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New investigatory powers of the Privacy Commissioner for Personal Data under the new anti-doxxing law

Peter So and Victor Wong

On 8 October 2021, Hong Kong's privacy law heralded a new era in the protection of personal data, by the introduction of doxxing-related offences in the Personal Data (Privacy) (Amendment) Ordinance 2021 (Amendment Ordinance). For the purpose of combatting doxxing behaviour in Hong Kong more effectively, the Privacy Commissioner for Personal Data (Commissioner) is empowered to carry out criminal investigations, institute prosecutions for doxxing-related offences and order the removal of doxxing messages. In this article, we set out the new investigatory powers of the Commissioner.

Investigatory Powers of the Commissioner in respect of Doxxing Offences

The Commissioner's criminal investigatory powers are provided for under Part 9A of the Amendment Ordinance with regard to certain offences under sections 64(1), 64(3A), 64(3C) (broadly the doxxing offences), 66E(1) (failure to comply with an investigation notice), 66E(5) (provision of false/misleading information), 66I(1) (offence of obstruction) and 66O(1) (contravention of cessation notice).

The Commissioner's broad investigatory powers are in line with those that are available to other regulatory authorities such as the Hong Kong Securities and Futures Commission, the Hong Kong Monetary Authority, and the Hong Kong Competition Commission. In particular, the interviewee has no right to silence and the interviewee's protection is that the evidence cannot be used in subsequent criminal proceedings against him/her (except for those relating to provision of false/misleading information or perjury type of offences).

Powers to require materials and assistance by issuing a written notice to the person

Pursuant to section 66D(2)(a), the Commissioner may require a person to provide documents, information or thing in the person's possession or control relevant to the investigation. This is the Commissioner's power to request production of documents.

Pursuant to section 66D(2)(b), the Commissioner may require a person to attend before the Commissioner at a specified time and place and answer questions relevant to the investigation. This is essentially the Commissioner's power to interview the interviewees.

Pursuant to section 66D(2)(c), the Commissioner may require a person to answer written questions relevant to the investigation. Pursuant to section 66D(2)(d), the Commissioner may require a person to make a statement relevant to the investigation.

Pursuant to section 66D(2)(e), the Commissioner may require a person to give the Commissioner all the assistance that the Commissioner reasonably requires for the investigation.

Powers exercisable in relation to premises, electronic devices and suspected offenders

Power to Search Premises and Access Electronic Devices with a Court Warrant

Pursuant to sections 66G(1)(b)(i) and (2), the Commissioner may apply for a warrant from the Magistrate to (i) enter and search the premises; (ii) carry out the investigation in the premises; and (iii) seize, remove and detain any material in the premises that is or contains evidence relating to the investigation.

Pursuant to sections 66G(1)(b)(ii) and (3), the Commissioner may apply for a warrant from the Magistrate to (i) access, seize and detain the electronic device (including mobile phones and computers, etc); (ii) decrypt any material stored in the electronic device; (iii) search for any material or evidence relevant to the investigation in the electronic device; and (iv) reproduce the relevant material stored in the electronic device in other forms, such as written forms on paper, copies of extracts etc.

When powers are exercised under the warrant, all persons situated in the premises or who are in possession or control of the relevant electronic devices must, without charge, afford facilities and assistance reasonably required by the Commissioner or any prescribed officer, such as directing the prescribed officers to the place where the material required is stored.

Power to Access Electronic Devices without a Court Warrant

Pursuant to section 66G(8), when the Commissioner is satisfied that a delay caused by an application for a warrant is likely to defeat the purpose of accessing the device, or for any reason it is not reasonably practicable to make the application, the Commissioner may, without warrant, access the electronic device that is suspected to contain material related to doxxing or its related offence. While the Commissioner has the power to access the electronic devices without a warrant, the Commissioner would not decrypt an electronic device without the authority of a warrant (see paragraph 3.4.3 of the Amendment Ordinance Implementation Guideline).

Suspected Offenders

Pursuant to section 66H, an authorised officer may stop, search and arrest without warrant any person reasonably suspected of committing certain doxxing offences. The “authorised officer” includes any officer at the rank of Personal Data Assistant or above; or a “police officer” as defined under section 3 of the Police Force Ordinance (Cap. 232).

