

WHETHER PERSONAL CREDIT INFORMATION IS SENSITIVE PERSONAL INFORMATION?

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* Yin Shanghong, LL.B. at Tsinghua University School of Law. Many thanks to Liu Mingxin, Yang Peiming, Qiu Qunran for their thoughtful feedbacks at various stages of this article, and the TCLR staff for careful editing. Any error or omission, however, remain mine.

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I. INTRODUCTION

Article 28.1 of the Personal Information Protection Law of PRC (“PIPL”) defined sensitive personal information in a “summarizing + listing” manner.¹ Previously, Article 3.2 of the national standard Information Security Technology—Personal Information Security Specification (GB/T 35273-2020) defined “personal sensitive information” in a similar way. Comparing the two definitions, “credit information” is listed by the latter, but not by the former. Does personal credit information belong to sensitive personal information? An affirmative answer seems easy to make. First, the leakage of credit information can bring telecom fraud including so-called “credit repair” pitfalls, falling within Article 28.1 of PIPL’s definition of easily leading to “harm to personal or property safety” once leaked.² Second, since Article 28.1 of PIPL does not exhaustively list all types, it is reasonable to refer to the judgment of the above-mentioned national standard, based on the systematic interpretation logic. Third, credit information often includes transaction information, e.g., borrowing and lending records, since they can help identify the credit status of enterprises and individuals.³ Given that bank transaction records are considered by the legislature as financial account information listed under Article 28.1,⁴ the same shall be true for credit information.

The problem arises. On the one hand, once credit information is characterized as sensitive personal information, according to Articles 28 and 29 of PIPL, information processors can only process it under an individual’s “separate consent” with “specific purposes”, “sufficient necessity”, and “strict protection measures”. First, “specific purposes” require that only specific occupations under specific business circumstances can process corresponding types of sensitive personal information,⁵ which disables non-credit institutions to collect

¹ See Wang Liming, *Mingan Geren Xinxi Baohu de Jiben Wenti* (敏感个人信息保护的基本问题) [Basic Issues in the Protection of Sensitive Personal Information], 1 DANGDAI FAXUE (当代法学) [CONTEMPORARY LAW REVIEW] 3, 4 (2022).

² See Ge Mengchao, *Tuidong Zhengxinye Gao Zhiliang Fazhan* (推动征信业高质量发展) [Promote High-quality Development of Credit Industry], RENMIN RIBAO (人民日报) [PEOPLE’S DAILY], Jun. 17 2022, at 5.

³ See Zhengxin Yewu Guanli Banfa (征信业务管理办法) [Measures for the Administration of the Credit Reporting Business] (promulgated by the People’s Bank of China, Sep. 17, 2021, effective Jan. 1, 2022), art. 3.2 (Chinalawinfo).

⁴ See YANG HEQING ed., *ZHONGHUA RENMIN GONGHEGUO GEREN XINXI BAOHU FA* (中华人民共和国个人信息保护法释义) [INTERPRETATION OF THE PERSONAL INFORMATION PROTECTION LAW OF THE PEOPLE’S REPUBLIC OF CHINA] 86 (2022).

⁵ See CHENG XIAO, *GEREN XINXI BAOHU FA LIJIE YU SHIYONG* (个人信息保护法理解与适用) [UNDERSTANDING AND APPLICATION OF THE PERSONAL INFORMATION PROTECTION LAW] 267 (2021).

credit-related transaction records in other businesses, and reduces the possibility for credit institutions to obtain credit information from other providers.⁶ Second, “sufficient necessity” points to “no processing unless necessary”,⁷ and credit agencies may thus be forbidden to collect individual transaction records beforehand for possible future credit assessment. Third, “separate consent” requires a strict distinction between credit information and other information before processing to obtain individual instead of blanket consent for personal credit information,⁸ significantly increasing the cost of credit analysis.

On the other hand, credit institutions have a social responsibility to facilitate financing. The Opinions on Advancing the High-quality Development of the Construction of the Social Credit System in Furtherance of the Shaping of a New Development Pattern, issued by the General Office of the CPC Central Committee and the State Council, requires “promoting financial services for the real economy with a solid credit foundation”, and “developing inclusive finance and increasing the scale of credit so as to solve financing difficulties of micro, small and medium-sized enterprises and individual industrial and commercial households.” Article 23 of the Law of PRC on the Promotion of Small and Medium-Sized Enterprises (“SME”) also stated that “the state supports credit agencies in developing credit products and services for the financing of SMEs.” Credit is the basis of financing, and the difficulty of SME financing arises from information asymmetry.⁹ Since SMEs are usually controlled by individual managers and owners and have no perfect governance structure, banks mainly rely on the personal credit of managers and owners to reasonably infer the creditworthiness of their corporations, and even directly issue relationship loans to or seek guarantees from managers and owners.¹⁰ Thus, it is crucial for solving SME financing difficulties to increase credit institutions’ access to the personal credit information of SME managers and owners. In March 2023, the Resolution of the First Session of the Fourteenth National People’s Congress on the Implementation of the 2022 Plan for National Economic and Social Development and on the 2023 Plan for National Economic and Social

⁶ Credit institutions could have obtained the credit information from the “information provider” (not limited to a credit institution). See Zhengxin Yewu Guanli Banfa (征信业务管理办法) [Measures for the Administration of the Credit Reporting Business] (promulgated by the People’s Bank of China, Sep. 17, 2021, effective Jan. 1, 2022), arts. 9, 10, 13, 14 (Chinalawinfo).

⁷ See YANG HEQING, *supra* note 4, at 96.

⁸ See Wang Hongliang & Li Yiyi, *Geren Xinxi Chuli Guize zhong “Tongyi Guize” de Fa Jiaoyixue Gouzao* (个人信息处理中“同意规则”的法教义学构造) [*The Legal Dogmatic Construction of the “Consent Rule” in Personal Information Processing*], 3 JIANGSU SHEHUI KEXUE (江苏社会科学) [JIANGSU SOCIAL SCIENCES] 102, 120 (2022).

