

CAC Draft Provisions on Regulating and Promoting Cross-Border Data Flows: Exemptions from the strict data regime for personal information in China?

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I. Background

On September 28, 2023, the Cyberspace Administration of China (“CAC”) issued the *Draft Provisions on Regulating and Promoting Cross-Border Data Flows* (“Draft Provisions”) for public comments, providing for a substantive relaxation of the current regime for cross-border provision of personal information (“PI”).

The general preconditions for cross-border transfer of PI are set forth in the Personal Data Protection Law (“PIPL”)¹, which in Article 38 requires a PI processor, when providing PI to an overseas recipient outside of the People’s Republic of China (“China”), to:

- (1) Pass a security assessment organized by the CAC (“CAC Security Assessment”);
- (2) Pass a personal information protection certification conducted by a qualified institution (“Certification”); or
- (3) Enter into a contract with the overseas recipient of the PI according to the Standard Contract formulated by the CAC (“Standard Contract”) (the CAC Security Assessment, the Certification and the Standard Contract are jointly referred to as: “Three Preconditions”).²

Many small and medium-sized enterprises (SMEs) in China transferring only small volumes of PI abroad to e.g. their headquarters, struggle to comply with the Three Preconditions for their PI cross-border transfers due to the significant time and cost involved in implementing at least one of the Three Preconditions (see the below table) as well as the lack of implementing regulations for and practical experience with the Three Preconditions.

	CAC-Security Assessment	Certification	Standard Contract
Time	Min. 57 Working days	Ca. 110 Working days	Filing with the CAC (PIPIA takes time)
Costs	N/A	Application: 18.000 CNY Registration: 24.000 CNY Examination fee (person/day): 6.000 CNY Yearly fee: 50.000 CNY	X

With the publication of the Draft Provisions, many foreign invested SMEs in China breathed a sigh of relief, expecting a significant relaxation of their PI cross-border transfers.

II. Exemptions from the Three Preconditions

According to Article 3 of the Draft Provisions, the Three Preconditions are not required to be met for “cross-border provision of PI that was not collected or generated in China”. This would apply to PI,

¹ Personal Data Protection Law of the People’s Republic of China, effective November 1, 2021.

² For more information on the Three Preconditions, please see our English article “How to Transfer Your Data Out of China” at https://www.bktlegal.com/files/global/Nachrichten/20221025_BKT_Artikel_TICKER%20WINTER2022_Extrakt.pdf or in our German Articles „Sicherheitsbewertung für grenzüberschreitende Datentransfers aus China” at <https://www.bktlegal.com/files/global/Nachrichten/China%20Contact%202022%205-6%20Belegexemplar%20-%20BKT%20Artikel.pdf> and „Maßnahmen zum Standardvertrag für grenzüberschreitende Übermittlung personenbezogener Daten – Voraussetzungen für die Datenübermittlung aus China” at https://www.bktlegal.com/files/global/Nachrichten/20230415_BKT_Artikel_Standardvertrag_personenbezogene_Daten.pdf

which is for example collected in the headquarter abroad, subsequently provided to the subsidiary in China and afterwards transferred back abroad by the Chinese subsidiary. In this case, the Chinese subsidiary would not have to fulfill any of the Three Preconditions when transferring such PI abroad.

In Article 4, the Draft Provisions introduces three scenarios, under which PI cross-border transfers are exempted from the Three Preconditions. These scenarios include:

(1) Transfer of PI abroad **where necessary for the conclusion or performance of a contract, to which the data subject (individual) is a party**, such as for purchase contracts, money transfers, flight and hotel reservations etc.;

(2) **Necessary transfer of employees' PI to carry out human resources management in accordance with lawfully drafted labor rules systems** and lawfully concluded collective contracts; and

3) Necessary transfer of PI in urgent situations in order to protect the safety of the life, health and property of natural persons.

Besides the exemption under No. (1), which will be embraced i.a. by commerce platforms, travel agencies and financial services institutions, the exemption under No. (2) is highly relevant for HR departments of companies in China with their headquarters (HQ) abroad when transferring PI of their employees to their HQ or shareholders abroad. However, it should be noted that the term "necessity", which is a precondition for the three above exemptions, is not defined or further explained in the Draft Provisions.

Another important exemption from the Three Preconditions under Article 38 PIPL is in Article 5 of the Draft Provisions, stipulating that none of the Three Preconditions need to be met in case of cross-border provision of less than 10,000 PI within one year.

However, based on the wording of the PIPL, the Three Preconditions shall apply without any exemption and regardless of the purpose or data volume, with the consequence that even if one single PI is transferred cross-border, the PI processor must comply with one of the Three Preconditions before providing such PI abroad.

As the exemptions under the Draft Provisions contradict and therefore conflict with the stipulations on cross-border provision of PI under the PIPL, the question arises as to what would happen if the CAC issues the Draft Provisions without "resolving" the conflicts, i.e. abolishing the exemptions?

According to the Legislative Law³, if a subordinate law violates the provisions of a superior law, the competent authority shall amend or revoke such subordinate law. As the Draft Provisions - issued by the CAC as an administrative body under the State Council - are subordinate to and in conflict with the superior PIPL - issued by the National People's Congress - the Draft Provisions, if released in the wording of the 1st draft, may be amended or revoked by the State Council.

