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Legislative Council

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Paper for the House Committee

**Report of the Subcommittee on Personal Data (Privacy) (Amendment)
Ordinance 2012 (Commencement) Notice**

Purpose

This paper reports on the deliberations of the Subcommittee on Personal Data (Privacy) (Amendment) Ordinance 2012 (Commencement) Notice.

Background

2. The Personal Data (Privacy) (Amendment) Ordinance 2012 ("Amendment Ordinance") was passed by the Legislative Council ("LegCo") on 27 June 2012. The Amendment Ordinance introduced amendments to the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO"), inter alia, to provide for regulation over the use of personal data in direct marketing and provision of personal data for use in direct marketing; to create a new offence for disclosure of personal data obtained without consent from data users; to empower the Privacy Commissioner for Personal Data ("the Privacy Commissioner") to provide legal assistance to aggrieved data subjects in bringing proceedings to seek compensation from data users under PDPO; to impose a heavier penalty for repeated contravention of enforcement notices; and to create a new offence for repeated contravention of the requirements under PDPO for which enforcement notices have been served.

3. All the provisions in the Amendment Ordinance have come into operation since 1 October 2012, with the exception of sections 20, 21, 38(2), 39 and 43. In gist, section 21 of the Amendment Ordinance introduces a new Part VIA to PDPO, which provides for a statutory scheme to regulate the use of personal data by a data user in direct marketing and the provision of personal data by a data user to another person for use by that other person in direct marketing. Section 34 of PDPO, the existing provision governing the use of personal data in direct marketing, is repealed by section 20 of the Amendment Ordinance.

4. Sections 38(2), 39 and 43 of the Amendment Ordinance empower the Privacy Commissioner to provide legal assistance to aggrieved data subjects

who intend to institute legal proceedings pursuant to section 66 of PDPO and provide for related amendments. Assistance may include the giving of advice and any other form of assistance which the Privacy Commissioner may consider appropriate.

5. The new regulatory requirements for the use and provision of personal data for use in direct marketing as well as the new legal assistance scheme are detailed in **Appendix I**.

The Personal Data (Privacy) (Amendment) Ordinance 2012 (Commencement) Notice (L.N. 5)

6. The Personal Data (Privacy) (Amendment) Ordinance 2012 (Commencement) Notice (L.N. 5) ("the Notice") was made by the Secretary for Constitutional and Mainland Affairs under section 1(3) of the Amendment Ordinance to appoint 1 April 2013 as the day on which sections 20, 21, 38(2), 39 and 43 of the Amendment Ordinance come into operation. The Notice was gazetted on 25 January 2013 and tabled in Council on 30 January 2013.

The Subcommittee

7. At the meeting of the House Committee on 8 February 2013, Members decided to form a subcommittee to scrutinize the Notice, the membership list of which is at **Appendix II**. Under the chairmanship of Hon CHAN Kin-por, the Subcommittee held a meeting with representatives of the Administration and the Office of the Privacy Commissioner for Personal Data ("PCPD") on 22 February 2013.

8. To allow sufficient time for the scrutiny of the Notice, the Council passed a resolution on 20 February 2013 to extend the scrutiny period of the Notice from 27 February 2013 to 20 March 2013.

Deliberations of the Subcommittee

Preparatory work of PCPD and readiness of businesses

Publicity and educational activities by PCPD to prepare businesses and consumers for new regulatory regime

9. The Subcommittee has expressed concern about the readiness of businesses for the new regime governing the use of personal data in direct marketing and provision of personal data for use in direct marketing coming into operation on 1 April 2013. The Subcommittee has asked about the preparatory

work carried out by PCPD to help businesses get prepared for the implementation of the new regulatory regime and the feedback received in the course of the relevant publicity and educational activities conducted by PCPD.

10. PCPD has briefed the Subcommittee on the promotional and public educational work for data users involved in the collection and use of personal data for direct marketing activities as well as for data subjects (i.e. the general public). Details are set out at **Appendix III**. According to PCPD and the Administration, no organizations that are involved in direct marketing activities have reflected to them that they cannot comply with the new requirements under the new regulatory regime when they come into force on 1 April 2013.

