

USES AND ABUSES OF DATA RIGHTS IN THE DATA DRIVEN ECONOMY. LOOKING FOR A MORE BALANCED AND HORIZONTAL APPROACH

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ABSTRACT:

Machine-generated data and automated data collection play a crucial role in the Data Era, thus urging a fresh analysis on the existing European regulatory framework with the view either to confirm its consistency or to suggest some adjustments. Moving from such request, in the following it will be verified under a strict European innovation policy perspective whether the existence and exercise of the rights on data granted by Directive 96/9/CE may erect excessive barriers to the entry of new players in those sectors characterized by the presence of few undertakings which can rely on considerable information sources and on the most advanced technologies, and, if so, whether it will be desirable to welcome a more horizontal approach in dealing with data as such, while applying the abuse of right doctrine as a *de iure condito* limit to the exploitation of databases rights beyond the scope of the European architecture.

KEYWORDS:

Directive 96/9/CE; rights on data; misuse doctrine; digital single market strategy.

1. Introduction

Following the success and outburst of the Data religion, digital contents are accumulated, selected, filtered, collected and processed together with enormous amount of other information, even apparently disconnected, and then used for studies, experiments and classifications¹.

Each set of personal and non-personal data represents a dynamic and interactive cluster, which is continuously nurtured to become a powerful instrument of proliferation and commercialization, also as (part of) a service or personalized product².

In this environment, the EU innovation policy rules on original databases granted by Directive 96/9/CE³ had the merit of contributing to copyright harmonization, promoting the removal of the existing

¹ OECD, *Big data: bringing competition policy to the digital era* (Paris, 2016); OECD, *Hearing on disruptive innovation* (DAF/COMP, 2015) 3; OECD, *Report on data-driven innovation* (Paris, 2015), available at <http://www.oecd.org/sti/data-driven-innovation-9789264229358-en.htm>; A. DE STREEL, P. LAROCHE, 'Disruptive Innovation and Competition Policy Enforcement', (2015) TILEC Discussion Paper; V. FALCE, G. GHIDINI, G. OLIVIERI, *Informazione e Big data tra innovazione e concorrenza*, (Giuffrè, 2018) Ch. 4.

² Par. 55 of the Final Report on the E-commerce Sector Inquiry {SWD(2017) 154 final} of the EU Commission states that: "data can be a valuable asset and analysing large volumes of data can bring substantial benefits in the form of better products and services, and can allow companies to become more efficient".

discrepancies between the national legislations – which interfered with the efficient functioning of the internal market - and permitting the elimination of any obstacle to the freedom of movement of goods and services.

However, even before and regardless of the blossoming of the Big Data Era, the Commission had explored the potential negative effects deriving from the new provisions, in the belief that such a choice could end up being counterproductive from a systematic perspective and could also fail in the achievement of the declared goal of boosting the competitiveness of the technologies of information sector⁴.

More recently, the European Commission, in perceiving the deep and radical discontinuity of the Digital Revolution, has called for a second Consultation aimed at verifying the coherence and effectiveness of Directive 96/9/CE in the Digital Single Market context, in light of a possible remedial action⁵.

In recent times, the EU institutions have first explored the possibility to strengthen the protection of industrial information in the digital market⁶. Lately, in the Communication on the Free Flow of Information and now in the draft Regulation⁷, they have abandoned the option of introducing a new property right concerning digital information, giving priority to the identification of the principles which will have to regulate the access and circulation of publicly available information in the Innovation Market⁸.

Starting from the cited uncertainties at EU level, which clearly highlight the existence of unsolved tensions, in the following it will be verified whether the existence and exercise of the rights granted by Directive 96/9/CE may represent barriers to the entry^{9 10} of new players in those sectors characterized by

³ Directive 96/9/CE of the European Parliament and of the Council of 11 March 1996, on the Legal Protection of Databases, [1996] O.J. L 77/20.

⁴ V. FALCE, 'The (over) protection of information in the Knowledge economy. Is the Directive 96/9/EC a faux pas?', (2009) *Diritto Autore* 602.

⁵ For a summary of the replies acquired during the Consultation, held on 30 August 2017, see: <https://ec.europa.eu/digital-single-market/en/news/summary-report-public-consultation-evaluation-directive-969ec-legal-protection-databases>.

