

PRELIMINARY STUDY ON THE RIGHT TO DATA PORTABILITY

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ABSTRACT

Abstract: Since the General Data Protection Regulation has been released in 2016, the right to data portability has been heatedly debated. As a new data right, the right to data portability is not accidentally emerged, but generated through the process of establishing the theory of data self-determination and the practice of number portability. This paper examined the right to data portability from three aspects: data, portability and rights, and after theoretical analysis, it revealed the essence of the right to data portability as well as its advantages and disadvantages. Combining with the current social situation in China, it concluded that it is immature to introduce the right to data portability to China at present and more studies on the internal mechanism of this right are needed.

Keywords: Right to Data Portability; Data; Portability; Rights; Number Portability

INTRODUCTION

Along with the development of Internet information technology and the arrival of the era of big data, big data is constantly used in various industries, and the value of big data is also highlighted. On the basis of the value of data, it is necessary to establish the protection system for data. From a global perspective, countries all over the world are actively formulating data protection laws. Among them, the General Data Protection Regulation (GDPR), which was passed by the European Parliament in 2016 and came into effect on May 25, 2018, is the most distinctive. The GDPR has improved several rights related to data, such as the right to know, the right to access, the right to object and so on. Additionally, it also established several new rights, such as the right to data be forgotten and the right to data portability. This paper explored the right of data portability in details. It first traced back to the origin and development of the right of data portability, and then analyzed this right within the framework of its internal attributes so as to reveal the essence of the right of data portability. After that it also examined the scope of the application of the right of data portability, and to make a preliminary discussion on the practice of this right in China.

THE EVOLUTION OF THE RIGHT OF DATA PORTABILITY

Theoretical Origin of Right of Data Portability

Right of data portability reflects a kind of data subject's control over personal data, which is enhanced with the continuous expansion of data rights. Therefore, it is also a further extension of basic data rights, reflecting the data subject's stronger control over relevant personal data. It is generally believed that the theoretical origin of the right of data portability lies in the decision of the Federal Constitutional Court on the right of information self-determination in Germany. In 1982, the federal government of Germany promulgated the Census Law, which declared that the citizens' personal information should be collected all over the country. Some citizens hold objection to this declaration, so they filed a constitutional action against it, claiming that it was unconstitutional. At last, the German Federal Constitutional Court made a judgement in 1983,

finding that the law was unconstitutional, and in its judgment, the right of personal information became a clear constitutional rightⁱ.

The decision shows the position of constitution law to protect personal data from unlimited extraction, storage, use and continuous transmission. This fundamental right guarantees the right of individual citizens to decide, disclose or use their personal data on their ownⁱⁱ. Individuals have the right to self-determination of their own data, and individual citizens can protect their own information security based on the right of self-determination of data. If other relevant individuals and institutions violate this right of self-determination of information, it is against the principles of the Constitution and will be declared invalid. Based on the principle of protecting citizens' personal data, personal data cannot be used, extracted, or spread wantonly by others or related enterprises or even the state at will without the consent of data subject. In a sense, it is also a manifestation of social contract. The theory of self-determination of information not only limits the collection and dissemination of data, but also determines the right of data and protects the rights of data subject. Here, the theory of information self-determination is the basis of data rights, which is also the origin of data portability, laying a theoretical foundation for the emergence of data portability.

Experimental Field of Right of Data Portability

As the experimental field of the right of data portability, number portability to some extent perfectly fits the concept and content of the right of data portability. Undoubtedly, telephone number as a personal contact method, is a kind of personal data. The so-called number portability, in the most common sense, means that the user of the number can continue to enjoy the service of the number without changing its number while changing different operators. Singapore is pioneered in the development process of number portability. In 1997, it first introduced the number carrying service and established the number carrying policy. The method adopted by Singapore is called call forwarding. The number subject can apply for the number carrying service from the old number to the new number, and in this process, the local number user can retain the original mobile phone number when changing the mobile communication operator. This method quickly spread to other countries, such as the US and

Japan. In general, the services carried by these numbers improve the user experience, facilitate the further use of users, and promote the competition of operators and other related enterprises. As a kind of personal data, the portability of number shows the emergence of the right of data portability. With the spread of the experiment of number portability in various countries, the determination of the right of data portability is becoming more and more mature. While the number subject experiences the convenience of number portability, it also improves the requirements for the right of data portability, which thus enriches the theoretical content of the right of data portability. For example, this number carrying to network is in line with the data transfer right in the right of data portability. The creation and continuous implementation of this number portability crates an experimental model for the establishment of the right of data portability.

