# *立法會*
# *Legislative Council*

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LC Paper No. CB(2)1024/11-12
(These minutes have been seen by the Administration)

**Panel on Constitutional Affairs**

**Minutes of meeting**
**held on Monday, 18 April 2011, at 2:30 pm**
**in the Chamber of the Legislative Council Building**

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| **Members present** | : | Hon TAM Yiu-chung, GBS, JP (Chairman)<br>Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP (Deputy Chairman)<br>Hon Albert HO Chun-yan<br>Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP<br>Dr Hon Margaret NG<br>Hon WONG Yung-kan, SBS, JP<br>Hon LAU Kong-wah, JP<br>Hon LAU Wong-fat, GBM, GBS, JP<br>Hon Miriam LAU Kin-yee, GBS, JP<br>Hon Emily LAU Wai-hing, JP<br>Hon Abraham SHEK Lai-him, SBS, JP<br>Hon Audrey EU Yuet-mee, SC, JP<br>Hon WONG Kwok-hing, MH<br>Hon LEE Wing-tat<br>Hon Jeffrey LAM Kin-fung, SBS, JP<br>Hon CHEUNG Hok-ming, GBS, JP<br>Hon WONG Ting-kwong, BBS, JP<br>Hon Ronny TONG Ka-wah, SC<br>Hon CHIM Pui-chung<br>Prof Hon Patrick LAU Sau-shing, SBS, JP<br>Hon Cyd HO Sau-lan<br>Dr Hon LAM Tai-fai, BBS, JP<br>Hon CHAN Kin-por, JP<br>Dr Hon Priscilla LEUNG Mei-fun<br>Hon WONG Kwok-kin, BBS<br>Hon IP Kwok-him, GBS, JP<br>Hon Paul TSE Wai-chun<br>Dr Hon Samson TAM Wai-ho, JP<br>Hon LEUNG Kwok-hung<br>Hon Tanya CHAN |

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| **Non-Panel Members attending** | | Hon James TO Kun-sun |
| **Members absent** | : | Hon CHEUNG Man-kwong<br>Dr Hon Philip WONG Yu-hong, GBS<br>Hon Timothy FOK Tsun-ting, GBS, JP<br>Hon Mrs Regina IP LAU Suk-yee, GBS, JP<br>Hon Alan LEONG Kah-kit, SC<br>Hon WONG Yuk-man |
| **Public Officers attending** | : | <u>Item III</u><br><br>Mr Stephen LAM<br>Secretary for Constitutional and Mainland Affairs<br><br>Mr Joshua LAW Chi-kong<br>Permanent Secretary for Constitutional and Mainland Affairs<br><br>Mr Arthur HO<br>Deputy Secretary for Constitutional and Mainland Affairs<br><br>Ms Anne TENG Yu-yan<br>Principal Assistant Secretary<br>(Constitutional and Mainland Affairs)<br><br>Mr Freely CHENG<br>Principal Assistant Secretary<br>(Constitutional and Mainland Affairs)<br><br><u>Item IV</u><br><br>Ms Adeline WONG Ching-man<br>Under Secretary for Constitutional and Mainland Affairs<br><br>Mr Arthur HO<br>Deputy Secretary for Constitutional and Mainland Affairs<br><br>Mrs Philomena LEUNG<br>Principal Assistant Secretary<br>(Constitutional and Mainland Affairs) |

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| **Clerk in attendance** | : | Miss Flora TAI<br>Chief Council Secretary (2)3 |
| **Staff in attendance** | : | Mr Arthur CHEUNG<br>Senior Assistant Legal Adviser 2 |
| | | Ms Wendy KAN<br>Assistant Legal Adviser 6 |
| | | Miss Ivy LEONG<br>Senior Council Secretary (2)3 |
| | | Ms Wendy LO<br>Council Secretary (2)3 |
| | | Mrs Fonny TSANG<br>Legislative Assistant (2)3 |

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**I. Information papers issued since the last meeting**

Members noted that no information paper had been issued since the last meeting.

**II. Items for discussion at the next meeting**
[LC Paper Nos. CB(2)1553/10-11(01) to (02), CB(2)1467/10-11(01) and CB(2)1481/10-11(01)]

2. Members noted that the next regular meeting would be held on 16 May 2011. Members agreed that the item "Work briefing by the Privacy Commissioner for Personal Data" proposed by the Secretary for Constitutional and Mainland Affairs ("SCMA") be discussed at the next meeting.

