

PCPD’s Submission in response to the
Public Consultation on Enhancing Transparency of Beneficial Ownership
of Hong Kong Companies

This Submission is made by the Office of the Privacy Commissioner for Personal Data, Hong Kong (“**PCPD**”) in response to the public consultation carried out by the Financial Services and the Treasury Bureau seeking views on the conceptual framework and broad parameters of a legislative proposal to enhance transparency of beneficial ownership of Hong Kong companies (“**Proposal**”). As the regulator to oversee compliance with the Personal Data (Privacy) Ordinance (Cap. 486) (“**PDPO**”), the PCPD would like to provide comments on the Proposal from the perspective of personal data privacy protection.

The Proposal

2. The Proposal is to amend the Companies Ordinance (Cap. 622) to require a company incorporated in Hong Kong to keep a register of people with significant control over the company (“**PSC register**”) for public inspection upon request in light of the recommendation of the Financial Action Task Force (“**FATF**”)¹ of which Hong Kong has been a member since 1991. In gist, Recommendation 24 of the FATF Standard on Transparency of Beneficial

¹ An inter-governmental body established in 1989 that sets international standards on combating money laundering and terrorist financing.

Ownership requires member jurisdictions to take measures to prevent the misuse of legal persons for money laundering and terrorist financing, and to ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities, in particular law enforcement authorities.

General comments

3. The PCPD acknowledges the public interest to combat money laundering and terrorist financing activities and to maintain an open, trusted and competitive business environment of Hong Kong. The PCPD, however, advocates that in setting up the related legislative framework in compliance with the said FATF recommendation, the Administration should strike a proper balance between enhancing transparency of beneficial ownership of Hong Kong companies and safeguarding personal data of the individual beneficial owners from being unnecessarily disclosed. The guiding principle is whether the measures adopted are necessary and proportionate to achieve the target purposes.

Comments on specific consultation questions

4. The PCPD notes that some proposals (such as the proposed format and maintenance of the PSC register and the power of the court to rectify the

PSC register) largely follow the existing mechanism for register of members under the Companies Ordinance. For other questions which mainly involve operational details, such as the proposed scope of application, definition of beneficial ownership and the proposed sanction, etc, the PCPD makes no submission thereon and will defer to the Administration in determining the appropriate approach in light of the views gathered during the consultation. In the ensuing paragraphs, the PCPD provides observations on specific consultation questions (following the corresponding order in the Consultation Paper) which may have implications on personal data privacy.

Q7 “Do you agree with the proposed content of the PSC register, which shall include the registrable individuals and registrable legal entities which meet the relevant conditions in respect of beneficial ownership?”

5. The PCPD notes that a company is not required under section 627 of the Company Ordinance² to collect the identity card or passport number of its member who is an individual for the purpose of keeping the register of members. Strong justification must be shown to support the proposed practice by which the privacy protection offered to the beneficial owners is less than the legal owners. Subject to the aforesaid, the PCPD recognises that the names, identity card or passport numbers, correspondence addresses and the nature of control, etc of the beneficial owners may be useful information for the purpose

² Section 627(2) of the Companies Ordinance provides that a company must enter in the register of members- (a) the names and addresses of its members; (b) the date on which each person is entered in the register as a member; and (c) the date on which any person ceases to be a member.

of investigations by law enforcement authorities. That said, it does not necessarily mean that such information has to be made available for indiscriminate access by the public at large including the law enforcement authorities. More details about this observation will be provided under Q12 and Q13.

Q9 “Do you agree with the ten-year record-keeping requirement?”

6. The PCPD is concerned about the justification for keeping the beneficial ownership information for a period of ten years after a person ceased to be a registrable individual under the Proposal. Under the PDPO, a data user must take all reasonably practicable steps to ensure that personal data is not kept longer than is necessary for the fulfilment of the purpose for which the data is or is to be used³. Companies being data users⁴ of the personal data contained in the PSC register have to comply with the requirements of the PDPO. It is noted from the Consultation Paper that the purpose of setting up the PSC register is for enhancing transparency of corporate beneficial ownership in order to combat money laundering and terrorist financing. The PCPD finds it more appropriate to tie in the retention period with the record-keeping requirements applicable to a financial institution under the Anti-Money Laundering and Counter-Terrorist Financing (Financial

³ See Data Protection Principle 2(2), Schedule 1 of the PDPO. A data user is also required under section 26(1) to erase the data when it is no longer required for the purpose.

