

A Comparative Study of "Right to Transfer Personal Information" and "Right to Data Portability"

Yunyue Ren

The Law School of Sichuan University, Chengdu, China

Abstract

The right to transfer personal information in China and the right to data portability in the EU are both new rights arising from the rapid development of the global digital economy, but they are not equivalent. The relevant regulations in China and the EU are different but show a lot of consistency or convergence. In the context of the Internet era, to avoid infringement of personal information or personal data and achieve the maximum protection of the human dignity and interests of natural persons, it is more appropriate to treat both as personality rights for protection. There are many conditions not specified in the right to transfer personal information that China can learn from the legislative experience of the right to data portability.

Keywords

The Right to Transfer Personal Information; Right to Data Portability; Personal Information Protection Law; General Data Protection Regulation.

1. Introduction

The rapid development of information technology and Internet technology has led to the increasing scale of the digital economy. The European Union ("EU") proposed building a "digital single market" in 2015, and the General Data Protection Regulation ("GDPR") came into being in 2018. In August 2021, China passed the Personal Information Protection Law ("PIPL"), which also provides a right similar to data portability. Some scholars refer to this as the Chinese version of the "right to data portability" ("RDP"). However, whether these two rights are similar in substance is open to debate. To distinguish them, we will call this right identical to the right to data portability as the "right to transfer personal information" ("RTPI"). This article intends to explore the similarities and differences between China's RTPI and the EU's RDP through a comparative study of the two rights and provide a comparable experience for understanding and applying the RTPI in China.

2. Comparison of Rights Attributes

2.1. Right Attributes of the RTPI

As a sub-right of the right to personal information ("RPI"), the RTPI has the same connotation of ownership as the RPI. However, there is no unified understanding of the attributes of the RTPI in the academic field. There are three central doctrines: the doctrine of "personality rights" (doctrine A), the doctrine of "property rights" (doctrine B), and the doctrine of "dual or multiple properties" (doctrine C).

1. Doctrine A

Doctrine A holds that personal information is identifiable and related to the formation and development of personality, so it should be treated as an object of personality rights. The main reasons for this are: First, China's Civil Code includes information and privacy as part of the fourth part of the personality rights, which can mean that personal information is a personality

right. Second, although personal information has property attributes, it cannot be treated as directly traded property. Its property interest is rooted in personality interest and derived as the property part of personality rights. Third, the value of information embodied in personal information may vary depending on social status and economic status. If the RPI is defined as a property right, it will hinder the equal protection of personality under the law.

2. Doctrine B

This theory believes that with the advent of the information age, the property interest in the RPI has become increasingly prominent, and therefore its property right attributes should be recognized. The main reasons are: firstly, personal data, as an information resource, is in a separate state from the information subject and can be transferred and shared, and some enterprises have long regarded customers' personal information as a transferable corporate asset. Secondly, the RPI and the right to privacy are similar in many aspects, which may cause conflicts in applying the two rights. Therefore, the RPI should be placed in the property rights system to solve the problems arising from the overlapping functions of protecting personality interests.

3. Doctrine C

Scholars who support this doctrine believe that the RPI carries the content of personality and property rights related to the information subject and even includes the content of other attributes. The main reasons include: first, the jurisprudence of the interests behind the RPI is uniquely complex and composite, and the interests of the existing rights can no longer cover the attributes of the property value of information, so personal information needs to be protected through the creation of rights. Secondly, the RPI is an emerging right because of its emerging attributes, mainly reflected in its emerging, dynamic, open, and independent individuality.

2.2. Right Attributes of the RDP

There is no consensus on the attributes of the RDP, and the mainstream doctrines are the "fundamental rights" doctrine (Doctrine D) and the "flexible rights" doctrine (Doctrine E).

1. Doctrine D

According to this theory, the right to personal data is a fundamental right explicitly stipulated in Article 8 of the EU Charter of Fundamental Rights. The GDPR states at the outset that personal data protection is derived from the safety of fundamental human rights. Therefore, the RDP can be considered as a sub-right of the right to personal data, which falls within the scope of fundamental rights.

