

Exposé on the thesis for obtaining a doctoral degree (Dr.ⁱⁿ iur) at the University of Vienna

The Right to Data Portability under the GDPR: Implementation and Enforcement

(Working title)

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Introduction

It is a truism how personal data is processed has substantially changed over the past decades. One of the first attempts to safeguard the privacy rights of individuals on EU level was Directive on Data Protection 95/46/EC¹ (DPD), which came into force in 1995 and was only superseded by the General Data Protection Regulation (GDPR)² in 2018.

The first drawback of the DPD, however, became apparent shortly after the transposition period of the DPD. Member States across the EU had transposed it differently into their national legislations, leading to a divergence of enforcement of rules.³ Another disadvantage emerged later when it turned out that gaps in the implementation of the data protection framework resulted in the widespread public perception that there are significant risks to the protection of natural persons.⁴ Moreover, such differences in the level of protection of the rights and freedoms of natural persons, created imbalance in the competition granting more advantages to big companies leading to the ‘lock-in’ effect and constraints in the free flow of personal data within the EU.⁵

In order to simplify the regulatory environment for businesses who had to deal with disparate national legislations, reinforce citizens’ fundamental rights to data protection (especially in line with the Charter of Fundamental Rights of the European Union⁶) and ensure the free movement of data, the European Commission had reviewed the results of fifteen years of application of

¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

² *Op. cit.* Regulation (EU) 2016/679 (...).

³ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions ‘A Comprehensive Approach on Personal Data Protection in the European Union’, Brussels, 4.11.2010, COM(2010) 609 final.

⁴ Commission Staff Working Paper Impact Assessment accompanying the document Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) and Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, Sec/2012/0072 Final.

⁵ 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) (Text with EEA relevance), OJ L 119, 4.5.2016, recital 9.

⁶ For example, in light of the following judgments of the Court of Justice of the European Union (CJEU), Cases C-101/01, ‘Bodil Lindqvist’, ECLI:EU:C:2003:596 paras 96–97, and C-275/06, ‘Productores de Música de España (Promusicae) v Telefónica de España SAU’, ECLI:EU:C:2008:5.

the DPD⁷ and engaged in the process of reforming the data protection framework in the EU in 2012.⁸ As a result of this laborious exercise, a fully revamped data protection framework was adopted repealing the DPD.

The GDPR was adopted in 2016 and, following a two-year transition period, entered into application on 25 May 2018. All entities across the EU (and outside its borders), be it natural or legal persons, who process personal data relating to an identified or identifiable natural (living) person shall implement the requirements set in the GDPR in the same manner. The new Regulation maintains the major rights and principles of the Data Protection Directive, further clarifies and modernises the data protection rules and introduces some new elements designed to enhance the protection of individuals' rights while at the same time offering more opportunities to businesses.⁹

One of the key novelties of the GDPR is enhanced control over personal data for individuals provided by a new right to data portability.

Section I. Research Topic

The right to data portability is governed by the provisions of Article 20 of the GDPR. Essentially, this right empowers individuals to receive personal data which they provided to the controller and to request their personal data to be transmitted directly to another controller. Before outlining the applicable criteria, it seems relevant to briefly discuss the origin of this right.

It is argued that there had been at least two factors that stimulated the development and the successive inclusion of the right to data portability in the GDPR. The first factor had emerged with the need to ensure that the internet users have increased control over their personal data,

⁷ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions 'A Comprehensive Approach on Personal Data Protection in the European Union', Brussels, 4.11.2010, COM(2010) 609 final.

⁸ Special Eurobarometer 431. Data protection. Conducted by TNS Opinion & Social at the request of Directorate-General for Justice and Consumers (DG JUST) Survey co-ordinated by the Directorate-General for Communication (DG COMM "Strategy, Corporate Communication Actions and Eurobarometer" Unit), <https://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_431_sum_en.pdf>, accessed on 26 May 2018.

