

Technology, Media and Telecommunications

# Public Consultation on Phase Two of the Review of the Personal Data Protection Act

*PDPC seeks the Public Consultation on their Proposed Amendments to the PDPA to (1) merge the Do Not Call Provisions and the Spam Control Act under a single Act; (2) introduce a proposed Enhanced Practical Guidance framework; and (3) seek feedback on the Exceptions to the Consent Obligation.*

## Introduction

On 27 April 2018, the Personal Data Protection Commission (the “**PDPC**”) issued a public consultation (“**Public Consultation**”) for the managing of unsolicited commercial messages and the provision of guidance to support innovation in the digital economy.

This Update summarises the Public Consultation.

For ease of access, you can obtain a copy of the consultation document [here](#).

## Review of the Do Not Call (“DNC”) Provisions and the Spam Control Act (“SCA”)

### Background on the Current Regime

There are two main sets of provisions to consider.

The first set is the DNC provisions, set out in Part IX of the Personal Data Protection Act 2012 (the “**PDPA**”). The DNC provisions provide a simple and effective way for individuals to opt-out of all marketing messages addressed to their telephone numbers. Individuals may register their telephone numbers on the DNC Registry (“**DNCR**”) and marketers will not be able to send them advertising messages, unless the marketer has obtained clear and unambiguous consent from the individual to whom the number belongs or has an ongoing relationship with said individual.

The second set of provisions is under the SCA. The SCA applies to electronic messages (i.e. email and text messages) when sent in bulk, and requires that an unsubscribe facility be provided in every unsolicited commercial electronic message that is sent in bulk. Commercial messages include marketing messages and messages relating to dishonest gains or deception. The SCA also allows for private right of action relating to the sending of unsolicited commercial electronic messages in bulk.

### Proposed Streamlining of Requirements under DNC Provisions and the SCA

Both the DNC provisions and the SCA aim to address consumer annoyance and provide consumers greater control over the number of unsolicited marketing messages received. At the same time, both sets of provisions aim to

## Technology, Media & Telecommunications

balance both consumers' and organisations' interests by ensuring that the requirements for sending such messages are not overly onerous for organisations. This also enables organisations to market and communicate more effectively with consumers who are interested in receiving information on their offers, products and services.

The PDPC has proposed for the DNC provisions and the SCA to be merged into a single legislation ("**New Act**") governing all unsolicited commercial messages, following similar approaches in other jurisdictions such as Hong Kong and United Kingdom.

### **Scope and Applicability**

Currently, both the DNC provisions and the SCA apply to text messages that are sent to Singapore telephone numbers, but they do not cover text messages that are sent via instant messaging ("**IM**") identifiers (e.g. through Facebook, WeChat). Additionally, there is an overlap between the two sets of provisions, as the SCA only applies to text messages that are sent in bulk, whereas the DNC provisions apply regardless of whether they are sent in bulk.

As such, the PDPC proposes to streamline the scope of the two sets of provisions under the New Act in the following manner:

- (a) The DNC provisions under the New Act will apply to unsolicited marketing text messages that are sent to Singapore telephone numbers, regardless of whether they are sent in bulk.
- (b) The provisions that deal with spam control ("**Spam Control Provisions**") under the New Act will be extended to apply to unsolicited commercial text messages where they are addressed to IM identifiers and are sent in bulk.

It is envisioned that the proposed changes will provide greater protection to individuals from unsolicited commercial messages (protecting them from text messages sent via IM identifiers) and reduce ambiguity for organisations in complying with differing requirements when sending commercial messages.

By extending the Spam Control Provisions to text messages addressed to IM identifiers, individuals will be able to better manage such messages as organisations will need to comply with the Spam Control requirements such as providing an unsubscribe facility and their contact information, when sending commercial text messages using IM identifiers in bulk. If there is a contravention of the Spam Control Provisions under the New Act, civil action may be taken by the affected individuals or organisations.

The PDPC has asked the public for its views on the proposed scope and applicability of the New Act, and in particular its views on extending the Spam Control Provisions to apply to unsolicited commercial text messages where they are addressed to IM identifiers and are sent in bulk.

### **Labelling Requirements**

Presently, there are labelling requirements under the PDPA, whereby a sender is to provide his contact information and to not conceal his calling line identity when sending a specified message to a Singapore telephone number. The PDPC proposes to retain the current labelling requirements for specified voice, text and fax messages under the DNC provisions and the Spam Control Provisions.

# Client Update: Singapore

## 2018 MAY

### Technology, Media & Telecommunications

However, for the labelling requirements of text messages sent via IM identifiers under the Spam Control Provisions under the New Act, the PDPC proposes that only the **contact information** will be required (e.g. an email address at which the sender can be contacted).

