

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

Follow up to Meeting on 8 November 2011

In response to Members' request at the meeting on 8 November 2011, this paper provides information on:

- (a) the arrangements adopted in overseas places in respect of use of personal data in direct marketing, and specifically whether an opt-in or opt-out regime is adopted; and
- (b) the mechanism for facilitating data subjects to object to the use or transfer of their personal data for direct marketing purposes and sale of their personal data, and to identify the transferees of their personal data and the original source of data transfer.

Legislation in Overseas Jurisdictions

2. According to information on relevant overseas legislation available to us, the personal data protection regulatory regimes of the United Kingdom ("UK"), France, Australia, New Zealand, Canada and the United States generally adopt the opt-out mechanism to regulate the use of personal data in direct marketing. In some jurisdictions, an opt-in mechanism is adopted for direct marketing activities conducted through certain channels such as e-mail, fax or automated calls. For details, please refer to Annex.

Proposed Arrangements for Objecting to the Use or Transfer of Personal Data for Direct Marketing

3. We have proposed in the Personal Data (Privacy) (Amendment) Bill 2011 ("PD(P)(A)B") that, irrespective of whether a data subject has, within the 30-day response period, sent any written reply to the data user indicating no objection to the use or provision of his personal data to other persons for direct marketing, the data subject may subsequently, at any time, object in writing and the data user will then have to cease to use the data subject's personal data or provide the data subject's personal data

to other persons for use in direct marketing¹. We also propose that the data subject may require the data user to notify the persons to whom his or her personal data has been provided for use in direct marketing to cease to so use the data². Upon receipt of the notification, the persons concerned have to cease to so use the data. A person who fails to comply with any of the above requirements commits an offence and is liable on conviction to a fine of \$500,000 and imprisonment for three years.

4. The same proposed arrangements apply to sale of personal data³. The maximum penalty for non-compliance is a fine of \$1,000,000 and imprisonment for five years.

5. The requirement under the current section 34 of the Personal Data (Privacy) Ordinance will be retained⁴. Under this section, a data user, when using the personal data of a data subject in direct marketing for the first time, shall inform the data subject that the data subject may request the data user to cease to so use the data. If the data subject so requests, the data user must cease to so use the data. To enhance the deterrent effect, we have proposed in the PD(P)(A)B to raise the penalty for contravention of this provision from a fine at level 3 (\$10,000) to a fine of \$500,000 and imprisonment for three years.

6. The proposals in paragraphs 3 to 5 above will strengthen the protection of personal data privacy in direct marketing activities.

**Constitutional and Mainland Affairs Bureau
December 2011**

¹ Sections 35K and 35P in Clause 21 of the PD(P)(A)B.

² Section 35P in Clause 21 of the PD(P)(A)B.

³ Section 35D in Clause 21 of the PD(P)(A)B.

⁴ Section 35L in Clause 21 of the PD(P)(A)B.

**Legislation in Other Jurisdictions Relating to
Use of Personal Data in Direct Marketing**

Jurisdiction	Legislation Relating to Use of Personal Data in Direct Marketing
United Kingdom	<p><u>General</u> (opt-out) : An individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing for the purposes of direct marketing personal data in respect of which he is the data subject. (Section 11(1) of the Data Protection Act 1998)</p> <p><u>Telephone calls</u> (opt-out) : A person shall not use a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where the called line is that of a subscriber who has <u>previously notified</u> the caller that such calls <u>should not</u> for the time being be made on that line. (Regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (“PECR”))</p> <p><u>E-mail</u> (opt-in, with exceptions) : A person shall not transmit unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail <u>has previously notified</u> the sender that he <u>consents</u> for the time being to such communications. However, under the following circumstances, the person may send e-mail for direct marketing purposes:</p> <ul style="list-style-type: none"> (i) that person has obtained the contact details in the course of the sale or negotiations for the sale of a product or service to that recipient; (ii) the direct marketing is in respect of that person’s similar products and services only; and (iii) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication. <p>(Regulation 22 of the PECR)</p> <p><u>Fax</u> (opt-in for individual; opt-out for corporate) : A person shall neither transmit unsolicited communications for direct marketing purposes by means of a facsimile machine where the called line is that of (a) an individual subscriber, except the individual subscriber <u>has previously notified</u> the caller that he <u>consents</u> for the time being to such communications; (b) a corporate subscriber who has <u>previously notified</u> the caller that such communications <u>should</u></p>

