

Stephanie Elfering

Unlocking the Right to Data Portability

An Analysis of the Interface with the Sui Generis Database Right



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Table of Contents

Abstract	7
Acronyms and Abbreviations	9
I. Introduction	11
II. The Right to Data Portability	14
A. Brief Overview on the GDPR	14
B. The Concept of 'Personal Data'	16
C. The Right to Data Portability under the GDPR	18
1. Legislative History and Purpose	18
2. Scope of the Right to Data Portability	20
3. Conditions for the Right to Data Portability	23
(a) Processing Based on Consent or Contract	23
(b) Processing by Automated Means	24
(c) Personal Data 'Concerning' and 'Provided by' the Data Subject	25
4. The Exception of Rights and Freedoms of Others	29
D. Data Portability Beyond Personal Data?	31
III. Personal Data Meets Sui Generis Database Right	33
A. The EU Database Directive	33
1. Defining a Database	34
2. The Sui Generis Database Right	36
(a) Protection Requirement	36
(1) The Substantial Investment Requirement	36
(2) Investment in Obtaining, Verifying or Presenting	37
(b) Ownership – the Database Maker	39
(c) Scope of Protection	40
(d) Exceptions and Limitations	42

Table of Contents

B. Intersection between the Right to Data Portability and the Sui Generis Database Right	43
1. Personal Data as Contents of a Database	43
(a) Online Platforms	44
(b) Connected Devices	45
2. Controllers as Database Makers Making a Substantial Investment	46
(a) Online Platforms	46
(b) Connected Devices	47
3. The Sui Generis Database Right as ‘Rights of Others’	48
4. Data Portability Request as Extraction or Reutilization of the Contents of a Database	49
IV. Do We Need a Re-Designed Approach for the Data Economy?	52
A. Potential Issues Arising from the Intersection	52
1. Competition Law Impacts	52
(a) Lock-In Effects	52
(b) Big Data Scenarios	53
(c) Data Portability Refusal as Abuse of Dominance	55
2. Consumer Protection Law	56
3. Suitability of the Sui Generis Database Right for the Data Economy?	57
B. Possible Ways Forward	59
1. Case-Law Interpretation	60
2. Repeal of the Database Directive or the Sui Generis Database Right	61
3. Amendment of the Database Directive	62
4. Preferred Approach	65
V. Conclusion	68
List of Works Cited	71

Abstract

The European Union (EU) data economy could reach EUR 739 billion in value by 2020 if policy and legal framework conditions are put in place in time. The first step towards the enhancement of the internal market dimension of data has already been taken by the EU in 2016 with the adoption of the General Data Protection Regulation (GDPR), which introduced the novel right to data portability (RtDP). While the RtDP's primary objective is to provide data subjects with greater control over their personal data, it also has a pro-competitive character, as a tool to decrease consumer lock-in.

The RtDP is, however, not an absolute right, as Article 20(4) GDPR sets forth that it 'shall not adversely affect the rights and freedoms of others'. This wording arguably also encompasses intellectual property rights (IPRs), which could represent a claim for controllers 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), considering that a database is commonly realised as a collection of data. Unfortunately, the Commission's recent second ex-post evaluation on the DbD did not approach such potential conflict.

Against this background, this research aims to explore and redefine the interface between the RtDP 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. Subsequently, Part III outlines the intersection between personal data and the SGDR. After delineating the SGDR, each element is then confronted with a personal data and RtDP scenario to determine if there is indeed a potential clash. Finally, Part IV discusses the potential issues arising from such intersection, as well as possible ways forward to solve it. This final analysis argues for a coordinated approach, which takes the big picture of the data economy into account, to provide for an effective outcome.

Keywords: GDPR, Right to Data Portability, Article 20(4), Database Directive, Sui Generis Database Right, Data Economy, Data Access Right

Acronyms and Abbreviations

B2B	Business-to-business
B2C	Business-to-consumer
BGH	<i>Bundesgerichtshof</i> (German Federal Supreme Court)
CJEU	Court of Justice of the European Union
DbD	Database Directive
DPD	Data Protection Directive
ECHR	European Convention on Human Rights
EDPB	European Data Protection Board
EDPS	European Data Protection Supervisor
EEA	European Economic Area
EU	European Union
FRAND	Fair, Reasonable and Non-Discriminatory
GDPR	General Data Protection Regulation
IoT	Internet of Things
IPR	Intellectual Property Right
ISP	Internet Service Provider
OECD	Organisation for Economic Co-operation and Development
RtDP	Right to Data Portability
SGDR	Sui Generis Database Right
SME	Small and Medium Enterprises
TFEU	Treaty on the Functioning of the European Union
WP29	Article 29 Data Protection Working Party

