

Relevant provisions of the Ordinance

Data Protection Principle (“DPP”) 1 of the Ordinance lays down the collection limitation principle which in essence provides that only necessary, adequate but not excessive personal data shall be collected and the means of collection shall be lawful and fair. When personal data are collected from the data subject, he should be informed whether it is obligatory or voluntary for him to supply the data and the consequences for not supplying the data. The data subject should also be clearly informed about the purpose of data collection and the specific classes of persons to whom the data may be transferred.

In relation to the use of personal data, **DPP3** stipulates that unless with the prescribed consent of the data subject, personal data shall only be used for a purpose that is the same or directly related to the original purpose of collection.

Direct marketing activities are specifically regulated under **section 34** of the Ordinance which requires the data user when using the personal data the first time for direct marketing, to inform the data subject of the latter’s right to request the data user to cease using his personal data for direct marketing (i.e. the “opt-out” right). A data user shall cease to so use the personal data upon exercise of the opt-out right by the data subject, otherwise the data user may commit an offence.

The trade or business practice in carrying out direct marketing activities : the impact upon personal data privacy

(i) The excessive collection of personal data for direct marketing activities

Insofar as the collection purpose of the personal data includes the use for direct marketing purpose, the data user should carefully consider and decide the kind and scope of personal data to be collected and the data subjects should be clearly informed about the intended purpose of use of their personal data. A sufficiently clear, unambiguous and easy to understand Personal Information Collection Statement should be given to the data subjects to take into account the general level of understanding of the data subjects, the target of the direct marketing

activities.

- (ii) Failure to obtain consent from the data subject to subscribe for direct marketing activities whenever practicable

Very often, the kind of personal data to be collected for achieving the primary purpose of collection of the personal data by a data user can be segregated and distinguished from other incidental purposes, such as direct marketing activities. Taking into account the data subjects' reasonable expectation of personal data privacy, a data user should avoid requesting "bundled consent" when specific consent could be practically obtained for using the data for direct marketing purposes. The application form for collecting personal data and information from the data subjects should be designed to this effect by the data users.

The Octopus incident has aroused public concern on the use of personal data for direct marketing activities. Where the transfer of the data to third parties is involved, particularly when the process leads to profits and gains, ethical and legal issues as well as the expectations and aspirations of data subjects have to be seriously addressed. From the perspective of personal data protection, explicit consent from the data subject (that is an indication of "opt-in" wish) is always desirable to avoid any doubt as to the permitted usages of the personal data.

- (iii) The means of collection of personal data may not be fair

Data subjects should not be misled into giving their personal data when the true purpose of collection is for carrying out direct marketing activities and the transfer of the data to other "business partners". Data subjects should be explicitly told on or before the collection of their personal data the actual purposes of use intended by the data users.

- (iv) Failure to be specific about the classes of transferees of the data

The classes of transferees of the personal data should be defined in specific terms. Data users should state clearly if the personal data shall be transferred to third parties for direct marketing. Defining a class of transferees in vague terms such as "business partners" or "such third

parties” should be avoided as it in effect allows for unlimited right of the data user to make use of the personal data collected. Data subjects are naturally concerned about the permitted classes of transferees and how far and wide the personal data will be transferred, e.g. whether personal data will be transferred outside Hong Kong or used for marketing all sorts of services not within their legitimate privacy expectation.

- (v) To limit the kind of personal data to be transferred and the mode of operation of the direct marketing activities

When personal data are to be used for direct marketing activities, a data user should be prudent in deciding the amount of personal data to be used (the term “use” includes transfer and disclosure of personal data under section 2 of the Ordinance). In most cases, the use of the contact information, i.e. name, contact telephone or address would be sufficient. A data user making any excessive disclosure of personal data to a third party will run the risk of contravention of DPP3.

If personal data are to be transferred to a third party for direct marketing activities for the latter’s product or service, the data user should avoid allowing the third party to hold out that it is doing so in the name of the data user, as this will mislead the data subjects to believing that their personal data have not been transferred and they are dealing directly with the data user. This mode of operation could amount to unfair means of collection of personal data.

- (vi) To ensure no excessive retention of personal data no longer required

When personal data used for direct marketing purposes are no longer required, for example, when the direct marketing campaigns or programmes have expired or when the data subjects have exercised “opt-out” rights under section 34 of the Ordinance, the data user should take steps to ensure that the personal data collected are safely erased. Hence, if the personal data are transferred to a third party for direct marketing, the data user shall promptly seek for assurance and proof from the transferees that the personal data are erased and that no further or other use of the personal data will be made by the transferees.