

EU 個人情報保護指針 域外適用*

目次

- I.
- II. 国内法 域外適用
 - 1. 美国
 - 2.
- III. EU 個人情報保護指針
 - 1. 個人情報保護
- 2. EU 個人情報保護基準
- 3. EU 個人情報保護 判定節次
- 4. EU 第3國間 協商
- III. EU 指針 對應方案
 - 1. 概 觀
 - 2. 對處方案

I.

(trans-border data flow: TBDF)

個人情報(personal data)¹⁾ (data subject) が (data 2)

權(right to privacy) 基本權

. 1980 (OECD) 「

」(Guidelines Governing the Protection of Privacy and Transborder Data Flows of Personal Data)

,³⁾ (UN) 1990 12 「

」(Guidelines for the regulation of computerized personal data files)

* 2001

[01-02]

1)

2) 藤原静雄, “諸外国における個人情報保護法制の動向 - 2000年12月”, 「法律のひろば」, 2001.2, 11 .

3) <<http://www.oecd.org/dsti/sti/it/secur/prod/PRIV-EN.HTM>>. OECD 1998 10 「

」 1980 8

(EU) 1995 1997 (Directive 95/46/EC, “EU ”)⁴⁾
(Directive 97/66/EC)⁵⁾ . EU 3
가
, 3 6) 國內立法⁷⁾ 準相
가
互主義(reciprocity) .⁸⁾ EU
가 9) EU 域外適用

4) 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, Official Journal n° L281 of 23.11.1995, p.31.

5) 1997 12 15 (Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector) . EU (95/46/EC) (97/66/EC) , ISDN

6) EU 1995 10 24 , 3 1998 10 24 () . Article 29 Data Protection Working Party, *Fourth Annual Report covering the Year 1999*, 5019/01/EN WP46, Footnote 5, 17 May 2001, p.5.

7) 指針(Directive) () (EC 189) . 規定(Regulation) . EU 1998 가 10 24 國內轉換(transposition) EU 1999 7 226 (reasoned opinions)

8) EU 25 1 3 “ 3 (adequate level of protection) 가 ” , 2 “ 3 가 . 3 가 3 가 3

9) 藤原靜雄, , 11 .

(extraterritorial application)

EU

EU

EU

(information technology:

IT) 強國

II. 國內法 域外適用

1. 美國

獨占禁止法

가

競爭制限行爲가

.¹⁰⁾

制定法

領域

(屬地主義),

.¹¹⁾

, 1940

’¹²⁾

() 가

影響理論(

: effects doctrine)

’¹³⁾

獨占禁止法

10) , 「 , 1986, 310 .

11) , “ ”, 2001.2, 2 .

12) *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

13) *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th cir. 1976); *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 749 F.2d 1378 (9th cir. 1984). 1

가 國際禮讓(international comity) 가 域外適用 合理性 (rule of reasonableness)¹⁴⁾ , ‘ ’¹⁵⁾ 가 (1) .¹⁶⁾ 가 「 - 法」, 「 - 經濟制裁法」 가 .¹⁷⁾

2.

가 對抗立法 (blocking statutes) .¹⁸⁾ (EC) 競爭制限行爲¹⁹⁾ 가 EU EU 가 3 雙方向 가 .

EU

14) 3 (Restatement (third) of the Foreign Relations Law)

15) *Harford Fire Ins. Co. v. California*, 113 S.Ct. 2891 (1993), 509 U.S. 764 (1993).

16) , 30 33 .

17) , 「 」, 1995, 6 .

18) EU 가 가

<<http://usaengage.org/news/970801iust.html>>

19) 85 (), 86 () .

가

가

節

III. EU 個人情報保護指針

1. 個人情報保護

가. 個人情報保護

人權

EU

가

가

가

消費者保護(consumerism)

²⁰⁾

EU

가 EU

가

權

「人權協約」²¹⁾

(European Convention for the Protection of Human Rights and Fundamental Freedoms: "ECHR") 「會議協約」(Council of Europe Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data, Euro. T.S. No.108: "CoE 108"), EU 95/46/EC 97/66/EC, EU 憲章

. EU指針

EU

3 1

(automatic

means)

手作業(manual)

20) Joel R. Reidenberg, "Privacy Protection and the Interdependence of Law, Technology and Self-Regulation", 23rd International Conference of Data Protection Commissioners, Sept. 25, 2001, Paris, p.2.