⁹ Communication from the Commission to the European Parliament and the Council 'Stronger Protection, New Opportunities - Commission Guidance on the Direct Application of the General Data Protection Regulation as of 25 May 2018', Brussels, 24.1.2018 COM(2018) 43 final.

thus can transfer their personal data from one provider to another.¹⁰ Another factor was the growing demand for a mechanism to prevent unfair competition practices with portability being regarded as the “key to market entry”.¹¹ Without going into detail of these two premises, one should keep in mind that a right to portability (of mobile telephone users) has existed since the adoption of the Universal Service Directive (Directive 2002/22/EC)¹². It therefore can be said that the nature of the right and the rationale behind it have been known to the European legislator long before the GDPR. Moreover, the European Data Protection Supervisor (EDPS) in his preliminary opinion on the privacy and competitiveness has drawn parallel of the right to data portability to the number portability.¹³ Furthermore, the right to data portability was regarded as an extension of the right to access that already existed under the DPD.¹⁴

In 2009, the European Parliament called on the Council and the Commission to take the initiative in establishing a global platform for the elaboration of privacy standards.¹⁵ One year later, after receiving an invitation from the European Council¹⁶ to evaluate the functioning of EU instruments on data protection, the European Commission engaged in the process of building a stronger and more coherent data protection framework in the EU. It translated the policy objectives based on the above concerns and put forward concrete reform proposals¹⁷, including the new right to data portability.

¹⁰ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions ‘A Comprehensive Approach on Personal Data Protection in the European Union’, Brussels, 4.11.2010, COM(2010) 609 final.

¹¹ Geradin, Damien; Kuschewsky, Monika, ‘Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue’, [2013], SSRN, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216088>, accessed on 21 May 2018.

¹² Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), Article 30 and Recitals 40–42.

¹³ European Data Protection Supervisor, ‘Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy’ (Preliminary Opinion), March 2014, <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2014/14-03-26_competition_law_big_data_EN.pdf>, accessed on 28 May 2018.

¹⁴ *Ibidem*.

¹⁵ European Parliament Resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme, <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0090+0+DOC+XML+V0//EN>>, accessed on 21 May 2018.

¹⁶ European Council, ‘The Stockholm Programme – An open and secure Europe serving and protecting citizens’, OJ C 115, 4.5.2010.

¹⁷ Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), COM/2012/011 final - 2012/0011 (COD).

Article 20 and Recital 68 of the GDPR outline the following prerequisites for the effectiveness of the right to data portability:

- Personal data should be provided to the controller by the individual;
- the controller processes data by automated means;
- the processing is based on the individual's consent or for the performance of a contract.

In light of the compelling need to further clarify the set-out criteria, the Commission invited the Article 29 Data Protection Working Party (hereinafter: WP29)¹⁸ to draft guidelines for the data portability. In December 2016, the WP29 issued Guidelines on the right to data portability¹⁹, which were discussed with stakeholders and revised in April 2017.

The guidelines provide for the detailed instructions as regards *ia* the material scope of the right, the interplay with other data subjects' rights under the GDPR, the kinds of operations that qualify for the data portability, the types of data covered, rights of other subjects ('third parties'), consequences for the intellectual property rights and trade secrets and obligations of the controllers.

Almost five years (since May 2018) of application of these guidelines indicate that controllers experience difficulties with interpreting certain provisions²⁰. Some examples of criticism are provided in this text to direct attention to the existing pressing issues. As some debate, it first needs to be determined if the economic advantages would be strong enough to ensure a corresponding market behaviour.²¹ Furthermore, the same entities believe that the future of the data portability right relies heavily on technical developments.²²

¹⁸ The WP 29 consisted of representatives of all national data protection authorities and the European Data Protection Supervisor. The key role of the WP29/EDPB was to ensure that the relevant guidelines are in place to facilitate the application of the GDPR by key actors. The Article 29 Working Party was replaced by the European Data Protection Board (EDPB) on 25 May 2018. The main task of the EDPB is to contribute to a consistent application of data protection law, issue guidelines on how to interpret core concepts of the GDPR and issue binding decisions on disputes regarding cross-border processing.

¹⁹ Guidelines on the right to data portability, adopted on 13 December 2016, as last revised and adopted on 5 April 2017. Article 29 Data Protection Working Party, 16/EN WP 242 rev. 01.

²⁰ Erin Egan, 'Charting a Way Forward. Data Portability and Privacy', September 2019: <https://about.fb.com/wp-content/uploads/2020/02/data-portability-privacy-white-paper.pdf> (accessed on 6 February 2021).

²¹ Horn, Nikolai; Riechert, Anne, 'Practical Implementation of the Right to Data Portability', [2018] Stiftung Datenschutz,

<https://stiftungdatenschutz.org/fileadmin/Redaktion/Datenportabilitaet/stiftungdatenschutz_abschlussbericht_Hyperlinks_20180124_01_web.pdf>, accessed on 27 May 2018.

