IV. Do We Need a Re-Designed Approach for the Data Economy?

A. Potential Issues Arising from the Intersection

The intersection between the RtDP and the SGDR does not remain without consequences. Considering that it is recognized that the RtDP also has a competition and consumer law dimension, this Chapter first analyses the issues arising within these areas. Subsequently, taking especial account of the First and Second Evaluation Reports in the DbD, it discusses whether the SGDR is still fit for the data economy.

1. Competition Law Impacts

(a) Lock-In Effects

The rationale behind the RtDP was precisely to reduce consumer lock-in, by enabling individuals to take their personal data and switch providers more easily. Competition and innovation in the data economy were expected to be concomitantly promoted,[261] as portability reduces entry barriers for personal data dependent business models.[262]

Although the RtDP seems to tackle all issues at once, it remains to be seen how it will work in practice. *First*, because it essentially depends on data subjects actively invoking the RtDP.[263] This is directly tied to user awareness and the limited extend of the right's scope. *Second*, there are other reasons, besides lock-in, why individuals might not want to change, such as network effects.[264] Nonetheless, both could be influenced by market players' willingness to provide additional portability incentives. This might likely happen considering the experience in the telecom sector and

261 WP242 (n 14) 5.
262 Graef, *Essential Facility* (n 6) 154-5.
263 Graef, Husovec and Purtova (n 7) 19; Vanberg and Ünver (n 6) 6.
264 Network effects are characterized by a service/product's value increasing with the increase of the number of its users. Social networks and search engines are typical examples. Graef, *Essential Facility* (n 6) 44ff.

the expected increase of undertakings seeking to acquire data to provide new products and/or services, or set new business models.[265]

However, lock-in effects are aggravated if database makers are able to rely on their right to prevent portability of personal data contents. In certain circumstances, there is already a *de facto* control over the individual's personal data,[266] while the SGDR grants an additional layer of exclusivity.[267] The database maker is the only one in possession of the personal data, being able to control access, whilst the individual has no alternative other than remaining with the supplier to use her data.

Connected devices are particularly problematic in this regard,[268] especially in relation to historic data. Take for instance an energy smart meter – the individual might also be interested in her 'old' consumption data, as it can be used by a third party to provide a comparison with other suppliers and allow the user to switch. Even though third parties could have collected, in theory, the data independently when the manufacturer did it, this is usually not the case. And the data cannot be collected anymore as the relevant point in time has passed. Consequently, only the database maker is in possession of the relevant personal data and might want to prevent third parties from accessing it by claiming its SGDR.[269]

While the RtDP might not be the magic pill envisioned by the Commission, the possibility of the SGDR barring the right's exercise undeniably does not leave data subjects, nor competition in the data economy in a better position.

(b) Big Data Scenarios

Big data analysis, characterized by a high volume, velocity and variety of data,[270] has an enormous potential in terms of better solutions and decision-making.[271] It increasingly relies on data collected by connected de-

265 COM(2017) 9 final (n 2) 13.
266 Leistner, 'Big Data' (n 180) 37.
267 Drexl, 'BEUC Study' (n 43) 85.
268 Ibid 70.
269 Ibid 19.
270 Drexl, 'Designing Competitive Markets' (n 132) para 26; Graef, *Essential Facility* (n 6) 131.
271 Drexl, 'Designing Competitive Markets' (n 132) para 19.

vices,[272] combining large datasets from diverse sources, to reach different results.

Data's non-rival nature allows personal data collected and processed for one initial purpose to be reused for a second one, without preventing the first.[273] As individuals become increasingly depended on their personal data to switch or enjoy different or new value-added products/services, they have a legitimate interest in unlocking it.[274] The RtDP now precisely enables individuals to retrieve their personal data from one controller and share it with others, permitting different big data analytics in favour of the individual.

Besides the possibility of changing to a service provider that renders better data analytics, individuals might also have an interest in combining their different personal datasets for new analysis. Take for instance historic data on body functions and data location: separately they might not indicate a health condition, but when analysed together they potentially can lead to a diagnosis.

Access to data is therefore essential for big data.[275] The SGDR, in contrast, generally represents a legal barrier for data access and reuse in big data settings, as the insubstantial parts exception is insufficient.[276] If the whole contents or a substantial part is extracted, the SGDR is infringed. Big data requires the largest possible (ideally complete) datasets from various sources to derive (reliable) outputs. Precisely because of this, data subjects have a legitimate interest in accessing all of their personal data for a reliable analysis.