3. Members also agreed that the item "Medical conditions of Principal Officials and arrangements made during the temporary absence of Principal Officials" proposed by Ms Emily LAU in her letter dated 4 April 2011 [LC Paper No. CB(2)1467/10-11(01)] be discussed at the next meeting. Noting that issues relating to medical conditions of directorate civil servants fell under the purview of the Civil Service Bureau, Members agreed that the Clerk should refer the issue to the Panel on Public Service for follow-up.

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4. Referring to her letter dated 7 April 2011 to the Chairman of the Panel [LC Paper No. CB(2)1481/10-11(01)], Ms Emily LAU proposed that the issue relating to management of government records should be discussed at a future meeting. SCMA advised that the Government maintained its stance that there was no need for archival legislation for the time being. SCMA added that he would relay members' views in this regard to the Administration Wing which would report back to the Panel in due course. Members noted that the Panel had discussed with the Administration and received views from deputations on "Code on access to information and management of public records" at its meeting on 17 May 2010 and the Administration had submitted an information paper to the Panel on 27 October 2010 on the progress of the follow-up actions arising from that meeting. Members agreed that the Panel should further discuss the issues relating to management of public records at a future meeting. Dr Margaret NG suggested that the Administration should report to the Panel on its work in following up the relevant views expressed by deputations at the meeting on 17 May 2010.

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## III. Review of various election expenses limits and adjustments to free mailing arrangements for candidates

[LC Paper Nos. CB(2)1504/10-11(01) and CB(2)1553/10-11(03)]

Briefing by the Administration

5. SCMA briefed members on the Administration's proposals regarding the election expenses limits for the Election Committee ("EC") Subsector elections in December 2011 and the Chief Executive ("CE") election in March 2012; financial assistance and the election expenses limit for the District Council ("DC") election in November 2011; and promotional letters sent by candidates free of postage as set out in the Administration's paper [LC Paper No. CB(2)1504/10-11(01)].

6. Members noted that the Legislative Council ("LegCo") Secretariat had prepared a background brief on the subject [LC Paper No. CB(2) 1553/10-11(03)].

Discussion

*Election expenses limits for the CE and DC elections*

7. Mr LEE Wing-tat considered that the scale of the proposed increase of the election expenses limit for the CE election from $9.5 million to $13

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million was too large. Given that the CE election had a small size of electorate (1 200 EC members), the election expenses incurred by the last CE-elect was $8.36 million and the increase in the composite consumer price index ("CCPI") from 2000 to 2012 was only 12.8%, Mr LEE did not see any justification for such an increase. He pointed out that if the election expenses limit for the CE election was increased to $13 million, a candidate could spend an average of $10,000 for each member of the EC in the 2012 CE election. He expressed concern that based on this calculation, the election expenses limit for electing the CE in 2017 by universal suffrage would be unreasonably high. Ms Audrey EU and Ms Emily LAU shared a similar view. Ms EU considered that the increase in the election expenses limit for the CE election should be in line with the CCPI. Given that the CE election had a small electorate, Ms LAU was not supportive of the proposed increase. Mr LEUNG Kwok-hung said that given the proposed increase, the election expenses limit for electing the CE in 2017 by universal suffrage would be further increased substantially when universal suffrage for the selection of the CE was implemented in 2017. He was concerned that members of the pan-democratic camp running for the election would be put at a disadvantage.

8. Mr Paul TSE was of the view that while the objective for setting an election expenses limit for an election was to ensure fairness in elections, there was no absolute fairness. Given financial resources were but one of the assets of candidates, the Administration should not single out financial resources for regulation by setting election expenses limit, otherwise it would be unfair to those candidates who had the financial resources but inadequate time to carry out electioneering work by themselves.

9. SCMA responded that the purpose of providing for an election expenses limit for the CE election was to allow a candidate to use as much financial resources as the candidate was entitled to use to promote his candidacy. A candidate had complete discretion to decide on the amount of election expenses to be spent. He advised that the detailed calculations and estimates of the election expenses limit for the 2012 CE election were set out at Annex C to the Administration's paper. Most of the increases in the estimated expenses were in line with the CCPI. SCMA supplemented that the Standing Committee of the National People's Congress had made a decision in December 2007 that universal suffrage for electing the CE would take place in 2017. The Administration would facilitate candidates from different backgrounds to participate in an election.

