

Research on the Cross-boundary Data Transfer within the Guangdong-Hong Kong-Macao Greater Bay Area

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Abstract: In the digital era, cross-boundary data transfer become the concern of press for the benefits it may bring. The Guangdong-Hong Kong-Macao Greater Bay Area, with the characteristic of “one country, two system, three jurisdictions”, also encounter this issue. The difference among the three jurisdictions in their rules and regulations could constitute institutional barrier of cross-boundary data flow. Hence, this paper will assess the data transferring regime in the said jurisdictions and identify the disparity, then updates the latest bilateral cooperation in GBA, mainly between Guangdong province and Hong Kong to facilitate data flow, finally recommend some practical measures as a respond. In this way, the digital industry in GBA would be advanced and the fundamental right and freedom regarding data processing would be safeguarded as expected.

1. Introduction

Given the importance of data(described as the new oil^[1]) to date, all the countries and regions are striking to facilitating its free movement while providing appropriate protection. The Guangdong-Hong Kong-Macao Greater Bay Area(GBA), as the national strategy to deepen the cooperation among the said three parties and promote the open-up level^[2], also take the free flow of data within GBA as an important task for legal harmonization and regional integration. Although the three jurisdictions are subject to a single sovereignty, Hong Kong and Macao as Special Administrative Region(SAR) both enjoy the power to enact and implement their own laws, leading to the disparity in rules and regulations. Such disparity to some extend would be considered as institutional barrier that might hamper the data transmission. In this regard, this paper attempt to identify the gap among the data transferring mechanism of the three jurisdictions by examining their respective laws. The recent bilateral cooperation between Guangdong province and Hong Kong SAR can serve as pilot as well as reference for further legal reconciliation of GBA. On the one hand, the bilateral cooperation between Guangdong province and Macao SAR can be conducted like this. One the other hand, multilateral cooperation among the three jurisdiction would be benefited from its pioneering work, such as the agreed principles and terms, as well as the legal basis and so forth. After all these, this paper will be ended with a series of useful and inspiring countermeasures, to ensure the cross-boundary data flow and safeguard relevant right.

2. The laws pertaining to data transfer of the three jurisdictions and the disparity

2.1 Legislation in Guangdong, Hong Kong and Macao

For their distinctive normative evolution, the legal systems and the affiliated regulations governing the data transfer of the three jurisdictions within GBA vary. Concern upon personal data protection and right of privacy became popular in the academic circle of the developed regions, inter alia, the America and European Union since the second half of the 20th century. A series of data protection law were enacted by the aforesaid regions and have influenced many jurisdictions including those of GBA. The earliest one, Hong Kong promulgated the Personal Privacy Protection Ordinance (PDO) in 1995, before its return to PRC. Article 33 of PDO forbids the outbound data transmission from Hong Kong unless the followed requirements are satisfied: the destination is specified in the notice of competent authority, the user has reasonable grounds to believe that there is a law in force in that place that is generally similar to or achieves the same purpose as this regulation, the relevant information has been transferred with the written consent of the parties involved and so on. However, this article remains ineffective until now, with worries about compliance burden the local enterprises especially the SMSE have to undertake^[3]. In other word, there is no limit of cross-boundary data transfer in Hong Kong SAR.

Macao SAR subsequently enact its data protection law namely Personal Data Protection Act (PDA) in 2005, which is contemplated to be the “The strongest personal data protection law in the Asia Pacific region^[4]” five years later. Article 19 of PDA prescribes the general principle of transferring data outside Macao, that is, the destination has to provide adequate protection level equivalent to Macao SAR. If such requirement cannot be fulfilled, Article 20 of DPA provides exemption clause, consisting of the necessity of concluding or performing the contract of relevant parties, protection of fundamental interest of data subject, the appropriate safeguard provided by contractual clauses and so forth. Transferring the data to the destination outside Macao SAR, alongside processing the sensitive data and other items, is considered to be a series of data processing activities that need to apply for authorization from the competent authority.