⁹ See World Bank Group, *Improving Access to Finance for SMEs*, World Bank (May 2018) 8, <https://www.doingbusiness.org/content/dam/doingBusiness/media/Special-Reports/improving-access-to-finance-for-SMEs.pdf>.

¹⁰ See International Committee on Credit Reporting, *Facilitating SME Financing through Improved Credit Reporting*, World Bank (May 1, 2014) 10, <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/429511468053058455/international-committee-on-credit-reporting-facilitating-sme-financing-through-improved-credit-reporting>.

Development reemphasized the target to “step up the sharing and application of credit information to facilitate fundraising for MSMEs”.

Then the paradox exists between the legal obligation of credit institutions to protect personal credit information as sensitive personal information and their social responsibility to facilitate financing. The strict obligation in processing personal credit information will deter credit institutions from accessing the credit information of SME managers and owners, increasing information asymmetry in SME financing.¹¹ Should such a conflict exist? Should personal credit information be classified as sensitive personal information? In a more general sense, is the standard for sensitive personal information in Article 28 of PIPL reasonable? How should personal credit information be protected by PIPL? It is even more important to clearly answer these questions, with PIPL coming into force for nearly two years.

This essay tries to reconstruct the position of personal credit information in PIPL based on a comparative look and a theoretical reanalysis. Part II looks at extraterritorial theory and practice to demonstrate the necessity to balance personal credit information protection and financing facilitation. Part III argues that the definition in Article 28.1 of PIPL is unreasonable and the protection of personal credit information as sensitive personal information is neither socially beneficial nor, in fact, conducive to personal information protection. Part IV denies personal credit information as sensitive personal information by a stricter interpretation of Article 28(1).

II. COMPARATIVE LOOK: BALANCING FINANCING PROMOTION AND PERSONAL INFORMATION PROTECTION

A. *World Bank Studies: Weakening Consent, Strengthening Sharing*

Information asymmetry is the main cause of SME financing difficulties. To be further, first, the small size of SME loans cannot match the high cost of information assessment; second, the high operational risk of SMEs conflicts with the difficult post-lending monitoring, both of which will discourage bank lending.¹² Therefore, professional credit analysis for SMEs can help alleviate information asymmetry and facilitate financing. Particularly, by subcontracting the work to professional institutions which rely on big data analysis to create credit reports, the cost of credit assessment can be significantly reduced.¹³ Thus, the two-step path to resolve information asymmetry is: First, banks divest credit analysis tasks to credit institutions to reduce the average cost through

¹¹ See Zhang Peng, *Lun Mingan Geren Xinxi zai Geren Zhengxin zhong de Yunyong* (论敏感个人信息在个人征信中的运用) [*The Use of Sensitive Personal Information in Personal Credit*], 6 SUZHOU DAXUE XUEBAO ZHIXUE SHEHUI KEXUE BAN (苏州大学学报哲学社会科学版) [JOURNAL OF SOOCHOW UNIVERSITY PHILOSOPHY & SOCIAL SCIENCE EDITION] 101-102 (2012).

¹² See International Committee on Credit Reporting, *supra* note 10, at 6-7.

¹³ See *id.*, at 11-13.

specialization; Second, credit institutions expand the scale of credit data to improve the accuracy of credit analysis.

Data is both the foundation of credit and the pain of SMEs. On the one hand, the World Bank's General Principles of Credit Reporting states that credit reporting systems should have relevant, accurate, timely, and adequate data systematically collected from all reliable, appropriate, and available sources.¹⁴ Typically, banks focus on the repayment capability and credit history of the lenders.¹⁵ The former points to the size and profitability of the lender, while the latter regards the lender's previous repayment performance. However, SMEs have no financial disclosure requirements and poor financial reporting mechanisms to provide credible proof of assets. They are also consistently difficult in financing and mainly obtain temporary liquidity through trade credit, thus lacking a formal credit history.¹⁶

Therefore, credit reports of SMEs rely mainly on data from utilities and SMEs' related traders.¹⁷ Loaning to SMEs relies thus on the individual creditworthiness of their managers and owners. In practice, it is often difficult to distinguish the personal accounts of SME managers from corporate accounts, both regarding trade records and utility payment records.¹⁸ Corporate credit analysis is thus dependent on personal credit information.¹⁹ Meanwhile, SMEs' business traders are usually also SMEs. The trading information therebetween thus involves the personal information of the counterparties' managers. In this sense, the personal credit information of SME managers related to corporation transactions is crucial for banks to assess the creditworthiness of the corporation.

The broadening of data sources requires both legal and technical support. On the legal side, for the information demanders, i.e., banks and credit institutions, the World Bank calls for broader legal permission to share non-traditional credit information (e.g., payment records in trade and utilities).²⁰ For the information suppliers, the World Bank cares more about the non-discrimination and accuracy of credit reports than about the need for consent before processing information.²¹ On the technology side, fintech innovations that combine big data and information technology have in recent years helped create credit institutions that use big data and algorithms to assess SME creditworthiness.²²

¹⁴ See World Bank, *General Principles for Credit Reporting*, General Principle 1, World Bank Group (Sep. 1, 2011), <http://documents.worldbank.org/curated/en/662161468147557554/General-principles-for-credit-reporting>.

¹⁵ See International Committee on Credit Reporting, *supra* note 10, at 9.

¹⁶ See *id.*, at 16.

¹⁷ See *id.*, at 18; See World Bank Group, *supra* note 9, at 12-13.

¹⁸ For example, the printshop in the Legal Library Building of Tsinghua Law School is also a "limited liability company". But within its daily operations, income is collected through personal WeChat payment QR codes.

¹⁹ See World Bank Group, *supra* note 9, at 11.

²⁰ See *id.*, at 12.

²¹ See International Committee on Credit Reporting, *supra* note 10, at 20.

²² See World Bank Group, *supra* note 9, at 19.

