

How's the personal information protection certification in China?



CHINA

Ever since the promulgation of the Personal Information Protection Law ("PIPL"), enterprises anticipate this new law could provide a solution to legitimize cross-border transfer of personal information ("PI"). It is true that Article 38 of the PIPL provides some conditions on cross-border data transfer and the PI processor (or, PI handler according to the PIPL, equivalent to the concept of the data controller under the General Data Protection Regulation) only needs to meet one of them before conducting cross-border PI transfer.

Per the item 2 of Article 38 of PIPL, where any PI processor has business necessity to transfer PI outside mainland China, the PI processor may choose to obtain a PI protection certification issued by professional institution according to the relevant requirements set by the Cyberspace Administration of China ("CAC"). However, many enterprises get lost on how to meet this condition due to lack of guidance in practice.

Many multinationals who are keen on data compliance look forward to a solution to legitimate cross-border PI transfer for good and all. As the PIPL also encourages qualified institutions to provide PI protection certification and assessment services, it seems that PI protection certification could be a possible and good choice. In fact, many multinationals already have made efforts to improve their data compliance situation by obtaining relevant data/privacy certification from existing service providers on the market.

So, who are the relevant service providers in China? Are they qualified to meet the article 38 of the PIPL as PI protection certification service providers?

In data privacy fields, some certifications are already widely and globally known, such as ISO certifications (e.g., ISO/IEC 27001, ISO/IEC 27701 and ISO/IEC 29151). In mainland China, for example, CCRC (China Cybersecurity Review Technology and Certification Center) also has a certification on the security aspect of mobile applications. However, currently neither the PIPL nor other circulars issued by CAC has confirmed any of those certifications as a legal basis to legitimize cross-border PI transfer. So far, even some multinationals who have already obtained some certifications on data and/or privacy protection, still wonder what else is or could be required in China for cross-border PI transfer.

Recently, a draft national standard released in late April 2022 provides a clue.

The National Information Security Standardization Technical Committee released a draft national standard of Technical Specification of Personal Information Cross-border Processing Activities ("Draft Standard"). Though it is still a draft, it is of value for enterprises to know what would be the key aspects or condition precedent to be assessed for cross-border PI protection certifications.

THIS DRAFT STANDARD INTRODUCES PI PROTECTION CERTIFICATION IN THE FOLLOWING ASPECTS.

I. APPLICABLE SCENARIOS, METHODS AND PRINCIPLES OF CERTIFICATION

The Draft Standard provides that in cross-border PI processing activities, normally it should be the party which is in mainland China to apply for the PI protection certification. The party can be the PI processor which acts as data exporter or the Chinese institution which acts as the representative of a foreign PI processor. Per this Draft Standard, it does not clearly exclude the foreign entity from applicable applicants yet. Thus, it is to be seen in the future in the approved version of this Draft Standard and in practice that whether a foreign enterprise can apply for PI protection certification in mainland China.

As for principles, this Draft Standard also emphasizes on that cross-border PI transfer should still comply with the basic mandatory requirements set forth by the PIPL throughout the PI processing activities (e.g., processing based on legal basis, respect principles of data minimization, data quality, equivalent protection, accountability).

II. BASIC REQUIREMENTS (ABOUT PI CROSS-BORDER PROCESSING RULES AND PI IMPACT ASSESSMENT “PIA”)

This Draft Standard confirms that the data exporter and data importer should conclude legally binding documents to ensure the PI rights of data subjects are protected, and lists the necessary content to be included in such legal documentation, such as:

1. Parties involved in the cross-border PI processing activities;
2. The categories and scope of the PI involved in the cross-border PI processing activities;
3. Measures implemented for the protection of the PI of the data subjects;
4. Parties undertake to comply with the PI processing principles and guarantee that the PI involved will be protected at a level equivalent to that required by the PRC laws and regulations;
5. Parties undertake to be supervised by the qualified certification institution(s) and the PRC applicable laws and regulations; and,
6. The institution located in mainland China to be legally responsible for the PI processing activities should be specified.

In addition to the legal documentation requirements, both the data exporter and data importer should properly handle the PIA, designate their own PI protection officer (DPO) and/or department to be in charge of the PI protection, and clearly allocate their corresponding rights and obligations about the management of the PI after the transfer.

III. PROTECTION OF THE RIGHTS OF DATA SUBJECTS.

In this aspect, in addition to listing the PI rights and rights/obligations of the parties, this Draft Standard mentions that the data subject has the right to take legal actions with the People’s court of its habitual residence against the parties related to the cross-border PI transfer, and/or to lodge compliant/report to with the competent supervising authority.

The convenience offered for data subjects for protection of their rights could be a nightmare for data processors, especially when the data subjects are from different places. However, it is not necessary to be overly concerned at the current stage for this provision because it is of this Draft Standard, which is to be adjusted more or less before its official approval and release. What is relevant and needs to be considered is to keep consistency of the dispute resolution clauses in relevant privacy policies by which the PI is collected.

When it comes to PI protection, it is always not a pure legal/technical topic, but a complicated issue varying largely depending on the industries, scale of the data volume and purposes of the processing etc. As the PIPL officially promotes the transfer tool of PI protection certification, the relevant qualified service providers will arrive on the market sooner or later. It is also possible that some of them may be designated by competent authorities as they may to some extent lighten the burden of supervision of authorities. Therefore, PI protection certification mechanism gets the potential to be an important and prevailing tool to legitimize cross-border PI transfer. Currently, if the cross-border data flow goes on, we



suggest to comply with the existing mandatory requirements (e.g., data transfer contracts, PIA etc.) set by the PIPL.

We will keep an eye on the evolution of this Draft Standard and other rules and principles in related to cross-border data flow.

**Please note that this new national standard about cross-border PI transfer remains a draft at the current stage.*



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