

Learning from Past Mistakes: Similarities in the European Commission's Justifications of the Sui Generis Database Right and the Data Producers' Right

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I. Introduction

In its communication entitled Building a European Data Economy¹ from January 2017, the European Commission considers the introduction of a 'data producer's right' as one of six policy options in order to address the issue of data access. This potential new right, which is described in the Commission's accompanying public consultation² as 'a sort of sui-generis intellectual property right', has been the subject of a lot of academic discussion already.³ The purpose of this article is neither to review this discussion nor to evaluate empirically the claims made about the potential effects of new sui generis intellectual property rights. It rather aims to take a comparative look at the arguments brought forward by the Commission itself when considering such policy interventions, in order to expose potential weaknesses in its past analysis that should be kept in mind when considering the introduction of new exclusive rights.

Sui generis intellectual property rights are not a common phenomenon under European intellectual property law. The case that lends itself to comparison is the sui generis database right introduced by the Database

¹ European Commission, 'Building a European Data Economy' COM(2017) 9 final (hereinafter 'Data Economy Communication').

² Consultation on building the European data economy: <ec.europa.eu/digital-single-market/en/news/public-consultation-building-european-data-economy> accessed 28 June 2017.

³ See for example Max Planck Institute for Innovation and Competition, 'Data Ownership and Access to Data – Position Statement of 16 August 2016 on the Current European Debate'. Available under <www.ip.mpg.de/en/link/position-paper-data-2016-08-16.html> accessed 30 June 2017.

Directive⁴ in 1996. This article examines the arguments that were brought forward in order to justify the introduction of the sui generis database right and the Commission's own first evaluation⁵ of its real-life effects. It outlines similarities with the case made for the data producer's right today and highlights some of the weaknesses in its justification.

II. Comparing Objectives of Sui Generis IP Rights

The starting point of the analysis is the overview of the European Commission's objectives in introducing the sui generis database right, which is provided in the evaluation report published in 2005. The objectives are structured into four columns that follow the themes of harmonization, investment, access and competitiveness, particularly in comparison to the United States of America. All of these themes can be found to some extent in the arguments brought forward in favour of a new data producer's right, in some cases the language used to justify the latter is strikingly similar to the objectives of the sui generis database right. The following paragraphs shall examine the four themes in detail.

1. The objective of harmonization

The objective of harmonization is closely connected to the objective of fostering investment. The evaluation report reminds that the Database Directive was first and foremost a harmonization exercise. Action at EU level was deemed necessary because investment in database production required 'a level playing field in the EU'⁶, one of the operational objectives of the Directive was therefore the 'elimination of differences in protection

⁴ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20 (hereinafter 'Database Directive').

⁵ DG Internal Market and Services Working Paper. First evaluation of Directive 96/9/EC on the legal protection of databases. 12 December 2005. Available under <ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf> accessed 28 June 2017 (hereinafter 'Evaluation Report').

⁶ *ibid* Figure 1 – General, specific and operational objectives of Directive 96/9/EC, 7.

in Member States that hamper the functioning of the Internal Market⁷. The introduction of this new sui generis right was justified with the need for harmonization, as, according to the Commission, ‘differences in the standard of “originality” required for a database to enjoy copyright protection impeded the free movement of “database products” across the Community’⁸. In particular, common law countries protect databases at a lower standard of ‘sweat of the brow’ copyright, whereas other countries do not. Rather than harmonizing the standard of originality in copyright across the Union and thereby increasing the coherence of copyright law in general, the Commission decided to focus on the harmonization of database protection only and to accompany the copyright protection for databases with a sui generis database right. It was taken as a given that harmonization would have to take place at the highest level of protection currently available in the EU, therefore an equivalent to the ‘sweat of the brow’ protection of databases existing primarily in the UK and Ireland would have to be established in all other Member States. Whereas databases protected by copyright under the Directive would require an element of intellectual creation, the sui generis database right would have no originality requirement. By creating a sui generis intellectual property right distinct from copyright, the Commission side-stepped the problem of getting the Member States to agree on a general harmonized standard of originality under copyright law, while at the same time extending the scope of intellectual property across the EU beyond what existed in the vast majority of Member States up to that point.

In the data economy communication of 2017, the Commission makes the case for a sui generis data producer’s right by pointing out that raw data is currently not protected under EU law – with the exception of the sui generis database right and the protection of trade secrets – but it vaguely refers to potential future decisions of Member States to introduce such protection in their national laws. It is argued that ‘an uncoordinated approach risks creating fragmentation and would be detrimental to the development of the EU data economy and the operation of cross-border data services and technologies in the internal market’⁹. In other words, it is not actual differences in national law that lead to the consideration of this

⁷ *ibid.*

⁸ *ibid.* 3.

⁹ Data Economy Communication (n 1) 11.

harmonization exercise in order to maintain a level playing-field, even the mere theoretical possibility that ‘Member States [...] may decide to regulate this issue by themselves’¹⁰ is considered sufficient justification for significantly extending intellectual property rights beyond the standard currently established in any of the Member States. Again, the alternative approach of banning Member States from introducing more far-reaching intellectual property protection that would hamper the functioning of the internal market is not discussed, whereas a previously non-existent sui generis protection of raw data is considered, because ‘modern, coherent rules across the EU are needed for data to flow freely from one Member State to another’¹¹.

