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4 December 2015

Mr Raymond Tam
Secretary for Constitutional and Mainland Affairs
Constitutional and Mainland Affairs Bureau
12/F, East Wing, Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Raymond,

Business Impact Assessment on the Proposed Implementation of Section 33 of the Personal Data (Privacy) Ordinance

Thank you for your letter dated 11 August 2015 advising the Chamber that the Constitutional and Mainland Affairs Bureau is conducting a study on the Business Impact Assessment on the proposed Implementation of Section 33 of the Ordinance. We appreciate your invitation for the Chamber to participate in an online survey and to also provide feedback at a face-to-face discussion subsequently held with your consultant, Deloitte Consulting (Hong Kong) Limited, which has been engaged by the Bureau to undertake the study.

2. We welcome the study and actively encourage members to provide comments through the online survey. We also organised a meeting with the consultant who were able to gather views from members across diverse business backgrounds. The interaction with the consultant provided a very useful forum for our members' to air their views on the subject.

3. We understand from the consultant that they will conduct similar discussions with other interest groups as part of the study and will submit their report to the Bureau towards the end of March 2016. No doubt the consultant will convey our members' practical concerns should the Government proceed with the implementation of Section 33 of the Ordinance. Yet we would like to reiterate our members' concerns and urge the Bureau to give these its serious consideration. We are ready to assist and welcome further dialogue with the Bureau and the consultant on this subject.

4. Our members' views on and concerns with Section 33 can be summed up as follows:

(a) **Lack of consultation**: Section 33 was drafted some 20 or so years ago and is the only provision in the Ordinance to remain dormant since the Ordinance was enacted in 1996. It therefore came as quite a surprise to stakeholders particularly the business community when the Privacy Commissioner decided to issue a Guidance on Personal Data Protection in Cross-border Data Transfer in December 2014, without prior consultation or warning.

It is also puzzling to note that the Guidance was issued while Section 33 continued to be held in abeyance. Issuing the Guidance before Section 33 is brought into operation and without any proper consultation creates confusion and unnecessary speculation on the treatment of Section 33. As far as the Chamber is concerned, we would like to see the continued suspension of Section 33 for the reasons as given under. That said, it is very important that a proper public consultation be carried out to assess the likely impacts of implementing Section 33 before any decision is made to bring it into force and before the issuance of any guidelines. We would therefore urge the Bureau to conduct a public consultation upon the completion of the study by the consultant should the Government intend to activate this particular aspect of the Personal Data (Privacy) Ordinance.

(b) **Privacy and security risks**: We do not believe that it is practical to bring Section 33 into operation, at least not in its current form. The provision if implemented would impose an enormous compliance burden on businesses and create greater security risk for personal data rather than to provide protection.

Section 33, as with similar laws in other jurisdictions, makes it difficult to transfer personal data outside of national borders for privacy and security reasons. This effectively creates barriers to restrict the free flow of cross-border information and creates data localization. The danger of this is that, instead of enhancing privacy and security of information, it has the opposite effect of putting data at risk of being easy targets for thieves. As noted by Anupam Chander and Uyen P. Le, "*...localized data servers reduce the opportunity to distribute information across multiple servers in different locations. ...information gathered together in one place offers a tempting Honeypot, an ideal target for criminals. As some computer experts have noted, 'Requirements to localize data...only make it impossible for cloud service providers to take advantage of the Internet's distributed infrastructure and use sharding and obfuscation on a global scale.' "Sharding" is a process in which rows of a database table are held separately in servers across the world – making each partition a "shard" that provides enough data for operation but not enough to re-identify an individual. ...Second, as we noted above, the Protected Local Provider offering storage and processing services may be more likely to have weak security infrastructure than companies which*

continuously improve their security to respond to the ever-growing sophistication of cyber-thieves."[1]

(c) **Creating uncertainties**: With respect to the various conditions as stipulated under Section 33, the following are of limited use or are fraught with uncertainties:

(i) For instance, the White List has yet to be published and there is little information as to the jurisdictions that would be included in the list. Given the foregoing, what criteria would be used to consider whether a jurisdiction qualifies for inclusion on the White List;

(ii) It is unclear how vigorous data users are expected to undertake their assessment on the personal data protection regime in the intended locations where personal data may be transferred or stored;

(iii) Obtaining data subjects' consent for the transfer would not work as data subjects are more likely to opt not to give the consent and in which case data users would be expected to handle their data in a manner that could differ on a case by case basis. For business operations, this scenario of varying treatments implies there is no standard approach or regime to handling data. Businesses who subscribe to cloud services in their operations are not in control of the location of the data centres where information would be stored or the whereabouts of their backup sites. Therefore, data users would not be in a position to inform data subjects of the location as to where the data would be transferred or stored; and

(iv) For contractual oversight, it would not work when the transferor or data subjects do not have the negotiating power in dealing with the data processors which are mostly large and multi-national companies who will inevitably assert their standard terms due to the global nature of their businesses and the standard global offering, often bundling their products/services.

(d) **Adoption of cloud computing**: We are very concerned that Section 33 will discourage the adoption of cloud computing, which could in turn hamper businesses' ability to take advantage of the benefits of cloud computing. There is an inherent contradictory policy intention, in that on one hand the Government is encouraging greater adoption of cloud computing and yet on the other it appears to be putting up barriers for their adoption through Section 33. We therefore urge the Government to undertake a broader and detailed study and to consult with the industry before it decides to bring Section 33 into operation.

1 Chander, A & Le, U. P. (2014). Breaking the Web: Data Localization vs. the Global Internet. *UC Davis Legal Studies Research Paper No. 378.* Available at http://ssrn.com/abstract=2407858

(e) **Ensuring relevance**: Finally, one key issue to be included as part of the study is to look at the current provision in Section 33 which was written over 20 years ago. We should consider whether Section 33 in its current form is still relevant in the light of today's highly digitized and globalized environment.

5. We look forward to continuing dialogue with you and the consultant on this important subject.

Yours sincerely,

Shirley Yuen
CEO