How the Data Rules of EU is Exported to the Outside of the Region: Take the EU ’s General Data Protection as an example

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Abstract. The General Data Protection of the European Union, the GDPR is the concentrative embodiment of the stringent regulation of data policy. In the field of cross-border data flows, the “White-List” evaluation mechanism of cross-border data flows is constructed by “adequacy decision”, “appropriate safeguards” and exceptional stipulates. Through the evaluation by the above mechanism, if the protection level of the overseas data recipients is substantially equal to the level of the EU, the EU will authorize the transfers of EU data to the region. This mechanism mentioned above, somehow makes the data rules of the EU and the preference on stringent regulation of data policy adopted by more and more Non-EU countries. The mode of data regulation supervise is considered as an ideal reference and it is gradually spread globally. However the evaluation mechanism of cross-border data flows, should be regarded as a new-type barrier on data flows. And it will block the development of free market for global trade in data services. Thus, to resolve the conflict on the regulations of data supervision and cross-border data interaction, the World Trade Organization should shoulder more responsibilities, promote a broader global negotiation.

Keywords: Cross-border data flows; GDPR; the out-of-domain exports of rules; data supervision; legal transplant.

1. Introduction

In the context of the digital economy development and globalization, data is becoming much more important than ever before. With the deepening of international trade activities, cross-border data flows has become increasingly frequent. The internet service industry and e-commerce services, Cloud Computing, The fourth Industrial Revolution in technology such as artificial intelligence... All of this, relies on high-quality data flows across territories [1].

Cross-border flow of data refers to the generation of electronic information records within a country and transfer to overseas, read, stored, used or processed by relevant institutions of other countries abroad. The data finally covert into specific value.

Cross-border flow of data generates many risks. For individuals, during the COVID-19 pandemic, when governments began to consider using apps to track population movement, it made citizens and policymakers to aware deeply the security issue of individual privacy [2]. For nations, with the rise of data-colonialism theory in recent years, policymakers worry about the massive outflow of data due to their excessive reliance on technical data services from other countries. And it enables some countries, which are in dominant statue of e-commerce services field, to plunder data, knowledge, intelligence and other information, thus gaining the power to directly control the political, economic and cultural life of other nations [3]. Therefore, most of data exporting countries tend to restrict the flow of data to prevent national information security risks, personal privacy infringement, “digital colonization” crisis and other problems.To sum up, the cross-border data flow not only shows huge economic interests, but is potentially risky. How to make the cross-border data flow unimpeded but less in risks simultaneously, has become the focus of the cross-border data field.

Since 1987, the EU has been exploring the establishment of a legal system for cross-border data flow. From the EU Data Protection Directive at the end of the last century to the General Data Protection Regulations implemented in 2018, they are all the representatives of high-standards cross-border data protection and regulation. And the EU also tries to export its own value and methods on data protection with specific mechanisms, to let more non-EU regions to adopt EU data legislation,

to pursue more non-EU countries to achieve the same level of data protection as the EU does. This paper focuses on how the General Data Protection Regulations, which is the latest and most stringent legislation in the field of data regulation, can export rules to the outside region of the EU members. The paper also analyses the impact of such behavior all around the globe.

2. The Mechanism of How the Data Rules of EU Is Exported To the Outside of the Region

The process of the EU exported its data rules to the outside of the region can be decomposed into two steps: First, the EU unilaterally and consciously establishes the global data protection legislation model; second, the countries or enterprises outside the EU take corresponding procedures, for many reasons, to adjust the regulations to meet the standards that the EU sets up.

The following discussion will be unfolded in three perspectives: legal mechanism, economic basis, justified value.

2.1. Legal Mechanism: the CHAPTER V of GDPR Constitutes the Review System of Transfer Permission on EU's Data

Chapter 5 of the GDPR sets up the overall institutional framework for cross-border data flows in the EU. Article 44 establishes the basic model, which is the "prohibit in principle" and "permit exceptionally". In principle, the EU forbid cross-border transfer of EU 's data, but only if it meets the requirements that GDPR provides. The "adequacy decision" established in Article 45 and the "appropriate safeguards" established in Article 46 are the exceptions to whether the overseas data recipients can "exceptionally" obtain the authorization of data transfer.

"Adequacy decision" means that the EU, in the form of the European Commission decisions, determines that a specific country or an international organization are capable of providing sufficient data protection. According to the decisions, personal data can be transmitted to the aforementioned countries or international organizations without additional authorization from the EU commission, which means less block in data transfer it will be [4]. So in order to judge whether the protection of the personal data in recipient countries are "comparable" to it in the EU, the review is not limited to the data sector laws of the recipient countries, but involves all the legislative content of the data protection system. As GDPR is the most advanced data legislation in the world, various countries have followed the rules and systems of the GDPR in order to make an "exchange" to the permission of EU cross-border data flow. To a large extent, it promotes the legal transplantation of the EU data protection mode presented by GDPR, and the EU data protection rules can be exported to the region. As the number of countries adopting the EU model increasing, the EU data protection rules could become a unified norm around the world. This seems to influence the trigger to adjust laws and legislative direction of other countries. Although the review of "adequacy decision" does not violate international principles to overstep the legislative matters of other nations.

