The Hong Kong Investment Funds Association Luncheon
The Hong Kong Bankers Club
2 August 2017

Recent Developments in the Data Protection Landscapes in Hong Kong and the Mainland of China

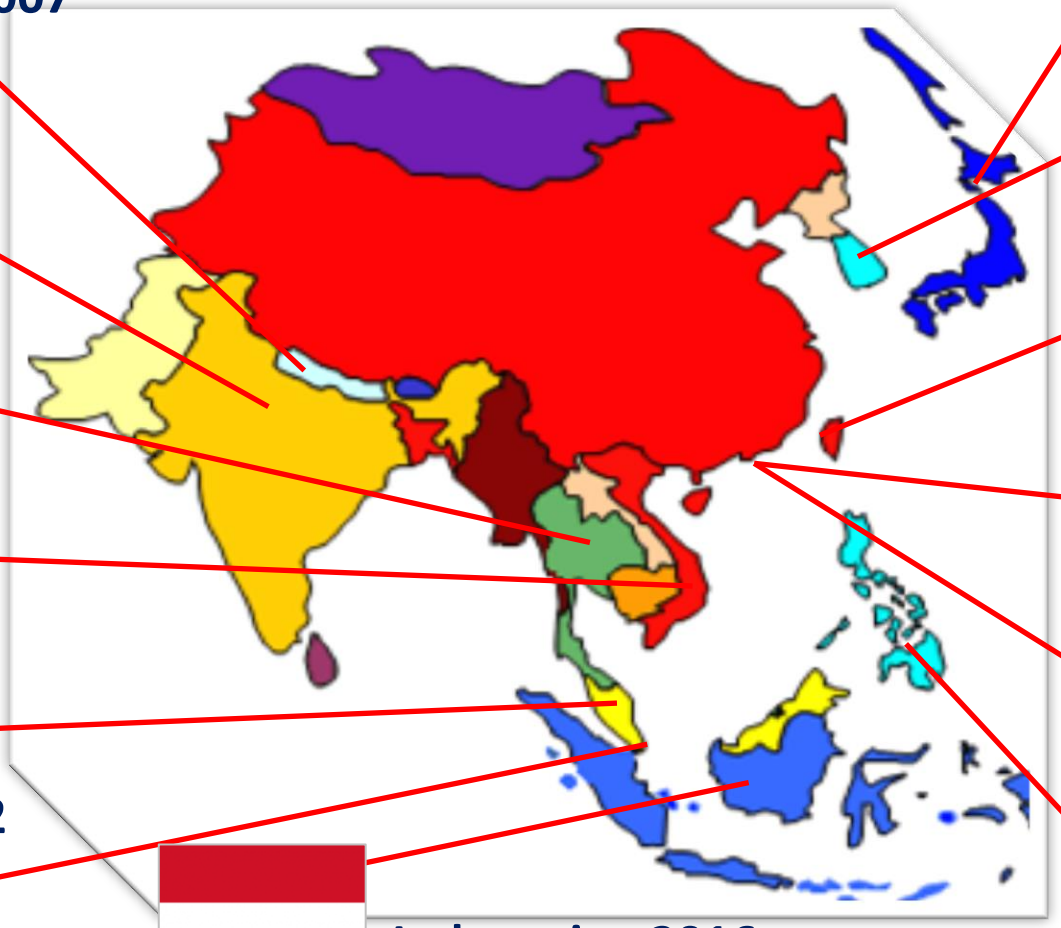
Stephen Kai-yi Wong, Barrister
Privacy Commissioner for Personal Data,
Hong Kong

Presentation Outline

- Overview of the Personal Data (Privacy) Ordinance
- Recent developments of the Ordinance and its enforcement
- Recent developments in the mainland China (Cybersecurity Law)
- Major impact of the EU General Data Protection Regulation (GDPR) 2018
- The Belt and Road Initiative: Hong Kong as a bridge in cross-border data transfers between Hong Kong, the mainland of China and EU