2. Doctrine E

Doctrine E believes that the RDP is not a fundamental right but a general civil right. This doctrine mainly includes the doctrine of "personality rights"(Doctrine F) and the doctrine of "new rights"(Doctrine G).

(1) Doctrine F

Scholars who hold this view believe that the nature of the RDP depends on understanding the legal attributes of personal data. As personal data is identifiable, it reflects the personality characteristics of the data subject and has personality attachment. The EU personal data protection system focuses more on protecting personality interests, so personal data is part of personality interests.

(2) Doctrine G

This theory believes that the RDP has multiple rights, and it is not easy to classify them into a specific category of rights. This right includes both personal rights and property rights. Still, it is not a simple addition of these two types of rights, but it has other attributes and should be defined as a new type of right.

3. Summary

Whether it is the RPI or the RDP, proponents of different doctrines analyze the right attributes from different perspectives. On their own, each view seems to be valid. To clarify the properties of the two rights, we should try to change the way we think about the issue - by analyzing the nature of the rights that they contain, and we can invert the properties of the rights.

2.3. The Shift in Thinking - Determining the Attributes of the Right by the Right Capacity

According to Article 45(3) of the PIPL, the RPI includes the right to "transfer personal information." First of all, the RPI is characterized by the individual's will over personal information. The exercise of the right can only be triggered when the individual initiates the request, reflecting the subjective initiative of the person. Secondly, transferring personal information cannot show any property right attribute characteristics but is only a means of managing and controlling the individuals' information. Therefore, the RPI can reflect only the attributes of personality rights.

The same is true for the RDP. According to Article 20(1) of the GDPR, the RDP consists of the right of access to copies and transfer of data. The "access" or "transfer" of personal data is at best an expression of how the data subject decides or controls their data according to their will. The self-determination and self-determination of individuals based on their rational thinking should be respected, which also reflects the EU's "right to information self-determination" as the theoretical basis of information protection in public law.

In conclusion, both the RPI and the RDP only reflect human dignity and interests and only remember the attributes of personal rights.

2.4. Refutation of Other Views

The analysis of the attributes of the RTPI starts from the attributes of the RPI. On the issue of the attributes of the RTPI, in addition to doctrine A, there are two main views: doctrine B and doctrine C.

Firstly, we refute doctrine B. In the information age, the premise that personal information can bring property benefits is that personal information is compatible with the individual. In addition, Criminal Law provides for the crime of "infringement of citizens' personal information," reflecting that personal information is not an object of property rights. Therefore, the view of doctrine B is not feasible.

Secondly, we refute doctrine C. The error of this view is that it ignores the fact that the personality right does not exclude the property value. Personal information is primarily a personal interest, and property interest is a subsidiary interest derived from personal interest. The content of the existing personality rights can already cover the attributes of personal information rights. The same is true for the rebuttal of doctrine G's view of the RDP.

Finally, doctrine D of the RDP is rebutted in two ways. First, the Constitution established the fundamental rights, but the GDPR was enacted only through the legislative process of general law. Second, Article 20(4) of the GDPR stipulates that the RDP must be exercised in concession to the rights and freedoms of others, i.e., the legislator also denied the fundamental right of the RDP. Therefore, the RDP is not a fundamental right.

To sum up, other doctrines of the RTPI and the RDP are flawed. It is more appropriate to define the RTPI and the RDP as personal rights.

3. Comparison of Rights Ontology

3.1. Subject and Object of Rights

The RTPI and the RDP are stipulated respectively in Article 45(3) of the PIPL and Article 20 of the GDPR, and a comparison of the provisions reveals that:

The subject of both rights is limited to "natural persons," but the wording of the two rights is different. The former describes them as "individuals," while the latter refers to them as "data subjects."

As for the object of rights, Article 4(1) of the PIPL stipulates that personal information is information related to an individual recorded in a certain way, except for anonymized information. The identity of the information provider and the manner of providing personal information is not limited.