Therefore, if the database maker can prevent personal data portability based on its SGDR, possible positive effects that could be derived from the RtDP will be undermined, to the detriment of individuals' legitimate interest.

272 Second Evaluation Report (n 144) 1.
273 Drexl, 'Designing Competitive Markets' (n 132) para 67.
274 Drexl, 'BEUC Study' (n 43) 157.
275 Second Evaluation Report (n 144) 40.
276 Leistner, 'Big Data' (n 180) 32, 48.

(c) Data Portability Refusal as Abuse of Dominance

In view of the RtDP's competition law dimension, portability refusal may lead to liability under Article 102 TFEU[277] for abuse of dominance.[278] Although there has been no competition law case so far dealing with access to personal data, as the underlying ground here would be the controller's SGDR, recourse can be taken from cases on refusal to license IPRs.[279]

Two prerequisites must be met for Article 102 TFEU to apply: (i) the controller has to enjoy a market dominance, and (ii) such dominant position must be abused by the controller. Besides the difficulty of establishing the relevant market and dominance in data markets,[280] it already demonstrates the limited applicability to portability. While individuals can exercise their RtDP vis-a-vis any controller, regardless of its size,[281] competition authorities can enforce the provision only against dominant undertakings.[282]

Moreover, the circumstances of the case have to amount to an abuse. Only in exceptional circumstances, a refusal to license constitutes abuse of dominance, whereby four cumulative conditions have to be met – the refusal must (i) relate to an indispensable product/service; (ii) exclude competition in the downstream market; (iii) prevent the emergence of a new product to consumers' prejudice;[283] and (iv) not be objectively justified.[284] Applicability of such rule is quite challenging.

To what extend data, and in particular personal data, can fulfil the indispensability requirement is doubtful.[285] As only 'technical, legal or even economic obstacles capable of making it impossible or even unreasonably difficult'[286] amount to indispensability, most data do not meet the thresh-

277 Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU).
278 Graef, Husovec and Purtova (n 7) 21; Graef, Verschakelen and Valcke (n 6) 7; Vanberg and Ünver (n 6) 6.
279 Drexl, 'Designing Competitive Markets' (n 132) para 123.
280 Drexl, 'BEUC Study' (n 43) 36-7.
281 This has been criticised in the literature, as the RtDP would be too burdensome for SMEs and could represent a disincentive to innovate. Graef, Verschakelen and Valcke (n 6) 9; Swire and Lagos (n 68) 351-65.
282 Graef, Verschakelen and Valcke (n 6) 8; Vanber and Ünver (n 6) 14.
283 Drexl, 'BEUC Study' (n 43) 77, fn 288 notes that this new product rule provides for a higher standard of abuse in case of refusal to license if compared to refusal to deal.
284 Case T-201/04 *Microsoft* [2007] ECLI:EU:T:2007:289 paras 331-2.
285 Van der Auwermeulen (n 6) 62.
286 Case C-7/97 *Bronner* [1998] ECLI:EU:C:1998:569 para 44.

old, since they are generally available and can be independently collected.[287] In limited circumstances, it could be argued that personal data is an indispensable input, as in case of historic data[288] or business models characterised by strong network effects.[289]

The exclusion from competition limits the provision to undertakings,[290] ie data subjects cannot rely on it, where no subsequent transfer to another controller takes place after an indirect portability. Moreover, taken jointly with the new product rule requirement, it prevents application where the new controller wishes to provide a competing product/service in the principal market. As the RtDP's rationale is to reduce lock-in, it is expected that direct portability requests will be made for competing providers.

In sum, although portability refusal based on the controller's SGDR can potentially amount to a competition law infringement, it definitively would not cover all cases. While enforcement by competition law authorities cannot be entirely excluded, only in very limited cases it would provide for a remedy. It is thus necessary to look outside the realm of competition law to find a suitable solution.

