

Personal Data Protection

EU Directives, Laws of EU Member States
and OECD Guidelines

中国人民大学信息法研究中心

个人数据保护

欧盟指令及成员国法律、经合组织指导方针

中英文对照

陈 飞 等译

张新宝 审校



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中国-欧盟信息社会项目的资助

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序 言

个人数据保护和隐私权并不是新概念。然而,自从一百多年以前提出隐私权以来,基本层面的东西没有太大变化:在“数据保护”这一标题之下的学科之任务仍然是确保每个人在与其相关的个人信息上都享有自我决定的权利。

在我们称之为“信息社会”的时代面临的新问题是,显然如今有如此之多的收集、存储和发布个人信息的方式。我们在网上冲浪时留下的踪迹可以被清晰地读取,比新鲜白雪上的脚印还要清晰:这可能对我们有利(当在线卖主知道我们的偏好时并改进其提供给我们信息时),也可能对我们有害(当恶意软件跟踪我们的使用模式和密码并将“私人”信息发送给滥用者时)。一个曾经在网上注册在线时事通讯或参加竞赛的人,可能会有个人数据以出乎意料的途径出现的经验:你进入一个电视放映网站,它会返回给你惊人的专门针对你所居住地区的大量未被要求的商业邮件或流行商品信息。信息社会有时也被称为“信息丛林”,这并不仅仅是说很难找到进口和出口,也意味着为了在那里发现非常珍贵有用的东西——信息——需要同丛林野兽进行残忍的斗争。

隐私权的正当性无需证明。它来源于个人的自我决定的权利,而这一权利建立在个人是最后且唯一的合法性的来源的观念之上(可以称之为一种“个人主义方法论”的方式)。这意味着作为一项基本原则,每个人都有权自我决定何种个人数据可以被收集、存储或发布。仅在最近,德国联邦宪法法院再次强调,隐私权有一个核心部分,各州无论如何也不得侵犯。最迟自20世纪80年代开始,隐私权在欧盟具有了基本人权的地位。

然而,为何保障隐私和保护个人数据是每个人在社会现代化过程中关注的核心问题,存在着非常实际的、事实的和商业的原因。缺乏此种保护会导致电子商务中的商业伙伴之间以及电子政务中的公民和政府之间缺乏信任。在线使用者会怀疑在线卖主会将其数据卖给其他公司,而这些公司将通过电子邮件或其它常规方式发起一

场发送匿名兜售邮件的运动,于是,在线使用者将放弃提供其数据(他们知道并介意此种风险)。公民会怀疑住房管理部门会将其数据传给税务当局,于是,公民在其新的家乡可能会首先重新考虑注册的事情。

多多少少所有潜在有益的信息社会的发明(电子政务、电子商务、电子社会网络、在线参与等等)都依赖于相互可信的承诺,承诺相关的个人数据不会用于未被同意之目的。因为其有时与使得程序更有效率和公民更友好的努力相抵触,这一点就更重要了。作为公民的一站式商店的电子政务的入口,必须使不同政府部门的后台办公程序一体化。这些一体化过程中必然的一步是建立单一的数据库以汇集税务部门、房管部门、公共健康部门等部门内存储的信息。这里需要清晰明确的制度框架和规定。

寻找这些部分冲突目标之间的平衡是数据保护法律和规章所要解决的问题。完美的数据保护制度将会创造这样一种环境:一方面鼓励电子通讯方式的使用,另一方面个人对其数据之使用保留主要控制权(并且,他们自己也能影响这种平衡,例如如果公司愿意同受影响的个人分享利益,通过有意识地允许将个人信息出售给电子商务中的“附属伙伴”而影响这种平衡)。

欧盟有完美的数据保护制度吗?没有。在这种复杂的事情上没有完美的解决方案。但是欧盟存在相当完善的保护个人数据和确保隐私的制度。为了发现哪些理论和实践方面的考虑可以被引入中国的个人数据保护的规定,还需要进一步的详细审查。

