supportive of enhancing user education in combating the problem and express a keen interest in participating in anti-spam efforts, notwithstanding there may be different views as to the most appropriate body to take the lead in mounting anti-spam campaigns. Outblaze, BLCC, HKAA, and DBA express doubt on the value of having local ISPs to mount anti-spam campaign. CompTIA suggests that user education should be initiated by both the Government and the industry. ASTA recommends that all industry members including ISPs, Mailbox Providers and software developers proactively should raise awareness about the availability of tools for customers to fight spam and messaging abuse. HKGCC suggests that the information technology industry should take the lead in developing an anti-spam campaign in Hong Kong, with the Government as a key partner in this effort. HKISPA and ADMA are committed to continuing its involvement in anti-spam efforts and encourage other industry, trade associations and governmental bodies to add their support. HKCSL is of the view that OFTA should take the lead in any anti-spam effort with the participation of the Consumer Council. Likewise, HKBN believes that public education has to be carried out by the Government. ACC is of the view that anti-spam education campaigns are best conducted as collaboration between the Government and the private sector, in order to reach the largest audience possible. CC believes that an anti-spam campaign should involve representatives from the industry and consumers. HK Christian Service is of the view that the Government should take a pro-active role in strengthening

education campaigns, such as “responsible e-mail users” to educate the public to respect others and not to send unsolicited electronic messages.

21. PCCW-HKTC recommends that any user awareness campaign should focus on e-mail spam. Microsoft and BSA support a broad-based education campaign in Hong Kong which aims at raising awareness and providing accurate information and useful resources to consumers, and that such a campaign should have strong government support. HKCS is of the view that an information campaign would be a useful part of an overall anti-spam strategy.

22. For SMS and MMS spam, SmarTone, Peoples, HKCSL and HT believe that the current pro-active and co-operative approach among operators is sufficient to address the issue of unsolicited messages.

Technical solutions

23. HKDMA and Doubleclick favour a focus of resources on a technical solution to the spam problem. HKDMA, in particular, is willing to lead a consensus building forum to formulate possible and practical technical solutions.

24. The HKASC emphasises that a number of the Coalition members have invested considerable resources in refining anti-spam technologies with measurable results. However, spammers are becoming increasingly sophisticated and effective in circumventing today’s technologies that the public and private sectors should join hand to address the spam issue.

25. ACC suggests that the Government should play an active role to ensure broad adoption of available anti-spam solutions and encourage R&D investment into the new technologies which would also provide opportunities for local IT companies, thereby strengthening Hong Kong’s position as a regional IT hub and technology centre.

26. ADMA fully supports technical solutions as part of a comprehensive and effective solution to the problem.

27. Microsoft indicates that it has invested heavily in R&D to refine existing anti-spam technologies and to develop new ones. It considers that it is critical to develop a multifaceted solution to the problem including anti-spam legislation and enforcement.

28. MessageLab explains a number of existing technical methods that can be employed to combat spam, such as DNS blacklisting, whitelisting, fingerprints/signatures, collaborative filtering etc. and also how the emerging technology of sender authentication (such as Sender Policy Framework, DomainKeys and Caller-ID solution) works. It considers effective anti-spam technology will remain the most successful way of combating spam. But as

spammers are becoming sophisticated, the only way to combat the problem is by means of a combined approach of technology, legislation and user awareness.

29. HKCERT explains how the Real-time Blackhole List (RBL) works to combat spam and suggests that a neutral and reputable body (instead of HKCERT) with sufficient resources should operate the RBL and should have close collaboration with the ISPs and network operators.

30. HKISPA firmly believes that the most effective measures to combat spam are technical means and will be willing to take a leading role in co-ordinating different technical solutions but would need to seek support and funding.

31. ASTA gives a Statement of Intent document presenting best practices/technologies and recommendations that its members are implementing to combat spam. HKCS also highlights and explains a number of useful technical solutions and information about the blacklist operation, pattern matching etc.

32. Yahoo! explains the merits of using the authentication standard called Domain Keys as technical solution to combat spam. The solution allows the recipient to verify the sender by matching the sender's digital certificate with the IP address.

