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DUALISTIC DATA PROPERTY RIGHT: SOLUTION FOR CONTROLLERSHIP OF DATA IN THE EUROPEAN UNION?

Petra *Žárská*

Faculty of Law, Comenius University in Bratislava, Slovakia

petra.zarska@flaw.uniba.sk

Matúš Mesarčík

Faculty of Law, Comenius University in Bratislava, Slovakia

matus.mesarcik@flaw.uniba.sk

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Summary: Personal data are new assets in the digital economy. While personal data are protected by GDPR in the European Union, its economic value is not protected. Unless, the economic value of personal data is addressed in legal systems of Member states, the interests of people are not fully covered. The article aims to fill the vacuum by introducing new property right to data, the dualistic data property rights. The dualistic data property right is conceptually inspired by Copyright. The article proposes the character and content of the right that is in line with existing legal system and GDPR as well. The authors embark on analyses of all aspect of the dualistic property right and its benefits for the digital economy.

Keywords: personal data, property rights, General Data Protection Regulation, ownership, moral rights, economic rights, Intellectual Property.

1 Introduction

The economic value of personal data is undisputable.[1] The European Union projects value of €829 billion concerning data in general on the continent in 2025.[2] Personal and non-personal data is the backbone of the proper function-

1 See further OECD. *The Economics of Personal Data and Privacy: 30 Years after the OECD Privacy Guidelines*. [online]. Available at: <https://www.oecd.org/sti/ieconomy/theeconomicsofpersonaldataandprivacy30yearsaftertheoecdprivacyguidelines.htm>. Accessed 15.10.2021. JEŽOVÁ, Daniela. Sharing Economy in Digital Single Market EU – a Phenomena with Future Potential. *European Studies*, vol. 7, 2020, pp. 218–236.

2 European Union. *European Data Strategy*. [online]. Available at: <https://ec.europa.

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ing of governments and many commercial services including widely used social media. The importance of data economy and revenues for social media providers have been already thoroughly discussed.[3] Benefits of data processing extends to various sectors including personalized medicine and better healthcare to more efficient transport or electronic public services requiring identification data.[4]

Due to the importance of data economy,[5] control or ownership of data is one of the fundamental issues. Personal data is a legal category well defined in the margins of EU data protection law. Whilst data protection law deals with aspects of personal data related to its protection, there is a big gap on the proper definition of personal data as an object of civil law. Given to fact that personal data have become valuable economic assets over last decade, most definitions are centred around qualifying personal data as an object of property law. In this article, the authors embark on creating the dualistic data property right related to personal data as the object of ownership. The issue has already been subject to academic debate[6] considering different views from ownership view[7] or priva-

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eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy> Accessed 15.10.2021.

3 VIERIA, Helena. *The economic value of personal data for online platforms, firms and consumers*. [online]. Available at: <https://blogs.lse.ac.uk/businessreview/2016/01/19/the-economic-value-of-personal-data-for-online-platforms-firms-and-consumers/> Accessed 15.10.2021.

4 European Union. *European Data Strategy*. [online]. Available at: <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy> Accessed 15.10.2021.

5 GÁBRIŠ, Tomáš; HAMUĽÁK, Ondrej. Pandemics in Cyberspace – Empire in Search of a Sovereign? *Baltic Journal of Law & Politics*, vol.14, no.1, 2021, pp.103–123. Considering efficiency of regulation of cyberspace see KASPER, Agnes; KRASZNAY, Csaba. Towards Pollution-Control in Cyberspace: Problem Structure and Institutional Design. International Cybersecurity. *International and Comparative Law Review*, 2019, vol. 19, no. 2, pp. 76–96.

6 See e.g. KERBER, Wolfgang. *Specifying and Assigning "Bundles of Rights" on Data: An Economic Perspective*. [online]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3847620> Accessed 15.10.2021. ZECH, Herbert. A legal framework for a data economy in the European Digital Single Market: rights to use data. *Journal of Intellectual Property Law & Practice*, 2016, 11 (6). pp. 460–470. ZECH, Herbert. Information as Property. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 6, 2015, pp 192–197. POLČÁK, Radim. Informace a data v právu. *Revue pro právo a technologie*. [online]. 2016, č. 13, pp. 67–91. Available at: <https://journals.muni.cz/revue/article/view/4946> Accessed 15.10.2021.