(policy model)

가

21) ECHR

1950

1953 9

3

40

가

가

. <<http://www.coe.fr/tablconv/5t.htm>>

가 2, , 共同體法 가 가 가 가 (指針前文 12, 13).

. . . (14). , () , 가 가 (9).

2. EU 個人情報保護基準

가. 가 EU 29 (Data Protection Working Party: “DP ”) 1998 7 24 「EU 25 26 3 」²²⁾ (working document) EU 1980 OECD 가 8

(purpose limitation) : , (data quality and proportionality) :

(transparency) : 가 3

EU 11 2 13

22) “Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU Data Protection Directive” <http://europa.eu.int/comm/internal_market/en/dataprot/wpdocs/wp12en>

(security) :

(rights of access, rectification and opposition) :

(restrictions on onward transfers): 가

2 가

26 1

EU 가 가 , (DM),

(sensitive data): . . .

가 가 .

(direct marketing): DM

가

(automated individual decision):

가 .

EU 가

가 , 가

가 .

評價基準

EU

EU

EU

가 3 가

가 (methodology) 가

(FUNDP) 「 」(Centre de Recherche Informatique et
Droit: “CRID”)

CRID EU 25 ‘ ’

가 .

(case by case approach): 3

가가 .

(flexible and open approach):

가 (TBDF)

(functional approach): 3

가 .

CRID 가 . CRID

,²³⁾ DP CRID

(:) 1998 7 24

(Transfers of personal data to third countries: Applying Articles 25 and 26 of the
EU Data Protection Directive) .²⁴⁾

CRID , , EU

25 2 가 25) , ,

CRID

가 , 가

23) CRID, *Preparation of a methodology for evaluating the adequacy of the level of protection of individuals with regard to the processing of personal data*, Annex to the Annual Report 1998 (XV D/5047/98), DG Internal Market and Financial Services, 1998.

24) (Annex) 가 3

EU 가 3 , EU 3 DM 가

EU DM 가 (XV D/5047/98), p.2.

25) 8) .

가

가

, 3 EU

EU

(functional similarity)

[機能的 評價]

.26)

CRID

가

-

4

가

個人參與

-

-

[]

-

[]

-

-

가

-

가

目的

-

-

(,)

가,

-

[]

[]

26)

가(functional approach)

EU

3

3

(equivalent protection)

가

EU

比例性

-
-

品質

-
-

(update)

CRID

가

EU

4

가

policy)

公的

(privacy

統制가

가

制裁

救濟手段

CRID

가

가

自律規制

EU

3

가

(self-regulation)가

自律規制

EU

27

가

行動綱領(code of conduct)

EU 域外國家

가

가

가

가

制裁

가

가

가

가 3

가

가 . 가
 EU , ,
 , ,
 가 ,
 ,
 가; , 가;
 가 가 .

· 契約方式

EU 가 3 ,
 26 2 EU

(contractual solutions)
 ‘ (Bahncard)²⁷⁾ .
 EU 가 가
 (data controller)가
 (processor) . EU

-
- EU
- 가 3 (third party beneficiary clause), 3 ,
 3

EU 2001 7 15 「 3

27) 1994 (Deutsche Bahn AG) 가
 가 「 가
 「(Agreement on Inter-territorial Data Protection) ,

」²⁸⁾(standard contractual clauses)

(data exporter) (data importer) 가
가 가 3

3. EU 個人情報保護 判定節次

EU CRID , 3
가 3
, , 가 ()
) 가 ()
), (,),
 (data
protection authority), . 가
(가) , EU
(가) .
CRID 가 EU 3
, 3
, / 가
(risk table) , 가
(observations) . 3
EU
, (,) , ()
EU ,

28) Commission Decision on Standard Contractual Clauses under article 26(4) of Directive 96/46/EC for the transfer of personal data to processors established in third countries. EU 3 , DM

EU

(DP)

CRID가 EU

가

EU

가 EU

가

< 1>

EU

EU	DP (§ 29)		(§ 31)
----	-----------	--	--------

- EU

- 3

- EU

(§ 25(6))

(§ 25(5))

-

- 가

-

- (§ 31(2))

(§ 26(1))

-

- 3

-

-

: () EU

4. EU 第3國間 協商

EU

(TBDF)

가 3 , EU , , 가

EU 「 」(CoE 108) EU

가 .

가.

EU

15 EU , 「 」(European Economic Agreement: EEA) , 가 , 3 .

3 EU 25

EU 6 ‘ , 5 ‘ , .

가 3 가 .

가 .

EU 25 1

EU (:)

가 . EU

가 가 .

