

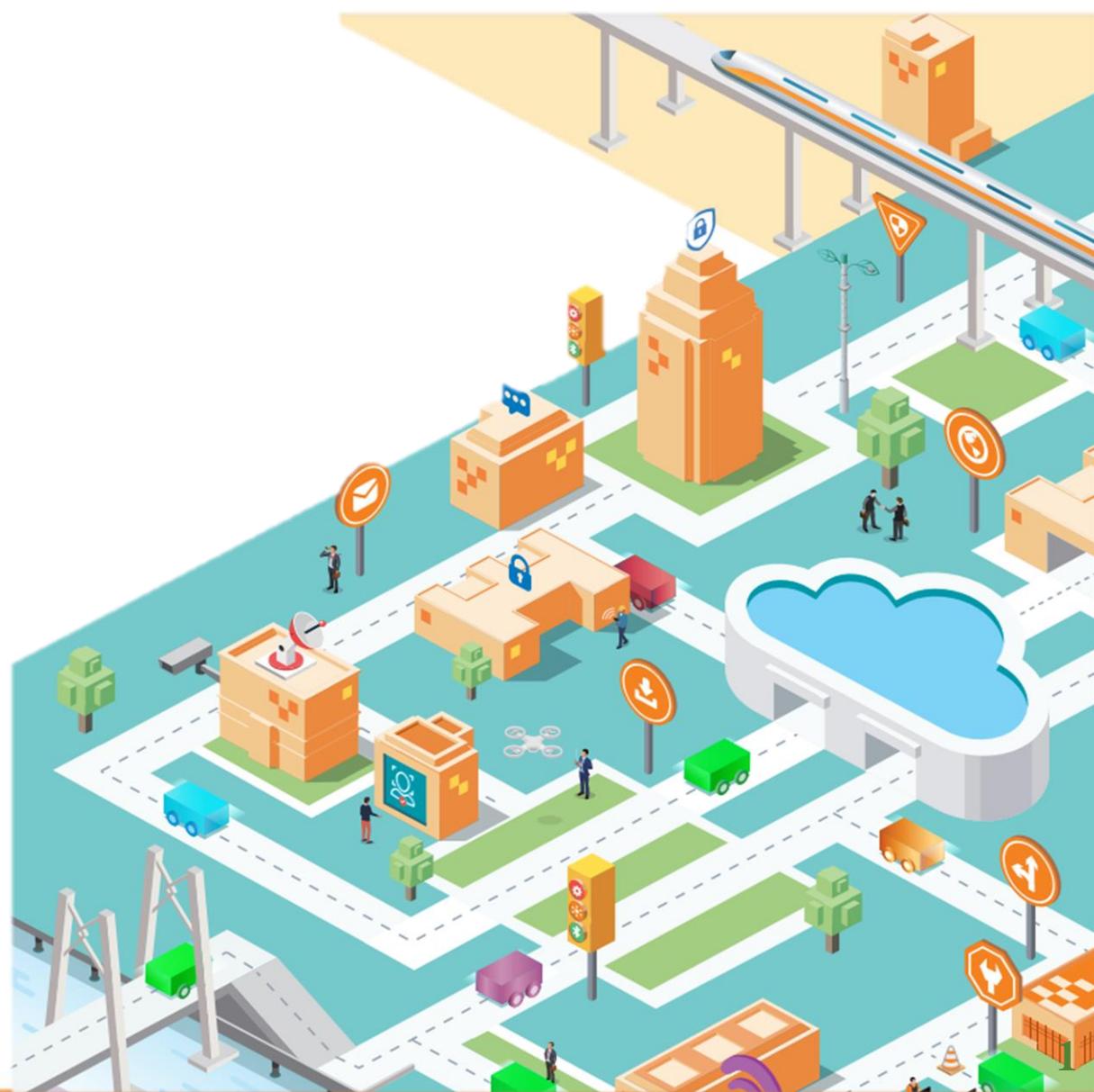
Law Society In-House Annual Conference

6 September 2022

Balancing Data-driven Marketing and Sales with Data Privacy

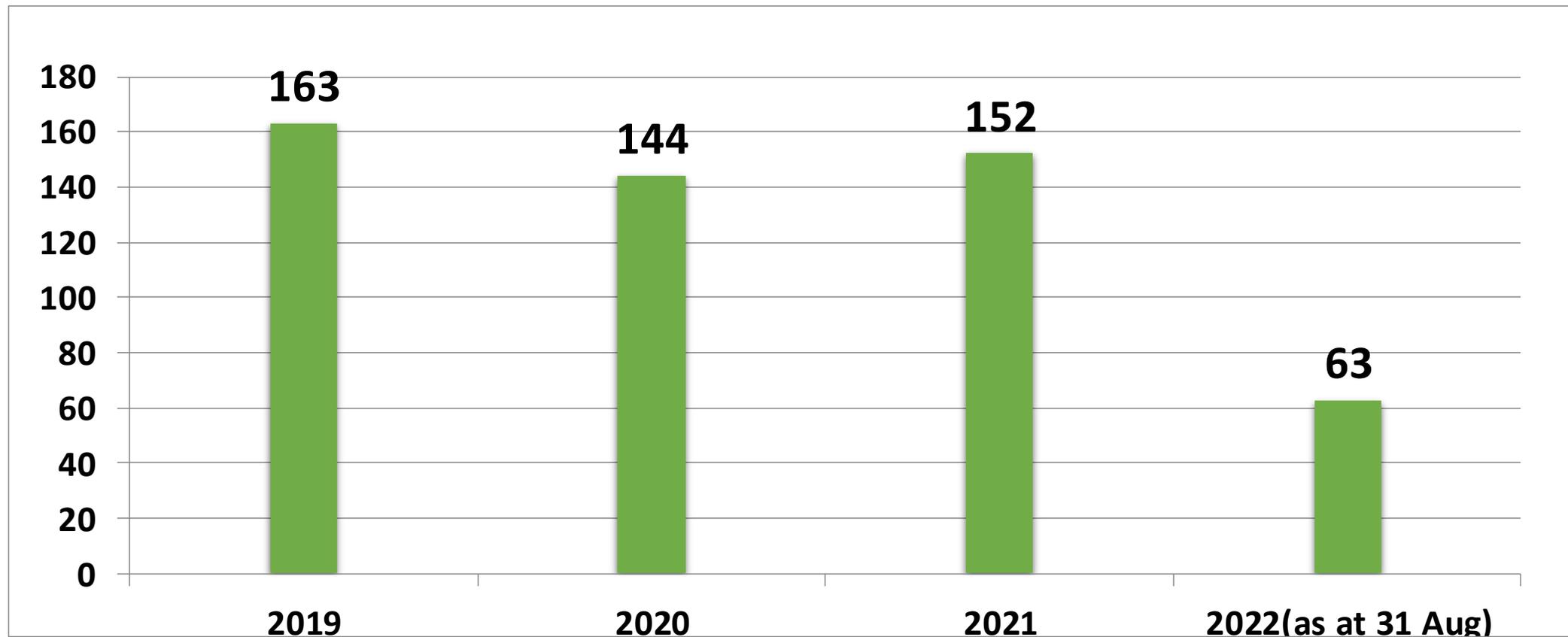
Ada CHUNG Lai-ling

Privacy Commissioner for Personal Data



香港個人資料私隱專員公署
Office of the Privacy Commissioner
for Personal Data, Hong Kong

Number of Direct Marketing Related Complaints



Personal Data (Privacy) Ordinance (Cap.486)

Direct Marketing Regime

What is 'Direct Marketing' (DM)?

“**Direct marketing**” is defined to mean:

- the offering, or advertising of the availability, of goods, facilities or services; or
- the solicitation of donations or contributions for charitable, cultural, philanthropic, recreational, political or other purposes, through **direct marketing means** (s.35A(1)).

“**Direct marketing means**” is further defined to mean:

- sending information or goods, **addressed to specific persons by name**, by mail, fax, electronic mail or other means of communication; or
- making telephone calls to **specific persons**.



Direct Marketing Regime

Steps a data user must take for *using of personal data in DM*

Before using personal data in DM:

- 1. Inform** the data subject (s.35C (2)(a)) -
 - Data user **intends** to so use the personal data
 - Data user may not so use the data unless the data subject **consents** to it
- 2. Provide** the data subject with the following information (s.35C (2)(b)) -
 - The **kinds** of personal data to be used
 - The **classes** of marketing subjects
 - A **channel** through which the data subject may communicate his consent to the intended use (s.35C (2)(c))
- 3. Receive** consent from data subject -
 - In writing (s. 35E(1)(a))
 - Consent given orally (s. 35E(1)(b))

Direct Marketing Regime

Steps a data user must take for *providing personal data to third parties for DM*

Before providing personal data for DM:

- 1. Inform** the data subject **in writing** (s.35J(2)(a)) -
 - Data user **intends** to so provide the personal data
 - Data user may not so provide the data unless he receives **written consent**
- 2. Provide** the data subject with the following information (s.35J (2)(b)) -
 - If the data is to be provided **for gain**, that the data is to be so provided
 - The **kinds** of personal data to be used
 - The **classes** of marketing subjects
 - A **channel** through which the data subject may communicate his consent to the intended use
- 3. Receive** **written consent** from data subject (s.35K(1)(a))