In conclusion, strengthening the specialization in credit and broadening the sources of credit data are the two key steps to resolving financing information asymmetry. Potential data sources have to involve personal credit information, including that of SME's managers and owners, as well as trade partners and customers. The World Bank's legislative recommendation is to increase the availability of this information and to weaken the request for consent from information providers. The protection of information providers should be geared towards possible discrimination due to credit reporting errors. The individual's right to consent is ceded to the need for credit, provided that personal credit information is not used to the detriment of the individual.

B. U.S. Regulation: Emphasis on Non-discriminatory Treatment

An October 2021 survey by the National Federation of Independent Business (NFIB) shows that credit was not a problem despite the challenges such as labor shortages and supply chain disruptions during the Covid-19 pandemic. Only 2% of small businesses were having serious trouble with financing, and 0% reported that the credit gap was a top problem.²³ U.S. SMEs are easier in financing. One of the reasons is the developed credit system alleviating information asymmetry.²⁴

Credit institutions are using big data and machine learning to analyze more data points and produce more accurate credit reports. A large number of non-traditional data sources are in use, including utility and telecom payment records. Lenders with no borrowing history can get credit reports through such transaction records, lowering the barrier to financing. Moreover, differences in the algorithms of credit institutions lead to different accuracy and sensitivity, forming a competitive credit market. The banks can compare and select the most cost-effective credit services.²⁵ In the SME credit field, U.S. banks have widely adopted automated scoring systems to process collected data in order to quantify risk, maintain consistency in decision-making, improve efficiency, and reduce costs. SMEs are scored on both the business and personal transaction dimensions, so the personal consumption of SME owners and managers is used as an important basis for indirectly understanding the business situation of SMEs.²⁶ Thus, corporation credit is inextricably linked to personal credit,

²³ See *Small Business Optimism Slips in September as Labor Shortages, Inflation Impact Business Operations*, NFIB (Oct. 12, 2021), <https://www.nfib.com/content/press-release/economy/small-business-optimism-slips-in-september-as-labor-shortages-inflation-impact-business-operations/>.

²⁴ See Liyan, *Meiguo Xiaowei Rongzi Zhidao: 70 Nian de Qishi* (美国小微融资之道—70 年的启示) [*The U.S. Way to Micro and Small Finance—70 Years of Insights*], WECHAT OFFICIAL ACCOUNT (May 7, 2020), <https://mp.weixin.qq.com/s/gCSOWxyHqFEV8ZeMbB5YhA>.

²⁵ See Vlad A. Hertz, *Fighting Unfair Classifications in Credit Reporting: Should the United States Adopt GDPR-Inspired Rights in Regulating Consumer Credit?*, 93 N.Y.U. L. REV. 1707, 1709, 1716-1717 (2018).

²⁶ See Ding Zhenhui, *Meiguo Zhongxiaowei Qiye Jinrong Fazhan Jingyan yu Jiejian* (美国中小微企业金融发展经验与借鉴) [*U.S. Micro, Small and Medium Enterprise Financial Development Experience and Lessons Learned*], Institute of Urban Finance, Industrial and Commercial Bank of China Research Report (July 17, 2015), <http://v.icbc.com.cn/userfiles/Resources/ICBC/fengmao/download/2015/0720meiguo-zhongxiaoweiqiye.pdf>

making finance and personal credit information processing two sides of the same coin.

The U.S. has a long history of regulating personal credit information processing, with the Fair Credit Reporting Act as the main legal regulation.²⁷ The two cores of U.S. regulation are the “accuracy and fairness of credit reports” and the “due process” of credit report generation.²⁸ “Due process” requires that credit reports are generated and disclosed only for specific purposes, to specific persons, and under specific procedures.²⁹ Improper disclosures and inaccurate reports bring remedy liability.³⁰ Moreover, the Financial Services Modernization Act entitles users to be informed of privacy policies and to opt out of information sharing between financial institutions and non-affiliated parties, but users cannot object when financial institutions share information with affiliated parties, or with non-affiliated parties for necessary purposes such as joint marketing.³¹

Therefore, the U.S. law focuses more on the application of personal credit information than on restrictions. Users can refuse the sharing of their non-public information by financial institutions only under exceptions and can dispute credit information only if it is inaccurate. Under the C&M Framework,³² the U.S. law in principle adopts the liability rule rather than the property rule for personal credit information. Credit institutions may use and share such information within their credit business as long as they pay the necessary consideration, i.e., to ensure the accuracy and fairness of the credit reports and to comply with proper disclosure procedures. Only if the business purpose is exceeded, the liability rule is transformed into a property rule by allowing individuals to refuse.

In summary, the good credit environment in the U.S. depends on the processing of non-traditional data including business owners’ personal credit information. Regarding the protection of personal credit information, the U.S. law distinguishes between two levels: First, it sets the areas where credit institutions can relatively freely process personal credit information, and the use of credit information beyond these areas is prohibited; Second, regarding lawful credit information processing, the protection focuses on accuracy, authenticity, and at most, the right to know,³³ without emphasis on the individual’s right to consent.

²⁷ See Lai Menyin, *Meiguo Zhengxin Jigou Jianguan de Falv Zhidu* (美国征信机构监管的法律制度) [*The Legal System of Credit Institution Regulation in the United States*], 2 FALV HE XIN JINRONG (法律与新金融) [LAW AND NEW FINANCE] 35 (2015).

²⁸ See 15 U.S.C.S. § 1681 (2022).

²⁹ See 15 U.S.C.S. § 1681a-h (2022).

³⁰ See 15 U.S.C.S. § 1681i-j (2022).

³¹ See Zhu Yunyang, *Geren Jinrong Xinxi Baohu de Luoji yu Guize Zhankai* (个人金融信息保护的逻辑与规则展开) [*The Logic and Analysis of the Rules of the Protection of Personal Financial Information*], 6 HUANQIU FALV PINGLUN (环球法律评论) [GLOBAL LAW REVIEW] 56, 63 (2012).

³² See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

³³ See Lai Menyin, *supra* note 27, at 41.

