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Building a European Data Economy – The European Commission’s Proposal for a Data Producer’s Right

The European Commission’s Communication “Building a European Data Economy”, dated 10th January 2017, contains inter alia a proposal to introduce a “data producer’s right”.¹ Whether such an exclusive right to use data should be introduced or not has already been debated extensively in European literature.² This article focuses instead on the possible details of such a data producer’s right. The article is structured in accordance with the current proposal of the European Commission, which outlines the concept of a possible “data property” very precisely and in a dogmatically consistent way. However, this should not marginalize the question of whether or not such a right should be introduced for economic or other reasons.³ The Commission’s Communication emphasises explicitly that the data producer’s right is only one possible building block of a future European legal framework for the data economy. For example, it can be combined with other building blocks such as the proposed default contract rules and – based on these – a contract fairness control (even in business-to-business cases); or with access rights to data (access against remuneration). However, there is also the possibility that it will not become part of the future legal framework at all.⁴ The possible effects of a data producer’s right and their evaluation from an economic point of view are primarily a task for further economic (and especially empirical) research. However,

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1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Building a European Data Economy”, COM(2017) 9 final, 13.

2 Cf. Zech, Information as a tradable commodity, in: De Franceschi (eds.), European Contract Law and the Digital Single Market, 2016, 51; Becker, Schutzrechte an Maschinendaten und die Schnittstelle zum Personendatenschutz, in: Büscher et al. (eds.), Markt-Kommunikation zwischen Geistigem Eigentum und Verbraucherschutz, Festschrift Karl-Heinz Fezer, 2016, 815. Critical: OECD, Maximising the Economic and Social Value of Data, <http://www.oecd.org/internet/ieconomy/enhanced-data-access.htm> (accessed on 7th September 2017); Kerber, A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis, GRUR Int 2016, 989; Drexel et al., Ausschließlichkeits- und Zugangsrechte an Daten, Positionspapier des Max-Planck-Instituts für Innovation und Wettbewerb vom 16. August 2016 zur aktuellen europäischen Debatte, 12; Zimmer, Fragwürdiges Eigentum an Daten, Frankfurter Allgemeine Zeitung 18.11.2016, 16; Plattform Industrie 4.0, “Industrie 4.0” – wie das Recht Schritt hält, Ergebnispapier, 2016, 22.

3 See e.g. Kerber, A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis, GRUR Int 2016, 989.

4 Commission Staff Working Document on the free flow of data and emerging issues of the European data economy, accompanying the document; Communication “Building a European Data Economy”, SWD(2017) 2 final, 30.

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to gauge the possible effects, a precise dogmatic concept is needed as a basis. The following aspects will be discussed: (I.) The scope of protection (scope of the right), (II.) the object of protection (scope of data covered), (III.) the original right holder (allocation to a person or entity), (IV.) the exceptions and limitations (exceptions to the right) and (V.) the interplay with other legal rules (intended effects and flanking measures).

I. The Scope of Protection

The communication starts – unlike conventional texts on intellectual property rights – with a description of the scope of protection (i. e. the allocated uses). This makes sense from a practical point of view because the current discussion on “data property” focuses primarily on the allocation of certain uses of data and especially on the analysis of raw data by big data tools.⁵

1. The “right to use and authorize the use of non-personal data” as an exclusive right (“data ownership”)

The Commission defines the data producer’s right as a “right to use and authorize the use of non-personal data”.⁶ The resulting comprehensive allocation of the use of data reminds the reader of parallel intellectual property law rules like § 9 PatG (German Patent Act) or § 15 UrhG (German Copyright Act; the provision lists single uses or competences such as a bundle of rights but only as special cases of a general allocation). Taking copyright as an example, the allocated uses (competences) should particularly encompass not only the copying and the material or immaterial display of data but also the analysis of data – independent of any copying associated with the analysis. To clarify, data-related value chains typically consist of the production, collection (or aggregation) and analysis of data; whereas the actual knowledge derived from such data may only ultimately lead to product innovations. Based on such a depiction of data value change, the allocated data use should encompass the level of data collection as well as the level of data analysis. It should be noted that it would be advisable to limit allocated uses to commercial uses, since further protection against uses in the private sphere for

5 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Building a European Data Economy”, COM(2017) 9 final, 9 sq.; Commission Staff Working Document on the free flow of data and emerging issues of the European data economy, Accompanying the document, Communication “Building a European Data Economy”, SWD(2017) 2 final, 12 sqq.; Zech, “Industrie 4.0” – Rechtsrahmen für eine Datenwirtschaft im digitalen Binnenmarkt, GRUR 2015, 1151, 1152.