⁴ See section 2(1) of the PDPO which defines a “data user” as a person who controls the collection, holding, processing or use of the personal data.

Institutions) Ordinance (Cap. 615) (“AMLO”)⁵ so that an entry in relation to a registrable individual should be removed from the PSC register and destroyed after a period of six years from the date on which that individual ceased to be registrable.

Q10 “Do you think companies should be given the choice to meet the requirement of nominating a person for cooperation with law enforcement agencies by authorising a natural person resident in Hong Kong or a local designated non-financial business and professional (DNFBP, viz. solicitor, accountant, or trust and company service provider) who would have to be regulated under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (AMLO)?”

7. The PCPD is neutral on whether companies should be given the choice to nominate a natural person or a professional regulated under the AMLO responsible for providing information and further assistance to law enforcement agencies on the companies’ beneficial ownership. The PCPD, however, is concerned about the particulars of the authorised persons that are to be entered into the PSC register. It is recommended that disclosure of the person’s job title or capacity in the company and his contact details shall be sufficient for the purpose of facilitating cooperation of companies with law enforcement agencies.

⁵ Under section 20(3), Schedule 2 of the AMLO, a financial institution must keep the records obtained in the course of identifying and verifying the identity of any beneficial owner of its customer for a period of six years from the date on which the business relationship ends.

Q12 “Do you agree that the PSC register should be available for public inspection?”

Q13 “If not, whether the PSC register should be accessible only to competent authorities? Why? Why not?”

8. The PCPD wishes to draw references to the Guidelines issued to government bureaux and departments by the then Home Affairs Bureau⁶ on protection of personal data contained in public registers (“**Guidelines**”)⁷. The Guidelines highlight the paramount principle that a public register should be introduced only where it would serve legitimate purposes. The factors to be taken into account when establishing a public register include: (i) what public interest is served by such disclosure; (ii) whether the circumstances give rise to a reasonable expectation of privacy on the part of the data subject; and (iii) whether disclosure would be offensive to reasonable persons.

9. The Guidelines also contain other recommendations for the measures to be adopted for establishing and maintaining a public register. They include (i) stating specifically the purpose of maintaining the public register in the establishing legislation; (ii) collecting or disclosing personal data only as necessary to fulfil the specified purposes of the public register; (iii) assessing

⁶ Since July 2007, the Constitutional and Mainland Affairs Bureau has taken over from the Home Affairs Bureau the policy area of personal data protection.

⁷ On 30 December 2000, the Home Affairs Bureau issued a Memorandum, titled “*Review of Public Registers*” to the heads of all government bureaux and departments, providing guidelines on the protection of personal data in relation to existing and new public registers maintained / to be maintained by them.

the appropriateness of introducing sanctions in the legislation; and (iv) adopting administrative measures to prevent misuse of the personal data contained in the public register.

10. The Proposal aims at enhancing the transparency of beneficial ownership of companies to address the concerns over the misuse of companies to disguise and hide crime proceeds, facilitate money laundering or serve illicit purposes such as tax evasion, corruption, or terrorist financing⁸. As pointed out in the Consultation Paper, the FATF recommendation merely specifies that competent authorities, in particular law enforcement authorities, should have all the powers necessary to be able to obtain timely access to the beneficial ownership information⁹. There was no suggestion by FATF for the PSC register to be made available for public access.