C. EU Regulation: A Subtle Leeway for Utilization

EU law is known for its strict protection of personal information. The General Data Protection Regulation (GDPR) is known as the most stringent data protection regulation nowadays.³⁴ Under Articles 6 and 7 of the Regulation, the processing of personal information requires individual consent, and such consent must be clearly identifiable and separate from other items for the information processing.³⁵ This makes it very difficult to create credit reports through big data processing, since each individual transaction record obtained by the credit institution may involve multiple individuals, and each of them must separately give consent. The whole process is extremely costly.

However, the EU's strict protection of personal information does not necessarily mean that the EU imposes the same stringent requirements on personal credit information processing. Credit practice in the EU creates an opportunity for relaxing the requirements on credit institutions. First, in the EU, the public credit agency instead of private entities is the main credit institution, which is entitled by law to comprehensively collect credit data of borrowers, and relevant institutions should report the credit data to the public credit agency.³⁶ This creates legal channels to obtain personal credit information without the need to obtain individual consent. Second, the EU has adopted the "open banking" concept, which allows third-party payment providers to access user data stored by commercial banks with the user's blanket consent.³⁷ A user's single consent can permit processing multiple times, thus easing the tension of acquiring consent for each processing.

D. Summary

Both the World Bank research results and the U.S. practice and regulation have shown that, in SME financing, information asymmetry can be significantly mitigated by credit institutions that generate corporate credit reports through big data algorithms based on a large amount of personal credit information. Credit institutions are entitled to use personal credit information without consent, and are liable to the individuals only if they cause an adverse impact. Even the EU, which strictly protects personal information, moderates the contradiction between obtaining consent from individuals and facilitating financing through its special practice mode in the credit field.

The extra-territorial practice can bring a reflection on whether personal credit information should be included in sensitive personal information under

³⁴ See Ju Hui, Oumeng "Zui Yan" Shuju Baohu Tiaoli Shengxiao (欧盟"最严"数据保护条例生效) [*The "Strictest" EU Data Protection Regulation Comes into Force*], ZHONGGUO QINGNIAN BAO (中国青年报) [CHINA YOUTH DAILY], May 28, 2018, at 4.

³⁵ See General Data Protection Regulation, Regulation (EU) 2016/679, arts. 6-7.

³⁶ See Li Xin, Lun Oumeng Zhengxin Jigou Jianguan Falv Zhidu (论欧盟征信机构监管法律制度) [*Legal Regime for the Regulation of Credit Institutions in the EU*], 2 FALV HE XIN JINRONG (法律与新金融) [LAW AND NEW FINANCE] 47-48 (2015).

³⁷ See Zhu Yunyang, *supra* note 31, at 64.

Article 28.1 of PIPL in China. More generally, does and should the definition of sensitive personal information in Article 28.1 take into account the social benefits of personal information processing?

III. THEORETICAL RECONSTRUCTION: NEGATION OF PERSONAL CREDIT INFORMATION AS SENSITIVE PERSONAL INFORMATION

A. General Principles: Considerations for Imposing Obligations on Personal Information Processors

1. Consequentialism: The Configuration of Multiple Obligations Should Follow Comparative Advantage Comparison. The legal obligation of credit institutions to protect personal information is at odds with their social responsibility to facilitate financing. The question is, why does the law impose legal obligations on market players? And how should different obligations be assigned to different market players facing different social expectations? The reason to impose legal obligations on market players is that their behavior causes externalities.³⁸ Credit institutions are no exception. Externalities refer to the influence on the consumer or producer's decision caused by the behavior of other players.³⁹ Externalities can be negative, e.g., the leakage of personal information by credit institutions, or positive, e.g., the promotion of SME financing by credit institutions and thereby the economic development by increasing liquidity. Positive externalities that are faced by the whole society are also known as public goods, such as SME financing.⁴⁰ With externalities, purely market-based exchange mechanisms cannot achieve Pareto optimality, and private entities have no incentive to provide public goods.⁴¹ For example, credit institutions have no incentive to protect users' personal credit information if not penalized, nor will they spontaneously help SMEs obtain loans. They will rather help banks to engage in more sound investments.

Addressing externalities requires internalizing them. A property right can be assigned to the affected subject, then the subject generating externalities has to consider the externality as a cost to compensate the property owner when making decisions.⁴² For example, if a credit institution has to pay a huge administrative fine or civil compensation for each leakage of personal information, it will try not to leak personal information. But is it necessarily the optimal configuration to make the externalities internalized by the subject that generates them? It is correct if there are only two subjects that each either

³⁸ See Liu Zhiyun, *Shangye Yinhang Jianxing Shehui Zeren de Neizai Youyin yu Lilun Jichu* (商业银行践行社会责任的内在诱因与理论基础) [*The Inner Incentives and Theoretical Basis of the Social Responsibility of Commercial Banks*], 1 ZHENGFA LUNCONG (政法论丛) [JOURNAL OF POLITICAL SCIENCE AND LAW] 74, 81 (2014).

³⁹ See HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS: A MODERN APPROACH* 644 (8th ed. 2010).

⁴⁰ See *id.*, at 695.

⁴¹ See *id.*, at 645.

⁴² See *id.*, at 655.

produce or suffer from externalities. However, in real society, there are also third-party subjects that neither produce nor bear externalities, but they may have a stronger ability to solve externalities. At this time, the solution to externalities is itself a public good that can be assigned to different providers. Whoever can solve externalities at the least cost should be the one to provide this public good.

Further, if the provision of public good A disables the market player to provide public good B, i.e., when the production possibilities of the player are bounded (because its total capital is limited), should the player be obligated to provide both public goods A and B? Particularly, what if there is another market player that can also supply both public goods? In this case, the production tasks should be allocated according to their comparative advantages! It is obvious that at the moment when good B is needed, the one who can produce more good B by reducing the supply of one unit of good A should switch its production.⁴³

Therefore, from a consequentialist perspective, an increase in the personal information protection obligations of credit institutions would be ineffective if it would cause detriment to financing and in turn reduce total social welfare. Particularly, it is impossible to internalize the social benefits of providing financing into the profits of credit institutions. Simply requiring them to protect personal information is an incomplete internalization, failing to achieve a state of production that maximizes their utility. When their capacity is limited, it is important to consider what functions they should undertake with priority to maximize social welfare.