The PDPC has stated that the requirement to provide a 'calling line identity' would not be relevant for text messages sent via IM identifiers, as (a) the display name or ID in IM platforms will typically be shown (e.g. WeChat ID cannot be hidden), and (b) the decentralised mode of creating and assigning display names or IDs for IM platforms makes this means of identifying the sender less relevant.

Also, while there is a requirement for the "<ADV>" label to be used in specified voice, text and fax messages under the DNC provisions and the Spam Control Provisions, this is not relevant for messages sent via IM identifiers as the "<ADV>" label is meant to enable filtering of emails by spam filters, and text messages sent via IM identifiers typically do not have subject titles.

#### ***Withdrawal Period for Specified Voice, Text and Fax Messages***

Presently under the DNC provisions, a person must effect a request for withdrawal of consent for the sending of a specified message to a Singapore telephone number within 30 days. The PDPC proposes to reduce the period to 10 business days for organisations. This would be in line with the period for organisations to effect an unsubscribe request under the Spam Control Provisions. This will minimise potential confusion and compliance costs as organisations streamline processes for all unsubscribe and withdrawal of consent requests. It will also strengthen protection for consumers.

The PDPC is seeking views on this proposed reduction.

#### ***Dictionary Attack and Address Harvesting Software***

A Dictionary Attack is the process of obtaining e-mail addresses by an automated means that generates possible electronic addresses by combining names, letters, numbers, punctuation marks or symbols into numerous permutations.

An Address Harvesting Software constitutes a software which is specifically designed or marketed for use to (a) search the Internet for e-mail addresses; and (b) collect, compile, capture or otherwise harvest those e-mail addresses.

Both the use of Dictionary Attacks and Address Harvesting Software are presently prohibited under the SCA, but not under the DNC provisions. PDPC proposes to prohibit the sending of commercial messages to all telephone numbers (not limited to Singapore telephone numbers), IM identifiers and email addresses generated by or obtained through the use of Dictionary Attacks or Address Harvesting Software by persons in Singapore.

The PDPC is seeking views on this proposed prohibition.

#### ***Dishonest Gains or Deception***

With the proposed streamlining for unsolicited marketing text messages to be covered by the DNC provisions under the New Act, unsolicited text messages relating to dishonest gains or deception which do not involve an offer of a good or service (e.g. kidnapping or fund-raising scams), sent in bulk to Singapore telephone numbers would not be

# Client Update: Singapore

## 2018 MAY

### Technology, Media & Telecommunications

covered by the Spam Control Provisions nor the DNC provisions under the New Act. The removal of the avenue for civil remedy under the Spam Control Provisions for such text messages is not expected to have a major impact as they will usually be the subject of criminal investigations.

#### ***Business-To-Business (“B2B”) Marketing Messages***

Currently, the DNC provisions do not apply to B2B marketing messages as many people use mobile telephone numbers for both business and personal purposes, which in turn creates uncertainty for organisations in complying with the DNC provisions when sending marketing messages to such telephone numbers. On the other hand, B2B messages are currently covered under the SCA.

The PDPC seeks comments on whether the DNC provisions under the New Act should be extended to cover B2B marketing messages, to align the coverage of the DNC provisions with the Spam Control Provisions. Doing so may increase business costs for certain persons as they would now have to check the DNCR before sending B2B messages, but it also eliminates uncertainty and risks for persons sending marketing messages to a DNC registered Singapore telephone number that may be an individual’s personal mobile number (not used for business purposes). Covering B2B marketing messages also provides more options for individuals who use their telephone numbers for both personal and business purposes, as they can choose not to receive B2B marketing messages by registering their numbers on the DNCR.

#### **Proposed Enforcement Approach for DNC Provisions under the New Act**

##### ***Enforcing DNC Breaches under an Administrative Regime***

Currently, breaches of certain DNC provisions are regarded as criminal offences under the PDPA. The PDPC proposes that the enforcement of infringements relating to the duties to check the DNCR, duties to provide contact information, and duties to not conceal calling line identity, will be brought under an administrative regime in the New Act. This new administrative regime will allow PDPC to better allocate resources for faster resolution of cases investigated, and also empower the PDPC to issue penalties for infringements. A private right of action in respect of the DNC provisions will also be provided under the New Act.

The PDPC is seeking views on this proposal.

##### ***Liability of Third-Party DNC Checkers and Resale of DNCR Lists***

Currently, organisations may rely on third-party checkers to check the DNCR on their behalf. However, these third-party checkers are not liable under the PDPA for DNC infringements resulting from the inaccurate DNCR results provided by them.

The PDPC proposes to impose an obligation for third-party checkers to communicate accurate information regarding DNCR results, such that they can be held liable for infringements of the DNC provisions under the New Act as a result of inaccurate information that they had provided to the sender.

