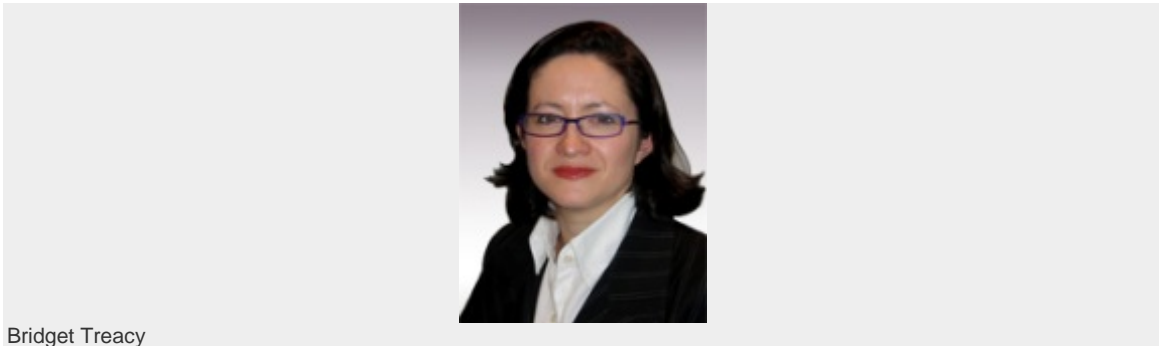


A privacy law for China?

May 29 2008 [Bridget Treacy and Martin Abrams](#)



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China has taken significant steps in the last three years to develop a privacy law which is consistent with the culture and values of its society. There has been wide consultation and discussions with privacy experts from many jurisdictions. Late last year there were rumours that a Chinese privacy law was imminent. This article will explain the current status of the work that China is undertaking to create a privacy law.

Current conditions

Last winter, there was a reorganisation of the Chinese government to make it more efficient. The former Informatisation Office of the State Council, responsible for the privacy legislation, was integrated into a super ministry, the Ministry of Industry and Information. It will take some time for the former leadership of the informatisation office to find its place in the new ministry. Privacy law will be added to the five-year legislative plan in 2009, however, it is anticipated that there will be little or no action this calendar year.

Background to China's privacy initiative

There is a great deal of speculation that China will enact privacy legislation and issue privacy regulations at some point in the next five years. A draft of a proposed law was prepared and placed into wide circulation in 2003. To understand the significance of such legislation, it is important to understand what factors are driving China towards a privacy law. During the last generation, China has experienced greater economic growth than any other country. The internet and the availability of mobile phones have become mainstream media for communication and entertainment. Just as telemarketing in the western world is seen as so intrusive that it warrants regulation, intrusive technology and marketing activity in China is now seen as having a negative impact on the limited personal space that individuals have in a very crowded culture.

At the same time, China has become part of the knowledge economy, taking advantage of the opportunity to become a core outsourcing destination for the west. Western countries that are considering using China as an outsourcing destination have well-established and mature privacy traditions of their own, and they expect data about their citizens to be protected while it is processed elsewhere.



In addition, the People's Bank of China is investing in the development of a modern banking system, which seeks to promote confidence in financial systems to encourage individuals to trust banks as guardians of their wealth and providers of liquidity to finance the economy. To facilitate this modern financial system, the People's Bank of China is creating what it says will be the largest credit reporting system in the world, which will contain information on more than 500 million people. Against this background, it is apparent that privacy law in China is not motivated by fundamental human rights issues, as Europe is. Rather, privacy is a very practical attempt to bring order to what Chinese leaders hope will be a more modern economy.

Features of China's draft privacy law

A draft recommended privacy law was presented, as an "experts' suggestion", to the Informatisation Office of the State Council in 2005. Features of the draft are summarised below:

- The draft applies to both public and private sector organisations.
- Prior to collecting or processing any personal data, all users would be required to register with government agencies, which specify the purpose for which information is used, the type of information collected, how it was collected and what measures have been implemented to protect the data.
- Data may only be collected and processed on a legitimate basis. Consent, contractual necessity and necessity for regulatory purposes are included in the draft as legitimate bases for processing.
- Individuals are entitled to receive certain fair processing information, such as the name and contact details of the data processor and details of the purpose for which the data will be processed.
- Individuals have the right to access, amend and (with limitations) to prevent the processing of their personal data.
- Data processors must ensure that the data is safeguarded from being disclosed, lost, destroyed or subject to a security breach.
- Government agencies may restrict transfers of personal data abroad, including in circumstances where the importing jurisdiction cannot provide sufficient legal protection for the data. It is not clear what would amount to "sufficient legal protection".
- It is not yet known which government agency (or agencies) will have responsibility for implementing and enforcing the law. The concept of "adequacy" that the EU Data Protection Directive defines is important to the Chinese, and European regulators will expect significant clarification of the enforcement mechanism as a crucial part of any adequacy assessment for China.

Hunton & Williams' Centre for Information Policy Leadership has been told that the current draft, based on European law, is no longer in favour. It is seen as not being compatible with the type of entrepreneurial economy the Chinese desire, however, the old draft demonstrates the Chinese desire for adequacy status from Europe.

Current status of draft privacy law

As previously mentioned, there are no real signs that the draft privacy law will be enacted in China in the immediate future. A significant part of the explanation for this is that it is not clear how the law would be enforced or, indeed, enacted. In addition, given the wider global debate that seeks cross-border solutions to data protection regulation, the drafters of the Chinese law may still feel that they need more time to consider their approach. From a local perspective, there are several possible routes through which legislation might be enacted, including:

- regulations that the regulatory authority issues over the financial services sector — these would be limited in scope and focus on credit reporting, but could be implemented quickly;
- "administrative" regulations — these would be preliminary but could be enacted quickly and would pave the way for a more comprehensive law to be enacted at a future point;
- a national law that governs personal data that the Standing Committee or the National People's Congress pass. This is a longer-term prospect, but would result in a more comprehensive, more permanent, law; or
- a provincial law, as in California, with the passing of the first US data breach law.

Contrary to recent rumour that a Chinese privacy law is imminent, it is unlikely that a law will be passed in the immediate future. There had been speculation that the People's Bank of China would issue rules in the consumer finance context, but that too has been deferred by jurisdictional issues. The development of privacy regulation in China, however, is an important area to watch.

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This article first appeared on Complinet on www.complinet.com on May 29 2008. For a free trial of Complinet's services, please contact client support on client.support@complinet.com or +44 (0) 870 042 6400.