11. Hon Cyd HO has pointed out that the Bills Committee on Personal Data (Privacy) (Amendment) Bill 2011 which scrutinized the Amendment Ordinance before its enactment had suggested that, in order to facilitate compliance with the new notification and consent requirements under the new regime, in addition to the inclusion of best practices for the use and provision for use of personal data in PCPD's guidance notes, standard scripts and standard forms for the purposes of obtaining data subjects' oral or written consent to the intended use of their personal data should be provided in PCPD's guidance notes. Ms HO has requested PCPD to obtain from the relevant business organizations their forms designed for such purposes to see whether the information regarding the collection, use or provision of personal data is presented in a manner that is easily readable and understandable as required under the Amendment Ordinance.

12. PCPD has advised that the New Guidance on Direct Marketing ("New Guidance") issued by PCPD in January 2013 has provided a detailed explanation regarding the specific information that has to be included in the notification to data subjects of the use of their personal data in direct marketing and obtaining their consent, including examples of the standard form for indicating consent/no objection for illustration. As regards members' request for obtaining a sample copy of the relevant forms from organizations that are involved in direct marketing activities, PCPD has explained that the requisite form is not available at the present stage because the organizations concerned are still in the course of developing their personal data collection statements for compliance with the new requirements before the commencement date. Nevertheless, PCPD has undertaken that it will monitor the implementation of the New Guidance by data users after the remaining provisions in the Amendment Ordinance have come into force.

13. Hon WONG Kwok-hing considers that it may not be easy for the general public to understand the New Guidance. He has suggested that consideration should be given to developing a cartoon format of the guidance to make it more easily comprehensible. PCPD has advised that while the New Guidance targets

businesses, a simpler information leaflet to guide consumers to indicate their consent to the use or provision of their personal data in direct marketing and exercise their opt-out right was also issued in January 2013 for reference by the general public. In addition, leaflets on issues of concern in relation to protection of personal data that are encountered in daily life with examples given for illustration will be published by PCPD in end of 2013. The Administration supplemented that publicity on television, radio and other media would be launched to inform the public about the new provisions and issues of interest to data users.

Preparation for implementation of the legal assistance scheme

14. PCPD has briefed the Subcommittee on its promotional and public educational work for the implementation of the legal assistance scheme. Details are set out at **Appendix III**. Hon Paul TSE has expressed concern about whether PCPD has adequate resources in terms of legal manpower and financial provisions to support the launch of the legal assistance scheme on 1 April 2013. PCPD has advised that for implementation of the Amendment Ordinance, including provisions regarding the legal assistance scheme, additional funding has been provided to PCPD in the financial year 2012-2013 for engaging three additional legal staff members. PCPD has further explained that as there is no express provision under the Amendment Ordinance which empowers the in-house barristers of PCPD to provide legal services to the public (such as provision of legal advice and attendance in court) and there is also uncertainty as to whether the legal advice given by PCPD's in-house solicitor/barrister to the aided person enjoy legal professional privilege, lawyers in private practice would be engaged where necessary. As informed by the Administration, \$1.2 million has been earmarked in the next financial year of 2013-2014 for meeting the legal costs that might be incurred.

15. The Subcommittee notes that the Privacy Commissioner is empowered under section 66A¹ of the Amendment Ordinance to prescribe forms for the implementation of the legal assistance scheme. Hon James TO and Hon Paul TSE have enquired about the preparatory work for implementation of sections 66A and 66B² of the Amendment Ordinance. PCPD has updated the Subcommittee on the current position as set out at **Appendix IV**.

¹ Section 66A empowers the Privacy Commissioner to prescribe forms which aggrieved persons and respondents may use in questioning and replying. Section 66A also provides for various matters relating to the questions and replies.

² Section 66B empowers the Privacy Commissioner to grant legal assistance in respect of compensation proceedings in cases where the Privacy Commissioner thinks fit to do so. Assistance granted may include giving advice, arranging for solicitors' or counsel's advice and arranging for representation relating to compensation proceedings.

Grandfathering arrangement

16. The Subcommittee notes that the new requirements for a data user to notify the data subject of his intention to use the latter's personal data in direct marketing and to obtain the data subject's consent or indication of no objection to the intended use under the new regulatory regime take effect on a prospective basis. These requirements do not apply under the circumstances in section 35D of the Amendment Ordinance.