Indicator for Establishing the Right of Data Portability

In the process of establishing the right of data portability, the European Commission finally established the final version of the General Data Protection Regulation after several drafts, and the right of data portability is reflected in the final version. The process of establishing the right of data portability can be traced back to the provisions on the portability of telephone numbers in the Universal Service Directive issued by the European Union in 2002ⁱⁱⁱ. As an instrumental medium of personal communication, telephone number records a lot of personal data, or call records, or the information content contained therein, or the communication number stored therein. In this sense, the provisions on number portability in the Universal Service Directive can be deemed as a starting point for the EU to establish the right of data portability. Since then, the EU has begun to further explore the right of data portability, which has been continuously reflected in subsequent legal documents. The emergence of portable telephone numbers has facilitated the lives o users. Therefore, the concept of portability has rapidly spread from the field of telephone numbers to the field of the Internet, including various communication tools, search engines, web records, etc. As people experienced the convenience of portable numbers, they also have further needed for other fields. For example, Facebook,

Google and other related Internet discussions on portability have further promoted the European Commission's legislative process on data portability.

Subsequently, the concept of right of data portability was first proposed and defined in detail in the Data Protection Directive issued by the European Commission in January 2012. After constant deliberation by the European Commission, the GDPR was finally issued in April 2016. The Regulation aims at all enterprises that collect, process, store and manage personal data of EU citizens, limits the disposal authority of these enterprises for users' personal data, and returns the final control of personal data to the users themselves. In order to maximize the protection of citizens' right to personal data and enhance citizens' right to control their own data, Article 20 of the Regulation creates a new right to data, that is, the right of data portability. Since then, the right of data portability has been officially established by legal documents, and continuously invoked and applied in subsequent practice.

INTERNAL ANALYSIS OF THE RIGHT OF DATA PORTABILITY

The right of data portability has aroused widespread controversy since its establishment. Major enterprises and many scholars have expressed great concern about the implementation of the system. The focus is not only on the practical application of the right of data portability, but also on the internal interpretation of this right, and even the overlapping issue of right of data portability and other data rights. In the following subsections, the author attempts to examine the right of data portability based on the relevant provisions of the GDPR and in combination with the Guide on the Right of Data Portability published by the EU Data Protection Working Party.

According to Article 20 of the GDPR, the data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided^{iv}.

“Data” in the Right to Data Portability

There are some restrictions on the “data” in the right to data portability. Firstly, the data only refers to the data provided by the data subject, that is, the personal data provided by the data subject to the data controller for a certain purpose, excluding the relevant data information provided by other data subjects. Secondly, the data provided to the data controller should be understood in a broad sense. The purpose of establishing the right to data portability is to protect the data rights of the data subject to the greatest extent, so as to reduce the infringement of personal data by the platform or enterprises. It can be inferred that the provision here not only includes the data actively provided by the data subject to the data controller based on the completion of a project, such as the registered account, personal name, age, address and other personal information to complete the login to a platform, but also includes the personal data obtained by the data controller from the use activities of the data subject after completing the registration and login. For example, search history, browsing footprints, collection records, pictures and videos, activity logs, etc. These data include personal concerns, personal interests and some credit records presented by users based on their online use of a platform, which is a connecting way to define the data subject and objectively reflects some data contents of the data subject and therefore can be deemed as personal data provided by the data subject to the data controller, although they are not actively provided by the data subject. Besides, the scope of the data provided by the data subject to the data controller cannot be expanded at will. It is not conducive to the protection of the rights and interests of the data controller when the personal data mastered by the data controller are all regarded as the data provided by the data subject and therefore be treated as the regulation scope of the right of data portability. For instance, the data derived from the relevant speculation made by the data controller based on the personal data provided by the data subject contains a certain subjective opinion, which is a subjective deduction made by the data controller from scratch based on analysis, and cannot be regarded as the personal data provided by the data subject to the data controller.