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10. Mr IP Kwok-him said that the Democratic Alliance for the Betterment and Progress of Hong Kong was supportive of the Administration's proposal for increasing the election expenses limit for the CE election from $9.5 million to $13 million. He was of the view that the election expenses limit had not been revised in the last 10 years and the amount must be sufficient for candidates to publicize their election platform to the public at large.

11. Noting from Annex C to the Administration's paper that there was an estimated amount of $2.82 million for sending publicity materials to each household for the 2012 CE election, Mr Ronny TONG queried as to why there was no estimation for sending publicity materials to the 1 200 EC members. SCMA responded that the estimated amount of expenses as set out in Annex C for setting up an election office, employing campaign staff, hiring professional services, conducing policy research and on publicity and promotion had included contact with members of the EC as well as all residents of the Hong Kong Special Administrative Region ("HKSAR"). In response to Mr TONG's further enquiry, SCMA explained that the policies introduced by the CE would affect the well-being of all residents in the territory, as such, the estimated expenses on publicity and promotion must be sufficient for candidates to publicize their election platform to all residents of HKSAR. Mr Albert HO, however, opined that the Administration was misleading to say that the CE candidates would need to publicize their election platform to all residents of HKSAR as only 1 200 EC members were eligible to vote in the CE election in 2012.

12. Dr LAM Tai-fai considered that the Administration should have given consideration to the same factors in reviewing the election expenses for the CE and DC elections. While the Administration proposed to increase the election expenses limit for the CE election from $9.5 million to $13 million, the proposed increase of the election expenses limit for the DC election was only from $48,000 to $53,000. Dr LAM enquired whether there was room to further adjust the election expenses limit upward for the DC election. He also queried the adoption of the election expenses limit of $53,800 across-the-board for the 2011 DC election as he considered that it would restrict unfairly the electioneering activities of candidates of constituencies with a large population size.

13. SCMA responded that the proposed increase of the election expenses limit would provide sufficient resources to enable the CE candidates to publicize their election platform to the public at large and to conduct the necessary canvassing activities both territory-wide and at district level. As

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regards the election expenses limit for the DC election, SCMA advised that according to the election expenses declared by candidates in the 2007 DC election, 19.2% of the candidates spent more than 70% to 80% of the election expenses limit, 13.6% of the candidates spent more than 80% to 90% of the election expenses limit, and 5.6% of the candidates spent more than 90% of the election expenses limit. In other words, most of the candidates had spent less than 90% of the election expenses limit. Having regard to the spending pattern of candidates in the 2007 DC election, the Administration considered that the proposed increase of the election expenses limit was appropriate. SCMA added that it was appropriate to apply the same election expenses limit to all DC constituencies because their size was small when compared to the LegCo geographical constituencies ("GCs") and the population of most DC constituency areas varied within a ±25% deviation of the population quota of 17 282.

*Electioneering on the electronic media*

14. Mr LEUNG Kwok-hung and Mr IP Kwok-him enquired whether the Administration would relax the existing restriction on election advertisement in the electronic media. Ms Emily LAU said that while she did not support spending a huge amount of money on election advertisement in the media like the practice in the United States, she enquired whether more airtime would be allocated to each candidate to enable them to explain their election platform in the electronic media.

15. SCMA responded that the Government had airtime on television and radio stations for publicizing government policies. The Administration, however, maintained the view that political advertisements should be prohibited in the electioneering campaign so that the election expenses limit would not have to be adjusted upwards further. SCMA considered that a relatively low election expenses limit would facilitate participation of candidates from different backgrounds, allowing them to compete on a level playing field in an election. The Administration welcomed candidates to make use of new media on the Internet for election publicity. He added that subject to the "equal treatment" principle, individual broadcasters were allowed to organize election forums in their programmes and they could decide on the amount of airtime to be allocated to candidates to explain their election platform.

16. Mr LEE Wing-tat considered that the Administration should be more pro-active in formulating policies and/or revising the relevant codes of

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practice in conjunction with the Commerce and Economic Development Bureau ("CEDB") to encourage television stations to organize election forums in their programmes so that candidates of various elections would have adequate time to explain their election platform to their electors. Mr Paul TSE concurred with the view that organizing election forums in the electronic media was crucial for electors to have a better understanding of the candidates' election platform.

