

Difficulties in application and suggestions for improvement of data trust in China

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Abstract: As a typical representative newly appeared in the research of trust typology and contemporary trust legislation, data trusts have the advantages of professional countermeasures, collective management, and personal benefits, which have been applied in domestic and foreign practice. However, it also has some problems, including unstable data authorization trust and difficulty in defining data value, so it is urgent to formulate a practical legal system to solve these problems. At present, there are two different schemes for data trust: one is the "information trustee" scheme in the United States, which imposes fiduciary duties on data controllers, but this scheme is still in the theoretical stage. The other is the UK's "data trust" scheme, which establishes a third-party agency to provide independent data trust services. The UK has launched various data trust pilots, and summarizes the six stages and five legal structures of the data trust life cycle, which provides an important reference for the practice of data trust in China.

1. Overview of Data Trust

For data trust, there is no unified definition in the world, and its concept is still being perfected. Based on China's legal system construction and practice research, comprehensively comparing the views of academic circles, and according to the connotation of the trust system, this paper decides to adopt the following definitions. Data trust, that is, based on trust in the trustee, the trustor entrusts its data rights to the trustee, and according to the wishes of the trustor and the law, the trustee manages or disposes of it in its own name for the benefit of the beneficiary or for a specific purpose. , the essence of which is to create a trust legal relationship between the data subject and the data controller. As a typical representative newly appeared in the research of trust typology and contemporary trust legislation, data trust "refers to a trust whose initial purpose is to manage data rights. It is a legal tool born to meet the needs of modern data management in the era of big data, and its essence is Verified framework agreement accepted by all parties". Data trust plays an important role, including effectively balancing the data rights and interests of data subjects and data controllers, maintaining data security, promoting and guaranteeing the sound development of the data market, etc., with the advantages of professional countermeasures, collective management, and personal benefits.

2. Difficulties in the Application of Data Trust in China

According to the application practice of data trust in China, as a new thing in the era of big data, data trust is still imperfect at the legal level. The imperfect definition of data property rights fundamentally makes it difficult to protect personal data in China. According to Article 127 of the Civil Code and Articles 19, 33 and 47 of the Data Security Law, they only provide general legal support and recognition of data transactions and They do not clearly state the specific method. In addition, if data producers or data operators do not fully obtain the consent of data subjects before establishing data trust products, their behavior of collecting personal data will easily lead to illegal problems, which is not conducive to the operation of data trusts. Furthermore, there is currently no clear data transaction rules, and the pricing of personal data is quite complicated in reality, and how to set a unified standard needs to be determined urgently.

3. Defects in the law

As a new thing in the era of big data, data trust has a short application cycle and the relevant legal system has not been formed or perfected. At present, at the legal level, as for data use restrictions, security and privacy protection policies, and risk management issues in data trusts, data trusts still need to establish more complete laws and regulations about statutory trust attributes, the scope of trust property of data trusts, Specific obligations of data trusts.

The definition of data property rights is not perfect, which fundamentally leads to the current difficulties in the protection of personal data and public data in China. According to the provisions of Article 127 of the Civil Code and Articles 19, 33 and 47 of the Data Security Law, they only provide general and superficial legal support for data transactions. and recognition, but the specific operation has not been clearly stated. Data element property rights have long been vigorously discussed in academia. Some scholars believe that data can be fabricated or imagined as "things" or other intangible properties or "open rights" in property law, but they still fail to form a unified theoretical standard. Moreover, identifying data as an element can still only formally regulate the right to know the use of information, but cannot protect the right to information in essence.

4. Facing practical challenges

The use of data can easily lead to violations of the law. If the data producer or data operator fails to obtain the consent of the data subject before establishing the data trust product, the behavior of collecting personal data will easily lead to illegal problems, which is not conducive to the operation of the data trust. Secondly, in real life, data users mostly adopt the "one-time" knowledge principle, and the subsequent new data use is vaguely concluded in the user privacy agreement, lacking clear transaction rules. At present, there are no clear data transaction rules, the pricing of personal data is quite complicated in reality, and how to set a unified standard needs to be determined urgently.