An Overview of
The Personal Data (Privacy) Ordinance

The Personal Data Protection Landscape in Asia



Nepal - 2007

India - 2011

Thailand - 1997

Vietnam - 2010

Malaysia - 2010

Singapore - 2012

Indonesia - 2016

Japan - 2003

S. Korea - 2011

Taiwan - 2010

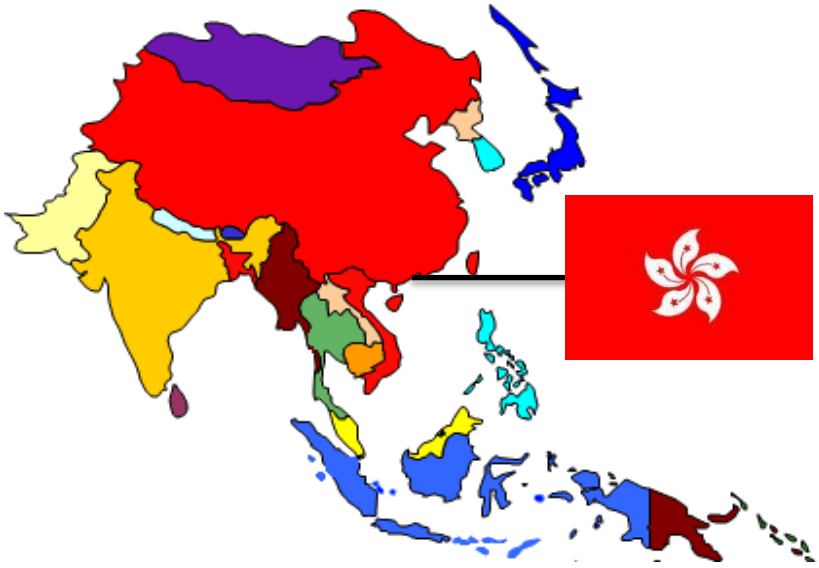
Hong Kong - 1995

Macau - 2005

Philippines - 2012

Personal Data (Privacy) Ordinance

- 1st comprehensive data protection law in Asia
- referenced to 1980 OECD Privacy Guidelines and 1995 EU Data Protection Directive
- single and comprehensive legislation
- covers the public (government) and private sectors



Personal Data (Privacy) Ordinance

- enacted in 1995
- core provisions came into effect on 20 December 1996
- Personal Data (Privacy) (Amendment) Ordinance 2012 effective from 1 October 2012 except for "direct marketing" and "legal assistance" provisions which took effect on 1 April 2013

What is "Personal Data"?

"**Personal data**" (個人資料) means any **data** -

(a) relating directly or indirectly to a living individual;

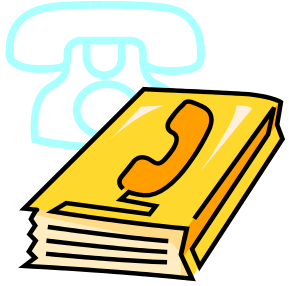
(b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and

(c) in a form in which access to or processing of the data is practicable.

"**Data**" (資料) means *any representation of information (including an expression of opinion) in any document*.

Examples of Personal Data in Everyday Life

- a person's name, telephone number, address, sex, age, occupation, salary, nationality, photo, identity card number, medical record, etc.



Personal Data (Privacy) Ordinance

6 保障資料原則 Data Protection Principles

PCPD.org.hk

1 收集目的及方式 Collection Purpose & Means

資料使用者須以合法和公平的方式，收集他人的個人資料，其目的應直接與其職能或活動有關。

須以切實可行的方法告知資料當事人收集其個人資料的目的，以及資料可能會被轉移給哪類人士。

收集的資料是有實際需要的，而不超乎適度。

Personal data must be collected in a lawful and fair way, for a purpose directly related to a function/activity of the data user.

All practicable steps shall be taken to notify the data subjects of the purpose of data collection, and the classes of persons to whom the data may be transferred.

Data collected should be necessary but not excessive.

2 準確性儲存及保留 Accuracy & Retention

資料使用者須確保持有的個人資料準確無誤，資料的保留時間不應超過達致原來目的的實際所需。

Personal data is accurate and is not kept for a period longer than is necessary to fulfill the purpose for which it is used.

3 使用 Use

個人資料只限用於收集時述明的目的或直接相關的目的，除非得到資料當事人自願和明確的同意。

Personal data is used for the purpose for which the data is collected or for a directly related purpose, unless voluntary and explicit consent is obtained from the data subject.

4 保安措施 Security

資料使用者須採取切實可行的步驟，保障個人資料不會未經授權或意外地被查閱、處理、刪除、喪失或使用。

A data user needs to take practical steps to safeguard personal data from unauthorised or accidental access, processing, erasure, loss or use.

5 透明度 Openness

資料使用者須公開其處理個人資料的政策和行事方式，交代其持有的個人資料類別和用途。

A data user must make known to the public its personal data policies and practices, types of personal data it holds and how the data is used.

6 查閱及更正 Data Access & Correction

資料當事人有權要求查閱其個人資料；若發現有關個人資料不準確，有權要求更正。

A data subject must be given access to his personal data and to make corrections where the data is inaccurate.

