European Commission

Legal study on Ownership and Access to Data

EXECUTIVE SUMMARY

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The ubiquity and increasing value of data in commerce and industry has shone a spotlight upon the lack of coherence of its treatment in law within national laws, let alone harmonisation (other than in respect of data privacy and, in future, trade secrets) between different Member States.

Within the United Kingdom, there is no statutory basis for the protection of data as such, and so no property rights subsist: data cannot be stolen, assigned or inherited. Instead, the law of equity provides limited protections for anyone holding valuable confidential data, including the ability to withhold access to third parties save where exceptions apply. Exceptions are very limited and generally focus on individuals' rights. There is no exception by which the importance of the data to the public interest, such as health or safety, or potential for commercial exploitation, can be invoked to provide any right of access for third parties.

Other Member States take completely different approaches. In Germany, some commentators consider that the criminal law has the effect of conferring ownership-like rights on a data holder while data access is treated primarily as a matter of statutory unfair competition law. Italy also has an unfair competition provision in the Code Civile which can be used to address any actions, such as theft and violation of secrets/ data, considered capable of breaking the principles of professional integrity and that are able to damage other companies. Clearly, the generality of such a provision is certain to lead to divergent approaches based upon the legal and commercial cultures of the respective jurisdictions. Spain confers property rights in data based upon Roman law principles, but would not recognise pure data as a trade secret capable of protection under its laws in that sphere. French law relating to data includes both criminal and civil provisions, but the French criminal law applies only to directors and employees of companies.

Consequently, it is currently difficult for businesses to manage their data in an economically efficient fashion since a programme of licensing access to data simultaneously risks losing control of the data. But such a regime, which incentivises stakeholders to withhold access for third parties to their data altogether, potentially restricts the extent of exploitation and innovation within data driven industry sectors. Further, the lack of clarity as to the rights which an entity holding data may or may not have over the data can lead to errors. Although commentators and contracting parties frequently discuss the issue in terms of 'ownership', this is misleading since few jurisdictions other than certain states of the USA have laws that treat data as a form of property. Legally speaking, to own something means to have property rights in it: that is, the rights of possession, use, and enjoyment, which the owner can bestow, collateralize, encumber, mortgage, sell, or transfer, and the right to exclude everyone else from.[1] The point is more than mere semantics: legal categorisation as property would automatically define the owner's privileges, including the ability to enforce terms for third party access and use, and dictate the legal mechanisms for transacting. Accordingly, a mistaken assumption that data is property may for example lead to reliance on covenants for title[2] and equivalent statutory provisions which do not, in fact, apply.

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[1] Academic discussion contemplates a range of different models of what property rights might encompass; this definition encapsulates the 'strong' form of property representing the rights of an owner of physical goods or land.

[2] The UK Law of Property (Miscellaneous Provisions) Act 1994 implies various covenants into transfers of property, for instance.

As a result, any business based upon generating, collecting and exploiting data currently needs to take extreme care in both defining and obtaining the rights necessary for the uses it proposes to make of the data. These problems are multiplied when a business operates across borders.

Nevertheless, the survey established that at present most businesses outside the UK are not concerned to establish complex contractual arrangements for the management of their data. The online advertising industry appears to be most aware of the issues; other industry sectors do raise data issues but these are less consistently a feature of transactions. Within the UK, where data issues are most frequently raised in transactions across a range of sectors, the contractual provisions agreed vary considerably. There have been no disputes to date on the effect of any form of clause in use and so no clear guidance as to what forms are more or less effective has been given by the courts in any jurisdiction.

The most helpful jurisprudence of the Court of Justice of the European Union ("CJEU") is the decision in *Ryanair v PR Aviation*[3] where, on a reference from the Dutch Supreme Court, the court ruled that there are no restrictions on the contractual limitations which may be applied by a licensor of a database where that database is *not* protected by the *sui generis* database right. Accordingly, freedom of contract applies subject to any restrictions imposed by competition laws or national laws, giving great flexibility for businesses to craft arrangements for the holding of and access to data to suit the precise situation they are facing.

In these circumstances, the specific nature of the conflicts which may arise between different parties in the data origination and exploitation process cannot yet be identified with any certainty. It seems highly likely that conflicts will arise, and given the range of different interests in, and values attaching to, data in different industry sectors there may be differences of quality as well as commercial or legal significance in the conflicts which arise in those different sectors. It may be necessary to await a maturing of the commercial and legal landscape in order properly to formulate what, if any, legislative intervention would be most appropriate.

[3] Case C - 30/14 15.1.15

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