中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China

立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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Ms Sandy CHEUNG
Principal Assistant Secretary for Security (E)
Security Bureau
E Division
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2 Tim Mei Avenue, Tamar
Hong Kong

Dear Ms CHEUNG,

Protection of Critical Infrastructures (Computer Systems) Bill

We refer to the captioned Bill. Please provide clarifications in relation to the following issues to facilitate Members' consideration of the Bill.

Part 1: interpretation

2. It is noted that under clause 2(1) of the Bill, the terms "computer-system security incident" and "computer-system security threat" respectively include an element that an event or an act that has or likely have an "adverse effect" on the computer-system security of the critical computer system. Please clarify what "adverse effect" intends to mean and encompass and whether it is necessary to expressly provide for its meaning in the Bill.

Part 4: proposed obligations of critical infrastructure operators

3. It is noted that under clause 20(1) of the Bill, "operator change" would be defined to mean "a change of the organization that operates the infrastructure" in relation to a critical infrastructure ("CI"). Please clarify what such "change" is intended to mean and what "change(s)" would be encompassed. For instance,

whether the buying or selling of e.g. 30% of the shares of a CI operator or change of directorship of a CI operator would constitute "operator change".

4. Under clause 21(4)(a) of the Bill, CI operators would have to appoint an employee who has "adequate professional knowledge" in relation to computer-system security to supervise the computer-system security management unit. Please clarify whether the relevant qualifications requirement (e.g. education and experience level) of such appointment would be specified and if so, whether it is appropriate to do so in the Bill or elsewhere (e.g. administrative guidelines).

5. It is noted that under clause 22(1) of the Bill, if certain events occur in respect of a CI operated by a CI operator, the CI operator must notify the regulating authority within one month. Clause 22(2)(a) seeks to provide that one of such events would be material change occurring to "the design, configuration, security or operation" of a critical computer system of the CI. The proposed meaning of "material" can be found in clause 22(3)(a) and (b), and clause 22(3) also seeks to provide that the meaning of "material change" under the Bill would not be exhaustive ("without limiting the meaning of "material"). Please clarify:

(a) in practical terms, what would "design, configuration, security or operation" of a critical computer system of a CI encompass;

(b) whether a material change could occur to other aspects of a critical computer system of a CI and if so, whether it would be appropriate to expressly provide for that;

(c) in view of the non-exhaustive nature of the meaning of "material change", what would constitute "material change" in practical terms, and whether e.g. interpretation note(s) would be issued via administrative means to avoid uncertainty; and

(d) alternatively, whether the current clause 22(3)(a) and (b) is adequately wide to cater to possible scenarios and if so, whether it is necessary to provide that the meaning of "material change" is "without limiting the meaning of "material"".

6. It is noted that under clause 25(1) of the Bill CI operators would be required to carry out computer-system security audit and submit report within the specified period. Please clarify whether the costs of carrying out such audit would be borne by CI operators and if so, whether it would be appropriate to expressly provide so in the Bill.

7. Clause 25(8) of the Bill further provides that a computer-system security audit would not be regarded as carried out unless it is carried out by an "independent auditor". Please consider whether it would be appropriate to

expressly define the term for clarity, e.g. an independent auditor should not have conflict of interest in discharging its duties.

8. It is noted that under clause 28(1) of the Bill, if a CI operator "becomes aware" that a computer-system security incident has occurred in respect of a CI operated by the operator, the operator would have to notify the Commissioner of the incident. Failure to notify would be punishable by a fine. Please clarify, in relation to the factual finding of the existence of knowledge, whether such would be based on a subjective or an objective standard (i.e. reasonable person test would be adopted), and whether it would be appropriate to expressly provide so in the Bill for clarity.

Proposed new offences

9. It is noted that it would be an offence if a CI operator (i) fails to comply with a direction issued by regulating authorities to do (or refrain from doing) an act in relation to the compliance with all the three categories of obligations (clause 7(8)); and (ii) fails to comply with any of the three categories of obligations under Part 4. In this regard, it is noted that CI operators could invoke the due diligence defence under clause 65 against the above offences as long as the specified conditions are fulfilled while no reasonable excuse defence would be applicable. Please consider whether it would be appropriate to provide the reasonable excuse defence for these offences, e.g. a CI operator would be under an obligation to participate in a computer-system security drill upon receiving written notice from the Commissioner and failure to do so would be an offence, even though participating in such drills could affect the normal operation of CI operators and their provision of essential services in Hong Kong.