17. SCMA responded that the electronic media had to comply with the relevant legislation and observe the terms and conditions of their licences. They were also subject to codes of practice issued by the Broadcasting Authority. It would not be appropriate to add more requirements after a license was granted. SCMA added that television stations would have their own editorial judgment on the programmes to be produced. In view of the expected keen participation of political parties in the new DC (second) functional constituency ("FC") election in 2012, it was envisaged that the LegCo election would become a focus of the media and attract extensive free coverage by the electronic media.

18. Mr Albert HO opined that television was the most effective medium in promoting election especially for large GCs, such as the New Territories West GC which had a population of around two million with close to 900 000 registered voters. Mr HO suggested that as an alternative financial assistance to candidates, the Government should consider buying airtime for use by candidates for publicity purpose. Mr LEUNG Kwok-hung held a similar view. He said that it would be most effective and fair for the Government to buy airtime for candidates to present their election platform to the electors in the electronic media. Mr Paul TSE considered that the restriction on election advertisement should be relaxed.

19. SCMA responded that the Administration had thoroughly considered such suggestion and maintained the view that political advertisements on electronic media should be prohibited. The Administration considered that the existing financial assistance provided to candidates was adequate. The subsidy rate for the financial assistance scheme for a candidate standing for a DC/LegCo election had been revised to $12 per vote and candidates were entitled to send a letter free of postage to each elector in their constituencies concerned. It was against the principle of the Government and was too costly to subsidize candidates in electioneering on the electronic media. If the Government provided such subsidy, it would be difficult to prohibit resourceful political parties or individual candidates to arrange more

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political/election advertisements, putting the less well-off candidates at a greater disadvantage. Besides, once television advertising for election was allowed, it might lead to substantial increase in election expenses. To ensure elections were conducted in an open, fair and clean manner, the Administration would not allow election advertisements in the electronic media at the current stage.

*Candidates to send joint promotional letters to electors free of postage*

20. Ms Emily LAU welcomed the Administration's proposal for allowing a list of candidates in a GC and a list of candidates in the DC (second) FC to send their promotional letters to the same elector. Ms LAU and Ms Audrey EU enquired whether such arrangement would be applicable to the making of banners, posters and signboards for elections.

21. SCMA responded that to facilitate candidates to participate in elections, the Administration had proposed to allow lists of candidates of different constituencies and candidates of FC or EC subsectors with multiple seats to send their promotional letters to the same elector/voter. The Registration and Electoral Office ("REO") would review the arrangements in relation to the production of banners, posters and signboards when drawing up the electoral guidelines for the coming elections. He added that the basic principle was that the expenses incurred in joint promotion would have to be borne by the candidates concerned as their respective election expenses.

22. Ms Audrey EU sought clarification on the arrangements for allowing candidates to jointly send one promotional letter free of postage to their electors. SCMA advised that the proposal would only apply to a list of candidates in a GC and a list of candidates in the DC (second) FC; candidates in the Labour FC which had three seats; and candidates standing for election in the same EC subsector, which had multiple number of seats (ranging from 16 seats to 60 seats). SCMA further explained that the proposal should not cover elections at which lists of candidates/candidates of different constituencies would have different electors/voters, such as candidates of different GCs, candidates of different FCs and candidates of different EC subsectors.

*Implementation of environmental-friendly measures in the distribution of election-related materials*

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23. Mr Paul TSE and Ms Emily LAU were of the view that the Administration should introduce measures to facilitate candidates to adopt more environmental-friendly means to distribute their election-related materials such as using electronic means instead of printed materials for election publicity and promotion. Mr TSE reiterated his suggestion on the provision of an allowance to candidates in the form of a voucher in lieu of free postage to provide financial incentive and more flexibility to candidates in distributing their election-related materials. Noting that the Administration would not take on board his suggestion in the coming elections, he urged the Administration to consider implementing the suggestion in the future. He further suggested that the Administration could consider adding the amount of expenses spent in sending promotional letters free of postage to the election expenses limit of a candidate, or rebating the same amount of assistance to a candidate who had chosen not to send such letters to each elector in the constituency.