11. The PCPD considers that there must be strong justifications for public disclosure of information on the beneficial ownership of companies in the PSC register. Generally speaking, directors and other officers duly authorised by a company may act on its behalf in the normal course of business and for entering into transactions. It is also an established principle¹⁰ that outsiders dealing with a company in good faith can assume that acts within the company's constitution and powers have been properly and duly performed and

⁸ Paragraph 1.2 of the Consultation Paper

⁹ Paragraph (e) of the "key elements of Recommendation 24", Annex A to the Consultation Paper

¹⁰ The Turquand rule (or so-called indoor management rule) laid down in *Royal British Bank v Turquand* (1856) 6 E&B 327

are not bound to enquire whether acts of internal management have been regular. While a member of the public may inspect the Companies register under section 45(1) of the Companies Ordinance to ascertain if he is dealing with a director or an officer of the company concerned, he is not bound to further inquire into the beneficial ownership or other internal management of the company. There may be circumstances in which beneficial ownership information of companies is relevant for particular purposes such as in carrying out a due diligence exercise. However, such exercise is normally performed by professionals or financial institutions according to the relevant laws or regulations, not by the general public. Paragraph 1.7 of the Consultation paper states that “to enhance transparency of beneficial ownership, we need to put in place a regime under the Companies Ordinance to enable beneficial ownership information of the companies to be captured and maintained so as to serve the purpose of allowing law enforcement agencies timely access to such information when necessary”. With the said purpose in mind, the general public’s role to play in this respect is doubtful.

12. Even assuming there are justifications for allowing members of the public to inspect the PSC register, the PCPD considers that the more sensitive personal data, such as identity card or passport numbers and residential addresses of the individual beneficial owners, should be withheld from public inspection. This is in line with one of the intended features of the Companies Ordinance which is to enhance protection of personal data in documents for

registration¹¹. Mechanisms have been introduced to restrict public access to the residential addresses and identification numbers of directors and officers on specific circumstances so as to protect personal data privacy¹². Commencement of the relevant provisions of the Companies Ordinance is still pending¹³.

13. The risks of financial loss, identity theft and personal safety (through stalking and surveillance) suffered by the relevant individuals as a result of unrestricted access to the PSC register by parties with malicious intent are real. The recommendation to withhold certain sensitive personal data from public access can strike a proper balance between the right to privacy and other legitimate interests such as freedom of information. Attention is also drawn to the recommended best practices for operators of public registers under the “*Guidance on Use of Personal Data Obtained from Public Domain*” issued by the PCPD¹⁴.

¹¹ See paragraph 11.3, Chapter 11, Public Consultation on Subsidiary Legislation for Implementation of the new Companies Ordinance - Phase Two Public Consultation:

http://www.cr.gov.hk/en/publications/docs/112012_Consultation_full-e.pdf.

¹² Chapter 11, Public Consultation on Subsidiary Legislation for Implementation of the new Companies Ordinance - Phase Two Public Consultation:

http://www.cr.gov.hk/en/publications/docs/112012_Consultation_full-e.pdf.

The PCPD’s submission in response:

https://www.pcpd.org.hk/english/enforcement/response/files/companies_ordinance.pdf

¹³ See Legislative Council Paper No. CB(1)788/12-13(01) on “New Arrangement for the Inspection of Personal Information on the Companies Register under the new Companies Ordinance” dated 28 March 2013: http://www.cr.gov.hk/en/companies_ordinance/docs/papers-e.pdf

¹⁴ Available at the PCPD’s website:

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

14. Insofar as competent authorities are concerned, it is considered that their access to the PSC register should not be unrestricted. The relevant FATF recommendation only requires that there are mechanisms in place so that competent authorities should have **timely** access to the beneficial ownership information. It does not necessarily mean that competent authorities should be given **free and unlimited** access to the information concerned. Under the existing legal framework of the PDPO, a company may invoke the exemption under section 58(2) in providing the beneficial ownership information to competent authorities, without consent of the individual owner concerned, if it is satisfied that the use of the information by the authorities is for any of the purposes specified under section 58(1)¹⁵ (e.g. prevention or detection of crimes) and failing to so provide the information would be likely to prejudice such purpose. At present, law enforcement agencies will provide justifications to the relevant data user on a case by case basis when seeking disclosure of personal data for their investigations. The PCPD notes that the discretion under s.58(2) is to be exercised by the data user, and the authority, despite having provided the justifications to the relevant data user, may not be certain as to how the discretion would be exercised. However, where the relevant data user refuses to exercise discretion to disclose the personal data, the law enforcement agencies may obtain court order to compel disclosure of personal