欧盟国家有大量的隐私和数据保护的规定,并非都起源于欧盟机构(经济合作与发展组织、欧洲议会以及联合国均采纳了有关核心数据保护的高度相关的规则的原则)。1995年欧盟数据保护指令是欧盟数据保护规章的核心。其制定了一系列需要所有的成员国实施的原则和规则。它确保欧盟内数据的自由流动并为个人数据保护设定了共同的标准。其所建立的原则适用于私人或商业生活的一切领域。最基本的原则可能是第七章规定的一条,其宣称个人数据处理通常是一个例外需要证明其正当性(其与在信息自由法中通常能够发现的条款相关并实质类似,而信息自由法建立了透明原则,并要求证明保留信息的正当性)。自从2002年以来,隐私与电子通讯指令(在早期的电讯服务条款之后)作为一般指令的补充,为电子通讯的所有方式明确规定了隐私条款。虽然这两个主要的数据保护指令之间的相互依赖性有时会受到专家的讨论,这两个文件被证明对建立欧洲信息社会的制度具有至关重要的作用。

个人数据保护将永远是一个热门讨论话题。随着新技术、新政策问题或新方法的出现(例如RFID、反恐斗争、电子政务一体化项目,仅举几个例子),基本原则需要不断地被解释。如果是好而强有力的原则,将会经受住这种挑战,并且不仅将指引欧

盟成员国,而且为其它愿意分享这些经验的国家提供好的例子。

欧盟—中国信息社会项目之发起目的是支持这种知识的共享。它旨在通过欧盟委员会和中国政府的共同努力,希望通过培育信息社会而支持中国的经济和社会改革。该项目的一部分专注于在中国所有的合作城市支持具体的政府项目。另一部分则包含信息社会的规制环境,努力支持建立一种健全的、综合性的法律和政策制度,以便允许社会的所有成员从所谓的信息社会中获得最大具体利益。支持个人数据保护政策的发展是此种努力的一部分。

当然,毫无疑问,欧盟和中国现在以及未来的数据保护制度会有一些重大差异:最重要的差异是欧盟毕竟不是一个国家,在所有欧盟政策中普遍存在的附属原则导致了为保障隐私进行制度设置的不同方式。这也是为什么不仅要考察欧盟层面的规定,而且要考察不同成员国是如何实施这些规定的,即在欧洲内部数据保护是如何以不同方式进行解释的。这些解释将为从外部考察欧盟并寻找可以移植到他们自己的社会的有用的原则和细节的人显示非常有趣的方面。

诸如本书之类的出版物在这方面起着重要作用。它们使得双方可以没有语言障碍地讨论相同的基本文件和原则。这将成为发展中国未来的个人数据保护制度的有价值的起点。很明显,起草并通过一部法律仅仅是建立可信且可靠的数据保护制度的一个元素。行业的努力例如行为守则、对使用者进行隐私权教育并教育其如何谨慎使用其数据、硬件和软件方面的隐私强化技术的发展将起着同等重要的作用。欧盟—中国信息社会项目希望能够有助于一同带来这些方面,并有助于支持中国建立一个综合的个人数据保护制度。

托马斯·哈特博士

规制专家

欧盟—中国信息社会项目

(宋志红 译)

Introduction

Personal Data Protection and the right for Privacy are no new concepts. Yet, since the right for privacy was defined for the first time well over 100 years ago, not much has changed on a fundamental level: The disciplines under the headline “data protection” still have the aim to ensure that everybody has the right to determine him-or herself which personal information can and should be revealed to whom.

What is new in the age that we call “Information Society” is that there are apparently so much more ways of collecting, storing and distributing personal data these days. We leave traces of our online surfing that can be more clearly read than steps in fresh snow: to our benefit (when the online vendors learn about our preferences and can improve the offers they make to us) or to our harm (when malevolent software traces our usage patterns and passwords and sends the information “home” to those who abuse them). Whoever registered with an online newsletter or took part in a competition on a website will have made the experience that personal data takes unexpected routes: you enter it on a tv show website, and it comes back to you through a stunning number of unsolicited commercial mailings or pop-up commercials that curiously are specific to the region you live in. Information Society is always called “information jungle” sometimes, and this does not only depict that it’s hard to find a way in and out again, but it also means that there are ferocious fights between the jungle beasts for what is the most precious good that can be found there: Information. And the most precious information is personal information.

The right for privacy does not need to be justified. It stems from the individual’s right for self-determination which again is based on a perception of the individual as the last and only source of legitimisation (a “methodological individualism” approach, one could call it). This means as a general principle that everybody has the right to decide himself or herself which

personal data should be collected, processed or disseminated. Only recently did the German Federal Constitutional Court stress again the point that there is a core sector of privacy rights into which the state under no conditions is allowed to infringe. Since the 1980s at the latest, the right for privacy in the European Union has the status of a fundamental human right.

