

AMENDMENTS TO THE HONG KONG PRIVACY LAW REGIME COOKIES AND CLOUD COMPUTING

INTRODUCTION

The Personal Data (Privacy) Ordinance ("PDPO") has undergone a review given the recent concerns on the sale of personal data and the use of personal data in direct marketing. Following the public consultation, the Personal Data (Privacy) (Amendment) Bill 2011 (the "Bill") was gazetted on 8th July 2011. The Bill has created a new offence for use or transfer of personal data for direct marketing purposes without compliance with the specific requirements. The Bill calls for a review of the personal data collection practice of the companies, in particular, the companies in the direct marketing or multi-level marketing arena.

During the consultation period, we have acted on behalf of major multi-nationals and trade associations in formulating their submissions on the proposed amendments.

KEY PROPOSED AMENDMENT

New offence for use or transfer of personal data for direct marketing purpose without compliance with the statutory requirements

If a company/the data user intends to use a data subject's personal data in direct marketing or to transfer personal data to other persons for their use in direct marketing, irrespective of whether the data is collected by the company itself, the company must take the following actions before such use or transfer:

- Inform in writing the data subject of the kind of personal data to be used and the classes of marketing subjects in relation to which the data is to be used
- Provide a 'response facility', without charge, through which the data subject may indicate in writing to the data user whether the data subject objects to the intended use ('opt-out mechanism')

- Ensure the information and response facility provided are presented in a manner that is easily readable and understandable

OUR RECOMMENDATIONS

- Review the internal procedure for collection, use and transfer of personal data to ensure compliance with the new requirements
- Review your Privacy Policy Statement ("PPS") and Personal Information Collection Statements ("PICS")
- Prepare a response facility
- For direct marketing companies, the current structure and how and what information is transferred upstream and downstream should be reviewed.

This is even if you do not sell any personal data as disclosure of personal data for use in direct marketing may still fall within the ambit of the Bill.

COOKIES

What are Cookies?

Cookies are small files that are sent from a web server to and stored at a user's computer for future identification of the websites previously visited. Cookies speed up the loading of contents at previously visited websites by automatically registering data previously entered. However, cookies are often stored in the computer without one's express authorization and they may be said to contain personal information as they contain information on one's preferences of how certain websites are to be viewed.

What obligations do data users have in the use of cookies?

In accordance with data protection principle 1 of the PDPO, a data user must inform a data subject the purpose for collecting personal data from that subject. Therefore, a



website that sends out cookies should inform visitors of this practice in their PPS and PICS.

The Privacy Commissioner also recommends that the PPS should inform visitors that non-acceptance of cookies may affect the functionality of the use of the website and specify the type of loss of functionality involved (e.g., that the banner display may not be available.)

A breach of the data protection principles is not an offence under the PDPO. If the Privacy Commissioner is of the opinion that a data user is acting in contravention of PDPO, he may serve an enforcement notice on the data user directing him to take specific steps to remedy the contravention. Failure to comply with the enforcement notice may then make the data user liable to a fine and imprisonment.

Is express consent necessary?

No. There is no positive obligation imposed on websites to obtain express consent from end-users before cookies are installed in Hong Kong. Websites would just have to inform users as to the purpose of cookies and how to opt-out. There are also no specific regulations as to whether websites are required to inform end-users as to each cookie and its specific purpose.

Has position changed by the new law?

No. The Bill does not change the position.

CLOUD COMPUTING

What is Cloud Computing?

Cloud computing refers to the provision of web-based services that allow businesses the use of software and hardware managed by third parties, with the services located on remote computers. While this gives business a low-cost alternative to computer resources, without having to purchase these resources themselves, the process is not without its risks and legal pitfalls.

What obligation does a data controller of a cloud have under the existing PDPO?

The nature of cloud computing raises concern over data security issues since there is a risk of exposing highly sensitive data to a broad base of internal and external attacks. According to data protection principle 4 of the PDPO, data users have to take appropriate security measures to protect personal data that they collect against unauthorized or accidental access. However, besides this broad principle, there is no clear regulation on the governance, business process and organizational changes that are required to be secured in by the cloud. Businesses are therefore well-advised to ensure the security of such data and also include relevant disclaimers with regards to the security of such data.

CONCLUSION

The current amendments contained in the Bill mainly addresses the public concerns for direct marketing and does not include wide-ranging changes. On the whole, the Hong Kong jurisdiction can be said to still be a relatively loose regime in terms of privacy protection, and does not include specific regulations to address recent technological advances.

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