2. Consumer Protection Law

In the data economy, the traditional distinction between consumer and data protection law becomes blurred. With the increasing use of personal data in exchange for services or integrated with IoT, 'many data protection issues also become consumer issues, and vice versa'.[291] Processing of personal data affects individuals both as data subjects and consumers,[292] which is the reason why 'data protection also has to be considered as a key element and an integral part of modern consumer protection law'.[293]

Promoting the interests of consumers and ensuring a high level of consumer protection is dictated by Article 169 TFEU. Consumer empower-

287 Drexl, 'Designing Competitive Markets' (n 132) para 135.
288 Banda (n 28) 23.
289 Drexl, 'Designing Competitive Markets' (n 132) para 135.
290 Drexl, 'BEUC Study' (n 43) 36-7.
291 Natali Helberger, Frederik Zuiderveen Borgesius and Agustin Reyna, 'The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law' (2017) 54 (5) CML Rev 1427, 1428.
292 Ibid 1459.
293 Drexl, 'BEUC Study' (n 43) 54.

ment[294] is intrinsically aligned with the RtDP's purpose to provide individuals with greater control.[295] By allowing data subjects to retrieve and share their personal data with other controllers, the RtDP strengthens the individual's position as consumer, redressing the imbalance in commercial transactions with suppliers.[296] It unlocks the reuse of personal data, from which individuals are increasingly depended to access 'better' or alternative services.

Contrarily, portability refusal could seriously weaken consumers' position. Considering that consumer law also seeks to protect individuals as weaker parts in commercial transaction,[297] it could potentially be applied to enforce portability.[298] Different from competition law, it could reach all types of controllers, as no dominance or abusive behaviour must be demonstrated.[299] Nevertheless, as the refusal here would be based on the controller's SGDR, it is quite unclear if and to what extend current consumer protection rules could take prevalence over an IPR.

3. Suitability of the Sui Generis Database Right for the Data Economy?

Whether the DbD is still fit-for-purpose in the data economy has been recently addressed in the Commission's second evaluation.[300] The study finds that it is an outdated legal framework, which does not cope with technological changes anymore,[301] as database creation 'has evolved (…) from the manual gathering of existing data, over automatic processes of data collection, even to automatic creation of data'.[302]

As in the first evaluation,[303] there is no evidence that the SGDR was able to fulfil its purpose to stimulate investment in database creation, nor influence EU's database competitiveness.[304] Database makers' decision to invest

294 Helberger, Zuiderveen Borgesius and Reyna (n 291) 1436.
295 This also explains why the RtDP can be considered more a provision of consumer protection. Drexl, 'Designing Competitive Markets' (n 132) para 155.
296 De Hert and others (n 107) 3.
297 Helberger, Zuiderveen Borgesius and Reyna (n 291) 1436.
298 Graef, 'Blurring Boundaries' (n 60) 4; Graef, Husovec and Purtova (n 7) 24.
299 Graef, 'Blurring Boundaries' (n 60) 4.
300 Second Evaluation Report (n 144).
301 Ibid Executive Summary, iv.
302 Ibid 26.
303 First Evaluation Report (n 149) 5.
304 Second Evaluation Report (n 144) Executive Summary, iv.

in database production seems to disregard the SGDR,[305] which supports the inquiry whether a legal-economic incentive is indeed necessary.

The SGDR has been subject to substantial critique in this regard.[306] IPRs are an exception to the general rule of free competition, where the underlying idea is to provide incentive to innovate in exchange for a long-term gain in static efficiency. However, they also affect third parties' ability to innovate, resulting in dynamic inefficiencies. In sum, the goal is to provide the ideal level of incentive, which in case of the SGDR apparently completely failed.

As sole-source databases demonstrate, database production is frequently a by-product of other main business activities. It would have been created regardless of the SGDR's incentive, considering that the database maker's aim is not the database production (as it is the case of online platforms and connected devices). Practice shows that the SGDR is opportunistically used *ex-post*.[307] This also means that the database maker is able to recoup its investment from other sources,[308] running against an incentive problem to justify protection under the SGDR.[309]

Moreover, the study indicates that databases are usually further protected by other means besides the SGDR, such as contractual terms and technological measures.[310] This supports the conclusion that the SGDR strengthens the *de facto* control that some database makers already have over the database's contents. Not unsurprisingly, the SGDR is reported as a 'strong right, coming very close to protecting data as such'.[311]

Therefore, the question whether the SGDR is suitable for the data economy essentially depends if one understands that there is need for more exclusivity or access to data.[312] Considering the harmful effects of data monopolies and the growing necessity of data in daily interactions, the latter