In addition, the scope of relevant personal data should also be limited. In real life, people often exist based on certain social relations rather than a single independent individual. Therefore, relevant personal data often involves third parties related to the data subject, including some

business contacts and confidential letters with third parties. If the portability of these data will damage the rights or freedoms of the third party, it should not be included, such as involving the privacy and trade secrets of the third party. However, if there is no harm to the interests of the third party, then it cannot be excluded, such as some ordinary telephone records, information transmission and other personal data about the third party. Because this connection is only an ordinary life connection, and it cannot be excluded, otherwise there will be little data left of this independent individual. Moreover, according to Article 4 (1) of the Regulation, personal data means any information related to an identified or identifiable individual^v. Therefore, unidentified data or data cannot identify individuals are not belonging to the personal data. Of course, the “data” here only refers to the personal information of natural persons, but not include the relevant data of enterprise legal persons. Thus, it can be learnt that “data” in the right of data portability should generally be expanded for interpretation, but it cannot be arbitrarily expanded beyond the degree acceptable to ordinary people, so as to reach the degree of analogical interpretation. Generally speaking, personal data here only includes the personal information presented by the objective activities of the data subject. The data derived from the subjective conjecture of the data controller is not regarded as personal data, and the relevant personal data does not completely exclude the personal data about the third party, but excluded when it is detrimental to the interests of a third party.

“Portability” in the Right to Data Portability

“Portability” in the right to data portability emphasizes the data subject’s portable control over the data. Portability or carrying generally refers to physical substances rather than virtual things, but here we can make an expanded explanation. For personal data existing in the virtual world, carrying it means that the data subject can control the data at any time and can access it at any time according to the needs of the data subject. In addition, “portability” stresses that the data can be transferred from one place to another, which reflects the data subject’s control over the data controller. Data subject can require the data controller to transfer its relevant personal data according to his needs, and the data controller cannot refuse without any reasons.

Therefore, relevant personal data must exist in a structured and universal way and be ready for transfer at any time.

Generally, the “portability” of the right to data portability can be understood from the following aspects. First, portability has two meanings—copy availability and data transfer. For one thing, the data subject can obtain relevant personal data at any time according to its own needs and take out its data from the data controller. For another, the data subject can require the data controller to transfer its data.^{vi} Second, as for the way of data portability, according to the provisions of the Regulation, it must be in a structured, commonly and machine-readable format. “Structured” emphasizes that the data must be summarized and sorted out, showing in a rational way. “Commonly” emphasizes that the data must be generally applicable, identifiable and convertible in form. As for “machine-readable”, it emphasizes that the data subject can re-identify its own data through machine, and its format text requirements are different due to different machines used by different controllers. In addition, the transplantation must be barrier free, and the data controller cannot interfere with it. The Guide to the Right of Data Portability clearly explains the term “barrier”, that is, “any legal, technical or financial obstacle created by the data controller to avoid or hinder the access, transmission or reuse of data by the data subject or other data controllers.” Accordingly, the “barrier free” should be understood in a narrow sense.^{vii}

“Right” in the Right to Data Portability

According to the above analysis on the “portability”, the content of the right to data portability mainly includes two aspects: one is the right to obtain the copy of data, and the other is the right to control the transfer of data. Pursuant to Article 20 of the Regulation, the so-called right to obtain copies of data is the right of data subject to download and obtain personal data from the data controller and keep it for reuse. This right not only improves the convenience of the data subject for its own data utilization, but also cooperates with the data controller with certain obligations. The data controller must provide the data subject with the personal data in a structured, commonly and machine-readable way, and cannot refuse to provide it against the will of the data subject. For example, Google and Facebook provide some download ports for

users, where data subject can easily and quickly download personal data and obtain its copy so as to realize its access right.

As for the right to transfer data, it is the right enjoyed by the data subject to require the data controller to transfer personal data from one data controller to another without obstacles. For example, the data subject can require the data controller of one platform to transfer personal chat records, photos, images, video information and other contents to another platform, and can require the data controller of an enterprise to transfer personal sales records, credit scores, settlement information and other contents to another enterprise. In addition, the object of the data transfer right is only limited to personal related data, but not include the data information of the interests of the third party. Besides, on the basis of the original data transfer right, the Regulation adds the provision of “directly transfer personal data between controllers under the condition of technically feasible”, so as to make the transfer of personal data more convenient.^{viii}

From the above analysis, it can be seen that the granting of right to data portability supports user selection, user control and user authorization of personal data under certain conditions. Considering the two aspects of right to data portability, it can be seen that the establishment of the right to data portability can effectively promote the innovation and sharing of personal data among data controllers in a certain stable way and at the request of data subjects. Moreover, it can promote the limited sharing of personal data among data controllers so as to improve service quality and user experience, as well as promote the transmission and reuse of personal data about users between different services they are interested in, so as to fully realize the value of data.

The boundary of the right of data portability is also an important issue to be discussed. Rights have certain boundaries, and there is no right without any restrictions.^{ix} Although the purpose of establishing the right of data portability is to effectively enhance the data subject’s control over their own data, this control is not absolutely unlimited. First of all, this control is reflected in that the data can only be based on its own relevant data, but not be extended to the data that has an interest in a third party. Secondly, the data about itself should not be detrimental to the

public interest of society. Thirdly, when exercising this data right, we cannot abuse the right to oppose the legitimate rights of others.