What the objectives of the sui generis database protection and the data producer’s right have in common is that their introduction is perceived as a means of eliminating (potential or actual) differences in the scope of intellectual property protection across the Union, thereby improving the functioning of the Internal Market. Whereas undoubtedly, having the same rules in all Member States is *ceteris paribus* beneficial for the Internal Market, the degree of intellectual property protection may itself have an effect, where a higher level of protection does not automatically translate to more trade and investment.

2. The objective of facilitating investment

Encouraging and protecting investment in the creation of databases and respectively in data itself is a prominent objective of both the sui generis database right and the data producer’s right. The evaluation report reminds that ‘effective uniform protection of non-original databases in all Member States’ in the form of a sui generis right was considered an appropriate tool to achieve the objective of ‘initiat[ing] more investment in the creation of databases’¹². Furthermore, aside from encouraging future investment, the Commission also believed ‘there was a need to *protect investment* in the creation of databases against parasitic behaviour by those who

¹⁰ *ibid.*

¹¹ *ibid.* 3.

¹² Evaluation Report (n 5) Figure 1.

seek to misappropriate the results of the financial and professional investment made¹³.

The same line of thinking can be found in the data economy communication, which argues that the data producer's right is one of the policy options that will 'ensure a fair return on [market players'] investments and thereby contribute to innovation'¹⁴. To 'protect investment and assets' is considered a policy objective in its own right, alongside other public policy objectives such as improving data access and facilitating data sharing¹⁵. An explanation of what market mechanisms would lead to the expected increase in investment following the introduction of a new intellectual property right is missing, it is assumed that broader intellectual property rights will lead to more investment, without empirically testing this claim.

3. The objective of increasing access

A remarkable element of the objectives associated with both the sui generis database protection and the data producer's right is the expectation that such new rights will increase, rather than decrease, public access to the data(bases) thus protected. This expectation is counter-intuitive, because an exclusive right, by definition, limits the circle of beneficiaries who may use the protected data without explicit permission.

Despite this obvious contradiction, the Commission expected that the introduction of the sui generis database right would contribute to the development of European 'information markets'¹⁶, which would be more effective at facilitating the re-use of databases than simply not protecting them with an exclusive right. The operational objective of the sui generis database right in the area of access is thus to 'safeguard the legitimate interests of lawful users of databases'¹⁷, without considering whether the interests of users might be better served by not dividing them into lawful users and unlawful users in the first place.

¹³ *ibid* 9, emphasis in original.

¹⁴ Data Economy Communication (n 1) 11.

¹⁵ *ibid*.

¹⁶ Evaluation Report (n 5) Figure 1.

¹⁷ *ibid*.

In the same vein, the data economy communication presents a new data producer's right as a policy that would 'improve access to anonymous machine-generated data'¹⁸, rather than limit said access as could be expected from an exclusive right, and furthermore 'facilitate and incentivize the sharing of such data'¹⁹. Just like in the objectives underlying the sui generis database right, the interests of users are seen as an argument for, rather than against, such legislative intervention, pointing out that 'the unequal bargaining power of companies and private individuals should be taken into account' and 'lock-in situations [...] should be avoided'²⁰. In such situations of unequal bargaining power, 'market-based solutions alone might not be sufficient to ensure fair and innovation-friendly results, facilitate easy access for new market entrants and avoid lock-in situations'²¹. In other words, legislative intervention is deemed necessary in order to prevent lock-in effects. The creation of a new exclusive right is explicitly considered as an appropriate legislative tool to achieve this goal.

4. The objective of enhancing competitiveness

Finally, an element of the justification of the sui-generis database right that is made very explicit in the evaluation report can be found on a more general level in the data economy communication as well: The creation of the sui generis database right was aimed at 'enhancing global competitiveness of the European database industry in particular by filling in the gap between the EU and the US'²². The data economy communication does not explicitly link this objective to the data producer's right as such, but it does remark 'that the European digital economy had been slow in embracing the data revolution compared with the USA'²³. The advantage of the operational objective underlying the database directive of 'in-

¹⁸ Data Economy Communication (n 1) 11.

¹⁹ *ibid.*

²⁰ *ibid.* 12.

²¹ *ibid.* 10.

²² Evaluation Report (n 5) 10.

²³ Data Economy Communication (n 1) 3.

creas[ing] the European production of databases as compared to the US'²⁴ is that it lends itself relatively easily to empirical ex-post evaluation.

III. Lessons from the First Evaluation of the Sui Generis Database Right

The evaluation report concluded by the European Commission in 2005, about a decade after the entry into force of the Database Directive, is a good basis for examining the success of the sui generis database right in achieving its stated objectives, not because it is the most up-to-date or the most comprehensive analysis of the sui generis database right in practice, but rather because it was conducted by the institution that proposed this right in the first place and could hence be expected to view the available evidence in a favourable light. Nevertheless, the evaluation paints the picture of an overall failed legislative intervention.