6 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Building a European Data Economy”, COM(2017) 9 final, 13.

non-commercial purposes (cf. § 11 No. 1 PatG) seems unnecessary. If a private person uses data only for his or her own personal purposes this should not harm commercial interests in the data.

2. Other concepts, especially non-exclusive property rights

The exclusive allocation of uses of data distinguishes a data producer's right (being a proper exclusive right) from other legal concepts. Thus, other possible rights to data (which to a certain extent already exist under current law) are also discussed by legal commentators: inter alia, the mere protection of the integrity of data⁷, non-exclusive rights to data (protection of an existing access to data, access rights to data),⁸ protection of factual exclusivity (especially protection of trade secrets) and mere defensive rights against the use of data (classical function of data protection law).⁹

Recently, the concept of a non-exclusive property right (i. e. a transferable non-exclusive right to use data including the necessary access) has been discussed more intensively.¹⁰ It would be effective erga omnes and transferable like owner-

⁷ Concerning the controversy about the protection of stored data (data files) by an "other right" (sonstiges Recht) according to § 823(1) BGB (German Civil Code) see *Zech*, Information als Schutzgegenstand, 2012, 386; *Faust*, Digitale Wirtschaft – Analoges Recht: Braucht das BGB ein Update?, Gutachten zum 71. Deutschen Juristentag, 2016, 48 sq.; Concerning the protection by penal law according to § 303a StGB (German Penal Code) as well as the liability in civil law according to § 823(2) BGB (German Civil Code) see *ibid.*, 394 sqq.

⁸ The access to an e-mail account, for example, may be protected by an "other right" (sonstiges Recht) according to § 823(1) BGB; *Zech*, Information als Schutzgegenstand, 131 sq. Antitrust law may give rise to access rights. These are also discussed in the Communication from the Commission as *access against remuneration*; cf. *Drexel et al.*, Ausschließlichkeits- und Zugangsrechte an Daten, Positionspapier des Max-Planck-Instituts für Innovation und Wettbewerb vom 16. August 2016 zur aktuellen europäischen Debatte, 2 sqq., 10 sqq.; *Körber*, Ist Wissen Marktmacht? – Überlegungen zum Verhältnis von Datenschutz, "Datenmacht" und Kartellrecht in: Immenga/Körber (eds.), Daten und Wettbewerb in der digitalen Ökonomie, Referate der 5. Göttinger Kartellrechtsgespräche vom 22. Januar 2016, 81, 96 sqq.

⁹ There is an intense discussion concerning whether the data protection law, which has only just been consolidated by the EU General Data Protection Regulation, should be developed further into a property law. That would only be the case if granting permission to process personal data would amount to a partial transfer of rights despite the free revocability of consent (see *Metzger*, Dienst gegen Daten: Ein synallagmatischer Vertrag, AcP 2016, 817, 832; *Zech*, "Industrie 4.0" – Rechtsrahmen für eine Datenwirtschaft im digitalen Binnenmarkt, GRUR 2015, 1151, 1154 sq.) or if the revocability of consent would be limited de lege ferenda. For details see *Liedke*, Die Einwilligung im Datenschutzrecht, 2012, 29 sqq; *Rogosch*, Die Einwilligung im Datenschutzrecht, 2013, 132 sqq.