香港個人資料私隱專員公署
Office of the Privacy Commissioner for Personal Data, Hong Kong

Direct Marketing

New Direct Marketing Regime

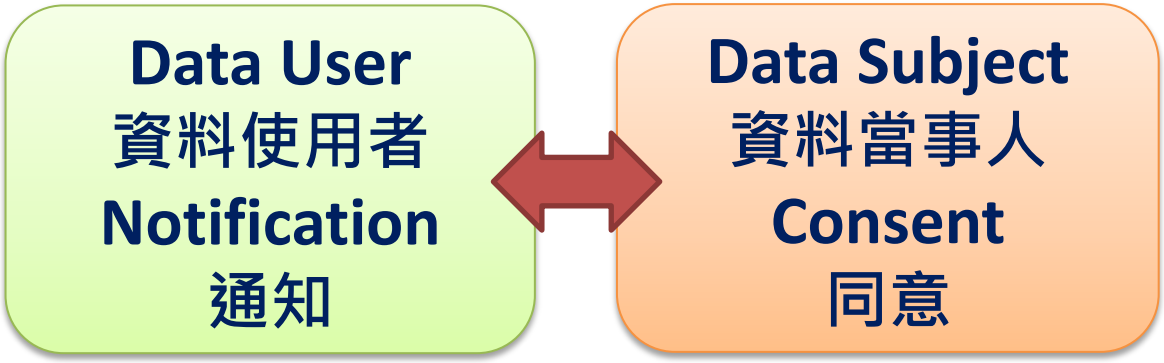
- **2012 Ordinance review exercise**

- **new direct marketing regime came into force on 1 April 2013**

- **direct marketing activities under the Ordinance include such activities made to specific persons by mail, fax, email and phone**

Direct Marketing Requirements

Intends to use or provide personal data to others for direct marketing



Provides personal data

Provide "prescribed information" and response channel for data subjects to elect whether to give consent Notification must be easily understandable	Consent should be given explicitly and voluntarily "Consent" includes an indication of "no objection"

Direct Marketing Requirements

- data user **must comply with the data subject's opt-out request without charge** [section 35G]

- **criminal sanctions** if data user fails to comply with requirements of notification, consent and opt-out requests

Direct Marketing Conviction Cases

Date	Case	Penalty
Sept 2015 (1st conviction after the 2012 amendment)	• A telecommunication company ignored customer's opt-out requests. • The company appealed against its conviction at the High Court, and the appeal was dismissed in Jan 2017.	Fined $30,000
Sept 2015	• A storage service provider failed to take specified actions and obtain the data subject's consent before direct marketing.	Fined $10,000
Nov 2015	• A healthcare services company ignored customer's opt-out requests.	Fined $10,000

Direct Marketing Conviction Cases

Date	Case	Penalty
Dec 2015	• An individual provided personal data to a third party for direct marketing without taking specified actions and obtaining the data subject's consent. • The individual appealed against the conviction at the High Court, and the appeal was dismissed in June 2017.	Fined $5,000
Apr 2016	• An insurance agent used personal data in direct marketing without taking specified actions and obtaining the data subject's consent. • The agent also failed to inform the data subject of his opt-out right when using his personal data in direct marketing for the first time.	Community Service Order of 80 hours for each charge
May 2016	• A telemarketing company used a customer's personal data in direct marketing without taking specified actions and obtaining his consent. • The company also ignored opt-out requests.	Fined $8,000 for each charge

Direct Marketing Conviction Cases

Date	Case	Penalty
Nov 2016	• Two financial intermediaries used personal data in direct marketing without taking specified actions and obtaining data subject's consent, total 11 charges, and all convicted. • Two senior management of the companies were also charged, but were acquitted due to lack of evidence.	Two companies fined $165,000 in total ($15,000 per charge), plus damages to claimants for 25% of profits ($47,800).
Dec 2016	• A watch company used an individual's personal data in direct marketing without taking specified actions and obtaining his consent. • The company also failed to inform the individual of his opt-out right when using his personal data in direct marketing for the first time.	Fined $8,000 for each charge
Jan 2017	• A bank failed to comply with client's opt-out request.	Fined $10,000

Recent Incidents

Registration and Electoral Office's Loss of Laptops (2017)