17. Hon MA Fung-kwok has expressed concern as to whether the data subject has the right to request the data user to cease to use his/her personal data in direct marketing, if the data subject has previously given consent to or has not indicated objection to the intended use of his/her personal data in direct marketing in relation to the class of marketing subjects. Mr MA has, however, pointed out that in the past, notification to customers of the use of their personal data in direct marketing and obtaining their consent contained in the service application forms used by businesses such as banks and telecommunications service providers had been found to be presented in very small print and buried among the terms and conditions for the provision of the data user's services. In the circumstances, there were doubts on the genuineness of the customers' consent so obtained and whether it was voluntarily given.

18. The Administration has advised that a data subject may at any time require a data user to cease to use his/her personal data in direct marketing, irrespective of whether the data is obtained directly from the data subject or not and whether an earlier consent has been given by the data subject to the data user for such use. Upon commencement of the new regulatory regime on 1 April 2013, any data user who fails to comply with the request to cease to use personal data in direct marketing made by a data subject will be liable on conviction to a fine of \$500,000 and to imprisonment for 3 years under section 35G(4) of the Amendment Ordinance. On the basis of the cases come across by PCPD hitherto, it would be very unlikely that a request made by a data subject to cease to use his/her personal data in direct marketing would nullify the relevant banking or telecommunications service contract that has been entered into by the data subject and data user concerned.

Recommendation

19. The Subcommittee does not object to the Notice and will not propose any amendment to it.

Advice sought

20. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
13 March 2013

**Subcommittee on Personal Data (Privacy)
(Amendment) Ordinance 2012 (Commencement) Notice**

(Extract)

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Use of personal data in direct marketing

5. Section 20 of the Amendment Ordinance repeals the existing section 34 of PDPO on the use of personal data in direct marketing. Section 21 of the Amendment Ordinance introduces a new Part VIA governing use of personal data in direct marketing and provision of personal data for use in direct marketing. The provisions are elaborated in paragraphs 6 to 14 below.

6. To provide data subjects with an informed choice as to whether to allow the use of their personal data in direct marketing, the Amendment Ordinance requires a data user who intends to use personal data in direct marketing to, before such use:

- (a) inform the data subject that the data user intends to so use the personal data and that the data user may not do so unless the data user has received the data subject's consent¹ to the intended use;
- (b) inform the data subject of the following in relation to the intended use:
 - (i) the kind(s) of personal data to be used; and
 - (ii) the class(es) of marketing subjects² in relation to which the data is to be used; and

¹ "Consent", in relation to use of personal data in direct marketing or provision of personal data for use in direct marketing, includes an indication of no objection to the use or provision.

² "Marketing subject", 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.

- (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.

The information in (a) and (b) above must be presented in a manner that is easily understandable and, if in written form, easily readable.

7. A data user 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 as described in paragraph 6(b) above;
- (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;
 - (ii) the permitted kind(s) of personal data; and
 - (iii) the permitted class(es) of marketing subjects³; and
- (c) the use is consistent with the data subject's consent.

8. The requirements in paragraph 7 above would not apply if, before the new provisions relating to direct marketing in the Amendment Ordinance come into operation:

- (a) the data user has explicitly informed the data subject in an easily understandable and, if in writing, easily readable manner of the intended use or use of the data subject's personal data in direct marketing in relation to a 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

³ The "permitted class of marketing subjects" means a class of marketing subject that is specified in the information in paragraph 6(b) above and in relation to which consent is given.

- (d) the data user had not, in relation to the use, contravened any provision of the PDPO as in force at the time of the use.

9. When using the personal data of a data subject in direct marketing for the first time, a data user is required to inform the data subject that the data subject may request the data user to cease to so use the data. Moreover, irrespective of whether the data subject has given consent earlier, he may, at any time, require a data user to cease to use his personal data in direct marketing. A data user who receives such a requirement must, without charge to the data subject, comply with the requirement.

10. A data user commits an offence and is liable, on conviction, to a fine of \$500,000 and imprisonment for three years if the data user uses personal data in direct marketing without taking all of the actions in paragraph 6 above, or uses personal data in direct marketing in contravention of paragraph 7 or 9 above. It is a defence for a data user charged to prove that all reasonable precautions have been taken and all due diligence has been exercised to avoid the commission of the offence.