Unequal litigation costs and infringed benefits. In digital transactions, not only is it difficult to identify the infringer, but because the losses suffered by each person are small, even if it is not difficult to prove, the litigation cost is still high, and even if the case is won, the compensation is very small. In the digital age, the Chinese data user group is very large, but the data loss suffered is inconsistent and difficult to quantify.

In short, at the current legal level, as for data trust use restrictions, security and privacy protection policies, and risk management issues, data trusts still need to legally specify trust attributes, the scope of trust property of data trusts, and data trusts. The specific regulation of obligations. China urgently needs to establish more complete laws and regulations, while taking into account the various measures being implemented.

5. Investigation of foreign data trust models

(1) Research status of foreign data trusts

In 2016, in the field of privacy data protection, Jack Barkin, a professor at Yale University in the United States, first proposed to explain the relationship between the data subject and the data controller through a trust tool, which quickly attracted widespread attention in the academic community and was gradually recognized. Subsequently, the U.S. Data Protection Act of 2018 clarified fiduciary duties for online service providers to collect and use user data, which explicitly requires online service providers to be faithful, prudent and confidential about users and their related data. That same year, in *Everett v. State*, the U.S. court in Delaware invoked the fiduciary theory to protect data subjects against sensitive information. On February 24, 2021, "MIT Technology Review" released the 2021 Top Ten Global Breakthrough Technologies List", and Data Trust is among them.

In the UK, the 2017 UK Artificial Intelligence Industry Development Report announced an investment of £100 million in AI research, and suggested establishing a data investment structure through a data trust system to ensure data exchange is safe and mutually beneficial. In October 2018, the UK Open Data Institute for the first time clearly defined a data trust as "a legal structure that

provides independent data management rights". On December 4 and 5, 2018, Element AI, a provider of artificial intelligence products, and Nesta, the UK-based global innovation foundation, jointly hosted an international workshop on data trust. At the end of the workshop, it was proposed that governments, industry, trade organizations and civil society should collaborate on data trust pilots. The pilots should explore the specific application of various data trust models in specific cases, especially to find out solutions related to their structure and financing.

Over the years, according to foreign data governance practices, more and more companies have introduced the trust system to analyze and demonstrate the relationship between the data controller and the data subject. For example, from December 2018 to March 2019, the Open Data Institute and the UK Government Office for Artificial Intelligence and Innovate UK conducted three data trust pilot projects.

(2) Summary of foreign data trust experience

In the data security governance abroad in recent years, data trust has been recognized and applied. The United Kingdom and the United States have also developed different data trust concepts, namely the United Kingdom's "data trust" concept and the United States' "information trustee" concept, both of which have a very profound trust theory and practice background.

Regarding the exploration and development of China's data trust system, the data trust in the United States has limited reference to China, while the theory and application of data trust in the United Kingdom can be used for reference. It is mainly reflected in two aspects: first, data circulation and transaction, in data circulation It is difficult to establish data ownership in China, and data trust can temporarily suspend the issue of data ownership. It establishes a data trust based on the data property rights and interests of individuals or enterprises, and uses third-party management and control means for personal data in the process of data circulation and transaction. Privacy provides security; the second is the management of public data. The public data held by the government has huge economic and social benefits. How to use it socially while ensuring data security is still being explored. The British proposal of "setting up different types of public data trusts for different public data by industry and field" may be a useful attempt.

6. Suggestions on the Application of Data Trust Model in China

(1) Improve relevant legislation

China should improve data rights legislation. According to the data element theory, we need to add clauses to clearly determine the property attributes of data rights in data legislation, as well as legal basis to support personal data transactions. In addition to "data element rights", academia has also proposed a new way of thinking - "data structure". Some scholars put forward: "The digital platform continues to expand its structure through space creation, enterprise merger, third-party account login, etc., which expands the space for element activities. It itself absorbs more production factors in an open way, but at the same time, due to the extension of digital infrastructure. And it tends to be closed." Data may not be as borderless as it seems, even if the ownership is temporarily suspended through data trusts, the requirements for improving data rights cannot be reduced, and the two can go hand in hand to tap the greater potential of data. In response to the outstanding problem of personal data infringement, clauses such as the right to delete data and the right to data portability can be introduced. At the same time, regulate data trust.