South China Morning Post | HK CHINA ASIA WORLD COMMENT BUSINESS TECH LIFE CULTURE SPORT WEEK IN ASIA POST MAG STYLE .TV

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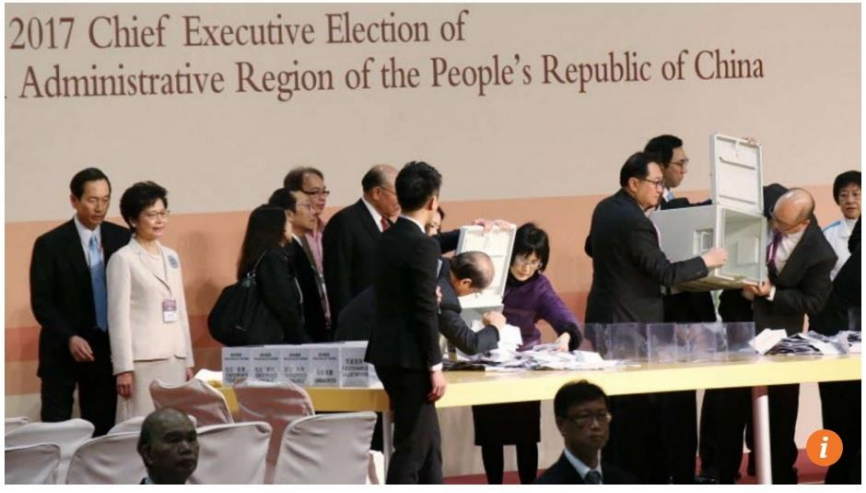
Laptops containing 3.7 million Hong Kong voters' data stolen after chief executive election

Devices contained ID card numbers, addresses and mobile numbers

PUBLISHED : Tuesday, 28 March, 2017, 12:30am
UPDATED : Tuesday, 28 March, 2017, 1:42am

COMMENTS: 24



In what could be one of Hong Kong's most significant data breaches ever, the personal information of the city's 3.7 million voters was possibly compromised after the Registration and Electoral Office reported two laptop computers went missing at

信報財經新聞

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恒生指數 25,380.22 ↑223.88 國企指數 10,453.37 ↑170.72 上證指數 3,090.23 ↑6.72

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2017年4月3日 時事脈搏

選舉處失電腦 花500萬發信道歉

選舉事務處遺失兩部載有300多萬選民資料的電腦，總選舉主任黃思文於立法會財委會特別會議上表示，目前已去信向受影響選民道歉，預計要花約500萬元。

財委會副主席田北辰批評，無故花費公帑去道歉，形容「道歉都幾重皮」。

對於多名議員質疑當時有否安排保安看守該兩部電腦，黃思文表示，同事測試完電腦後便將電腦鎖進儲物室，直至27日才返回收回電腦，承認期間沒有保安看守，而現時正檢視做法是否符合標準措施。

他透露，電腦內的選民資料已採取比保安要求更高級別的方式去處理，強調資料經多重加密，理論上難以破解，更提醒市民放心，並非得到電腦就能夠閱讀相關資料。

Call-Blocking App Leaks Personal Data (2017)

FactWire News Agency 中文 ENGLISH

Exclusive | Interview | Follow Up | Security | Technology | Hong Kong | English

Mobile Numbers of Chinese and Local Officials Exposed By Baidu App

May 13, 2017 | Staff Reporter, FactWire

May 13, Hong Kong, (FactWire) - A smartphone application (app) developed by China's Baidu (NASDAQ:BIDU) may have invaded millions of users' mobile contacts, exposing mobile numbers of senior Chinese and Hong Kong officials, an investigation by the FactWire reveals.

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《傳真社》揭侵私隱後　百度App封搜尋結果　《01》發現仍有漏洞

撰文：陳惠嫻　梁融軒　楊婉婷　發佈日期：2017-05-13 19:47
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標籤： 商務及經濟發展局 + 傳真社FactWire + 電話促銷 +

讚好 66 分享

Recent Developments in the Mainland of China (Cybersecurity Law)

China's Cybersecurity Law

- effective on 1 June 2017

- <u>Purposes:</u> [Art 1]
  - guarantee cybersecurity
  - safeguard cyberspace sovereignty
  - safeguard national security and public interest
  - protect lawful rights and interests of citizens, legal persons and other organisations
  - promote sound development of economic and social informatisation (信息化)

China's Cybersecurity Law

Scope of Application:

- apply to the construction, operation, maintenance and use of the network, and the supervision and administration of cybersecurity within China. [Art 2]

- "network operator" - the owners and administrators of the network as well as network service providers. [Art 76(3)]

- "personal information"- information recorded in electronic or other forms, which can be used, independently or combined with other information, to identify personal identity, e.g. name, date of birth, identity certificate number, biology-identified personal information, address and telephone number. [Art 76(5)]

China's Cybersecurity Law

Data Collection & Use:

- where personal information is collected, explicitly notify users and obtain their consent. [Art 22]
- follow principles of legality, rightfulness and necessity during collection and use, explicitly indicate the purposes, means and scope of collection and use. [Art 41]
- do not collect personal information irrelevant to services provided. [Art 41]
- do not collect or use personal information in violation of any law or administrative regulation or agreement of both parties. [Art 41]

