

Stephanie Elfering

Unlocking the Right to Data Portability

An Analysis of the Interface with the
Sui Generis Database Right



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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

