THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

NINTH EDITION

Editor
Alan Charles Raul

THE LAWREVIEWS

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HONG KONG

Yuet Ming Tham, Linh Lieu and Lester Fung[1]

I OVERVIEW

The Personal Data (Privacy) Ordinance (PDPO) establishes Hong Kong's data protection and privacy legal framework. All organisations that collect, hold, process or use personal data (data users) must comply with the PDPO, and in particular the six data protection principles (DPPs) in Schedule 1 of the PDPO, which are the foundation upon which the PDPO is based. The Office of the Privacy Commissioner for Personal Data (PCPD), an independent statutory body, was established to oversee the enforcement of the PDPO.

Hong Kong was the first Asian jurisdiction to enact comprehensive personal data privacy legislation and to establish an independent privacy regulator. Unlike the law in several other jurisdictions in the region, the law in Hong Kong covers both the private and public sectors. Hong Kong issued significant new amendments to the PDPO in 2012 with a key focus on direct marketing regulation and enforcement with respect to the use of personal data.

Despite Hong Kong's pioneering role in data privacy legislation, the PCPD's level of activity with respect to regulatory guidance and enforcement has been relatively flat when compared with many other jurisdictions. In addition, Hong Kong has not introduced stand-alone cybercrime or cybersecurity legislation as other Asian countries have done. Certain sectoral agencies, notably Hong Kong's Securities and Futures Commission (SFC), have continued to press forward on cybersecurity regulation for specific industries.

In January 2020, the Constitutional and Mainland Affairs Bureau of the Hong Kong government issued a discussion paper on a review of the PDPO, which proposed amendments to the PDPO, including:

a mandatory data breach notification;

b requirement to specify a retention period for personal data collected, which must then be clearly communicated to the data subjects in the privacy policies;

c stricter sanctions, which would peg the penalties to a data user's global annual turnover and empower the PCPD to directly impose administrative fines instead of issuing an enforcement notice first;

d increased regulation of data processors, so that they would be directly accountable for breaches and subject to the same breach notification requirements that apply to data users;

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e expansion of the definition of 'personal data', such that it would not only capture data subjects that could be identified; and

f implementation of anti-doxxing measures.

As explained below, with the exception of the anti-doxxing measures that have been implemented since 8 October 2021, the other proposed amendments are still being considered. There is no timeline as to when these amendments would be tabled for further discussion at the Legislative Council, passed and implemented. This is certainly a space to watch in the years to come.

This chapter discusses recent data privacy and cybersecurity developments in Hong Kong from July 2021 to June 2022. It will also discuss the current data privacy regulatory framework in Hong Kong, and in particular, the six DPPs and their implications for organisations, as well as specific data privacy issues such as direct marketing and issues relating to technological innovation, international data transfer, cybersecurity and data breaches.

II THE YEAR IN REVIEW

i Personal data privacy and security developments

Since 2019, doxxing activities have become rampant in Hong Kong. The PCPD has been dedicating significant efforts to curb doxxing activities. On 8 October 2021, the Personal Data (Privacy) (Amendment) Ordinance 2021 (2021 Amendment Ordinance) came into effect to combat doxxing acts that are intrusive to personal data privacy. Under the 2021 Amendment Ordinance, any person who discloses personal data of a data subject without the relevant consent of the data subject, with an intent or is being reckless as to whether any specified harm would be (or would likely be) caused to the data subject or his or her family member, commits an offence. PCPD is empowered to carry out criminal investigations and directly prosecute for the doxxing offences, instead of having to refer cases to the Hong Kong Police and the Department of Justice. The PCPD may serve a cessation notice where there is a disclosure of personal data without the data subject's consent, the discloser has an intent or is being reckless as to the causing of any specified harm to the data subject or any family member of the data subject by that disclosure and the data subject is a Hong Kong resident or is present in Hong Kong when the disclosure is made.

From mid-2021 to mid-2022, the PCPD revised the guidance note for the property management sector.[2] The PCPD also released several new guidance notes: Guidance for Employers on Collection and Use of Personal Data of Employees during the Covid-19 Pandemic;[3] Personal Data (Privacy) (Amendment) Ordinance 2021 Implementation Guideline;[4] Guidance Note: Guidance on the Ethical Development and Use of Artificial Intelligence;[5] Pamphlet: Guidance on the Ethical Development and Use of Artificial

2 https://www.pcpd.org.hk//english/resources_centre/publications/files/property_e.pdf.

3 https://www.pcpd.org.hk//english/resources_centre/publications/files/covid19_pandemic.pdf.

4 https://www.pcpd.org.hk//english/doxxing/files/GN_PDPAO_e.pdf.

5 https://www.pcpd.org.hk//english/resources_centre/publications/files/guidance_ethical_e.pdf.

Intelligence;[6] and Guidance on Recommended Model Contractual Clauses for Cross-border Transfer of Personal Data.[7] None of these publications are legally binding, but a failure to follow the guidance notes may give rise to negative presumptions in any enforcement proceedings.

According to its annual report published in August 2021, in the reporting year of 2020 to 2021,[8] the PCPD received 2,200 complaints, excluding those that are related to doxxing. This is 66 per cent fewer than that in the last reporting year. Most of the complaints were made against private sector organisations, with financial, property management and education institutions companies leading the way. The most common complaints concerned improper use and disclosure of personal data, improper collection of personal data, inadequate security of personal data and direct marketing, which accounted for 50 per cent, 28.4 per cent, 6.9 per cent and 6.1 per cent of the complaints, respectively. The highest number of complaints was related to information technology, with the majority about online social networks and smartphone applications. The PCPD also received 106 data breach notifications, 35 from the public sector and 71 from the private sector, involving the personal data of about 850,000 individuals. These data breach incidents involved hacking, system, misconfiguration, unauthorised access of personal data by internal staff, loss of documents or portable devices, inadvertent disclosure of personal data by fax, email or post, and accidental erasure of personal data, etc.