24. SCMA responded that candidates were encouraged to distribute their election advertisements by e-mail and make use of the new media on the Internet for election publicity. REO would continue its efforts to solicit e-mail addresses from electors to facilitate candidates sending election-related materials. SCMA explained that the amount of financial assistance received by a candidate was determined by the number of votes he or she obtained. It would not be feasible to provide financial assistance to candidates in payment in cash in lieu of free postage. The Administration, however, would consider Mr Paul TSE's suggestion on the provision of an allowance to candidates in the form of a voucher for future elections.

25. Ms Emily LAU enquired about the number of electors who had provided their e-mail addresses to REO. She considered that the Administration should provide address labels to candidates for sending election-related materials to electors on a household basis for environment protection purposes.

26. SCMA responded that each candidate was provided with address labels of all electors in the constituencies concerned on an individual basis. Candidates could decide on whether to send out their election-related materials to their electors on a household basis. The Electoral Affairs Commission and REO had explored the feasibility of providing address labels of electors to candidates on a household basis, however, there were practical difficulties which needed to be resolved, including the way to

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ascertain whether electors residing in the same address belonged to a family or they were resided in elderly homes sharing a communal address.

27. Deputy Secretary for Constitutional and Mainland Affairs supplemented that through the voter registration campaign, registered electors and persons who applied for registration as electors were encouraged to provide their e-mail addresses to REO on a voluntary basis. About 200 000 registered electors had done so and their e-mail addresses would be provided to the candidates of the constituencies concerned for the purpose of sending election-related materials. REO would continue its efforts in this regard. In response to Ms Emily LAU's enquiry, SCMA advised that candidates would not be provided with address labels of those electors who had provided their e-mail addresses to REO.

*Election returns*

28. Ms Emily LAU urged the Administration to introduce appropriate legislative amendments to implement a special arrangement for handling election returns ("ERs") with minor errors. Ms LAU expressed grave concern that if appropriate arrangement had not been introduced before the coming elections in 2011 and 2012, candidates would have to undergo investigation of trivial breaches under the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554) ("ECICO") by the Independent Commission Against Corruption ("ICAC").

29. SCMA responded that the Administration had held discussions with REO and ICAC on the feasibility of making special arrangements to deal with minor errors or omissions in ERs. While the Administration had to ensure that elections would continue to be held in a fair, open and honest manner, the Administration would work closely with ICAC and REO to improve the existing mechanism to facilitate candidates in the participation in elections. The Administration would seek members' views on its proposal in due course.

*Electronic voting*

30. Ms Audrey EU expressed concern that there were always complaints about the accessibility of polling stations by persons with disabilities ("PWDs") after each election. She enquired whether the Administration would facilitate PWDs in casting their votes by electronic means.

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31. SCMA responded that more than 80% of over 500 polling stations were easily accessible to PWDs. Should an elector had difficulty in mobility was allocated to a polling station not accessible to PWDs, the elector could apply to REO five days before the polling day for re-allocation to a nearby barrier-free polling station. The Administration considered it appropriate and more practicable to continue to use ballot papers for voting and hence would not consider electronic voting at this stage.

## IV. Report on Further Public Discussions on Review of the Personal Data (Privacy) Ordinance

[LC Paper Nos. CB(2)1553/10-11(04) to (05)]

Briefing by the Administration

32. Under Secretary for Constitutional and Mainland Affairs ("USCMA") gave a PowerPoint presentation on the result of the further public discussions on review of the Personal Data (Privacy) Ordinance ("PDPO") (Cap. 486) conducted from October to December 2010 and the legislative proposals drawn up in the light of the views received as detailed in the Administration's Paper [LC Paper No. CB(2)1553/10-11(04)] and the Report on Further Public Discussions on Review of the Personal Data (Privacy) Ordinance. Members also noted the updated background brief prepared by the LegCo Secretariat on "Review of PDPO" [LC Paper No. CB(2)1553/10-11(05)].

Discussion

*Opt-in or opt-out mechanism for collection and use of personal data*

33. Mr James TO expressed strong dissatisfaction that the Administration did not propose to adopt an opt-in mechanism for collection and use of personal data. He was opposed to the view of the marketing/direct marketing, banking and exhibition and convention industries that an opt-out mechanism should be adopted on the ground that as consumers tended not to read the information provided to them, adopting an opt-in mechanism would wreck the industries. Mr TO considered that data subjects were not given an informed choice under the opt-out mechanism as the consent to use their personal data would be presumably given if they were not conscious of the need to make a choice for opting out.