33. PISA gives an account of its views and assessment on some technical measures on blacklists and technology to close down open relay, to filter mail content and also certain technical means against directory harvesting etc. It considers that anti-spam technology is new and complex and there is a huge gap in the technology know-how in business sectors and the general public. It recommends the Government should provide support to close the gap and provide more guidelines and resources in collaboration with the industry, the professional association and HKCERT on how to choose the appropriate technologies and how to apply them in their environment.

34. CompTIA requests that innovative anti-spam products should be encouraged and supported by the Government and should receive appropriate intellectual property protection thus providing an incentive for commercial organisations to invest in this area.

35. HKCSL agrees with the principle that technical solutions should be reviewed and assessed to block unsolicited electronic messages. However, it has doubt about the effectiveness of them for wireless-related technology. The spammers in this case could also keep changing the origination source or identity to get around blocking.

36. Peoples maintains a view that the issue of unsolicited messages in the mobile phone arena does not pose a major problem to the operator or the customer and considers that there are technical solutions available that can address the anticipated problems in the future if necessary.

37. HT considers that it would be inappropriate to implement technical solutions and tools to block or filter those messages by default. Mobile network operators should be allowed to deploy anti-spamming solutions and tools on a voluntary basis. They will be able to develop and identify the most effective measure, campaign, solution and/or tool to meet their needs.

38. PCCW-HKT considers that other than identifying the domains/source of spam, technical measures which involve the service provider examining the content of electronic messages and blocking those messages are effective solution to combat the spam problem. However, the fundamental issue is whether service providers are authorised to carry out such actions.

Legislation

39. A majority of the respondents supports the enactment of a specific legislation targeting unsolicited electronic messages. While Axisoft, Peoples, CompTIA, DoubClick, MessageLabs, Microsoft, Yahoo! and Hon SIN Chung-kai support the enactment of a specific legislation, they emphasise that legislation should only be one component in a multi-faceted anti-spam solution, and legislation alone will not be sufficient to combat the problem entirely. Hon SIN Chung-kai further considers that in order to remove some concern of the general public about freedom of speech and free flow of information the Government should first introduce a relatively minimal legislation. After having more experience in enforcement in Hong Kong and studying the experience of enforcement in other places the Government should review the technology development and consider tightening the provisions. Hon SIN Chung-kai suggests setting up a task force to enforce the legislation and handle related matters concerning complaints, co-operation with the industry, guidelines, user education, research and survey. Given the possible concern on freedom of speech and free flow of information and the likely compliance costs Hon SIN Chung-kai also suggests to have second round of consultation on the detailed provisions of the legislation. Likewise, organisations such as ACC, BSA, HKASC, HKISPA and PISA express the same view that legislation should be introduced as part of a multi-faceted solution to the problem of unsolicited electronic messages. Several respondents also point out the need to amend loopholes in existing laws, which are not designed to specifically deal with spam.

40. On the other hand, HKCSL, HGC and SmarTone are not in favour of a legislative approach in relation to SMS and MMS spam. They consider that sufficient initiatives have been implemented by the industry to combat the problem of SMS spam. HKCSL considers that enacting anti-spam legislation

may not lead to a significant drop in spam, in particular spammers are difficult to locate and a significant amount of spam originates from outside Hong Kong. Further, HKCSL is of the view that enacting anti-spam legislation will impose a substantial financial burden on mobile operators. While not having objection against the introduction of anti-spam legislation, HT considers that it is pre-mature at this stage to explore the legislative route.

41. The respondents made the following recommendations in relation to the spam legislation:

(a) Scope of the legislation

CompTIA urges a strong legislation to address the criminal intent of spam that involves unsolicited downloads, spoofing of addresses and the creators of unofficial websites (phishing) rather than broad legislation that would be onerous for private industry to follow. The legislation should also identify basic components that industry guidelines should address, such as notice and “opt-in/out” obligations.

HKBN considers that the legislation should provide a clear definition for “spam”, and for any legislation to be effective, cross-border and international co-operation should be taken into account.