China's Cybersecurity Law

Data Accuracy & Record Retention:

- **not tamper** with personal information collected [Art 42]

- take technical measures to monitor and record the status of network operation and cybersecurity incidents, and **preserve weblogs for not less than 6 months**. [Art 21(3)]

China's Cybersecurity Law

Data Security & Breach Notification:

- strictly keep confidential users' personal information collected, and establish and improve the system for information protection. [Art 40]

- not damage personal information collected, and take technical measures and other necessary measures to ensure security of personal information collected, and prevent information leakage, damage and loss. [Art 42]

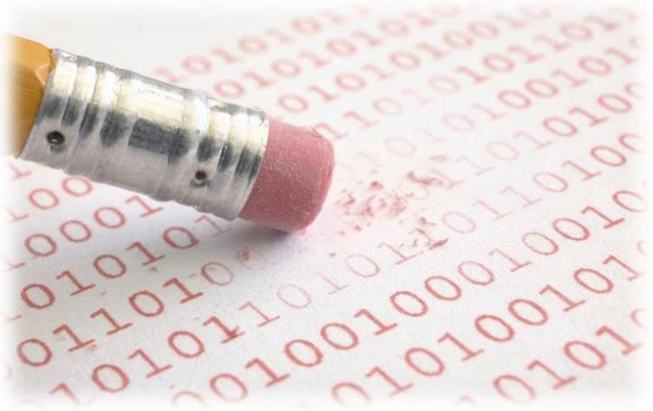
- where personal information has been or is likely to be divulged, damaged or lost, take remedial measures, inform users, and report to regulatory authority. [Art 42]

China's Cybersecurity Law

Data Deletion & Correction:

- individual can request network operator to delete his personal information, if the operator collects or uses information in violation of any law, administrative regulation or agreement of both parties. [Art 43]

- individual can request network operator to correct his personal information collected or stored if there is any error. [Art 43]



China's Cybersecurity Law

Data Localisation & Cross-Border Data Transfer:

- higher standard of care for "critical information infrastructure" (CII)

- CII examples: public communications and information services, energy, transport, water conservancy, finance, public services, e-government affairs, and CII that will result in serious damage to state security, national economy and people's livelihood and public interest if it is destroyed, loses functions or encounters data leakage. [Art 31]

China's Cybersecurity Law

Data Localisation & Cross-Border Data Transfer:

- **personal information and important data** collected and produced by CII operators during their operations within China shall be **stored within China**. [Art 37]

- if CII operators need to provide such information and data to overseas parties due to business requirements, they shall conduct **security assessment according to the measures developed by the Cyberspace Administration of China (CAC)** and relevant departments of State Council, unless otherwise prescribed. [Art 37]

- operators other than CII operators are encouraged to **voluntarily participate** in the CII protection system. [Art 31]

China's Cybersecurity Law

Sanctions and Fines:

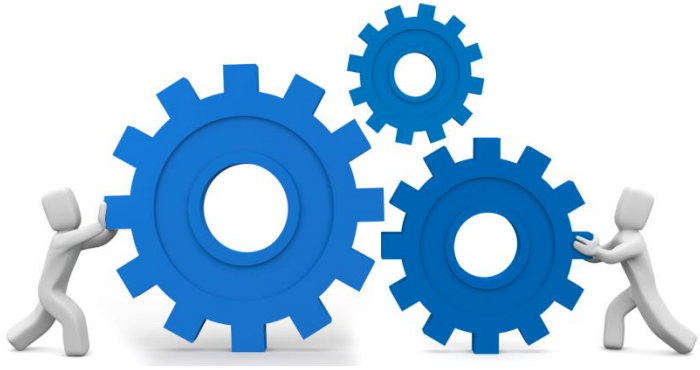
- **Breach of Collection, Use, Security, Breach Notification, Deletion & Correction requirements:**
  - **corrective action**
  - **warning, confiscate illegal income, impose fine between 1 and 10 times such income**
  - **if no illegal income, impose fine < RMB 1 million, and impose fine between RMB 10,000 and 100,000 on directly responsible person in charge and other directly liable persons**
  - **in serious cases, suspend or cease business operation for rectification, or close down website, or revoke business permit or license. [Art 64]**

China's Cybersecurity Law

- **Breach of Data Localisation Requirements:**
  - corrective action; and
  - warning, confiscate illegal income, and impose fine between RMB 50,000 and 500,000; and
  - suspend or cease business operation for rectification, or close down website, or revoke business permit or license; and
  - impose fine between RMB 10,000 and 100,000 on directly responsible person in charge and other directly liable persons. [Art 66]