⁶ In the Communication of 6 May 2015 - A Digital Single Market Strategy for Europe, COM(2015) 192 final, the Commission identifies the creation of a 'data economy' as a priority. On the other hand, OCSE, in the report *Data-Driven Innovation: Big Data for Growth and Well-Being* (2015) 195-198, accessible at: <http://www.oecd.org/sti/data-driven-innovation-9789264229358-en.htm>, refers to the need of enhancing the 'data governance regimes' in order to overcome any barrier to entry, sharing and interoperability between data. See J. DREXL, 'Designing Competitive Markets for Industrial Data - Between Propertisation and Access', (2016) Max Planck Institute for Innovation & Competition Research Paper n. 16-13, available at SSRN: <https://ssrn.com/abstract=2862975>.

⁷ European Commission, Proposal for a Regulation of the European Parliament and of The Council on a Framework for the Free Flow of Non-Personal Data in the European Union {SWD(2017) 304 final} SWD(2017) 305 final, Brussels, 13.9.2017 COM (2017) 495 final 2017/0228 (COD), accessible at <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-495-F1-EN-MAIN-PART-1.PDF>.

⁸ This is a crucial point "for the development of the EU market for information, which will be brought back to the attention of commentators": see G. RESTA, 'Sulla tutelabilità delle carte geografiche ai sensi della direttiva sulle banche di dati', (2016) 2 *Diritto dell'Informazione e dell'Informatica* 191; also, J.H. REICHMAN and P.F. UHLIR, 'Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology', (1999) *Berkeley Technology Law Journal* 793; P. WEISS, 'Borders in Cyberspace: Conflicting Public Sector Information Policies and Their Economic Impacts', in G. AICHHOLZER and H. BURKERT (eds.), *Public Sector Information in the Digital Age, Between Markets, Public Management and Citizens' Rights* (Cheltenham, 2004) 93-107.

⁹ See A. PEZZOLI, 'Big Data e antitrust: un'occasione per tornare ad occuparci di struttura?', in V. FALCE, G. GHIDINI, G.

the presence of few undertakings which can rely on considerable information sources and on the most advanced technologies. A further aim, what is more, is to verify whether a persistent approach in shaping the regulation of databases, in the context of market economies centred around the classification of information, may eventually lead to endanger the Directive's ultimate goal, even before and regardless of the existence of dominant positions upon the incumbents^{11 12}. Last, it is to be considered whether in the medium term, a more consistent and horizontal approach shall be examined.

2. Data accumulation and database regulation

The process of 'dematerialization' triggered by the fourth industrial revolution affects entire social and economic environments: products, services, production phases are all transformed into raw data, and later digitalized and transferred into the Internet in a non-stop process of disaggregation, analysis and re-assemblage aimed at defining (direct or indirect) connections and homogenous categories of information.

In such renewed context, the process of collecting and elaborating data is in fact reserved to few players, which rely on sufficient financial and technological resources needed to process in real time unlimited volumes of data and extract the highest economic value. A multitude of players, of smaller dimension too, eventually take advantage of the data sets made available¹³.

The capacity to collect and analyze this unlimited volume of digital data belongs to upstream firms which make use of intelligent algorithms¹⁴. Such algorithms are able to identify connections, similarities, identities and differences, and ultimately offer to the market clusters of homogenous data which are constantly updated to provide the latest information¹⁵. At the downstream level, instead, we find a

OLIVIERI, *Informazione e Big data tra innovazione e concorrenza* (Giuffrè, 2018) Ch. 12; A. DE MAURO, M. GRECO, M. GRIMALDI, 'A Formal Definition of Big Data Based on its Essential Features', (2016) *Library Review*; and M.E. STUCKE, A.P. GRUNES, *Big Data and Competition Policy* (Oxford University Press, 2016).

¹⁰ See *Inter alia*, European Commission, Case COMP/M.4854 *Tomtom/TeleAtlas* (2008); European Commission, Case COMP/M.4731 *Google/Double Click* (2008), at 365; European Commission, Case COMP/M.6314 *Telefonica UK/Vodafone UK* (2012), at 543-544; European Commission, Case COMP/M.7217 *Facebook/Whatsapp* (2014); European Commission, Case COMP/M.8124 *Microsoft/LinkedIn* (2016), at 338.

¹¹ On the relation between an intellectual property right and the existence of a dominant position, see G. SENA, 'Note paradossali sulla proprietà intellettuale', in AA.VV., *Studi di diritto industriale in onore di Adriano Vanzetti* (Giuffrè, Milano, 2004) Ch. II, 1534-1535. On the need for an integrated approach, see W. KERBER, 'Digital Markets, Data, and Privacy: Competition Law, Consumer Law and Data Protection', in V. FALCE, G. GHIDINI, G. OLIVIERI, *Informazione e Big data tra innovazione e concorrenza* (Giuffrè, 2018) Ch. 1.