10. It is further noted that it would be an offence if an organization, without reasonable excuse, fails to comply with (i) any of the requirements to provide information under clauses 14(2), 15(3), 16(2) or 17(3) (clause 18); (ii) a specified requirement in relation to the Commissioner's power of making inquiries and conducting investigations under Divisions 1 and 2 of Part 5 (clause 42); or (iii) a requirement in relation to the regulating authorities' power of investigation under clause 43 (clause 45). It would also be an offence if (i) a specified person suffers or permits any person to have access to any matter relating to any person's affairs that comes into the specified person's knowledge due to his performance of function under the Bill or communicate such matter to any other person unless the specified conditions are fulfilled (clause 58(1)); or (ii) a person receiving such information disclosing such information to any other person without satisfying the specified conditions (clause 58(2)). Regarding these proposed new offences and the proposed new offences referred to in paragraph 9 above, please clarify:

(a) whether it is your intention that each of these proposed new offences is a strict liability offence and that the prosecution needs not prove the

existence of *mens rea* (i.e. the mental element) of committing the offence;

(b) if your answer in (a) is in the affirmative, whether it is your intention that the implied common law defence of "honest and reasonable mistaken belief" is available to a person charged with each of these new offences, and if so, in proving his belief whether the defendant would bear an evidential burden, or would be required to discharge a persuasive burden, or would be confined to relying on the statutory defence expressly provided for[1]; and

(c) if it is the Administration's intent that the defendant would be required to discharge a persuasive burden, or it is your view that the statutory defence available would exclude the defence of "honest and reasonable belief", please clarify whether it is consistent with Article 87 of the Basic Law ("BL") and Article 11(1) of the Hong Kong Bill of Rights ("HKBOR") (right to be presumed innocent) and how the proposal could satisfy the rationality and proportionality tests laid down in *Hysan Development Co Ltd v Town Planning Board* [2016] 6 HKC 58 ("*Hysan*").

Parts 5 and 6: enforcement related matters

11. Clause 13(1) of the Bill proposes that a computer system could be designated as a "critical computer system" for the infrastructure if it is (i) accessible by the operator in or from Hong Kong and (ii) essential to the core function of a CI operated by the operator, irrespective of whether it is under the control of the operator. It is further noted that under clauses 30 and 35 of the Bill, authorized officers would be empowered to e.g. require CI operators to produce documents that the officers have reasonable grounds to believe to be relevant to the inquiries or investigations ("Relevant Documents"). Under clause 37 of the Bill, authorized officers could apply to a magistrate for a warrant authorizing the officers to require organizations (other than the investigated CI operators) to e.g. not to use the system. Given the prevalent use of cloud computing service providers nowadays where the operating location (including data centres) of theses providers may be located outside Hong Kong ("overseas cloud providers"), please clarify:

(a) whether the computer system controlled by these overseas cloud providers could be designated as critical computer systems;

(b) if so, whether clauses 30, 35 and 37 (and other relevant clauses) would have extraterritorial effect; and

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[1] See *Kulemesin v HKSAR* (2013) 16 HKCFAR 195.

(c) in practical terms, how the officers could exercise the above powers vis-a-vis overseas cloud providers.

12. It is noted that under clause 37(2)(a) to (d) of the Bill, an authorized officer could apply to a magistrate for a warrant authorizing the officer to require organizations (other than the investigated CI operators) to e.g. produce Relevant Documents for investigation. Meanwhile, similar powers would be given to the authorized officers under clauses 30(1), 35(1) and 43(2) of the Bill for making inquiries and investigation in relation to CI operators, except that the authorized officers could do so by written notice and it would not be necessary for the authorized officer to apply for a warrant. Please clarify the reason that a magistrate's warrant would not be necessary for the exercise of power under clauses 30(1), 35(1) and 43(2) of the Bill.

13. Similarly, clause 37(2)(e) to (j) of the Bill provides that an authorized officer could apply to a magistrate for a warrant authorizing the officer to require organizations (other than the investigated CI operators) to e.g. not to use the investigated system for investigation. An authorized officer would have similar powers under clause 36(2) of the Bill, except that the authorized officer would not be required to apply for a warrant from the magistrate. Please clarify the reason that a magistrate's warrant would not be necessary for the exercise of power under clause 36(2) of the Bill.

14. It is noted that power would be given to the authorized officer of the Commissioner to enter any premises without a warrant in case of emergencies and do one or more of the specified acts under clause 38(2) of the Bill (e.g. search for Relevant Documents) under clause 40 of the Bill. Such use of power may affect individuals and legal persons' rights against arbitrary or unlawful search of, or intrusion into, or unlawful interference with a resident's home or other premises which are guaranteed by BL 29 and HKBOR 14. Please clarify whether the proposed power are consistent with BL 29 and HKBOR 14 and could satisfy the four-step proportionality test laid down in *Hysan*.

15. Clauses 31(2)(a), 38(2)(a) and 46(2)(a)(i) of the Bill further propose to empower authorized officers to enter premises, if necessary, by force, to e.g. search for Relevant Documents if the specified conditions are met and after a magistrate grants a warrant for that purpose. Please clarify:

(a) what circumstances would warrant the use of force to enter a premises;

(b) how it would satisfy the four-stage proportionality test; and

(c) whether e.g. practice guidelines would be issued to authorized officers.