Further, in the reporting year of 2020 to 2021, the PCPD handled a total of 957 doxxing cases, which dropped by nearly 80 per cent when compared to 4,707 cases in the last reporting year.

With respect to enforcement actions, the PCPD completed 3,402 complaints and 1,225 were in progress as at 31 March 2021. Among those completed cases, 524 were doxxing-related, in which 59 complaints were suspected contravention of Section 64 of the PDPO and were referred to the police for criminal investigation and consideration of prosecution. Fifteen complaints involved suspected violations of relevant court injunction orders and were referred to the Department of Justice. In the 2,878 non-doxxing cases, 1,909 of them were concluded after preliminary assessment and 969 were accepted for further handling. Among those accepted for further handling, 887 of them (92 per cent) were successfully resolved by the PCPD by conciliation. In those cases, corresponding remedial actions were taken by parties complained against, complaints were withdrawn after the PCPD had given further information or explanation to the complainants, or follow-up actions were taken by parties being complained against to address the complainants' concerns conveyed by the PCPD.

The PCPD does not systematically publish decisions or reports based on the outcome of its investigations. From 2021 to June 2022, the PCPD published five investigation or inspection reports. These include:

a the inspection of the customers' personal data systems of CLP Power Hong Kong Limited and the Hongkong Electric Company, Limited;[9]

6 https://www.pcpd.org.hk//english/resources_centre/publications/files/guidance_ethical_leaflet_e.pdf.

7 https://www.pcpd.org.hk//english/resources_centre/publications/files/guidance_model_contractual_clauses.pdf.

8 The reporting year starts on 1 April 2020 and ends on 31 March 2021.

9 https://www.pcpd.org.hk/english/enforcement/commissioners_findings/files/r21_3099_e.pdf.

b an investigation into the security measures taken by restaurants to protect customers' information collected for the purposes of complying with the covid-19 anti-pandemic measures;[10]

c an investigation into the improper collection, retention, use and storage of personal data of residents and visitors by property management companies;[11] and

d an investigation into a hacker's intrusion into the email system of Nikkei China (Hong Kong) Limited.[12]

ii Cybercrime and cybersecurity developments

Hong Kong does not have (and as of this writing, there do not appear to be plans to establish) stand-alone cybercrime and cybersecurity legislation. The Hong Kong Police Department maintains a resource page for 'Cybersecurity and Technology Crime', including a compendium of relevant legislation on computer crimes.[13] These specific provisions relate to the Crimes Ordinance, the Telecommunications Ordinance and laws related to obscenity and child pornography. The government has also established an Information Security (InfoSec) website that sets out various computer crime provisions contained in, among others, the Telecommunications Ordinance, the Theft Ordinance and the Crimes Ordinance.[14] According to the latest statistics released by the Hong Kong Police Force, there were 7,838 computer crime cases in 2018, with an associated loss of HK$2.8 billion as compared to 5,567 cases in 2017 amounting to a loss of HK$1.4 billion.[15]

Sectoral regulators have continued to press forward with specific cybersecurity regulation, particularly financial regulators. Both the SFC and the Hong Kong Monetary Authority (HKMA) have issued circulars on cybersecurity risk. In December 2016, the HKMA announced implementation details of its Cybersecurity Fortification Initiative undertaken in collaboration with the banking industry,[16] launching an industry-wide Enhanced Competency Framework on Cybersecurity.[17] In October 2017, the SFC published the Guidelines for Reducing and Mitigating Hacking Risks Associated with Internet Trading (Guidelines),[18] and issued two circulars to licensed corporations engaged in internet trading, one on good industry practices for IT risk management and cybersecurity;[19] the other on the implementation of the Guidelines.[20] In May 2018, the SFC issued a circular to intermediaries on receiving client orders through instant messaging.[21] In January 2019, the HKMA issued the Update on Enhanced Competency Framework on Cybersecurity.[22] In

10 https://www.pcpd.org.hk/english/enforcement/commissioners_findings/files/r21_2485_e.pdf.
11 https://www.pcpd.org.hk/english/enforcement/commissioners_findings/files/r22_14226_e.pdf.
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22 www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2019/20190110e1.pdf.

June 2019, the Hong Kong Insurance Authority published the Guideline on Cybersecurity (GL20),[23] which specifies the minimum cybersecurity standards that all authorised insurers (except for captive insurers and marine mutual insurers) must observe. GL20 took effect from 1 January 2020. In the healthcare sector, the Commissioner for the Electronic Health Record issued a Code of Practice for Using Electronic Health Record for Healthcare (effective 10 October 2019), which provides good practice and recommendations in the use of the Electronic Health Record Sharing System,[24] a government-funded information infrastructure that enables healthcare providers to view and share electronic health records of patients. In the public sector, the Office of the Government Chief Information Officer has also published cybersecurity guidelines for government bureaux, departments and agencies.[25]

iii Recent developments and regulatory compliance

From a regulatory perspective, the key compliance framework for companies and organisations remains with data protection and privacy. The government has not taken any additional legislative steps in the cybercrime and cybersecurity arenas although cybersecurity remains a significant challenge in Hong Kong. Financial sector regulators continue to be active with respect to cybersecurity, with the HKMA putting forward ambitious initiatives. For companies outside the financial sector, their focus will remain with PDPO compliance, particularly with the stringent direct marketing requirements. Internet platform providers may also wish to assess whether the contents posted on the platforms may amount to doxxing to avoid criminal risks.

III REGULATORY FRAMEWORK

i The PDPO and the six DPPs

The PDPO entered into force on 20 December 1996 and was amended by the Personal Data (Privacy) (Amendment) Ordinance 2012 (2012 Amendment Ordinance). The majority of the provisions of the 2012 Amendment Ordinance entered into force on 1 October 2012 and the provisions relating to direct marketing and legal assistance entered into force on 1 April 2013.