As a new data right, whether there is any competition between the right of data portability and other rights is also an issue worthy to be explored. As for the right to know of the data subject, it can be learnt from the Regulation that the data controller must explain to the individual how his personal data is collected and processed in a clear and simple way. If the data subject wants to exercise the right to data portability, he must first know what his data includes and who owns it. Otherwise, he will not be able to exercise the right to data portability. Therefore, the right to know data is the basis of the right to data portability, and the latter is the core of data rights. Additionally, the so-called right of access means that the data subject should have the right to access personal data and obtain personal information. The right to access data in the right to data portability is similar to the right of access. Personal data can be obtained through access, but “access” may be limited to browsing and consulting, while the right to access data may further include downloading copies. Besides, the right of access cannot be transferred. Hence it can be learnt that the right of access is to protect data rights of the data subject to a very low extent, while the right to data portability is the extension and expansion of the basic rights.

The right to correct data refers to the right to correct and improve the data on the premise that the data subject knows his data is incorrect. It may be learned by itself through access and portability, or by the data controller in a timely manner. This correction right cannot be underestimated, because the correctness of data is the basic of data value and the premise of data portability. In addition, the connection between the right to be forgotten and the right to data portability is that if the data subject no longer wants the data controller to keep the data information related to personal interests after obtaining its own data and knowing that the data transfer has been carried out, the data controller can be further required to delete the data, such as account cancellation, which can be deemed as a further extension of the right to data portability. The right to data portability does not require the data controller to delete the personal data of the data subject, which may bring hidden dangers to the data privacy of the data subject. The right to be forgotten further requires that the data controller must delete the relevant personal data at the request of the data subject so as to be forgotten by the data

controller. Through the cross analysis of data rights, we can learn that they are interrelated and cooperate with each other. In general, as a pedigree of data rights, they belong to a unified purpose, that is, to protect the data rights of data subjects and enhance the degree of data subjects controlling their own data, so as to promote the integration of social benefits and personal benefits.

RIGHT TO DATA PORTABILITY IN CHINESE CONTEXT

The right to data portability has been studied by EU countries since its establishment. There has also been a heated discussion on whether China should introduce the right to data portability and whether we should learn from relevant systems from other countries to strengthen the data subject's control over the data. On November 11, 2019, the Ministry of Industry and Information Technology issued the Regulation on the Management of Number Portability Service, which has been officially implemented nationwide. Article 2 of the Regulation stipulates that the number portability service refers to a service in which cellular mobile communication users (excluding Internet of things users) change the contracted basic telecom business operator and the user number remains unchanged within the same local network. That is, the user can change the telecom operator without changing the telephone number so as to realize the migration of telephone number data. This implies that China has gradually begun to pay attention to the protection of personal data, and this is also a useful attempt to introduce the right to data portability. From the above historical development and evolution process of the right to data portability, it can be seen that the number portability has been implemented in Singapore and continuously transmitted to countries all over the world. Before the EU established the right to data portability, it also went through a process of number portability. Therefore, as the experimental field of the right to data portability, number portability is also a part of the establishment of the right to data portability.

Therefore, the number portability service spread throughout the country can also be called a test filed for the establishment of the right to data portability. In the development of number portability, China has also gone through a process from partial pilot to full liberalization. From October 2006, the former Ministry of Information Industry issued the *Notice of the Ministry of*

Information Industry on Protecting the Option of Mobile Phone Users' Tariff Scheme, which is also known as the “number carrying package” or “number carrying brand” policy in the industry. Then the pilot was carried out in Hainan and Tianjin, and then was launched throughout the country. It was more than ten years since the pilot being launched that the pilot field of the right to data portability has been preliminarily established. Through the implementation of number portability, the network transfer cost of consumers is reduced, the number resources are saved, the market competition is promoted and the market structure is optimized. These are the visible advantages of number portability.

While number portability has many advantages, several problems also occurred during its long-term development in China. For instance, it may not be conducive to the protection of privacy, and would increase the security risk of data or even the compliance burden of small and medium-sized enterprises, as well as hindering innovation and competition, etc.^x Therefore, it would be immature to introduce the right to data portability in China at this stage. In addition, whether to regulate the right to data portability in the Personality Right Law, or in the Personal Information Protection Law, or even in the Network Security Law is also a problem. Article 16 of the Personal Information Protection Law (Draft 2017) established the right to information portability.^{xi} The right to information portability can be described as a Chinese expression of the right to data portability in the EU Regulation, but whether the “information” in the Chinese context is equivalent to the “data” is still a controversial issue.