¹⁵ The specified purposes include: the prevention or detection of crime; the apprehension, prosecution or detention of offenders; the assessment or collection of any tax or duty; the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice; the prevention or preclusion of significant financial loss arising from any imprudent business practices or activities or unlawful or seriously improper conduct, or dishonesty or malpractice; ascertaining whether the character or activities of the data subject are likely to have a significant adverse impact on anything to which the discharge of statutory functions by the authorities relates.

data held by the data user and such disclosure is exempted under section 60B of the PDPO¹⁶. The advantage of the aforesaid current practice, as opposed to indiscriminate access by law enforcement agencies, is that the necessity and justification of the access will be assessed and determined by an independent judge having regard to all the circumstances. The PCPD considers that there needs to be strong justifications to deviate from the current practice, and in the absence of any information on the inadequacies of the current system, the PCPD believes that the proposed requirement for companies to ascertain and keep beneficial ownership information, coupled with the mechanism for disclosure of information to competent authorities under the exemption provisions of the PDPO, shall satisfy the relevant FATF recommendation.

Q17 “Do you agree that a rectification mechanism should be included to enable applications to the court from anyone aggrieved by the entry in or omission from a PSC register as a registrable individual or a registrable legal entity?”

15. The PCPD agrees that an aggrieved party should be entitled to apply to the court for rectification of any incorrect entry in or omission from a PSC register. Such right of the aggrieved party to correct his personal data in the PSC register generally accords with the data correction right conferred on data

¹⁶ Under section 60B(a) of the PDPO, personal data is exempt from data protection principle 3 (the use principle) if the use of the data is required by an order of the court in Hong Kong.

subjects under the PDPO¹⁷ and is particularly important, given the information held by the companies may not be originated from the individuals in some circumstances as mentioned in the Consultation Paper¹⁸ and there may be legal consequences to a beneficial owner.

Concluding Remarks

16. To conclude, the PCPD generally supports the proposal to enhance transparency of beneficial ownership of Hong Kong companies so as to comply with the relevant FATF recommendation, subject to the data privacy concerns as raised in this submission. In particular, the PCPD would advise the Administration to consider if there is strong justification for making the PSC register available for public inspection. Even if so, the PCPD is of the view that the more sensitive personal data, such as identification document number and residential address of the individual beneficial owners, should be withheld from public inspection. As for the access to the PSC register by competent authorities, the PCPD would advise that there needs to be strong justification for unrestricted access which is a deviation from the existing mechanism that allows for disclosure of information to competent authorities without the consent of the data subject only where the circumstances fall within the

¹⁷ Data Protection Principle 6 in Schedule 1 of the PDPO provides that a data subject shall be entitled to request the correction of personal data. Part 5, Division 1 of the PDPO provides more specific provisions on compliance with a data correction request.

¹⁸ Paragraph 3.9 of the Consultation Paper states that “...*The required particulars of a registrable individual and any relevant change must not be entered into the PSC register unless supplied or confirmed by the registrable individual **or by another person with the knowledge of that individual**...*” (emphasis added)

exemption provisions of the PDPO. Concerning the record-keeping requirement, the PCPD finds it more appropriate to tie in the retention period with the requirement under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance, i.e. for a period of six years.

17. The right to privacy is a fundamental right of individuals protected under the Basic Law and the Hong Kong Bill of Rights Ordinance. When introducing mechanism with personal data privacy concerns, consideration must be given as to whether it serves legitimate purpose, and that the measures adopted are proportionate to the target purpose. The PCPD also believes that a comprehensive legal framework to deal with the subject matter with built-in mechanism to protect personal data privacy will be a competitive edge for Hong Kong as a major international business and financial centre.

Privacy Commissioner for Personal Data, Hong Kong

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