7 See e.g. BIRCH, Kean – COCHRANE, DT – WARD. Callum. Data as asset? The measurement, governance, and valuation of digital personal data by Big Tech. *Big Data & Society*, January–June: 1–15. PIERRE, Barbara. Classification of Property and Conceptions of Ownershipin Civil and Common Law. *Revue générale de droit*, 28(2), 1997, pp. 235–274. AKKERMANS, Bram. *The Principle of Numerous Clausus in European Property Law*. Intersentia, 2008.
GORDLEY, James. *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*. Oxford University Press, 2016. JANEČEK, Václav. Ownership of Personal Data in

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cy.[8] The aim of the authors is to provide an overview of current theories on the definition of personal data as the object of property law in the context of the EU data law. Specific theories combining civil law perspective and data law perspective were selected. Based on the findings and inconsistencies in the EU data law, the concept of dualistic data property right is proposed.

The article is divided into introduction, three parts and conclusion. After the introduction, part 2 maps several legal aspects of the definition of personal data as the object of property law from Civil Law perspective. Third part of the article analyses the definition of data (including personal data) in the context of the EU data law, specifically General Data Protection Regulation (GDPR)[9] and proposed Data Governance Act. Specific rights and controllership mechanisms are discussed. Final part presents the data property right with dualistic character formulated by authors as the most viable option for future legislations. In conclusion, authors summarize presented arguments and theories with the preference for the dualistic data property right.

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the Internet of Things. *Computer Law & Security Review*, 2018, 34(5), pp. 1039–1052. DE HINGH, Anne. Some Reflections on Dignity as an Alternative Legal Concept in Data Protection Regulation. *German Law Journal*, (2018) 19, pp. 1269–1290. JURCYS, Paulius. et al. Ownership of User-Held Data: Why Property Law Is the Right Approach. *Harvard Journal of Law and Technology Digest 2021*. [online]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3711017>. Accessed 15.10.2021.

8 See ex.g. YU, Xiaolan. – ZHAO, Yun. Dualism in data protection: Balancing the right to personal data and the data property right. *Computer Law & Security Review*, Volume 35, Issue 5, 2019. p. 5. PEARCE, Henry. Could the doctrine of moral rights be used as a basis for understanding the notion of control within data protection law? *Information & Communications Technology Law*, Volume 27, 2018, Issue 2, pp. 133–165. ROSTOW, Theodore. What Happens When an Acquaintance Buys Your Data? A New Privacy Harm in the Age of Data Brokers. *Yale Journal on Regulation*, 2017, 34. TRAKMAN, Leon – WALTERS, Robert – ZELLER, Bruno. Is Privacy and Personal Data Set to Become the New Intellectual Property? (2019) *International Review of Intellectual Property and Competition Law*, UNSW Law Research Paper No. 19–70. [online]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3448959> Accessed 15.10.2021. PURTOVA, Nadezhda. Do property rights in personal data make sense after the Big Data turn? Individual control and transparency. *Journal of Law and Economic Regulation*, November 2017, 10(2). FUNTA, Rastislav. Obchodovanie s osobnými údajmi z pohľadu hospodárskej súťaže (essential facility). *Justičná Revue*, 1/2020, 2020.

9 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).

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2 Recent theories: The ownership, dualism and erga omnes effect

2.1 The ownership of personal data

Personal data have been already recognized as valuable economic assets[10], therefore, the question of ownership must be asked. Can people own their personal data in the true meaning of the traditional ownership[11] designed by civil laws of EU Member states? There is no general definition of an ownership in EU legislation. Member states are predominantly jurisdictions of the civil law; therefore, the authors focus on the ownership under the civil law. "The civil law recognizes a limited number of property rights and a limited number of legal objects that can be subjects to these property rights (the so-called numerus clausus)[12]. Therefore, the civilian idea of ownership is an absolute dominion encompassing all the listed rights (numerus clausus)."[13] The authors proceed with "an absolute concept of ownership to accent the common erga omnes/in rem feature of ownership."[14] Is personal data a property? This question is crucial to the ownership of personal data. Personal data are only defined in GDPR, but not as a property or object of ownership. Although data are not defined as an object of ownership, the process of propertisation has already begun. "We may discuss propertisation – the resource turns into property."[15]