¹² See more extensively, V. FALCE, V. TORTI, *Use and Abuse of database rights in the data era*, Conference paper, Hanken School of Economics and IPR University Center, Helsinki, 5-8 August 2018.

¹³ OCSE (2016) on the matter explains that "The control over a large volume of data is a not-sufficient factor to establish market power, as nowadays a variety of data can be easily and cheaply collected by small companies — for instance, through point of sale terminals, web logs and sensors — or acquired from the broker industry. In addition, data faces decreasing returns to the number of observations and is most valuable when combined with data analytics and good predictive algorithms, which may require high investments in complementary assets, including hardware, software and expertise".

¹⁴ OCSE, *Algorithms and Collusion: Competition Policy in the Digital Age* (2017), available at www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm. See also A. EZRACHI, M.E. STUCKE, *Virtual Competition. The promise and perils of the Algorithm-Driven Economy* (Harvard University Press, 2016).

¹⁵ This is the paradox of power highlighted by N.M. RICHARDS, J.H. KING, 'Three paradoxes of big data', (2013) 66 *Stanford Law Review* 41-46. See also N. NEWMAN, 'Search, antitrust and the economics of the control of user data', (2016) *Yale Journal of Regulation* 401. Overall, as clearly evidenced by the literature, the figure concerning market shares can be misleading: see G. COLANGELO, 'Big data, piattaforme digitali e antitrust', (2016) *Mercato, Concorrenza e Regole* 425.

multitude of new players and businesses making use of the available data sets, in a dynamic and interactive way, in order to provide goods and services which may meet the needs of the society and may even create new ones.

The gap between the upstream and downstream levels of the industrial sectors has grown: the economies of scale, characterizing the processes of collection and analysis of data, have experienced an acceleration as a consequence of the current concentrative processes¹⁶. These processes also lead to an accumulation and contamination of data, which could further justify action from a regulatory perspective¹⁷.

On the one hand, the recognition of certain phenomena or trends should not be confused with their evaluation. With this regard, it is important to refrain from applying to the digital ecosystem the equation according to which the specific capacity to process data automatically reflects the possession of market power¹⁸. On the other hand, however, in the presence of certain market dynamics facilitated by the very structure of the market¹⁹, the existence of exclusive and exclusionary rights benefiting those parties processing the data does not promote the competitive process but slows it down in an excessive and unjustified manner.

Leaving aside the antitrust implications concerning the (excessive) accumulation of data and information²⁰, which have been thoroughly scrutinized by the literature²¹, it is worth here exploring a separate but related issue: the existence of exclusive rights connected to the cited activity²². In particular, the activity of collecting and systematizing data is not neutral or fortuitous, nor is limited by rules or technical restrictions. It responds to autonomously programmed settings and selects technically homogenous bits from the jumble of information, which are then skimmed on the basis of preset filters. Each dataset is thus the expression of a choice of partial and selective structure, which may perhaps give

¹⁶ OCSE, *Data-Driven Innovation: Big Data for Growth and Well-Being* (2015), at <http://dx.doi.org/10.1787/9789264229358-en>.

¹⁷ G. MUSCOLO, 'Big Data e concorrenza. Quale rapporto?', and M. GAMBARO, 'Big data, mercato e mercati rilevanti', in V. FALCE, G. GHIDINI, G. OLIVIERI, *Informazione e Big data tra innovazione e concorrenza* (Giuffrè, 2018), Ch. 9 and Ch. 10 respectively.

¹⁸ See I. GRAEF, *EU Competition Law, Data protection and Online Platform. Data as Essential Facility* (Wolters Kluwer, 2016); See also European Commission, Case COMP/M.4731 *Google/Double Click* (2008), at 365; European Commission, Case COMP/M.6314 *Telefonica UK/Vodafone UK* (2012), at 543-544; European Commission, Case COMP/M.7217 *Facebook/Whatsapp* (2014), at 188-189; European Commission, Case COMP/M.8124 *Microsoft/Linkedin* (2016), at 253, 257, 259 and 262; Federal Trade Commission, Case 071-0170 *Google/DoubleClick* (2007), p. 12-13.

¹⁹ G. PITRUZZELLA, 'Big data, Competition and Privacy: a Look from the Antitrust Perspective', (2016) *Concorrenza e Mercato* 15; M.E. STUCKE, A.P. GRUNES, *Big Data and Competition Policy* (Oxford University Press, 2016). See also European Commission, Staff Working Document on the Free Flow of Data and Emerging Issues of the European Data Economy, SWD(2017)2 final.