¹⁰ See e. g. *Van Asbroeck/Debusse/César* (Bird & Bird), Building the European Data Economy, Data Ownership, White Paper, 2017, 120 sqq.; cf. *Drexel et al*, Position Statement of the Max Planck Institute for Innovation and Competition of 26 April 2017 on the European Commission's "Public consultation on Building the European Data Economy", 9: "Rather than establishing a new property rights system, the better solution would therefore consist in recognising a targeted and non-waivable data access right."; *Drexel* (Max Planck Institute for Innovation and Competition), Building the European Data Economy, public consultation, response to ques-

ship but without exclusivity. Such a concept would be feasible because data is a non-rival good which can be used without interfering with other parties using the same data at the same time.¹¹ However, the question remains whether the introduction of such a novel, non-exclusive property right would serve any purpose. Such a right would only make sense in scenarios where data is held exclusively (e.g. by secrecy or technical protection measures) and the party holding the data is not willing to grant access to parties interested in using the data non-exclusively. As an example, the data stored in a smart car may not be accessible to the car owner but only to the car manufacturer, who in turn is not willing to grant access to third parties such as big data analysts. If the car owner assigns the non-exclusive property right to the analyst, the analyst may claim access to the data in usable form from the car manufacturer. Furthermore, should the data be transferred from the car manufacturer to other storage providers the analyst may claim whoever controls the data. However, the car manufacturer is free to use the data and transfer them to whoever he or she wants.

Notwithstanding the question whether such a right should be introduced at all, care should be taken to ensure the use of clear terminology. A non-exclusive right to use data may be called a property right if it is transferable but it should not be referred to as data ownership.¹² The concept of ownership at least indicates an exclusive entitlement modelled after property rights in tangible assets. There is a close connection to the access rights mentioned in the Communication (see below V.2.). However, the concept of non-exclusive property means transferable rights. This would enable the right holder to trade the data without actually accessing the data. In cases where the use requires technological skill (e.g. big data analyses), proper access (i.e. in the right form or standard) might only be feasible for professional data analysts. A non-skilled right holder (e.g. a car owner) might therefore be interested in trading the mere right of use. The analyst might then go on to claim access against the entity controlling the data. In data protection law, similar problems are addressed by the concept of data portability (Art. 20 General Data Protection Regulation¹³).¹⁴ However, the focus of data portability is

tionnaire, accessible at <https://ec.europa.eu/eusurvey/publication/European-Data-Economy-Consultation> (accessed on 1st July 2017): "As an alternative, our Institute therefore recommends considering legislation on an unwaivable right of data access for the device user (see attachment). Similar to the right of data portability under EU General Data Protection Regulation, such a right could unlock the data held by the manufacturer for data analyses that are either conducted in-house by the holder of that right or provided as a service by third-party data analysts without creating additional access problems."

11 Zech, *Information als Schutzgegenstand*, 71.

12 Cf. *Van Asbroeck/Debusse/César* (Bird & Bird), *Building the European Data Economy*, Data Ownership, White Paper, 2017, 120 sqq.

13 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

14 Cf. *Drexl*, *Designing Competitive Markets for Industrial Data – Between Propertisation and*

rather the accessibility (and usability on multiple platforms) by the original right holder (which is why the right can be constructed as unwaivable¹⁵) than trading data and giving access to third parties. It also needs to be discussed whether trading non-exclusive uses of data may also be facilitated in a much simpler way by safeguarding the assignability of access rights (i. e. claims against the data holders), i. e. introducing access rights (see below V.3.) with mandatory assignability.

Within existing law, role models for non-exclusive rights are rare. There seem to be no transferable non-exclusive absolute rights originating from the creation of the object of property. However, non-exclusive licenses, derived from exclusive rights in non-rival intangible assets (like copyright law) may serve as a comparable legal instrument. The difference is that these non-exclusive rights are derived from an exclusive property right. Under German copyright law, according to § 34(1) UrhG, licenses may only be transferred with the consent of the author who in turn may not refuse the consent against good faith.

There is also another difference between non-exclusive licenses and the non-exclusive property rights under discussion: Many non-exclusive licenses may be created in the same object of property (the protected work). However, it is conceivable that also a non-exclusive property right may be licensed non-exclusively. As a result, the original right holder could enable multiple potential users to access and use the data. Moreover, it has to be discussed whether a non-exclusive property right may also be transferred multiple times (which could also be achieved by giving the original right holder an indefinite number of non-exclusive property rights). On the one hand, this would create an indefinite number of non-exclusive use-rights which (unlike non-exclusive licenses) may be freely transferred to other parties. On the other hand, it could also be stipulated that the original right holder may transfer the right only once and not license it at all.

