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Bills Committee on Personal Data (Privacy) (Amendment) Bill 2011
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Sirs

Personal Data (Privacy) (Amendment) Bill 2011 (“Amendment Bill”)

We refer to the Administration’s Revised Proposal on Use of Personal Data in Direct Marketing (“Further Revised Proposal”) enclosing Revised Part VIA of the Amendment Bill which was presented to the Bills Committee on 17 April 2012.

We would like to provide comments to the Bills Committee with respect to the following:

1. Section 35A(1) - Definition of “consent”

We understand that the policy intention of the Further Revised Proposal is to allow data subjects to make an informed choice as to whether to allow data users to use or transfer their personal data for direct marketing purposes. We also understand that the Administration considers an “opt-out” approach for such purposes to be appropriate. To satisfy this, we anticipate that practically, a data user such as a bank may provide an option on the application form for the particular service whereby the data subject will be informed that his personal data may be used for direct marketing purposes and (i) if the data subject disagrees, he will need to place a tick in the box provided, and (ii) if the data subject agrees, he need not give any response at all. This approach is efficient and practicable for both data users and data subjects in allowing the latter to make an informed choice one way or another at the time of data collection. In the case of (ii), the data subject may still opt out subsequently by notifying the data user. In any event, there would be a strong incentive on data users to ensure the arrangement adopted is robust given the sanctions including fines and imprisonment in case of breach.

However, section 35C of the Amendment Bill (read together with the definition of “consent”) seems to provide for an “opt-in” rather than “opt-out” mode since

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the definition of “consent” requires the data subject to give an “indication” of no objection. The requirement to obtain an “indication” of no objection by the data subject might raise ambiguity in scenario (ii) described above. Accordingly, for the avoidance of doubt, we consider that it would be desirable to revise the definition of “consent” as follows:

consent, 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;

2. Section 35D – “Grandfathering” arrangement

We are concerned that the scope of the grandfathering arrangement is not clear from the current wording in section 35D of the Amendment Bill. We consider that this section should expressly provide that the grandfathering arrangement (i) covers personal data changed or additional ones collected subsequent to first time collection and (ii) will apply with respect to a data subject’s data if the data user has used any data of that data subject before the cut-off date to be specified. We propose that this can be achieved by amending Section 35D as follows:

- (1) Section 35C does not apply in relation to the continued use by a data user of a data subject's personal data held by the data user from time to time in direct marketing in relation to a class of marketing subjects if, before the commencement date -
 - (a) the data subject has been explicitly informed of the use of the data subject's personal data in direct marketing in relation to 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 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.

For any questions, please contact our Ms Ivy Wong at 2526-8895.

Yours faithfully



Ronie Mak
Secretary

c.c. HKMA (Attn: Ms Meena Datwani)

Dr. the Hon David K.P. Li, GBM, GBS, JP, Member of the Legislative Council