The General Provision of the Civil Law establishes the dichotomy between information and data. Article 111 is about the protection of personal information while Article 127 is about the protection of data. Therefore, in the context of right to data portability, whether information and data should be distinguished is an issue. Article 76 of the Network Security Law also defines the network data and personal information respectively. The most obvious difference between the two is that the scope of personal information is greater than that of the network data. Personal information is not only reflected in physical world, but also in virtual world. When it exists in the virtual world, it becomes network data. But it is still unclear whether data only includes network data, or “network” is only a further limitation of the data so as to make a range comparison between data and information. Therefore, whether the right to data

portability in the EU Regulation and the right to information portability in the Chinese Personal Information Protection Law (Draft) have the same meaning remains to be discussed.

Moreover, whether the right to data portability belongs to the personality right or property right is also a controversial issue. If it belongs to property right, it is not suitable to be stipulated by the Personality Right Law. Regarding this, some scholars believe that data rights should be divided into data personality rights and data property rights, and the right to data portability belongs to data property rights.^{xii} The author believes that this division should be affirmed. Data rights are not the only one right, but a system composed of different rights. In this system, these rights have different legal attributes. We should judge different right attributes and accurately divide them in different contexts so as to attribute different data rights to data personality right and data property right and make relevant legal provisions on them. To sum up, many issues have yet to be resolved before China introduced the right to data portability. The issues mentioned in this paper are only the embodiment of one aspect. The current development of China's Internet enterprises and the disposal measures of personal data should also be considered.

CONCLUSION

At present, with the rapid development of internet technology and the advent of the big data era, various information platforms relying on internet technology are trying to build an industrial chain development model with electronic data, trying to occupy a dominant position in the information age, whether it is internet companies, enterprises, various e-commerce platforms, or telecom business operators. In the era of big data, data is obviously different from the traditional structured data based on text data. Its characteristics also have its uniqueness, and its value is the focus of its full utilization. In the process of utilization, it also highlights the contradiction and conflict between personal data rights and enterprise interests or public interests. The boundary of personal data rights is constantly disturbed, which enters the field of personality rights and competition law, which also gives birth to the national legislation for the protection of personal data rights, so as to establish a system that gives full play to the role

of data in the era of big data and at the same time, balance the protection mechanism of the interests of all parties to achieve economic and social benefits. Whether the right to data portability established by the EU based on long-term development, or the discussion about whether to introduce this right into the Chinese context, it is to better promote the protection and utilization of personal data and give full play to the value of large data to the greatest extent. Therefore, when deciding whether to establish the data rights based on ones' own national conditions, we should not only balance the interests of all stakeholders, but also realize the effective combination of personal interests and social benefits.

ENDNOTES

ⁱ See Xuxu He, 'The Right of Self-Determination of Personal Data Information in Comparative Law' (2013) 2 Journal of Comparative Law, pp 61-76.

ⁱⁱ See Yuanquan Zhang, 'Right to Information Self-determination in Germany'(2009) 10 Proceedings of the 4th National Public Law Doctoral Forum, p 39.

ⁱⁱⁱ See Lixiong Zhuo, 'Right to Data Portability: Basic Concepts, Problems and China's Countermeasures' (2019) 8 Administrative Law Review, p 5.

^{iv} See Article 20 of the GDPR.

^v See Article 4 (1) of the GDPR.

^{vi} See Zhe Zhang, 'Exploration and Enlightenment: Research on Right to Data Portability in the EU General Data Protection Regulation' (2016) 6 Journal of Guangxi University of Political Science and Law.

^{vii} See Xinhua Fu, 'Right to Data Portability in the EU and the US and its Localization System Design in China' (2019) 8 Hebei Law Science, pp 157-168.

^{viii} See Yuhao Shen, *Right to Data Portability in the EU General Data Protection Regulation* (Mphil thesis, Shanghai International Studies University 2019), p 31.

^{ix} See Zhenying Wei, *Civil Law* (Peking University Press 7th 2017), p 25.

^x See Xinhua Fu (n 7).

^{xi} See Article 16 of the Personal Information Protection Law (Draft 2017).

^{xii} See Dongmei Xiao and Yuheng Wen, 'On the Pedigree of Data Rights'(2015) 6 Journal of Xiangtan University, pp 69-75.