The PCPD has issued various codes of practice and guidelines to provide organisations with practical guidance to comply with the provisions of the PDPO. Although the codes of practice and guidelines are only issued as examples of best practice and organisations are not obliged to follow them, in deciding whether an organisation is in breach of the PDPO, the PCPD will take into account various factors, including whether the organisation has complied with the codes of practice and guidelines published by the PCPD. In particular, failure to abide by certain mandatory provisions of the codes of practice will weigh unfavourably against the organisation concerned in any case that comes before the Privacy Commissioner. In addition, a court is entitled to take that fact into account when deciding whether there has been a contravention of the PDPO.

As mentioned above, the six DPPs of the PDPO set out the basic requirements with which data users must comply in the handling of personal data. Most of the enforcement

23 www.ia.org.hk/en/legislative_framework/files/Guideline_on_Cybersecurity_English.pdf.

24 www.ehealth.gov.hk/filemanager/content/pdf/en/hcp/ehealth-code-of-practice.pdf.

25 www.ogcio.gov.hk/en/our_work/information_cyber_security/government/.

notices served by the PCPD relate to contraventions of the six DPPs. Although a contravention of the DPPs does not constitute an offence, the PCPD may serve an enforcement notice on data users for contravention of the DPPs, and a data user who contravenes an enforcement notice commits an offence.

DPP1 – purpose and manner of collection of personal data

Principle

DPP1 provides that personal data shall only be collected if it is necessary for a lawful purpose directly related to the function or activity of the data user. Further, the data collected must be adequate but not excessive in relation to that purpose.

Data users are required to take all practicable steps to ensure that on or before the collection of the data subjects' personal data (or on or before first use of the data in respect of item (d) below), the data subjects were informed of the following matters:

a the purpose of collection;

b the classes of transferees of the data;

c whether it is obligatory to provide the data, and if so, the consequences of failing to supply the data; and

d the right to request access to and request the correction of the data, and the contact details of the individual who is to handle such requests.

Implications for organisations

A personal information collection statement (PICS) (or its equivalent) is a statement given by a data user for the purpose of complying with the above notification requirements. It is crucial that organisations provide a PICS to their customers before collecting their personal data. On 29 July 2013, the PCPD published the Guidance on Preparing Personal Information Collection Statement and Privacy Policy Statement, which serves as guidance for data users when preparing their PICS. It is recommended that the statement in the PICS explaining what the purpose of the collection is should not be too vague and too wide in scope, and the language and presentation of the PICS should be user-friendly. Further, if there is more than one form for collection of personal data each serving a different purpose, the PICS used for each form should be tailored to the particular purpose.

DPP2 – accuracy and duration of retention

Principle

Under DPP2, data users must ensure that the personal data they hold are accurate and up to date, and are not kept longer than necessary for the fulfilment of the purpose.

It is provided under DPP2 that if a data user engages a data processor, whether within or outside Hong Kong, the data user must adopt contractual or other means to prevent any personal data transferred to the data processor from being kept longer than necessary for processing the data. 'Data processor' is defined to mean a person who processes personal data on behalf of a data user and does not process the data for its own purposes.

Under Section 26 of the PDPO, a data user must take all practicable steps to erase personal data held when the data are no longer required for the purpose for which they were used, unless any such erasure is prohibited under any law or it is in the public interest not to have the data erased. Contravention of this Section is an offence, and offenders are liable for a fine.

Implications for organisations

The PCPD published the Guidance on Personal Data Erasure and Anonymisation (revised in April 2014), which provides advice on when personal data should be erased, as well as how personal data may be permanently erased by means of digital deletion and physical destruction. For example, it is recommended that dedicated software, such as that conforming to industry standards (e.g., US Department of Defense deletion standards), be used to permanently delete data on various types of storage devices. Organisations are also advised to adopt a top-down approach in respect of data destruction, and this requires the development of organisation-wide policies, guidelines and procedures. Apart from data destruction, the guidance note also provides that the data can be anonymised to the extent that it is no longer practicable to identify an individual directly or indirectly. In such cases, the data would no longer be considered as 'personal data' under the PDPO. Nevertheless, it is recommended that data users must still conduct a regular review to confirm whether the anonymised data can be re-identified and to take appropriate action to protect the personal data.

DPP3 – use of personal data

Principle

DPP3 provides that personal data shall not, without the prescribed consent of the data subject, be used for a new purpose. 'Prescribed consent' means express consent given voluntarily and that has not been withdrawn by notice in writing.

Implications for organisations

Organisations should only use, process or transfer their customers' personal data in accordance with the purpose and scope set out in their PICS. If the proposed use is likely to fall outside the customers' reasonable expectation, organisations should obtain express consent from their customers before using their personal data for a new purpose.

DPP4 – data security requirements

Principle

DPP4 provides that data users must use all practicable steps to ensure that personal data held are protected against unauthorised or accidental processing, erasure, loss or use.

It is provided under DPP4 that if a data user engages a data processor (such as a third-party IT provider to process personal data of employees or customers), whether within or outside Hong Kong, the data users must adopt contractual or other protections to ensure the security of the data. This is important, because under Section 65(2) of the PDPO, the data user is liable for any act done or practice engaged in by its data processor.

Implications for organisations

In view of the increased use of third-party data centres and the growth of IT outsourcing, the PCPD issued an information leaflet entitled 'Outsourcing the Processing of Personal Data to Data Processors' in September 2012. According to this leaflet, it is recommended that data users incorporate contractual clauses in their service contracts with data processors to impose obligations on them to protect the personal data transferred to them. Other protection measures include selecting reputable data processors and conducting audits or inspections of the data processors.

The PCPD also issued the Guidance on the Use of Portable Storage Devices (revised in July 2014), which helps organisations to manage the security risks associated with the use of portable storage devices. Portable storage devices include USB flash cards, tablets or notebook computers, mobile phones, smartphones, portable hard drives and DVDs. Given that large amounts of personal data can be quickly and easily copied to such devices, privacy could easily be compromised if the use of these devices is not supported by adequate data protection policies and practice. The guidance note recommended that a risk assessment be carried out to guide the development of an organisation-wide policy to manage the risk associated with the use of portable storage devices. Further, given the rapid development of technology, it is recommended that this policy be updated and audited regularly. Some technical controls recommended by the guidance note include encryption of the personal data stored on the personal storage devices and adoption of systems that detect and block the saving of sensitive information to external storage devices.