"Measures for Security Assessment of Cross-Border Transfer of Personal Information and Important Data" (《個人信息和重要數據出境安全評估辦法》)

- **Purposes: implement data localisation and security assessment requirements under China's Cybersecurity Law**
- **1st Draft Measures issued on 11 April 2017; consultation ended on 11 May 2017**
- **date of implementation is uncertain**



The New York Times | https://nyti.ms/2vbooTd

BUSINESS DAY

Apple Opening Data Center in China to Comply With Cybersecurity Law

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By PAUL MOZUR, DAISUKE WAKABAYASHI and NICK WINGFIELD JULY 12, 2017

SHANGHAI — Apple said Wednesday that it would open its first data center in China, joining a parade of technology companies responding to growing global demands to build facilities that store online data closer to customers.

The move is a response to a strict new law in China that requires companies to store users' data in the country. The new data center, in Guizhou, a province in southwest China, is part of a $1 billion investment in the province and will be operated in partnership with a local data management company, Apple said.

The move is part of a worldwide trend regarding the security and sovereignty of digital data. Microsoft, Amazon and Facebook are among the big American technology companies plowing billions of dollars into building data centers in Germany, the Netherlands, France and other countries. While some of the expansion is for technical reasons — the online services operate faster when they are near customers — the companies are also reacting to growing pressure from European governments and customers to maintain some control over their data.

As is the case with many laws, the digital security regulations approved last month in China were vaguely worded, leaving many foreign companies uncertain about which parts would be enforced and how. Already, Amazon, Microsoft and IBM have formed partnerships with Chinese companies to offer cloud computing services

https://www.nytimes.com/2017/07/12/business/apple-china-data-center-cybersecurity.html?mkt_tok=eyJpIjoiTTJaak16STFOR1V6WW1RMyIsInQiOiIz... 1/4

Apple Opening Data Centre in China to Comply With Cybersecurity Law

Source: The New York Times 12 July 2017

Major Impact of the 2018

Hong Kong – European Union Trade Relationships

- EU is Hong Kong's second major trading partner after China
- EU has been a major source of foreign direct investment in Hong Kong
- In 2015, EU was Hong Kong's second largest supplier of goods after China
- In 2015, EU was Hong Kong's third largest market of goods after China and the USA

Sources: HK Trade and Industry Department, European Commission

EU General Data Protection Regulation (GDPR)

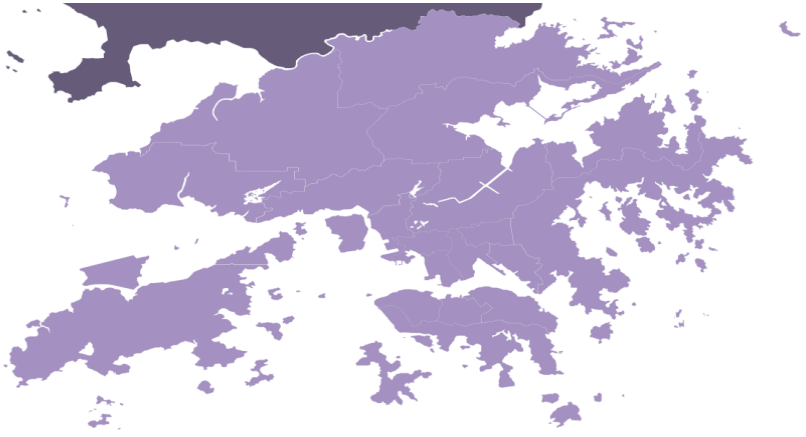
- approved by EU Parliament on 14 April 2016
- will be enforced on 25 May 2018
- replaces the 1995 EU Data Protection Directive (95/46/EC)
- harmonises data protection laws across Europe

GDPR – Extra-Territoriality

GDPR applies to data controllers (i.e. data users) and data processors:

- with an establishment in the EU; or
- without an establishment in the EU, but offer goods or services to data subjects in the EU, or monitor their behaviours in the EU.

  [Art 3]



GDPR – Cross-Border Data Transfer

Personal data may be transferred outside the EU in limited circumstances, which include:

- **transfer to countries with "adequate" level of data protection [Art 45]**
- **European Commission shall consider the following elements when assessing the adequacy level: [Art 45(2)]**
  a. **the rule of law, respect for human rights and fundamental freedoms, as well as the implementation of relevant legislation and rules;**
  b. **the existence and effective functioning of one or more independent data protection authorities, including adequate enforcement powers; and**
  c. **the international commitments the third country has entered into, or other obligations arising from legally binding conventions or instruments.**

GDPR – Cross-Border Data Transfer

- In the absence of an adequacy decision, organisations in the EU may still transfer personal data to a third country on the following bases:

  - legally binding and enforceable instrument between public authorities or bodies [Art 46(2)(a)];
  - binding corporate rules [Arts 46(2)(b) and 47];
  - standard contract clauses [Art 46(2)(c) & (d)];
  - codes of conduct approved by the European Commission or data protection authorities of the EU Member States [Arts 40 and 46(2)(e)];
  - certification mechanism approved by the European Commission or data protection authorities of the EU Member States [Arts 42 and 46(2)(f)];
  - derogations for specific situations (e.g. informed and explicit consent from data subject; necessity for the conclusion or performance of contract; necessity for important public interest; etc.) [Art 49(1)]; etc.

