

## I. Introduction

The European Union (EU) data economy could reach EUR 739 billion in value by 2020<sup>1</sup> ‘if policy and legal framework conditions (...) are put in place in time’,<sup>2</sup> doubling within the next two years.<sup>3</sup> It is, therefore, not surprising that ‘data’ has become a trending buzzword and is being referenced by many as the ‘new oil’ of the modern data economy.<sup>4</sup>

The first step towards the enhancement of the internal market dimension of data has already been taken by the EU in 2016 with the reform of its data protection framework, including adoption of the General Data Protection Regulation (GDPR) regarding the processing of personal data and its free movement.<sup>5</sup> Among the innovations introduced to adapt the EU legal landscape to the data economy is the novel right to data portability (RtDP) laid out in Article 20 GDPR.

As a right established within a data protection legislation, the RtDP’s first and main objective is to grant individual’s greater control over their personal data. However, with the increase of data-based businesses (such as big data, cloud and Internet of Things (IoT)), data has acquired an economic dimension, representing a strategic element in competition between digital products and services, in view of its ability to create consumer lock-in and hinder market.<sup>6</sup>

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1 IDC, ‘European Data Market – Final Report’ [2017] SMART 2013/0063, 126.

2 Commission, ‘Building a European Data Economy’ (Communication) COM(2017) 9 final, 2.

3 Commission, ‘Towards a Common European Data Space’ (Communication) COM(2018) 232 final, 1.

4 Notwithstanding the criticism of economist on such comparison, since data is not a scarce commodity and has a nonrival character.

5 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ 2 119/1 (General Data Protection Regulation – GDPR).

6 Inge Graef, *Data as Essential Facility: Competition and Innovation on Online Platforms* (Doctoral Thesis, KU Leuven Faculty of Law 2016) <<https://lirias.kuleuven.be/bitstream/123456789/539854/1/Final+draft+PhD++Inge+Graef++Data+as+Essential+Facility++30+May+2016.pdf>> accessed 15 March 2018, 146; Inge Graef, Jeroen Verschakelen and Peggy Valcke, ‘Putting the Right to Data Portability into a Competition Law Perspective’ (2013) <<https://ssrn.com/abstract=2416537>> accessed

Although the GDPR became applicable on 25 May 2018, numerous questions remain open on the extent of its scope, as well as its implementation, applicability, and enforceability. Among the questions is what Graef, Husovec and Purtova identify as the ‘Silent Conflict [of the RtDP] with IP Rights’.<sup>7</sup>

The RtDP is not an absolute right, as Article 20(4) GDPR sets forth that it ‘shall not adversely affect the rights and freedoms of others’. In view of its broad wording, ‘rights of others’ arguably also encompass intellectual property rights (IPRs), which could represent a claim for controllers<sup>8</sup> to not comply (or only partially comply) with a portability request.

The most relevant IPR candidate in this regard is the *sui generis* database right (SGDR) under the Database Directive (DbD),<sup>9</sup> considering that a database is commonly realised as a collection of data. The SGDR’s broad scope grants owners the right to prevent extraction and reutilization of all or a substantial part of the contents of the database.<sup>10</sup> Thus, a portability request could be perceived by the SGDR’s owner as adversely affecting its right.

Modernization of the legal framework and development of a data economy have been at the core of the EU’s Digital Single Market Strategy.<sup>11</sup> Among the initiatives to foster the data-driven economy, the Commission has launched in May 2017 a public consultation on the DbD for its second

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28 March 2018, 2; Aysem D Vanberg and Mehmet B Ünver, ‘The Right to Data Portability in the GDPR and EU Competition Law: Odd Couple or Dynamic Duo?’ (2017) 8 (1) EJLT 13; Barbara van der Auwermeulen, ‘How to Attribute the Right to Data Portability in Europe: A Comparative Analysis of Legislations’ (2017) 33 (1) CLSR 57, 61.

7 Inge Graef, Martin Husovec and Nadezhda Purtova, ‘Data Portability and Data Control: Lessons for an Emerging Concept in EU Law’ (2017) DP 2017-041 Tilburg Law School Legal Studies Research Paper Series No. 22/2017 <<https://ssrn.com/abstract=3071875>> accessed 26 March 2018, 10.

8 Article 4(7) GDPR defines ‘controller’ as ‘natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data’.

9 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20 (Database Directive – DbD).

10 DbD art 7(1).

11 Commission, ‘A Digital Single Market Strategy for Europe’ (Communication) COM(2015) 192 final 6, 14.

*ex-post* evaluation.<sup>12</sup> The main objective was to verify ‘whether the Directive is still fit-for-purpose in (...) [the] data-driven economy’ and ‘identify possible needs of adjustment’.<sup>13</sup> Unfortunately, however, the consultation did not approach the potential conflict between the SGDR and the RtDP.

Against this background, this research aims to explore and redefine the interface between Article 20 GDPR and the SGDR, taking particular account of the data economy’s context. It is organized in three key parts:

Part II focuses on the legal framework of the RtDP. Special recourse will be taken from the ‘Guidelines on the Right to Data Portability’<sup>14</sup> issued by the Article 29 Data Protection Working Party (WP29)<sup>15</sup> to clarify its view on the RtDP. Also, although this research focuses on the RtDP (and, consequently, on personal data) it is instructive to note that there are other legislative proposals in the EU dealing with data portability which go beyond personal data.<sup>16</sup>

Part III outlines the intersection between personal data and the SGDR. Is there a real potential clash that could prevent individuals from porting their personal data? To answer such question, first the SGDR is delineated and analysed, with special consideration of the applicable case-law. Thereafter, each element is confronted with a personal data and RtDP scenario.

Finally, Part IV intends to answer the question if there is a need for a re-designed approach to enable the RtDP in the context of the data economy, by considering potential issues arising from the intersection between personal data and the SGDR, as well as possible ways out.

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12 Commission, ‘Summary Report of the Public Consultation on the Evaluation of Directive 96/9/EC on the Legal Protection of Databases’ (Consultation Results, 6 October 2017) <<https://ec.europa.eu/digital-single-market/en/news/summary-report-public-consultation-legal-protection-databases>> accessed 7 March 2018.

13 Ibid.

14 Article 29 Data Protection Working Party, ‘Guidelines on the Right to Data Portability’ [2017] WP242 rev 01 (WP29 Guidelines). The WP29 Guidelines are not binding.

15 The European Data Protection Board (EDPB) has meanwhile succeeded WP29 under the GDPR. WP29’s documents, including the WP29 Guidelines, were endorsed by the EDPB, ‘Endorsement of GDPR WP29 guidelines by the EDPB’ [2018] Endorsement 1/2018.

16 Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content’ COM(2015) 634 final; Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on a Framework for the Free Flow of Non-Personal Data in the European Union’ COM(2017) 495 final.