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## Hong Kong Privacy Commissioner Calls for Expanding Do-Not-Call Register to Cover Person-to-Person Calls

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Cold calls are a commonplace nuisance in Hong Kong. It therefore comes as no surprise that the Hong Kong Privacy Commissioner is pushing to expand the current do-not-call register to include person-to-person calls, and not just pre-recorded telephone messages.

### Public Opinion

In March 2014, an opinion survey was commissioned by the Office of the Privacy Commissioner (“Survey”) on person-to-person direct marketing calls (“P2P Calls”). The results of the Survey were released on August 5, 2014. Over 99 percent of the respondents to the Survey viewed P2P Calls as a nuisance, with over 42 percent considering such nuisance to be high.

The responses received also indicate that P2P Calls are ineffective. According to the Survey, only 6 percent of the respondents said that they derived some benefits from the P2P Calls, with 49 percent of the respondents usually indicating at the beginning of the P2P Calls that they were not interested, and 21 percent terminating the calls immediately. Only 28 percent of the respondents would first listen to the P2P Calls to deter-

mine whether or not they were interested in the information being provided, before they terminated the call.

It seems that any advantage that could be derived by marketers or consumers from P2P Calls is disproportionate to the inconvenience and nuisance caused to the majority of the public.

### Current Legal Position

#### **Unsolicited Electronic Messages Ordinance, Cap. 563 (“UEMO”)**

Under the UEMO, consumers can register their telephone or fax numbers on a do-not-call register (administered by the Office of the Communications Authority) to block unsolicited commercial electronic messages. Apart from an individual’s telephone or fax number, no other information is collected as part of the registration process for the do-not-call registers.

Any business that sends unsolicited commercial electronic messages to a number which is registered on the do-not-call register, without the consent of the recipient, commits a breach of the UEMO. The Office of the Communications Authority may issue an enforcement

notice against the infringer requiring the infringer to take specified steps to rectify the contravention within a reasonable period of time. Anyone who contravenes an enforcement notice will be liable to a fine of HK\$100,000 (U.S.\$12,892) or, on a second or subsequent conviction, to a fine of HK\$500,000 (U.S.\$64,463) and a further daily fine of HK\$1,000 (U.S.\$129) for each day that the offence continues.

However, the do-not-call registers under the UEMO do not cover P2P Calls — they apply only to electronic messages, such as fax messages, short message service (“SMS”) messages, and pre-recorded telephone messages. This loophole has been exploited by marketers to provide P2P Calls, which allow them to market even to subscribers on the do-not-call register, subject to compliance with the Personal Data (Privacy) Ordinance (discussed below).

This being said, it is an offence for a person to obtain information from the do-not-call registers (*e.g.*, collating the telephone numbers registered on the do-not-registers) and to use that information to make P2P Calls or for any other purpose other than what is permitted under the UEMO. Anyone who knowingly commits such an offence faces a fine of HK\$1 million (U.S.\$128,925) and five years’ imprisonment.

### **Personal Data (Privacy) Ordinance, Cap. 486 (“PDPO”)**

Even though P2P Calls are allowed under the UEMO, some P2P Calls may amount to a breach of the stringent requirements under the PDPO on the use of personal data in direct marketing. These provisions were introduced on April 1, 2013 (*see analysis at WDPR, July 2012, page 4*).

The PDPO will apply only where personal data is involved. Personal data is defined as any data relating directly or indirectly to a living individual, from which it is practicable for the identity of the individual to be directly or indirectly ascertained, and in a form in which access to or processing of the data is practicable (*e.g.*, name and contact details).

Under the PDPO, anyone who is collecting personal data from an individual for the purposes of using it for direct marketing must notify the individual at the time of collection of the following:

- its intention to use the data for direct marketing;
- the type of data that may be used;
- the categories of goods/services that may be marketed (which must be sufficiently detailed);
- a means by which the individual can indicate his/her consent; and
- if the personal data will be transferred to a third party for it to use the data for direct marketing purposes, the individual must be notified of this in writing beforehand, along with the fact that such transfer cannot occur without his/her consent; the classes of

transferees; and whether the transfer is made in return for gain, *e.g.*, money.