Starting with the most objective criterion of increasing the database production compared to the US, the evaluation finds that in fact the production of databases decreased in absolute terms after 2001²⁵, a point in time when the implementation of the 1996 database directive into national law had been concluded by the vast majority of Member States.²⁶ The gap between the share in global database production between the US and the EU actually widened significantly from 2001 to 2004, after an initial narrowing between 1996 and 2001 (a time period when many EU Member States had not yet implemented the Database Directive into national law).²⁷ The report observes that 'there has been a considerable growth in database production in the US, whereas, in the EU, the introduction of "sui generis" protection appears to have had the opposite effect', concluding that 'with respect to "non-original" databases, the assumption that more and more layers of IP protection means more innovation and growth appears not to hold up'²⁸. It is remarkable that this conclusion seems to have been entirely forgotten by the European Commission and has not been ref-

²⁴ Evaluation Report (n 5) Figure 1.

²⁵ *ibid* Figure 5 – Trend of the database sector in 'West Europe' (1992–2004), 19.

²⁶ *ibid* 11.

²⁷ *ibid* Figure 7 – Database production in North America and West Europe (1992–2004), 23.

²⁸ *ibid* 24.

erenced when in the 2017 data economy communication, exactly the same questionable assumption about the relationship between additional IP rights and innovation was made once again.

The evaluation report's verdict in terms of innovation and competitiveness is consequently rather negative. With regards to the objective of improving access, the picture does not look much better: Users of databases have voiced greater concerns over the sui generis database right than over the copyright protection of databases, arguing that the former has 'led to an over-broad protection'²⁹. The exceptions to the sui generis right are criticized by users as being too narrow. It is even reported that 'certain libraries claim that the "sui generis" right has resulted in a concentration of leading database producers, for example electronic journals, monopolizing information'³⁰, a finding that should inspire caution among the proponents of a new sui generis IP right, considering that such a right, according to the Commission, should 'avoid lock-in situations'³¹.

What remains is the objective of harmonization, which shows its ironic flip-side in the policy recommendations resulting from the evaluation report. Having concluded that the sui generis right is 'difficult to understand'³², having led to considerable litigation, 'comes close to protecting data as property'³³ and that 'the economic impact of the "sui generis" right is unproven', one would expect a recommendation for repealing the sui generis right to follow naturally from the negative outcome regarding the directive's core objectives. However, the evaluation report comes to a different conclusion.

When comparing the expected costs and benefits of either repealing the Directive as a whole, abolishing or amending the sui generis right, or simply sticking with the status quo, the report concludes that the costs of any action to address the apparent shortcomings of the sui generis right

²⁹ *ibid* 21.

³⁰ *ibid*.

³¹ Data Economy Communication (n 1) 10.

³² Evaluation Report (n 5) 23.

³³ *ibid* 24. This is a particularly ironic criticism of the consequences of the sui generis right considering that the very objective of introducing a 'data producer's right' would be the protection of raw data as property, an endeavour that, as the report rightly points out here, would run counter to long-established principles of copyright law.

would probably outweigh the benefits. The report ends in the sobering realization that ‘even if a piece of legislation has no proven positive effects on the growth of a particular industry, withdrawal is not always the best option’³⁴. Although the report does not make it explicit, it is worth pointing out that repealing the Directive, or the Article that introduced the sui generis right, would in any case not bring any immediate improvements, as removing an obligation on Member States to protect non-original databases by means of a sui generis right does not automatically create the reverse obligation to remove the sui generis right from national law. An actual removal of the sui generis database right from national laws of Member States would require a ban of such national laws at EU level.

IV. Conclusion

What lessons can be drawn from the experience of the sui generis database right for the current debate on a possible data producer’s right? Primarily, the anticipated benefits in terms of innovation, access and competitiveness deserve a much more critical assessment, given that they have failed to materialize in the case of the sui generis database right, which may even be said to have been counter-productive.

Secondly, when employing the argument of harmonization, it is important to keep in mind that the benefits of a more uniform legal framework come with the drawback of added difficulty in correcting past legislative mistakes. Repealing an exclusive right, once established through an EU directive, is far from trivial, even if that exclusive right has entirely failed to achieve its goals. The European Commission should therefore refrain from proposing new exclusive rights unless a compelling economic and societal case has been made for their usefulness and they have ideally been tested and proven to be beneficial in a national context. The data producer’s right would be a novelty not only in the European Union, but worldwide, and therefore clearly fails to reach that high bar.

Finally, the European Commission would do well to work on its institutional memory, in order to ensure that past experiences with similar legislative initiatives are thoroughly analyzed when considering new legislative

³⁴ *ibid* 27.

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interventions. If properly applied to the data producer's right, such an exercise would have undoubtedly included the evaluation report on the Database Directive and consequently provoked reflection on the question whether breaking with the established practice of keeping raw data free from exclusive rights is a good idea, considering the importance of this principle for access to knowledge and freedom of expression.