

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                |