The PDPC also proposes to prohibit the resale of any results of telephone numbers that were screened through the DNCR. This is to protect the integrity and accuracy of results of checks with the DNCR.

The PDPC is seeking views on these proposals.

## Technology, Media & Telecommunications

### ***Presumption of Sending***

The PDPC proposes to introduce a deeming provision under the DNC provisions in the New Act such that the subscriber of the Singapore telephone number is presumed to have sent the specified message unless he or she proves otherwise. This is expected to improve enforcement effectiveness and ensure greater responsibility on subscribers on taking active steps to prevent misuse of their telephone service. At the same time, should the specified message be sent by a third party, the PDPC will consider any evidence submitted by the subscriber to substantiate the same.

The PDPC is seeking views on this proposed deeming provision.

## **Proposed Enhancements for Practical Guidance on PDPA Provisions**

### **Need for Enhanced Practical Guidance**

The PDPC has received requests from organisations seeking confirmation and assurance that their business practices are compliant with the PDPA.

The PDPC proposes to introduce an Enhanced Practical Guidance (“**EPG**”) framework for the PDPC to provide organisations guidance with regulatory certainty (“**Determinations**”). The proposed EPG framework will:

- (a) address the current gap for addressing complex compliance queries that cannot be addressed by published resources and professional data protection services or legal advice; and
- (b) provide regulatory certainty which current guidance provided by PDPC does not provide.

Overseas jurisdictions have provided for similar frameworks, where the data protection authority is able to issue guidance to organisations that are legally binding. In Singapore, a similar framework is provided for by the Competition and Consumer Commission of Singapore (“**CCCS**”), which may issue decisions as to whether an agreement, conduct or merger situation infringes the Competition Act.

The PDPC is seeking views on the proposed EPG framework.

### **Proposed Criteria and Scope**

Under the proposed EPG framework, the PDPC may provide Determinations on whether a particular business activity complies with specific Data Protection Provisions under the PDPA. The queries must be from the organisations performing the business activity for which the guidance is sought, and cannot relate to hypothetical situations or deal with the organisation’s entire business model, processes or policies.

The PDPC will assess requests for Determinations based on the following criteria:

- (a) the query relates to a complex or novel compliance issue for which there is currently no clear position for its treatment under the PDPA;
- (b) the query cannot be addressed by the PDPC’s general guidance and existing published resources; and

## Technology, Media & Telecommunications

- (c) the query does not amount to a request for legal advice.

Additionally, there must be no ongoing investigation into the organisation in relation to the issue in question by any regulatory or law enforcement agencies.

The PDPC's provision of Determinations under the EPG framework will be chargeable so as to deter frivolous requests. However, the PDPC intends to calibrate the fees to be charged according to the type and size of organisation to ensure that costs are not prohibitive for SMEs and start-ups.

Once assessment of the query has been done, the PDPC will provide a Determination as to whether a particular business activity or course of action in the given circumstances complies with specific Data Protection provision(s) of the PDPA. Organisations applying for EPG are expected to propose solutions for ensuring compliance. Notwithstanding the PDPC's Determination, organisations will be expected to conduct their own risk and impact assessments and take appropriate measures to mitigate any risks.

The PDPC will continue to provide the current Practical Guidance and organisations may choose whether to request for the Practical Guidance or Determinations under the EPG framework. Alternatively, organisations that require more certainty after receiving the PDPC's guidance may apply for a Determination under the EPG framework.

Similar to the current Practical Guidance provided by the PDPC, a redacted version of the PDPC's Determination will be published on a case-by-case basis without disclosing any confidential or commercially sensitive information, to help raise awareness on matters which PDPC's Determination was provided.

### **Proposed Validity and Effect of Determinations**

The Determinations issued by the PDPC will generally be valid, unless:

- (a) there have been changes made to an aspect of the PDPA that are relevant to the Determination; or
- (b) the information provided by the organisation with which the PDPC's Determination was made was false, misleading or no longer accurate.

Where the PDPC receives a complaint relating to the subject of an EPG Determination that is no longer valid due to changes to the PDPA, the PDPC may take into consideration factors such as the date of the change to the PDPA and may provide a grace period for the organisation to comply with the revised PDPA.

In addition, the PDPC will not initiate investigations in situations where the PDPC, in the course of assessing and providing a Determination to an organisation, finds any non-compliance with the PDPA based on the information submitted by the organisation. The exception to this is where a complaint is separately received during the assessment. However, generally where the PDPC finds any non-compliance based on the information submitted by the organisation, the PDPC may suspend the assessment and provide the organisation a reasonable period of time to rectify the non-compliance before resuming the assessment.

