

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

**Revised Proposal on Use of Personal Data in Direct Marketing**

**Introduction**

At the meeting on 24 February 2012 at which Members were briefed on the changes the Administration proposed to make to the provisions in the Personal Data (Privacy) (Amendment) Bill 2011 (“the Bill”) regulating the use of personal data in direct marketing (as set out in LC Paper No. CB(2)1169/11-12(01)), Members asked the Administration to consider allowing data users to provide information on such use to data subjects orally and data subjects to reply to data users orally to indicate no objection to such use. Subsequent to the meeting, the Administration has also received from an industry body proposed amendments to the grandfathering arrangement. This paper sets out the further changes the Administration proposes to make after consideration of these requests.

**Verbal Communication between Data Users and Data Subjects**

2. As set out in LC Paper No. CB(2)1169/11-12(01), we propose that if a data user intends to use a data subject’s personal data in direct marketing or provide (whether for gain or not) a data subject’s personal data to another person for use in direct marketing, the data user must provide to the data subject in writing certain information required under the Bill. Also, before proceeding to use or provide (whether for gain or not) the data, the data user must receive a reply in writing from the data subject indicating that the data subject does not object to the data user doing so.

3. At the meeting on 24 February 2012, Members requested the Administration to consider whether verbal communication between data users and data subjects should also be accepted. We have discussed this with the Privacy Commissioner for Personal Data and the concerned industry bodies. Considering that it is not uncommon for personal data

to be collected, and transactions concluded, over the phone in the business world and to allow room for businesses to operate, we now propose to permit a data user to provide the data subject with the required information either orally or in writing, and the data subject to reply to the data user either orally or in writing to indicate no objection. As an additional safeguard, if the reply from the data subject indicating no objection is given orally, the data user must, before using or providing (whether for gain or not) the personal data to others for use in direct marketing, send a written confirmation to the data subject confirming the date of receipt of the reply and the particulars of the reply.

### **Grandfathering**

4. The grandfathering arrangement proposed in LC Paper No. CB(2)1169/11-12(01) is that, for personal data which a data user has, before the entry into force of the new requirements in paragraph 2 above (“the commencement date”), used in direct marketing in compliance with the existing requirements under the Personal Data (Privacy) Ordinance and which the data user intends to use (but not provide to other persons) in relation to the same class of marketing subjects after the commencement date, the new requirements in paragraph 2 above will not apply.

5. This grandfathering arrangement will only be applicable to the personal data that has been used in direct marketing before the commencement date. An industry body has indicated to us that, in the business world, direct marketing activities very often involve the use of different combinations of personal data. To cater for this, the industry body proposed that the grandfathering arrangement should apply to the use of any personal data of the data subject in relation to the same class of marketing subject if any of the data subject’s personal data had been so used before the commencement date.

6. Having regard to the operational need of businesses, we consider the proposal amendable as the data subject had been approached previously by the data user on such direct marketing activities, the data subject could have requested the data user to cease had he so wished but

he has not done so, and direct marketing activities for the same class of marketing subjects should fall within the data subject's reasonable expectation. We now propose to amend the grandfathering arrangement accordingly. It should be noted that this revised grandfathering arrangement will not affect data subjects' right to indicate objection to the use of his personal data in direct marketing at any time.

### **Revised Provisions relating to Direct Marketing**

7. Based on the revised proposals in this paper and LC Paper No. CB(2)1169/11-12(01), we have revised the provisions relating to direct marketing in Part VIA of the Bill. A copy of the revised Part VIA is at **Annex**.

**Constitutional and Mainland Affairs Bureau**  
**April 2012**

Revised Part VIA

\*\*\*

**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)(c);

**specified class of marketing subjects** (指明類別促銷標的) means a class of marketing subjects specified in the information provided by a data user under section 35C(2)(b)(ii) or 35J(2)(b)(iv);

**specified class of persons** (指明類別人士) means a class of persons specified in the information provided by a data user under section 35J(2)(b)(iii);

**specified kind of personal data** (指明種類個人資料) means a kind of personal data specified in the information provided by a data user under section 35C(2)(b)(i) or 35J(2)(b)(ii).

(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 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 this section does not apply because of section 35D 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) the data subject had 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 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.
- (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.

**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 sent a written confirmation to the data subject, confirming—
    - (i) the date of receipt of the consent; and
    - (ii) the particulars of the consent; 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—
    - (i) the personal data falls within a specified kind of personal data; and
    - (ii) the marketing subject in relation to which the data is used falls within a specified 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; and

- (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—
    - (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 consent to the intended provision;
  - (b) provide the data subject with the following 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.
- (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 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;
  - (c) if the data is provided for gain, the intention to so provide was specified in the information under section 35J(2)(b)(i); and
  - (d) the provision is consistent with the data subject's consent.
- (2) For the purposes of subsection (1)(d), 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 kind of personal data;
    - (ii) the person to whom the data is provided falls within a specified class of persons; and
    - (iii) the marketing subject in relation to which the data is to be used falls within a specified 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 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.

\*\*\*