However, there are very pragmatic, factual and commercial reasons why the safeguarding of privacy and the protection of personal data should be at the core of attention of anybody concerned about the modernisation of society. Lack of such protection leads to lack of trust between business partners in electronic commerce and between citizens and government in electronic government. Online users who will suspect that the online vendor will sell their data to other companies, who will then start an annoying spam mailing campaign by email or regular, will abstain from providing the data (of they are aware of the perils and care about them). Citizens who suspect that the housing administration will forward their data to the tax authority might reconsider the idea of registering at their new home town in the first place.

More or less all the potentially beneficial Information Society innovations (e-government, e-commerce, electronic social networking, online participation, etc.) rely on a mutual credible commitment that the personal data involved will not be used for purposes that have not been agreed upon. This is all the more important as it sometimes collides with efforts to make processes more efficient and citizen-friendly. E-government portals that serve as one-stop shop for citizens have to integrate the back-office procedures of many different government departments. A logical step in these integration processes would be to create single databases where the personal data stored within the tax department, the housing office, the public health department etc. were pooled. This is where clear and unambiguous frameworks and regulations are required.

To find the balance between these partly contradictory goals is what data protection laws and regulations are about. The perfect data protection regime will create an environment in which the use of electronic communication means can be fostered while the individuals retain primary control over the use of their data (and they can also affect the balance themselves, for example by consciously allowing for the sale of personal data to "affiliated partners" in e-commerce, if the company is willing to share the benefit with the person affected).

Does the EU have the perfect data protection regime? No. There is no such thing as the perfect solution on such complex matters. But a considerably well-established system to protect personal data and ensure privacy exists. And there is a case for closer scrutiny in order to find out which of the theoretical and practical considerations can find their way into the Chinese personal data protection provisions.

Countries in the European Union are engulfed in a variety of privacy and data protection provisions, not all of which have their origin in EU institutions (the OECD, the Council of Europe, but also the United Nations adopted principles regarding essential data protection rules that are highly relevant). The 1995 EU Data Protection Directive is at the core of the EU data protection regulation. It set out a system of principles and rules that needed to be implemented by all member states. It ensures the free flow of data within the EU and sets a common standard for the protection of personal data. The principles established apply for all areas of private or commercial life. The most fundamental principle may be the one laid out in Art. 7, which declares the processing of personal data is always an exemption that requires justification (similar in nature and related to the provisions usually to be found in Freedom of Information Laws, which establish the principle of transparency, and require justification for withholding information). Since 2002, there is the Directive on Privacy and Electronic Communications (following earlier provisions on telecommunications services) as an important addition to the General Directive, specifying privacy provisions for all means of electronic communication. While the interdependence between these two main data protection directives is sometimes subject to expert discussions, these two documents have proven to be of crucial importance for establishing the framework for Information Society in Europe.

Personal data protection will always be a subject of heavy discussions. With new technologies, new policy issues or new processes emerging (such as RFID, the fight against terrorism or integrated e-government projects, to name just a few), the basic principles require continuous interpretation. If they are good and solid principles, they will stand up to this challenge and will guide not just the EU member states on their way through the dynamics of Information Society, but can also provide good examples for other countries willing to share these experiences.

The EU-China Information Society Project was initiated to support this kind of knowledge sharing. It is a joint effort on part of the EU Commission and the Chinese government to support economic and social reform in China through fostering Information Society. One part of the project is dedicated to the support of specific e-government projects in partner cities all over China. The other part covers the regulatory environment of Information Society, and strives to support the establishment of a sound and comprehensive legal and policy framework that allows all parts of society to gain the most and concrete benefits from what we call Information Society. Supporting the development of a personal data protection policy is a part of this effort.

Of course, there are most fundamental differences between the European and the Chinese present and future Data Protection regimes, no doubt: the most important of which may be the

fact that the European Union, after all, is not a state, and that the principle of subsidiarity that is prevalent in all EU policies causes different approaches to the institutional setting for safeguarding privacy. That's why it is important not just to look at EU level provisions, but also at how the different member states implement them, how data protection is being interpreted in different ways even within Europe. These interpretations will show very interesting aspects for anybody looking at the EU from the outside and searching for principles and details that can provide useful input for their own societies.