Chinese mainland is the latest jurisdiction that enact its data protection law. It is not until 2021 that the legislature of PRC promulgated the Personal Information Protection Law (PIPL). As prescribed by Article 38 of PIPL, when outbound data transfer is needed, one of the following conditions should be met: (1) It or he has passed the security assessment organized by the national cyberspace administration in accordance with Article 40 of this Law. (2) It or he has been subject to the personal information protection certification by a specialized institution in accordance with the provisions issued by the national cyberspace administration. (3) It or he has entered into a contract with the overseas recipient in accordance with the model contract developed by the national cyberspace administration, agreeing on both parties' rights and obligations. (4) It or he meets other conditions provided in laws or administrative regulations or by the national cyberspace administration.

2.2 The gaps among the three jurisdiction that might hinder data transfer

As depicted above, different compliance requirements should be fulfilled when transferring data. Such difference would constitute barrier of data transmission within the GBA. The gaps among the three jurisdictions therefore have been identified as followed. Firstly, although Hong Kong has promulgated PDO at the end of 20th century, and later have issued SCCs and its Guidelines in 2014 and 2022 respectively, the prominent provisions that regulate cross-boundary data transfer did not come into force till today. Enterprises and individuals that want to transfer data would consider it hard to find the rules to comply, and the other jurisdictions of GBA claim that Hong Kong fail to

provide adequate safeguard. Secondly, Macao apply a “case by case” authorization for cross-boundary data flow, while offers limited guidelines to the applicants. Even though the supervisory authority of Macao has issued legal opinions and authorization on its website for reference, there is still uncertainty of law enforcement. As a consequence, the efficiency of data transfer would be reduced. Thirdly, Chinese mainland offers comprehensive legal basis for data transfer, but impose harsh limitation on certain kinds of data and certain amount of personal data or sensitive data. Article 4 of Measures for the Security Assessment of Outbound Data Transfer stipulates that security assessment shall be applied under the following circumstances: (1) The data processor provides important data abroad. (2) The critical information infrastructure operator or the data processor that has processed the personal information of over one million people provides personal information abroad. (3) The data processor that has provided the personal information of over 100, 000 people or the sensitive personal information of over 10, 000 people cumulatively since January 1 of the previous year provides personal information abroad. (4) Any other circumstance where an application for the security assessment of outbound data transfer is required. As this provision apply directly to Guangdong province, the data flow from Guangdong to the rest jurisdiction is also bound by the restriction. Besides, the approach of legal harmonization among these three jurisdiction remains the crux of matter. Bilateral cooperation will be more flexible to narrow the gap, while multilateral cooperation might eliminate the institutional barrier more thoroughly. The prior practice of Guangdong province and Hong Kong may inspire the policy maker in GBA.

3. Bilateral cooperation between Guangdong province and Hong Kong as breakthrough

On June 30, 2023, the MoU on Facilitating Cross-boundary Data Flow Within the bay area was signed by ITIB of Hong Kong and CAC of Mainland^[5]. It is not the first try of bilateral cooperation within GBA, given the Closer Economic Partnership Arrangement (CEPA) was concluded with between Chinese mainland and Hong Kong SAR, and between Chinese mainland and Macao SAR respectively in 2003^[6], even though with no specific provisions regulating cross-boundary data transfer. As the respond to the MoU, the CAC and ITIB has jointly issued the Guidelines for Cybersecurity Standard Practice--Cross border Personal Information Protection Requirements in the Guangdong- Hong Kong-Macao Greater Bay Area (Draft for Comments) and Implementation Guidelines on the Standard Contract for Cross-boundary Flow of Personal Information Within the Guangdong-Hong Kong-Macao Greater Bay Area (Mainland, Hong Kong). These two legal documents provide more justifications for data transmission and more detailed regulation to be easily complied, thus are considered the breakthrough of current legislation. Especially the latter one, which is also called Guangdong-Hong Kong SCCs, loosens the limitation of amount of transferred data and simplifies the procedure of recordation, thus improve the certainty and efficiency of data transfer between Guangdong and Hong Kong.