²⁰ Autorité de la Concurrence and Bundeskartellamt, *Competition Law and Data*, Report (2016); 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 (2014). See also UK Competition & Market Authority, *The Commercial Use of Consumer Data*, Report (2015).

²¹ For an excellent analysis, M. PATTERSON, *Antitrust Law in the New Economy: Google, Yelp, LIBOR, and the Control of Information*, 2017.

²² For an in-depth analysis of the type and properties of the data collected for the purpose of applying or disapplying the norms on databases, see V. ZENO ZENCOVICH, G.CODIGLIONE, 'Ten Legal Perspectives of the Big Data Revolution', (2016) 23 *Concorrenza e Mercato* 31.

rise to copyright protection²³ in presence of a double constitutive requirement: one indisputable, the other uncertain.

But let's proceed in an orderly manner. Datasets consist of data and, when needed, digital contents. This suffices to meet the first requirement to benefit from legal protection, provided that the scope of the protection granted by Directive 96/9/CE also embraces collections of vulnerable data and information – such as raw information, news or even simple non aggregated data - or other independent elements which are organized in a systematic or methodical manner and can be individually accessed by electronic or other means.

As to the second condition, the Directive makes the substance of the originality requirement dependent on the activity of selection, organization and coordination of the collected materials²⁴. It further specifies that such activities are conducted through the systemic and organic arrangement of the different elements - also collected via electronic processes - which must be made available²⁵. In brief, the Directive recognizes diversity and originality in the structure²⁶ of the work considered as a whole, regardless of the single elements it consists of. This is enough to regard it as an intellectual creation. What is, then, the meaning of originality and creativity if it is accepted that a database is a product conceived for the market which responds to a specific demand and satisfies a precise need? Is it sufficient that the data be merely identified according to a personal choice of the author, regardless of the quality or aesthetic value obtained (Recital 15 and 16), or is it rather necessary something more (a *quid pluris*) than that²⁷?

The answer is only partially given by the jurisprudence. Under established case law, the legal concept of creativity does not correspond to those of creation, originality and absolute novelty, but it refers to the personal and individual expression of an objectivity belonging to the protected categories, so that, for an intellectual work to receive protection, it suffices that a creative act exists, even if minimal, susceptible of being externalized in the outside world. It thus follows that creativity cannot be excluded only because the work consists of simple ideas and notions, capable of being understood by people with expertise in the

²³ For a different perspective, see C. GALLI, M. BOGNI, 'I requisiti per la tutela IP dei Big data', in V. FALCE, G. GHIDINI, G. OLIVIERI, *Informazione e Big data tra innovazione e concorrenza* (Giuffrè, 2018), Ch. 5.

²⁴ See G. GUGLIELMETTI, 'La tutela delle banche dati con diritto sui generis nella direttiva 96/9 CE', (1997) *Contratto e Impresa/Europa* 44; P. FRASSI, *Creazioni utili e diritto d'autore* (Giuffrè, Milano 1997) 171; V. DI CATALDO, 'Banche-dati e diritto sui generis: la fattispecie costitutiva', (1997) *AIDA* 21.

²⁵ The Directive states that, in order to benefit from copyright protection, any assessment of the quality or aesthetic value of the database is not needed (Recital 16). For an in-depth analysis of the choice of the EU legislator and the related consequences, see P. SPADA, 'Banche dati e diritto d'autore', (1997) *AIDA* 9; G. SCHRICKER, 'Farewell to the « Level of Creativity » in German Copyright Law?', (1995) *International Review of Intellectual Property and Competition Law* 41.

²⁶ It must be added that, under art. 3 par. 2 and Recital 15 of Directive 96/9, only the 'structure' of the database, and not its content or the elements it consists of, can benefit from the copyright protection granted by the Directive; similarly, under art. 10 par. 2 of the TRIP Agreement and art. 5 of the WIPO Treaty on copyright, the compiling of data, as a result of the selection or arrangement of their content, amounts to an intellectual work protected as such by copyright; such protection does not instead extend to the single data, without prejudice to any copyright subsisting in such data; in this context, the terms 'selection' and 'arrangement', under art. 3 par. 1 of Directive 96/9, concern respectively the selection and systematization of the data used by the author to provide the database with its structure; such concepts do not instead refer to the creation of the data included in the database; consequently, the considerations concerning the intellectual effort and the know-how used to create the data can not be taken into account to assess whether the database, including those data, can benefit from the copyright protection granted by Directive 96/9.