Publications such as this one play an important part in this. They allow both sides to discuss the same basic documents and principles without a language barrier. This will be a valuable starting point for developing the future framework for personal data protection in China. It is clear that drafting and passing a law can only be one element in setting up a credible and reliable data protection regime. Industry efforts such as codes of conducts, education of users on their privacy rights and how to make careful use of their data, development of privacy-enhancing technologies in hard- and software will play an equally important part. The EU-China Information Society Projects hopes to be able to help bring these aspects together and help support the establishment of a comprehensive personal data protection regime for China.

Dr. rer. pol. Thomas Hart
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一、欧盟指令及相关规定

EU Directives
and Related Regulations

**Directive 95/46/EC of the European Parliament
and of the Council of 24 October 1995 on the protection of
individuals with regard to the processing of personal data
and on the free movement of such data**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission^①,

Having regard to the opinion of the Economic and Social Committee^②,

Acting in accordance with the procedure referred to in Article 189b of the Treaty^③,

(1) Whereas the objectives of the Community, as laid down in the Treaty, as amended by the Treaty on European Union, include creating an ever closer union among the peoples of Europe, fostering closer relations between the States belonging to the Community, ensuring economic and social progress by common action to eliminate the barriers which divide Europe, encouraging the constant improvement of the living conditions of its peoples, preserving and strengthening peace and liberty and promoting democracy on the basis of the fundamental rights recognized in the constitution and laws of the Member States and in the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(2) Whereas data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals;

(3) Whereas the establishment and functioning of an internal market in which, in accordance with Article 7a of the Treaty, the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be

① OJ No C 277, 5. 11. 1990, p. 3 and OJ No C 311, 27. 11. 1992, p. 30.

② OJ No C 159, 17. 6. 1991, p.38.

③ Opinion of the European Parliament of 11 March 1992 (OJ No C 94, 13. 4. 1992, p. 198), confirmed on 2 December 1993 (OJ No C 342, 20. 12. 1993, p. 30); Council common position of 20 February 1995 (OJ No C 93, 13. 4. 1995, p. 1) and Decision of the European Parliament of 15 June 1995 (OJ No C 166, 3. 7. 1995).

欧洲议会和欧盟理事会 1995 年 10 月 24 日 关于涉及个人数据处理的个人保护以及 此类数据自由流动的指令(95/46/EC)

欧洲议会和欧盟理事会,

根据《建立欧洲共同体条约》,特别是其中的第 100a 条,考虑到委员会的建议^①以及经济与社会委员会的意见^②,依照该条约第 189b 条所规定的程序^③,

(1)鉴于《建立欧洲共同体条约》(已由欧盟条约所修正)所确立的目标,包括在欧洲人民之间创造一个更紧密的联合体,在共同体各成员国之间培育更密切的关系,通过一致行动来消除割裂欧洲的障碍以确保经济和社会的发展,促进欧洲人民生活条件的持续改善,在各成员国宪法、法律以及《保护人权和基本自由的欧洲公约》所确认的基本权利的基础上保持并促进和平与自由、发扬民主;

(2)鉴于数据处理体制是为服务人类而设置的;无论自然人的国籍和住所,他们必须尊重他人的基本权利和自由,特别是隐私权,并促进经济和社会进步、贸易扩张以及个人福利的提高;

(3)考虑到欧盟内部市场的建立和运行,依照条约第 7a 条之规定,应当确保货物、人员、服务和资金在该市场内的自由流动,这不仅要求个人数据能在成员国之间自由流动,而且个人的基本权利应当被保护;

① 载 OJ No C 277, 5. 11. 1990, p. 3 以及 OJ No C 311, 27. 11. 1992, p. 30。

② 载 OJ No C 159, 17. 6. 1991, p.38。

③ 欧洲议会 1992 年 3 月 11 日的意见(载 OJ No C 94, 13. 4. 1992, p. 198),在 1993 年 12 月 2 日得到确认(载 OJ No C 342, 20. 12. 1993, p. 30);理事会 1995 年 2 月 20 日的一致立场(载 OJ No C 93, 13. 4. 1995, p. 1)以及欧洲议会 1995 年 6 月 15 日的决定(载 OJ No C 166, 3. 7. 1995)。