Direct Marketing Regime

Rights of the data subjects

1. **Request** data user to **cease to use** the data in direct marketing (s.35G(1))
2. **Request** data user (s.35L(1)) –
 - to **cease to provide** his personal data to any other person for use by that other person in direct marketing
 - to **notify** that other person to cease to use the data in direct marketing

Data users must comply with the requests
without charge to the data subject

Direct Marketing Regime

Criminal Offences and Penalties - Examples

Offence	Relevant Section	Max fine	Max Imprisonment
<p>A data user who uses a data subject's personal data in direct marketing without observing any of the following:–</p> <p>(1) having received the data subject's consent to the intended use;</p> <p>(2) having sent a written confirmation to the data subject within 14 days from receiving the consent if given orally, confirming:–</p> <p style="padding-left: 40px;">(a) the date of receipt of the consent;</p> <p style="padding-left: 40px;">(b) the permitted kind of personal data; and</p> <p style="padding-left: 40px;">(c) the permitted class of marketing subjects.</p> <p>(3) the use of the personal data is consistent with the data subject's consent.</p>	35E(4)	\$500,000	3 years
<p>A data user who, when using a data subject's personal data in direct marketing for the first time, fails to inform the data subject that the data user must, without charge, cease to use the data in direct marketing if the data subject so requires.</p>	35F(3)	\$500,000	3 years
<p>A data user who fails to comply with the request to cease to use personal data in direct marketing made by a data subject without charge.</p>	35G(4)	\$500,000	3 years

Source: PCPD's New Guidance on Direct Marketing

Direct Marketing Regime

Criminal Offences and Penalties - Examples

<u>Offence</u>	<u>Relevant Section</u>	<u>Max fine</u>	<u>Max Imprisonment</u>
<p>A data user who provides the data subject's personal data to another person for use in direct marketing without observing any of the following:—</p> <p>(1) having received the data subject's written consent to the intended provision of personal data;</p> <p>(2) if the data is provided for gain, having specified in the information provided to the data subject the intention to so provide;</p> <p>(3) the provision of the data is consistent with the data subject's consent.</p>	35K(4)	<p>\$1,000,000 (for gain)</p> <p>\$500,000 (not for gain)</p>	<p>5 years (for gain)</p> <p>3 years (not for gain)</p>
<p>A data user who fails to comply with a data subject's request to:—</p> <p>(1) cease to provide the data subject's personal data for use in direct marketing; or</p> <p>(2) notify any data transferee in writing to cease to use the data in direct marketing.</p>	35L(6)	<p>\$1,000,000 (for gain)</p> <p>\$500,000 (in any other case)</p>	<p>5 years (for gain)</p> <p>3 years (in any other case)</p>
<p>A data transferee who fails to comply with a data user's written notification to cease to use a data subject's personal data in direct marketing.</p>	35L(7)	\$500,000	3 years

Source: PCPD's New Guidance on Direct Marketing

Statutory Defence

The data user charged to prove that the data user has taken **all reasonable precautions** and **exercised all due diligence** to avoid the commission of an offence.

(s.35C(6), 35F(4), 35G(5), 35J(6), 35K(5), 35L(8))

↑
Applicable to all DM related offences

Common direct marketing pitfalls

(1) CONSENT

In writing vs Oral consent

Use Personal Data in DM

- Consent in writing, or
- Oral consent

s.35E(1)(a) - (b)

Provide Personal data for use in DM

- Consent in writing ONLY

s.35K(1)(a)

Common direct marketing pitfalls

(1) CONSENT

Design of consent form

 Bundled consent: avoid incorporating both the terms and conditions for the provision of service and statements relating to the use and/or provision of personal data in direct marketing in the same tick box.

 Design forms in a manner that separates customer's agreement to the terms and conditions for the provision of the service from the customers' consent to the use of his/her personal data for direct marketing.

Source: PCPD's New Guidance on Direct Marketing

Common direct marketing pitfalls

(1) CONSENT

Consent Withdrawal s.35G, 35L

2021年4月20日 星期二 5:56PM

明報新聞網

客戶拒收直銷信息仍接保險推廣 花旗被控違私隱條例罰款1萬 (18:46)

Twitter WhatsApp Facebook 讚好 0

A+ A- 分享 打印



Media Statements

Date: 12 September 2019

Direct Marketing Offence Admitted: Telecommunications Company Fined HK\$84,000

SmarTone Mobile Communications Limited (SmarTone) faced 23 charges under the Personal Data (Privacy) Ordinance (the Ordinance) today at the Kwun Tong Magistrates' Courts. All charges related to the offence of failing to comply with the requirement from the data subject to cease to use her personal data in direct marketing, contrary to section 35G(3) of the Ordinance. The Company pleaded guilty to 14 charges, and was fined HK\$84,000 in total (HK\$6,000 in respect of each charge). This single case has recorded the highest number of charges and the second highest amount of fine since the added provisions of the Ordinance relating to regulating direct marketing activities came into effect on 1 April 2013.