Provision of personal data to another person for use in direct marketing

11. The Amendment Ordinance also requires 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 to, before such provision:

- (a) inform the data subject in writing that the data user intends to so provide the personal data and that the data user may not do so unless the data user has received the data subject's written consent to the intended provision;
- (b) inform the data subject of the following written information in relation to the intended provision:
 - (i) that the data is to be provided for the data user's gain, if the data is to be so provided;
 - (ii) the kind(s) of personal data to be provided;
 - (iii) the class(es) of persons to which the data is to be provided; and

- (iv) the class(es) 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.

The information in (a) and (b) above must be presented in a manner that is easily understandable and easily readable.

12. A data user must not provide the data subject's personal data to another person for use in direct marketing unless:

- (a) the data user has received the data subject's written consent to the intended provision as described in paragraph 11(b) above;
- (b) if the data is provided for the data user's gain, the intention to so provide was specified in the information in paragraph 11(b) above; and
- (c) the provision is consistent with the data subject's consent.

13. A data subject who has been provided with information by a data user under paragraph 11(b) above 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.

A data user who receives such a requirement from a data subject must, without charge to the data subject, comply with the requirement. If the data user receives a requirement in (b) above, then the data user must also so notify the person to whom the data has been provided in writing; a person who receives such a notification must, without charge to the data subject, cease to use the personal data in direct marketing in accordance with the notification.

14. A data user commits an offence and is liable, on conviction, to a fine of \$500,000 and imprisonment for three years (\$1,000,000 and imprisonment for five years in the case of provision of personal data for gain) if the data user provides personal data to another person for use by that other person in direct marketing without taking all of the actions in paragraph 11 above, or provides personal data in direct marketing in contravention of paragraph 12 above, or fails to comply with the requirement of the data subject in paragraph 13 above. A person who receives a notification referred to in paragraph 13(b) above but fails to cease to use the personal data in direct marketing in accordance with the notification will commit an offence and be liable, on conviction, to a fine of \$500,000 and imprisonment for three years. It is a defence for a data user or a person charged to prove that all reasonable precautions have been taken and all due diligence has been exercised to avoid the commission of the offence.

Provision of legal assistance

15. Sections 38(2), 39 and 43 of the Amendment Ordinance empower the Privacy Commissioner to provide legal assistance to aggrieved data subjects who intend to institute legal proceedings pursuant to section 66 of the PDPO and provide for related amendments. The assistance the Privacy Commissioner provides may include (a) giving advice; (b) arranging for the giving of advice or assistance by a solicitor or counsel; (c) arranging for representation by any person, including all such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings, or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings; and (d) any other form of assistance which the Privacy Commissioner may consider appropriate. Applications for legal assistance may be granted if the Privacy Commissioner thinks fit to do so, in particular, where the case raises a question of principle, or where it is unreasonable to expect the applicant to deal with the case unaided having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved or any other matter.

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**Subcommittee on Personal Data (Privacy) (Amendment)
Ordinance 2012 (Commencement) Notice**

Membership List

Chairman Hon CHAN Kin-por, BBS, JP

Members Hon James TO Kun-sun
Hon TAM Yiu-chung, GBS, JP
Hon WONG Kwok-hing, MH
Hon WONG Ting-kwong, SBS, JP
Hon Cyd HO Sau-lan
Dr Hon Priscilla LEUNG Mei-fun, JP
Hon IP Kwok-him, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon YIU Si-wing
Hon MA Fung-kwok, SBS, JP
Hon Charles Peter MOK
Hon Christopher CHEUNG Wah-fung, JP
Hon SIN Chung-kai, SBS, JP

Total: 14 Members

Clerk Ms Joanne MAK

Legal Adviser Mr Kelvin LEE

Date 22 February 2013

NEW REGULATORY REGIME FOR DIRECT MARKETING ACTIVITIES

Promotional and Public Educational Work

To facilitate data users' compliance with the new requirements of the regulatory regime for direct marketing activities, PCPD has launched promotional and public educational work for two groups of target audience.