²² *Ibidem*.

The discussion on the existing challenges is ongoing, with the main criticism directed at the lack of a common approach to the effective and full implementation of the right to data portability in absence of uniform standards for transmission of data.²³ As some emphasise, the role of the European Commission in incentivising interoperability has been excluded from the final proposal for the GDPR, therefore making it unclear how the implementation in practice will affect the success of the data portability right.²⁴

As regards the **aim** of the GDPR and economic effectiveness of the right to data portability, the question arises as to what it will entail for industries and companies, where “lock-in effects” are not an issue.²⁵

Further, as regards the **scope** of the data portability right, it remains unclear how narrowly or broadly should the aspect of the *provision of data* in terms of Article 20(1) of the GDPR be interpreted. Furthermore, the extent to which the controllers may exercise their right to deny the transmission of data based on the *trade secrets* needs to be established. It is also unclear whether it would be proportionate to leave the obligation to ensure that the data received is relevant and not excessive on the receiving controller.²⁶

With regard to the **technical realisation** of the right to data portability, a definition of the *commonly used format* is desirable as is the elaboration of the specific requirements for a *compatible format*. Detailed instructions for the verification of the identity of customers requesting a transfer should also be provided.²⁷

Moreover, in connection with the **legal requirements**, some authors argue whether a legal obligation to accept the data by the receiving controller would be desirable.²⁸ Under the current

²³ Tikkinen-Piri, Christina; Rohunen, Anna; Markkula, Jouni, ‘EU General Data Protection Regulation: Changes and implications for personal data collecting companies’, [2018] Computer Law & Security Review 34, p. 150, <<https://reader.elsevier.com/reader/sd/57ED246BBE11BB39DBDC13983A1C80CB7E3ED7B6C92C627B0E089F66C300B371A1CF5AFF9A191F138F1C756E62302849>>, accessed on 20 May 2018.

²⁴ De Hert, Paul; Papakonstantinou, Vagelis; Malgieri, Gianclaudio; Beslay, Laurent; Sanchez, Ignacio, ‘The right to data portability in the GDPR: Towards user-centric interoperability of digital services’, [2018] Computer Law & Security Review 34), <<https://reader.elsevier.com/reader/sd/09E50E7DC815B3A5739847457F04B932136A22FDDDED7E486B5A9560D71620E63A80197ED5F017420DC48EC18372C8B56>>, accessed on 20 May 2018.

²⁵ *Op. cit.* ‘Practical Implementation of the Right to Data Portability’ (...).

²⁶ *Ibidem.*

²⁷ *Ibidem.*

²⁸ *Ibidem.*

WP29 guidelines on data portability, a receiving controller is not obliged to accept and process personal data transmitted following a data portability request.²⁹

Finally, the limited range of processed data that fall under the scope of the right to data portability (“the processing must be based either on the data subject’s consent or the contract”), seems to raise concerns and therefore might require careful consideration of the other **legal bases** as provided under Article 6 GDPR.

Section II. Research questions

The research of the doctoral thesis intends to address the following questions:

1. *What is the material scope of the right to data portability under Article 20 GDPR?*
2. *Why is the right to data portability often seen as a ‘dead’ right? An empirical study on how data subjects and controllers implement it in practice.*
3. *What are the challenges to enforce the right to data portability?*

In order to answer these questions, it will be necessary to define the scope of the right and subsequently analyse real-world attempts to exercise the right by data subjects. The failed attempts to exercise the right will lead to legal action (a complaint with a supervisory authority, a judicial remedy, or both). The challenges of the legal action will be assessed to answer the final question.

To achieve this goal, it will be necessary to analyse the documents developed in preparation of the GDPR, reach out for the impact assessment and the reports on the consultation of proposals with the EU institutions. Subsequently, it will be crucial to carry out the legal analysis of the EU data protection law and the draft provisions of the new EU legal instruments on the regulation of platforms. The thesis might also need to take into account the EU competition law provisions.

Further, the research will consider the WP29 guidelines, the feedback received during the consultation of the latter with the stakeholders in December 2016–February 2017 and analyse whether all the concerns voiced were addressed in the revised version of April 2017. Consideration will be given to the necessity to further revise the Guidelines in the future.

²⁹ *Op. cit.* Guidelines on the right to data portability (...), p. 6.

