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A vanishing right? The Sui Generis Database Right and the proposed Data Act

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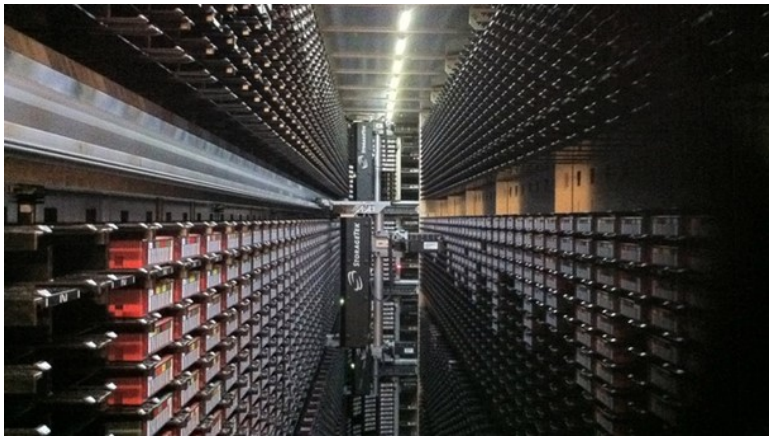

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Last week the European Commission published its proposal for a Data Act. The proposal is the second major element of the European Data Strategy presented in 2020 and complements the Data Governance Act that is expected to be formally adopted this spring.

As expected, the proposed Data Act introduces rules strengthening user access and portability to data generated by connected devices (ranging from industrial appliances to personal virtual assistants), rules related to the interoperability of data spaces and cloud services, and new requirements for businesses to share data with the public sector bodies. But for anyone who had expected the Data Act to include a revision of the Database Directive — an ambition that the Commission had signalled in both the 2020 Data Strategy and the 2020 Intellectual Property Action Plan — the final proposal will be a major disappointment.

Instead of reviewing the Database Directive, the proposal for the Data Act contains a single article (Article 35) that clarifies that the sui generis database right (SGDR) introduced by the Database Directive (Chapter III) does not apply to databases containing data obtained from or generated by the use of a connected device:

> In order not to hinder the exercise of the right of users to access and use such data in accordance with Article 4 of this Regulation or of the right to share such data with third parties in accordance with Article 5 of this Regulation, the sui generis right provided for in Article 7 of Directive 96/9/EC **does not apply** to databases containing data obtained from or generated by the use of a product or a related service.

In the impact assessment report this intervention is now described as a targeted review of the Database Right. The decision to exclude data generated by the use of connected products and related services — everything ranging from industrial equipment to personal virtual assistants — is supported by a 230 page study that was published alongside the Data Act.

And while the decision to exclude databases containing this type of data from the application of the SGDR is consistent with the policy objectives of the Data Act — which include endowing enforceable access and portability rights to the users/owners of connected devices — the fact that the Commission saw the need to include Article 35 in the proposal raises a set of more fundamental questions about the SGDR in the European data economy.

A right that shall not be exercised

The sui generis database right introduced in Article 7 of the 1996 Database Directive (as amended) has been controversial from the start. Intended as a means to bolster the competitive position of European database producers, the right has failed to live up to this objective as evidenced by successive evaluations that have failed to demonstrate a positive economic impact. Despite these failures to demonstrate positive impact the European Commission has not found the courage or the political opportunity to admit to this failed experiment and retract or fundamentally revise this right. The fact that the announced revision of the Database Directive in the context of the Data Act has failed to meaningfully materialise fits in an almost 20 year long tradition of legislative inaction.

It is telling that the “targeted” exclusion of databases containing data generated by the use of connected products and related services from the scope of the right is not the first such exclusion. A very similar provision can be found in both the Data Governance Act that is in the last stages of approval, which in Article 5(7) states that

> the right of the maker of a database as provided for in Article 7(1) of Directive 96/9/EC **shall not be exercised** by public sector bodies in order to prevent the re-use of data or to restrict re-use beyond the limits set by this Regulation.

and in Article 1(6) of the 2019 Open Data Directive which contains the same language as the Data Governance Act proposal.

Put differently, every time the sui generis database right comes into conflict with the European Union’s attempt to create a modern regulatory framework for the data economy, the SGDR loses out. .

What good is the database right anyway?

It seems time to ask how much scope of application of the SGDR remains in between databases that are protected by copyright based on their originality and databases that are out of the scope of protection of the sui generis database right based on the provisions of the Data Act, the Open Data directive and the Data Governance Act and the relevant case law of the CJEU. And — more

importantly — is whatever scope remains really worth incurring the significant legal uncertainties that are caused by intransparent criteria for protection under the SGDR? Recollecting that all previous evaluations of the SGDR have failed to identify any positive economic impact the answer is almost certainly “No”.

By repeatedly refusing to revise the relevant parts of the Database Directive and opting for “targeted” reviews the European Commission has further undermined the legitimation of the sui generis database right. The Commission should finally muster the courage to face this reality and revise the Database Directive to adjust it to changed realities. The current data governance landscape is much more complex than the one that provided the backdrop for the ill-conceived database right that considered “database producers” to be the backbone of the Information Society. This basic assumption does not hold anymore in an environment in which nearly every economic transaction or productive process creates data.

Such a revision of the Database Directive needs to have two core components: As Derclaye & Husovec (2021) point out, the Database Directive “*should be conceptualized as an exhaustive statement about the protection of databases as such*” to ensure that it creates legal certainty about the scope of protection of databases in the EU. In addition, the scope of the sui generis database right should be significantly reduced either by making it conditional on “*due diligence and transparency standards*” for investments in databases (Derclaye & Husovec, 2021) or on registration (Wikimedia, 2022) or by repealing the right all-together (COMMUNIA, 2017 and 2021).

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