



**MALAYSIAN COMMUNICATIONS AND
MULTIMEDIA COMMISSION**

**A REPORT ON A PUBLIC
CONSULTATION EXERCISE
“REGULATING UNSOLICITED
COMMERCIAL MESSAGES”**

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Introduction

1. The purpose of this report is to inform the public of the responses received to the public consultation exercise conducted by the Commission on the issue of regulating unsolicited commercial messages, and to outline the plan of action that will be pursued as a consequence of the responses made. Since the exercise conducted was a public consultation exercise, the Commission is not legally obliged to publish a report but has done so due to the general interest expressed by the public on this issue during the public consultation phase.

Public Consultation

2. The Malaysian Communications and Multimedia Commission undertook a study on the issue of unsolicited commercial messages (junk mail) or “spam”. A discussion paper, which provided the salient findings from that study and the action plan to be put in place by the Commission in dealing with this issue in a proactive manner was issued for public comment and feedback from 7 August to 3 September 2003.
3. The discussion paper contained the following key issues:
 - (a) Suggesting a possible definition of spam to be utilized by all service providers;
 - (b) Identifying the scope of spam and its use as a marketing tool;
 - (c) The impact of spam;
 - (d) Identifying the need to regulate and monitor spam via Internet e-mail and mobile short messages (sms);
 - (e) Identifying legal provisions in the Communications and Multimedia Act 1998 that deal with this issue; and
 - (f) Developing and coordinating an action plan amongst the service providers, Content Forum, Consumer Forum and the Commission in managing this issue.

4. Nineteen relevant submissions were received individuals, service providers, academics, non-governmental organizations and service providers.
5. Given the fact that all submissions did meet the deadline, the Commission was obliged to consider the submissions. As such, any position in this Report emanates from the Commission’s deliberation of the submissions and a reassessment undertaken of various positions hitherto adopted.

Definition of Spam

6. The definition adopted by the Commission is as follows : **“Spam may be elucidated as the activity of sending unsolicited messages (for example Internet e-mails or mobile SMS (short message service).”**
7. An agreed definition is both useful and necessary. This is particularly so as we wish to work towards public awareness of this issue. Arriving at an agreed definition is a potentially contentious issue as service providers, regulatory authorities, spammers and privacy and consumer groups each have their own intent and views.
8. This definition has been broadened to include “non-commercial” messages as well. This is due to the fact that spamming is not restricted to the unsolicited advertising of goods and services per se, but may encompass solicitations for donations or certain causes sent via various mediums, including Internet e-mail or mobile short message services (sms). It must also be noted that recipients may use the term “spam” to describe mass, unsolicited advertising; solicitations, offensive and fraudulent messages. Messages sent may fall into a few categories; i.e. it may be offensive and it may involve the element of solicitation. **Thus the definition proposed by the Commission is to be broadened to regulate all “unsolicited messages”**. Drawing demarcations introduces many refinements that may confuse people and not ensure that their rights are adequately protected. As the term “non-commercial messages” encompasses almost every type of message however, the exact parameters of non-commercial messages for the purposes of curbing spam will be further studied by the Information and Network Security Department of

the Commission and discussed with various parties before it’s scope is made explicit.

Clarification of the meaning attributed to the word “unsolicited” by the Commission

9. Consumers should be able to receive advertisements from vendors with whom they have a pre-existing business relationship, in order to take advantage of new products and services that might be of interest to them.
10. It is practical to distinguish between legitimate advertising and unwanted spam, by allowing advertising to consumers where the consumer has consented to the receipt of such advertising, or where there is a prior or existing business relationship between the vendor and the consumer.
11. In cases where there has been no consent, or the advertiser/sender has received the consumers e-mail from a third party or by "harvesting" e-mails from other sites, advertisers/senders should be required to notify the consumer that the email is unsolicited advertising (for example, by placing “ADV:” in the subject line) and to provide a mechanism allowing the recipient to easily and at no cost, remove themselves from the sender's electronic mailing list so that they are not included in the future mailings. This interpretation to reiterate, balances the commercial imperatives against the need to protect personal information.

Is the “content” of the message relevant?

