

**Bills Committee on
Personal Data (Privacy) (Amendment) Bill 2011**

Committee Stage Amendments

The revised provisions relating to direct marketing in the proposed new Part VIA of the Personal Data (Privacy) (Amendment) Bill 2011 (“the Bill”), amended on the basis of our responses in LC Paper No. CB(2)1854/11-12(01), are at Annex A. The amendments to the version at Annex to LC Paper No. CB(2)1701/11-12(03) are shown in underline/strike through mode.

2. Regarding the provisions of the Bill other than those in new Part VIA, as indicated in our responses to the views of the Bills Committee and deputations (LC Paper No. CB(2)1854/11-12(01)), we will move further Committee Stage Amendments (“CSAs”). A marked-up copy of the relevant provisions of the Personal Data (Privacy) Ordinance showing these CSAs is at Annex B. The amendments proposed in the Bill are shown in underline/strike through mode and the amendments proposed in the CSAs to be introduced are shown in shaded underline/strike through mode. The new sections 14A and 63B in Annex B attached hereto supersede the corresponding provisions in the Annex to LC Paper No. CB(2)1788/11-12(01).

**Constitutional and Mainland Affairs Bureau
April 2012**

Further Revisions to Part VIA

(amendments to the version at Annex to LC Paper No. CB(2)1701/11-12(03)
are shown in underline/ strike through mode)

Part VIA

**Use of Personal Data in Direct Marketing and Provision of
Personal Data for Use in Direct Marketing**

Division 1—Interpretation

35A. Interpretation of Part VIA

(1) In this Part—

consent (同意), in relation to a use of personal data in direct marketing or a provision of personal data for use in direct marketing, includes an indication of no objection to the use or provision;

direct marketing (直接促銷) means—

- (a) the offering, or advertising of the availability, of goods, facilities or services; or
- (b) the solicitation of donations or contributions for charitable, cultural, philanthropic, recreational, political or other purposes, through direct marketing means;

direct marketing means (直接促銷方法) means—

- (a) sending information or goods, addressed to specific persons by name, by mail, fax, electronic mail or other means of communication; or
- (b) making telephone calls to specific persons;

marketing subject (促銷標的), in relation to direct marketing, means—

- (a) any goods, facility or service offered, or the availability of which is advertised; or
- (b) any purpose for which donations or contributions are solicited;

~~**response channel** (回應途徑) means a channel provided by a data user to a data subject under section 35C(2)(c) or 35J(2)(e);~~

~~**specified-permitted class of marketing subjects** (指明許可類別促銷標的), in relation to a consent by a data subject to an intended use or provision of personal data, means a class of marketing subjects—~~

- ~~(a) that is specified in the information provided by to the data user subject under section 35C(2)(b)(ii) or 35J(2)(b)(iv); and~~
- ~~(b) in relation to which the consent is given;~~

~~**specified-permitted class of persons** (指明許可類別人士), in relation to a consent by a data subject to an intended provision of personal data, means a class of persons—~~

- ~~(a) that is specified in the information provided by to the data user subject under section 35J(2)(b)(iii); and~~
- ~~(b) in relation to which the consent is given;~~

specified-permitted kind of personal data (指明許可種類個人資料), in relation to a consent by a data subject to an intended use or provision of personal data, means a kind of personal data—

(a) that is specified in the information provided by a data user under section 35C(2)(b)(i) or 35J(2)(b)(ii); and

(b) in relation to which the consent is given;

response channel (回應途徑) means a channel provided by a data user to a data subject under section 35C(2)(c) or 35J(2)(c).

(2) For the purposes of this Part, a person provides personal data for gain if the person provides personal data in return for money or other property, irrespective of whether—

(a) the return is contingent on any condition; or

(b) the person retains possession of any control over the use of the data.

Division 2—Use of Personal Data in Direct Marketing

35B. Application

This Division does not apply in relation to the offering, or advertising the availability, of—

(a) social services run, subvented or subsidized by the Social Welfare Department;

(b) health care services provided by the Hospital Authority or Department of Health; or

(c) any other social or health care services which, if not provided, would be likely to cause serious harm to the physical or mental health of—

(i) the individual to whom the services are intended to be provided; or

(ii) any other individual.

35C. Data user to take specified action before using personal data in direct marketing

(1) Subject to section 35D, a data user who intends to use a data subject's personal data in direct marketing must take each of the actions specified in subsection (2).

(2) The data user must—

(a) inform the data subject—

(i) that the data user intends to so use the personal data; and

(ii) that the data user may not so use the data unless the data user has received the data subject's consent to the intended use;

(b) provide the data subject with the following information in relation to the intended use—

(i) the kinds of personal data to be used; and

(ii) the classes of marketing subjects in relation to which the data is to be used; and

(c) provide the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended use.