The above practice proves that the bilateral cooperation of cross-boundary data transfer within GBA is feasible and can work effectively. However, attention should be paid on the fact that the DPO of Hong Kong implements no substantial restriction on data transfer while develops clear guidelines for data processors. Macao is dramatically different, for its PDA adopt an “application-authorization” method and provide less guidelines compared with Hong Kong. Bilateral cooperation can be utilized as a mean to remove the legal barrier of data transmission between Macao and Guangdong, as well as between Macao and Hong Kong, noted with the aforesaid distinction between Macao and Hong Kong. Meanwhile, the difference in the roles that the three parties are expected to play should be taken into consideration. Guangzhou is supposed to be the regional center of GBA in varying aspects including data transfer. Hong Kong although

encountered failure in high-tech industry transformation^[7], still remain the potential to and seek to be the international data trade hub^[8]. Whilst Macao caters for the data transmission with the Portuguese-speaking countries and European countries. The achievements and experience of the cooperation between Guangdong and Hong Kong, such as the unified terms and principle regulating data transfer and so on, would serve as reference. Notwithstanding it, the multilateral cooperation involving the concern three jurisdictions of GBA is still deemed to be the most ideal model pertaining to cross-boundary data transfer in long term.

4. Conclusion: suggestions for facilitating data flow within GBA

As the identified gaps of the rules and regulations among the three jurisdictions would hinder cross-boundary data flow in many aspects, certain countermeasures therefore has to be taken. In short term, the legislator should continuously perfect the bilateral cooperation model between Guangdong and Hong Kong, exploring more possibility to break through the upper level law, in particular the “white list” system encouraged to be developed in the Three-Year Action Plan for Digital Greater Bay Area issued by the Guangdong government^[9]. Meanwhile, the bilateral cooperation regarding data transfer between Macao and Guangdong province, and between Macao and Hong Kong SAR should be carried out. SCCs(Standard Contractual Clauses), the successful template of the cooperation between Hong Kong and Guangdong and the most frequently used legal tool at global level^[10], can be jointly issued by the data supervisory authority of Macao and its counterpart of Mainland after sufficient discussion to serve as breakthrough point of cooperation with Macao involved.

In long term, a multilateral cooperation to remove the barrier of data transfer within GBA should be considered. Modelling on the internal data transfer of EU, the data autonomy of the three jurisdictions should be sacrificed^[11]. More concretely, the three parties would alienate certain power to achieve an agreement on data transfer. The task force for the construction of “the Digital Greater Bay Area” under the Guangdong government is expected to play a more important role in overall planning and coordination. The experienced officers of data supervisory authorities, legal professionals and legal participants of the three jurisdictions should be welcome to provide insights to the enactment of the rules governing cross-boundary data transfer within GBA. A step-by-step scheme, similar with that applied to jurisdictions of varying legal and cultural background^[12], might be considered. Moreover, the free trade zones located in Guangdong for further institutional innovation could serve as pilots in this process. The Hengqin Guangdong-Macao In-depth cooperation zone is carrying out the inter-government cooperation, which is interpreted as the expansion of high degree autonomy^[13]. By applying the “first try”policy and fault-tolerant mechanism^[14], it might legislate “appropriately ahead of schedule^[15]” to offer more space for legal reconciliation between Macao and Guangdong, and even among the three jurisdictions of GBA. Experience of the pilots, after summary and review, can be introduced to other parts of GBA, and further the rest of Guangdong province

Against the backdrop that cross-boundary data transfer has become one of the utmost important issues in the field of legal harmonization in GBA, this study would be of reference to advancing the reform of digital regulation of the three jurisdictions. Even though most of the recommendations of this paper might not be taken by the policy maker in GBA, it still offers some insights. The critical balance between the utilization of data and the protecting purpose are hereby considered. By narrowing the gap of data transferring regime of the three jurisdictions, both free movement of data and the safeguard upon digital human right would be ensured. More importantly, the unique data governance rules enable the enterprises in Chinese mainland to avoid hard regulation and to export data to other countries through Hong Kong SAR or Macao SAR^[16]. GBA would therefore function

as the data trade hub between Chinese mainland and the outside world, promoting the digital “one belt one road” initiative.