305 Ibid.
306 Ibid 40.
307 Ibid 95.
308 See for instance the *Autobahnmaut* case (n 181), where the toll company was already receiving compensation by the German government for the service provision, or the payment of a price for a connected device – Drexl, 'BEUC Study' (n 43) 74.
309 This is one of the main arguments underlying the so-called 'spin-off doctrine'. See Davison and Hugenholtz (n 165) 114.
310 Second Evaluation Report (n 144) Executive Summary, ii.
311 Ibid 59.
312 Drexl, 'BEUC Study' (n 43) 69.

seems most appropriate.[313] The SGDR's expansion to a data ownership alike right[314] lacks legal and economic grounds.[315]

As discussed, the SGDR' broad protection can lead to a sole-source database issue even where data is obtained and not created,[316] such as with historic data. With access to data being compromised, there might be a foreclosure of secondary markets, which are data dependent, creating anti-competitive entry barriers.[317] The SGDR's inefficient and outdated dispositions to foster innovation were highlighted by some study participants, who considered it as 'an obstacle to key activities in the market, such as [data] sharing, re-use and mining'.[318] This is perfectly exemplified by its conflict with the RtDP, which potentially prevents reuse of personal data.

In view of this, the answer to the question whether the SGDR is still suitable for the data economy has to be answered in the negative. The right does not seem appropriate to fulfil its goals, may be regarded as excessively generous by affording protection even where not needed, and might have significant anticompetitive effects.

B. Possible Ways Forward

The fact that the SGDR is able to bar the RtDP creates a barrier for the free flow of personal data, which contradicts the assumption that unjustified restrictions on such free flow might hamper the data economy.[319] Considering the above-identified issues, as well as the RtDP's pro-competitive character, there seem to be valid grounds to conclude that the SGDR needs to undergo a change to be fit for the data economy.

Even though the SGDR is apparently not (yet) regularly invoked,[320] its potential (harmful) role within the data economy should not be underesti-

313 Ibid; Hugenholtz, 'Data Property' (n 161) 98-9; Leistner, 'Big Data' (n 180) 43, 55-6.
314 The Commission is discussing the possibility of introducing a data ownership alike right (the data producer's right). COM(2017) 9 final (n 2); SWD(2017) 2 final (n 131).
315 Drexl and others (n 139) para 8.
316 Second Evaluation Report (n 144) 39.
317 Ibid 46.
318 Ibid 27.
319 COM(2017) 9 final (n 2) 2-3.
320 Drexl, 'BEUC Study' (n 43) 85; Leistner, 'Big Data' (n 180) 55.

mated, nor ignored.[321] Thus, possible ways forward to address its clash with the RtDP are discussed below with the aim of ensuring the RtDP's effectiveness.

1. Case-Law Interpretation

Leaving the conflict's resolution to case-law is a logic option, as the judicial system is the one tasked with interpreting the law when it is vague, unclear or silent. National courts apply EU law on a daily basis, which, however, might lead to inconsistencies across Member States. Through a preliminary ruling referral, the CJEU has jurisdiction to issue a binding decision on a matter of interpretation and validity of EU law.[322]

In view of this, the timeframe can be somewhat problematic. It could take a few years until the CJEU issues a ruling on the interface between the RtDP and the SGDR, which would keep the uncertainty and possibly inconsistency across the EU for some while, potentially preventing the free flow of personal data. Until such decision is issues, significant harm could also be done to the EU's data economy development.

Nevertheless, predicting the outcome of the CJEU's decision is probably the major challenge.[323] In addition to Article 20(4) GDPR referring to 'rights and freedoms of others', Article 13 and Recital 48 DbD explicitly set forth that the DbD's provisions shall be without prejudice to data protection legislation. The absence of a clear hierarchy of norms certainly does not render the question any simpler.

As discussed, the expression 'adversely affect' is also far from clear. The reason why some authors consider it as a balancing clause might lie on the data protection's status as fundamental right. The right to personal data protection is recognized under Article 16 TFEU and regarded as a fundamental right under Article 8 Charter,[324] as well as a human right under Article 8 ECHR, as part of the right to respect for private and family life.[325]

Data subjects' right of access is even expressly recognizes under Article 8(2) Charter. Considering that the RtDP might be regarded as a logical

321 Drexl, 'BEUC Study' (n 43) 85.
322 TFEU art 267.
323 Drexl, 'BEUC Study' (n 43) 85.
324 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (Charter).
325 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

derivative thereof, its fundamental right status could be understood as extending to the RtDP.

