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## Asia-Pacific news



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### ABSTRACT

**Keywords:**

Asia-Pacific  
IT/Information technology  
Communications  
Internet  
Media  
Law

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. To market or not to market? Outsourced service provider convicted for breach of direct marketing provisions

On 16 May 2016, a marketing company was convicted for 2 breaches of the direct marketing provisions under the Hong Kong Personal Data (Privacy) Ordinance ("PDPO"). This is the fifth conviction in the last 12 months concerning the use of personal data in direct marketing, and the first time a marketing company has been in the firing line. The case sends a warning message to outsourced service providers carrying out marketing activities on behalf of a client that an agency arrangement may not shield them from liability under the PDPO.

##### 1.1.1. The relevant direct marketing restrictions

On 1 April 2013, the new direct marketing provisions introduced by the Personal Data (Privacy) (Amendment) Ordinance 2012 came into effect. Under the PAPO, unless the relevant data

subjects' express and prior consent has been obtained, data users are prohibited from using personal data for direct marketing purposes, or from transferring it to a third party for their own use in direct marketing.<sup>1</sup> Valid consent for the transfer or use of personal data for direct marketing purposes can only be obtained if the data user has notified concerned data subjects of the following<sup>2</sup>:

- (a) that it intends to use their personal data for direct marketing and/or to transfer their personal data to a third party for direct marketing purposes, and cannot do so without their consent;
- (b) the classes of transferees to whom their personal data will be transferred for their use in direct marketing;
- (c) the type of personal data that will be used or transferred;
- (d) the classes of goods, etc. that will be marketed;
- (e) whether the personal data is being transferred in return for gain (e.g. in return for payment, etc); and
- (f) a means through which the individual can communicate his/her consent in writing for free.

The notification and consent requirements regarding the transfer of personal data to a third party, do not apply where the data user is transferring the personal data to its agent, so

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<sup>1</sup> Section 35E and 35K of the PDPO.

<sup>2</sup> Section 35C and 35J of the PDPO.

<http://dx.doi.org/10.1016/j.clsr.2016.07.014>

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that they can carry out direct marketing solely on behalf of the data user.<sup>3</sup>

In addition, a data user must promptly comply with any request it receives from an individual asking them to cease using their personal data for direct marketing purposes.<sup>4</sup>

Breach of the direct marketing provisions is a criminal offence and may result in a maximum fine of HK\$500,000 and 3 years imprisonment, or a maximum fine of HK\$1,000,000 and up to 5 years imprisonment (if there has been a transfer of personal data in return for gain).

#### 1.1.2. The case

In May 2014, the Privacy Commissioner received a complaint against a marketing company (“**Marketing Company**”). The complainant had made a reservation with a restaurant at a hotel in Hong Kong (“**Hotel**”), and provided his surname and mobile number (“**Personal Data**”). In April 2014, the complainant received a call from the Marketing Company inviting the complainant to join the Hotel’s membership programme. The complainant had never provided his consent for such use of his Personal Data. During the call, the complainant informed the Marketing Company that he was not interested and asked the Marketing Company to never call him again. Contrary to the complainant’s opt-out request, the Marketing Company called the complainant again in May 2014 to promote the Hotel’s membership programme. During the call, the Marketing Company indicated to the complainant that the Hotel had outsourced the promotion of its services to the Marketing Company.

The case was referred by the Privacy Commissioner for prosecution and brought before the Kwun Tong Magistrates’ Court. Interestingly, the case was brought against the Marketing Company only. The Marketing Company pleaded guilty to using the complainant’s prior consent and without complying with its notification obligation, and also for failing to cease using the complainant’s Personal Data in direct marketing after receiving the complainant’s request to do so. The Marketing Company was fined HK\$16,000 in total (HK\$8,000 for each charge).

#### 1.1.3. Who is liable?

Why were the criminal proceedings for breach of the PDPO brought against the Marketing Company, but not the Hotel?

Under Section 2(12) of the PDPO, a person is not considered to be a data user for the purposes of the PDPO, if the person holds, processes or uses the relevant personal data solely on behalf of another, and does not hold, process or uses the relevant personal data for its own purposes. The Hotel had collected the Personal Data from the complainant and provided it to the Marketing Company in order for it to provide marketing services on behalf of the Hotel. Since the Marketing Company had pleaded guilty to both charges, there was no discussion as to whether the Marketing Company should in fact be held liable in respect of the first charge, i.e. failing to provide the specified notification and to obtain consent. Arguably, such obligations fell on the shoulders of the Hotel as the data user and original collector of the personal data, and

the Marketing Company simply acted as the Hotel’s data processor and agent.

The case was heard before a Magistrate’s Court and no written judgement is publicly available. For now, this means that the many questions the case raises, will remain just open to speculation.

However, in the wake of this case, it is likely that data processors might take the view that having a data processing arrangement in place, will no longer offer immunity from the direct provisions in Hong Kong. A tightening of relevant provisions in data processing or marketing agreements is to be expected, as data processors and marketing companies will seek to obtain appropriate warranties and indemnities from their customers.

#### 1.1.4. Where to now?

In 2015, 322 complaints were received by the Privacy Commissioner relating to direct marketing. As of 31 December 2015, 53 cases were referred by the Privacy Commissioner to the police for criminal investigation and prosecution. A constant stream of decisions on direct marketing can be expected from now on. So far the criminal convictions have related to isolated incidents of breaches, with the maximum fine imposed being HK\$30,000. It is likely that the courts will impose higher fines in future cases involving multiple complainants, repeat breaches and transfers of personal data in return for gain.

This most recent case will no doubt cause marketing companies and other data processors to review their terms of business and seek stronger assurances from their corporate customers regarding consents from data subjects, and cause them to revisit their procedures regarding the maintenance of opt-out lists.

## 2. China

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### 2.1. China releases regulations on internet search services and mobile apps

On 25 June 2016, the Cyberspace Administration of China (“**CAC**”) published its new Administrative Provisions on Internet Information Search Services (the “**Search Provisions**”). Three days later, the Administrative Provisions on Mobile Internet Applications Information Services (the “**Mobile Provisions**”) were released. Both Provisions came into effect on 1 August 2016.

The Search Provisions impose several new obligations on Internet information search service providers (“**Search Providers**”), which are broadly defined as entities that “utilize computer technology to collect and process information on the Internet for retrieval by users”. This includes search engines and social media providers. Search Providers shall: (1) adopt information security management systems to enable the review and real-time inspection of the information by the relevant government agencies, and protection of personal information; (2) not post or allow obscene content and other content

<sup>3</sup> Section 35I of the PDPO.

<sup>4</sup> Section 35G of the PDPO.

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