(3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.

- (4) The information provided under subsection (2)(a) and (b) must be presented in a manner that is easily understandable and, if in written form, easily readable.
- (5) Subject to section 35D, a data user who uses a data subject's personal data in direct marketing without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (7) In any proceedings for an offence under subsection (5), the burden of proving that the data user is not required to take any of the actions specified in section 35C(2) or that this section does not apply because of section 35D(1) or (2) lies on the data user.

35D. Circumstances under which section 35C does not apply

- (1) ~~Section 35C does not apply in relation to the continued use by a data user of a data subject's personal data in direct marketing in relation to a class of marketing subjects if,~~ before the commencement date—
 - (a) ~~at~~ the data subject had been explicitly informed by a data user in an easily understandable and, if informed in writing, easily readable manner of the use of the data subject's personal data in direct marketing in relation to ~~at~~ the class of marketing subjects;
 - (b) the data user had so used any of the data;
 - (c) the data subject had not required the data user to cease to so use any of the data; and
 - (d) the data user had not, in relation to the use, contravened any provision of this Ordinance as in force as at the time of the use,₂
then the data user may use the data subject's relevant personal data, as updated from time to time, in direct marketing in relation to the class of marketing subjects, without taking any of the actions specified in section 35C(2).
- (2) Section 35C does not apply in relation to the use by a data user of a data subject's personal data in direct marketing in relation to a marketing subject if—
 - (a) the data was provided to the data user by a person other than the data subject (*third person*);
 - (b) the data user has been notified in writing by the third person—
 - (i) that sections 35J and 35K have been complied with in relation to the provision of data; and
 - (ii) of the class of marketing subjects in relation to which the data may be used in direct marketing by the data user, as consented to by the data subject; and
 - (c) the marketing subject falls within that class of marketing subjects.
- (3) In this section—

commencement date (本部生效日期) means the date on which this Part comes into operation;

relevant personal data (有關個人資料), in relation to a data subject, means any personal data of the data subject over the use of which a data user had control immediately before the commencement date.

35E. Data user must not use personal data in direct marketing without data subject's consent

- (1) A data user who has complied with section 35C must not use the data subject's personal data in direct marketing unless—
 - (a) the data user has received the data subject's consent to the intended use of personal data, as described in the information provided by the data user under section 35C(2)(b), either generally or selectively;
 - (b) if the consent is given orally, the data user has, within 14 days from receiving the consent, sent a written confirmation to the data subject, confirming—
 - (i) the date of receipt of the consent; ~~and~~
 - (ii) ~~the particulars of the consent~~ permitted kind of personal data;
and
 - (iii) ~~the permitted class of marketing subjects;~~ and
 - (c) the use is consistent with the data subject's consent.
- (2) For the purposes of subsection (1)(c), the use of personal data is consistent with the data subject's consent if—
 - ~~(a) where the consent is given generally—~~
 - ~~(a)~~ (a) the personal data falls within a ~~specified~~ permitted kind of personal data; and
 - ~~(b)~~ (b) the marketing subject in relation to which the data is used falls within a ~~specified~~ permitted class of marketing subjects; ~~or~~
 - ~~(b) where the consent is given selectively—~~
 - ~~(i)~~ (i) ~~the personal data falls within a specified kind of personal data selected by the data subject; and~~
 - ~~(ii)~~ (ii) ~~the marketing subject in relation to which the data is used falls within a specified class of marketing subjects selected by the data subject.~~
- (3) A data subject may communicate to a data user the consent to a use of personal data either through a response channel or other means.
- (4) A data user who contravenes subsection (1) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

35F. Data user must notify data subject when using personal data in direct marketing for first time

- (1) A data user must, when using a data subject's personal data in direct marketing for the first time, inform the data subject that the data user must, without charge to the data subject, cease to use the data in direct marketing if the data subject so requires.
- (2) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
- (3) A data user who contravenes subsection (1) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (4) In any proceedings for an offence under subsection (3), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

35G. Data subject may require data user to cease to use personal data in direct marketing

- (1) A data subject may, at any time, require a data user to cease to use the data subject's personal data in direct marketing.
- (2) Subsection (1) applies irrespective of whether the data subject—
 - (a) has received from the data user the information required to be provided in relation to the use of personal data under section 35C(2);
or
 - (b) has earlier given consent to the data user or a third person to the use.
- (3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with the requirement.
- (4) A data user who contravenes subsection (3) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (6) This section does not affect the operation of section 26.