DPP5 – privacy policies

Principle

DPP5 provides that data users must publicly disclose the kind of personal data held by them, the main purposes for holding the data, and their policies and practices on how they handle the data.

Implications for organisations

A privacy policy statement (PPS) (or its equivalent) is a general statement about a data user's privacy policies for the purpose of complying with DPP5. Although the PDPO is silent on the format and presentation of a PPS, it is good practice for organisations to have a written policy to effectively communicate their data management policy and practice. The PCPD published a guidance note entitled Guidance on Preparing Personal Information Collection Statement and Privacy Policy Statement in July 2013, which serves as guidance for data users when preparing their PPS. In particular, it is recommended that the PPS should be in a user-friendly language and presentation. Further, if the PPS is complex and lengthy, the data user may consider using proper headings and adopting a layered approach in presentation.

DPP6 – data access and correction

Principle

Under DPP6, a data subject is entitled to ascertain whether a data user holds any of his or her personal data, and to request a copy of the personal data. The data subject is also entitled to request the correction of his or her personal data if the data is inaccurate.

Data users are required to respond to a data access or correction request within a statutory period of 40 days. If the data user does not hold the requested data, it must still inform the requestor that it does not hold the data within 40 days.

Implications for organisations

Given that a substantial number of disputes under the PDPO relate to data access requests, the PCPD published a guidance note entitled Proper Handling of Data Access Request and Charging of Data Access Request Fee by Data Users (revised in July 2020) to address the relevant issues relating to requests for data access. For example, although a data user may impose a fee for complying with a data access request, a data user is only allowed to charge

the requestor for the costs that are 'directly related to and necessary for' complying with a data access request. It is recommended that a data user should provide a written explanation of the calculation of the fee to the requestor if the fee is substantial. Further, a data user should not charge a data subject for its costs in seeking legal advice in relation to the compliance with the data access request.

ii Direct marketing

Hong Kong's regulation of direct marketing deserves special attention from organisations engaging in such activities. Unlike with violations of the DPPs, violations of the PDPO's direct marketing provisions are criminal offences, punishable by fines and by imprisonment. The PCPD has demonstrated a willingness to bring enforcement actions in this area and to refer particularly egregious violations for criminal prosecution.

Direct marketing provisions under the PDPO

With effect from 1 April 2013, the PDPO imposed a stricter regime that regulates the collection and use of personal data for sale and for direct marketing purposes.

Under those direct marketing provisions, data users must obtain the data subjects' express consent before they use or transfer the data subjects' personal data for direct marketing purposes. Organisations must provide a response channel (e.g., email, online facility or a specific address to collect written responses) to the data subject through which the data subjects may communicate their consent to the intended use. Transfer of personal data to another party (including the organisation's subsidiaries or affiliates) for direct marketing purposes, whether for gain or not, will require express written consent from the data subjects.

Guidance on Direct Marketing

The PCPD published the New Guidance on Direct Marketing in January 2013 to assist businesses to comply with the requirements of the revised direct marketing provisions of the PDPO.

Direct marketing to corporations

Under the New Guidance on Direct Marketing, the Privacy Commissioner stated that in clear-cut cases where the personal data are collected from individuals in their business or employee capacities, and the product or service is clearly meant for the exclusive use of the corporation, the Commissioner will take the view that it would not be appropriate to enforce the direct marketing provisions.

The Privacy Commissioner will consider the following factors in determining whether the direct marketing provisions will be enforced:

a the circumstances under which the personal data are collected: for example, whether the personal data concerned are collected in the individual's business or personal capacity;

b the nature of the products or services: namely, whether they are for use of the corporation or for personal use; and

c whether the marketing effort is targeted at the business or the individual.

Amount of personal data collected

While the Privacy Commissioner has expressed that the name and contact information of a customer should be sufficient for the purpose of direct marketing, it is provided in the New Guidance on Direct Marketing that additional personal data may be collected for direct marketing purposes (e.g., customer profiling and segmentation) if the customer elects to supply the data on a voluntary basis. Accordingly, if an organisation intends to collect additional personal data from its customers for direct marketing purposes, it must inform its customers that the supply of any other personal data to allow it to carry out specific purposes, such as customer profiling and segmentation, is entirely voluntary, and obtain written consent from its customers for such use.

Penalties for non-compliance

Non-compliance with the direct marketing provisions of the PDPO is an offence, and the highest penalties are a fine of HK$1 million and imprisonment for five years.

Spam messages

Direct marketing activities in the form of electronic communications (other than person-to-person telemarketing calls) are regulated by the Unsolicited Electronic Messages Ordinance (UEMO). Under the UEMO, businesses must not send commercial electronic messages to any telephone or fax number registered in the do-not-call registers. This includes text messages sent via SMS, pre-recorded phone messages, faxes and emails. In addition, the UEMO prohibits the use of unscrupulous techniques to expand the reach of commercial electronic messages, and fraud and other illicit activities related to the sending of multiple commercial electronic messages. Contravention of the UEMO may result in fines ranging from HK$100,000 to HK$1 million and up to five years' imprisonment.

There have only been two prosecutions under the UEMO.[26] In early 2014, the Office of the Communications Authority (OFCA) prosecuted a travel agency for sending commercial facsimile messages to telephone numbers registered in the do-not-call registers. This is the first prosecution since the UEMO came into force in 2007. The case was heard before a Magistrates' Court, but the defendant was not convicted because of a lack of evidence. In January 2017, a commercial facsimile sender was prosecuted under the UEMO for failing to comply with the unsubscribe requests from recipients of his commercial electronic messages. The OFCA served an enforcement notice in October 2015, requiring the sender to cease sending electronic messages in contravention of the UEMO. The sender failed to comply with the enforcement notice and was ordered to pay a fine of HK$7,500 and HK$60,000 to OFCA for the costs and expenses of the investigation.[27]

Person-to-person telemarketing calls

Although the Privacy Commissioner has previously proposed to set up a territory-wide do-not-call register on person-to-person telemarketing calls, this has not been pursued by the government in the recent amendment of the PDPO.[28] Nevertheless, under the direct marketing provisions of the PDPO, organisations must ensure that they do not use the

26 www.ofca.gov.hk/filemanager/ofca/en/content_296/eng_enf_uemo.pdf.