If such a non-exclusive property right is considered, the key question is who should be enabled to trade the non-exclusive possibility to use the data. This depends on who is deemed to be the original right holder. The most likely idea would be to use the first ownership concepts already discussed for exclusive rights to data, especially the data producer (see below III.).¹⁶

Access, Max Planck Institute for Innovation and Competition Research Paper No. 16–13 2016, SSRN 2862975, 56 sqq.

15 Cf. *Drexel et al*, Position Statement of the Max Planck Institute for Innovation and Competition of 26 April 2017 on the European Commission’s “Public consultation on Building the European Data Economy”, 9; consequently, *Drexel et al*, Position Statement of the Max Planck Institute for Innovation and Competition of 26 April 2017 on the European Commission’s “Public consultation on Building the European Data Economy”, proposes a further restriction: “The right of access should be limited to the purpose of conducting data analysis in the interest of the entitled person, irrespective of whether this analysis is organized within the company of the entitled person or out-sourced to an independent data analysis service provider.” The resulting right is clearly not aimed at creating a market for raw data.

16 Similar *Drexel* (Max Planck Institute for Innovation and Competition), Building the European Data Economy, public consultation, response to questionnaire, accessible at <https://ec.europa>.

II. The Object of Property (Definition of Data)

If the scope of protection (the allocated competences) is defined as the use of data, then the term data – and therefore the object of protection – must inevitably be defined more precisely. Only when they are based on such a precise definition it is possible to distinguish data-related actions (defined as uses of data within the scope of protection) from actions which are only deemed to take advantage of data indirectly and therefore lie outside the scope of protection. In a very broad sense, data may be defined as information coded to be machine readable.¹⁷ This interpretation entails data being defined as the result of a coding process and therefore as a number of signs or syntactical information. The European Commission chooses such an approach by clarifying that “independent of this scope, it is important to frame [the right] so that only the syntactical level of information is protected, not the semantic level”.¹⁸ This is based on the distinction of the level of signs and the level of physical carriers (semantic, syntactic and structural information).¹⁹ The European Commission stresses correctly that a data producer’s right should not lead to the propertisation (exclusive allocation) of semantic information, which would curtail the public domain more strongly than the mere allocation on the syntactic level: “Care also needs to be taken so that any new right to data is not conceived as a super-IP right. It should only cover the syntactical (data code) level, but not the encoded ideas or information it contains.”²⁰ This concept is different to the one underlying data protection law, under which personal data (Art. 4 No. 1 General Data Protection Regulation) are defined as “information relating to an identified or identifiable natural person”. Data relating to preclinical and clinical trials (Directive 2001/83/EC²¹) are defined as semantic information as well. So far, the definition of data on a syntactic level for legal purposes has only been discussed in criminal law, especially under § 303a StGB (German Penal Code).

Another purpose of restricting the object of protection is achieved by only protecting machine-generated data. This is defined by the European Commission as

eu/eusurvey/publication/European-Data-Economy-Consultation (accessed on 1st July 2017): “device user”.

- 17 Zech, Information als Schutzgegenstand, 32 (with further references); *idem*, JIPITEC 2015, 192, 193.
- 18 Commission Staff Working Document on the free flow of data and emerging issues of the European data economy, accompanying the document: Communication “Building a European Data Economy”, SWD(2017) 2 final, 34.
- 19 See Zech, Information as Property, JIPITEC 2015, 192.
- 20 Commission Staff Working Document on the free flow of data and emerging issues of the European data economy, accompanying the document: Communication “Building a European Data Economy”, SWD(2017) 2 final, 34.
- 21 Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJEU L 311 from 28.11.2001, 67).