Sanctions

Maximum administrative fine:

- **€10 million or 2% of global annual turnover for less serious contravention, e.g. failure to notify data breach, appoint data protection officer, conduct data protection impact assessment, etc.**

- **€20 million or 4% of global annual turnover for more serious contravention, e.g. processing without lawful basis, failure to comply with individuals' request to erasure, failure to comply with cross-border data transfer requirements, etc. [Article 83]**

The Belt and Road Initiative: Hong Kong As a Bridge in Cross-Border Data Transfers Between Hong Kong, the Mainland of China & EU

The Belt and Road Initiative

- cover more than 60 countries and regions from Asia to Europe via China, Southeast Asia, Europe, Africa and the Middle East

China – European Union Trade Relationships

- EU is China's largest trading partner, largest supplier of goods and second largest market of goods

- China and EU cooperate in areas of energy, technology, finance, industry and agriculture

Source : Ministry of Foreign Affairs of the People's Republic of China

Hong Kong's Unique Advantages

"Hong Kong…has many unique advantages…for instance, free and open economy, efficient business environment, advanced professional services sector, well-established infrastructure and facilities, internationally recognised legal system, free flow of information and large supply of quality professionals…"

Mr Zhang Dejiang,
Member of the Standing Committee of the Political Bureau of the Communist Party of China Central Committee;
Chairman of the Standing Committee of the National People's Congress of the People's Republic of China
Keynote Speech,
Belt and Road Summit, 18 May 2016

Hong Kong's Unique Advantages

"With the combined advantages of 'one country' and 'two systems,' Hong Kong can serve as a 'super-connector' (超級聯繫人) between the mainland of China and the rest of the world. In areas such as finance, investment, professional services, trade, logistics, culture, creativity, innovation and technology, Hong Kong's unique 'super connector' role can bring together the strengths of Belt and Road economies."

The Hon C Y Leung, GBM, GBS, JP
Former Chief Executive, Hong Kong SAR
Opening Remarks
Belt and Road Summit, 18 May 2016

Hong Kong – Asia's Leading Data Hub

- **2016 Cloud Readiness Index Overall Ranking # 1:**
  - International Connectivity #1
  - Data Centre Safety #1
  - Privacy #1
  - Broadband Quality #2
  - Power Grid, Green Policy & Sustainability #2

Secretary for Innovation and Technology Mr Nicholas Yang's Speech at 2nd Phase NTT Communications Hong Kong Financial Data Center Opening Ceremony (9 Dec 2015):

"Hong Kong…well-positioned to…secure data centre services…Our robust information infrastructure is among the most sophisticated and advanced, with submarine and overland cable systems connected to other parts of the world. We have a highly stable power supply, with reliability exceeding 99.999 per cent. Our Internet connection speed ranked second in the world…Hong Kong…offer effective protection of data privacy and information security."

Source: Innovation and Technology Bureau (9 Dec 2015)

Support of Hong Kong Government

Hong Kong Government fully supports developing Hong Kong into Asia's Leading Data Hub:

"**Data centres are an essential infrastructure** to support pillar sectors like financial services, trading and logistics as well as other economic sectors. Data centres also provide the **catalyst for the development of new content and applications**, as well as cloud computing services… **the Government fully supports** the **development of data centres** in Hong Kong as the backbone to our economic growth…"

Source : Hong Kong Office of the Government Chief Information Officer

Hong Kong Government Policy

- Set up a Data Centre Facilitation Unit and a thematic information portal, to provide coordinated services to interested developers and investors on matters related to setting up of data centres in Hong Kong
- Step up promotion to position Hong Kong as a prime location for data centres in the Asia Pacific region;
- Promote the incentive measures that optimise the use of industrial buildings for the benefit of developing data centres; and
- Identify sites for development of high-tier data centres and appropriate land disposal arrangements.

