

VISCHER

Data transfers from China.

How to handle the China SCC and PIPIA

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Setting the Stage

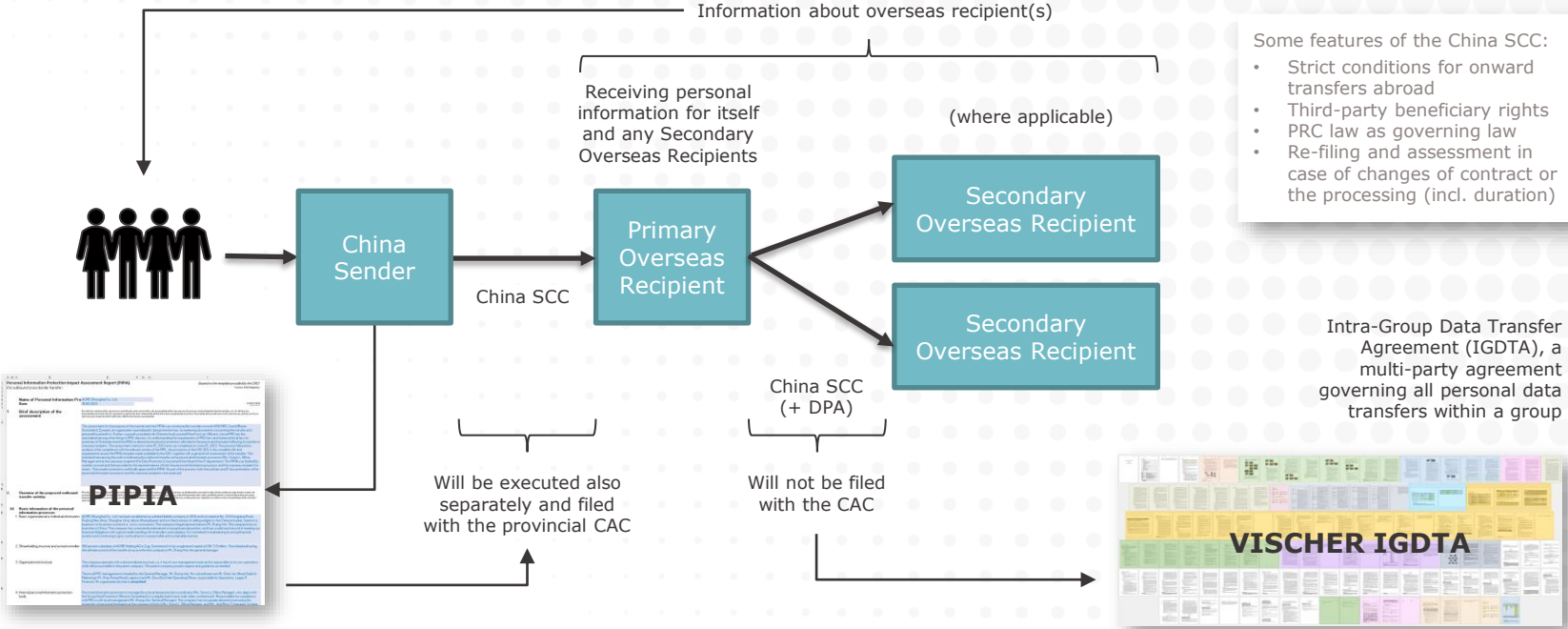
- Personal Information Protection Law of the People's Republic of China (**PIPL**)
 - "Personal Information" (**PI**) processed by "Processors" (handlers)
 - Basic principles (purpose limitation, minimization, transparency, quality, etc.) and need of legal ground (e.g., consent, conclusion or performance of a contract, statutory duties, self-disclosures)
 - Rules for consent (incl. withdrawal) and information obligation
- **Transfers** of PI to "overseas recipients" (Art. 38 et seqq., 55)
 - One of three "transfer mechanisms": Special security assessment or certification or Standard Contractual Clauses (**China SCC**)
 - Information on overseas recipients to, and consent of, individuals
 - Personal Information Protection Impact Assessment (**PIPIA**)