Should the RtDP be recognized as a fundamental right, it would necessarily have to be balanced with other fundamental rights, such as IPRs under Article 17 Charter. Although it might be unclear whether Article 17(2) would also be read as including sui generis rights, such as the SGDR, it cannot be excluded upfront. The balancing exercise would have to take account of the principle of proportionality, but its outcome would still be uncertain.

On the other hand, as the RtDP's purpose is not to enhance the data subject's moral interests, it can also be understood as being more of a consumer protection rule,[326] falling outside the realm of data protection. Should the RtDP not be regarded as a fundamental right, the CJEU could possibly held that the 'rights and freedoms of others' (including the SGDR) always take precedence over the RtDP. Such outcome could significantly endanger the effectiveness of the RtDP, as discussed

Even in case of a decision favouring the RtDP, the risk of it being reversed in the future cannot be disregarded. The legal uncertainty that this possibility causes was precisely one of the justifications why the Second Evaluation Report cogitates including a compulsory licensing for the SGDR.[327]

2. Repeal of the Database Directive or the Sui Generis Database Right

Repealing the DbD as a whole, or even merely the SGDR, would certainly solve the issue of the SGDR being raised by controllers as a bar to the RtDP.[328] These radical possibilities have actually been considered in both DbD's evaluations by the Commission,[329] in view of the DbD's hardly discernible impacts.

On the other hand, it must be noted that the DbD provided at least for some benefit in the internal market, such as some greater legal certainty and harmonization,[330] and that the SGDR seems to work in certain con-

326 Drexl, 'Designing Competitive Markets' (n 132) para 155.
327 Second Evaluation Report (n 144) 39.
328 It would have an immediate effect for new databases, but probably a medium to long term effect for databases already protected by the SGDR before repeal, as acquired rights would have to be respected.
329 First Evaluation Report (n 149) 25-6; Second Evaluation Report (n 144) 126.
330 Second Evaluation Report (n 144) Executive Summary, ii.

texts.[331] Both Evaluation Reports also confirm that once legislation is put in place, undoing it is very challenging.[332] Hence, a complete withdrawal is probably unrealistic and eventually unnecessary.[333]

Although abolishment is a way forward, it is not proportionate for the specific purpose of ensuring the RtDP. Moreover, to ponder such drastic option, an in-depth analysis of other issues and impacts would be required to determine its suitability, which goes far beyond this research's scope.

3. Amendment of the Database Directive

The possibility of amending the DbD has been considered by both Evaluation Reports[334] and, therefore, could constitute a concrete way to solve the conflict.

Considering that in numerous situations no need for incentive to invest in database production was identified, an option could be to reduce the SGDR's scope to exclude by-product databases. Thus, the SGDR would be limited to cases where protection is really needed to recoup investment. Although such option could substantially reduce cases of spin-off databases (such as online platforms and connected devices) and, consequently, of conflicts with the RtDP, it would still leave room for some problems. *First*, any amendment to the SGDR's scope would be risky, as its untested wording would be subject to courts' scrutiny,[335] leading to uncertainty (likewise the case-law interpretation). *Second*, depending on the amendment, it might be insufficient for both the RtDP, as well as other portability schemes or general data access issues.

A more radical alternative in line with the above would be transforming the SGDR in a registrable IPR.[336] Protection would also be afforded only in those situations where an incentive is necessary, as database makers would have to actively seek it.[337] Besides a possible increase in administrative costs, a registrable SGDR could lead to a rise in strategic registra-

331 Leistner, 'Protection of Databases' (n 175) 454-5.
332 First Evaluation Report (n 149) 5, 25; Second Evaluation Report (n 144) 126.
333 Kur and others (n 221) 552; Leistner, 'Protection of Databases' (n 175) 450-1.
334 First Evaluation Report (n 149) 26; Second Evaluation Report (n 144) Executive Summary, vi.
335 First Evaluation Report (n 149) 26.
336 Leistner, 'Big Data' (n 180) 38; Second Evaluation Report (n 144) 139.
337 Leistner, 'Big Data' (n 180) 38; Second Evaluation Report (n 144) 71.

tion.[338] Once controllers realize that protection could assist them in preventing sharing of users' personal data with third parties based on the RtDP, there could be a flood of applications from online platforms operators and connected device manufactures.[339]

In view of the issues with monopolistic databases, the idea of introducing a compulsory licensing system has been revisited.[340] It could also be used to prevent the SGDR from barring the RtDP, as the database maker would be obliged to grant a license upon the data subject's and/or the new controller's request, whereby the parties would have to agree upon a price.

