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A big step forward - new regulation to facilitate data export from Chinese Mainland



New Regulation

On 22 March 2024, the Cyberspace Administration of China (CAC) published the **Provisions on Facilitating and Regulating Cross-Border Data Flow** (the "**New Provisions**"). On the same day, CAC also released the second editions of the **Guidelines on Application for Data Export Security Assessment** ("**DESA Guidelines**") and the **Guidelines on Filing of Standard Contract on Export of Personal Information** ("**SCCs Guidelines**"). The two guidelines have been updated to, amongst other things, reflect the exemptions newly created under the New Provisions, introduce procedures for online submission, and streamline the components of the assessment to be conducted by data exporters.

We have previously released a briefing note [[New Draft regulation to facilitate data export from Chinese Mainland | Stephenson Harwood - Data protection \(dataprotectionlawhub.com\)](#)] on the draft form of the New Provisions in October 2023. With the New Provisions being finalised with immediate effect upon promulgation, there are now various scenarios of data export in which data exporters could be exempted from the obligation of passing the data export security assessment ("**DESA**"), executing the standard contract ("**SCCs**"), or obtaining the personal information protection certification ("**PIPC**") (collectively, the "**Data Export Mechanisms**" or "**DEMs**").

Under the New Provisions, free trade zones may formulate their own checklist of data to be regulated in data export (the "**Negative Checklist**") and for data exporters in the free trade zones, any data which is outside of the applicable Negative Checklist could be exported without going through any of the Data Export Mechanisms.

Exemptions

The **Measures on the Security Assessment of Data Export** and the **Measures on the Standard Contract for Export of Personal Information** (collectively, the "**Measures**") require data exporters to go through at least one of the Data Export Mechanisms, depending on the nature and volume of the data to be exported.

Under the New Provisions, in any of the following scenarios, the data exporter is no longer required to go through any of Data Export Mechanisms, provided only if the data to be exported is not important data:-

- (a) the data is collected and generated from international trade, cross-border transportation, academic cooperation, cross-border manufacturing or marketing and promotion activities, and does not include any personal information or important data;
- (b) where the data exporter processes and then exports personal information which is originally collected and generated outside of Chinese Mainland, and there is no domestic personal information or important data involved during the course of such data processing;
- (c) the export of personal information is necessary to conclude or perform a contract with the individual (e.g., cross-border shopping, mailing, remittance, payment or account opening, air ticket and hotel booking, visa application, and examination service);
- (d) the export of employee personal information is necessary to implement cross-border human resource management pursuant to the lawfully concluded labour rules or collective employment contract;
- (e) the export of personal information is necessary to protect the life, health or property of natural person under emergency conditions; or
- (f) to the extent where the data exporter is not an operator of any critical information infrastructure ("**CIIO**"), the aggregate volume of personal information (excluding any sensitive personal information) exported by the data exporter since 1 January of the current year does not reach 100,000 individuals.

Volume threshold for DEMs

To facilitate the cross-border flow of personal information (excluding sensitive personal information, important data and any data export by CIIOs), the New Provisions raise the thresholds for triggering the DEMs, including setting a volume threshold of 100,000 for triggering SCCs filing/PIPC, increasing the volume threshold for triggering DESA from 100,000 to 1,000,000, and also shortening the period for calculating the volume of personal information exported. Details are set out in the table below.

Applicable DEMs	Volume of personal information ^{Note}		
	1 - 99,999	100,000 – 999,999	1,000,000 or more
Measures Calculation from 1 January of the preceding year or in the case of the volume threshold of 1,000,000, cumulatively for all time	SCCs or PIPC	DESA	DESA
New Provisions Calculation from 1 January of the current year	Exempted	SCCs or PIPC	DESA

Note: It refers to the number of individuals and is exclusive of any sensitive personal information and important data.

Sensitive personal information

In the draft form of the New Provisions, it was not clear whether sensitive personal information will be counted into the volume of personal information exported when deciding whether the exemption could be applicable. The New Provisions clarify that sensitive personal information is excluded when calculating the volume of personal information exported, meaning that the volume threshold under the Measures will remain applicable to export of sensitive personal information, save that the period for calculating the relevant volume has been shortened. Details are set out in the table below.