34. Mr LEUNG Kwok-hung also expressed opposition to the proposed adoption of an opt-out mechanism. He considered that the Administration

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in deciding on the regulatory mechanism should give priority consideration to the protection of personal data privacy of the general public, instead of the interests of the direct marketing industry.

35. USCMA responded that of the respondents who expressed views on whether an opt-out or opt-in mechanism should be adopted during the public consultation exercise, about 60%, including the marketing/direct marketing, banking and exhibition and convention industries supported the opt-out mechanism. These respondents considered that it would be unrealistic to request consumers to read through the information for making a choice to opt in; an opt-out mechanism could allow room for the continued operation of the direct marketing industries which created thousands of employment opportunities. Having considered the views received and the fact that most jurisdictions adopted the opt-out mechanism which provided data subjects with an informed choice as to whether to allow the use of their personal data for direct marketing, the Administration proposed to adopt the opt-out mechanism in order to strike a balance between facilitating business operation and safeguarding personal data privacy. USCMA advised that such arrangement was in line with the approach adopted under the Unsolicited Electronic Messages Ordinance (Cap. 593) ("UEMO"), which regulated the sending of unsolicited commercial electronic messages.

36. USCMA stressed that as detailed in paragraph 9 of the Administration's paper, the Administration proposed to add new requirements to the effect that a data user intending to use the personal data to be collected for direct marketing should inform the data subject of (i) the classes of goods, facilities or services to be offered or advertised and/or the purposes for which donations or contributions might be solicited; (ii) the classes of persons to whom the data might be transferred for direct marketing purposes and (iii) the kinds of personal data to be transferred. The layout and presentation of the information, if in written form, should be easily readable to individuals and the language easily understandable. A data subject could opt out any time and if he so requested, the data user had to cease using his personal data for direct marketing as currently stipulated in section 34(1) (ii) of PDPO. The Administration also proposed that the data subject could request the data user to notify the classes of persons to whom his personal data had been transferred for direct marketing to cease using the data.

37. USCMA further advised that according to an industry survey conducted by the Office of the Telecommunications Authority ("OFTA"),

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31% of the respondent companies reported success rates of over 10% in selling goods/services through person-to-person telemarketing calls ("P2P calls"). 13% of the respondents of the public opinion survey conducted by OFTA also said that they had gained benefits from P2P calls, for example, getting lower price or discounts. The surveys indicated that more consumer choices could indeed be provided in direct marketing activities.

38. Mr WONG Ting-kwong opined that unsolicited P2P calls which brought a high level of nuisance to the public should be regulated. He sought clarification from the Administration on whether the establishment of a Do-not-call ("DNC") register for P2P calls would be proposed under PDPO. He also enquired about the position of the Constitutional and Mainland Affairs Bureau ("CMAB") in respect of the establishment of such a register under UEMO administrated by CEDB. Mr CHAN Kin-por enquired how the Administration would regulate unsolicited random calls (e.g. in P2P or pre-recorded message form).

39. USCMA replied that a survey conducted by OFTA indicated that around half of P2P calls did not involve the use of personal data. Having discussed with CEDB, CMAB decided not to pursue the proposal for regulating P2P calls under PDPO as it appeared not directly relevant to the personal data privacy issue and went beyond the ambit of PDPO. The position of the Administration had been clearly explained in the consultation report published in October 2010. CMAB would offer advice from the perspective of protection of personal data privacy if CEDB proposed to establish a DNC register for P2P calls under UEMO.

40. USCMA added that OFTA had established three DNC registers for fax, short messages and pre-recorded telephone messages respectively under UEMO. A person who had opted out would no longer receive commercial electronic messages, including random calls in pre-recorded message form. OFTA had also drawn up a code of practice with the industries concerned to regulate P2P calls to enhance the protection for call recipients. Under the code, enterprises were required to maintain an internal DNC register for P2P calls.

41. Mr WONG Kwok-hing enquired about the overseas jurisdictions that had been taken reference by the Administration in drawing up the regulatory mechanism. USCMA replied that the Administration noted that the United States, Canada, the United Kingdom ("UK"), France and Australia generally adopted an opt-out mechanism to regulate the use of personal data in direct marketing. An opt-in mechanism was only adopted for direct marketing

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activities conducted through certain channels, such as email and fax, in some jurisdictions like the UK and France.

