Baker McKenzie.

Client Alert

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Hong Kong: Fuelling Growth - Data transfers in the Guangdong-Hong Kong Greater Bay Area

In brief

Regulatory measures came into force at the end of 2023 to facilitate cross-border transfers of personal data between Guangdong Province ("**Guangdong**") and Hong Kong ("**GBA Measures**"). The recent relaxation of the cross-border data transfer (CBDT) regime at a national level may make the GBA Measures less appealing to some companies in the Chinese Mainland ("**China**", in this article, for the sake of brevity), but the GBA Measures will still be useful to companies which operate in Hong Kong and Guangdong that need to transfer **sensitive personal data** or large volumes of personal data across the Greater Bay Area (GBA), such as those in the healthcare and financial sectors, or those with a large base of data subjects in Guangdong and a regional office in Hong Kong that conduct cross-border transfers of personal data (e.g., customer data) on a regular basis.

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We now live in an era characterised by globalization and intricate digital connections. The access, utilisation, and exchange of data across borders is crucial for many multinational corporations operating in sectors such as manufacturing, retail, healthcare, and technology, which heavily rely on data and its global flow, and yet the legislative restrictions in China on outbound data flows are arguably the most restrictive in the world. The Provisions on Facilitating and Standardizing Cross-Border Data Flows ("**New CBDT Rules**") and the Standard Contract for the Cross-boundary Flow of Personal Information within the Guangdong-Hong Kong-Macao Greater Bay Area (Mainland, Hong Kong) ("**GBA Standard Contract**") regime, together with the GBA data transfer certification regime (once finalised), will facilitate the inward and outward movement of data, making it easier for multinational corporations with a presence in China and Hong Kong to manage and process their data. Whether the more relaxed regime that is now in place in the GBA is ultimately rolled out across China more broadly remains to be seen.

In depth

Facilitation measures have been in place since December 2023 to facilitate cross-border transfers of personal data between nine cities in Guangdong (namely Guangzhou, Shenzhen, Zhuhai, Foshan, Huizhou, Dongguan, Zhongshan, Jiangmen, and Zhaoqing) and Hong Kong, which, together with Macau, form the GBA. There are currently no in-force rules in Hong Kong on transfers of personal data to a place outside Hong Kong, therefore calling into question the extent to which organizations in Hong Kong would wish to avail themselves of the benefits of the GBA Measures. The GBA Measures, however, represent a relaxation of the restrictions in place under the Personal Information Protection Law of China (PIPL) that would apply to transfers of personal data from Guangdong to Hong Kong.

In a twist to the story, the Cyberspace Administration of China (CAC) issued on 22 March 2024 the long-awaited New CBDT Rules, which took effect from the same date, after having published a draft of such provisions on 28 September 2023. The New CBDT Rules aim to respond to concerns and complaints raised by many companies operating in China about the onerous

obligations on CBDTs and greatly relaxed the relevant restrictions then in place (see our China team's client alert on this development for more detail).

In this article, we examine what the GBA measures consist of, how they differ from the existing regimes in China and in Hong Kong, how they have been received four months on from their introduction and their relevance in light of the New CBDT Rules.

Background

On 29 June 2023, the Innovation, Technology and Industry Bureau (ITIB) of Hong Kong and the CAC signed the Memorandum of Understanding on Facilitating Cross-boundary Data Flow within the Guangdong-Hong Kong-Macao Greater Bay Area (MOU) to jointly promote cross-boundary data flows within the GBA. Following an announcement that a pilot program would be launched to streamline the CBDT arrangements within the GBA, the ITIB and CAC on 13 December 2023 jointly formulated the GBA Standard Contract, together with its Implementation Guidelines.

Hong Kong's CBDT restrictions

In Hong Kong, Section 33 of the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO) prohibits the transfer of personal data to places outside of Hong Kong except where specified conditions are met, although this provision has not come into force. However, the Office of the Privacy Commissioner for Personal Data (PCPD) has issued two non-binding guidelines in 2014 and 2022 to prepare for the implementation of Section 33, including two sets of Recommended Model Contractual Clauses for Cross-border Transfers of Personal Data, one for transfers from a data user (i.e., the equivalent concept to a personal information processor (PIP) under the PIPL and a data controller under the GDPR and the laws of some other jurisdictions) to another data user, and one for transfers from a data user to a data processor.