Microsoft suggests that the legislation should provide immunity to e-mail service providers which merely provide transmission capacity for the delivery of e-mail and often have no way to determine the nature of each individual e-mail carried over their system. BSA, HKASC and HKGCC also suggest that the legislation should provide exemption for routing activities of ISPs.

PCCW-HKTC, CC, HKISPA and Hon. SIN Chung-kai are of the view that the legislation should be made technology neutral in order to cover all forms of unsolicited electronic messages.

HKGCC supports a minimal legislation to deal with specific problems of abuse, and that the legislation should be narrowly focused and targeted specifically at practices which have a deceptive element so as not to interfere with legitimate e-commerce.

(b) Messages of a “commercial” nature

PCCW-HKTC considers there is no need to limit the legislation to messages of a commercial nature, firstly because of the difficulty in distinguishing between “commercial” and “non-commercial” messages; and secondly, because the major objection to unsolicited messages lies in the fact that they were “unsolicited” rather than the content of the message itself. HKISPA also expresses the view that the legislation should cover non-commercial messages, with appropriate exclusions for registered charities, political parties and other appropriate bodies.

On the other hand, CC and Mr Hon. SIN Chung-kai believe that the law should cover only electronic messages of a commercial nature.

(c) “Bulk”

PCCW-HKT and HKISPA consider that “bulk” should not be the criteria for defining spam in the legislation. A message should be considered as spam if the sender did not receive permission from the message recipient to send the message.

(d) Cold calls, voice and video

PCCW-HKT and Hon SIN Chung-kai are of the view that the legislation should be made as broad as possible in order to cover all forms of unsolicited messages, and there is no reason to specifically exclude cold calls, voice or video.

(e) Permission-based approach

EDIasia suggests that the legislation should stipulate certain mandatory requirements on the labelling of e-mail headers and provide an “opt-out” option to recipients.

Microsoft and BSA advocate legislation that prohibits fraudulent and deceptive spamming practices, and promotes consumer empowering technologies that allow consumers to differentiate between legitimate advertising and unwanted e-mail. Microsoft suggests that a sensible way to distinguish between legitimate advertising and unwanted spam is to allow online vendors to deliver advertising to consumers where the consumer has consented to the receipt of such advertising (“opt-in”), or where there is a prior or existing business relationship between the vendor and the consumer. If there is no consent, or the advertiser has received the consumer’s e-mail from a third party or by “harvesting” emails from other sites, advertisers should be

required to notify the consumer that the e-mail is unsolicited advertising (e.g. by placing “ADV:” in the subject line and to provide a mechanism allowing the recipient to easily and at no costs remove themselves from the sender’s electronic mail list (“opt-out”) so that they are not included in future mailings.

Outblaze criticises the opt-out approach as deeply flawed, and suggests that marketing e-mails should only be sent with the permission of the recipients (“opt-in”), and the permission must be explicit, specific and non-transferable.

PCCW-HKT prefers that prior permission be granted by the recipient (expressed or implied) before the sender is allowed to send messages to the recipient (“opt-in”). Implied permission can be inferred from an existing business relationship. The recipient must, however, be allowed at any time to request the sender not to send further messages (“opt-out”). However Hon SIN Chung-kai considers the requirement of a permission may add burden to companies which are using e-mails for marketing and does not favour the permission-based approach.

ADMA recommends the definition of permission-based e-mail marketing as defined in ADMA’s guidelines for responsible e-mail marketing to be included in the legislation to clearly differentiate between the activities of spammers and legitimate marketers.

HKASC suggests that the law should stipulate requirements that unsolicited commercial e-mails include a functioning mechanism for opting out of receiving future e-mails. Likewise HKCS considers that messages should be “solicited” from the start, and the sender should cease to send messages when requested.

HKISPA considers that the “opt-in” and “opt-out” debate is something of a smoke screen. The critical point is that there must be a valid pre-existing relationship before an unsolicited message can be sent out.