References

- [1] Hirsch, D. D. (2014). *The glass house effect: big data, the new oil, and the power of analogy*. *Maine Law Review*, 66(2), 373-396.
- [2] *The Central Committee of the Communist Party of China and the State Council have issued the Outline of the Development Plan for the Greater Bay Area of Guangdong, Hong Kong and Macao*. http://www.gov.cn/xinwen/2019-02/18/content_5366593.htm#1.
- [3] *Personal data protection practices in Hong Kong and the control framework for cross-border/cross-jurisdiction data flow*. https://www.pcpd.org.hk/tc_chi/news_events/speech/files/Zhuhai_simpchi.pdf.
- [4] *Annual Report 2012*. https://www.gdpd.gov.mo/file/Annual_Report/2012_files/1_all.pdf.
- [5] *Bay area data-flow MoU signed*. https://www.news.gov.hk/eng/2023/06/20230630/20230630_120748_916.html?type=ticker.
- [6] *Editorial*. <http://tga.mofcom.gov.cn/aarticle/Nocategory/200612/20061204086002.html>.
- [7] *Why is Hong Kong's transformation so difficult?* <https://mp.weixin.qq.com/s/n00i2SmSFtSn5SeerTA5fA?>
- [8] *RCCL'S Contract Research For Microsoft HONG KONG Limtid — "Legal Research Project: Proposal For HONG KONG to be a Data Center Hub For The Greater Bay Area & China"*. https://www.cityu.edu.hk/slwl/lib/doc/CCCL/201901_RCCL_Report-HK_as_Data_Centre_Hub-ES.pdf.
- [9] *Notice from the General Office of the Guangdong Provincial People's Government on the issuance of a three-year action plan for the construction of the "Digital Bay Area"*. http://www.gd.gov.cn/zwgk/wjk/qbwj/ybh/content/post_4287596.html?from=qcc.
- [10] LI Yanhua.(2021).*Supervision on the Cross-border Flows of European and American Data in the Post-Schrems II Era and China's Response—The Trend of Soft Data Localization Mechanism and the Innovation of the Standard Contractual Clauses Path*.*China Journal of European Studies*, 39: 25-49.
- [11] *Research Group of Institute of Studies for the Greater Bay Area.(2021).Cross- border Data Element Flow and Governance Mechanism Design: A Perspective Based on the Construction of Guangdong -Hong Kong -Macao Greater Bay Area*. *International Economics and Trade Research*,(37):86-98.
- [12] Qi Xiangquan, Wen Yuanyi.(2019).*Establishing Regional Legal system Regulating Cross-Border Data Flow Among R&B Countries: Divergence, Consensus and Cooperative Approach*. *Journal of Henan Normal University (Philosophy and Social Science)*, 46:71-80.
- [13] Li Ke, Tang Xiaoqing.(2022).*Guangdong Macau In-depth Cooperation Zone in Hengqin: Concept Innovation and Institutional Construction*.*Hong Kong and Macao Journal*,(1):13-24.
- [14] *Regulations on Promoting the Development of Hengqin Guangdong Macao Deep Cooperation Zone*.http://www.gd.gov.cn/gdywdt/zwzt/ygadwq/zxzc/content/post_4091516.html.
- [15] Tang Xiaoqing, Li Ke.(2022).*Hengqin Guangdong-Macao Deep Cooperation Zone Economic Collaboration Legislation: Motives, Problems and Paths*. *Macao Law Review*, (1), 1-12.
- [16] Jiang, F. (2024). *China's legal efforts to facilitate cross-border data transfers: a comprehensive reality check*. *Asia Pacific Law Review*, 32(1), 81-101.