2. Motivation Theory: Appropriate Incentives of a Single Obligation for Personal Information Processors. From motivation theory, punishing personal information processors will motivate them to protect personal information, according to the basic economic principle that incentives change behavior.⁴⁴

But what level of incentives are appropriate? Can personal information processing be banned wholly due to negative externalities, even if a net increase in total benefits to society has been brought about? Marginal benefits and marginal negative externalities of personal information processing should be compared. Applying the famous Hand formula, it is reasonable to require enterprises to increase prevention costs only when the prevention costs are lower than the potential damage to information subjects, otherwise, enterprises will prefer to commit torts rather than bear excessive prevention costs. If personal information processors are obliged to protect personal information no matter how, the results will be: First, information subjects will lack the incentive to mitigate their damages and cause unnecessary externalities;⁴⁵ Secondly, when personal information processors are faced with other choices than serving

⁴³ See N. GREGORY MANKIW, *PRINCIPLES OF ECONOMICS: MICROECONOMICS* 52ff. (Liang Xiaomin & Liangshuo trans., 7th ed. 2015) (discussing theories regarding comparative advantage).

⁴⁴ See *id.*, at 7-9.

⁴⁵ See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 162 (3rd ed. 1986)

individuals, they may prefer to engage in alternative transactions, i.e., credit institutions will no longer provide credit services to SMEs and to serve large enterprises more often. Therefore, incentives cannot be excessive, otherwise, market players will not produce at the point where social welfare is maximized, which is inefficient.

In summary, both the consequentialism and motivation theory perspectives prove that it is irrational to consider merely the internalization of externalities. The maximization of overall benefits requires personal information processors to undertake the legal obligations that they are most capable of and that can maximize overall benefits.

B. Theoretical Critique: Problems of the Definition in Article 28.1 of PIPL

Article 28.1 of PIPL does not fully emphasize the maximization of overall benefits in its definition of sensitive personal information.

First, the listing of sensitive personal information in Article 28.1 can be rigid under certain circumstances. Setting types in advance may ignore the utility measurement in specific situations.

Article 9.1 of the GDPR also lists sensitive data that require stricter protection according to the “nature” of different types of data.⁴⁶ This causes the need for the strict protection of the listed sensitive data in all cases, e.g., talking online about a person working half-time due to a foot injury is a reference to data concerning health, which is sensitive data.⁴⁷ Scholars, therefore, advocate a purposive restrictive interpretation of sensitive data categorized in Article 9.1 considering the actual interest to be protected in specific cases.⁴⁸ The processing of sensitive data happened only if the personal information processor uses the relevant data for sensitive purposes.⁴⁹

Second, Article 28.1 of PIPL merely focuses on the risk level of personal information processing,⁵⁰ but ignores the related benefits brought about. Risk and benefit always go hand in hand. Even if a higher risk exists when the relevant information is processed, greater social benefits can be produced meanwhile. Too high a duty on personal information processors can discourage the reasonable use of personal information and cause more harm than good. In this case, a liability rule is better, i.e., the subject who gains benefits from personal information processing activities should compensate the damaged individual

⁴⁶ See General Data Protection Regulation, Regulation (EU) 2016/679, Recital 51.

⁴⁷ See Criminal Proceedings against Bodil Lindqvist, Case C-101/01 (Judgment of 6 November), [2003] ECR I2971, paras. 50-51.

⁴⁸ Vgl. Albers/Veit, in: BeckOK DatenschutzR, 40 Aufl., DS-GVO Art. 9, Rn. 21.

⁴⁹ See CHRISTOPHER KUNER et al. eds., THE GENERAL DATA PROTECTION REGULATION (GDPR): A COMMENTARY 374 (2019).

⁵⁰ See Ning Yuan, *Mingan Geren Xinxi de Falv Jizhun yu Fanchou Jieding* (敏感个人信息法律基准与范畴界定) [The Legal Attributes and Definition of Sensitive Personal Information], 5 BILIAO FA YANJIU (比较法研究) [JOURNAL OF COMPARATIVE LAW] 33, 38-39 (2021).

afterward. The property rule to prevent all processing activities in advance shall be avoided.

Third, Article 28.1 of PIPL does not distinguish between the measurement of human dignity, personal security, and property security in balancing gains and losses. Human dignity and personal security are superior to property security in terms of the priority of rights and interests.⁵¹ Admittedly, the economic benefits of processing personal information may not necessarily compensate for the damage to human dignity. Economic benefits can, however, offset the risk to an individual's property security, making the individual happy to have the information processed. In comparative law, the protection of sensitive personal information is mainly aimed at maintaining personal rights, e.g., information autonomy of the information subject,⁵² rather than property rights. Therefore, not all property-related information shall be sensitive personal information.⁵³

In conclusion, Article 28.1 of PIPL lacks a comparison of benefits and losses. Enhancing protection obligations merely due to the existence of risks may hinder the maximization of overall benefits. To include personal credit information is one case.

C. Case Study: Incentive Distortion when Personal Credit Information Treated as Sensitive Personal Information

1. The Prior Social Responsibility of a Credit Institution is to Facilitate Financing. The social benefits of financing brought by credit institutions should be considered. With ΔD units of initial reserves, a commercial bank can create a total deposit of $\Delta R = \Delta D \times d$ (d is deposit expansion multiplier).⁵⁴ To simplify, d approximately equals the reciprocal of the legal deposit-reserve ratio and is generally around 10. Therefore, commercial banks can transform each unit of initial capital into 5-10 times circulating capital, while credit institutions are crucial in the process.

Now to analyze the role allocation of credit institutions between facilitating financing and protecting personal information. Credit institutions are at most the source of personal information leakage, and more illegal activities are committed by downstream lawbreakers. It is not so efficient to impose a high duty of protection on credit institutions, which have limited protection capacity compared with other more professional entities able to combat crimes, e.g., the public security department. In contrast, credit institutions have an irreplaceable comparative advantage in promoting financing by serving commercial banks.