The individual must have explicitly consented to the use of his/her personal data for direct marketing purposes after receiving the above notification. In addition, when a business uses an individual’s personal data for the first time for direct marketing purposes (*e.g.*, when it first makes a P2P Call), the individual must be informed of his/her right to withdraw his/her consent at any time.

Breach of the above requirements constitutes an offence, which may result in a maximum fine of HK\$500,000 (U.S.\$64,463) and three years’ imprisonment or, if the personal data has been sold (or otherwise transferred for gain) to a third party for direct marketing purposes in breach of the PDPO, then the maximum fine is increased to HK\$1 million (U.S.\$128,925) and five years’ imprisonment.

However, whilst the current PDPO may be effective in protecting individuals from receiving direct marketing P2P Calls, the PDPO will apply only where personal data is collected and used (*e.g.*, telephone calls made by companies to their existing customers in order to promote an upgrade of services). A marketing call to an unidentified registered user of a particular telephone number (*e.g.*, dialling a random telephone number without having any other information to enable the caller to identify the owner of the number) will not amount to use of personal data for direct marketing purposes under the PDPO, and will therefore not be subject to the above PDPO requirements.

### **Proposed Expansion in Hong Kong**

Given all this, the Privacy Commissioner has been urging the Commerce and Economic Development Bureau (“CEDB”) (which has policy responsibility over the UEMO) to expand the UEMO to cover P2P Calls.

Extending the UEMO and the do-not-call register to apply to P2P Calls would enable individuals to opt out of receiving all unwanted telemarketing calls, and not just pre-recorded telephone messages or other electronic messages. This would bring the UEMO in line with the current practice in many other jurisdictions, including the United Kingdom, the United States and Singapore.

Not only would the proposed expansion of the UEMO reduce the inconvenience caused to the public by P2P Calls, but it may also benefit marketers by enabling them to focus their resources on individuals who do not object to receiving P2P Calls.

An alternative solution to the do-not-call register may be the use of smartphone apps to assist in filtering P2P Calls. However, such a solution would leave out fixed-line phones and therefore not close the loophole completely.

The expansion of the UEMO to P2P Calls is not a new proposal, and was already considered during the Legislative Council Panel meeting in November 2009, and again during the 2009-2010 public consultation on the review of the PDPO.

However, the Privacy Commissioner's latest push to expand the do-not-call register appears to have encountered some resistance from the CEDB. In a letter to the Privacy Commissioner dated August 11, 2014, the CEDB, amongst other things, noted that introducing a do-not-call register for P2P Calls would not resolve all issues, *e.g.*, it may be ineffective to block calls made from outside Hong Kong, and would affect the 20,000 plus individuals employed by local telemarketing companies<sup>1</sup>. The CEDB also appeared to suggest that, if a do-not-call register is set up for P2P Calls, it should be done under the PDPO rather than under the UEMO.

The Privacy Commissioner, however, disagreed with the CEDB, and maintained that any do-not-call register should fall within the UEMO in order to apply to all P2P Calls, and not just those that involve personal data<sup>2</sup>. This is supported by data in the Survey, as only 27.4 percent of the respondents stated that more than half of the P2P Calls that they received specified their names —

indicating that most P2P Calls are cold calls made to unknown registered users and therefore no personal data is involved. Such calls do not fall within the ambit of the PDPO.

Despite all this, it seems that, for the time being, the call for the expansion of the do-not-call register is not being answered.

#### NOTES

<sup>1</sup> See the Privacy Commissioner's Blog on the "Renewed Call to Set Up a Do-not-call ("DNC") Register for Person-to-person ("P2P") Telemarketing Calls caught between two Bureaux (21.8.14)" at <http://www.pcpd.org.hk/english/about/blog.html>.

<sup>2</sup> Ibid 2.

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