

DPOC Welcoming Reception Cum Lunch Talk



保障資料主任聯會
DATA PROTECTION OFFICERS' CLUB

Sharing on Recent Direct Marketing Conviction Cases

Carol CHAN
Manager (Corporate Communications)



保障資料主任聯會
DATA PROTECTION OFFICERS' CLUB

New Requirements for Direct Marketing

- **Part 6A** of the Personal Data (Privacy) Ordinance (the Ordinance’’: S.35A to S.35M
- to replace the original S.34



What is “Direct Marketing”

“Direct marketing” is defined to mean:

- a. the offering, or advertising of the availability, of goods, facilities or services; or
- b. the solicitation of donations or contributions for charitable, cultural, philanthropic, recreational, political or other purposes,

through direct marketing means (S.35A(1)).

“Direct marketing means” is further defined to mean:

- a. sending information or goods, addressed to specific persons by name, by mail, fax, electronic mail or other means of communication; or
- b. making telephone calls to specific persons.

4



Direct Marketing Activities?

- A salesperson knocking on the door of a potential customer to promote a product / service ✕
- telemarketing agent making telephone calls to specific persons offering insurance products / tax loans / beauty services ✓
- organisation sending letters addressed to its members at their addresses enclosing leaflets soliciting donations/contributions for charitable/political purposes ✓
- Marketing mail sent to the mail box of a building addressing “the occupant” ✕



Use of Personal Data in Direct Marketing

- Notwithstanding the source of the personal data, the following **specified actions** must be taken before using the personal data for own direct marketing activities (S.35C) : -

- 1) To **inform** the data subjects that it intends to so use the personal data and that the data may not be so used unless it receives the data subject's **consent**
- 2) To inform the data subjects either orally (easily understandable) or in writing (easily readable and understandable) :
 - the **kinds of personal data** to be used;
 - the **classes of marketing subjects** in relation to which the data is to be used ;
 - the **response channel** through which the data subject may communicate his **consent** to the intended use.

6



Use of Personal Data in Direct Marketing

- Oral vs. written consent
- Where an oral consent is obtained from a data subject, a written confirmation must be sent to the data subject not later than **14** days (S.35E) on :
 - (i) the date of receipt of the consent ;
 - (ii) the permitted kind of personal data ; and
 - (iii) the permitted class of marketing subjects.
- sent to the last known correspondence address of the data subject (e.g. physical address, email address and mobile phone number)



Providing Personal Data to another person for Use in Direct Marketing

- The following specified actions must be taken before providing personal data to a third person for use in direct marketing (S.35J)

- 1) To inform the data subject **in writing** that his/her personal data is intended to be provided for direct marketing and that the data may not be so provided unless it obtains **written consent (oral consent is not acceptable)**
- 2) To provide the data subject with the following **written information** (easily readable and understandable)
 - where the data is to be provided for **gain**, that the data is to be so provided
 - the **kinds of personal data** to be provided
 - the **classes of persons** to which the data is to be provided
 - the **classes of marketing subjects** in relation to which the data is to be used



Offence

Failing to take the specified actions is an offence punishable by a fine up to HK\$500,000 and imprisonment up to 3 years ; if the data is to be provided for gain, the maximum penalty of a fine of HK\$1,000,000 and 5 years' imprisonment



Other Offences

- A data user must notify data subject of his opt-out right when using his personal data for the first time (S.35F) (e.g. insert “opt-out” box in promotion materials)
- A data subject may at any time (irrespective of prior consent) require a data user to cease to use his/her personal data in direct marketing (S.35G)
- A data subject may at any time require a data user to cease to provide his/her personal data to any other person for use in direct marketing ; and to notify any person to whom the data has been so provided to cease to use his/her personal data (S.35L)
- A data user is required to notify such other person in writing to cease to use a data subject’s personal data (S.35L)
- Must not impose any charge on the data subject who makes such request (S.35G and S.35L)



10



香港個人資料私隱專員公署
Privacy Commissioner
for Personal Data, Hong Kong

保障、尊重個人資料
Protect, Respect Personal Data

PCPD.org.hk

Other Offences

- **Contravention:**

- a fine up to HK\$500,000 and imprisonment for up to 3 years;

- if the data is to be provided for gain, the maximum penalty of a fine of HK\$1,000,000 and 5 years' imprisonment



11



Exceptions

1) Social and Healthcare services

- only certain providers
- not for gain

2) Pre-existing data

- S.35C (data user to take specified action before using personal data in DM) does not apply to personal data controlled by data user before 1 April 2013
- conditions:
 - (1) data subject to be explicitly informed of the intended use or use in an easily understandable or readable (if in writing) manner
 - (2) data user has so used any of the personal data
 - (3) no opt-out request received from data subject
 - (4) data user had not contravened any provisions under the Ordinance in force at the time
- only apply in relation to the same class of marketing subjects
- only apply to data user's own use of personal data in direct marketing
- also apply to update of personal data held by a data user before 1 April 2013.