42. Ms Audrey EU was of the view that different mechanisms for collection and use of personal data could be adopted having regard to the purpose of collection. For instance, an opt-in mechanism could be adopted for sale of personal data whereas an opt-out mechanism could be adopted for transfer of personal data which did not involve monetary or in kind gain. USCMA replied that as personal data were mainly sold for the purpose of direct marketing, the Administration considered that for the sake of consistency, a single regulatory mechanism (i.e. an opt-out mechanism) should be adopted for collection and use of personal data for both direct marketing and sale purposes.

43. Ms Audrey EU was also disappointed at the Administration's decision not to introduce a more stringent regulatory regime for the use of sensitive personal data considering that an opt-in mechanism could be adopted in regulating such use. USCMA replied that diverse views were received on the proposal for regulating sensitive personal data during the public consultation exercise. Having considered that there were no mainstream views in the community on the coverage of sensitive personal data, the regulatory model or sanctions, the Administration did not intend to pursue the proposal at the present stage.

44. Noting that it would be an offence (i.e. liable on conviction to a fine of $1,000,000 and imprisonment for five years) for a person to disclose personal data with a view to gaining or causing loss without the data user's consent, Mr Albert HO expressed concern that the media sector would be prosecuted for disclosing personal data which were of the public interest. USCMA replied that having considered the views received and making reference to the overseas privacy legislation, various defences for the proposed offences would be provided for under the proposed legislation as detailed in paragraph 3.73 in the Report on Further Public Discussions on Review of PDPO. She assured members that the disclosure of personal data for the purpose of news activity was one of the defences proposed.

45. Mr CHAN Kin-por expressed support for the legislative proposals put forward by the Administration which, in his view, could allow room for business operation and provide clear guidelines on the requirements of data users in using personal data. He stressed that an opt-out mechanism was commonly adopted in overseas countries except in Germany and a data subject could any time request the data user to cease using his personal data.

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Under the circumstances, it was considered appropriate to adopt an opt-out mechanism for direct marketing under which an informed choice was given to data subject. He suggested that public education on the right of data subjects should be stepped up to enhance the knowledge of privacy protection.

*Control over the transfer and sale of personal data*

46. Mr James TO said that the Administration had not addressed the issue raised by the Democratic Party that a data user should notify the data subject of the source of his personal data for direct marketing purpose. Mr TO opined that if the data subject was informed of the source of his personal data, he could request the data user concerned to cease using and transferring his personal data in one go. In his view, it would be an onerous burden on the data subject if he had to notify various data users to cease using his personal data. Mr Albert HO enquired whether the data subject would be given the right to request any data user to notify both the transferee who held the source of his personal data and the classes of persons to whom his personal data had been transferred for direct marketing to cease using and transferring the data.

47. USCMA responded that as the personal data of data subjects were probably collected from diverse channels by a data user, it would be difficult for a data user to trace the sources and notify all the data users concerned to cease using the data. Under the Administration's proposal, a data subject could request a data user to notify the classes of persons to whom his personal data had been transferred for direct marketing to cease using the data. Mr Albert HO expressed reservations about the Administration's proposal, saying that it could not eradicate continued transfer of personal data by the original transferee.

48. Mr Paul TSE enquired whether the sale of personal data could be regulated by imposing a responsibility on the seller of personal data to request the buyer, through contractual agreement for instance, to cease using the data upon notification of the data user. USCMA replied that under the Administration's proposal, a data user intending to sell personal data had to inform the data subject in writing and provide an option for the data subject to choose not to agree to the sale as detailed in paragraph 20 of the Administration's paper. If no opt-out request was received from the data subject within 30 days after the information and option were given to the data subject, the data user could proceed to sell the personal data. The

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buyer of the personal data, as a data user, had to comply with the above requirements as well when he intended to sell the personal data to other parties.

49. While expressing support for the enhanced deterrent measures against unauthorised sale of personal data, Mr CHAN Kin-por expressed concern about the application of "sale" to sharing and temporary transfer of data in exchange for fees or commissions in the direct marketing industry. He would further consult the business sectors on that proposal.

*Notification for collection and use of personal data*

50. Mr WONG Kwok-hing enquired whether a data user had to notify the data subject on the intended direct marketing use of his personal data which was collected before the entry into force of the proposed new requirements under PDPO. He also asked how the personal data that were transferred to other parties before the enforcement of the new requirements would be handled. Mr LEUNG Kwok-hung considered that a data user should be required to notify these data subjects again on the use of his personal data once the new requirements were in force.