Offences in relation to the Commissioner’s Investigatory Powers

A person commits an offence under section 66E(1) if the person fails to comply with a requirement of a notice given to the person under section 66D(2). The maximum penalty for summary conviction is a fine at level 5 (i.e. HK\$50,000) and imprisonment of 6 months. The maximum penalty for conviction on indictment is a fine of HK\$200,000 and imprisonment for 1 year.

If a person, with an intent to defraud, fails to comply with a requirement of a notice given to the person under section 66D(2), the maximum penalty for summary conviction is a fine at level 6 (i.e. HK\$100,000) and imprisonment of 6 months, while the maximum penalty for conviction on indictment is a fine of HK\$1,000,000 and imprisonment for 2 years.

A person commits an offence under section 66I(1) if, when any power is being exercised under section 66G or 66H, the person, without lawful excuse, obstructs, hinders or resists the Commissioner, a prescribed officer, or a person authorised by the Commissioner for the purposes of section 66H or a person assisting the Commissioner or a prescribed officer. The maximum penalty is a fine at level 3 (i.e. HK\$10,000) and imprisonment for 6 months.

Rights of a Person

Privilege against self-incrimination. Section 66E(7) provides that a person is not excused from complying with a requirement of a notice given to the person under section 66D(2) only on the ground that to do so might tend to incriminate the person. **In other words, there is no right to silence.** However, pursuant to section 66F, if (i) the answer, directions, explanation, particulars or statement (required matter) might tend to incriminate the person, and (ii) the person claims, before giving or making the required matter, that it might so tend, the requirement, question and required matter are *not* admissible in evidence against the person in criminal proceedings other than those in which the person is charged in respect of the required matter with (i) an offence under section 66E(2), i.e. with an intent to defraud, provide false and misleading material, answer, direction, explanation or particulars to the Commissioner or (ii) an offence in relation to “perjury” under Part V of the Crimes Ordinance (Cap. 200).

Legal professional privilege (LPP). A person may make a claim of LPP in the course of investigation. If any prescribed officer executing a warrant considers that a valid claim of LPP exists, he shall (i) not examine the materials in respect of which LPP is claimed; (ii) seize those materials and seal them in an envelope or other suitable container; and (iii) deposit the sealed materials in the premises, and seek further legal advice on the matter at the earliest opportunity.

Implications

The Commissioner is empowered with extensive investigatory powers with regard to doxxing offences. The Commissioner may even access electronic devices without warrant in certain circumstances. The Amendment Ordinance demonstrates the Government's determination to combat doxxing acts. Businesses should be prepared to facilitate the Commissioner's investigation whenever a written notice under section 66D(2) is issued or whenever the Commissioner exercises its power to search premises and access electronic devices under section 66G.

Serving writs in Mainland China by public announcement

Genevieve Lam

Hong Kong has a number of mutual arrangements with Mainland China for judicial assistance for civil and commercial cases. The Mutual Service of Judicial Documents in Civil and Commercial Proceedings between the Mainland and Hong Kong Courts (Arrangement) provides an official channel for Hong Kong to make requests to the Mainland for service of judicial documents in civil and commercial proceedings.

In a recent telephone fraud case, *Su Xin & another v Qian Xiaochun* [2021] HKDC 1056, the Hong Kong District Court granted the Plaintiffs leave to make substituted service of the Concurrent Amended Writ on the Defendant in the Mainland by way of public announcement.

The Plaintiffs' claim arose from a telephone fraud scheme, by which the Plaintiffs had been deceived into making two money transfers into the Defendant's bank account in Hong Kong. Upon investigation by the Hong Kong police, the Defendant was found to be a Mainland Chinese resident with a last known address in the Mainland. However, his/her whereabouts were unknown.

This was the Plaintiffs' appeal against the Master's decision refusing to grant the Plaintiffs leave to make substituted service of the Concurrent Amended Writ on the Defendant in the Mainland by way of public announcement pursuant to:-

- (1) Articles 85 to 92 Civil Procedure Law of the PRC;
- (2) the Arrangement; and
- (3) Rules of District Court.

