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Panel on Constitutional Affairs

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 15 May 2017**

Section 33 of the Personal Data (Privacy) Ordinance

Purpose

This paper gives an account of the past discussion of the Panel on Constitutional Affairs ("the Panel") on the implementation of section 33 of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO").

Background

2. Enacted in 1995, PDPO protects the privacy of individuals in relation to personal data. According to the information provided by the Office of the Privacy Commissioner of Personal Data, section 33 of PDPO (in **Appendix I**) provides stringent and comprehensive regulation of transfer of data to places outside Hong Kong. It expressly prohibits the transfer of personal data to places outside Hong Kong, except in specified circumstances such as:

- (a) the place is specified by the Privacy Commissioner of Personal Data ("PCPD") as one which has in force a data protection law which is substantially similar to, or serves the same purpose as PCPO; and
- (b) the data user has taken all reasonable precautions and exercised all due diligence to ensure that the data will not, in that place, be handled in a manner tantamount to a contravention of a requirement under PCPO.

The purpose of the provision is to ensure that the standard of protection afforded by PDPO to the data under transfer will not be reduced as a result of the transfer. However, section 33 of PDPO is not yet in operation.

Discussions held by the Panel

3. It is the usual practice of the Panel to receive a briefing by PCPD on the work of the Office of PCPD in each legislative session. Issues relating to the implementation of section 33 of PDPO were discussed at the relevant meetings. The major views expressed by members are summarized below.

Lack of progress of implementation

4. Some members expressed grave concern about the slow progress in bringing section 33 of PDPO into operation to regulate the transfer of data to places outside Hong Kong. They pointed out that many banks, insurance companies and telecommunication organizations in Hong Kong had transferred their clients' personal data to their back offices and agencies in places outside Hong Kong for storage and processing. They considered that section 33 of PDPO should be brought into operation as soon as possible. The former PCPD advised that the transfer of personal data to places outside Hong Kong was regulated in some respects under the relevant Data Protection Principle ("DPP")¹ of PDPO. However, breaches of DPPs were not criminal offences. Hence, the current protection for personal data transferred overseas was weak and far from comprehensive. He agreed that section 33 should be implemented as early as possible.

5. The former PCPD also informed the Panel that, to assist the Administration to prepare for the implementation of section 33, his Office had commissioned a consultancy study on drawing up a "white list" of jurisdictions with privacy protection standards comparable to that of Hong Kong and to which data transfer could be made legitimately. It would also draw up a sample contract to assist organizations to ensure a comparable standard of protection would be afforded by the overseas data user to the personal data so transferred.

6. In addition, the Office of PCPD published in 2014 a Guidance which assisted organizations to prepare for the eventual implementation of section 33 and enhance privacy protection for cross-border data transfer. In particular, the Guidance contained a set of recommended model data transfer clauses to assist organizations in developing their cross-border data transfer agreement with the

¹ Data users must follow the fair information practices stipulated in the six DPPs in Schedule 1 to PDPO in relation to the purpose and manner of data collection, accuracy and duration of data retention, use of personal data, security of personal data, availability of data information, and access to personal data. PCPD is empowered to direct the data user concerned to take corrective actions for non-compliance with the provisions of DPPs by issuing an enforcement notice.

overseas data recipients. Organizations were encouraged to adopt the practices recommended in the Guidance as part of their corporate governance responsibility before section 33 came into operation.

Business impact assessment conducted by the Administration

7. Members noted that PCPD had submitted the aforementioned consultancy report covering a "white list" of jurisdictions to the Government (see paragraph 5), and issued a Guidance Note on Personal Data Protection in Cross-border Data Transfer. Members enquired about the Administration's follow-up actions taken to prepare for the commencement of the operation of section 33 of PCPO. The Administration advised that it had been in close liaison with the Office of PCPD on the work pertaining to the implementation of section 33. The Administration explained that as implementing section 33 would have significant implications on data transfer activities of various sectors of the community, the Administration had engaged a consultant to conduct a business impact study to look at the possible impact on the relevant sectors and ensure their readiness for the implementation of section 33. The study report was expected to be completed in the first half of 2017.

Recent developments

8. The Administration will brief the Panel on the preliminary findings of the business impact assessment on the implementation of section 33 of PDPO at the next meeting on 15 May 2017.

