

**PCPD’s Submissions in response to Public Consultation on
Improvement of Corporate Insolvency Law Legislative Proposals
 (“Consultation Document”)**

It is noted that the Financial Services and Treasury Bureau has drawn up legislative proposals in the Consultation Document to improve the corporate insolvency and winding up provisions in the Companies Ordinance, Cap.32, laws of Hong Kong. As the regulator to protect the privacy of individuals in relation to personal data, the Office of the Privacy Commissioner for Personal Data (“**PCPD**”) would like to raise some privacy concerns in relation to the matters in light of its regulatory experience under the Personal Data (Privacy) Ordinance (“**Ordinance**”), Cap. 486 whilst acknowledging that these concerns may have to be considered together with other factors.

Comments

Providing for a prescribed form for a statutory demand by a creditor

2. According to paragraphs 2.7 to 2.8 of the Consultation Document, it is proposed that a prescribed form of Statutory Demand, which must be served on a debtor-company setting out the amount indebted preceding a winding-up petition against the company, shall be adopted and the Statutory Demand should contain key information, including the creditor’s contact information. As a creditor may well be an individual, personal data relating to such individual will be involved as a result.

3. Firstly, the types of contact information that are required from a creditor in the prescribed form of Statutory Demand have not been spelt out clearly. The types of contact information may range from telephone number, address, fax number, etc. Being a prescribed form, the Statutory Demand

must be in no uncertain term as to what types of personal data are required from the creditors.

4. From data protection point of view, it is prudent to confine the types of contact information to such personal data that is necessary for or directly related to the purpose of collection which is to enable contact to be established for the purpose of the winding-up proceedings. Also, the personal data to be collected should be adequate but not excessive in relation to the purpose.

5. If address will be stated as a type of prescribed contact information, creditor should be allowed to provide his correspondence address to enable contact to be established in lieu of residential address which is considered to be excessive and unnecessary for the purpose to facilitate the winding-up proceedings.

Disclosure of relevant relationships in relation to the appointment of provisional liquidators and liquidators

6. It is proposed in paragraph 3.21 of the Consultation Document that a new statutory disclosure system will be introduced to require a prospective provisional liquidators or liquidators to make a statement as to whether he/she is or in the preceding two years has been (i) a member/ creditor/ director/ auditor/ legal advisor/ financial advisor, etc. of the company (see paragraph 3.21(a)), *or* (ii) an immediate family member of a director/ secretary/ auditor, etc. of the company (see paragraph 3.21(b)). In effect, the prospective provisional liquidators or liquidators are required to disclose their own information (which is generally considered as personal data) during the application process as liquidators for a company.

7. It is generally stated in the Consultation Document that the proposal aims at enhancing transparency in the appointment process with a view to reducing the risk of *real or perceived* conflict of interest. The statutory disclosure scheme operates in such a way that the prospective provisional liquidator or liquidator has to depose that the existence of such facts or relationships will not give rise to any real or perceived conflict of interest or duty and give reasons.

8. Due consideration must be given as to whether the statutory disclosure system is justified with compelling reasons. It will be a balancing exercise for the Government and the Legislative Council (when preparing and vetting the proposed legislation) as to whether the justification for identifying the real or perceived conflict of interest or duty shall override the personal data privacy protection afforded to prospective provisional liquidator or liquidator. When assessing the proper balance to be struck, the key point is whether the non-disclosure of such facts or relationships will likely prejudice the interests of creditors or others in the winding-up proceedings.

Allowing communication by liquidators with creditors, contributories, members of COI and other interested parties by electronic means

9. In paragraph 4.21 of the Consultation Document, it is proposed that the liquidator and provisional liquidator should be given the flexibility to give, deliver or send any notice or documents to any person required to be given, delivered or sent by him under the Companies Ordinance/ Companies Winding-up Rules by electronic means (such as using emails or through websites) subject to conditions, one of which is to obtain the recipient's prior consent. It is not clear if personal data is included in the notice or documents and if yes, whether the personal data relates to the recipients of the notice or

documents. Our comments below are provided on the assumption that personal data is indeed involved in this manner.

10. Apart from the recipient's prior consent, it is equally important that the liquidator or provisional liquidator would adopt sufficient measures to ensure the security of the personal data (if any) contained in the documents so delivered. Encryption will be one of the means to ensure that the information will be kept confidential. The password may be sent to the intended recipient on a need-to-know basis through another means of communications. Furthermore, notice should be given to the intended recipient on the possible data privacy risks (including the consequence on data leakage or other security issues) that may be involved when seeking his consent for using electronic means of communication.