²⁷ A. CRISTOFORI, 'Tribunale Milano, 22/08/2011', in M. Scuffi and M. Tavassi, *Le sezioni specializzate italiane della proprietà industriale e intellettuale* (Giuffrè, 2012) 251.

subject²⁸. In brief, in relation to compilatory works, it suffices that the data be processed and organized by the author in a personal and autonomous way, for the choice or the arrangement of the materials. Conversely, the intellectual effort, the use of significant know-how for the creation of such a database, as well as the conferment of a certain degree of relevance to the content, become irrelevant factors. Such factors indeed are unable to justify copyright protection in the absence of an originality requirement in the choice and arrangement of the included data.

The data extrapolated from the internet jungle are then selected, processed and organized according to a certain structure which does not reflect the author's personality²⁹ but rather the autonomous choice, disentangled from rules or limits. The database, in other words, is not characterized by a 'personal touch or sign'³⁰ of the author, but it is rather the expression of a certain degree of autonomy in the choice, processing and management of the collected information. Overall, there are no rules or technical limits, because through the process of dematerialization products and services are converted into homogenous goods, the bits, which are overabundant rather than limited³¹.

This would in theory suffice to satisfy the parameter of creativity. However, the ratio itself behind the protection of original databases suggests a different conclusion. Through Directive 96, the Legislator has indeed manifested the will to raise the standard of creativity, required to obtain copyright protection, above the threshold of the 'sweat of the brow'. We need a *quid pluris* which may distinguish the dataset from a mere compilation, without it being necessary to achieve the threshold of the artistic or aesthetic value.

Within such limits, datasets are encompassed within the category of autonomously protectable works³², subspecies of original databases deserving protection – all conditions being equal - in Europe. The dataset's owner is the only entitled to reproduce, record, disseminate or translate the whole work, as well as to act in response of the unlawful use of it. The same author has the right to perform or authorize the reproduction, distribution and communication to the public of the original collection.

3. Databases, computer programs and the over-protection of investments

Datasets, as already mentioned, can be interpreted as subsets of data accessible through the internet. They are not intended to be used for a merely aesthetic or intellectual function; rather, they are perceived as having material utility, in light of the nature of the selected materials and the aim (typically informative) pursued. It seems reasonable to argue that the process of 'functionalizing' databases is in line with the process of extending to databases specific features of the protection of computer programs. The effect is to

²⁸ *Ex multis*, Italian Supreme Court n. 12314/2015; Italian Supreme Court n. 17795/15; Italian Supreme Court n. 9854/12.

²⁹ Case C-604/10 *Football Dataco Ltd. v. Yahoo! UK Ltd* [2012] O.J. C 118/5. See also Case C-5/08 *Infopaq International AS v Danske Dagblades Forening* [2009] E.C.R. I-6569, at 45; Case C-393/09 *Bezpečnostní softwarová asociace* [2010] E.C.R. I-13971, at 50; and Case C-145/10 *Painer v Standard Verlags GmbH* [2011] ECR I-12533, at 89.

³⁰ Case C-145/10 *Painer v Standard Verlags GmbH* [2011] ECR I-12533, at 92.

³¹ See the judgments in Case C-393/09 *Bezpečnostní softwarová asociace* [2010] E.C.R. I-13971, at 48-49; and Case C-604/10 *Football Dataco Ltd. v. Yahoo! UK Ltd* [2012] O.J. C 118/5, at 98.

³² In this way, databases acquire their own identity and autonomy, without being ascribed to the category of collective or compilatory works. See M. FABIANI, 'Banche dati e multimedialità', (1999) 1 *Rivista Diritto Autore* 3.

scale down certain aspects or problems, not yet clarified by the case law, which may arise when a database is implemented as a program³³.

In particular, the rights of economic exploitation of the creative collection are reserved to the employer (legal entities included) of the author every time the activity of creation falls within the tasks assigned to the employee and in all those cases where the work is carried out by following the employer's instructions, unless different provisions agreed by the parties apply.

Secondly, the maker of the database is entitled to exercise certain rights, such as the translation, adaptation, rearrangement and any other change of it, on the ground that only the maker of the database has the right to reproduce, present or demonstrate in public the results of the change. All these rights are not affected by the originality of the result, the prerogatives recognized to the author of the derived work, or the extent of the protection.