The PDPC will not use the information provided by the organisation for the EPG assessment as part of its investigations. This would ensure the integrity of the EPG framework and safeguard business confidentiality.

Technology, Media & Telecommunications

### Proposed Exemptions under the EPG Framework

The PDPC envisages that in some cases, EPG assessments may lead to the organisation applying for an exemption where the organisation is unable to comply with specific PDPA provisions and is unable to rely on any exception under the PDPA for the business activity. For expediency, the PDPC proposes to provide for exemptions from specific PDPA provisions to be sought from the Minister as part of its Determinations issued under the EPG framework, where applicable.

### Solicitation of Feedback on Exceptions to Consent

The Second, Third and Fourth Schedules to the PDPA provide exceptions to the obligation to obtain consent for the collection, use and disclosure of personal data respectively. The PDPC seeks feedback from organisations on the practicality of relying on these exceptions. In particular, feedback is sought for the following:

- (a) whether the scope or conditions of any exception should be adjusted or clarified; and
- (b) whether any exception is no longer necessary or relevant.

Organisations providing feedback on their experience in considering how specific exceptions apply in their specific circumstances should provide sufficient details in order for the PDPC to understand the practical issues faced. If there are confidential or commercially sensitive details, organisations may identify these and request for their redaction from the published feedback.

### Closing Comments

The consolidation and streamlining of the DNC provisions and the SCA is a welcomed one, as many businesses will benefit from greater clarity for the purposes of compliance.

The PDPC's invitation for feedback on the exceptions to consent (under the Second, Third and Fourth Schedules to the PDPA) is welcomed too, as the PDPC has expressed its interest in ensuring that the exceptions remain relevant in the face of technological developments and changes in business practices.

Organisations are strongly encouraged to carefully consider the PDPC's proposed amendments and to provide feedback in respect of any concerns that these proposed amendments may have on them.

The public consultation ends on **7 June 2018**. Organisations are encouraged to make their submissions by that deadline.

For further enquires or discussion on the above matters, please do not hesitate to contact our team below.

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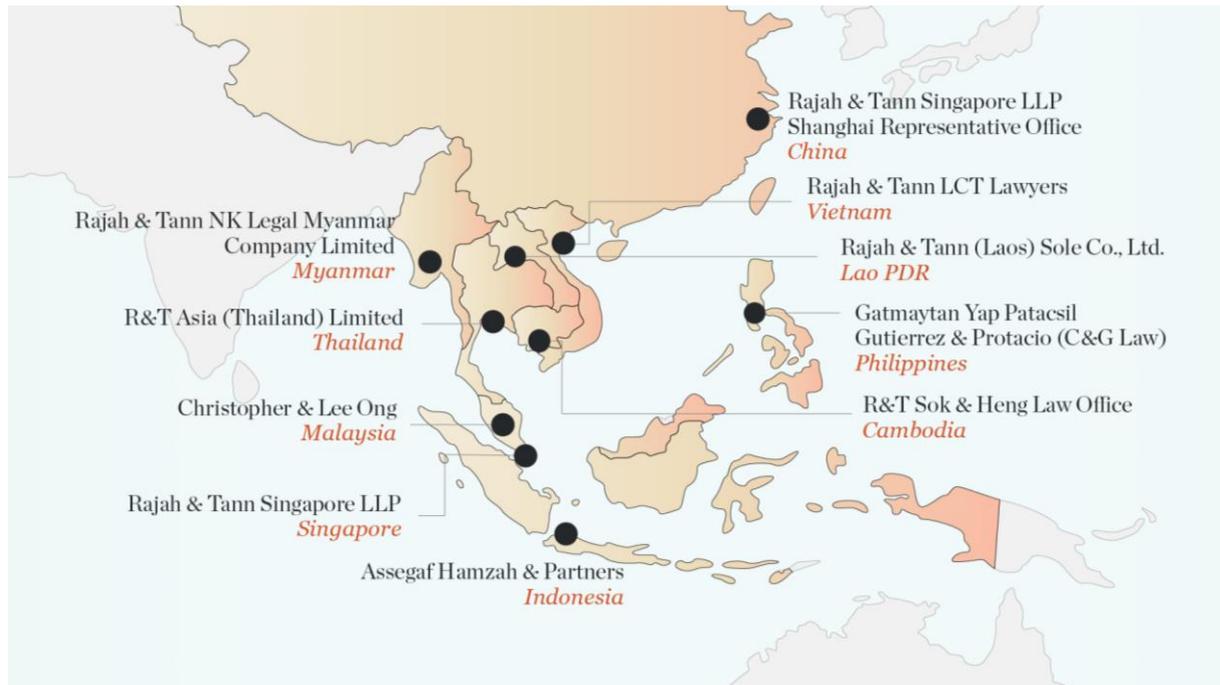
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