The Second Evaluation Report lists three main reasons to consider a compulsory license: (i) doubts whether case-law can prevent sole-source databases; (ii) importance of access to data in the context of big data and connected devices; and (iii) the risk of CJEU's obtaining-creating rule being reversed.[341] On the other hand, it also notes some downsides, mainly related to the system's precise delineation, ie its scope, remuneration and administrative matters.[342] There is currently also no EU-wide compulsory licensing scheme for any IPR. In the absence of a unitary SGDR, national laws would ultimately regulate and implement it, which could lead to harmonization problems.[343]

Leistner defends that, where the SGDR holds valuable under the incentive to invest ratio, the compulsory license would have to be subject to a Fair, Reasonable and Non-Discriminatory (FRAND) payment.[344] Besides the difficulty in negotiating and setting such fees, in certain situations there seems to be no solid reason for remuneration. The database maker was (and might even continue to be) able to recoup its investment from other sources, such as from the price paid by the data subject for the service and/or the connected device,[345] or advertising revenue in online platforms.

Although a theoretical option, a compulsory license would probably fall short for the SGDR-RtDP clash. If, for instance, the system would be sub-

338 Ibid.
339 This could be minimized with a joint reduction of the SGDR's scope, but then again, similar problems could arise.
340 Derclaye (n 165) 280; Leistner, 'Big Data' (n 180) 43; Second Evaluation Report (n 144) 41.
341 Second Evaluation Report (n 144) 39.
342 Ibid 41.
343 Ibid 42.
344 Leistner, 'Big Data' (n 180) 43-5.
345 Drexl, 'BEUC Study' (n 43) 83.

ject to competition law rules,[346] similar problems on the applicability of Article 102 TFEU would be encountered. Moreover, it could result in a further layer of data access regulation, possibly incentivizing *de facto* holders to claim the SGDR.[347]

A statutory licensing system, through the introduction of an exception to the SGDR subject to remuneration, could be another option. Different from the compulsory licensing system, no prior authorization from the right owner is needed and, generally, the law sets the fee *ex-ante*.[348] By removing the price negotiation element, it is less burdensome for the party interested in the IPR.

This comes very close to Graef, Husovec and Purtova's proposal of a purpose-specific exception to IPRs with a claim for fair remuneration.[349] The authors distinguish between two scenarios: (i) use of the personal data by the own data subject (ie indirect potability without subsequent transfer to a new controller), and (ii) use by a new controller.[350] In the first, considering the data subject's legitimate interest to use her own personal data, the RtDP would prevail free of charge. In the second, however, where the new controller would usually have to seek a license, remuneration would be owed to the original controller.[351]

From a practical standpoint, the distinction is somewhat problematic.[352] *First*, in case of indirect portability, it would be tough to control a subsequent transfer to one or more new controllers. There could even be a significant gap between receipt from the original controller and the transfer. *Second*, identifying the database maker might not be an easy task, especially in case of joint ownership. *Third*, in view of data's non-rival nature, it could be hard to prove that the data was extracted from the database of a particular controller – the exact same data could theoretically have been provided to multiple controllers.

In addition, similar to the compulsory licensing, this option would 'transform a right to exclude to a less intrusive right to be paid',[353] enabling the database maker to recoup its investment. Nonetheless, as dis-

346 Leistner, 'Big Data' (n 180) 44; Second Evaluation Report (n 144) 42.
347 Ibid 76.
348 Derclaye (n 165) 282.
349 Graef, Husovec and Purtova (n 7) 15-8.
350 Ibid 14.
351 Ibid 17-8.
352 Ibid 18, the authors also recognize that the concept would lead to several complications, including administrative costs.
353 Ibid.

cussed, there are cases where such a remuneration might have no ground to be in place. Considering that the new controller is under no obligation to receive ported personal data, this could also reduce such controller's incentive to accept it, to the detriment of data subjects.

Adding the RtDP to the list of exceptions to the SGDR could be a further possibility. Different from the statutory and compulsory licensing systems, no remuneration would be mandated. Its applicability could be general or purpose-specific (for example, considering the subsequent use's purpose, as discussed). In case of general applicability, it could undermine, in theory, the incentive necessary of the creation of certain databases. Also, if too narrowly designed (ie mentioning specifically the RtDP), the exception would not take account of other types of portability which might be enacted in the future, possibly not standing the test of time.