When considering the appeal, the Court had the benefit of reading the following documents:-

- (1) Letter from the Supreme People's Court of the PRC (SPC) dated May 2014 in which the SPC cited Mainland law governing service, where the person's whereabouts are unknown, and stating that service of legal documents under business jurisdiction could be served in accordance with the law of the country of the one to be served and it was clear that under the Civil Procedure Law of the PRC, public announcement is a prescribed mode of effecting service. Therefore, if such service is specified by the High Court of Hong Kong in its requests pursuant to the Arrangement, service by public announcement would appear possible for the Mainland courts to consider acceding to;
- (2) Letter from DoJ to the Law Society dated 29 May 2014: to answer questions raised by the Law Society about effecting substituted service for Matrimonial Proceedings in the Mainland.
- (3) Letter from Plaintiffs' then solicitor to Registrar of High Court requesting Service of Judicial Documents in Mainland to effect service of the Concurrent Amended Writ and documents to Defendant;
- (4) Letter from the Registrar of High Court to Plaintiffs' then solicitors dated 21 October 2020 enclosing the Return Form which said that personal service on the Defendant had failed, with documents returned;
- (5) Affirmation setting out the relevant provisions in PRC Civil Procedure and stating public announcements to be an appropriate permitted method in this case for the purpose of effecting substituted service on the Defendant; and

- (6) Interpretation and application of the “Arrangement of the Supreme People’s Court on Mutual Entrustment in Service of Judicial Documents in Civil and commercial Matters between the Courts of the Mainland and the Hong Kong Special Administrative Region”: An article published by the SPC stating that in practice, if service cannot be effected through the Arrangement or by other means in order to protect the rights of the party situated in Hong Kong, service by way of public announcement should be made, as a final means to confirm service of proceeding.

The Court allowed the appeal, holding that public announcement is a prescribed mode of service in the Mainland and is not excluded by the Arrangement. Therefore, if such service is specified by the High Court of Hong Kong in its request pursuant to the Arrangement, service by public announcement is possible for the Mainland courts to consider acceding to.

An order was made that service of the Plaintiffs’ Amended Writ and all subsequent documents in the action on Defendant be substituted by posting a notice of the proceedings once, with copies of the same documents as a public announcement on the bulletin board of the People’s Court Tianning, Changzhou, Jiangsu in Mainland; such service to be done through proper procedures under the Arrangement.

Comments

This judgment usefully confirms that in circumstances where a defendant to proceedings who is resident in Mainland China cannot be located, public announcement is a prescribed mode of service of the writ on the defendant and is not excluded by the Arrangement.

SFC disciplined sponsors for inadequate due diligence and disclosure

Peter So and Mandy Pang

In October 2021, the Securities and Futures Commission (SFC) reprimanded Yi Shun Da Capital Limited (YSD) and Ample Capital Limited (ACL) and fined them HK\$3 million and HK\$5.5 million respectively, for failing to discharge their duties as sponsors in listing applications in 2016 and 2017. Those disciplinary actions underscore the importance for sponsors to carry out adequate due diligence and make adequate disclosure in listing applications.

Role of Sponsors

Sponsors play a pivotal role in initial public offering activities. Their responsibilities include:

- Advising and guiding a listing applicant as to the Listing Rules and other relevant regulatory requirements.
- Conducting reasonable due diligence.
- Ensuring the listing document provides sufficient particulars and information for investors to form a valid and justifiable opinion of the listing applicant’s shares, financial condition and profitability.
- Ensuring that the information in the listing application submitted on behalf of a listing applicant to The Stock Exchange of Hong Kong Limited (HKEX) is substantially complete.

Sponsors under SFC’s Scrutiny

Given the critical role of sponsors in initial public offering activities, in recent years, the SFC has closely scrutinised sponsors’ work and taken disciplinary actions against a number of sponsors for different failures, including inadequate due diligence and neglecting red flags.

YSD and ACL’s failures

In October 2021, the SFC reprimanded and fined both YSD and ACL for failing to carry out adequate due diligence and make adequate disclosure in listing applications.

YSD's failures

YSD was the sole sponsor in the listing application of Imperial Sierra Group Holdings Limited (Imperial Sierra) in 2017.

HKEX identified in the listing application that there was a possible circular flow of funds which gave the appearance that Imperial Sierra was in a strong financial position. The listing application lapsed six months after submission.

The SFC later found that before submitting the listing application, YSD had failed to perform all reasonable due diligence on Imperial Sierra in respect of:

- Third party payments representing 67.5%, 67.8% and 39.7% of Imperial Sierra's revenue in the three-year period before the listing application, which the SFC believed was for disguising the original source of funds and facilitated a deceptive or fraudulent scheme. YSD had failed to obtain and review the underlying documents in relation to the arrangements and to make appropriate follow-up enquiries to address a number of red flags concerning the third party payments when conducting due diligence.
- Suspicious transactions, which raised concern whether Imperial Sierra and/or its chairman had provided financial support to some of the customers' payments and pointed to a possible circular flow of funds.
- Withdrawals made by Imperial Sierra's chairman / controlling shareholder for facilitating various loan and investment arrangements between himself and various individuals who may have connections with the third-party payors. YSD did not obtain or review the underlying documents in relation to the finance arrangements before submitting the listing application.