16. Clause 46 of the Bill proposes that an authorized officer could apply to a magistrate for a warrant authorizing the officer e.g. to enter the premises or to access and inspect an "electronic device" if the specified conditions are met. Please consider whether it would be appropriate to expressly define "electronic device" for clarity.

17. It is further noted under clause 36(2)(a) of the Bill, authorized officers would be empowered to require an investigated CI operator not to use the investigated system if the Commissioner is satisfied that the specified conditions are met. Under clause 36(1)(b), the Commissioner would have to have regard as to in particular, "the potential impact of exercising the power on the core function of the infrastructure and on the operator" (paragraph (v)). Please clarify what information or evidence would have to be laid before the Commissioner for the purpose of deciding whether to require the investigated CI operator not to use the investigated system, and whether the CI operator concerned and/or independent consultant(s) would be requested to offer assistance to the Commissioner for the purpose of the deliberation.

18. Under clause 37(2)(e), a magistrate's warrant could be obtained for the purpose of requiring an organization having or appearing to have control over an investigated system to not use the system, the magistrate would have to be satisfied by information on oath laid by an authorized officer that the specified conditions for issuing warrant under clause 39 are met (amongst which the authorized officer has to have reasonable grounds to believe that it is in the public interest to issue the warrant having regard to in particular, "the potential impact of doing the acts on the core function of the infrastructure and on any person who may be affected by the acts"). Please clarify what information or evidence the authorized officer would have to tender in support of his application.

Part 7: Appeal matters

19. Clause 48(1) of the Bill proposes that only certain decisions under the Bill would be appealable, including the decisions to (i) give directions to CI operators to comply with the relevant obligations under Part 4 (clause 7); and (ii) designate organizations as CI operators (clause 12) and computer systems of CI operators as critical computer systems (clause 13). All other decisions made by the regulating authorities under the Bill, e.g. whether to grant time extension for CI operators to maintain office in Hong Kong under clause 19(2)(b) and whether to exempt CI operators from complying with certain Part 4 obligations under clause 55, would not be appealable. Please clarify the rationale for only allowing certain decisions to be appealable.

20. Clause 48(4) of the Bill proposes that organizations may, at any time before the appeal is determined by the appeal board, apply for a stay of execution of the decision. Please clarify whether it would be appropriate to expressly

provide for how such discretion could be exercised by the appeal board, e.g. whether there are strong grounds of the proposed appeal (see *World Trade Centre Group Ltd v Resourceful River Ltd* [1993] HKLY 847) and that failure to grant the stay would result in the appeal, if successful, being nugatory (see *Wenden Engineering Service Co Ltd v Lee Shing Yue Construction Co Ltd* [2002] HKEC 1059).

21. It is further noted that under clause 49(6) of the Bill that the decisions of the appeal board would be final. Please clarify whether the proposed finality of decisions would satisfy the proportionality test referred to in *Mok Charles v Tam Wai Ho* [2010] 13 HKCFAR 762 at 781 insofar as to the proposal would appear to restrict or limit the power of final adjudication vested in the Court of Final Appeal under BL 82.

Part 8: miscellaneous matters

22. It is noted that clause 55 of the Bill provides that the Commissioner could exempt CI operators from complying with obligations under Division 4 provided that specified conditions are met. Please clarify whether the designated authorities would have identical or similar power to grant exemption and if so, whether such would be provided for in the Bill.

23. It is further noted that clause 56 of the Bill provides that the designated authorities could prosecute a list of offences (e.g. failure to comply with a direction given by the authority) and such offence would have to be tried before a magistrate as an offence that is triable summarily. Please consider whether the same proposed power would be given to the Commissioner as well.

Subsidiary legislation

24. It is noted that codes of practice which could be issued by a regulating authority would not be subsidiary legislation (clause 8(8)). Please clarify the rationale for adopting this approach, and whether consideration would be given to e.g. adoption of the negative vetting procedure, in the light of the powers and functions of the Legislative Council ("LegCo") in enacting, amending and repealing laws under BL 73.

25. It is further noted that clause 69(1) of the Bill proposes that the Secretary for Security ("Secretary") could make regulations for "the better carrying out of the provisions of this Ordinance". Please consider specifying the matters that the Secretary could make regulations in relation to for clarity, e.g. further details in relation to matters specified for computer-system security risk assessments (Schedule 4), matters specified computer-system security audits (Schedule 5) and appeals (e.g. procedural requirements such as payment of appeal fees, timeline and manner in filing evidence) (Schedule 7). Further, please clarify

whether it is intended that such regulations would be subsidiary legislation subject to LegCo's scrutiny.

We look forward to receiving your written response in both English and Chinese preferably before the second meeting of the Bills Committee.

Yours sincerely,

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