35H. Prescribed consent for use of personal data in direct marketing under data protection principle 3

Despite section 2(3), where a data user requires, under data protection principle 3, the prescribed consent of a data subject for using any personal data of the data subject in direct marketing, the data user is to be taken to have obtained the consent if the data user has not contravened section 35C, 35E or 35G.

Division 3—Provision of Personal Data for Use in Direct Marketing

35I. Application

- (1) This Division does not apply if a data user provides, otherwise than for gain, personal data of a data subject to another person for use by that other person in offering, or advertising the availability, of—
 - (a) social services run, subvented or subsidized by the Social Welfare Department;
 - (b) health care services provided by the Hospital Authority or Department of Health; or
 - (c) any other social or health care services which, if not provided, would be likely to cause serious harm to the physical or mental health of—
 - (i) the individual to whom the services are intended to be provided;
or
 - (ii) any other individual.
- (2) This Division does not apply if a data user provides personal data of a data subject to an agent of the data user for use by the agent in carrying out direct marketing on the data user's behalf.

35J. Data user to take specified action before providing personal data

- (1) A data user who intends to provide a data subject's personal data to another person for use by that other person in direct marketing must take each of the actions specified in subsection (2).
- (2) The data user must—

- (a) inform the data subject in writing—
 - (i) that the data user intends to so provide the personal data; and
 - (ii) that the data user may not so provide the data unless the data user has received the data subject's written consent to the intended provision;
 - (b) provide the data subject with the following written information in relation to the intended provision—
 - (i) if the data is to be provided for gain, that the data is to be so provided;
 - (ii) the kinds of personal data to be provided;
 - (iii) the classes of persons to which the data is to be provided; and
 - (iv) the classes of marketing subjects in relation to which the data is to be used; and
 - (c) provide the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended provision in writing.
- (3) Subsection (1) applies irrespective of whether the personal data is collected from the data subject by the data user.
 - (4) The information provided under subsection (2)(a) and (b) must be presented in a manner that is easily understandable and, ~~if in written form,~~ easily readable.
 - (5) A data user who provides personal data of a data subject to another person for use by that other person in direct marketing without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction—
 - (a) if the data is provided for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
 - (b) if the data is provided otherwise than for gain, to a fine of \$500,000 and to imprisonment for 3 years.
 - (6) In any proceedings for an offence under subsection (5), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

35K. Data user must not provide personal data for use in direct marketing without data subject's consent

- (1) A data user who has complied with section 35J must not provide the data subject's personal data to another person for use by that other person in direct marketing unless—
 - (a) the data user has received the data subject's written consent to the intended provision of personal data, as described in the information provided by the data user under section 35J(2)(b), either generally or selectively;
 - ~~(b) if the consent is given orally, the data user has sent a written confirmation to the data subject, confirming—~~
 - ~~(i) the date of receipt of the consent; and~~
 - ~~(ii) the particulars of the consent;~~
 - ~~(be)~~ if the data is provided for gain, the intention to so provide was specified in the information under section 35J(2)(b)(i); and
 - ~~(cd)~~ the provision is consistent with the data subject's consent.

- (2) For the purposes of subsection (1)(c), the provision of personal data is consistent with the data subject's consent if—
 - (a) ~~where the consent is given generally—~~
 - ~~(i) the personal data falls within a specified permitted kind of personal data;~~
 - ~~(ii) the person to whom the data is provided falls within a specified permitted class of persons; and~~
 - ~~(iii) the marketing subject in relation to which the data is to be used falls within a specified permitted class of marketing subjects; or~~
 - ~~(b) where the consent is given selectively—~~
 - ~~(i) the personal data falls within a specified kind of personal data selected by the data subject;~~
 - ~~(ii) the person to whom the data is provided falls within a specified class of persons selected by the data subject; and~~
 - ~~(iii) the marketing subject in relation to which the data is to be used falls within a specified class of marketing subjects selected by the data subject.—~~
- (3) A data subject may communicate to a data user the consent to a provision of personal data either through a response channel or other written means.
- (4) A data user who contravenes subsection (1) commits an offence and is liable on conviction—
 - (a) if the data user provides the personal data for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
 - (b) if the data user provides the personal data otherwise than for gain, to a fine of \$500,000 and to imprisonment for 3 years.
- (5) In any proceedings for an offence under subsection (4), it is a defence for the data user charged to prove that the data user took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

35L. Data subject may require data user to cease to provide personal data for use in direct marketing