EU , 가 1999

가

· 美國

가 個別法
가

EU가

가 .29)

EU

'(Safe Harbor Principles)

· EU

가

DP

가

EU

.30)

(FAQs)

告知(Notice):

(organizations)

3

選擇(Choice):

가 3

(opt-out)

가 3

29)

(OBM)

「

」(1984), 「

」(1988)

」(1988), 「

」(1996)

(FTC)

가

· 松井茂記, “アメリカ-プライバシ-保護法制の展開”, 「法律時報」 72卷10號 (2000.9), 26 .

30) EPIC & Privacy International, *Privacy & Human Rights : An International Survey of Privacy Laws and Developments*, Electronic Privacy Information Center Washington, DC, 2001, p.17.

(opt-in) .
EU

3 (FAQ
14).

(FAQ 1).

3 傳送(Onward Transfer): 3

, 3 가

(ISP),

(FAQ 3).

安全性(Security):

, , ,

無缺性(Data Integration):

가 가

接近(Access):

. FAQ 가

가

가 .

實行(Enforcement):

,

EU 合意

協約 .

가

가
 1990 「 (National Principles for the Fair Handling of Personal Information) EU
 (codes of conduct)
 DP

IV. EU 指針 對應方案

1. 概 觀

EU 가 3
 가
 3
 EU 가
 安全對策(safeguards)
 가
 第3 受益者(third party beneficiary)
 EU
 特約

31) 外, 「 가
 2000.12, 43

2. 對處方案

가. 原則

EU 가 가 가 가 가

32) 가

(IT)

(privacy enhancing technologies: PET s)³³⁾

- P3P(platform for privacy

preferences)

가 .

. 公共部門 民間部門別 基本戰略

가 8 EU OECD , EU가

3

DM .

EU EU 28

34)

(Ombudsman)

32)

33)

(compliment)
pp.47-48.

(replace)

. EPIC, *Op.cit.*,

34) EU
1),

(28

35) 一般法

日本

36)

EU

37)

中央集權式 規制

業界 自律規制

가

가

EU

EU

協商

가

35)

가

()

, 4 , 6 , 7

1 , 2 , 5

()

36)

가

가

가

37) EU

가

가

가

가 가
 , , , 가
 가 EU (38)
 EU 가
 가 OECD ,

,
 가
 가
 가

EU 標準契約書 約款

· 業界 自律規制
 EU 27
 (39) ()가
 自律規制規約 實踐綱領(compliance)
 가
 (40)

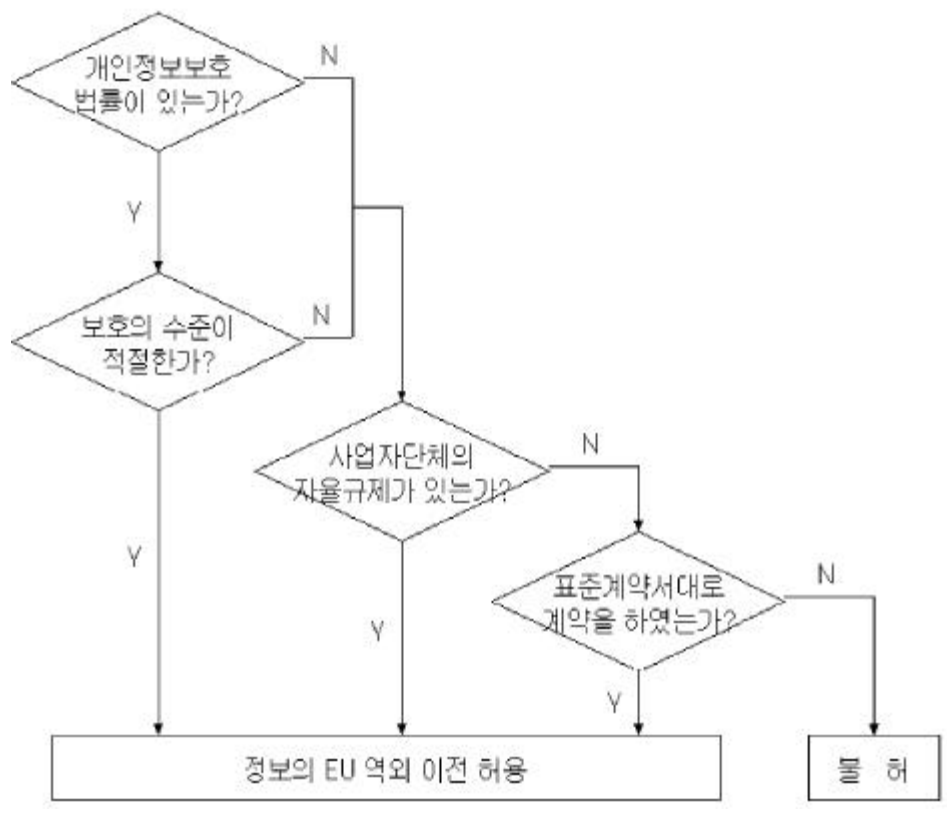
38) EU 가 (:) 가
 39) EU 가 DP EU
 (Federation of European Direct Marketing: FEDMA), (International Air
 Transport Association: IATA) (Community code)