27 www.info.gov.hk/gia/general/201701/10/P2017011001020.htm.

28 Report on Further Public Discussions on Review of the Personal Data (Privacy) Ordinance (April 2011).

personal data of customers or potential customers to make telemarketing calls without their consent. Organisations should also check that the names of the customers who have opted out from the telemarketing calls are not retained in their call lists.

On 5 August 2014, the Privacy Commissioner issued a media brief to urge the government administration to amend the UEMO to expand the do-not-call registers to include person-to-person calls. On 9 April 2019, the Hong Kong Commerce and Economic Development Bureau announced a plan to amend the UEMO to extend the regulatory framework to cover direct person-to-person telemarketing calls, including by establishing a new do-not-call register, and imposing fines and imprisonment on violators. On 8 June 2022, the government issued a press release stating the response of the Secretary for Commerce and Economic Development, Mr Edward Yau, to the possible amendment of the UEMO. The Secretary pointed out that the government did 'not maintain sufficient date to assess the situation of person-to-person telemarketing calls' and that the specific timetable for the proposed legislative amendments is yet to be announced.[29]

Enforcement

Following prosecution referrals by the PCPD, Hong Kong courts handed down the first penalties in direct marketing violations in 2015. In September 2015, the Magistrates' Court convicted the Hong Kong Broadband Network Limited (HKBN) for violating the PDPO's requirement that a data user cease using an individual's personal data in direct marketing upon request by that individual.[30] The court imposed a fine of HK$30,000. In a separate court action from September 2015, Links International Relocation Limited pleaded guilty to a PDPO direct marketing violation for not providing required information to a consumer before using his personal data in direct marketing.[31] The court fined the company HK$10,000.

Additional convictions and fines followed for direct marketing violations. The most recent cases initiated by the PCPD resulting in fines and convictions involved two telecommunications companies, SmarTone Mobile Communications Limited and HKBN. On 12 September 2019, SmarTone Mobile Communications Limited pleaded guilty to failing to comply with the requirement from a data subject to cease to use her personal data in direct marketing, resulting in a fine of HK$84,000.[32] On 20 May 2020, HKBN was fined HK$12,000 for using the personal data of a data subject in direct marketing without obtaining consent, and for failing to comply with the requirement from the data subject to cease to use his personal data in direct marketing.[33] On 7 September 2021, an estate agent was fined HK$15,000 for failing to comply with the requirement from a data subject to cease to use his personal data in direct marketing.[34] Given the large number of criminal referrals by the PCPD with respect to direct marketing violations, we expect direct marketing prosecutions to continue to be an active enforcement area.

29 www.info.gov.hk/gia/general/202206/08/P2022060800381p.htm.

30 www.pcpd.org.hk/english/news_events/media_statements/press_20150909.html. HKBN appealed, and in 2017, the Hong Kong High Court dismissed the appeal, confirming that HKBN's communication was for the purpose of direct marketing. See www.onc.hk/en_US/can-data-user-received-data-subjects-opt-request-continue-promote-services-part-sale-service.

31 www.pcpd.org.hk/english/news_events/media_statements/press_20150914.html.

32 www.pcpd.org.hk/english/media/media_statements/press_20190912.html.

33 www.pcpd.org.hk/english/media/media_statements/press_20200525.html.

34 www.pcpd.org.hk/english/news_events/media_statements/press_20210907.html.

In addition, the Hong Kong courts have handed down an increasing number of injunction orders against doxxing activities and doxxing-related criminal convictions under the PDPO.

iii Technological innovation and privacy law

Search engines, cookies, online tracking and behavioural advertising

While there are no specific requirements in Hong Kong regarding the use of search engines, cookies, online tracking or behavioural advertising, organisations that deploy online tracking that involves the collection of personal data of website users must observe the requirements under the PDPO, including the six DPPs. Privacy-enhancing technologies should be adopted to minimise the risk of personal data exposure, such as encryption or hashing to maintain data confidentiality, robots exclusion protocol to prevent search engines from indexing websites, anti-robot verification to stop databases from being downloaded in bulk by automation.

The PCPD published an information leaflet entitled 'Online Behavioural Tracking' (revised in April 2014), which provides the recommended practice for organisations that deploy online tracking on their websites. In particular, organisations are recommended to inform users what types of information are being tracked by them, whether any third party is tracking their behavioural information and to offer users a way to opt out of the tracking.

In cases where cookies are used to collect behavioural information, it is recommended that organisations pre-set a reasonable expiry date for the cookies, encrypt the contents of the cookies whenever appropriate, and do not deploy techniques that ignore browser settings on cookies unless they can offer an option to website users to disable or reject the cookies.

The PCPD also published the Guidance for Data Users on the Collection and Use of Personal Data through the Internet (revised in April 2014), which advises organisations on compliance with the PDPO while engaging in the collection, display or transmission of personal data through the internet.

Cloud computing

The PCPD published the information leaflet 'Cloud Computing' in November 2012, which provides advice to organisations on the factors they should consider before engaging in cloud computing. For example, organisations should consider whether the cloud provider has subcontracting arrangements with other contractors, and what measures are in place to ensure compliance with the PDPO by these subcontractors and their employees. In addition, when dealing with cloud providers that offer only standard services and contracts, the data user must evaluate whether the services and contracts meet all security and personal data privacy protection standards they require.

On 30 July 2015, the PCPD published the revised information leaflet 'Cloud Computing' to advise cloud users on privacy, the importance of fully assessing the benefits and risks of cloud services and the implications for safeguarding personal data privacy. The new leaflet includes advice to organisations on what types of assurances or support they should obtain from cloud service providers to protect the personal data entrusted to them.