follows: “machine-generated data is created without the direct intervention of a human by computer processes, applications or services, or by sensors processing information received from equipment, software or machinery, whether virtual or real”.²² Especially, this means that software programmed by humans is not encompassed. A typical example of machine-generated data is data produced by a highly or fully automated car, or by a sensor-equipped production machine (especially as a part of Industry 4.0/cyber-physical systems industry applications). Such data are the direct result of measuring or recording processes and therefore do not fulfil the requirement of being an intellectual creation, as described in copyright law. These data are typically produced without being refined by software, which is why they are also known as raw data (as opposed to analysis data which are derived from or produced by analysing the raw data).²³

Any further restrictions employed by the European Commission with respect to the relationship with data protection law would seem unnecessary (at least from a dogmatic point of view). According to the Commission’s Notice, only such data shall be encompassed which do not contain personal information.²⁴ If a data producer’s right is used as an instrument to allocate the value of raw data (which analysis makes use of – but at the same time creates – additional value), this rationale applies to non-personal data as well as to personal data. However, it may become necessary to make the distinction due to the differing legal allocation (i. e. allocation to the data subject instead of to the data producer). At least, this would be necessary if data protection law could be perceived to be a kind of property law. Any restricting of the scope of application of a possible data producer’s right devised by the European Commission might rather be due to questions of legislative competence, and to the fact that with the General Data Protection Regulation, a fiercely contended milestone in the development of data protection law has just been reached. The distinction between the two legal regimes also has the advantage of being easily understandable. The underlying, basic value-oriented legal decisions – most especially the question of who will profit from the value of the data – should be openly addressed and decided by the legislator, taking all relevant interests into account.

22 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Building a European Data Economy”, COM(2017) 9 final, 9.

23 Concerning the legal situation of raw data created by machines, see: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Building a European Data Economy”, COM(2017) 9 final, 10; *Zech*, Information als Schutzgegenstand, 176.

24 Commission Staff Working Document on the free flow of data and emerging issues of the European data economy, accompanying the document: Communication “Building a European Data Economy”, SWD(2017) 2 final, 4.

III. The Original Right Holder, First Ownership (Data Producer)

Apart from the question of whether a new exclusive right to data should be created at all, the most controversial issue brings into question to whom such a right should be attributed. One of the key problems is which person can clearly be defined as a possible original right holder (first owner). Only if such a person is clearly definable the discussion can proceed as to whether an exclusive right should be attributed to this person or not.

The Commission proposes attributing an exclusive right to the data producer: The right “could be granted to the ‘data producer’, i. e. the owner or long term user (i. e. the lessee) of the device”²⁵ or “the persons or entities that operate sensor-equipped machines, tools or devices at their own economic risk (‘data producer’)”.²⁶ Such an allocation can be justified with a systematic argument drawing a parallel to the attribution of rights to the data base producer (§ 87a(2) UrhG, Article 7 Database Directive²⁷), to the producers of phonograms (§ 85(1) UrhG, Article 3(2) Directive 2006/116/EC²⁸) and to the press publisher (§ 87f(1) UrhG), but also – within property law – to the producer of a new tangible asset (§ 950(1) BGB (German Civil Code)).²⁹ The attribution to the data producer may also be justified with the idea of a parallel attribution of risks and benefits (internalisation of negative and positive externalities), especially if the data are produced by machines which are subject to special strict liability rules allocating the risks of running such a machine to the person in charge of running it.³⁰

However, the difficulty of attributing data production to a single machine run by a clearly identifiable, economically responsible person – especially with con-

25 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Building a European Data Economy”, COM(2017) 9 final, 13.

26 European Committee survey for a public consultation regarding its “Building a European Data Economy” policy documents, accessible at <https://ec.europa.eu/eusurvey/pdf/survey/70852?lang=EN&unique=60e14e2c-f225-42c0-ae73-921a76aa0a30> (accessed on 1st July 2017), 34.

27 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (Database Directive).

28 Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the terms of protection of copyright and certain related rights.

29 Concerning the determination of the processor who is economically responsible or authorized to give instructions see *Zech*, Information als Schutzgegenstand, 270 sqq. (with further references); The producer of a new tangible asset who acquires ownership is not the worker who actually performs the productive process but rather the employer who is economically responsible and is authorised to give instructions.

