



HONG KONG RETAIL MANAGEMENT ASSOCIATION

Submission on Guidance on Personal Data Protection

in Cross-Border Data Transfer

24 April 2015

The Privacy Commissioner has issued new guidance on international data transfers in preparation for the potential implementation of section 33 of the Personal Data (Privacy) Ordinance (the "PDPO").

The Association submits our views on the following issues:

1. Status of the Guidance Note

Section 33 is of great significance to Hong Kong as it imposes stringent restrictions on the export of personal data from Hong Kong. This could have a substantial potential impact on HK retailers, given the number of multinationals here, and the business transacted with the PRC in particular.

The Government has not announced any timetable for the implementation of section 33, nor have they even indicated any legislative agenda to do so. Notwithstanding, the Privacy Commissioner has recently, and without any prior public consultation, issued Guidelines on best practice for cross border data transfers.

Although the Commissioner stated in his press release that it is a "guide for voluntary compliance", the guidelines are very prescriptive and would be challenging and costly for businesses to comply with.

Moreover, there are two important points of principle at stake:—

(i) the appropriateness of issuing guidelines for an inactive statutory provision that is not certain to come into force; and



(ii) to issue such guidelines without any prior public consultation and debate.

2. Model Clauses

The Commissioner has drafted a set of Recommended Model Clauses in an appendix to the guidelines that is directed at compliance with point (iii) above (regarding taking all reasonable precautions and exercising all due diligence).

These model clauses will be unwieldy to implement in practice and run well ahead of what the PDPO actually requires of data users. For example, the terms do not distinguish between situations in which data is exported to: (i) a "co-data user", i.e. another business that determines the purposes for which data will be processed; or (ii) a data processor, i.e. a service provider that simply follows the exporter's instructions as to how data should be processed. This generates fundamental confusion in the Recommended Model Clauses at a number of stages.

Moreover, the Commissioner proposes that the model clauses include third party enforcement rights for data subjects, meaning that data subjects would be in a position to directly sue the parties for breaches of the export terms. This cuts across the general approach to regulation on privacy under the PDPO which is administrative – i.e. by the Commissioner's office reviewing complaints and handling investigations - rather than direct enforcement by data subjects.

3. White List

Another justification for compliant international data transfer is to transfer to a country on the designated "White List". We understand the Commissioner's office has carried out a survey of a number of jurisdictions for the purposes of compiling such White List. Obviously this list will be of great interest to Hong Kong data users. Depending on which jurisdictions are included in the White List (and which have been considered and excluded), the list and its underlying rationale will be a critical means for businesses to assess requirements and achieve compliance in practice.

To the extent that the guidelines can be effective as an indicator of potential future compliance requirements, and even as a guide to best practice now, it is essential to know which countries are deemed adequate for inclusion on the White List (and the reasoning behind the rejection of other countries not included on the list).



4. Data Subject Consent

As well as the concerns noted above regarding the Model Clauses and the White List, another approach under s.33 is to rely on data subject consent for international transfers. The guidelines indicate that a separate tick box consent in relation to international data transfers would be required (as opposed to a "bundled consent" that combines the data subject's agreement to various matters).

Bearing in mind that compliance with the PDPO requirements on direct marketing also requires a separate "tick box" consent for use of personal data for direct marketing this would seem to require two separate "tick boxes" at a minimum. We believe that this approach is overly burdensome and impractical for businesses, without it being clear how a separate consent for international transfers would improve the position for data subjects.

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About HKRMA

The Hong Kong Retail Management Association (HKRMA) was founded in 1983 by a group of visionary retailers with a long-term mission to promote Hong Kong's retail industry and to present a unified voice on issues that affect all retailers. Established for 31 years, the Association has been playing a vital role in representing the trade, and raising the status and professionalism of retailing through awards, education and training.

Today, HKRMA is the leading retail association in Hong Kong with membership covering more than 7,800 retail outlets and employing over half of the local retail workforce. HKRMA is one of the founding members of the Federation of Asia-Pacific Retailers Associations (FAPRA) and is the only representing organization from Hong Kong. FAPRA members cover 17 Asian Pacific countries and regions.