According to Commission Staff Working Document on the free flow of data and emerging issues of the European data economy[16]from 2017, "for the vast majority of the EU Member States, the issues of ownership and access to data are indeed emerging ones, but discussions seem to still be in early stages. Most Member States have not formulated a policy on issues of "data ownership" and access to commercially-held data yet."[17] Although there has not been published a new document on the topic from Commission since 2017, academics have

10 BIRCH, Kean. – COCHRANE, DT, WARD. Callum. Data as asset? The measurement, governance, and valuation of digital personal data by Big Tech. *Big Data & Society*, January–June, pp. 1–15.

11 PIERRE, Barbara. Classification of Property and Conceptions of Ownershipin Civil and Common Law. *Revue générale de droit*, 28(2), 1997.

12 AKKERMANS, Bram. *The Principle of Numerous Clausus in European Property Law*. Intersentia, 2008.
GORDLEY, James. *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*. Oxford University Press, 2016, p. 49.

13 JANEČEK, Václav. Ownership of Personal Data in the Internet of Things. *Computer Law & Security Review*, 2018, 34(5), p. 1041.

14 Ibid.

15 Ibid, p. 1042.

16 European Commission. *COMMISSION STAFF WORKING DOCUMENT on the free flow of data and emerging issues of the European data economy*, point. 4. [online]. Available at:<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017SC0002> Accessed: 15.10.2021.

17 Ibid.

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moved forward in advocating for the ownership of personal data with various arguments and theories.

2.2 Justification of ownership

The idea of owning personal data is fairly new, connected to digital world. The ownership of personal data can be explained by two approaches: bottom-up and top-down. „In the top-down approach, some superior authority must posit ownership, otherwise it would not exist. De jure ownership thus precedes de facto ownership. It explains and justifies introduction of ownership by some authoritative reasons and goals, i.e., by reference to interests that are considered sufficient regardless of individuals' interests. It is important to stress though that these authoritative and, in democratic societies, public interests can be perfectly in line with individual persons' preferences— which may be a source of confusion when identifying the top-down approach to ownership of personal data—but that these individual non-authoritative interests are irrelevant."[18] The top-down approach has not been applied yet, EU and Member states have not posited ownership of personal data. The ownership of personal data seems to be in the interest of citizens, data subjects. "By contrast, the idea common to all bottom-up approaches to ownership is that property rights, the owner and the valuable resource are all inherently pre-positive and would exist regardless the official legal system. In the bottom-up perspective, de facto ownership precedes de jure ownership, and the overarching reason why it is desirable to introduce de jure ownership is merely to bestow stability upon the de facto state of affairs."[19] While EU and Member States hesitate, people have got a head of the law. People use personal data like commodity[20], without knowing that personal data are objects of ownership in these transactions. EU is behind the de facto situation of owning personal data. We can see that, in this situation, the bottom-up approach precedes top-down approach. The approaches differ considerably. "The core distinction thus is that whereas in the top-down approach the law posits and creates ownership as a fundamentally legal institute, i.e. something that would not exist without the positive laws; in the bottom-up approach the law protects and sustains ownership as a fundamentally pre-positive." [21] Both approaches possess some shortcomings, therefore the more suitable approach is *a revised version of*

18 JANEČEK, Václav. Ownership of Personal Data in the Internet of Things. *Computer Law & Security Review*, 2018, 34(5), p. 1044.

19 Ibid.

20 The Guardian. *Facebook launches app that will pay users for their data*. [online]. Available at: <https://www.theguardian.com/technology/2019/jun/11/facebook-user-data-app-privacy-study> Accessed: 15.10.2021. See in the context of geo-blocking HAMUĽÁK, Ondrej – KISS, Lilla Nóra – GÁBRIŠ, Tomáš – KOCHARYAN, Hovsep. "This Content is not Available in your Country" A General Summary on Geo-Blocking in and Outside the European Union. *International and Comparative Law Review*. 2021;21(1), pp. 153–183.