Employee monitoring

In April 2016, the PCPD published the revised Privacy Guidelines: Monitoring and Personal Data Privacy at Work to aid employers in understanding steps they can take to assess the appropriateness of employee monitoring for their business, and how they can develop privacy-compliant practices in the management of personal data obtained from employee monitoring. The guidelines are applicable to employee monitoring activities whereby personal data of employees are collected in recorded form using the following means: telephone, email, internet and video.

Employers must ensure that they do not contravene the DPPs of the PDPO while monitoring employees' activities. The PCPD has provided some additional guidelines on monitoring employees' activities and has recommended employers to do the following:

a evaluate the need for employee monitoring and its impact upon personal data privacy. Employers are recommended to undertake a systematic three-step assessment process:
- 'assessment' of the risks that employee monitoring is intended to manage and weigh that against the benefits to be gained;
- 'alternatives' to employee monitoring and other options available to the employer that may be equally cost-effective and practical but less intrusive on an employee's privacy; and
- 'accountability' of the employer who is monitoring employees, and whether the employer is accountable and liable for failure to be compliant with the PDPO in the monitoring and collection of personal data of employees; and

b monitor personal data obtained from employee monitoring. In designing monitoring policies and data management procedures, employers are recommended to adopt a three-step systematic process:
- 'clarity' in the development and implementation of employee monitoring policies the purposes of the employee monitoring; the circumstances in which the employee monitoring may take place; and the purpose for which the personal data obtained from monitoring records may be used;
- 'communication' with employees to disclose to them the nature of, and reasons for, the employee monitoring prior to implementing the employee monitoring; and
- 'control' over the retention, processing and the use of employee monitoring data to protect the employees' personal data.

In March 2022, the PCPD also issued the Guidance for Employers on Collection and Use of Personal Data of Employees during the Covid-19 Pandemic (the March 2022 Guidance)[35]. While the March 2022 Guidance is not legally binding, it offers some guidance on the employers' obligations under the PDPO when collecting and using employees' health data in ensuring workplace safety in the context of the covid-19 pandemic. The March 2022 Guidance explores some practical topics such as the data privacy implications arising from

35 https://www.pcpd.org.hk//english/resources_centre/publications/files/covid19_pandemic.pdf.

the collection by employers of temperature measures, travel histories, vaccination records and other covid-19 related data of their employees or the employees' family members. The March 2022 Guidance also stresses the importance of the following:

a employers should only collect health data that is necessary for and directly related to the purpose of data collection; personal data irrelevant or not strictly necessary for the prevent or control of covid-19 in the workplace should not be collected;

b data collected by employers should be adequate but not excessive – employers should adopt least intrusive measures;

c employers should clearly convey all the requisite information to employees;

d employers should not retain the requisite information for a period longer than is necessary;

e employers should ensure that there are policies to maintain accurate and up-to-date vaccination information and test results of employees; and

f employers should take all practicable steps to ensure the safety of the health data collected.

Fintech

In March 2019, the PCPD published an information leaflet entitled 'Tips for Using Fintech', which offers advice to users in protecting their personal data privacy in the use of fintech and recommends good practices for fintech providers or operators.[36] In May 2019, the HKMA issued a circular on the Use of Personal Data in Fintech Development to encourage authorised institutions to adopt and implement the Ethical Accountability Framework (EAF) for the collection and use of personal data issued by the PCPD.[37] The EAF promotes ethical and fair processing of data through (1) fostering a culture of ethical data governance; and (2) addressing the personal data privacy risks brought by emerging information and communication technologies such as big data analytics, artificial intelligence and machine learning.

IV INTERNATIONAL DATA TRANSFER AND DATA LOCALISATION

Section 33 of the PDPO deals with the transfer of data outside Hong Kong, and it prohibits all transfers of personal data to a place outside Hong Kong except in specified circumstances, such as where the data protection laws of the foreign country are similar to the PDPO or the data subject has consented to the transfer in writing. Section 33 of the PDPO has not been brought into force since its enactment in 1995. Although implementation has been consistently discussed in recent years, the government currently has no timetable for its implementation.

In May 2022, the PCPD issued the Guidance on Recommended Model Contractual Clauses for Cross-border Transfer of Personal Data[38] (the May 2022 Guidance). While the May 2022 Guidance is not legally binding, the PCPD advises data users to incorporate the recommended model clauses (RMCs) set out in the May 2022 Guidance into cross-border data transfers. The PCPD indicated that the adoption of the RMCs would also serve to illustrate that the data user has taken all reasonable precautions and exercised all due diligence

36 www.pcpd.org.hk/english/resources_centre/publications/files/fintech.pdf.

37 www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2019/20190503e1.pdf.

38 https://www.pcpd.org.hk//english/resources_centre/publications/files/guidance_model_contractual_clauses.pdf.

to ensure that the data would not, in the jurisdiction of the transferee, be collected, held, processed, or used in any manner which, if that took place in Hong Kong, would be a contravention of a requirement under the PDPO. All these factors will be taken into account when there is any suspected or alleged breach of the PDPO, including the DPPs. The RMCs apply to transfers from a data user to another data user or to a data processor. The RMCs include requirements that the transferee contractually agree to use the personal data for the purposes of the transfer agreed with the transferor, apply agreed security measures, retain personal data for a period not longer than necessary for the purposes of the transfer, etc.

V COMPANY POLICIES AND PRACTICES

Organisations that handle personal data are required to provide their PPS to the public in an easily accessible manner. In addition, prior to collecting personal data from individuals, organisations must provide a PICS setting out, inter alia, the purpose of collecting the personal data and the classes of transferees of the data. As mentioned above, the PCPD has published the Guidance on Preparing Personal Information Collection Statement and Privacy Policy Statement (see Section III.i), which provides guidance for organisations when preparing their PPS and PICS.