The legality of the source of personal data in China, and the obligation of the data management agency to do a good job of basic auditing of data entry from the law, clarify the basic auditing standards.

At the same time, China should attach importance to resolving legal conflicts. Through the principle of good faith or other general terms, Chinese judges should give more discretion to deal with various data trust issues, continuously expand the extension of trust relationships, and promote the formation of a data trust system.

(2) Optimizing practical applications

China should set up a special supervision and management department. For the current use of data information, the platform has insufficient regulatory force, so it is still necessary for relevant departments to supervise and manage data information and ensure the smooth operation of the data trust mechanism, such as setting up a data asset management bureau, or setting up a special consulting agency for disputes over the use of data assets.

China should improve relief methods and add other relief channels. For the high cost of litigation, we should improve the rights and interests distribution and damage compensation mechanism between trustees and trustors, so that information rights holders can truly obtain relief. Secondly, considering the relevance of profit and loss, in the current market, the average cost of each data breach for Fortune 500 companies is US\$3.62 million, which indicates that the data controller is the data breach party rather than a third party without direct interest. While protecting information rights holders, it is also necessary to provide corresponding safeguards for information controllers and add more professional mediation channels.

China should establish a reasonable pricing mechanism and a reasonable data pricing mechanism. Regarding the underestimation of the value of personal data in the current illegal data transactions, and the country lacks specific valuation standards for the value of personal data, we should compare the category of personal data or the degree of privacy of importance, and then combine some specific data applications. A set of reasonable and complete data pricing mechanisms should be developed, similar to the UK's attempt to "establish different types of public data trusts for different public data by industry and field" in public data trusts.

7. Conclusion

Data governance is a combination of domestic governance and international governance. As for the international scope, the theoretical community continues to study data trusts. At present, the United Kingdom and the United States have developed different data trust concepts, namely the British "data trust" concept and the American "information trustee" concept, both of which have very profound trust theory and practice background. Considering China's specific national conditions, the UK's data trust theory and application are more useful for reference to China's data trust legal system. The research on data trust in China cannot be limited to the existing framework and culture of financial trust, and more research needs to be carried out based on civil trust and statutory trust, and integrated into the globalized data governance and data security protection.

References

- [1] On Data Trust: A New Scheme of Data Governance[J]. Zhai Zhiyong. *Oriental Law*.2021(04)
- [2] Doubts on the fiduciary duty theory of data controllers[J]. Xing Huiqiang. *Law and Social Development*.2021(04)
- [3] Data Trust [J]. Zhang Xiaosong. *China Science Foundation*.2021(03)
- [4] Legal attributes of data and its civil law orientation[J]. Mei Xiaying. *Chinese Social Sciences*. 2016(09)
- [5] Data Trust from "Right Norm Mode" to "Behavior Control Mode": Another Way to Construct Mechanism for Protecting Data Subject's Rights[J]. Feng Guo, Xue Yisa. *Law Review*. 2020(03)
- [6] The use and protection of personal information under the concept of trust [J]. Wu Hong. *Journal of East China University of Political Science and Law*. 2018(01)
- [7] The Safe Harbour is invalid: what tools remain for data transfers and what comes next? [J]. Padova Yann. *International Data Privacy Law*.2016(2)
- [8] Property Rules, Liability Rules, and Inalienability: One View of the Cathedral[J]. *Harvard Law Review*.1972(6)

[9] A skeptical view of information fiduciaries[J]. Khan Lina M., Pozen David E.. Harvard Law Review.2019(2)

[10] Bottom-up data Trusts: disturbing the 'one size fits all' approach to data governance[J]. Delacroix Sylvie, Lawrence Neil D. International Data Privacy Law.2019(4)