- (1) A data subject who has been provided with information by a data user under section 35J(2)(b) may, at any time, require the data user—
 - (a) to cease to provide the data subject's personal data to any other person for use by that other person in direct marketing; and
 - (b) to notify any person to whom the data has been so provided to cease to use the data in direct marketing.
- (2) Subsection (1) applies irrespective of whether the data subject has earlier given consent to the provision of the personal data.
- (3) A data user who receives a requirement from a data subject under subsection (1) must, without charge to the data subject, comply with the requirement.
- (4) If a data user is required to notify a person to cease to use a data subject's personal data in direct marketing under a requirement referred to in subsection (1)(b), the data user must so notify the person in writing.
- (5) A person who receives a written notification from a data user under subsection (4) must cease to use the personal data of the data subject in direct marketing in accordance with the notification.
- (6) A data user who contravenes subsection (3) commits an offence and is liable on conviction—

- (a) if the contravention involves a provision of personal data of a data subject for gain, to a fine of \$1,000,000 and to imprisonment for 5 years; or
 - (b) in any other case, to a fine of \$500,000 and to imprisonment for 3 years.
- (7) A person who contravenes subsection (5) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.
- (8) In any proceedings for an offence under subsection (6) or (7), it is a defence for the data user or person charged to prove that the data user or person took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.
- (9) This section does not affect the operation of section 26.

35M. Prescribed consent for provision of personal data to person for use in direct marketing under data protection principle 3

Despite section 2(3), where a data user requires, under data protection principle 3, the prescribed consent of a data subject for providing any personal data of the data subject to another person for use in direct marketing, the data user is taken to have obtained the consent if the data user has not contravened section 35J, 35K or 35L.

Further Revisions to the Personal Data (Privacy) Ordinance
(other than new Part VIA)

(amendments proposed in the Bill are shown in underline/strike through mode;
amendments proposed in the CSAs to be introduced are shown in
shaded underline/strike through mode)

14A. Verification of data user returns (*amendments to newly added provision*)

(1) For the purpose of verifying the accuracy of information in a data user return or change notices submitted under section 14, the Commissioner may, by written notice served on require any of the persons specified in subsection (2), reasonably require the person—

(a) to provide any document, record, information or thing specified in the written notice; and

(b) to respond in writing to any question specified in the written notice.

(2) The persons are—

(a) the data user; and

(b) any other person whom the Commissioner has reasonable grounds to believe may be able to assist in verifying any information in the data user return or change notice.

(3) A person on whom a notice is served under subsection (1) may refuse to provide any document, record, information or thing, or any response to any question, specified in the notice, if the person is entitled or obliged under this or any other Ordinance to do so.

(4) If, having regard to any document, record, information or thing, or any response to any question, provided under subsection (1), the Commissioner considers has reasonable grounds to believe that any information in a data user return or change notice is inaccurate, the Commissioner may, by written notice, require the data user to correct the information in the data user return or change notice.

(5) Subject to subsection (3), a person on whom a notice is served under subsection (1) or (4) must comply with the requirement within the such reasonable period as is specified in the notice.

(5A) A person who contravenes subsection (5) commits an offence and is liable on conviction to a fine at level 3.

(6) A person who, in purported compliance with a notice under subsection (1), knowingly or recklessly provides any document, record, information or thing, or any response to any question, which is false or misleading in a material particular, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.

(7) A data user who, in purported compliance with a notice under subsection (4), knowingly or recklessly in a data user return or change notice supplies any information which is false or misleading in a material particular, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.

50. Enforcement Notices (*amendments to existing provision*)

~~(1) Where, following the completion of an investigation, the Commissioner is of the opinion that the relevant data user-~~

- ~~(a) is contravening a requirement under this Ordinance; or~~
- ~~(b) has contravened such a requirement in circumstances that make it likely that the contravention will continue or be repeated;~~

~~then the Commissioner may serve on the relevant data user a notice in writing-~~

- ~~(i) stating that he is of that opinion;~~
- ~~(ii) specifying the requirement as to which he is of that opinion and the reasons why he is of that opinion;~~
- ~~(iii) directing the data user to take such steps as are specified in the notice to remedy the contravention or, as the case may be, the matters occasioning it within such period (ending not earlier than the period specified in subsection (7) within which an appeal against the notice may be made) as is specified in the notice; and~~

~~(iv) accompanied by a copy of this section.~~

(1) If, following the completion of an investigation, the Commissioner is of the opinion that the relevant data user is contravening or has contravened a requirement under this Ordinance, the Commissioner may serve on the data user a notice in writing, directing the data user to remedy and, if appropriate, prevent any recurrence of the contravention.