Relevant papers

9. A list of the relevant papers on the LegCo website is in **Appendix II**.

第486章 《個人資料(私隱)條例》

Chapter Personal Data (Privacy) Ordinance
486

33. 禁止除在指明情況外將個人資料移轉至香港以外地方

(尚未實施)

- (1) 除 ——
- (a) 其收集、持有、處理或使用是在香港進行的個人資料；或
 - (b) 其收集、持有、處理或使用是由主要業務地點是在香港的人所控制的個人資料，
外，本條不適用於任何個人資料。
- (2) 除非符合以下條件，否則資料使用者不得將個人資料移轉至香港以外的地方 ——
- (a) 該地方是為本條的施行而在第(3)款下的公告中指明的；
 - (b) 該使用者有合理理由相信在該地方有與本條例大體上相似或達致與本條例的目的相同的目的之法律正在生效；
 - (c) 有關的資料當事人已以書面同意該項移轉；
 - (d) 該使用者有合理理由相信在有關個案的所有情況下 ——
 - (i) 該項移轉是為避免針對資料當事人的不利行動或減輕該等行動的影響而作出的；
 - (ii) 獲取資料當事人對該項移轉的書面同意不是切實可行的；及
 - (iii) 如獲取書面同意是切實可行的，則資料當事人是會給予上述同意的；
 - (e) 該資料憑藉第8部下的豁免獲豁免而不受第3保障資料原則所管限；或 (由2012年第18號第2條修訂)

33. Prohibition against transfer of personal data to place outside Hong Kong except in specified circumstances

(Not yet in operation)

- (1) This section shall not apply to personal data other than personal data the collection, holding, processing or use of which—
- (a) takes place in Hong Kong; or
 - (b) is controlled by a data user whose principal place of business is in Hong Kong.
- (2) A data user shall not transfer personal data to a place outside Hong Kong unless—
- (a) the place is specified for the purposes of this section in a notice under subsection (3);
 - (b) the user has reasonable grounds for believing that there is in force in that place any law which is substantially similar to, or serves the same purposes as, this Ordinance;
 - (c) the data subject has consented in writing to the transfer;
 - (d) the user has reasonable grounds for believing that, in all the circumstances of the case—
 - (i) the transfer is for the avoidance or mitigation of adverse action against the data subject;
 - (ii) it is not practicable to obtain the consent in writing of the data subject to that transfer; and
 - (iii) if it was practicable to obtain such consent, the data subject would give it;

- (f) 凡假使該資料在香港以某方式收集、持有、處理或使用，便會屬違反本條例下的規定，該使用者已採取所有合理的預防措施及已作出所有應作出的努力，以確保該資料不會在該地方以該方式收集、持有、處理或使用。*(由2012年第18號第2條修訂)*
- (3) 凡專員有合理理由相信在香港以外的某地方有與本條例大體上相似或達致與本條例的目的相同的目的之法律正在生效，他可藉憲報公告，為本條的施行指明該地方。
- (4) 凡專員有合理理由相信在第(3)款下的公告所指明的某地方，已不再有與本條例大體上相似或達致與本條例的目的相同的目的之法律正在生效，他須藉廢除或修訂該公告，令該地方停止被為本條的施行而指明。
- (5) 為免生疑問，現聲明——
 - (a) 就第(1)(b)款而言，資料使用者如屬在香港成立為法團的公司，即為主要業務地點是在香港的資料使用者；
 - (b) 第(3)款下的公告是附屬法例；及
 - (c) 本條的施行不損害第50條的概括性。

(編輯修訂——2013年第1號編輯修訂紀錄)

- (e) the data is exempt from data protection principle 3 by virtue of an exemption under Part 8; or *(Amended 18 of 2012 s. 2)*
- (f) the user has taken all reasonable precautions and exercised all due diligence to ensure that the data will not, in that place, be collected, held, processed or used in any manner which, if that place were Hong Kong, would be a contravention of a requirement under this Ordinance.
- (3) Where the Commissioner has reasonable grounds for believing that there is in force in a place outside Hong Kong any law which is substantially similar to, or serves the same purposes as, this Ordinance, he may, by notice in the Gazette, specify that place for the purposes of this section.
- (4) Where the Commissioner has reasonable grounds for believing that in a place specified in a notice under subsection (3) there is no longer in force any law which is substantially similar to, or serves the same purposes as, this Ordinance, he shall, either by repealing or amending that notice, cause that place to cease to be specified for the purposes of this section.
- (5) For the avoidance of doubt, it is hereby declared that—
 - (a) for the purposes of subsection (1)(b), a data user which is a company incorporated in Hong Kong is a data user whose principal place of business is in Hong Kong;
 - (b) a notice under subsection (3) is subsidiary legislation; and
 - (c) this section shall not operate to prejudice the generality of section 50.

Appendix II

Relevant documents on Section 33 of the Personal Data (Privacy) Ordinance

Committee	Date of meeting	Paper
Panel on Constitutional Affairs ("CA Panel")	20.11.2010 (Item I)	Agenda Minutes
Legislative Council ("LegCo")	12.1.2011	Official Record of Proceedings Page 126 - 209 (Motion)
CA Panel	16.5.2011 (Item III)	Agenda Minutes
	17.3.2014 (Item IV)	Agenda Minutes
	16.2.2015 (Item IV)	Agenda Minutes
LegCo	29.4.2015	Official Record of Proceedings Pages 74 – 76 (Written question)
CA Panel	20.3.2017 (Item V)	Agenda

Council Business Division 2
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