⁵¹ See Wang Liming, *Lun Minshi Quanyi Weijie: Yi Minfadian wei Zhongxin* (论民事权益位阶：以《民法典》为中心) [*On the Rank of Civil Rights and Interests: With the Civil Code as the Centre*], 1 ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCIENCE] 32, 46 (2022).

⁵² See Paul Ohm, *Sensitive Information*, 88 S. CAL. L. REV. 1125, 1164-1165 (2015).

⁵³ See Wang Liming, *supra* note 1, at 9.

⁵⁴ See YI GANG & WU YOUNG, *HUOBI YINXING XUE* (货币银行学) [MONEY AND BANKING] 215ff. (1999).

Therefore, if credit institutions only have limited resources to allocate between promoting financing through credit reports and personal information protection, priority should be given to the former.

2. Too Much Emphasis on Personal Information Protection Discourage Credit Institutions from Promote Financing. First, credit institutions originally do not have incentives to serve SMEs in loaning due to high costs. The cost of credit analysis (review, due diligence, etc.) depends on the number of loans and is irrelevant to the size of an individual loan. The cost of issuing small-sized loans is usually the same as that of microloans.⁵⁵ To reduce costs, credit institutions naturally want to serve larger loans, because the cost per unit is lower for larger loans than for small and medium-sized loans. Moreover, SMEs have serious credit information asymmetry. As mentioned above,⁵⁶ SMEs do not have sound financial systems and are difficult to monitor. Their ability and willingness to repay are not transparent, increasing the cost of credit analysis.

Second, including credit information in sensitive personal information would worsen the situation. As mentioned above,⁵⁷ the personal credit information of SME managers, owners, trade partners, and consumers is crucial in credit analysis for the corporation. However, processing sensitive personal information shall have specific purposes, significant necessity, and separate consent under Articles 28 and 29 of PIPL, which highly increases the compliance cost for credit institutions. Credit institutions would thus prefer big companies as customers since the compliance cost under PIPL does not exist.

Third, the compliance cost of credit institutions would be transformed to SMEs in the manner of higher credit interest. The basic interest formula for banks is $p(1 + r_s)L + C = (1 + r_m)L$, with p being the probability to receive the loan, r_s being the interest ratio, L being the loan amount, r_m being the time value of money (assumed to be zero), and C being the cost of loaning.⁵⁸

$$\text{Therefore, } r_s = \frac{1 - \frac{C}{L}}{p} - 1.$$

Compared with loans to big companies or mortgaged loans, SME loans have a lower p and L with a higher C . SMEs are thus always facing the highest interest ratio. The financing cost for SMEs in China is already higher than 10% on average.⁵⁹ A higher cost of loaning, causing a higher interest rate, can only make things worse.

⁵⁵ See Al Berry et al., *The Economics of SMMs in South Africa*, TIPS (Dec. 2002), 71, <http://www.tips.org.za/files/506.pdf>.

⁵⁶ See *supra* pp.3-4.

⁵⁷ See *supra* p.4.

⁵⁸ See M. Neil Browne & Lauren Biksacky, *Unconscionability and the Contingent Assumptions of Contract Theory*, 2013 MICH. ST. L. REV. 211, 283, 288(2013).

⁵⁹ See *Zhongguo Shehui Rongzi Chengben Zhishu Gongbu: Pingjun Chengben Da 7.6%* (中国社会融资成本指数公布: 平均成本达7.6%) [China's Social Financing Cost Index Released with an Average Cost of 7.6%], CHINA NEWS (Feb. 1, 2018), <https://www.chinanews.com.cn/fortune/2018/02-01/8438785.shtml>.

3. Higher Protection Obligations on Personal Credit Information Cannot Really Help the Protection. First, the protection of personal information related to property security requires particular attention to the comparison of profits and losses. In the case of personal credit information protection, the more important goal for the information subject is to obtain loans. Protecting personal credit information with sensitive personal information standards cannot meet the expectation of the information subject itself, making the marginal benefit lower than the marginal cost.

Secondly, the protection cost of personal credit information will still be transferred to the information subject in the end. Since banks are in a stronger position in contracting with lenders, the interest rate of the contract does not depend on the lenders. The costs spent by credit institutions to protect personal information will eventually be passed on to information subjects through their contracts with banks and the interest rate of the loan. In the transaction structure, the separate consent to the use of information is thus inevitably affiliated with the loan contract, in which the information subject does not have bargaining power. The information subject cannot, therefore, benefit much from the property rule, although the legislator wishes to achieve it.

In conclusion, opinions to classify personal credit information as sensitive personal information do not consider the credit institutions' comparative advantage in promoting financing, and falsely enhance their duty of personal information protection to a too high level. The internalization of the externalities caused by leakage or misuse of personal information will sacrifice the positive externalities of promoting financing, and the cost is eventually on the borrowers, i.e., the information subjects.

IV. RULE INTERPRETATION: PURPOSE-BASED PROTECTION OF PERSONAL CREDIT INFORMATION UNDER DIFFERENT PROCESSING PURPOSES

A. Interpretation Philosophy: Distinguish Externalities Based on Processing Purposes

Article 28.1 of PIPL should be interpreted restrictively based on a benefit-risk balance, to exclude information types and processing circumstances which do not necessarily require higher protection standards.

Credit institutions can produce various types of externalities in processing personal credit information. On the one hand, processing personal credit information to create credit reports can not only help reduce information asymmetry and promote financing but also benefit a larger scope through information sharing. Positive externalities are thus created. On the other hand, negative externalities would happen if credit institutions utilize personal credit information beyond legal purposes (e.g., selling for profits, leaking due to negligence, etc.), or create erroneous credit reports even with legitimate purposes.