According to Article 4(1) and Article 20(1) of the GDPR, personal data is limited to the data provided by the data subject. Some scholars point out that the RDP is too narrowly defined in terms of the object of the right to cover many types of data, making it challenging to realize data subjects' data interests effectively and is not conducive to data transfer. The "Guidelines on the Right to Data Portability" issued by WP29 (Working Party 29 of the EU Data Protection Supervisory Authority) stipulate that personal data also includes anonymous data that can be accurately linked to the data subject. The interpretation made by WP29 is broader and expands the scope of the exercise of the RDP.

3.2. Content of Rights

As also mentioned above, the RTPI only includes the right to transfer information. On the other hand, the RDP consists of the right to obtain a copy and transfer data. In short, the former refers to the right of individuals to access their data. In contrast, the latter refers to the right of individuals to transfer their data to another controller in a "structured, generic, data-readable" format, where "technically feasible."

In terms of the legal provisions, the RDP adds the right of access to copies. However, in the context of the entire PIPL, the right to copy personal information is provided in the first two paragraphs under the same Article 45. In other words, it is not an omission of the right but just a difference in the arrangement of the system.

3.3. Conditions for the Application of Rights

1. Conditions for the application of the RTPI

The RTPI is provided for in Article 45, Paragraph 3 of the PIPL. However, other individual rights stipulated in the same chapter may also affect the exercise of the RTPI. According to the law, the specific conditions for applying the RTPI are summarized in the following six points.

(1) The scope of applicable data is personal information.

The objects of rights have been analyzed in the previous article, so they are not repeated here. The scope of data to which the RTPI applies is information related to individuals, excluding the information after anonymization.

(2) Making requests to the personal information processor ("processor").

The right holder's request is a precondition for exercising this right, and the processor is not entitled to exercise it on its initiative. Since the legislation does not provide for this, the request can be made orally, in writing, by mail, or any other form.

(3) Exercising the right of access ("RA") to the processor.

Article 45, paragraphs 1 and 2 of the PIPL, provides the right to access and copy. A necessary step before exercising the RTPI is to access personal information. Only when the scope of the personal information is known can he decide which information to transfer.

(4) Selective exercise of some specific rights to the processor.

Other rights are also provided in the PIPL. After reviewing personal information, an individual finds that the content of personal information is incorrect, omitted, or unnecessary. He or she can correct or delete the inaccurate information by exercising the "right to correction and supplementation" or "right to deletion." In addition, individuals may exercise the "right to be informed" and make decisions to know the progress or details of the processing of their personal information. However, none of these conditions is necessary.

(5) Comply with the conditions stipulated by the state network information department.

The PIPL does not provide specific constituent elements for exercising rights but rather delegates legislative authority to state departments. Paragraph 1 of Article 62 also provides that the State Internet Information Department shall coordinate the work of relevant departments to promote the development of specific rules and standards for the protection of personal information under this law. Still, no guidelines have been issued on the particular conditions for the application of the RTPI.

(6) Processors can provide a means to transfer personal information.

It is necessary to create transfer models that can be used uniformly between different processors to implement the RTPI. However, given the varying levels of technological development of the Internet in different areas and companies. It is not very feasible and practical to achieve the conditions above. The PIPL does not seem to have taken these technical difficulties into account when legislating.

2. Conditions of application of the RDP

The RDP is stipulated in Chapter 3 of the GDPR. The exercise of other rights in the same chapter may also affect the practice of the RDP. Therefore, the conditions for the exercise of the RDP are summarized in the following eight points, taking into account the content of other rights.

(1) Personal data must be collected with the individual's consent or based on a contract automatically.

According to Article 20(1)(a) and 20(1)(b) of the GDPR, data collection must be based on the premise of "knowledge + consent" of the data subject, and it must be automated, excluding the collection of personal data contained in paper documents.

(2) The data subject requests the controller before exercising the RDP.