12. As pointed out in the discussion paper, the annoyance caused here has nothing to do with the “**content**” of the message sent. Where the content is malicious, offensive or indecent, this would constitute problems with content that is inappropriate/unacceptable. The term “spam” is used to connote problems that relate to misuse/strain of resources like processing power, bandwidth and storage capacity due to bulk mailing. Content related matters will fall under the purview of the advertising guidelines for now, and eventually under the **Content Code**. Legislative action is possible here under S 211 and 233(1) (a) of the Communications and Multimedia Act 1998. Thus, it was proposed that the concept of unsolicited and unwanted mail in this context

does not extend to “all communication” but be restricted to “commercial messages” only. **However, following comments received from the public, this definition will be broadened to include “non-commercial” messages as well.** Drawing a demarcation between commercial and non-commercial messages may be too refined a distinction, and be counter-productive to our ability to take action. Therefore if an unsolicited offensive message is sent, the sender may be liable for two offences, i.e. sending content that is inappropriate and for spamming (improper use of network facilities and services).

Is bulk mailing necessary?

13. The real problem with spam lies with the volume of messages that are sent. A single message sent to a large number of recipients qualifies as “bulk”. Separate but identical copies of a message, sent to a large number of recipients are also categorized as “bulk mail”. The distinction between both is the stage at which the message is copied or “exploded¹”. Substantially similar² messages can also qualify as bulk.
14. Whilst these messages are characteristically sent in bulk, this element should not be part of the definition as there is no agreed upon threshold on what amounts to “bulk”. The concern here is on how many copies of a message must be sent and within what time period for it to qualify as bulk transmission. Defining a precise threshold is bound to be arbitrary; spammers may also respond by adjusting their message volume to any clearly disclosed threshold. Whilst the damage caused by spam is related to the number of copies of a message that is sent; the relationship is not necessarily proportional. Thus it is best that this requirement of “bulk” be a mere feature of spam and not a pre-requisite for a message to be categorized as spam. Having defined spam as unsolicited commercial messages rather than unsolicited bulk messages, there is no need for the Commission to define a threshold for “bulk”.

Spam: Areas of focus

¹ A “mail exploder” is a server that takes an incoming message and forwards copies of the message to multiple recipients. One common application used here is an Internet mailing list.

15. The Commission is of the opinion that spam that is sent via Internet e-mail and mobile SMS require management. This is because
 - (a) The economics of the Internet has created this problem since there is no “per message” cost. The charges borne by the consumer are for Internet access services per se. In the case of mobile SMS the charges on the sender are minimal to make this an attractive way to market goods and services.
 - (b) The coming of MMS (multimedia messaging service) and 3G messaging services will further enhance this marketing tool.
 - (c) Identifying the senders of such messages is difficult.

The regulatory framework

S 233 (1) (b) Communications and Multimedia Act 1998

16. The intent underlying Section 233 (1) (b) may be utilized to deal with unsolicited communications. It may be an appropriate section to deal with the problems posed by spamming activities.
17. Notwithstanding, to fall within the scope of the section however the communication must have been initiated with the intention of annoying, abusing, threatening or harassing a person. In cases of spamming, the consequence or effect of such communication may be that the recipients are annoyed, harassed or abused. However, it may be difficult to argue that this was the intention of the sender. The requirement or kind of “intent” the section requires may not always exist or be difficult to determine.
18. This may give rise to enforcement problems, bearing in mind that the onus of proof is on the prosecution. Further, such intention may not exist given that people who initiate such communication for marketing and advertising purposes are unlikely to initiate such communication with the intent to annoy, abuse, threaten or harass potential clients.
19. S 233 may be seen as being inadequate in some aspects, for instance:

² Here the sender may make very minor changes to each message, perhaps by personalizing

- (a) There are no provisions in this section that allow a person to opt in or opt out to receive unsolicited Internet e-mail or short messages;
- (b) There is no requirement that all electronic messaging contains accurate details of the sender’s name and address; and
- (c) There are no civil sanctions for unlawful conduct including financial penalties and the ability to seek enforceable undertakings and injunctions to minimize the proliferation of spamming.

Areas to develop and avenues to explore

20. The development of a regulatory framework that is designed to empower all whom are adversely affected by spam such as service providers, recipients and organizations whilst preserving the ability of the Commission to engage in criminal enforcement against spammers is necessary. The respondents appear to be of the opinion that service providers and recipients of spam must be empowered to pursue civil action and recover damages. Such a measure is no doubt, meant to encourage participation from all parties in curbing spam. Notwithstanding the submissions proposed require careful study as the amendments proposed appear to have the effect of the Commission delegating it’s authority to the service providers in taking action against end-users.