Avoiding negative externalities can be consistent with motivating positive externalities. A correct rule interpretation should distinguish between the

processing purposes of credit institutions. When credit institutions process personal credit information within the scope of credit business, the processing is not only beneficial to the total financing of society, but also more beneficial than detrimental to the information subject as a borrower. Personal credit information should not be included in sensitive personal information under this circumstance. When credit institutions carry out non-credit businesses with more risk than benefit, stricter obligations can be imposed, without hindering their main business or curbing their motivation to analyze credit data. Thereby, personal credit information can be classified as sensitive personal information. In addition, when credit institutions provide incorrect credit reports, it is not only detrimental to the information subject but also not beneficial to correctly issuing loans. It is necessary to impose an obligation to provide correct reports, which can be realized under Article 46 of PIPL, while a special law is particularly needed to refine the correction procedure and the liability for failure to correct.

This means that, regarding rights allocation, although PIPL allocates information ownership to information subjects through the informed consent rule, the property rule should be weakened and the liability rule should be strengthened when credit institutions carry out credit businesses. The application of sensitive personal information rules should be excluded. Credit institutions do not need separate consent, but can utilize blanket consent, implied consent,⁶⁰ or even silence,⁶¹ to legitimize their information processing activities. Meanwhile, credit institutions are still required to compensate under PIPL when they really harm the information subject (e.g., leakage or misuse of information). Thereby, purpose-based differentiated protection of personal information can be realized.⁶²

B. Rule Interpretation: Centered on Article 28.1 of PIPL

Faced with the possible rigidity of the list in Article 28.1 of PIPL, some scholars advocate the application of “context theory” to include or exclude certain types of information into or from sensitive personal information in specific scenarios.⁶³ However, first, Article 28.1 has explicitly listed several types of sensitive personal information, and it may be contrary to the literal meaning to

⁶⁰ See Wang Hongliang & Li Yiyi, *supra* note 8, at 11.

⁶¹ See Cai Xingyue, *Shuju Zhuti de “Ruo Tongyi” ji Qi Guifan Jiegou* (数据主体的“弱同意”及其规范结构) [*The “Weak Consent” of Data Subject and Its Normative Structure*], 4 BILIAO FA YANJIU (比较法研究) [JOURNAL OF COMPARATIVE LAW] 71, 82-83 (2019).

⁶² See Zhang Jihong, *Lun Woguo Jinrong Xiaofeizhe Xinxi Quan Baohu de Lifa Wanshan: Jiyu Da Shuju Shidai Jinrong Xinxi Liudong de Fumian Fengxian Fenxi* (论我国金融消费者信息权保护的立法完善: 基于大数据时代金融信息流动的负面风险分析) [*Legal Protection of Financial Consumers’ Information Rights Against the Backdrop of Big Data*], 6 FAXUE LUNTAN (法学论坛) [LEGAL FORUM] 92, 100 (2016).

⁶³ See Wang Yuan, *Mingan Geren Xinxi de Gainian Jieding yu Yaosu Panduan* (敏感个人信息的概念界定与要素判断) [*Definition of the Concept and Identification of the Elements of Sensitive Personal Information*], 2 HUANQIU FALV PINGLUN (环球法律评论) [GLOBAL LAW REVIEW] 85, 93-94 (2022).

simply apply the context theory to exclude these types of information.⁶⁴ The context theory can at most, through the general definition, include into the scope of regulation a type of information that is not listed but may transform into sensitive personal information in a particular scenario.⁶⁵ Second, the context theory has methodological flaws. The context theory requires comprehensive consideration of elements including information subject, information processor, third-party subject, nature of information, and purpose of processing.⁶⁶ In multi-factor analysis, judges usually have the path dependence to select easy and familiar elements for analysis and ignore difficult elements.⁶⁷ With the development of big data and algorithmic technologies, information processors have increased their abilities to use information illegally. Judges may rely on their concerns about the technical capabilities of information processors to classify each type of information as sensitive personal information, causing a significant and elusive increase in compliance costs for information processors.⁶⁸

In fact, the most important element in the context theory is the purpose of information processing.⁶⁹ Different processing purposes determine the processing results, and in turn determine the balance of cost and benefit, thus determining whether a type of information shall not be included as sensitive personal information due to the great net benefit of processing. Therefore, a purpose-based approach to categorizing sensitive personal information, which merely considers the foreseeable benefits based on the objective purpose of information processing, is more predictable and reasonable.⁷⁰

To apply the purpose-based approach in interpreting Article 28.1 of PIPL, first, the “violation of the personal dignity of a natural person or harm to personal or property safety” shall refer to a net “violation” or “harm” after balancing benefits and costs. Especially when the risk to the information subject is posed on the property security, the information shall not be categorized as sensitive personal information if the processing of it can bring a higher benefit than the risk. Second, since sensitive personal information is information that is harmful only under “leakage or illegal use”, there must be situations where such information is not leaked or used legally and has net benefits through processing. If there is no predictability of leakage or illegal use when processing such information, there is no need to protect it under sensitive personal

⁶⁴ See Han Xuzhi, *Mingan Geren Xinxi de Gaozhi Tongyi* (敏感个人信息处理的告知同意) [*The Informed-Consent Rules of Processing Sensitive Personal Information*], 3 DIFANG LIFA YANJIU (地方立法研究) [LOCAL LEGISLATION JOURNAL] 67, 68 (2022).

⁶⁵ See Ning Yuan, *supra* note 50, at 42.

⁶⁶ See Wang Yuan, *supra* note 63, at 94.

⁶⁷ Cf. Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 420-421 (2017).

⁶⁸ See also Paul Quinn, *The Difficulty of Defining Sensitive Data—The Concept of Sensitive Data in the EU Data Protection Framework*, 8 GERMAN L. J. 1583, 1596, 1605 (2021).

⁶⁹ The principle of purpose limitation has been called the “imperial clause” in personal information protection law. See Cheng Xiao, *Lun Woguo Geren Xinxi Baohu Fa de Jiben Yuanze* (论我国个人信息保护法的基本原则) [*On Basic Principles of China Personal Information Protection Law*], 5 GUOJIA JIANCHAGUAN XUEYUAN XUEBAO (国家检察官学院学报) [JOURNAL OF NATIONAL PROSECUTORS COLLEGE] 3, 9 (2021).