Case Background

The case stemmed from a complaint received by the office of the Privacy Commissioner for Personal Data, Hong Kong (PCPD) in 2017. The complainant received 23 direct marketing text messages or emails from SmarTone between August and December 2017 (in four months' time).

The complainant was a customer of SmarTone which provided mobile telecommunications service to her. In July 2017, she made her opt-out request to SmarTone relating to cessation of using her personal data in direct marketing by phone. However, the complainant still received a direct marketing email from SmarTone in August 2017 and hence complained to PCPD. During the period when PCPD was handling her complaint, the complainant continued receiving direct marketing text messages and emails from SmarTone. The Privacy Commissioner for Personal Data, Hong Kong was of the view that SmarTone failed to comply with the opt-out request of the complainant.

Related Regulation

Pursuant to section 35G(3) of the Ordinance, a company which receives a customer's request for ceasing to use his or her personal data in direct marketing must comply with the request without charge. Failure to comply with the request is a criminal offence which is punishable by a fine of up to HK\$500,000 and imprisonment of up to 3 years.



港聞 / 社會新聞

利嘉閣地產代理涉致電拒收直銷訊息客戶 違私 隱例罪成罰1.5萬



撰文：袁潔

出版：2021-09-07 18:25 更新：2021-09-07 18:25



Data Privacy Pitfalls

PDPO Criminal Offences – Case Sharing: Direct Marketing

**Telecommunications Company
Pleaded Guilty to Violating
Direct Marketing Provisions and
Fined HK\$12,000**



Using Personal Data in Direct Marketing

Background:

A complainant had subscribed broadband service with a telecommunications company and opted out the use of his personal data in direct marketing. However, the complainant still received three direct marketing calls promoting a new service plan.

The complainant complained to the PCPD. The case was subsequently referred to the Police for follow-up actions. In 2020, the telecommunications company pleaded guilty to six charges and was fined \$12,000.

Takeaway:

- ✓ Organisations should not ignore customers' opt-out requests.
- ✓ Developing and implementing policies, as well as providing proper training to employees, are important

Common direct marketing pitfalls

(2) NOTIFICATION

Failure to adequately inform the data subject *s.35C, 35F*

Case Sharing

Background:

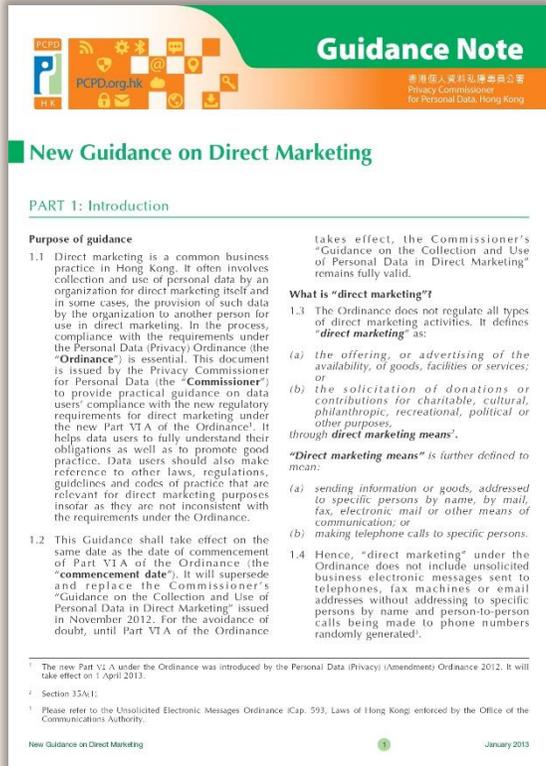
The complainant received an instant communication message on her mobile number, addressing her by her surname, from an insurance agent for promoting a new saving plan. The complainant said that she did not know the agent and questioned how he obtained her surname and telephone number. The agent failed to provide a satisfactory reply. Neither had the agent notified the complainant of her opt-out right.

Outcome and takeaway:

- ✓ The agent was charged with the offence of (1) using the personal data of the complainant in direct marketing without taking specified actions, contrary to section 35C(2) of the PDPO; and (2) failing to inform the complainant, when using her personal data in direct marketing for the first time, of her right to request not to use her personal data in direct marketing without charge, contrary to section 35F(1) of the PDPO.
- ✓ Always inform the customer of the specified information under s.35C, and his/her right under s.35F to request for his/her personal data not to be used in direct marketing without charge.

Contact Us

Guidance on Direct Marketing



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