The subscription contract

21. The subscription contract between the service providers and the customers should be the instrument that is used to facilitate civil action by service providers against spammers. The contract should ensure that service providers are able to take action in good faith against spammers without fear of litigation. Ideally, all service providers should have similar clauses in these contractual arrangements that facilitate co-operation amongst themselves and the ability to take action if necessary.

Development of a sub-code

22. It may be prudent for industry to develop a code that imposes obligations on service providers to take reasonable steps to adopt and implement

it, spreading them out over hours or days instead of sending them simultaneously.

appropriate solutions in curbing spam. This code should take the form of a “sub-code” that is developed and enforced by the Consumer Forum. The General Consumer Code already contains provisions that ensure personal data and information is protected and not misused. Developing sub-codes that specifically apply to Internet Service Providers and Mobile Service Providers to regulate unsolicited commercial messages is therefore a natural progression. Service providers cannot contract out of these obligations. Thus the service provided to consumers will inevitably take cognizance of the service providers’ obligations under the industry code. This will effectively make certain that service providers are protected from litigation for having in good faith, blocked what they consider to be spam.

The limitations inherent in a legislative approach

23. Countries are unlikely to agree on a given definition of spam and the penalties to be applied to offenders. Legislative action would consequently be dependent on continuous co-operation between countries and legal systems to ensure that spam received in one country will result in legal action being taken in another. Practical problems may arise here, as countries implement laws with varying degrees of enthusiasm or diligence.
24. For legislation to be effective, anti-spam laws in all countries must be of a similar nature and standard so as to prevent spammers from forum shopping.
25. The immediate focus is on “blocking spam” and this is perhaps best addressed via technological solutions. Thus the focus should be on the first and second portions of the plan that encourages self-help by users; and service providers’ use of their exclusivity of knowledge, technology and infrastructure to manage and control this problem. Global alliances amongst service providers from various countries may use technology in stopping mail at international gateways. This may be the only currently practical measure that can be adopted to effectively curb spamming.
26. This is due to the fact that appropriate software tools, whilst not foolproof, are improving. Innovation in this area allows for enhancements that are effective to be rapidly introduced. Filtering based on IP addresses (for Internet e-mail)

in particular has been mentioned as being an effective way to manage this problem. Users will however have to be educated in the use of these tools.

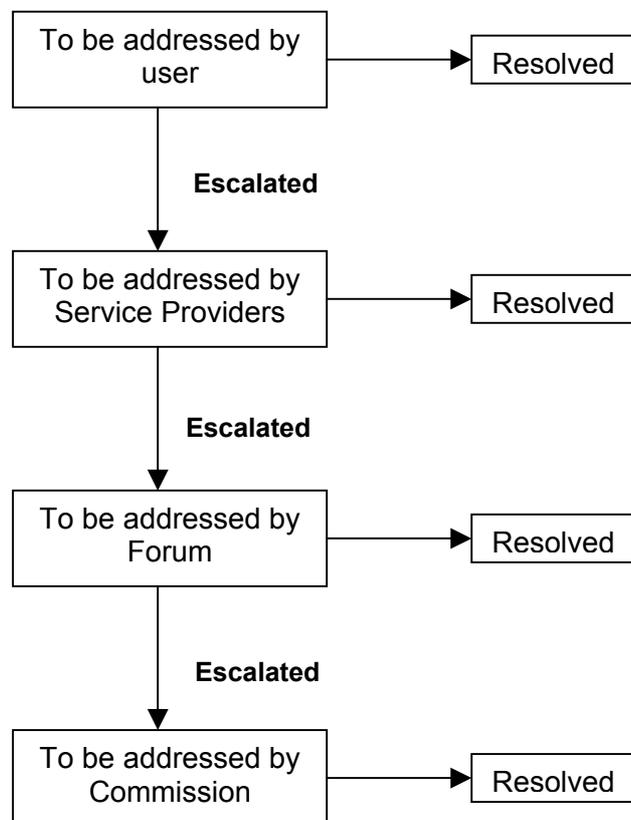
27. Coordination amongst ISPs with IANA (Internet Assigned Numbers Authority), which is the organization responsible for assigning addresses, may be necessary and felt to be achievable.