Source : Hong Kong Office of the Government Chief Information Officer

Hong Kong – Reputable Legal System

- The Rule of Law
- Common Law Jurisdiction
- Strong Commercial and Property Law
- Independence of the Judiciary
- Arbitration and Mediation

Hong Kong – Legal Professionals

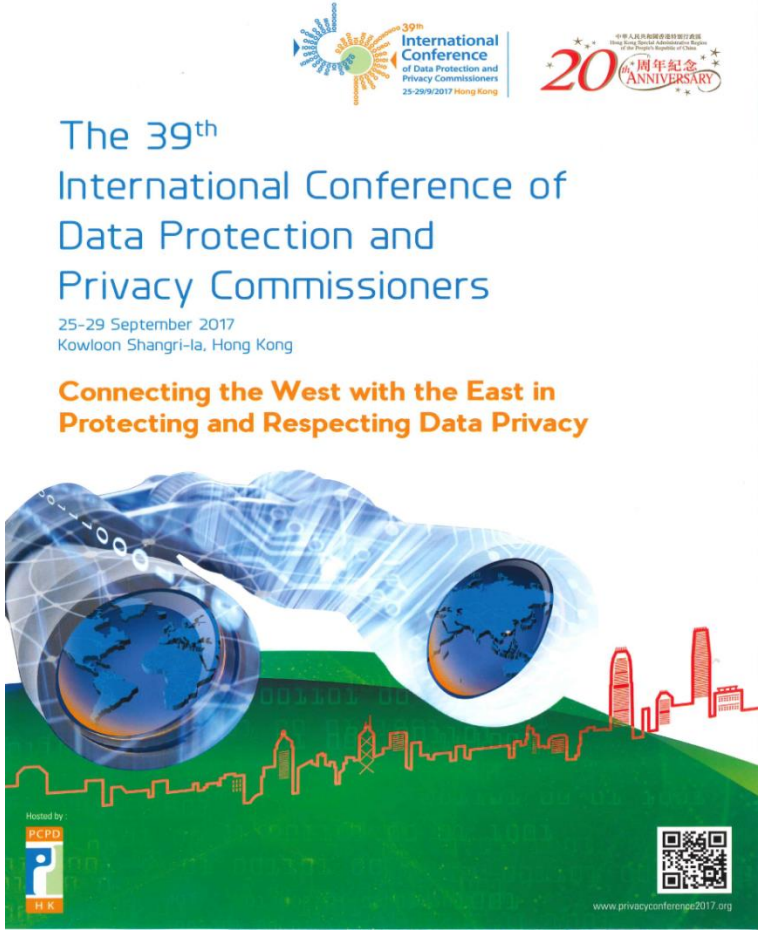
- International Trade
- Intellectual Property
- International Arbitration
- Professional Knowledge
- Diverse Cultures
- International Vision

Hong Kong's comprehensive data protection regime

- **Personal Data (Privacy) Ordinance**: A comprehensive data protection law in line with international standards
- **Office of the Privacy Commissioner for Personal Data**: independent, fair and reliable enforcement agency trusted by local citizens and overseas enforcement agencies

39th International Conference of Data Protection and Privacy Commissioners

- **East Meets West**
- **meet over 110 data protection authorities from over 70 countries/regions**
- **local, the mainland of China and international corporations will participate**



Stay tuned for updates on
www.privacyconference2017.org

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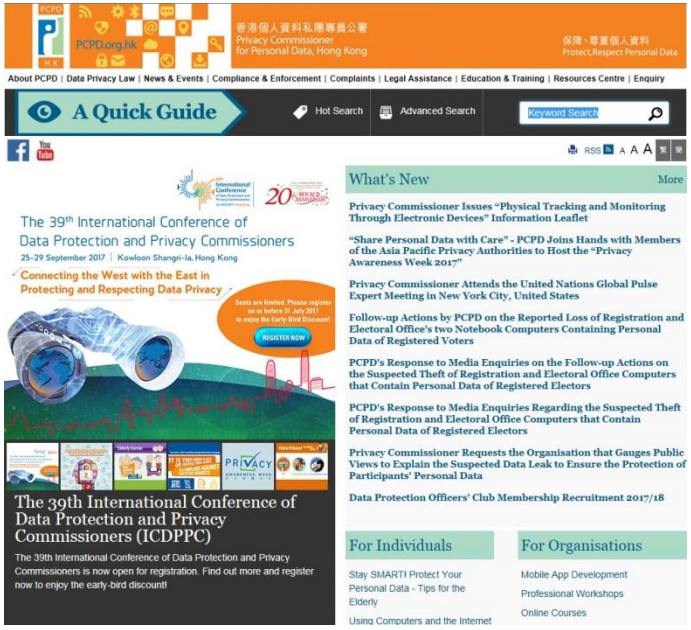

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