Annex

Personal Data (Privacy) (Amendment) Bill 2011 (the "Bill")
Standpoint of the Privacy Commissioner for Personal Data (the "Commissioner")

The Bill as a whole

1 Q: What is the general view of the Privacy Commissioner for Personal Data (the Commissioner) on the Bill?

A:

- The Commissioner is pleased that the majority of the proposals previously made by the Office of the Privacy Commissioner for Personal Data (the "PCPD") had been incorporated into the Bill. He hopes they will be implemented at an early date to provide greater protection to personal data privacy and enhance the effectiveness and efficiency of the operations of PCPD.
- However, in the collection, use and sale of personal data in direct marketing, there are certain flaws in the proposed regime. Some of the proposals initiated by the Administration represent a retrograde step in the protection of personal data and they are thus unacceptable.
- Separately, a significant number of PCPD's original proposals have been shelved by the Administration. We hope to be able to convince the Administration to resurrect these proposals in future.

Collection and use of personal data in direct marketing

2 Q: What is the Commissioner's view on adopting the "opt-out" mechanism in the collection and use of personal data in direct marketing?

A:

- The Commissioner considers that the ultimate goal should be to adopt the "opt-in" mechanism as it respects the customers' self-determination right.
- However, as it would take time for the consumer market to adjust to an "opt-in" regime and most of the overseas jurisdictions presently adopt an "opt-out" mechanism, the Commissioner accepts "opt-out" as a transitional arrangement.

3 Q: In the Commissioner's opinion, which part of the Administration's proposal is a retrograde step in the protection of personal data?

A:

- Under the existing Ordinance, the purpose of use of personal data collected has to be made known to the customer on or before collecting the data. The customer may then or thereafter opt-out from the use of his personal data for direct marketing purpose.
- However, the Administration proposes that organisations can issue the notification to the customers at any time after collection of their personal data. If the customer does not respond within 30 days, he would be deemed to have consented to the use of his personal data for the intended direct marketing use.
- Under the existing Ordinance, if the products to be marketed are not directly related to the services for which the personal data were originally collected, explicit consent must be obtained from the customers, i.e. opt-in. Therefore, the Administration's proposal of deemed consent is a retrograde step in the protection of personal data privacy.

4 Q: In the Commissioner's opinion, if the "delayed notification" is implemented, what difficulties will result?

A:

- Organisations may not have customers' up-to-date contact particulars to ensure that customers receive the notification.
- It could be a heavy burden for organisations to keep records of notifications to customers.
- Unscrupulous organisations can legitimately make use of delayed notification instead of timely notification to secure a higher chance of customer "consent" to use the data for direct marketing.
- If a customer exercises his/her opt-out right after the prescribed 30-day response period, his/her personal data may have already been transferred to third parties. It is likely that he/she is unable to identify the original data source. He/she will then have to make opt-out requests to each and every data transferee that approaches him/her. This is a heavy burden to the customer.
- Customers have to keep documentary evidence for "opt-out requests" . This is a heavy burden to them.

<u>Collection and use of personal data for sale</u> (including transfer of data to third parties for monetary or in-kind gain)

5 Q: Is there any special provision regulating the sale of personal data in other overseas jurisdictions? In general, do they implement "opt-in" or "opt-out" mechanism?

A:

- It seems that a special provision regulating the sale of personal data is unique to Hong Kong. However, according to internationally accepted privacy standards, when the data are used for purposes not consistent with or directly related to the original purpose for which the data were collected, explicit consent from the data subject (i.e. "opt-in") must be obtained.

6 Q: Why does the Commissioner accept "opt-out" for direct marketing but insist on "opt-in" for sale of personal data?

A:

- The above international standard is enshrined in the existing Ordinance. Hence, the Administration's proposal to adopt the "delayed notification and deemed consent" system (as for direct marketing) to regulate the sale of personal data is a retrograde step.
- It seems clear from the Octopus case that the public does not expect their personal data to be sold to third parties without their explicit consent. The Administration's proposal apparently falls short of this expectation and is tantamount to legalising sale of personal data not permitted under the existing Ordinance.

7 Q: The Administration proposes to adopt "opt-out" for both direct marketing and sale of personal data on grounds of consistency of approach and avoidance of confusion. What is the Commissioner's view?

A:

- Administrative convenience is not a sufficient ground to override privacy and data protection requirements.
- Sale of personal data by organisations exceeds people's reasonable expectation of the use to which their personal data would be put. "Opt-in" rather than "opt-out" must be adopted.

Others

8 Q: Can the problem of "delayed notification" be solved by guidelines to be issued by the Commissioner?

A:

- This is not feasible because guidelines cannot override the law. The Commissioner cannot issue guidelines to disallow practices that are permitted under the revised legislation.

9 Q: The number of complaints about direct marketing received by the PCPD is small. Is there a real need to strengthen the regulation?

A:

- The number of complaints about direct marketing received by the PCPD rose from 127 in 2009-10 to 263 in 2010-11, a more than double increase.
- The Commissioner believes that the number of complaint cases related to direct marketing activities represented only a small percentage of a large pool of cases of non-compliance with the provisions of the Ordinance. For one complaint, there must be many other cases in which the data subjects tolerated the misuse of their personal data as they did not have time to lodge complaints, and probably even more cases in which the data subjects were not even aware that their privacy rights had been violated. To take the Octopus incident as an example, though 2.4 million customers were affected, the PCPD's investigation into the problem was prompted by a handful of complaints.

Conclusion

10 Q: What follow up actions does the Commissioner expect from the Administration and the Bills Committee?

A:

- In the Bills Committee meeting of 26 November, the industry did not press for the "delayed notification" provision as customers were clearly informed of the purpose of use when their personal data were collected. Hence the proposal is not necessary. The Commissioner hopes the Administration will make appropriate amendment to the Bill.
- At the same meeting, the industry also indicated no objection to PCPD's previous proposal to confer on individuals a right to be informed of the source of their personal data by direct marketers. Indeed, direct marketers expressed that their code of practice required them to disclose the source of data to customers who made such enquiries and to give a reply in 7 days. Under this favourable light, the Commissioner hopes that the Administration could re-consider incorporating this meaningful proposal into the Bill.
- The Commissioner would also appreciate if the Bills Committee would consider PCPD's other views on the Bill as outlined in its full submission (LC Paper No. CB(2)263/11-12(01).

Office of the Privacy Commissioner for Personal Data
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