Further, along the same lines of the *Software Directive*, the lawful user is entitled to implement certain actions, necessary to operate and access to the contents of the database, as well as to make a technical or normal use of it. In any case, the strength and relevance of Directive 96/9/CE, in the Data era, arises with and through the *sui generis* right. The new provision³⁴, it is well known, aims at protecting the industrial interest – or, put differently, the economic investment and work done to assemble the relevant content, regardless of any consideration about merit, end use, quality or aesthetic value achieved.

While systematic considerations suggest limiting access to copyright protection, it is now clear that the author of an interactive and dynamic machine-generated dataset³⁵, which is the result of qualified investments, is entitled to invoke the *sui generis* right³⁶. Of course, in order to benefit from the legal

³³ G. GIANNONE CODIGLIONE, 'La violazione del diritto d'autore sulle c.d. App da parte del gestore di un social network', (2017) 1 *Diritto dell'informazione e dell'informatica* 138, according to whom the Milan Tribunal's decision (1 August 2016, Sez. spec. Impresa) can be considered in this grey zone, in line with the EU Court of Justice in *Ryanair v. PR Aviation* (CJEU, case C-30/14 *Ryanair Ltd c. PR Aviation BV*, [2015] 2 CMLR 36), where it was held that a database concerning flight information managed and implemented by Ryanair is not protected neither by copyright nor by the *sui generis* right (art. 3-6 and 7-11 of the Directive 96/9/CE), and for this reason access to such database by third parties can be subject to specific contractual limitations. Moreover, in *Innoweb v. Wegener*, the Court held that the activity of making available to the public a dedicated meta search engine on the Internet, which simultaneously accesses several databases managed by a third party, comes close to the manufacture of a parasitical competing product, considered by Recital 42 of the Directive 96/9/CE, albeit without copying the information stored in the database concerned, since such dedicated meta search engine, taking into account its search options, resembles a database but without having any data itself (CJEU, Case C-202/12 *Innoweb BV v. Wegener ICT Media BV, Wegener Mediaventions BV* [2013]). See also Tribunal of Milan (Sez. spec. Impresa, *Soc. Business Competence C. Soc. Facebook e altro*, in *Foro italiano* (2016), 12, I, 3989).

³⁴ On the topic, see A. ZOPPINI, 'Nota alla direttiva 96/9/CE', (1996) *Diritto dell'Informazione e dell'Informatica* 491, according to whom the *sui generis* protection does not have an ancillary function with respect to the exclusive right granted by intellectual property. Both types of protection have equal dignity and, above all, are based on diverging profiles of protection: copyright looks at the structure of the database; the *sui generis* right instead looks at the content and aims at preventing the unauthorised extraction or reuse of the whole or substantial part of the database.

³⁵ COMMISSION STAFF WORKING DOCUMENT, Evaluation of Directive 96/9/EC on the legal protection of databases, Brussels, 25.4.2018 SWD(2018) 146 final, {SWD(2018) 147 final}: "The trigger has been the revival of the 2010 German Federal Court of Justice (BGH) decision (*Autobahnmaut*) where machine-generated data, namely data about motorway use, was deemed to be protected as a *sui generis* database. In the case, the German Federal High Court of Justice accepted a highway company's *sui generis* right in a database of machine-generated toll data. The court found that the company invested money in the recording of pre-existing data ('obtaining') on cars using the highway and in the processing of such data through software ('verifying' and 'presenting'). The case is revealing, as the highway company resembles a spin-off database producer, yet the company successfully claimed a *sui generis* right in these, in essence, traffic data. Stakeholders from the automotive industry provided similar examples resonating with this case: for instance the car industry's incorporation of sensors in cars".

protection, limited and renewable, there must be a natural or legal person³⁷, residing or with a registered office or principal place of business within the Union, which takes the initiative and runs the risks related to the obtaining, verification or presentation of the contents of a database, and employs financial means and/or time, work and energy.

On the whole, once the investment has been turned into an asset worthy of legal protection, the author is given the exclusive power to prohibit – with effect *erga omnes* – any act of extraction or reutilization of the whole content of the collection or of a substantial part of it (and, under certain conditions, of an insubstantial part), regardless of the use or of the fact that the act is carried out by the lawful user. What is more, the maker of the database can prohibit any kind of use amounting to an unlawful economic exploitation of its content (in other words, all forms and modes of enjoyment of the product which are able ‘to prejudice – in terms of commercial impact - the market share of the first maker, depending on the replaceability of the new product unlawfully obtained’, or more simply to prejudice the economic interest of the maker of the database).

