

電話 TEL.: 2527 1893
傳真 FAX: 2861 1494
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來函編號 YOUR REF.:

BY FAX

21 June, 2001

Mrs Florence Lam
Clerk to LegCo Panel on
Financial Affairs
Legislative Council Building
8 Jackson Road
Hong Kong

Dear Mrs Lam,

**Bank of China (Hong Kong) Limited (Merger) Bill
Bank of East Asia, Limited Bill**

At the LegCo Financial Affairs Panel meeting on 19 June 2001, Members asked the Administration to seek the views of the Privacy Commissioner for Personal Data on the points raised by the Assistant Legal Adviser of LegCo and solicitors of the banks, as reflected in the exchange of correspondence attached to your letter of 19 June 2001 to me.

The Home Affairs Bureau has consulted the Privacy Commissioner whose views are set out in his letter of 21 June 2001 addressed to Mr Ng Hon-wah of Home Affairs Bureau (copy attached).

I should be grateful if you would convey the above information to Members of the Panel.

Yours



(Stanley V.H. Wong)

for Secretary for Financial Services

專 用 箋

From the desk of the Commissioner

Government Secretariat Home Affairs Bureau
31st Floor, Southern Centre
130 Hennessy Road
Wanchai, Hong Kong
Mr. NG Hon-wah

21 June 2001

Dear Hon-wah,

Bank of China (Hong Kong) Limited (Merger) Bill
The Bank of East Asia, Limited Bill

We refer to the LegCo Panel meeting on 19 June 2000, in which the above Bills were discussed. Subsequently, we are given to understand by you that further comments are sought from our Office in the light of the discussion in the Panel on clause 8(1) of the 1st and clause 7(1) of the 2nd Bill. Having studied the views expressed by Members and other parties as contained in relevant papers, our further comments are provided as follows.

As it would be clear to all, the clauses in question are aimed, *inter alia*, to prevent any possible issue from arising under data protection principle 3 ("DPP3") of the Personal Data (Privacy) Ordinance ("PDPO"), regarding the disclosure/transfer of personal data in connection with the proposed merger/acquisition. In considering those clauses, we have taken into account such factors as we consider to be relevant. First, we note that in each of the 2 cases, the line of business of the resultant entity will be essentially the same as that of the original entities. The significance of this is that, so far as customers are concerned, the acquisition/merger will enable them to continue to obtain essentially the same service as before. Hence, apart from the eventual transfer of personal data to the resultant entity (which transfer admittedly comes within the meaning of the term "use" as defined in section 2(1)), there is otherwise likely to be little or no change in the purpose for which the data are to be used as brought about by the acquisition/merger (which would not be the case if the resultant entity were to engage in a totally different business altogether).

Secondly, we have also taken into account the fact that, in each of the 2 cases, the proposed acquisition/merger is to involve the data of a substantial number of customers and/or employees. The significance of this is that, the theoretical alternative under DPP3 of obtaining the "prescribed consent" from each of these customers and employees is likely to be far less practicable in the present cases than in, say, another acquisition/merger involving the disclosure/transfer of only a handful of individuals' data. The reason for our view in this regard is related to our interpretation of the term "prescribed consent", as explained below.

According to section 2(3) of the PDPO, "prescribed consent" must be both "express" and "given voluntarily". According to our interpretation of the latter requirement, consent is given by a data subject voluntarily only where he is free to otherwise withhold consent without any undesirable consequence whatsoever. Therefore, in the case of a consent clause being a non-negotiable term of a standard-form contract, which contract an individual is required to sign in order to obtain the service (especially essential services) being applied for, we would normally be inclined to regard the signing of such contract by (not to mention the mere issuing of the relevant terms and conditions to) the individual as not amounting to "prescribed consent" on his part.

Regarding the requirement for prescribed consent to be **express**, this implies that mere silence will not suffice. Accordingly, despite the fact that a bank customer may have been asked to raise his objection (if any) to the proposed transfer of his personal data, the absence of any indication whatsoever from him does not, in law, constitute "prescribed consent" on his part.

It should be emphasized that the legal interpretation adopted by our Office notwithstanding, other parties are at liberty to adopt other lines of interpretation as they may see proper. However, applying our interpretation of "prescribed consent", we have serious doubt as to whether the banks in the present cases may be entitled to rely on "consent" purported to have been obtained previously in the form of standard terms and conditions of contract. Similarly, we have doubt as to the practicability for those banks now to obtain prescribed (i.e. express) consent from each and every customer.


In view of those considerations, we have not previously objected to the proposed clauses 8(1) and 7(j), and do not see any significant reason now to change our view for these cases.

In addition to the above, having now had the benefit of the views expressed by LegCo Members and other parties, we note the concern about equity of treatment. In

particular, this point has been raised that the protection available to the parties to the current transactions may not be likewise available to any parties to similar transactions in the future, especially for those for whom the presenting of a Private Member's Bill may not be an option.

In order to address this issue and, moreover, with the view to achieving a proper balance between the economic interests of society and individuals' privacy rights, we agree that it will be highly worthwhile, as already suggested in the Panel meeting, for the Administration to carry out further study on whether it may be necessary or desirable to introduce exemption provisions in the PDPO regarding the use of personal data in acquisition/merger activities under different situations. For the purpose of such study, we shall be happy to make available to you our further views on the matter in due course.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'Stephen Lam', written over a printed name.

Stephen Lam

Privacy Commissioner for Personal Data