51. USCMA explained that under the Administration's proposal, a data user should inform the data subject of the intended direct marketing activities and provide an opt-out choice to the data subject as specified in paragraph 9 of the Administration's paper if he intended to use (including transfer) the personal data already collected (whether before or after the entry into force of the new requirements) for direct marketing purpose. The classes of persons to whom the personal data of the data subject had been transferred for direct marketing were also required to comply with those requirements as data users themselves. However, the requirements would not apply to the pre-existing data which the data user had, before the entry into force of the new requirements, used for direct marketing in compliance with the existing arrangements under PDPO, and which he continued to use (but not transfers) for offering or advertising the same class(es) of goods, facilities or services, or solicitation of donations or contributions for the same purpose(s). Such arrangement could help avoid a huge number of notices providing the required information and option to be sent to data subjects to cover data being used for such activities when the new requirements came into effect.

52. Mr WONG Kwok-hing enquired whether the notification of the use of personal data for direct marketing from a data user to a data subject must be

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given in written form. USCMA advised that for collection and use of personal data in direct marketing, a data user could choose to inform the data subject in written form. The layout and presentation of the information, if in written form, should be easily readable. For sale of personal data which had aroused widespread community concerns, a data user must inform the data subject in writing. Mr WONG expressed concern that disputes would arise if the notification for direct marketing purpose was not provided in writing. Mr LEUNG Kwok-hung considered that notification should be given in writing for the use of personal data for both direct marketing and sale purposes.

53. Noting that the data user might deem that the data subject has not opted out if no opt-out request was received within 30 days after the information and option were given to the data subject, Ms Audrey EU was concerned that disputes would arise in cases where the data user denied receipt of the data subject's notification. She enquired how such disputes could be handled.

54. USCMA responded that as some consumer agreements were reached through tele-marketing, the consent to use the personal data of the data subject for direct marketing activities was allowed to be sought in non-written form. Since criminal liability would be imposed for violation of the proposed new requirements regarding direct marketing under PDPO, she believed that relevant records of tele-conversations, letters and emails on consumer agreements would be maintained properly by enterprises to avoid disputes. She added that the Privacy Commissioner for Personal Data ("PCPD") could conduct investigation into such kind of consumer complaints involving personal data. PCPD would look into the existing practices and internal guidelines on use of personal data of the enterprise concerned during the investigation and suggest good practice to enterprises if necessary.

55. To offer better protection to the data subject under the opt-out mechanism, Mr Paul TSE was of the view that the notification, such as the font size of words, should be presented in a much more eye-catching and conspicuous manner. USCMA replied that the Administration considered it adequate to request the data user to present the information in easily readable manner to individuals.

*Proposal for empowering PCPD to award compensation to aggrieved data subjects*

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56. Noting that the Administration would not pursue the proposal for empowering PCPD to award compensation to aggrieved data subjects, Ms Audrey EU enquired about the channels through which the victims could seek redress for damage suffered. USCMA replied that the Administration proposed to empower PCPD to provide legal assistance to an aggrieved data subject to institute legal proceedings against the data user to seek compensation under section 66 of PDPO. Such assistance would include giving legal advice on the sufficiency of evidence and arranging for a lawyer to represent the applicant in legal proceedings. Following the model of the Equal Opportunities Commission, the Administration further proposed to stipulate that proceedings under section 66 shall be brought in the District Court and that each party had to bear his own costs to ensure that the claimant did not have to bear huge legal fees in the event he lost the case.

57. Ms Audrey EU asked about the criminal liability of a data user who had failed to comply with the directions of an enforcement notice ("EN") issued by PCPD under the proposed legislation. USCMA replied that while non-compliance with any of the new requirements for collection and use of personal data under PDPO would be subject to issuance of an EN by PCPD, it would be a criminal offence if a data user did not comply with such requirements and subsequently used the personal data for direct marketing or sale purposes. PCPD could refer such cases to the Police for criminal investigation and the Department of Justice for consideration of prosecution.

## V. Any other business

58. There being no other business, the meeting ended at 5:40 pm.

Council Business Division 2
Legislative Council Secretariat
10 February 2012