Using the China SCC

- Issued by the Cyberspace Administration of China (**CAC**)
 - Not compatible with EU SCC, cannot be changed, with annexes
- Can only be used under certain **preconditions**
 - No critical information infrastructure operator (CIIO)
 - No processing of PI of more than 1m individuals
 - No transfers of PI of more than 100'000 individuals/year
 - No transfers of sensitive PI of more than 10'000 individuals/year
- Executed China SCC need to be **filed** with the **provincial CAC**
 - By the PRC PI processor, with the PIPIA and other documents
 - Filing will be reviewed in substance
 - Deadline for existing in-scope transfers is November 30, 2023

The Practical Setup



Onward Transfer Rules of the China SCC

8. The overseas recipient shall not provide any personal information to a third party outside the territory of the People's Republic of China, unless the following conditions are met simultaneously:

- a. There is an actual business need.
- b. The personal information subject has been informed of the name or title of the third party, its contact information, the purpose of processing, the method of processing, the category of personal information, the storage period, the method and procedure for exercising the rights of the personal information subject, and other matters; if any sensitive personal information is provided to the third party, the personal information subject shall also be informed of the necessity to provide sensitive personal information and the impact on the individual rights and interests, except where relevant laws and administrative regulations stipulate that it is not required to inform the personal information subject.
- c. If the processing of personal information is based on individual consent, the specific consent from the personal information subject shall be obtained; if the personal information of a minor under the age of 14 is involved, the consent from the minor's parents or other guardians shall be obtained; if written consent is required by laws or administrative regulations, such written consent shall be obtained.
- d. It has reached a written agreement with the third party to ensure that the third party's activities of personal information processing meet the personal information protection standards stipulated in relevant laws and regulations of the People's Republic of China, and it will assume the legal liability for damaging the rights of the personal information subject due to provision of personal information to a third party outside the territory of the People's Republic of China; and

Article 3 (Obligations of the overseas recipient)

← Information of data subjects about onward transfers

← Consent

← Obligation to contractually bind recipient

Obligation to approve subcontractors and contractually bind them



9. If the overseas recipient is entrusted by a personal information processor to process personal information, and then subcontracts the processing to a third party, the consent from the personal information processor shall be obtained in advance, and it shall require the third party entrusted to process the personal information in accordance with the purpose and method of processing as agreed in Appendix I "Instructions on Outbound Cross-border Transfer of Personal Information" hereof, and shall supervise the personal information processing activities of such third party.

The PIPIA

The VISCHER sample PIPIA for a group-wide use of M365 and CRM covering also a China entity



The company uses local personal computer equipment and servers to manage the personal information, but is also connected to the computer network of the group, and where it has access to the global CRM system (Customer Relationship Management) and "M365" for collaboration and communications (e.g., e-mail, calendar, videoconferencing) operated by the group in the Microsoft cloud.

The local computer systems are physically at the address of the company in Shanghai. The IP address of the network of the company is 142.23.12.44.

	Risk aspects	Probability	Reasoning & measures
The data provided by the company for the purpose of the Activity	Scale of of personal information to be exported	Remote	The personal information processor has carefully analyzed the personal information to be made available to the overseas recipient and has limited it to what it considers necessary for the purpose, which is sales and marketing to the customer. Since all such processing activities are under the control of the parent company in its main business analytics application, the data transfer is to take place under the control of the parent company. Hence, there is no alternative to the export. In order to ensure that the data transfer remains to the minimum necessary, there is a process of reviewing the personal information to be exported every year. We consider the risk that the principle of minimization is not complied with to be remote.
	Scope of the personal information to be exported	Remote	The personal information processor has thoroughly examined the data it provides to the overseas recipient and has restricted it to what is essential for sales and marketing purposes. To ensure that data transfers are kept to a minimum, the exported personal information is reviewed annually. We believe that the risk of not adhering to the minimization principle is remote.

Better wait and see?

- On September 28, 2023, the CAC released **draft** "Provisions on Regulating and Promoting Cross-Border Data Flows"
- **Exemptions** to use PIPL transfer mechanisms (e.g., SCC)
 - **Under 10k:** No need to use transfer mechanism if company expects to export PI of less than 10'000 individuals/year
 - **Contractual need:** Export required for conclusion/performance of contract with the data subject (\approx PIPL consent exemption)
 - **HR management need:** Employee data transfers required for legal HR management (\approx PIPL consent exemption) – but to which extent may such HR management be outsourced to abroad?
 - Some more exemptions (incl. non-important & foreign data)
- **No exemptions** for obligations to **inform** and get **consent**

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Thank you for your attention!

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