The Privacy Management Programme: A Best Practice Guide (Best Practice Guide) also provides guidance for organisations to develop their own privacy policies and practices. In particular, it is recommended that organisations should appoint a data protection officer to oversee the organisation's compliance with the PDPO. In terms of company policies, apart from the PPS and PICS, the Best Practice Guide recommends that organisations develop key policies on the following areas: accuracy and retention of personal data; security of personal data; and access to and correction of personal data.

The Best Practice Guide also emphasises the importance of ongoing oversight and review of the organisation's privacy policies and practices to ensure they remain effective and up to date.

The PCPD published an information leaflet in April 2019 entitled 'Data Ethics for Small and Medium Enterprises' to advise small and medium-sized enterprises (SMEs) on the core values of data ethics including respectful, beneficial and fair, and the adoption of the ethical data impact assessment before pursing any advanced data processing activity.[39]

VI DISCOVERY AND DISCLOSURE

i Discovery

The use of personal data in connection with any legal proceedings in Hong Kong is exempted from the requirements of DPP3, which requires organisations to obtain prescribed consent from individuals before using their personal data for a new purpose (see Section III.i). Accordingly, the parties in legal proceedings are not required to obtain consent from the individuals concerned before disclosing documents containing their personal data for discovery purposes during legal proceedings.

39 www.pcpd.org.hk/english/resources_centre/publications/files/dataethics_en.pdf.

ii Disclosure

Regulatory bodies in Hong Kong, such as the Hong Kong Police Force, the Independent Commission Against Corruption and the Securities and Futures Commission, are obliged to comply with the requirements of the PDPO during their investigations. For example, regulatory bodies in Hong Kong are required to provide a PICS to the individuals prior to collecting information or documents containing their personal data during investigations.

Nevertheless, in certain circumstances, organisations and regulatory bodies are not required to comply with DPP3 to obtain prescribed consent from the individuals concerned. This includes cases where the personal data are to be used for the prevention or detection of crime, and the apprehension, prosecution or detention of offenders, and where compliance with DPP3 would be likely to prejudice the aforesaid purposes.

Notwithstanding the above, the PCPD stressed that hospitals should first ask the enforcement authority requesting personal data to provide sufficient information, including but not limited to the purpose of data collection, the nature of the case being investigated and the relevance of the requested data to the investigation. The enforcement authority also has the duty to inform the hospital whether the supply of data is obligatory, or else the enforcement authority may be considered to contravene the PDPO through misleading the hospital or on abuse of power grounds.[40]

Another exemption from DPP3 is where the personal data is required by or authorised under any enactment, rule of law or court order in Hong Kong. For example, the Securities and Futures Commission may issue a notice to an organisation under the Securities and Futures Ordinance requesting the organisation to produce certain documents that contain its customers' personal data. In such a case, the disclosure of the personal data by the organisation would be exempted from DPP3 because it is authorised under the Securities and Futures Ordinance.

VII PUBLIC AND PRIVATE ENFORCEMENT

i Public enforcement

An individual may make a complaint to the PCPD about an act or practice of a data user relating to his or her personal data. If the PCPD has reasonable grounds to believe that a data user may have breached the PDPO, the PCPD must investigate the relevant data user. As mentioned above, although a contravention of the DPPs does not constitute an offence in itself, the PCPD may serve an enforcement notice on data users for contravention of the DPPs, and a data user who contravenes an enforcement notice commits an offence.

Prior to the amendment of the PDPO in 2012, the PCPD was only empowered to issue an enforcement notice where, following an investigation, it is of the opinion that a data user is contravening or is likely to continue contravening the PDPO. Accordingly, in previous cases where the contraventions had ceased and the data users had given the PCPD written undertakings to remedy the contravention and to ensure that the contravention would not continue or recur, the PCPD could not serve an enforcement notice on them as continued or repeated contraventions were unlikely.

Since the entry into force of the 2012 Amendment Ordinance, the PCPD has been empowered to issue an enforcement notice where a data user is contravening, or has

40 www.pcpd.org.hk/english/news_events/media_statements/press_20190623.html.

contravened, the PDPO, regardless of whether the contravention has ceased or is likely to be repeated. The enforcement notice served by the PCPD may direct the data user to remedy and prevent any recurrence of the contraventions. A data user who contravenes an enforcement notice commits an offence and is liable on first conviction for a fine of up to HK$50,000 and two years' imprisonment and, in the case of a continuing offence, a penalty of HK$1,000 for each day on which the offence continues. On second or subsequent conviction, the data user would be liable for a fine of up to HK$100,000 and imprisonment for two years, with a daily penalty of HK$2,000.

ii Private enforcement

Section 66 of the PDPO provides for civil compensation. Individuals who suffer loss as a result of a data user's use of their personal data in contravention of the PDPO are entitled to compensation by that data user. It is a defence for data users to show that they took reasonable steps to avoid such a breach.

Affected individuals seeking compensation under Section 66 of the PDPO may apply to the Privacy Commissioner for assistance and the Privacy Commissioner has discretion whether to approve it. Assistance by the Privacy Commissioner may include giving advice, arranging assistance by a qualified lawyer, arranging legal representation or other forms of assistance that the Privacy Commissioner may consider appropriate.

VIII CONSIDERATIONS FOR FOREIGN ORGANISATIONS

Although the PDPO does not confer extraterritorial application, it applies to foreign organisations to the extent that the foreign organisations have offices or operations in Hong Kong. For example, if a foreign company has a subsidiary in Hong Kong, the Hong Kong subsidiary will be responsible for the personal data that it controls, and it must ensure the personal data are handled in accordance with the PDPO no matter whether the data are transferred back to the foreign parent company for processing.

IX CYBERSECURITY AND DATA BREACHES

i Cybercrime and cybersecurity

As previously noted, Hong Kong does not have stand-alone cybercrime or cybersecurity legislation. The Computer Crimes Ordinance, which was enacted nearly 30 years ago in 1993, amended the Telecommunications Ordinance,[41] the Crimes Ordinance[42] and the Theft Ordinance,[43] expanding the scope of existing criminal offences to include computer-related criminal offences. These include:

a unauthorised access to any computer; damage or misuse of property (computer program or data);

b making false entries in banks' books of accounts by electronic means;

41 Sections 24 and 27 of the Telecommunications Ordinance.

42 Sections 59, 60, 85 and 161 of the Crimes Ordinance.

43 Sections 11 and 19 of the Theft Ordinance.

c obtaining access to a computer with the intent to commit an offence or with dishonest intent; and

d unlawfully altering, adding or erasing the function or records of a computer.