4. Towards a more balanced and horizontal approach

The systemic implications and possible repercussions of the *sui generis* right have been immediately identified, examined and also criticized. Also the European Commission contributed the discussion, suggesting, among the other proposals, to abrogate the *sui generis* right³⁸.

Perhaps, in the achievement of an optimal balance, should the *sui generis* protection framework be retained, one could suggest to rely on the role antitrust norms can play as pro-competitive antibodies³⁹. In particular, antitrust may provide an additional check by imposing special responsibilities on database owners who are granted a position of dominance and may be able to damage effective competition by preventing access to information markets or driving out existing competition.

³⁶ For some authors, the right is systematically related to a perspective of unfair competition (similar to that of Art. 100 of the Italian Copyright Law, concerning the reproduction of news and information performed through means contrary to fair uses in the area of journalism). See G. GHIDINI, G. CAVANI, ‘Presupposti e portata della tutela dei marchi dotati di rinomanza’, (2017) 2 *Rivista di Diritto Industriale* 69, footnote 32; V. DI CATALDO, ‘Banche-dati e diritto sui generis’, (1997) *AIDA* 27. *Contra* M. BERTANI, *Impresa culturale e diritti esclusivi* (Giuffrè, Milano 2000), according to whom the *sui generis* right is ascribable to the category of connected rights. However, in case of data created thanks to sensor: M. Leistner, Matthias: ‘Big Data and the EU Database Directive 96/9/EC: Current Law and Potential for Reform’ in Lohsse, Schulze, Staudenmayer (eds), *Trading Data in the Digital Economy: Legal Concepts and Tools* (Nomos, Baden-Baden) 2017, according to whom “many authors have derived that in typical big data scenarios, the investments of ‘producers’ of sensor or machine-generated data of all kinds will be excluded from the *sui generis* right because in most practical cases, such investments would have to be regarded as investments in the ‘creation’ of data.”

³⁷ The *sui generis* right is reserved to natural persons citizens of the EU or regularly residing in the EU, as well as undertakings set up according to the law of a Member State of the EU and having the registered or administrative office within the EU (in this case, an effective and continuous link between the activity of the undertaking and the economy of a Member State is required).

³⁸ This position had been supported by authoritative literature, which - since the adoption of the Directive - had challenged the proprietary structure of the *sui generis* right. See J.H. REICHMAN and P. SAMUELSON, ‘Intellectual Property Rights in Data?’, (1997) *Vanderbilt Law Review* 51; G. GHIDINI, *Profili evolutivi del diritto industriale* (Giuffrè, Milano 2001) 108; L. MANSANI, ‘La protezione dei database in internet’, (1996) *AIDA* 149.

³⁹ Indeed, some commentators have acknowledged that competition law plays a complementary role, beside endogenous regulatory mechanisms provided for by IP rules, in ensuring the ‘access-incentive’ balance in the exploitation of databases. See D. LYM, ‘Regulating access to databases through antitrust law: the missing perspective in the database debate’, (2006) *Stanford Technology Law Review* 7.

The Court of Justice has clarified that the EU legislation is sensitive to the concern that protection by the *sui generis* right must not be afforded in such a way as to facilitate abuses of a dominant position. Therefore, national judges are warned not to interpret it in a way that may affect competition, providing the maker of a database with a right that will be abusively exercised⁴⁰. In this context, when we scrutinize the potential antitrust violations which could be committed by the maker of a database, the main example pertains to the practice of refusal to license or deal. Hence, the EU case law on the ‘exceptional circumstances’ could be plausibly invoked, from *Magill* to *Tierce Ladbroke*, from *IMS* to *Microsoft*⁴¹.

Should a court wish to go beyond the uncertain antitrust boundaries, then it would probably have to deal with the questions generated by the doctrine of the abuse of right, which has gained the status of a principle of general application to all areas of EU law⁴².

As such, it could in theory be applied to the framework of databases and the related rights, regardless of the existence of a dominant position.