Article 20(1) of the GDPR does not explicitly require the data subject to request the controller. However, it can be assumed from the interpretation of the provision that the controller is only obliged to assist the data subject in exercising the RDP if the data subject requests the controller.

(3) Exercise of the right of access ("RA") by the data subject to the controller.

The exercise of the RDP first involves access to personal data, i.e., the RA as defined in Article 15(1) of the GDPR. The data subject must first be informed of the content of his data before he can decide on which data to exercise his rights. Therefore, the exercise of the RA is a necessary condition for exercising the right of data portability.

(4) Optional exercise of the right to rectification ("RR") or restriction of processing to the controller.

Article 16 of the GDPR provides for the RR for data subjects. After accessing the personal data, the data subject may correct the inaccurate data by exercising the RR. The RDP is then exercised concerning the updated personal data. In addition, the data subject has the right to request the controller to restrict the processing of his data under the provisions of Article 18 (1) point (a).

(5) When exercising the right to transfer data, the condition of "technically feasible" must also be met.

Article 20(2) of the GDPR stipulates that personal data should be transferred under "technically feasible" conditions. However, it is not explicitly stated what "technically feasible" means.

Article 68 of the Preamble states that "technically feasible" does not impose an obligation on the controller to adopt or maintain a technically compatible processing system. WP29 believes that the determination of "technical feasibility" should be assessed on a case-by-case basis. Still, it has been argued that this approach is challenging to achieve due to the lack of uniform industry standards and format specifications.

(6) The exercise of the "right to erasure" ("RE") shall not be impeded.

Article 20(3) of the GDPR stipulates that the RDP shall not prejudice the exercise of the RE under Article 17. The legislator recognizes the priority of the RE in the exercise of the two rights. The RDP shall not be exercised concerning the data content to which the RE applies.

(7) It must not harm the rights or freedoms of others.

This condition is derived from Article 20(4) of the GDPR, restricting the scope of application of the RDP from the opposite side. It mainly includes data relating to other persons as well as intellectual property rights and trade secrets. However, it does not specify the specific circumstances, so it is regarded by some scholars as a bottoming-out clause, and in practice, it is easy to override this provision.

(8) No objection to necessary processing based on public interest or being officially authorized.

According to Article 20(3) of the GDPR, the private interests of individuals must yield to the public interest or state power. The legislator's decision to make such a provision should be based on a policy consideration to strengthen the State's control over such particular data to prevent information leakage.

3. Similarities and differences in the conditions of application between the two rights

The above analysis shows some similarities in the conditions of application of the two rights, but the conditions of application of the RDP are more detailed and stringent in Comparison.

In terms of similarities, both are subject to a request to the processor or controller. Additionally, both have the RA as an antecedent right. The exercise of the RTPI and the RDP can be supplemented by exercising other rights in certain circumstances. In addition, the implementation of both rights requires the provision of viable technology by processors and controllers of personal information.

As far as differences are concerned, they are mainly reflected in the restrictive conditions for exercising rights. The GDPR establishes various negative conditions for the exercise of the RDP. The PIPL, on the other hand, is not overly prescriptive in this regard.

3.4. Effects of Application of Rights

Implementing the right must give rise to specific legal or factual effects, including the time of reaching the right and the direct effect of exercising the right. For the former, the PIPL does not contain any restrictions on responding to the RTPI. Article 12(3) of the GDPR, however, provides for this in detail. Determining the time to respond to a request is essential to urge the processor to respond as soon as possible to protect the legal rights of individuals. Therefore, the PIPL should improve the provisions on time to fill this legislative gap. For the latter, both rights enable personal information to be managed or controlled at the individual's will.

3.5. Summary: Comparison of the Similarities and Differences between the RTPI and the RDP

In terms of the subject and object of rights, the subject of both rights is a natural person. However, the scope of the right object of the latter is more narrow.

In terms of the content of the right, the RTPI only includes the right to transfer information, while the RDP includes the right to transfer data and obtain a copy, so the latter has a richer right content than the former.

As summarized above, we will not go into details regarding the conditions for applying the right.