30 Concerning the argument of attributing risks and benefits in parallel see *Zech*, “There’s no such thing as a free lunch” – Die Zuweisung von Chancen und Risiken im Life Sciences-Recht, *Basler Juristische Mitteilungen (BJM)* 2014, 1, 12 sqq.; *Zech*, Gefährdungshaftung und neue Technologien, *JZ* 2013, 21, 26. Concerning strict liability regarding data producing machines in particular, see also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Building a European Data Economy”, COM(2017) 9 final, 13 sqq.

nected machines, which are part of an entire machine network owned by different people, – can be accurately argued. The increasing level of connectivity (the future traffic situation with automated cars can be cited as a primary example) makes the distinction of individual machines increasingly difficult. If, however, a single data producing machine can be identified, the concept of an economically responsible person in charge of running the machine poses no special legal problems. Such a concept is, for instance, familiar from trust asset cases and can be easily understood by the examples given by the Commission like the lessee or, if special contractual relations do not exist, the owner.

IV. Exceptions and Limitations

As with all intellectual property rights, the proposed exceptions and limitations to the discussed data producer's right are of special interest. These are to guarantee that the public domain is curtailed to the smallest possible extent and for this reason, the Commission named several important data usage cases which should be exempt from a data producer's right.

The first case is the use of data by the producer of a data-generating product. In cases where the producer needs to use the data to fulfil a legal obligation to monitor products on the market, such a limitation is easily comprehensible.³¹ Even as far as product safety and security in general are at stake, such a limitation makes sense – at least if the use of the data is necessary to ensure safety and security. However, a limitation without compensation for the general purpose of enhancing the product (i. e. for further development that is not safety and security related) is less convincing.³² This seems to be a question of open competition in which the producer of the product and the competitors should be treated equally. A functioning market for the data produced by the product enables the right holder to sell the data to the person who, from a welfare perspective, can make the best use of them. This might be the producer but could also be one of the competitors. It is understood that friction may arise with the protection of trade secrets (especially concerning the illegality of reverse engineering under German law which, however, may change with the new Know-How-Directive³³).

31 See Commission Staff Working Document on the free flow of data and emerging issues of the European data economy, accompanying the document: Communication “Building a European Data Economy”, SWD(2017) 2 final, 35: “legal obligation to monitor the behaviour of [one’s] products on the market” (Produktbeobachtungspflicht).

32 “For the purposes of further improving product design”, Commission Staff Working Document on the free flow of data and emerging issues of the European data economy, accompanying the document: Communication “Building a European Data Economy”, SWD(2017) 2 final, 35.

33 Directive (EU) 2016/943 of the European Parliament and the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Know-How-Directive).

Be that as it may, this should not tempt the legislator to allocate the use of data to the producer of data generating products without proper cause.

A clear case of limitation for public benefit is the free use for certain authorities, especially for the purposes of statistics or other public welfare tasks (statistical information, urban planning, environmental protection, civil protection etc.). This would seem self-evident.

Less self-evident but at least plausible are limitations which benefit third parties in cases of their data use benefitting public interest (public interest in making certain data available for several private entities).³⁴ This corresponds to a discussion about new access rights to privately held data which are mentioned in the Commissions Notice as another possible building block of a legal framework for a data economy (access against remuneration³⁵). The proposed limitations show that such access rights may well be combined with a data producer's right.

Finally, the Commissions Notice mentions limitations for scientific research as a privileged use of data. Such a scientific limitation can also be applied to the *sui generis* right for the maker of a database under § 87c(2) UrhG, Article 9 lit. b Database Directive. It should be discussed whether such a limitation should only benefit research within public institutions (such as universities) for non-commercial purposes, or whether it should also benefit commercial research and development. One argument against the extension of such a limitation to commercial purposes would be that it might render the limitation ineffective as it would be possible to label every conceivable data analysis as a research activity. Drawing a parallel to the research exception under patent law (§ 11 No. 2 PatG), such usage may rather be classified as using the object of protection as a research tool rather than as gathering information about the object of protection (such a use not only occurs in patent law but also within software protection in the form of decompilation (§ 69e UrhG, Article 6 Directive 2009/24/EC³⁶)). However, in the case of raw data, such a use would only be conceivable in a handful of cases such as copying, in order to clarify the type of coding.