Furthermore, the options of compulsory license, statutory license and exception to the SGDR have also a common drawback – they could incentivize database makers to not claim the SGDR to avoid being subject to the provision. Considering that the database maker will usually be the one best qualified to evidence that its investment fulfils the requirements, applicability of the DbD could probably be circumvented without great efforts.[354] Where such database makers are *de facto* controllers of the databases' contents, they could try to prevent applicability of RtDP based on a different right or freedom (such as trade secrets protection[355] or right to conduct business[356]), retaining the uncertainty.

4. Preferred Approach

Balancing the above options, the one repealing the DbD as a whole or only the SGDR are clearly the first to be disregarded. It is disproportionate for purpose of ensuring portability of personal data and does not account for

354 This would be further supported by CJEU's decision in *Ryanair* (n 219), holding that the DbD does not apply to databases which do not fulfil the conditions for protection.

355 For instance, Facebook already denied access to a user's full personal data based on the Irish Data Protection Acts, which 'carves out an exception to subject access requests where the disclosures in response would *adversely affect trade secrets or intellectual property*'. E-mail from Facebook to Max Schrems (28 September 2011) <http://www.europe-v-facebook.org/FB_E-Mails_28_9_11.pdf> accessed 1 September 2018 (emphasis added).

356 Graef, Husovec and Purtova (n 7) 12, fn 66.

other potential issues and consequences. This leaves essentially two realistic possibilities: case-law interpretation or amendment of the DbD.

While case-law interpretation might appear as an obvious candidate, the outcome's unpredictability is very risky for the data economy's development. The CJEU has already given the SGDR a quite broad and generous interpretation. Should the Court rule that Article 20(4) GDPR requires full prevalence of the SGDR over the RtDP, this would not only harm individuals with regard to access to their personal data, but also represent a negative precedent for other cases of legitimate interest in accessing non-personal data.

Both the case-law interpretation and the discussed amendment options also have a common disadvantage: as the SGDR is frequently an additional layer of protection, database makers could easily circumvent any judgments or provisions favouring the RtDP over the SGDR by simply not invoking the right. Their investment decision is usually not based on the existence of protection, nor is the recoupment of such investment dependent thereupon. This urges for a coordinated approach, which takes the big picture of the data economy into consideration.

Rather than focusing solely on the RtDP, the better solution would consist in the inclusion of a broader non-waivable exception in the DbD, whereby regimes on data access rights prevail over the SGDR.[357] The Max Planck Institute for Innovation and Competition has proposed such a non-waivable data access right (not restricted to personal data) for those with a legitimate interest in such access,[358] under which the RtDP can be regarded as a specific category. The Second Evaluation Report even considered such access right proposal and concluded that it could be enshrined under an amended version of DbD,[359] which is coherent with the identified need to guarantee greater access to data.

Although providing for an exception within the DbD would already solve the conflict of the RtDP with the SGDR, it would not suffice in a broader context, as it could be circumvented. To be effective, the access right would also have to take account of other laws (such as privacy, trade secrets and contract law) to provide for a consistent and systematic

357 Drexl, 'BEUC Study' (n 43) 83, 85, 161.

358 Drexl and others (n 139) para 20. For further comments and analysis on the particularities of such proposed data access right regime, see Drexl, 'BEUC Study' (n 43) (more specifically on connected devices) and Drexl, 'Designing Competitive Markets' (n 132).

359 Second Evaluation Report (n 144) 115.

regime.[360] This would require analysis and empirical studies in different sectors to identify where exactly amendments are necessary, which also speaks against a case-law option, which cannot provide for such a far-reaching and coordinated possibility.

Besides already covering the RtDP, the general access right exception has some clear advantages. *First*, it could encompass possible future forms of data portability (beyond personal data), as well as other general access regimes developed based on the needs of new data business models. This broader provision would render it more time resistance. *Second*, database makers 'law shopping' could be at least reduced, as it avoids circumventing one access provision within a legislation by choosing to invoke another right. *Third*, any particularities on possible FRAND remuneration could be discussed outside the DbD system,[361] enabling different solutions for the particularities of each case.

Unfortunately, however, the Commission (supported by the Second Evaluation Report) has decided to not conduct a legislative intervention at the DbD for now.[362]

360 Ibid 42.
361 Drexl, 'BEUC Study' (n 43) 83.
362 Ibid 141; COM(2018) 232 final (n 3) 9.