<i>Target Audience</i>	<i>Activities</i>
Data users involved in the collection and use of personal data for direct marketing activities	1. Media briefing to all media held on 15 Jan 2013.
	2. New Guidance on Direct Marketing issued on 15 January 2013: <ul style="list-style-type: none"> - New requirements on the Collection and Use of Personal Data in Direct Marketing; and - Sale of personal data to third parties for Direct Marketing.
	3. Introductory seminar to members of the Data Protection Officers' Club held on 22 January 2013.
	4. Advertisements in professional publications/newsletters of the Hong Kong General Chamber of Commerce, the Hong Kong Retail Management Association, and the Hong Kong Institute of Chartered Secretaries will be placed in March 2013.
	5. 12 professional workshops and one special seminar on Direct Marketing have been/will be organized from January to March 2013. Participants included data protection officers, compliance officers, legal practitioners, marketing practitioners and personnel from the industries of banking, insurance, telecommunications and retail, as well as the public and other private sectors.
	6. A dedicated seminar for the Hong Kong Retail Management Association and another one for SMEs will be held in March 2013.
Data subjects (General public)	7. A short video was uploaded onto PCPD website in October 2012.
	8. To generate coverage in mass media: <ul style="list-style-type: none"> - Special article published on 16 October 2012 in Metro Daily; - Special ATV report broadcast on 31 December 2012; and - Pitch for coverage in print and electronic media from January to March 2013.

	9. Information leaflet on the exercise of the right of consent to and opt-out from direct marketing activities (Annex B) was issued on 15 January 2013.
	10. The contents of seminars for the public/organizations (held approximately three times per month) have been updated to cover the new regulatory requirements.

(Not attached)

LEGAL ASSISTANCE SCHEME

Promotional and Public Educational Work

<i>Target Audience</i>	<i>Activities</i>
Data subjects (general public) and data users	1. Media briefing to all media held on 15 Jan 2013.
	2. Information leaflet on “Legal assistance for civil claims under the Personal Data (Privacy) Ordinance” was issued on 15 January 2013. This is available on PCPD website and copies are available for distribution at District Offices.
	3. A short video was uploaded onto PCPD website in October 2012.

**Office of the Privacy Commissioner for Personal Data
25 February 2013**

LEGAL ASSISTANCE SCHEME

Preparation for Implementation of the Legal Assistance Scheme

<i>Item</i>	<i>Section</i>	
1	s.66A(1)&(2)	<p>The provisions will empower PCPD to prescribe forms by which an aggrieved data subject may question the target respondent (the data user). The information so obtained from the target respondent may help the data subject decide whether to institute civil action to seek compensation.</p> <p>No prescribed form has yet been prepared because of the following reasons:-</p> <p>(a) Section 66A(1) states that the Commissioner “may” prescribe the forms. The operative word “may” means the Commissioner can in his discretion decide whether and when to exercise this power.</p> <p>(b) The legal assistance scheme is a new service of the PCPD and it is too early to predict the demand for it. If it turns out to be in great demand and cases are generally meritorious, the PCPD will seek more resources from the Administration as well as consider prescribing the forms so that prospective applicants for legal assistance may avail of such self-help procedures to make their own preliminary assessment of whether to institute civil action.</p> <p>(c) There are a number of issues which the PCPD will have to consider in prescribing the forms, such as the questions to be set out in the forms and how detailed they ought to be, the period within which the forms must be served, and the manner in which the forms may be served. PCPD will be in a better position to consider those issues after having acquired more practical experience in operating the legal assistance scheme.</p>
2	s.66A(3)	In light of item 1 above, no work under this sub-section will be carried out at this stage.
3	s.66A(4)	In light of item 1 above, no work under this sub-section will be carried out at this stage.

<i>Item</i>	<i>Section</i>	
4	s.66B	<p>To prepare for the launch of the legal assistance scheme, the PCPD has carried out/will carry out the following activities:</p> <p>(a) Prepared and launched an information leaflet on “Legal assistance for civil claims under the Personal Data (Privacy) Ordinance” (Annex C) which covers the prerequisites to an application for legal assistance, factors to be considered in vetting an application, forms of legal assistance, and review of a decision to refuse or to discontinue legal assistance; and</p> <p>(b) An application form will be made available upon the launch of the legal assistance scheme.</p>

(Not attached)

Office of the Privacy Commissioner for Personal Data
25 February 2013