40) 가 ,
 가 가 ,
 “ ”,
 , 2001.8, 58 59 .

- .
 -
 - 가
 - 司法判斷
 - 가
 政主導() , 標準規範 () 行

< 2 >

EU



가

(privacy policy)

認證

· 個人情報保護 標準契約書

가

約

款

個別 契約

(ICC)

가 EU

EU

()

· 對内外 弘報

가

가

英譯

가

(FAQs)」

別表

< >

EU指針 域外適用 對應方案

	- EU ()	-
	- EU	- ()
	-	

[: 「 」 43 , 2002. 2.]

- 「 」, 2000.
- 「 」, () , 2001.7.
- “ ”, 「 」, 94 , 2001.5.19.
- 「 が 」, 00- 1, 2000.12.
- “ ”, 「 」 5 , 2000.10.
- _____, “ ”, 「 」, 2001.11.10.
- 「 」, 00- 2, 2000.11.
- “ ”, 「 」 34 1 , 1999.12.
- 「 」, 2001.10.17.
- 「 」, 196 , , 1995.
- 堀部政男, “欧州聯合(EU)個人情報保護指令の経緯”, 「法律のひろば」, 2001.2.
- 藤原静雄, “個人データの保護”, 「現代の法」, 岩波講座 10, 岩波書店, 1998.
- _____, “諸外国における個人情報保護法制の動向 - 2000年12月”, 「法律のひろば」, 2001.2.
- 三宅 弘, “個人情報保護法制化の経緯と課題”, 「法律時報」72巻10號(2000.9).
- 松井茂記, “アメリカ- プライヴァシ- 保護法制の展開”, 「法律時報」72巻10號(2000.9).
- 個人情報保護法制化専門委員会, “個人情報保護基本法制に関する大綱案(中間整理)”, 「法律時報」72巻 10號(2000. 9).
- CRID, *Preparation of a methodology for evaluating the adequacy of the level of protection of individuals with regard to the processing of personal data*, Annex to the Annual Report 1998 (XV D/5047/98) of the Working Party established by Article 29 of Directive 95/46/EC.
- Joel R. Reidenberg and Paul M. Schwartz, *On-line services and data protection and privacy - Regulatory responses*, Vol. II, Annex to the Annual Report 1998 (XV D/5047/98) of the Working Party established by Article 29 of Directive 95/46/EC.
- Joel R. Reidenberg, "Privacy Protection and the Interdependence of Law, Technology and Self-Regulation", 23rd International Conference of Data Protection Commissioners, Sept. 25, 2001, Paris.
- EPIC & Privacy International, *Privacy & Human Rights : An International Survey of Privacy Laws and Developments*, Electronic Privacy Information Center Washington, DC, 2001.
- EU <http://europa.eu.int/comm/internal_market/en/dataprot/wpdoc/index.htm>

Abstract

The Extraterritorial Application of EU Rules on Data Protection

Whon-Il Park

With the rapid increase of trans-border data flow, so has the prospect of an infringement of the interest of a given data subject through an unauthorized release or use of personal data. This development has made data protection an international issue. EU has issued a couple of Directives(Directive 95/46/EC, Directive 97/66/EC), obligating its member countries to legislate national laws to protect personal data. According to Directive 95/46/EC("the Directive"), transfer of personal data to a non-Member country is allowed only when an adequate level of protection is provided by that country.

This essentially blocks non-member countries, whose level of protection does not meet the standards set by the Directive from engaging in trans-border data flow with EU member countries, thus bringing up an issue of the extraterritorial application of EU rules.

The current article examines the Directive and lays out the basic principles of personal data protection; the standards for evaluation of level of protection in non-member countries; and the evaluation procedure. The current article then discusses specific ways for both public and private sectors of Korea to cope with the extraterritorial application of EU rules on data protection.