China's CBDT restrictions - now that the New CBDT Rules have come into effect

By contrast, the regulatory regime for CBDTs in China was (until the New CBDT Rules came into force) much more robust, with relatively lower data volume thresholds triggering formality requirements.

The main changes to China's CBDT regime with the New CBDT Rules are as follows:

1. **Raising the thresholds for triggering formality requirements**: The CAC has raised the threshold numbers of individuals whose personal data is exported from China that would trigger the need for the exporting PIP (provided that such data is not classified as "important data" and the PIP is not a critical information infrastructure operator (CIIO)) to complete the formality requirements. Such changes will result in the exemption of more PIPs from the security assessment requirement or even from all formality requirements, namely:
    a. Since January 1 in the **current** (not preceding) calendar year, the PIP has transferred overseas personal information of **1 million** (not 100,000) or more individuals residing in China or sensitive personal information of 10,000 or more individuals.
    b. The "small-scale data exporter exemption": a PIP that has exported non-sensitive personal information of less than 100,000 individuals since January 1 of the current calendar year does not need to complete **any** formality requirement, including the conclusion and filing of a standard contract for personal information export ("**China SCCs**").
    c. There is no longer any linkage between the sheer number of individuals whose personal information is processed in China (but not exported) and the requirement to complete a security assessment review.
2. **Other exemptions from the formality requirements**: In certain other scenarios, PIPs will not need to file the China SCCs or complete other formality requirements when exporting non-sensitive personal information (that is not "important data") from China, namely:
    a. Personal information in transit, i.e., that was collected and generated outside China and transmitted to China for domestic processing.
    b. Contracting exemption: the PIP exports personal information where it is necessary to do so for the purpose of concluding or performing a contract to which the individual is a party, such as for cross-border shopping, cross-border posting and delivery, cross-border fund remittance, etc.
    c. HR Management Exemption: the PIP exports employees' personal information where it is necessary to do so for the purpose of implementing cross-border human resources management in accordance with labor rules and policies.
    d. Emergency Exemption: the PIP exports personal information where it is necessary to do so for the purpose of protecting life, health of individuals and the safety of their property in emergencies.

3. **Clarifications made by the CAC:**
    a. A CIIO will be notified by competent governmental authorities of its status as a CIIO.
    b. Unless certain data (a) has been clearly identified by competent governmental authorities as "important data", or (b) falls into any published catalogues of "important data", a PIP may treat its data as non-important data.
    c. In updated implementation guidelines released by the CAC concurrently with the New CBDT Rules, the CAC has amended and clarified the requirements for certain application materials, and lowered the granularity requirements for relevant risk/impact assessment reports that are required to be submitted.
4. **Free trade zones (FTZs) and "negative lists"**: Authorities in various FTZs in China have been empowered to issue their respective "negative lists", meaning that for PIPs located in the FTZs, only those CBDT activities that fall under the "negative lists" would be subject to the applicable formality requirements. At present, authorities in FTZs in Lingang, Shanghai, and Tianjin are reported to be in the process of "negative list" formulation.

The GBA Standard Contract and the key differences with the China SCCs

The GBA Standard Contract allows individuals and organizations in the nine cities in Guangdong and Hong Kong to enter into a standard form contract on a voluntary basis for conducting cross-border transfers of personal information from these cities to Hong Kong and vice versa, streamlining the compliance requirements for CBDT from Guangdong to Hong Kong. Like the existing China SCCs, the GBA Standard Contract provides for the respective obligations and responsibilities of the PIP and personal information recipient, as well as the rights of the personal information subject. The parties entering into a GBA Standard Contract must set out the details of the cross-border transfer of personal information, such as the purposes and means or processing and the categories of personal information to be transferred. If there are any changes to such details, or if there are any other circumstances that affect or may affect either party's performance of the GBA Standard Contract, the PIP must conduct a personal information protection impact assessment (PIPIA) afresh, enter into a supplemental agreement or a new GBA Standard Contract, and conduct the corresponding filing procedures.

Similar to the New CBDT Rules, the Implementation Guidelines indicate that companies may deem their data as non-important data unless otherwise classified or promulgated by the relevant authorities. This is a welcomed approach.