⁷⁰ See Paul Quinn, *supra* note 68, at 1609.

information rules. To summarize, Article 28.1 of PIPL shall not apply to the processing of information, as long as such processing can bring a net positive benefit in accordance with the foreseeable scope of the processor's objective processing purpose. This interpretative approach has been supported by judicial practice. In 2022, the Hangzhou Internet Court illustrated in a typical case that credit information is different from general personal information, because well-handled credit information can help create more trading opportunities with lower transaction costs.⁷¹

Specifically, on the one hand, if personal credit information is processed by credit institutions and their information providers for the purpose of forming accurate credit reports, it should not be considered sensitive personal information to avoid unnecessary protection obligations on credit institutions and their information providers, considering the unparalleled social benefits of credit businesses. Herein, as the Hangzhou Internet Court illustrated in 2022, a balance between the rights and interests of personal information and the public interest shall be made.⁷²

If, in contrast, there is a foreseeable objective danger that the personal credit information will be misused for purposes other than credit analysis or forming false credit reports, it shall be protected as sensitive personal information. Herein, channels to effectively correct erroneous personal credit information should be established. The judicial practice has recognized the right to correct credit information, as illustrated in an outstanding judgment issued by the Supreme People's Court in 2022.⁷³ Meanwhile, unlawful channels to change personal credit information shall be forbidden, which has been emphasized in the 2022 Notice by the General Office of the National Development and Reform Commission on Strengthening the Special Campaign against "Credit Repair" Problems.

V. CONCLUSION: MORE PRECISE BEHAVIOR GUIDANCE FOR MARKET

⁷¹ See Huang Moumou Su Mou Xinyong Guanli Youxian Gongsi Geren Xinxi Baohu Jiufen (黄某某诉某信用管理有限公司个人信息保护纠纷) (2021) 浙0192民初8058号 (Hangzhou Internet Court 2021), *Hangzhou Hulanwang Fayuan Fabu Geren Xinxi Baohu Shida Dianxing Anli* (杭州互联网法院发布个人信息保护十大典型案例) [*Hangzhou Internet Court Releases Ten Typical Cases of Personal Information Protection*], HANGZHOU INTERMEDIATE PEOPLE'S COURT (Aug. 19, 2022), <https://mp.weixin.qq.com/s/82rYeUUmNzCgehKjY4ifhA> (last visited Apr. 20, 2022).

⁷² See Wangmou Su Mou Yinhang Gufen Youxian Gongsi Geren Xinxi Baohu Jiufen (王某诉某银行股份有限公司个人信息保护纠纷) (2021) 浙0192民初5426号 (Hangzhou Internet Court 2021), *Hangzhou Hulanwang Fayuan Fabu Geren Xinxi Baohu Shida Dianxing Anli* (杭州互联网法院发布个人信息保护十大典型案例) [*Hangzhou Internet Court Releases Ten Typical Cases of Personal Information Protection*], HANGZHOU INTERMEDIATE PEOPLE'S COURT (Aug. 19, 2022), <https://mp.weixin.qq.com/s/82rYeUUmNzCgehKjY4ifhA> (last visited Apr. 20, 2022).

⁷³ See Xu Xiaodong Su Jiangsu Dongtai Nongcun Shangye Yinhang Gufen Youxian Gongsi Mingyu Quan Jiufen (徐小东诉江苏东台农村商业银行股份有限公司名誉权纠纷) (2021) 苏0981民初5290号 (Dongtai City People's Court 2021), *Zuigao Renmin Fayuan Fabu Quanguo Fayuan Xitong 2022 Niandu Youxiu Anli* (最高人民法院发布全国法院系统2022年度优秀案例) [*The Supreme People's Court Released the Outstanding Cases of 2022 in the National Court System*] 法办〔2022〕652号 (Supreme People's Court 2022).

PLAYERS

This essay arises from the possibility that Article 28.1 of PIPL may classify personal credit information as sensitive personal information, thereby imposing higher protection obligations on credit institutions and their information providers. This essay argues that these high obligations are contradictory to the social responsibility of credit institutions to promote financing (especially for SMEs). Comparing the practice and research from the World Bank, the U.S., and the EU, the mainstream trend is to encourage the application of big data and machine learning to fully utilize the personal credit information of SME managers and controllers, so as to analyze the creditworthiness of SMEs to reduce information asymmetry. Theoretically, the allocation of legal obligations should focus on maximizing the comparative advantages of market players and the overall benefits, i.e., emphasizing the responsibility of credit institutions to promote financing herein. The higher obligations of credit institutions to protect personal information cannot help social financing, but only shift the compliance cost to information subjects through the contract, and are against the real expectation of them to obtain loaning. On this basis, Article 28.1 of PIPL should be interpreted not to apply when credit institutions utilize personal credit information within the scope of credit business, and to characterize personal credit information as sensitive personal information when there is an expected danger of non-credit use or providing wrong credit reports. Therefore, maximized social benefits can be achieved by distinguishing the different externalities of processing personal credit information. Since the Supreme People's Court may consider drafting a judicial interpretation of PIPL,⁷⁴ the above conclusions are available for reference.

The definition of sensitive personal information in Article 28.1 of PIPL has not adequately considered maximizing benefits and reflects a tendency to emphasize policy advocacy over economic rationality. Over-exalting the obligations of market players to comply with personal information protection can impair the special social responsibility of different market players. The configuration of legal obligations must be based on the full evaluation of behavioral externalities and the maximization of net social benefits through appropriate incentives. In this sense, the interpretation of the PIPL should focus more on the needs of economic practice, and avoid simply repeating the protection idea.

⁷⁴ See Cheng Xiao, *Yingdang Jinkuai Zhiding Gebao Fa Sifa Jieshi* (应当尽快制定个保法司法解释) [The judicial interpretation of PIPL should be formulated as soon as possible], WECHAT OFFICIAL ACCOUNT (Mar. 22, 2023), <https://mp.weixin.qq.com/s/o1ko5TMGfxHrBq7J322yjjg> (last visited Apr. 20, 2023).