Applicable DEMs	Volume of sensitive personal information ^{Note}	
	1 - 9,999	10,000 or more
Measures Calculation from 1 January of the preceding year	SCCs or PIPC	DESA
New Provisions Calculation from 1 January of the current year	SCCs or PIPC	DESA

Note: It refers to the number of individuals and is exclusive of any important data.

Notably, it is clarified in the New Regulations that the exemptions of scenarios (b) to (e) above could still cover export of sensitive personal information to the extent applicable.

Given the more stringent rules for export of sensitive personal information compared to general personal information, it would be worthwhile for PRC data controllers to evaluate more cautiously before they process any sensitive personal information and to consider whether sensitive personal information should be stored and accessed locally only.

Negative checklist of free trade zone

The New Provisions allow free trade zones to formulate its own Negative Checklist subject to the framework of national data classification and grading protection system. On 21 March 2024, the day before the release of the New Provisions, the National Technical Committee 260 on Cybersecurity of Standardization Administration of China issued a new national standard, **GB/T 43697-2024 Data security technology – Rules for data classification and grading**. This national standard sheds the light on the principles, methods and procedures of data classification and provides guidance in identifying important data, which would be a helpful reference for data exporters and all other data controllers in terms of its data identification, classification and grading practice, and could become the basis for the formulation of Negative Checklist by free trade zones.

Currently there are 22 free trade zones in Chinese Mainland. Any data not included in such Negative Checklist could be exported by data exporters without going through the Data Export Mechanisms. This may create a "special zone" from which data flow could be more friendly for multi-national companies. Company registered in such special zone could be a solution for multi-national companies to centralize its data processing activities in Chinese Mainland and further export the data from Chinese Mainland. We would recommend that data controllers with PRC operations and data flow concerns to monitor the development of the Negative Checklist in free trade zones.

On 13 December 2023, the Implementation Guidelines on the Standard Contract for Cross-boundary Flow of Personal Information Within the Guangdong-Hong Kong-Macao Greater Bay Area (Mainland, Hong Kong) (the "**GBA Guidelines**") is promulgated [[New regulation: GBA standard contract for the cross-border flow of personal information - will it make Hong Kong unique under PIPL? | Stephenson Harwood - Data protection \(dataprotectionlawhub.com\)](#)], which simplifies and promotes the safe and orderly flow of personal information within the Guangdong-Hong Kong-Macao Greater Bay Area ("**GBA**"), including flow of PRC personal information across border from Chinese Mainland to Hong Kong and within Hong Kong. To certain extent, the GBA is a "special zone" for cross border data flow. Looking forward, free trade zones in the GBA may have the prospect to utilize both the Negative Checklist regime and the facilitation brought by the GBA Guidelines to allow more freely flow of PRC personal information in the GBA and beyond.

Updates to the Guidelines

In response to the developments brought by the New Provisions to the Measures, CAC has updated the DESA Guidelines and SCCs Guidelines. The key updates include:-

- adding references to the exemptions created by the New Provisions;
- in addition to cross-border data transfer and granting of remote access to domestic data, providing another example of data export activities, which is, extraterritorial processing of personal information of domestic individuals;
- introducing procedures for online submission. Data exporters may now submit and manage their application for DESA or SCCs filing to CAC via a designated online system; and
- streamlining the components of the assessment to be conducted by data exporters.

In respect of the application submitted to CAC (DESA or SCCs filing), CAC has clarified that where the data exporter has submitted the application to CAC offline, there is no need to re-submit the same online. In addition, in the case of CIIOs and other forms of DESA by which the online submission are inappropriate, the data exporters shall still submit their application for DESA to CAC offline.

Next steps

The New Provisions represent a big step forward in the facilitation of cross-border data flow. Multi-national companies who have been long awaiting since the release of the draft New Provisions may now evaluate further as to what steps should be taken – whether they are eligible to carry out data export activities by virtue of the exemptions under the New Provisions or, whether their intended data export would require the SCCs filing or PIPC after all. In particular where the SCCs filing is required, given the deadline for the filing has passed on 30 November 2023, and with the New Provisions already in effect, data exporters are urged to take actions in a timely manner in order to be in compliance with the data protection legislations as soon as feasible.

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