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## *Letter of No Consent Regime under Judicial Review*

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### 1. INTRODUCTION

In Tam Sze Leung & Others v Commissioner of Police [2021] HKCFI 3118, the High Court of Hong Kong (the “**High Court**”) had revisited whether the operation of the letters of no consent (the “**LNCs**”) regime in the context of sections 25 or 25A of Organized and Serious Crimes Ordinance (the “**OSCO**”) to freeze account established with financial institution (e.g. bank or securities account) is lawful and not unconstitutional. In a nutshell, the High Court ruled that the LNCs regime is unlawful and unconstitutional on the ground that it is (i) ultra vires; (ii) not prescribed by law; and (iii) disproportionately interfering with individuals’ constitutional rights to property.

### 2. THE LNCs REGIME

As a matter of prevailing practice, where the Police of Hong Kong (the “**Police**”) suspects that the funds in account consist of tainted money, LNCs will be issued to the relevant financial institutions where the accounts are established to put a hold on the operation of the accounts concerned. A statement made by the Police certifying that it no longer consents any further operation of the accounts is usually comprised of in the LNCs. The above practice is known as “LNCs” regime.

A striking example triggering the issuance of the LNCs is when account is connected with money laundering activities. In such event, the Police is used to purportedly exercise its power under sections 25 and 25A of the OSCO to suspend the operation of the account. This is a longstanding practice adopted by the Police.

Under the case of Tam Sze Leung & Others, the LNCs regime was under judicial review.

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### 3. CASE BACKGROUND

The case concerns 12 applicants (the “**Applicants**”) who are family members and collectively holding 12 bank accounts in Hong Kong. They were under investigation by the Securities and Futures Commission for the suspected offence of “stock market manipulation” contrary to the Securities and Futures Ordinance.

Stock market manipulation may fall within money laundering activities and fund involved therein may be regarded as tainted money. LNCs were subsequently issued by the Joint Financial Intelligence Unit (“**JFIU**”) of the Police. The Applicants eventually made an application for judicial review against the LNCs issued by JFIU.

### 4. FOUNDATIONS OF JUDICIAL REVIEW AND RULING

The Applicants put forward six grounds in support of the application as listed out as follows:

- (1) The LNCs is in breach of procedural justice and unfair;
- (2) The LNCs regime is ultra vires OSCO;
- (3) Interference with the Applicants' constitutional rights under the LNCs regime is not prescribed by law;
- (4) The LNCs regime deprives the Applicants of the right to a fair hearing;
- (5) The LNCs regime disproportionately interferes with the Applicants' rights to property, privacy and family; and
- (6) The LNCs constitutes an unlawful "blanket freeze" of the relevant accounts.

The High Court held that only grounds (2), (3) and (5) above are made out and that the LNCs regime unconstitutional.

## 5. **KEY TAKE-AWAYS**

It is doubtful whether the operation on the LNCs regime is being put on a complete hold following the above case and it remains to be seen as to how far-fetched the implications of the case are. The reasons as elaborated hereinafter.

In the first place, the judgment is handed down by the High Court which is not ranked on the top of the hierarchy in the judicial system of Hong Kong. Secondly, the legislature may consider appropriate amendments to OSCO to expressly empower the Police to operate the LNCs regime.

In any event, the case has significant impact on banks or brokers. While banks or brokers are obliged to comply with the LNCs, the banks or brokers may now find it difficult to solely rely on the LNCs which was held unlawful and unconstitutional as a shield for freezing the accounts. No doubt, this will put banks or brokers into a dilemma. It is therefore suggested that, if it is not provided in the general terms and conditions, banks or brokers resort to revising its general terms and conditions to provide them with full power and rights to suspend accounts where, in their reasonable opinion, the accounts' operation is suspicious or irregular.

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*This explanatory note is not, and should not be regarded as, legal advice. Should you have any enquiries, please seek specific advice from legal advisers.*

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