If the "exception permission" of cross-border data flow cannot be obtained by public-law subject, the protection of cross-border data can still be insured by regulating the international trade behavior of commercial subjects. The review of "appropriate safeguard" is to check whether the commercial subject can provide sufficient protection on EU personal data. If so, the companies still can have the permission to use the data from the EU. For instance, When the commercial entities within the EU making a contract about data transfer with the regional foreign entities, they have the obligation to join the "standard clause" formulated by the EU [5]. As business interaction with the EU become more frequent all around the world, the EU data protection regulation will infiltrate into the communication of commercial subjects and become norms among them.

2.2. Economic Base: the Theory of "The Brussels Effect"

Whether it is the nation to strengthen its data supervision, or enterprises to undertake more data protection obligations, the cost of them will increase. But they still choose to do so willingly. Why? The reason can be explained by the "the Brussels Effect" theory proposed by Anu H.Bradford.

If all commercial entities are assumed to be "rational" in the economic sense, then the cost of adjusting protection regulations or implementing data protection measures must be covered by the benefits of "obtaining the EU permit for free cross-border flow of data". "The Brussels Effect" theory emphasizes the attractiveness of market size to external enterprises [6]. Based on the huge EU market, the EU has a strong "market coercion" for overseas companies and the countries behind them. The "market coercion" refers to, the nations or enterprises are reluctant to give up the EU market because the benefits of entering the EU market (such as providing data services to the EU, which inevitably lead to cross-border flow of data) outweigh the costs. Therefore, in order to meet the two EU data protection level evaluation systems of "adequacy decision" and "appropriate safeguard", the countries choose to adjust the legislation, and cross-border enterprises choose to embed protection clauses in commercial contracts and corporate regulations.

2.3. Justified Value: the Norm of Human Right in GDPR

The EU 's data legislation permeates the EU 's idea of human rights. The wide spread of a system means that a system has its justified basis. So what is the basis behind the GDPR? Some scholars resort to the universal law of Kant and the Theory of Communicative Action, and believe that what reflects a high degree of human rights protection and justice are good laws [7]. In accordance with the theories mentioned, the GDPR with high-standards of data protection is deemed justified and rational because it aims to protect the personal data as a fundamental right written in constitution. It can be noticed in the beginning of the GDPR text.

Focusing on "adequacy decision" mechanism, there are listed elements that the EU Commission shall take into account during the decision-making process. And the first provision is that "the rule of law, respect for human rights and fundamental freedoms [8]", which provides as a general standards to review whether the country gives sufficient protection on personal data and deserve to be given the permission to data transfer. But what is "human rights"? Shall the rights on personal data can be defined as a fundamental right of human? Are there any accurate indicators for evaluating the level of data protection? The answers are vague. Or in another word, There is no consensus on the concepts or recognition on some main items, like "human rights" or "fundamental freedoms". Many views criticize GDPR, believing that the GDPR is a "barrier under the cloak of human rights". The GDPR justifies the purpose of trade protectionism by promoting its own norms of human rights.

However, the GDPR does provides relatively strict supervision for cross-border data flow, which meets the current needs of cross-border data flow in some countries. After the outbreak of the Prism Event, a number of developing countries that are backward in the field of digital technology, and even a few developed countries felt concerned. In the process of cross-border data flow, countries with backward digital technology lack the ability to control and protect the outflow of data, and are vulnerable to the suppression of advanced developed countries and affected by the improper use of data. Therefore, they favor strict data protection. In the absence of reference choices, many countries follow the GDPR as a reference and build their own data protection model, so as to effectively restrain the controllers and processors from the data power.

3. Convergence Development of Data protection legislation: How EU data protection standards diffused globally

At present, the export of the EU data protection regulations makes some multinational companies and countries to follow the EU's data protection measures. Such a trend of "adopting EU norms" will lead to the convergence of global data protection legislation in line with the EU data protection system. The convergence of law refers to the phenomenon that the laws of different countries gradually absorb

and penetrate each other on the basis of increasingly developed international exchanges, thus tending to get assimilated [9].

In the field of public law on data protection, 13 countries around the world have passed the EU's "adequacy accreditation" process. These countries have adjusted their domestic legislation in order to make an exchange for extremely low-restricted cross-border data flows with the EU. At the same time, the countries that adopt the EU data protection model have also transplanted the "adequacy decision" mechanism established by the EU. Hypothetically, country A has passed the adequacy decision from the EU by adjusting legislation after negotiation and consultation. In the legal adjustment process, country A adopts the "adequacy decision" mechanism. And then, based on the "adequacy decision" mechanism of its domestic laws, country A further trigger new agreements on cross-border data flow with other countries, which brings the evaluation standards derived from the EU data protection framework into a new round of consultation and negotiation. In this way, the EU data protection regulations can be spread among countries outside the region. With the expansion of cross-border EU data flows, the more countries directly adopt EU rules, and the GDPR global influence is also increasing. At present, many countries have established their own "adequacy decision" mechanism and created a "white list" of cross-border data flows [10].