The proposed action plan by the Commission

28. There is broad consensus that a comprehensive approach in tackling spam is necessary. In principle therefore, there are no objections to the multi-pronged strategy put forth by the Commission. The use of new technology, self-regulation, strong anti-spam legislation and vigorous enforcement as well as developing industry best practices is vital. Service providers, regulatory authorities, privacy and consumer groups as well as the Commission have a role to play in curbing the difficulty posed by spam and educating the public on this issue. The Commission as the regulator of this industry is best placed to spearhead and co-ordinate international co-operative measures amongst all parties. This is because the Commission is in a position to be impartial and neutral, besides being able to take a balanced view of the issues at stake.

ACTION PLAN: MANAGEMENT OF SPAM

Flowchart: Management of Spam



First step: Self regulation by users

29. The first step in managing this problem should be self-regulation by users

Internet Users

30. Internet users can ignore spam and delete it. Internet users can be advised to avoid going to places where spammers generate mailing lists, such as newsgroups, chat rooms and public directories.
31. Many e-mail servers have automatic filtering capabilities. This may be enabled or disabled at the users’ preference by informing the service provider of their preferences. If this fails, a complaint should be lodged with the respective forums. If it is spam, this comes under the Consumer Forum whilst content matters should be under the Content Forum
32. Promoting the use of disposable or dispensable e-mail address.

Mobile SMS users

33. In the case of SMS, the recipient can just delete the messages expediently. The numbers from which such messages are sent may be recorded if the recipient deems further action necessary.
34. If the volumes of the messages are excessive, complaints should be lodged with the service provider for them to take action according to their service contract/agreement. If this fails, a complaint should be lodged with the respective Industry Forums. If it is spam, this comes under the Consumer Forum whilst content matters should be under the Content Forum.

Areas of focus:

- (a) Education and awareness of consumers via initiatives by service providers

- (b) Education and awareness brochures or campaigns to be developed and distributed to the general public by the Commission
- (c) Making information available on this issue at the Commission’s website
- (d) Promoting the installation and use of filtering mechanisms by users.

Second Step: Management by service providers

A) The Contract for subscription of services between Service Providers and Customers

- 35. Management here is two-fold; i.e. the obligations of the customer to the service provider and the obligations of the service provider to the customer.
- 36. A study of most service application forms indicate that the terms of the service generally contain clauses pertaining to user responsibility and obligations, prohibited behaviour or use; and terms and conditions of service use or access. This takes into account the fact that spammers like all other service users may need to subscribe to ISPs for Internet access/use.
- 37. Such clauses are useful as they allow the service provider to cease to offer their service to spammers, if a complaint is lodged and the offending party can be accurately identified.
- 38. The service providers appear to have also put in place privacy policies, anti-spamming complaint centres, and acceptable user-policies in place. These policies include specifically prohibiting the sending of harassing or mass unsolicited email. Most of these policies are very comprehensive and valuable resources and information is disseminated on the service providers’ websites. Users must be educated or encouraged to take full advantage of these resources.

Areas of focus:

- 39. Making such policies the mainstay of all service providers. These service providers’ policies and practices appear to be practiced predominantly by Internet access service providers. This may no doubt be reflective of the fact that spam may be a particularly pressing problem in this medium.

Notwithstanding, such policies should also be made the mainstay of all mobile messaging service providers.

40. Making certain that service providers have put in place the necessary infrastructure to handle this problem. This includes amongst others have to the purchasing of appropriate software and technical systems, and developing and committing technical expertise to facilitate effective monitoring, supervision and investigation activities. In short, it is crucial that policies put in place are implemented smoothly.
41. To initiate the setting up of regional and possibly global collaborative alliances amongst service providers to ensure that the problem is successfully tackled at the global level. This is pertinent to combat spam that originates outside Malaysia effectively.

B) Service Providers’ Obligations under the Content and the General Consumer Code

42. Both the Content and the Consumer Codes³ play a complementary role to the agreements made between the service providers and the users of the service.
43. The Content Code, once registered can be utilised effectively to manage content that is provided across a variety of platforms. Part 3 of the Code provides for strict advertising guidelines, whilst Part 5 of the Code deals specifically with online guidelines. This Code needs to include measures that specifically deal with spam.
44. The Consumer Code likewise endeavours to promote, protect and enhance consumer and customer expectations and rights with regards to the application aspects of all services such as pricing, packaging, use of data and description of services. This Code needs to include measures that specifically deal with spam. The development of sub-codes in this respect may be necessary.