The thesis will also attempt to elaborate on possible situations where data subjects' rights might prevail over the interests of data controllers. This issue will need to be analysed taking into consideration the relevance of available resources and capacities as an impeding or encouraging factor to position the interests of controllers over the rights of data subjects and vice versa.

Finally, the research will take into account any decisions of the supervisory authorities and case law of national courts and the CJEU.

Section III. Existing Research

There are several scholarly writings and numerous articles published online discussing possible effects of the right to data portability. Since this right is relatively new, the status of its implementation and the results thereof are still patchy and need further assessment.

Despite that research in this area is not very developed, there seem to exist certain trends in how the right to data portability is seen by the legislator, the companies, and the addressees of this right. Controversies arise over the vague terminology and/or contradicting terms identified in the WP29 guidelines and within the GDPR.

There are more scholarly works focusing on the interplay of different rights of the GDPR among which data portability is mentioned but not studied profoundly. The European Commission had confirmed already before the GDPR became applicable that more measures may need to be put in place with the development of case law and after the practical implementation of the new rights had begun.³⁰ In June 2020, the Commission took stock of the Regulation's implementation and concluded that "the right to data portability is not used to its full potential"³¹. Based on the results of this review and in consultation with stakeholders, the Commission may decide to adjust certain solutions to provide more legal certainty to the respective parties. Possible (binding) decisions that may be issued by the EDPB as well as

³⁰ Communication from the Commission to the European Parliament and the Council 'Stronger Protection, New Opportunities - Commission Guidance on the Direct Application of the General Data Protection Regulation as of 25 May 2018', Brussels, 24.1.2018 COM(2018) 43 final.

³¹ Commission Staff Working Document Accompanying the document Communication from the Commission to the European Parliament and the Council 'Data protection rules as a pillar of citizens empowerment and EU's approach to digital transition - two years of application of the General Data Protection Regulation', Brussels, 24.06.2020 SWD/2020/115 final.

specific national provisions that Member States will adopt to fulfil their obligations under the GDPR will also be analysed and trends will be tracked. Moreover, it is envisaged that with the development of academic work as regards the implementation of the right to data portability from the technical point of view, more options may become available.

Whereas most of the existing research concentrates on either the rights of the data subjects or on the analysis of possible drawbacks as regards the interests of data controllers, it seems appropriate to look at these two issues jointly taking into account such factors as predictability of demand for data transfers from one digital environment to another, assessment of possible risks with regard to the competition power of businesses who built their strategies based on the algorithms developed thanks to the collection of a unique combination of data. Moreover, the issue of the third-party rights must be examined more closely as the new rules become fully applicable and effective.

Section IV. Methodology

The methodology applied will focus on the interpretation of existing provisions of the EU data protection law as well as of the draft relevant legislation (eg the Digital Markets Act, the Digital Services Act, the Data Governance Act etc). It will also consider any relevant decisions issued by supervisory authorities, the official publications by the European Union institutions and agencies. Any developing case law of the Court of Justice of the European Union and national court decisions (where possible) will be examined.

Finally, the thesis will take account of scholarly works, empirical studies, and reports commissioned by the European Data Protection Supervisor, European Data Protection Board, supervisory authorities, research groups, and non-governmental organisations. Technological developments play a crucial role in the law governing data protection and will also be considered. The thesis will therefore undertake, as far as possible, to confront the feasibility and relevance of the developing technologies in accommodating the needs of those concerned and to address the challenges of the right to data portability.

Section V. Suggested timetable

For conducting the necessary research, analysing the available sources and writing the doctoral thesis, the following timeline is put forward:

Time range	Stages
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12–13 June 2018	Presentation of the topic at the seminar ‘General Data Protection Regulation and its implementation in Austria (2018S) from a data protection and a civil law perspective’.
July 2018, October 2019, February 2021	Revisions of the exposé (if necessary) and its submission.
June 2018–June 2021	Attendance of courses and seminars.
February 2021	Registration of the topic of the doctoral thesis.
January 2021–December 2022	<ul style="list-style-type: none"> - Conducting research and composition of the doctoral thesis; - regular meetings with the supervisor; - completion of the necessary seminars and courses in accordance with the programme of the doctoral studies at the University of Vienna (as applicable).
January–April 2023	Time dedicated for revisions.
May–August 2023	Submission of the doctoral thesis and defence.

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