In addition to the limitations mentioned in the Communication, more limitations could be implemented, especially limitations governing usage within the private sphere for non-commercial purposes as well as for educational use. To prevent hold-ups regarding the use of data, a compulsory license for certain data analyses could be envisaged. This could be implemented instead of the limita-

³⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Building a European Data Economy", COM(2017) 9 final, 36.

³⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Building a European Data Economy", COM(2017) 9 final, 13.

³⁶ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.

tions for certain public uses proposed by the Commission; or could complement them in cases where public welfare aspects are less prominent. As a parallel to such a rule, the patent law compulsory license in cases of dependent inventions (§ 24(2) PatG) does not require a special public interest to be mentioned. This rule fulfils a key function in patent law by preventing hold-up effects for follow-on inventions, at the same time insuring the right holder's economic participation.³⁷

V. Interplay with other Areas of Law

The proposed data producer's right – like the other proposed measures (e. g. access against remuneration) – has been called a “possibility” by the Commission (i. e. these measures are not exclusive but may – and should – also be combined). If it is to be introduced at all, it is feasible that the data producer's right will only function in conjunction with other legal rules.

1. Contract law

First and foremost, there is contract law. A data producer's right would be ineffective if it could be “contracted away” by the terms and conditions of a contract. With its decision for an original allocation (first ownership) and with its exemptions and limitations, such a right could serve as the basis for a fairness control of contracts, especially for the control of terms and conditions. This is also explicitly addressed by the Commission, which mentions “default contract rules”³⁸ and which could be used for the review of contracts (cf. § 307(2) No. 1 and 2 BGB³⁹). The most hotly debated question is whether such a fairness control should also take place in business-to-business cases. The Commission explicitly mentions these cases and answers the question in the affirmative.⁴⁰

³⁷ Concerning sequential and cumulative innovation as a challenge for patent law and other intellectual property rights see *Zech*, Neue Technologien als Herausforderung für die Rechtfertigung des Immaterialgüterrechtsschutzes, in: Hilty / Jaeger / Lamping (eds.), Herausforderung Innovation, Berlin / Heidelberg 2012, 87 sqq.; cf. *Krusemarck*, Die abhängige Schöpfung im Recht des geistigen Eigentums, 2013, 289 sqq.

³⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Building a European Data Economy”, COM(2017) 9 final, 12.

³⁹ Whereas No. 1 pertains to central purposes of legal provisions as the basis for a fairness control, No. 2 pertains to central obligations of a contract.

⁴⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Building a European Data Economy”, COM(2017) 9 final, 12.

2. Data protection law

The role of data protection law has already been contemplated. It is impossible to separate the question as to whether and with what content a data producer's right should be introduced from the discussion about the future role of data protection law. It is impossible to overemphasize the fundamental importance of the question as to whether the allocation of the value of raw data should be left to free and unhindered competition; whether it should be attributed economically to the data producer; or whether, in the special case of personal data, it should be attributed to the person concerned. If the data economy is to function and be accepted by the consumer, settling this question becomes an issue of great importance.

3. Access rights

The Commission explicitly mentions the possible introduction of new access rights as "access against remuneration".⁴¹ New access rights for private data users might be instituted in cases where data usage is in a special public interest, or where it may be regarded as useful solely from an economic perspective. Under certain circumstances, the existing law may provide such access rights under competition law (data as an essential facility, leveraging of a dominant position etc.). However, competition law is not regarded to be sufficient.⁴² Whether the introduction of new access rights is dangerous for the data economy or whether it might be beneficial (at least for clearly defined cases) must be determined by further economic analysis.

4. Liability law: product liability for data-generating products

Finally, the Commission also explicitly mentions liability law.⁴³ The specific risks of "emerging technologies such as the Internet of Things (IoT), the factories of the future and autonomous connected systems" have to be addressed.⁴⁴ This

⁴¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Building a European Data Economy", COM(2017) 9 final, 13.