³ The General Consumer Code and the Content Code have yet to be registered

45. The Consumer Code has outlined specifically the importance of protecting personal information. It lists out good practices that must be employed in collecting and maintaining such information; and the need for appropriate security and respect for consumers’ preferences regarding unsolicited mails and telephone calls. Code rules have been drafted to facilitate this (*paragraph 2.3*) and emphasis is placed on service providers ensuring data security. Service providers must take reasonable precautions to ensure that data is not lost, misused or altered. Such an obligation must also be impressed upon third parties to whom such information may be transferred.
46. A complaint handling mechanism that is responsive is also provided for; where by the complaint handling process is made visible with clear assurances of a response within a given time frame. Whilst the time frame is dependent on the gravity of the complaint, there is an obligation on the part of the service provider to ensure that the customer is given regular updates of the process.

Areas of focus

47. The Commission’s Information and Network Security Department will work with the Forums to ensure that this issue is addressed in the Codes. Concerted efforts will be made by the Commission to ensure that service providers make tackle this issue on an on going basis.
48. The Commission will also work to make certain that the Forums’ have systems and work- flow processes as well as the resources to deal with this issue.
49. The Content Forum and the Consumer Forum must play an active role in educating the public on this issue and preparing information kits that enable users to take measures to combat spam, file complaints and assist in enforcement efforts.

Third step: Legislative recourse via the Commission

50. This step should only be utilized as a last resort; after the first and second steps detailed in the management of this problem has been exhausted. This

will ensure that our resources are wisely employed and all avenues for redress are explored. Legislative action under the Communications and Multimedia Act, specifically Section 233 (1) shall be pursued.

Spam that originates outside Malaysia

51. Should the origin of the spam be beyond the geographical limits of Malaysia, two problems may arise; i.e. identifying the spammer and dealing with the offender effectively. This is due to jurisdictional issues in the legal system and processes. Filters utilized by end-users will help tackle spam that comes from beyond Malaysia as well. Service providers’ filters or management of this problem as mentioned earlier will also help in this regard.

Areas to focus on:

52. To initiate the setting up of regional and possibly global collaborative alliances to ensure that the problem is successfully tackled. It is felt that alliances amongst service providers or service provider associations in various countries should be the first avenue for this alliance. This can eventually lead to further alliances at different levels, such as:
 - (a) Amongst regulators;
 - (b) The Consumer and Content Forums and their foreign counterparts;
 - (c) Amongst service providers;
 - (d) Non-governmental organisations-such as “CAUCE” (Coalition Against Unsolicited Commercial E-Mail”) which is essentially a group of ISP administrators and technical experts dedicated to formulating good anti-spam laws, making advertisers accountable for their actions and empowering legal action by individuals; and
 - (e) Projects and initiatives that are committed to making these services useful and safe.

Co-operative measures:

53. International co-operative measures to address this problem is felt to be more useful than legislation in combating spam at the regional and global levels, it is felt appropriate that the Commission and the Government work with the relevant bilateral and multilateral bodies at the policy level. This is particularly so, as the service providers in other countries may not be motivated to manage spam due to the financial impact of this initiative. Thus the regulator is in a better position to spearhead international co-operative measures to curb anti-spamming.

Conclusion:

54. These measures are necessary because they promote the national policy objectives for the communications and multimedia industry, more so when information based services provide the basis of continuing enhancements to the quality of life and work of an individual.⁴
55. These recommendations in our view are meant to enhance long-term regulatory efforts for end-users and integral to promoting a high level of consumer confidence in service delivery from the industry. These measures will go a long way in ensuring information security and network reliability and integrity⁵.

The way forward

56. The action plan proposed by the Commission should thus be implemented and not delayed whilst a more comprehensive and balanced regulatory framework is developed. The Commission is of the considered opinion that technological solutions in this regard must play a key role in managing this problem effectively.

⁴ Section 3 (2)(b) CMA 1998.

END OF DOCUMENT

⁵ Section 3 (2)(d) (e) and (f), CMA 1998