The SFC found that YSD had failed to ensure disclosure of all material information in the prospectus, including, details and particulars of the relationships between Imperial Sierra's customers and their third party payors, the reasons for the third party payments, and the explanations for the suspicious transactions.

The SFC found that YSD was culpable of misconduct in its conduct of the listing application of Imperial Sierra and that it was not a fit and proper person to remain licensed. YSD was reprimanded and fined HK\$4.5 million. The SFC also prohibited its former responsible officer and chief executive officer from re-entering the industry for 20 months.

Subsequently, YSD sought a review of the SFC decision. The Securities and Futures Appeals Tribunal (SFAT) reviewed and upheld the SFC's decision but varied the fine imposed on YSD from HK\$4.5 million to HK\$3 million. The SFAT opined that:

- A sponsor's obligation is two-fold. On one hand, a sponsor has an obligation to the listing applicant. On the other hand, a sponsor has an obligation to the HKEX in relation to the listing application and to investors generally in respect of the prospectus.
- A sponsor must act with independent professionalism in ensuring that all information placed before the HKEX and investors generally is fully, fairly and accurately presented.
- A sponsor should examine the accuracy and completeness of representations made to it by the representatives of the listing applicant and do so with the necessary degree of professional scepticism. A sponsor fails to discharge reasonable due diligence by simply relying on bland management representations without sufficient details, when seeking to verify information that on its face may be problematic.
- A sponsor is required to conduct additional due diligence where it becomes aware of circumstances that may cast doubt on the information provided to it.

ACL's failures

ACL was the sole sponsor in the listing application of COCCI International Limited (COCCI) between 2016 and 2017. After COCCI submitted its listing application (1st Application), the SFC and HKEX made various comments on COCCI's wholesale business.

COCCI thereafter re-submitted another listing application (2nd Application) and the SFC and HKEX made further comments following the 2nd Application. The SFC and HKEX took the view that the revised prospectus submitted by COCCI still failed to explain and provide sufficient information on COCCI's wholesale business. ACL did not respond to the SFC and HKEX's comments. The listing application later lapsed.

SFC found that:

- ACL failed to conduct adequate due diligence on suspicious cash settlements received by COCCI and keep proper records of its due diligence work. In particular, ACL failed to assess the reasons behind the suspicious

cash settlements and failed to conduct independent due diligence to ascertain the truth and completeness of COCCI's representations.

- ACL failed to ascertain the background and independence of a major wholesale distributor of COCCI and its associates, and to assess the reasonableness of COCCI's sales to the distributor. ACL did not seek to obtain any objective data to verify the information provided. ACL only performed further due diligence after COCCI submitted the 1st Application and received comments from the HKEX and SFC.
- ACL failed to critically assess the reliability of the shipping documents provided to it by COCCI before relying on them as part of its due diligence. ACL also failed to identify red flags which cast doubt on the reliability of the shipping documents.

ACL was reprimanded and fined HK\$5.5 million, and the responsible officer and sponsor principal of ACL in charge of supervising the execution of the listing application had his license suspended for 17 months.

Takeaways

- Sponsors not only have obligations to the listing applicants, but also to the HKEX in respect of the listing applications and to investors generally in respect of the prospectuses.
- Before listing applications are submitted, sponsors should perform reasonable due diligence. When sponsors come across information which is dubious or shows a potential problem in the due diligence process, sponsors cannot simply take the representations of the representatives of the listing applicants at face value, but should, in the words of the SFAT, examine the accuracy and completeness of management representations "**with the necessary degree of professional scepticism**" and conduct additional due diligence.
- Sponsors should ensure disclosure of all material information in the prospectuses and disclosure of all material issues to the HKEX for their consideration as to whether the listing applicant is suitable for listing.
- Sponsors will not be absolved from liability and will still, potentially, be held liable for inadequate due diligence and disclosure in the listing applications even though the listing applications lapsed or were rejected and no harm was caused to the investing public.

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