But when would the exercise of a database right fall in conflict with the abuse of right principle? In other words, provided that the doctrine prevents any right holder from manipulating his own right, which test should be applied to assess whether a legitimate conduct amounts to an abuse of law? In this regard, the EU case law has elaborated an increasingly articulated test, which has alternatively looked at whether: i) the right is only exercised to circumvent a national law (*TVIO*); ii) the right is exercised to gain an undue benefit from another Member State’s national law (*Liar v Universitat Hannover*); iii) the right is exercised to obtain improper advantages contrary to the goals pursued by the right (*Centros* and *Diamantis*); iv) the right is exercised to achieve objectives other than those which are legitimate under the law at stake (*Donaldson*); v) the aim of the right is not achieved, and the abuser intended to get an advantage by artificially creating the conditions for the application of the right (*Emsland Starke*); and vi) the aims of the allegedly abused right would be frustrated if the right claims were actually conferred, and the right invoked derives from activities for which there is no other explanation than the creation of the right claimed (*Halifax*)⁴³. The *Halifax* case, in particular, seems to have represented the maximum expression of this complex articulation⁴⁴. Further, in the antitrust scenario, an abuse of right has been invoked for firms taking advantage of legitimate governmental procedures to harm competition and produce anticompetitive outcomes. In *AstraZeneca*, for instance, the EU Commission had argued that the existence of a piece of EU law allowing a specific behaviour could not exempt that behaviour from the application of EU competition law if and when the same conduct was misused and if and when it produced anticompetitive effects⁴⁵. At national level then, in the *Pfizer* case, an Italian administrative authority held that the abuse of right offence takes place when the right holder makes an opportunistic use of his right, *i.e.* when he uses

⁴⁰ V. FALCE, ‘The (over) protection of information in the know-ledge economy. Is the Directive 96/9/EC a faux pas?’, (2009) *Diritto Autore* 602.

⁴¹ EU Court of Justice, Joined Cases C-241-242/91, *RTE & ITP v. European Commission (Magill)* [1995] 4 CMLR 718; Court of First Instance, Case T-504/93 *Tiercé Ladbroke v. European Commission* [1997] ECR II-923; EU Court of Justice, Case C-418/01 *IMS Health c. NDC Health* [2004] 4 CMLR 28; Court of First Instance, Case T-201/04 *Microsoft c. European Commission* [2007] ECR II-03601.

⁴² *Halifax e a.*, C-255/02, EU:C:2006:121, 68; *SICES e a.*, C-155/13, EU:C:2014:145, 29. For an analysis, K. Sørensen, Abuse of Rights in Community Law: A Principle of Substance or Merely Rethoric?, in *Common Market Law Review*, 2006, 423. G. ALPA, Appunti sul divieto dell’abuso del diritto in ambito comunitario e sui suoi riflessi negli ordinamenti degli Stati membri, in *Contr. e impr.*, 2015, p. 247.

⁴³ See M. MAGGIOLINO and M. MONTAGNANI, ‘Wandering in the land of the EU abuse of rights: coordinates from the antitrust experience?’, (2015) Social Science Research Network.

⁴⁴ Court of Justice of the EU, Case n. C-255/02 *Halifax plc et al. v. Commissioners of Customs & Excise* [2006] ECR I-01609.

⁴⁵ General Court, Case T-321/05 *Astrazeneca v European Commission* [2010] ECR II-02805.

the right in a way which is not consistent with the purpose in the name of which the legislator chose in the first place to grant him the right⁴⁶.

All these legal tests, which constitute the linchpin of the abuse of right principle, may eventually serve to shape a curative mechanism that would prevent the unfair misuse or degeneration of an exclusionary right, including the *sui generis* right envisaged by the Database Directive. Of course, there should be evidence that the database legal protection was exploited in an ambiguous way or to obtain advantages contrary to the goals pursued by the right, eventually leading to an unjustified imbalance between the database right holder's benefit and the sacrifice suffered by the counterparty.

In the medium and long term, however, it shall be carefully considered whether a more horizontal approach shall be endorsed in connection to digital data as such, the personal and non-personal boundaries having a formal nature only and the systemic implications of the accumulation, analysis and use of data raising similar issues deserving consistent analysis and solutions.

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⁴⁶ Consiglio di Stato, Sentenza n. 693/2014 (12/2/2014). A different dispute, yet unrelated to the antitrust realm, also gave the same authority the opportunity to further explore the scope of the doctrine and clarify that a right is abused when it is exercised in a way that, although consistent with the law, violates another principle of law, and when the benefit gained by the holder by exercising the right is unduly higher than the sacrifice that it casts upon the others (Consiglio di Stato, Sentenza n. 2857/2012 (17/5/2012)). Finally, at the intersection between competition and IP laws, a ruling by a Dutch court in the *ZTE v Vringo* case had invoked the abuse of right principle in relation to the misuse implemented by the holder of a standard essential patent, which had claimed for an injunction despite the existence of a FRAND licensing promise (The Hague District Court, Case n. 470109/KG ZA 14-870 *ZTE v Vringo* (2014)).