⁴² *Drexl*, Designing Competitive Markets for Industrial Data – Between Propertisation and Access, Max Planck Institute for Innovation and Competition Research Paper No. 16–13, 2016, SSRN 2862975, 26; *Körber*, Ist Wissen Marktmacht? – Überlegungen zum Verhältnis von Datenschutz, "Datenmacht" und Kartellrecht in: *Körber/Immenga* (eds.), Daten und Wettbewerb in der digitalen Ökonomie, 81, 96 sqq.; *Zimmer*, Fragwürdiges Eigentum an Daten, Frankfurter Allgemeine Zeitung (FAZ) 18.11.2016, 16.

⁴³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Building a European Data Economy", COM(2017) 9 final, 13 sqq.

⁴⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Building a European Data Economy", COM(2017) 9 final, 13. Such risks are the "possibility of design errors, malfunction-

could be done by relying on existing liability rules (including product liability⁴⁵) or by introducing new liability rules such as a special, strict liability for data-generating products. As already mentioned under III., the specific perspective of the discussion about property rights allocating the use of data liability rules is interesting due to a possible parallel attribution of risks and benefits.⁴⁶ To create such a parallel attribution by introducing matching liability and property rules makes sense from an economic point of view as an internalisation of negative and positive externalities. Regulatory law only has to step in where necessary.⁴⁷

VI. Conclusions

Thanks to the Commissions' Notice, the object of the discussion about "data ownership" has been well shaped and defined. The legislator's final decision cannot yet be foreseen, even though it seems that the majority of comments are critical. The results of the European Commission's public consultation will be of critical importance. The discussion about rights to data is no longer regarded as a question of property rights in data carriers⁴⁸ but has finally arrived at intellectual property jurisprudence. This is a positive step when seen from a legal dogmatic perspective. Since data are not tangible but intangible goods with all their peculiarities, the current debate is most welcome regardless of whether a data producer's right will ever be introduced or not.

Zusammenfassung

Die Mitteilung der Europäischen Kommission „Building a European Data Economy“ vom 10. Januar 2017 enthält unter anderem den Vorschlag ein „data producer's right“ einzuführen. Die Frage, ob ein solches Ausschließlichkeitsrecht an Daten eingeführt werden soll, oder nicht, wurde in der Literatur bereits ausführlich diskutiert. Der vorliegende Beitrag widmet sich dagegen in erster Linie der möglichen Ausgestaltung eines solchen Datenherstellerrechts. Er orientiert sich dabei an den aktuellen Vorschlägen der Kommission, die das Konzept eines möglichen „Dateneigentums“ bereits sehr präzise und dogmatisch konsistent

ing or manipulation in every device“; *ibid.*, 14; cf. *Zech*, Zivilrechtliche Haftung für den Einsatz von Robotern – Zuweisung von Automatisierungs- und Autonomierisiken, in: Gless/Seelmann (eds.), *Intelligente Agenten und das Recht*, 163, 165 sqq.

⁴⁵ Cf. Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

⁴⁶ Fn. 29.

⁴⁷ For a possible regulation ensuring consumers' choice between data generating and "data free" products, see *Becker*, p. 371 in this issue.

⁴⁸ See the ruling of the BGH (German Federal Supreme Court) which still classifies the purchase of software as a purchase of physical data carriers, BGH 15 November 2006, XII ZR 120/04, NJW 2007, 2394 – Application Service Providing; cf. *Zech*, Information als Schutzgegenstand, 332 sqq.

aufzeigen. Damit soll jedoch nicht die Frage, ob ein solches Recht aus ökonomischen oder anderen Gründen eingeführt werden sollte, oder nicht, auf die Seite gedrängt werden. Die Kommissionsmitteilung stellt ausdrücklich klar, dass ein data producer's right nur ein *möglicher* Baustein eines zukünftigen Europäischen Rechtsrahmens für die Datenwirtschaft ist. Auch auf die Schaffung nicht-exklusiver Vermögensrechte als mögliche Alternative wird ausführlicher eingegangen.