12



The First Conviction Case

● Case background

- The complainant is a customer of a telecommunications company (the “Company”)
- In April 2013, he made his opt-out request to the Company via email and mail
- In response, the Company acknowledged receipt of the complainant's opt-out request in writing
- a staff member of the Company still left a voice message through the complainant's mobile phone number in May 2013, informing the complainant of the termination of his service contract and at the same time promoting to him their services



The First Conviction Case

- Charge: Failing to comply with the requirement from data subject to cease to use his personal data in direct marketing (S.35G(3))
- Outcome: The Company was fined HK\$30,000



The Second Conviction Case

● Case background

- The complainant engaged the storage service of a company ("Company A") and provided his personal data including his name, credit card number, mobile phone number, company email address managed by him and current residential address, to this Company A
- Subsequently, Company A ceased business in Hong Kong; and the business was taken over by Company B, a company similarly providing storage service.
- Company B sent a direct marketing email to the complainant, in which Company B addressed the complainant with his name, and a storage service quotation as well as the terms and conditions offered by Company B was enclosed

15



The Second Conviction Case

- Case background (con't)
 - The complainant was not a customer and had no prior dealings with Company B, and neither had been informed nor given consent to Company B about the use of his personal data for direct marketing
- Charge: Failing to take specified actions and obtain consent before using the personal data of a data subject in direct marketing (S.35C)
- Outcome: Company B was fined HK\$10,000



The Third Conviction Case

- Case background

- The complainant was an ex-customer of a Body Check Service Company (the “Company”)
- Since mid-2013, the Company had repeatedly made direct marketing calls to the complainant promoting body check up services
- Despite the complainant’s earlier verbal and written opt-out requests, the Company still made a direct marketing call to him on 28 July 2014

- Charge: Failing to comply with the requirement from data subject to cease to use his personal data in direct marketing (S.35G(3))
- Outcome: The Company was fined HK\$10,000

17



The Fourth Conviction Case

● Case background

- A real estate agent (“1st Defendant”) obtained the complainant’s Christian name and mobile phone number (“the Data”) in a social function
- the 1st Defendant did not inform the complainant or seek his consent for providing the Data to another party for direct marketing
- About two months later, an insurance agent (“2nd Defendant”) called the complainant twice on his mobile phone
- During the first phone call, the 2nd Defendant identified herself as a financial planner of an insurance company, claiming that the 1st Defendant provided the Data to her

18



The Fourth Conviction Case

- Case background (con't)

- 2nd Defendant called the complainant again. Once the complainant realised that the 2nd Defendant intended to provide him with information about financial planning and insurance products, he immediately indicated that he had no interest in such products and hung up the phone

- Charge

- 1st defendant: failing to take specified actions and obtain consent before providing personal data to a third party for use in direct marketing (S. 35J)



The Fourth Conviction Case

- Charge (con't)

- 2nd defendant: failing to take specified actions and obtain consent before using the personal data of a data subject in direct marketing (S.35C)

- Outcome

- 1st defendant was fined HK\$5,000 (first conviction of new offence under S.35J)
- 2nd defendant was acquitted on the facts of the case, mainly because the Court could not rule out the possibility of her attempting to take those specified actions but was interrupted as the data subject hung up the phone after she mentioned about insurance matters

20



The Fifth Conviction Case

● Case background

- The complainant had purchased an insurance policy at an insurance company (“Insurance Company A”)
- Subsequently, the complainant received at his home address a letter from the Defendant who was working as an insurance agent of another insurance company
- the Defendant promoted financial services to the complainant after knowing the suspension of service of Insurance Company A in the letter



The Fifth Conviction Case

- Charge

1. Failing to take specified actions and obtain consent before using the personal data of a data subject in direct marketing (S.35C)
2. Failing to inform the data subject when using his personal data in direct marketing for the first time, of his right to request not to use his personal data in direct marketing without charge (S.35F)

- Outcome

A Community Service Order of 80 hours was imposed by the Court on the defendant in respect of each charge, to be served concurrently



Practical Tips for Compliance

- Must take specified actions and obtain consent from data subject before using his personal data or transferring the data to another person for use in direct marketing activities
- Must notify data subject of his opt-out right when using his personal data in this manner for the first time
- Update the Opt-Out List regularly (computer network: update as and when received) (other means: staff be notified no less than 7 days per week)
- Ensure that organisations' standing procedures for their staff to follow are followed



Privacy as a Competitive Advantage

- privacy and personal data protection can be an asset and a business edge



Guidance to help data user

- New Guidance on Direct Marketing issued by the PCPD to assist data users to understand their obligations and promote good practice
- A leaflet on Exercising Your Right of Consent to and Opt-out from Direct Marketing Activities was also issued by PCPD to assist data subjects to understand their rights
- Professional Workshop, to familiarise organisations with the new provisions and compliance measures.





спасибо
danke 謝謝
ngiyabonga
teşekkür ederim
dank je
gracias
tapadh leat
hvala
mauruu
dziękuje
sagolun
sukriya
kop khun krap
go raibh maith agat
arigatō
takk
dakujem
merci
obrigado
bedankt
mochchakkeram
merci
ευχαριστώ
감사합니다
terima kasih
grazie
arigatō
takk
dakujem
merci