In order to provide data services to the EU, when the country does not meet the requirements of adequacy protection, the commercial entities carry out appropriate safeguards, like setting up binding corporate rules, standard data protection clauses, to obtain the authorization of the EU data flow and enter the EU data service market. More and more enterprises adopt the EU data protection rules around the world and apply them to global branches and subsidiaries. With the development international trade activities and the increasing surge of transnational commercial contracts, the EU data protection rules are expected to become the consensus of transnational commercial activities.

4. The Comment on the Tendency of the Data Rules of EU Being Adopted Globally

Through the above discussion, the EU data regulation regulation is spreading. The EU 's data regulation model is derived from the EU single market and head to the world. It has become one of two the most influential regulatory models of cross-border data flow in the world.

This situation will have negative impact on international trade. The demonstrations are as follow:

4.1. Rules on Data Flows Across Borders in the EU Constitute A New-type Trade Barriers

Certainly, data cannot be transferred freely without any restriction. Regulatory measures are necessary. However, not every restrict actions is appropriate. The cross-border data flow rules that constitute trade barriers should be identified and removed. GDPR has set a high regulatory standard for data flow within the EU. With the help of the two mechanisms of "adequacy identification" and "appropriate safeguard", a country's regulatory measures must reach the level of the data protection like the EU provided in order to exchange for the authorization of cross-border data flow. So the GDPR, a legislation in delimited region, sets up standards not only for the EU members, but only for nations outside the region. After the review of "adequacy identification" and "appropriate safeguard", perhaps some nations or enterprises do not reach the standards and lost the chance to achieve freedom-but-safety data transfer. Since data trade services are based on the smooth flow of data across borders, the limited data flow will inevitably affect the liberalization of international data trade market. But are such standards reasonable? Can they achieve their goals? And are they too strict?

In order to meet the requirements of the EU, overseas enterprises suffer huge compliance costs, while those that do not meet them will completely cut off the data flow and are unable to provide data trade services, which generate discrimination in trade. At the same time, due to the excessive requirements of the cross-border flow of EU data and the vague review standards, the protection of "public morality and public order" intends to achieve the purpose of local protectionism. All above

mentioned constitute a new-type trade barriers, under existing framework of the World Trade Organization.

4.2. The Diffusion of Data Regulatory Models with Barrier Attributes

Many countries have not only transplanted strong regulatory measures from the EU, but also established the "adequacy decision" mechanism, and released their own "white list" of cross-border data flow permits. With more and more countries adopt the EU strong regulatory standards, these countries hold the EU standards to further review another nations. Such data barriers not only happens between the EU and the non-EU countries, but will also deepen between the EU countries.

4.3. How to Effectively Regulate the Data Supervision Mode Led by EU Legislature with Barrier Attributes

Even if a large number of scholars prove that EU standards form a new type of barrier. However, global international organizations and the existing framework of trade agreements can not well regulate the barrier system brought by the GDPR. In addition, the international appellate organization is in a state of suspension. So the crisis of the EU GDPR only stays in academic discussion, but we have not found any sue toward it. To be sure, the EU mode is not a good way to adapt to the development of globalization and promote the construction of a global free market. We need to restore the normative power of global international organizations,which is the WTO.

The cross-border data flow is related to data services activities in trade, while the provisions on trade in services in the WTO law system are concluded in GATS. It does not mean that there is no regulation on digital trade services, but that it is vague and difficult to practice the GATS in this field. In the digital field, what is "personal information right", "public morality" and what is "national security"? The authorization to explain and answer is held by the EU. Arrangements to limit the flow of data due to internal security and stability issues are necessary. But if the extension of public security is wrongly expanded, then the restrictions are also deepening. So how to ensure that the vague provisions are not generalized and abused becomes the current challenge.

The interpretation of vague provisions is influenced by values, and it is necessary for the WTO to facilitate the unified interpretation of specific vague words by its member units. Only when the standards are unified can the subsequent necessity test on barriers be carried out smoothly. The WTO 's framework can still learn from the existing system content of the European Union and the United States in the world and absorb the existing consensus, which is conducive to gaining the trust and obedience of these data-powers. At the same time, following the tradition of multilateral trade, to make easing measures to special subjects in special fields to reduce the entry threshold and regulatory standards, do help to promote the growth in the field of data of developing countries.

5. Conclusion

The EU GDPR is an example of strong data regulatory legislation, representing the strictest and strongest data regulation model. The protection of personal data given by GDPR is more extensive and systematic, but it does not mean that this is the most ideal data model. The GDPR 's pursuit of higher data regulatory standards is intended to enhance the EU's discourse power in digital trade and reverse its excessive reliance on data exports. The process of exporting rules to the world through the specific mechanisms, is also the process of exporting its values. The conflict of regulatory standards is substantially the conflict of values and interests, and all the inconsistency of values and interests will eventually be reflected in the barriers of trade. Therefore, in order to build a free and secure global trade market, we still need to focus on the function of the World Trade Organization. In this way, can do help to seek more flexible, safer, less-restriction data circulation patterns and data trade rules in a more polar consultation mechanism.

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