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A B S T R A C T

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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

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1.1. Do not disturb! Convictions for breach of the direct marketing restrictions and unsolicited electronic messages ordinance

On 10 January 2017, an individual was convicted of three offences for breach of an enforcement notice issued against him for sending commercial electronic messages in violation of the Unsolicited Electronic Messages Ordinance (Cap.593) ("UEMO"). Soon after, on 27 January 2017, the High Court upheld the Tsuen Wan Magistrates' Court's landmark conviction of 2015 in which the internet service provider, Hong Kong Broadband Network Limited ("HKBN"), was fined HK\$30,000 for breach of the direct marketing provisions under the Personal Data (Privacy) Ordinance ("PDPO").

1.1.1. The law

Under the PDPO, data users cannot use personal data for direct marketing purposes unless they obtain the prior consent of the relevant individual. Even after consent is provided, the individual has the right to opt-out, and the data user must promptly comply with such opt-out request and cease providing direct marketing materials. A breach of the direct marketing restrictions under the PDPO amounts to an offence, and can result in a maximum fine of HK\$500,000 and 3 years imprisonment. If there has been a transfer in return for gain of personal data for direct marketing purposes, then a higher fine of HK\$1,000,000 and up to 5 years imprisonment may be imposed.

The direct marketing restrictions under the PDPO only apply to the use of personal data collected by a data user to send marketing materials to a specific person. For example, a company using the personal data collected by it in order to send a promotional text message to the relevant individual and identifying them by name. In contrast, if a company sends text messages to a random telephone number, not knowing or being able to identify the recipient, then this may not fall within the scope of the PDPO. However, such unsolicited marketing messages may still fall foul of the UEMO.

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The UEMO regulates the sending of marketing or promotional electronic messages (i.e. spam). Whilst it regulates pre-recorded telephone messages, text messages, facsimiles and emails, it does not apply to person-to-person calls or other non-electronic messages. Ongoing proposals to expand the UEMO to include person-to-person calls have so far not been effective.¹

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). 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, is in breach of the UEMO. For any other telephone or fax numbers not registered on the do-not-call register, businesses can send them commercial electronic messages, so long as certain requirements are complied with. For example:

- the sender must clearly identify itself and provide contact information in the electronic message;
- the sender must offer a way for the recipients to unsubscribe and to notify the recipient of how they can exercise this right; and
- the sender must comply with any unsubscribe request within 10 working days.

If there is a breach of the UEMO, the Communications Authority (“CA”) can issue an enforcement notice against the infringer requiring them 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 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).

1.1.2. The PDPO case

Despite having opted out of receiving direct marketing messages from HKBN, in May 2013 the complainant received a voice message from HKBN reminding the complainant that his service contract was coming to an end, and further promoting HKBN’s services. On 9 September 2015, the lower court held that such a telephone call amounted to direct marketing and therefore breached the direct marketing restrictions under the PDPO. HKBN was fined HK\$30,000. The lower court’s decision was the first conviction issued after the new direct marketing provisions came into effect on 1 April 2013.²

HKBN filed an appeal on the grounds that the lower court had erred in finding that the telephone call amounted to direct marketing, rather than a notice informing the complainant of the upcoming termination of his service contract.

On appeal, the High Court upheld the lower court’s finding that the telephone call provided information to the complainant on an early renewal promotion, and therefore amounted to direct marketing. The High Court confirmed that the definition of “directing marketing” under the PDPO is to be interpreted broadly, so as to include any offer or promotion of goods, services or other business opportunities, even if disguised as purely informational. Financial loss or other harm does not need to have been suffered by the complainant in order for the Privacy Commissioner and Department of Justice to take enforcement action against a breach of the direct marketing provisions.

1.1.3. The UEMO case

An individual (“Sender”) had sent unsolicited fax messages promoting their design and decoration services to various third parties. The fax messages did not contain the Sender’s name or address. The Sender also failed to comply with requests from recipients to unsubscribe them from the Sender’s list for such unsolicited facsimile messages, and he had disconnected the unsubscribe facility so that recipients could not send him opt-out requests.

In October 2015, following several complaints, the CA issued an enforcement notice against the Sender requiring him to stop sending commercial facsimile messages in breach of the UEMO. However, despite the enforcement notice, the CA continued to receive complaints from the public in relation to the Sender.

On 10 January 2017, the Sender was convicted by the West Kowloon Magistrates’ Courts for failing to comply with an enforcement notice, and fined HK\$7500. He was also ordered to pay HK\$60,000 to the CA to cover the CA’s investigation costs and expenses.

1.1.4. More to follow?

In 2016, the Privacy Commissioner received 393 complaints relating to the direct marketing restrictions under the PDPO – a 22% increase compared to 2015.³

Since the new direct marketing provisions came into effect on 1 April 2013, there have been seven convictions for breach of the direct marketing requirements. The highest penalty so far has been the HK\$30,000 fine issued against HKBN. Whilst the fines imposed to date have been relatively low, the courts have taken a strict approach to the enforcement of the PDPO and have demonstrated that they are willing to interpret the direct marketing provisions broadly. No one is beyond the reach of the courts. Even individuals⁴ and outsourced service providers⁵ have been held accountable.

³ https://www.pcpd.org.hk/english/news_events/media_statements/press_20170124b.html.

⁴ See our article entitled “How Much is that Data in the Window? Individual Convicted for Transferring Personal Data to Third Party for Direct Marketing Purposes”: <https://www.mayerbrown.com/How-Much-is-that-Data-in-the-Window-Individual-Convicted-for-Transferring-Personal-Data-to-Third-Party-for-Direct-Marketing-Purposes-01-27-2016/>.

⁵ See our article entitled “To Market or Not to Market? Outsourced Service Provider Convicted for Breach of Direct Marketing Provisions”: <https://www.mayerbrown.com/files/Publication/b9b1ed67-cbef-46f0-901c-2a05391ab000/Presentation/PublicationAttachment/5a502076-501e-488b-bc93-09b6df6c922/160630-ASI-IP-TMT-QuarterlyReview-2016Q2.pdf>.

¹ See our article entitled “Call Me Maybe? Hong Kong Privacy Commissioner Proposes Expansion of the Do-Not-Call Register”: https://www.mayerbrown.com/files/Publication/e63bf4a6-89ef-497c-9840-4a55f3312a5f/Presentation/PublicationAttachment/9750b58d-0119-4d39-a2a9-5f4a61355c12/IP%20%26%20TMT%20Quarterly%20Review_2014%20Q3_Final.pdf.

² See our article entitled “Two Companies Convicted for Breach of the Direct Marketing Provisions under the Hong Kong Personal Data (Privacy) Ordinance”: <https://www.mayerbrown.com/files/Publication/e1349067-d2c0-4cf8-b45c-2dcf10fab9c/Presentation/PublicationAttachment/aebd35df-c0d6-42e7-8f37-373c58e083ff/150916-HKG-PrivacySecurity-Litigation-TMT.pdf>.

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