(f) “Opt-in” or “opt-out”

PCCW-HKTC advocates an “opt-in” approach, whereby the sender is required to secure the express or implied consent from the message recipient before sending out the message. On the other hand, PISA and Hon SIN Chung-kai support the adoption of an “opt-out” approach in the legislation.

(g) Labelling of e-mail headers

PCCW-HKTC agrees that senders should be prohibited from falsifying headers in e-mail messages, and further suggests that the legislation should outlaw the falsification of any transmission data contained in the unsolicited electronic messages. Yahoo! suggests that the legislation should prohibit fraud in the header and subject line information. BSA also suggests that the legislation should contain provisions against the transmission of commercial e-mails that contain false or misleading transmission or routing information or subject lines.

HKASC and Hon SIN Chung-kai suggest that e-mails for marketing should be identified through “ADV” label. HKASC further suggests a “safe harbour” should be provided for digital marketers which follow e-mail best practices.

On the other hand, HKISPA does not see labelling a strong requirement.

(h) Restrictions on e-mail harvesting etc.

PCCW-HKT and Hon SIN Chung-kai suggest that activities deployed by spammers to compile e-mail address listing such as harvesting e-mail addresses from websites, the generation of e-mail addresses by automatic means and trading e-mail lists between ISPs (without the e-mail addressee’s permission) should be prohibited.

BSA, HKASC, HKCS and HKISPA are of the view that the law should prohibit practices commonly used by spammers such as “harvesting” of e-mail addresses and “dictionary attacks”. HKISPA goes further to include the evolving techniques used by spammers in the legislation.

(i) Scope of investigation and enforcement powers

PCCW-HKTC is of the view that the exact rights of ISPs vis-à-vis examining the content of messages and stopping the transmission of suspected spam need to be clarified in the legislation.

(j) Compliance costs

PCCW-HKT is of the view that the increase in compliance costs as a result of the new legislation will be off-set by the decrease in

marketing costs and the fact that promotions will be made more effective, and on this basis should not be a reason not to introduce the new legislation. HKISPA emphasises that ISPs cannot be made to carry the burden of increased compliance costs.

(k) Civil and criminal penalties

Both PCCW-HKTC and Yahoo! are of the view that the legislation should provide for a private right of action for ISPs to bring suits against spammers for damages and recovery of legal costs. They consider that the legislation should impose civil fines on spammers.

ACC, BSA, HKASC, HKGCC and HKISPA suggest that the legislation should include meaningful civil and criminal penalties in order to be of deterrent value.

CC, on the other hand, favours civil rather than criminal penalties, and suggests that the legislation should provide for the right to bring representative action by designated bodies such as OFTA and CC.

HKCS considers that the penalty for sending spam should be related to the number of offending messages. Failing to manage a mailing list correctly (i.e. keeping records of opt-ins, and promptly obeying unsubscribes) should also be fined.

International Cooperation

42. Given that the main source of spamming comes from overseas, HKBN takes the view that enacting a legislation in Hong Kong alone is not sufficient to address the problem. HKBN believes that in order to combat spamming efficiently, cross border and international co-operation are important. Outblaze, BLCC, HKAA, and DBA call for international co-operation among mail administrators and the promotion of facilitating policies. They consider that there should be inter-ISP co-operation in other avenues of international co-operation such as regular exchanges with overseas lawmakers and regulators. PCCW-HKTC and Hon SIN Chung-kai also stress the importance of a co-ordinated international effort against spam. On an international basis, regulators around the globe should co-operate with each other to implement anti-spam measures given that a large amount of spam originates from overseas. PCO considers that there will be a need for an internationally co-ordinated approach to develop a framework for combating the problem of unsolicited electronic messages, and that APEC would be an appropriate forum to debate and

develop a regional approach. PISA is of the view that spam is an international issue, and an effective system to combat spam must be a globalised one. It further considers that Hong Kong should co-operate with overseas governments to chase spammers and close down spamming sources located in Hong Kong, and that the Government should take initiatives to build up relationship (e.g. signing bilateral agreement or memorandum of understanding) with mainland China and strategic international business partner states to share information and co-ordinate enforcement against cross-border spam violations.

Office of the Telecommunications Authority
March 2005