11. As to the proposed electronic delivery through website, regard must be given as to whether public disclosure of such information (which may contain personal data) is indeed necessary. Personal data which has been made available publicly is still subject to the protection under the Ordinance. Liquidators or provisional liquidators, who publish the personal data contained in a document in their websites, will likely be considered as data users in control of the relevant personal data. The requirements under the Ordinance governing various aspects of a data handling cycle including its collection, accuracy, retention, use, security, access and correction, as well as transparency must be observed. For example, a data user is required to take all practicable steps to ensure that the personal data is accurate. Personal data should not be kept longer than is necessary for the fulfillment of the purpose for which the data is or is to be used. A data user is also required to comply with data access or data correction requests from the relevant individuals.

12. Most importantly, personal data disclosed in a website is often difficult to control. Any person who accesses the personal data in a website may subject the same to any secondary use that is unintended by the liquidators or provisional liquidators and it is often beyond the reasonable expectation of the relevant individuals. In this regard, the liquidators or provisional liquidators should, in seeking the recipient's consent, also draw the intended recipient's attention to such possible consequence of publication of his/her personal data in their website.

13. If it is considered necessary to disclose personal data on a website having regard to the circumstances, the PCPD suggests prescribing in the proposed legislation (i) the purpose of use of the personal data so published in the website; (ii) limitation on the use of the personal data to such purpose that is directly related to the original purpose of its collection or prohibiting such use that is not directly related; and (iii) sanctions on misuses of personal data.

Enhancing the effectiveness of the private and public examination procedures by providing for the express abrogation of the privilege against self-incrimination

14. It is proposed in paragraph 6.9 that a person summoned should not be allowed to claim the privilege against self-incrimination as a reason for refusing to answer questions during private or public examination so as to ensure the efficiency and effectiveness of the liquidation investigation.

15. Such fundamental privilege against self-incrimination can also be found in section 60A of the Ordinance. It is provided that the personal data is exempt from the data access provisions under the Ordinance if the compliance of which may incriminate the data user in any proceedings for

any offence other than an offence under the Ordinance. It is also provided that any information disclosed by a data user in compliance with a data access request is not admissible against the data user in any proceedings for an offence under the Ordinance. In addition, in any investigation carried out by the PCPD, a person who is asked by the PCPD to provide information or to produce any documents, etc. will enjoy the privilege against self-incrimination. His right is protected pursuant to section 45 of the Ordinance.

16. It is draconian to deprive such privilege from the person summoned. A person must not be lightly deprived of such fundamental privilege unless there are compelling justifications. Besides, it should be considered whether the public interest in ensuring that effective and efficient liquidation investigation is so compelling to justify the proposal.

Other matters not on the list for consultation

(a) *Statutory requirement for disclosure of Liquidator's ID number*

17. It is noted that a liquidator is required (under section 235 of the Companies Ordinance) to publish a notice of his appointment or cessation of his appointment as liquidator by way of gazette containing the prescribed information including his name and also his identity card number or passport number. Consideration should be given if the publication of the liquidator's identity card or passport number is indeed necessary, and whether measures should be introduced to protect the personal data of liquidator by (i) limiting the disclosure to necessary parties; or (ii) reducing the disclosure to the extent as necessary to enable the creditors or contributories to identify him.

18. In this regard, the Government had put forward a similar proposal to protect personal data of directors. By the Companies (Residential Addresses and Identification Numbers) Regulations, it is proposed that the

directors' full identity card numbers and residential addresses need to be disclosed only under specific circumstances but not to whoever makes a search with the Companies Registrar. The proposed Regulations have been put on hold for the time being for further deliberation. The PCPD urges the Government to review the position on the disclosure of the identity card or passport numbers of liquidators or provisional liquidators as well.

(b) Limitation on secondary use of the personal data contained in gazette

19. According to the regulatory experience of the PCPD, the personal data of individuals which have been published in the public domain may be put to secondary improper use by third parties. While the publication of the gazette containing the liquidator's identity card or passport number may aim at facilitating the winding-up proceedings, the secondary use by any third parties of such data may not necessarily related directly to the original purpose of collection or the purpose of publication of the personal data.

20. The PCPD suggests prescribing in the proposed legislation (i) the purpose of use of the liquidator's personal data as contained in a gazette, (ii) limitation on the use of such personal data to those purposes which are directly related to the original purpose of its collection or prohibiting such use that is not directly related; and (iii) sanctions on misuses of personal data.

Conclusion

21. While the Consultation Document sets out the justifications for the proposals, due regard should be given to their privacy risks and data protection implications, and its alignment with the Ordinance. The PCPD takes the view that the concerns raised above must be thoroughly considered

so as to enable an informed decision to be made when formulating the appropriate legislative proposals on the topic.

Office of the Privacy Commissioner for Personal Data

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