(1A) An enforcement notice under subsection (1) must—

- (a) state that the Commissioner is of the opinion referred to in subsection (1) and the reason for that opinion;
- (b) specify—
 - (i) the requirement which, in the opinion of the Commissioner, is being or has been contravened; and
 - (ii) the act or omission that constitutes the contravention; and
 - ~~(iii) the reason for that opinion;~~
- (c) specify the steps that the data user must take (including ceasing any act or practice) to remedy and, if appropriate, prevent any recurrence of the contravention ;
- (d) specify the date on or before which the steps must be taken; and
- (e) be accompanied by a copy of this section.

(1B) The date specified in subsection (1A)(d) must be a date which is not earlier than the expiry of the period specified in subsection (7) within which an appeal against the notice may be made.

(2) In deciding whether to serve an enforcement notice the Commissioner shall consider whether the contravention ~~or matter~~ to which the notice relates has caused or is likely to cause damage or distress to any individual who is the data subject of any personal data to which the contravention ~~or matter, as the case may be,~~ relates.

(3) The steps specified in an enforcement notice to remedy any contravention ~~or matter~~ to which the notice relates may be framed-

- (a) to any extent by reference to any approved code of practice;
- (b) so as to afford the relevant data user a choice between different ways of remedying the contravention ~~or matter, as the case may be.~~

(4) Subject to subsection (5), the period specified in an enforcement notice for taking the steps specified in it shall not expire before the end of the period specified in subsection (7) within which an appeal against the notice may be made and, if such an appeal is made, those steps need not be taken pending the determination or withdrawal of the appeal.

(5) If the Commissioner is of the opinion that by reason of special circumstances the steps specified in an enforcement notice should be taken as a matter of urgency-

- (a) he may include a statement to that effect in the notice together with the reasons why he is of that opinion;
- (b) where such a statement is so included, subsection (4) shall not apply but the

notice shall not require those steps to be taken before the end of the period of 7 days beginning with the date on which the notice was served.

(6) The Commissioner may cancel an enforcement notice by notice in writing served on the relevant data user.

(7) An appeal may be made to the Administrative Appeals Board against an enforcement notice by the relevant data user not later than 14 days after the notice was served.

(8) Where the Commissioner-

(a) forms an opinion referred to in subsection (1) in respect of the relevant data user at any time before the completion of an investigation; and

(b) is also of the opinion that, by reason of special circumstances, an enforcement notice should be served on the relevant data user as a matter of urgency,

he may so serve such notice notwithstanding that the investigation has not been completed and, in any such case-

(i) the Commissioner shall, without prejudice to any other matters to be included in such notice, specify in the notice the reasons as to why he is of the opinion referred to in paragraph (b); and

(ii) the other provisions of this Ordinance (including this section) shall be construed accordingly.

63B. Due diligence exercise (*amendments to newly added provision*)

(1) Personal data transferred or disclosed by a data user for the purpose of a due diligence exercise to be conducted in connection with a proposed business transaction that involves—

- (a) a transfer of the business or property of, or any shares in, the data user;
- (b) a change in the shareholdings of the data user; or
- (c) an amalgamation of the data user with another body,

is exempt from the provisions of data protection principle 3 if each of the conditions specified in subsection (2) is satisfied.

(2) The conditions are—

- (a) the personal data transferred or disclosed is not more than necessary for the purpose of the due diligence exercise;
- (b) goods, facilities or services which are the same as or similar to those provided by the data user to the data subject are to be provided to the data subject, on completion of the proposed business transaction, by a party to the transaction or a new body formed as a result of the transaction;
- (c) it is not practicable to obtain the prescribed consent of the data subject for the transfer or disclosure.

(3) Subsection (1) does not apply if the primary purpose of the proposed business transaction is the ~~sale~~, provision for gain, transfer or disclosure of the personal data.

(4) If a data user transfers or discloses personal data to a person for the purpose of a due diligence exercise to be conducted in connection with a proposed business transaction described in subsection (1), the person—

- (a) must only use the data for that purpose; and
- (b) must, as soon as practicable after the completion of the due diligence exercise—
 - (i) return the personal data to the data user; and
 - (ii) destroy any record of the personal data that is kept by the person.

(5) A person who contravenes subsection (4) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 2 years.

(6) In this section—

due diligence exercise (盡職審查), in relation to a proposed business transaction, means the examination of the subject matter of the transaction to enable a party to decide whether to proceed with the transaction;

sellprovision for gain (售賣為得益而提供), in relation to personal data, means provision of the data in return for money or other property, irrespective of whether—

- (a) the return is contingent on any condition; or
- (b) the person who provides the data retains any control over the use of the datahas the same meaning given by section 35A.¹

¹ The definition of “provision for gain” is amended to tally with that in the proposed new section 35A(2) in Annex A.