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ABSTRACT

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This column provides a country by country analysis of the latest legal developments, cases and issues relevant to the IT, media and telecommunications' industries in key jurisdictions across the Asia Pacific region. The articles appearing in this column are intended to serve as 'alerts' and are not submitted as detailed analyses of cases or legal developments.

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1. Hong Kong

1.1. Call me, maybe? Hong Kong privacy commissioner proposes expansion of the do-not-call register

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.

1.1.1. 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 5 August 2014. Over 99% of the respondents to the Survey viewed P2P Calls as a nuisance, with over 42% considering such nuisance to be high.

The responses received also indicate that P2P Calls are ineffective. According to the Survey only 6% of the respondents said that they derived some benefits from the P2P Calls, with 49% of the respondents usually indicating at the beginning of the P2P Calls that they were not interested, and

21% terminating the calls immediately. Only 28% of the respondents would first listen to the P2P Calls to determine 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.

1.1.2. Current legal position in Hong Kong

1.1.2.1. *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 them to take specified steps to rectify the

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contravention within a reasonable period of time. Anyone who contravenes an enforcement notice will be liable to a fine of HK\$100,000 or, on a second or subsequent conviction, to a fine of HK\$500,000 (and a further daily fine of HK\$1000 for each day that the offence continues).

However, the do-not-call registers under the UEMO do not cover P2P Calls – they only apply to electronic messages, such as fax messages, SMSs, 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 (see further details 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\$1,000,000 and 5 years imprisonment.

1.1.2.2. *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 1 April 2013. The PDPO will only apply 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:

- (a) its intention to use the data for direct marketing;
- (b) the type of data that may be used;
- (c) the categories of goods/services that may be marketed (which must be sufficiently detailed);
- (d) a means by which the individual can indicate his/her consent; and
- (e) if the personal data will be transferred to a third party for them 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 and 3 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\$1,000,000 and 5 years imprisonment.

However, whilst the current PDPO may be effective in protecting individuals from receiving direct marketing P2P Calls, the PDPO will only apply 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 them 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.

1.1.3. *Proposed expansion in Hong Kong*

Given all this, the Privacy Commissioner has been urging the Commerce and Economic Development Bureau (“CEDB”) (who has policy responsibility over the UEMO) to expand the UEMO to cover P2P Calls. Extending the UEMO and do-not-call register to apply to P2P Calls will 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 UK, USA 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 has already been 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 received some resistance from the CEDB. In a letter to the Privacy Commissioner dated 11 August 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.¹ 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 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.² This is supported by data from the Survey, as only 27.4% of the

¹ See the Privacy Commissioner's Blog on the “Renewed Call to Set Up a Do-not-Call Register for Person-to-person Telemarketing Calls caught between two Bureaux (21.8.2014)”: <http://www.pcpd.org.hk/english/about/blog.html>.

² Ibid 2.

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