	<p>not be sent on that line. (Regulation 20 of the PECR)</p> <p><u>Automated calls</u> (opt-in) : A person shall not transmit communications comprising recorded matter for direct marketing purposes by means of an automated calling system except where the called line is that of a subscriber who <u>has previously notified</u> the caller that for the time being he <u>consents</u> to such communications. (Regulation 19 of the PECR)</p>
France	<p><u>General</u> (opt-out) : Any natural person is entitled to <u>object</u> to the use of the data relating to him for purposes of canvassing, in particular for commercial ends, by the controller. (Article 38 of Act N° 78-17 of 6 January 1978 on Data Processing, Data Files and Individual Liberties)</p> <p><u>Automated calls, fax and e-mail</u> (opt-in) : Direct canvassing (i.e. the sending of any message intended to directly or indirectly promote goods, services or the image of a person selling goods or providing services), via an automatic calling machine, a facsimile machine or an electronic mail system, using the contact details of a natural person <u>who has not consented</u> to being canvassed by such means is prohibited. (Article L121-20-5 of the Consumer Code)</p>
Australia	<p><u>General</u> (opt-out) : An organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection unless:</p> <p>(a) both of the following apply:</p> <ul style="list-style-type: none"> (i) the secondary purpose is related to the primary purpose of collection and, if the personal information is sensitive information, directly related to the primary purpose of collection; (ii) the individual would reasonably expect the organisation to use or disclose the information for the secondary purpose; or <p>.....</p> <p>(c) if the information is not sensitive information and the use of the information is for the secondary purpose of direct marketing :</p> <ul style="list-style-type: none"> (i) it is impracticable for the organisation to seek the individual's consent before that particular use; and (ii) the organisation will not charge the individual for giving effect to a request by the individual to the organisation not to receive direct marketing communications; and (iii) the individual has not made a request to the organisation not to receive direct marketing communications; and (iv) in each direct marketing communication with the individual, the organisation draws to the individual's attention, or prominently displays a notice, that he or she may express a wish not to receive any further direct marketing communications; and (v) each written direct marketing communication by the organisation with the individual (up to and including the communication that involves the

	<p>use) sets out the organisation's business address and telephone number and, if the communication with the individual is made by fax, telex or other electronic means, a number or address at which the organisation can be directly contacted electronically.</p> <p>(Subclause 2.1(a) and (c) of the National Privacy Principles)</p> <p>An organisation does not necessarily need to rely on Subclause 2.1(c) of the National Privacy Principles for use of personal information for direct marketing. An organisation could get the individual's consent at the time of collection to use information about them for direct marketing or the use might be related to the primary purpose and within the individual's reasonable expectations.</p> <p>(Page 39 of the Guidelines to the National Privacy Principles)</p>
New Zealand	<p>General (opt-out) : The Privacy Act 1993 does not contain express provision to deal with direct marketing.</p> <p>Under Principle 10 of the Privacy Act 1993, an agency that holds personal information that was obtained in connection with one purpose shall not use it for any other purpose unless the agency believes, on reasonable grounds, -</p> <p>....</p> <p>(e) that the purpose for which the information is used is directly related to the purpose in connection with which the information was obtained.</p> <p>(Principle 10 of the Privacy Act 1993)</p>
Canada	<p>General (opt-out) :</p> <p>The knowledge and <u>consent</u> of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.</p> <p>Consent can be given in many ways, for example a checkoff box may be used to allow individuals to request that their names and addresses not be given to other organizations. Individuals who <u>do not check the box are assumed to consent</u> to the transfer of this information to third parties.</p> <p>(Principle 3 in Schedule 1 to the Personal Information Protection and Electronic Documents Act)</p> <p>Automated calls (opt-in) : A telemarketer shall not initiate a telemarketing telecommunication via an automatic dialing-announcing device unless <u>express consent</u> has been provided by the consumer.</p> <p>(Part IV, para. 2 of Canadian Radio-television and Telecommunications Commission's Unsolicited Telecommunications Rules)</p>
United States	<p>E-mail (opt-out) : Message must include an explanation of how the recipient can <u>opt out</u> of getting commercial messages from you in the future.</p> <p>(CAN-SPAM Act)</p>

	<p><u>Automated calls</u> (opt-in) : No person may initiate any telephone call which includes the transmission of any unsolicited advertisement using an automatic telephone dialing system or an artificial or prerecorded voice for a commercial purpose, unless the call is made with the <u>prior express consent</u> of the called party or the caller has an established business relationship at the time the call is made. (Section 64.1200 of Telephone Consumer Protection Act)</p> <p><u>Fax</u> (opt-in) : No person may send an unsolicited advertisement to a telephone facsimile machine. The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's <u>prior express invitation or permission</u>. (Section 64.1200 of Telephone Consumer Protection Act)</p>
Germany	<p><u>General</u> (opt-in, with some exceptions) : The processing or use of personal data for purposes of advertising or trading in addresses shall be lawful if the data subject <u>has given</u> his or her <u>consent</u>. (Section 28(3) of the Federal Data Protection Act)</p> <p><u>Telephone calls, automated calls, fax and e-mail</u> (opt-in) : It is illegal to advertise by means of a telephone call, made to a consumer without his <u>prior express consent</u>, or made to another market participant without at least the latter's <u>presumed consent</u>; or advertising using an automated calling machine, a fax machine or electronic mail without the addressee's <u>prior express consent</u>. (Section 7(2) of the Act Against Unfair Competition)</p>