Nonetheless, there are some key aspects in which the GBA Standard Contract provides a more lenient mechanism for CBDTs than the China SCCs:

- **No volume threshold and a broader scope of application:** Under the New CBDT Rules, there is still a maximum amount of personal information that companies are allowed to transfer overseas by using the China SCCs. If the proposed transfer exceeds specific thresholds of quantities of personal information, then the only transfer mechanism that would be available in such case is the CAC-led security assessment review. The CAC-led security assessment review has proven to be time-consuming, costly in terms of the professional advisory support required to file the application and respond to requests from the CAC, and ultimately uncertain and inconsistent in terms of duration and outcome. However, under the GBA Standard Contract, no such limits apply, provided that "important data" is not involved.
- **Pre-contractual impact assessment:** Both regimes require PIPs to conduct a PIPIA before entering into a standard contract in order to assess the risks and impact of the proposed transfer. Under the regime of the China SCCs, a PIPIA report is required to be filed with the regulators. This obligation is considered to be onerous, and various corporations have been concerned by the level of detail required to be disclosed in the report. However, under the GBA Standard Contract regime, this requirement has been removed and while a PIPIA must be conducted, a report does not need to be filed.
- **Regulatory oversight:** Under the regime of the China SCCs, the offshore recipient of personal information must submit to the supervision and management of the CAC and demonstrate compliance with the terms of the China SCCs by responding to inquiries from time to time and producing documentary evidence. With the GBA Standard Contract, the receiving party is still required to accept regulatory oversight of the CAC, but it is the PIP that must provide the relevant documents to the regulators.
- **Dispute resolution:** The China SCCs mandate that the governing law of the contract must be PRC law, which might be a concern for some multinational corporations. This restriction is removed from the GBA Standard Contract to the extent that Hong Kong law may apply where personal data is transferred from Hong Kong to any of the nine cities in Guangdong.
- **Simplified filing procedure:** Apart from removing the requirement to submit a PIPIA report, the GBA Standard Contract also streamlines the filing procedure in comparison to the regime of the China SCCs and requires only the executed Standard Contract, an undertaking letter and a copy of the legal representative's identification documents to be submitted for filing.

Generally speaking, PIPs in China outside of the GBA will continue to use the China SCCs for CBDTs, unless an exemption applies or unless those transfers are subject to the CAC-led security assessment. For PIPs in the GBA, using the GBA Standard Contract regime represents a less stringent mechanism than the options under the New CBDT Rules pursuant to the PIPL for them to transfer personal information between Guangdong and Hong Kong, particularly in respect of large-volume transfers of non-sensitive personal information, where a security assessment could still be triggered under the New CBDT Rules.

Application of the GBA Standard Contract regime in Hong Kong and Guangdong

The PCPD issued, on 13 December 2023, the Guidance on Cross-boundary Data Transfer: Standard Contract for Cross-boundary Flow of Personal Information Within the Guangdong - Hong Kong - Macao Greater Bay Area (Mainland, Hong Kong), to guide data users how to use the GBA Standard Contract. It also makes clear the following points:

- Data users are still required to comply with the requirements under the PDPO when they transfer personal data to places outside Hong Kong, including those cities in Guangdong to which transfers are permitted in the context of the GBA Standard Contract (since no onward transfers to places outside of the GBA are permitted).
- The requirements under the Implementation Guidelines do not affect the Privacy Commissioner's supervisory and management roles within the scope of its functions under the PDPO, including the handling of complaints and reports relating to personal data protection, conducting investigations and dealing with activities involving unlawful handling of personal data.
- According to the GBA Standard Contract:
    - "Personal information" processed by PIPs in the nine Guangdong cities shall be determined in accordance with the PIPL, while personal information processed by PIPs in Hong Kong shall be subject to the definition of "personal data" under the PDPO.
    - In relation to China, "personal information processor" refers to an organization or individual that autonomously determines the purposes and means of personal information processing (i.e., a PIP); in relation to Hong Kong, this includes a "data user" as defined under the PDPO.
    - In relation to China, "personal information subject" refers to the natural person identified by or associated with the personal information; in relation to Hong Kong, it includes a "data subject" as defined under the PDPO.

If a data user registered or located in Hong Kong intends to conduct CBDTs to the nine Guangdong cities and the recipient meets the requirements of a PIP and a recipient under the GBA Standard Contract respectively, the Privacy Commissioner encourages them to adopt the GBA Standard Contract for cross-border transfers of personal data. For other cross-border transfers of personal data, the Privacy Commissioner states that data users and recipients may continue to use the Recommended Model Contractual Clauses for Cross-border Transfers of Personal Data.