In terms of applying the right, the RDP is specified when responding to the right required. In terms of exercising the right, both rights enable personal information or data to be transferred or copied at the individual's will.

The above summary of the similarities and differences between the two rights shows some gaps in the RTPI regarding the conditions of application of the right and the time to respond to the right. The EU, on the other hand, has made more detailed and thorough provisions in its legislation, which is necessary for the successful implementation of a right.

4. Remedies to the Right

There must be a remedy for the right. According to Article 50(2) and Article 65(1) of the PIPL, individuals can seek remedies in two ways: through judicial remedies and supervision or reporting. According to Article 12(4) and Articles 77-79 of the GDPR, the data subject also has the right to seek judicial remedies or file a complaint with a higher supervisory authority when the controller refuses to respond to a request right.

For the first avenue of remedy, Articles 78 to 79 of the GDPR provide for the data subject's right to judicial remedy against the supervisory authority and the controller, respectively. The PIPL, on the other hand, only provides for the right of a judicial remedy for individuals against the processor. However, the first case above can correspond to Article 7, paragraph 1 of China's Administrative Punishment Law; the second case corresponds to Article 25, paragraph 1 of the Administrative Procedure Law. Therefore, the right subject of the RTPI also enjoys the right to judicial remedy against the regulator, and the relevant content is only stipulated in the legal provisions related to the administrative law.

As for the second remedy, the GDPR stipulates that a complaint to the supervisory authority must satisfy the prerequisite of not affecting other administrative or judicial remedies and not specify the circumstances in which a complaint may be made. The PIPL has no prerequisites and stipulates that complaints and reports can only be made to the relevant authorities for "illegal personal information processing activities." However, both stipulate that the relevant department shall inform the complainant of the progress or result of the processing to ensure the right to know the right subject.

In short, both the PIPL and the GDPR provide for a thorough remedy of rights. The right holder can seek a remedy through both judicial and complaint channels. Moreover, these two ways are not conflicting, and the parties can freely choose.

5. Conclusion

Based on the PIPL and the GDPR, we have elaborated the RTPI and RDP from three aspects. A comparative analysis of the two shows that they have many similarities and differences.

The RTPI is an emerging right created in China based on the experience of the EU legislation. China has taken into account its national conditions and social development when enacting legislation. Therefore, the two rights are inconsistent in connotation and extension, and the RTPI is not equivalent to the RDP.

Through the previous analysis, the PIPL is still vague in terms of the conditions for applying the RTPI. In contrast, the GDPR has more detailed provisions on the RDP and provides more comprehensive provisions on many restrictions. However, the PIPL fails to provide a complete answer. In order to fill these legal gaps, China can learn from the legislative experience of the EU and make more perfect provisions to achieve the organic unity of legal and social effects.

References

- [1] Graef I, Husovec M, Purtova N. Data portability and data control: lessons for an emerging concept in EU law[J]. *German Law Journal*, 2018, 19(6): 1359-1398.
- [2] Purtova N. Property in personal data: A European perspective on the instrumentalist theory of propertisation[J]. *Eur. J. Legal Stud.*, 2008, 2: 193.
- [3] De Hert P, Papakonstantinou V, Malgieri G, et al. The right to data portability in the GDPR: Towards user-centric interoperability of digital services[J]. *Computer law & security review*, 2018, 34(2): 193-203.
- [4] Diker Vanberg A. The right to data portability in the GDPR: What lessons can be learned from the EU experience?[J]. *Journal of Internet Law*, 2018, 21(7): 12-21.
- [5] Weiss S. Privacy threat model for data portability in social network applications[J]. *International journal of information management*, 2009, 29(4): 249-254.
- [6] Van der Auwermeulen B. How to attribute the right to data portability in Europe: A comparative analysis of legislations[J]. *Computer law & security review*, 2017, 33(1): 57-72.
- [7] Swire P, Lagos Y. Why the right to data portability likely reduces consumer welfare: antitrust and privacy critique[J]. *Md. L. Rev.*, 2012, 72: 335.