III. Exemption from the CAC Security Assessment

Further, according to Article 6 of the Draft Provisions, in case of cross-border provision of more than 10,000 and less than 1 million PI within one year, the CAC Security Assessment is not required, but one of the other two preconditions shall be met, i.e. a Standard Contract with the overseas recipient of PI must be concluded or the Certification must be passed. Passing the CAC Security Assessment is only required for cross-border transfer of more than 1 million PI.

It should be noted that the thresholds and the respective calculation period in Article 6 Draft Provisions differ from those in the Security Assessment Measures.⁴ According to the Security

³ The Legislative Law of the People's Republic of China, amended March 13, 2023.

⁴ Measures on Cross-border Data Transfer Security Assessment, issued by the CAC and effective since September 1, 2022.

Assessment Measures, the CAC Security Assessment is required when a data processor provides more than 100,000 PI or more than 10,000 sensitive PI abroad “since January 1 of the previous year”. Compared to the Security Assessment Measures, the Draft Provisions do not differentiate between “sensitive” or “non-sensitive” PI. This leaves the question open whether sensitive PI provided abroad shall be calculated based on the stricter Security Assessment Measures, which are also issued by the CAC. Based on the principles for resolution of conflicts between laws (Conflict Rules), one may argue that the Draft Provisions as the later law (*lex posterior*) derogate the Security Assessment Measures as prior law (*lex prior*). One may however also argue that the Security Assessment Measures as more specific law (*lex specialis*) have prior application to the Draft Provisions (*lex generalis*) including more general stipulations.

The Draft Provisions further do not mention the “amount of processed PI” as criterion⁵ for the CAC Security Assessment. Although the Draft Provisions stipulate in Article 11 that they supersede the Security Assessment Measures in case of conflicting stipulations, the question arises, whether the CAC Security Assessment can be exempted prior to the cross-border provision of PI in case the volume of PI is below the threshold as stipulated by the Draft Provisions, but equal or higher than the threshold for the “amount of processed PI” as stipulated under the Security Assessment Measures. It is therefore unclear, if a data processor, who processes more than 1 million PI in China – and therefore meets the threshold under the Security Assessment Measures – shall pass the CAC Security Assessment when providing less than 1 million PI abroad within one year and thereby does not meet the threshold under the Draft Provisions.

Furthermore, based on the wording of the Draft Provisions, the applicability of the thresholds in Article 6 in relation to the exemptions in Article 4 of the Draft Provisions is unclear. One possible interpretation is that the exemptions in Article 4 shall prevail over the thresholds in Article 6 and apply regardless of PI amount provided abroad. However, one may also argue that the thresholds in Article 6 prevail over the exemptions in Article 4, i.e. if more than 10,000 PI are transferred cross-border, the PI covered by the exemptions in Article 4 shall be counted in the total amount of PI transferred cross-border.

IV. Special regime for Pilot Free Trade Zones

The Draft Provisions also empower the Administration Committee of Pilot Free Trade Zones in China to formulate their own list of data (“Negative List”), that are subject to the Three Preconditions when provided abroad. Such Negative Lists are subject to prior approval by the provincial Network Security and Informatization Commission and must be filed with the CAC on national level. The PI not included in the Negative Lists would be exempted from the Three Preconditions when transferred abroad.

V. Important data and data involving CCP, government, military and classified units

The Draft Provisions confirm the existing rule/obligation that a CAC Security Assessment is required when providing “important” data abroad. So far and despite of the description in § 19 Security Assessment Measures, the term “important data” remains vague. The Draft Provisions intend to facilitate the identification of “important data” for companies, by stipulating that only data, that has been “declared by the relevant departments through notices or public announcements”, shall be considered as “important data”.

Article 8 of the Draft Provisions finally mention a special regime for “the cross-border provision of data and sensitive PI involving the Chinese Communist Party, government, military and classified units”. The Draft Provisions do not provide further details and refer to “laws, administrative regulations, and departmental rules.” This stipulation might be considered as a counter-exemption from the exemptions under the Draft Provisions with the consequence that in addition to the volume

⁵ Data processors processing over 1 million PI providing PI abroad.

and types of data, companies may also be obliged in the future to analyze if and to extend the data processed “involves” the CCP, government, military and classified units.

V. No time to lose!

The Draft Provisions have been widely welcomed by companies in China with a need to transfer PI abroad. However, considering the contradictions of the Draft Provisions with the PIPL and the possible legal consequences, companies are now facing the question whether to wait and see, if and how CAC may revise the Draft Provisions or proceed with their Personal Information Protection Impact Assessments (PIPIA) and other compliance tasks under the PIPL.

Taking our above analysis into account, we do not expect that Draft Provisions will be issued in present wording. As PIPL is already effective since November 1, 2021, there is no good reason to wait for a facilitation which may not come. Instead, prudent managers should continue their efforts to ensure that the PI cross-border data transfers of their companies are compliant with the PIPL requirements. There is no time to lose!

Should you have any questions regarding data protection law in the PRC or other China-related legal issues, please feel free to contact Burkardt & Partner at info@bktlegal.com!

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