On 4 January 2024, the Guangdong CAC released the Notice on the Implementation of the Guidelines for the Standard Contract for Cross-Border Flow of Personal Information in the Guangdong-Hong Kong-Macao Greater Bay Area (Mainland, Hong Kong). The Notice further clarifies the scope of application, filing methods, and filing procedures for the GBA Standard Contract from the perspective of applicants in the listed cities in Guangdong.

How the GBA Standard Contract regime has been received so far

An "early and pilot implementation" arrangement for the GBA Standard Contract, which invites participation from banking, credit referencing and healthcare sectors, is being implemented as a first phase of the regime by the Office of the Government Chief Information Officer (OGCIO) of Hong Kong. According to inquiries made of the OGCIO, as of 31 December 2023 (the deadline for submission of Expressions of Interest (EoI)), the OGCIO had received a total of about 70 EoIs, about half of which came from the healthcare sector, and the rest coming from the banking and credit referencing sectors. According to the EoIs received, about one-third of the respondents expected to conclude the signing of the GBA Standard Contract with their China partners, conduct PIPIAs and complete the filing procedures within one to three months, while another one-third expect to complete the related work within six months. After the deadline of EoI submission, the OGCIO continued to receive dozens of EoIs (including some from other sectors) which, the OGCIO suggests, the GBA Standard Contract regime has been well received by the private sector.

The ITIB and OGCIO plan to review the arrangements in mid-2024, with a view to extending the GBA Measures to different business sectors.

Unlike the Hong Kong pilot scheme, which currently invites participation of entities from three specific sectors, the Guangdong CAC welcomes submissions from all industries. When contacted informally by phone, the Guangdong CAC declined to disclose a rough estimate of the number of filings but indicated that a lot of telephone inquiries have been received. We also understand that the number of submissions filed by entities in the healthcare, banking and finance industries is slightly higher than those in other industries. It is possible that many organizations are still preparing their submissions, as this GBA Standard Contract regime is relatively new.

The fact that a personal information recipient is not permitted to make onward transfers of the data received to a place outside of the GBA under the GBA Standard Contract regime limits the appeal of this regime to some multinational corporations. However, it may still be useful for a company with a large base of data subjects in Guangdong and a regional office in Hong Kong. For example, a Hong Kong-based company may establish or manage a GBA customer relationship management (CRM) program more easily.

The need for further clarification

There are issues which would benefit guidance and clarity from the CAC and the ITIB with respect to the GBA Standard Contract regime. For instance, if a PIP located in a relevant city in Guangdong that is already using the China SCCs to transfer data overseas and intends to use the GBA Standard Contract going forward for transfers of personal data to Hong Kong, can it rely on the existing consent it has obtained from a personal information subject for overseas transfer of their personal data, to the extent that it disclosed Hong Kong as a recipient territory when collecting the initial consent, or would it need to obtain fresh consent from the same personal information subject? Would it be permissible for a company located in Beijing, for example, to collect personal information there and transfer it to its affiliate in one of the listed Guangdong cities under the GBA regime and then transfer such personal information to Hong Kong using the GBA Standard Contract?

Furthermore, it appears that Macau is currently omitted from the GBA Standard Contract regime. There are certain groups who have advocated Macau's inclusion in the regime.

The GBA Standard Contract regime and the New CBDT Rules are welcomed relaxations of CBDT restrictions in China - will there be further relaxation to come?

Under the New CBDT Rules, compliance with the formality requirements is no longer necessary for transfers of data falling outside of the "negative lists" determined and issued by the FTZs in China. It will be interesting to see whether and when the Guangdong FTZs (which includes Nansha district in Guangzhou, and Qianhai and Shekou districts in Shenzhen) will announce that they are in the process of formulating their own "negative lists".

Indeed, outside of the GBA, even prior to the New CBDT Rules, various cities/areas in China have also been putting in place relaxed CBDT rules. For example, in relation to the Shanghai FTZ (including the Lingang Special Area), the State Council issued a circular in December 2023 which provides that financial institutions will be allowed to transfer data overseas necessary for daily operations under the framework of a national security management system for CBDTs. It also urges the Shanghai FTZ to take a pioneer role in facilitating cross-border data flows, including establishing a "negative list".

Now that both the New CBDT Rules and the GBA Measures are in force, we hope that the issuance of "negative lists" by the FTZs in China, and more details on the GBA data transfer certification regime that has been proposed, will complement the existing mechanisms for exporting data from China as part of the next wave of liberalization of the CBDT restrictions.

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