Although Hong Kong does not currently have cybersecurity legislation, the government does support a number of organisations dedicated to responding to cyber threats and incidents. These entities include the Hong Kong Emergency Response Team Coordination Centre (managed by the Hong Kong Productivity Council) for coordinating responses for local enterprises and internet users, and the Government Computer Emergency Response Team Hong Kong (a work unit established under the Office of the Government Chief Information Officer), which is a team charged with coordinating and handling incidents relating to both the private and public sectors. In addition, the Hong Kong Police Force has established the Cyber Security and Technology Crime Bureau, which is responsible for handling cybersecurity issues and combating computer crime.

The Hong Kong Monetary Authority announced in January 2019 that the financial sector will be stepping up its efforts to combat cybercrime through the Cyber Resilience Assessment Framework (C-RAF), which is a three-part assessment instrument that helps artificial intelligence evaluate cyber resilience for the banking industry.[44]

ii Data breaches

There is currently no mandatory data breach notification requirement in Hong Kong. In October 2015 and then again in January 2019, the PCPD revised its Guidance on Data Breach Handling and the Giving of Breach Notifications, which provides data users with practical steps in handling data breaches and to mitigate the loss and damage caused to the individuals involved. Although the PCPD noted in the Guidance that there are no statutory notification requirements, the PCPD recommended that data users strongly consider notifying affected persons and relevant authorities, such as the PCPD. In particular, after assessing the situation and the impact of the data breach, the data users should consider whether the following persons should be notified as soon as practicable:

a the affected data subjects;

b the law enforcement agencies;

c the Privacy Commissioner (a data breach notification form is available on the PCPD's website);

d any relevant regulators; or

e other parties who may be able to take remedial actions to protect the personal data privacy and the interests of the data subjects affected (e.g., internet companies such as Google and Yahoo! may assist in removing the relevant cached link from their search engines).

X OUTLOOK

Hong Kong's data privacy and protection framework is long-standing, but is relatively less stringent when compared with other major jurisdictions such as the European Union. For example, there is currently no requirement for data breach notification. A breach of DPPs

44 www.hkma.gov.hk/media/eng/doc/key-information/speeches/s20190124e1.pdf.

would not immediately lead to criminal liabilities. Even if the direct marketing provisions were breached, it would appear that the fines imposed thus far are generally modest. There are also no legally binding requirements on contractual agreements between data users and processors. Even if Section 33 of PDPO were to come into effect, it would seem that consent from the data subject per se would be sufficient to allow cross-border transfer of data by a data user. In light of the rampant doxxing activities and the massive collection of personal data in combating the covid-19 pandemic in recent years, the general public have become increasingly aware of their rights to and the importance of data protection. It is expected that, following the 2021 Amendment Ordinance, the government would continue to lobby with various stakeholders to push for further amendments to the PDPO as noted at the outset of this chapter in order to have Hong Kong's data privacy and protection framework aligned with international standards.

We expect that the PCPD will continue enforcement at generally the same levels, with continued emphasis on doxxing activities, direct marketing violations and prosecution referrals for such violations. The PCPD has previously emphasised the importance of striking a balance between privacy protection and free flow of information, engaged SMEs in promoting the protection of and respect for personal privacy, and strengthened the PCPD's working relationship with mainland China and overseas data protection authorities. The PCPD also reminded the organisations and businesses in Hong Kong to assess the potential impact of the regulatory framework for data protection in the EU General Data Protection Regulation (GDPR), which became effective on 25 May 2018. The GDPR's extraterritorial effect suggests that the organisations and businesses in Hong Kong that collect and process personal data of EU individuals should be prepared to comply with the GDPR's requirements.[45] We expect that the PCPD and the Hong Kong government will continue with this policy direction and these initiatives to reinforce Hong Kong's status as Asia's premier data hub and to provide additional policy, promotional and incentive support to facilitate growth in the region.

With respect to cybercrime and cybersecurity, we do not anticipate major legislation in the near term and expect that sectoral regulators will continue to take the lead in these areas.

45 www.pcpd.org.hk/english/data_privacy_law/eu/eu.html.

Appendix 1

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Yuet Ming Tham is the global co-chair of the white collar: government litigation and investigations practice. She speaks fluent English, Mandarin, Cantonese and Malay and is admitted in New York, England and Wales, Hong Kong and Singapore. Yuet focuses on cross-border work, and in the context of privacy and cybersecurity she has led projects globally including setting up compliance hotlines and advising on relevant labour and privacy laws as well as on the implementation of the EU Whistleblower Protection Directive. Yuet has set up numerous data privacy programmes for clients across Asia Pacific, and these have included drafting SOPs, data transfer agreements and online data policies. She has deep experience in the area of crisis management including major breach incidents.

Yuet's multiple accolades include being named by *Global Investigations Review* 2021 in its 'Top 100 Women in Investigations' in the world; a leading lawyer in the *Women in Business Law Expert Guide* 2021; 'Dispute Resolution Star: White-collar' by *Benchmark Litigation Asia-Pacific*, 2019–2022; *Who's Who Legal: Thought Leaders – Global Investigations Review* 2019-2020 and *Who's Who Legal: Thought Leaders – Hong Kong* 2020; Emerging Markets 'Compliance & Investigations Lawyer of the Year' by *The Asian Lawyer*, and a top ranked lawyer since 2012 by *Chambers Global* and *Chambers Asia-Pacific* for corporate investigations/anti-corruption: international, where she was described as 'a trusted counsel . . . in relation to global investigations and compliance advice' and 'is frequently sought after by international corporations, who respect her experience and expertise in risk management'.

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