21 JANEČEK, Václav. Ownership of Personal Data in the Internet of Things. *Computer Law & Security Review*, 2018, 34(5), p. 1044.

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a bottom-up explanation and justification of ownership of personal data. It means that this revised bottom-up theory must be better able to encompass conceptually personal data as potential objects of ownership rights and IoT as the key future environment for data transactions. Conceptually, this means to disambiguate information from data and to consider ownership exclusively in respect of data. Furthermore, this theory must also disambiguate intrinsically personal data from extrinsically personal data. The revised approach works with the idea, that that only extrinsically personal data can be discussed as a potential object of ownership rights and that these two categories shall not be replaced with the traditional duality between personal and non-personal data.[22] The revised bottom-up approach is novel mostly for the separation of intrinsically personal data from extrinsically personal data, where intrinsically personal data are for example a human DNA sequence or human cellular samples. According to the approach, the ownership of personal data would not cover intrinsically personal data, the ownership would only cover extrinsically personal data, for example GPS data, your IP address.

2.3 Ownership of different subjects: Is the dualism model a perfect solution?

The dualistic character of personal data is evident, because personal data are seen as an object protected by GDPR and a potential object of ownership in the digital economy. The dualism model of personal data "takes into account both, the right of data subjects and the property right in data. Data are believed to constitute a basic national resource, and the development and success of the digital economy therefore relies to a certain extent on the existence of an appropriate legal regime for the protection of data property rights."[23] The complex legal regime for the protection of data property rights is about to be built. The legal regime is conditioned on who possess the data property right, why this subject is entitled to the ownership and whether the ownership can be transferred. The digital economy exposed the existence of "three categories of holders of data property right – data users, data processors and data purchasers."[24] The process of becoming a holder of data property right depends on the beginning of data processing. "Before processing, data reflect raw information on data users without any value-added work, and hence users should have the final say on data ownership and enjoy the right to their personal data. After processing to remove information permitting identification of the data subject and to perform generalisation, the data now have added value for commercial transactions, and hence the property right in the data should rightly belong to the data processor."[25] The

22 Ibid, p. 1052.

23 YU, Xiaolan. – ZHAO, Yun. Dualism in data protection: Balancing the right to personal data and the data property right. *Computer Law & Security Review*, Volume 35, Issue 5, 2019. p. 5.

24 Ibid, p. 10.

25 Ibid, p. 6.

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moment when the data property right belongs to a subject different from a data subject is the moment of adding a value to personal data, some information that is not a part of data. The question is whether it is the data property right to same data or different data, because raw data and processed data are not the same data. Then processed data can be sold to a data purchaser, where a data purchaser is the second holder of data property right to processed data. According to the dualism in personal data," once the processed data are sold on the market that right than transfers to the data purchaser. It should be noted, however, that both data processors and data purchasers can also be considered data controllers, and it is thus this entity that should ideally enjoy the property right in data, a possibility that the proposed dualism model, which takes into account both the data owner and data controller, allows."[26] The proposed legal regime suggests a gradual transfer of property right based on processing data between a data subject and a data processor. The data processor then would add some value to processed data and creates a new data – processed data. This legal regime designs a new category of owners – data processors and purchasers. "The legal regime also clearly differentiates between rights of data subjects under GDPR and the data property right.[27] The primary target of the data property right arising in the digital economy is the protection of data controllers' rights. First, the object of property rights is expanded by defining data as a new object. That expansion is also in line with the historical development of the concept of property itself. The delineation of the possible types of data that can be used in transactions helps to prevent the illegal disclosure of state secrets, trade secrets and personal data. Second, the dichotomy within the data property right is intended to specify that the right to personal data protects the original data owned by the right holder, whereas the data controller holds the right to the processed data as data property."[28] [29] This legal regime, proposed by Xiaolan Yu and Yun Zhao, creates a new data system, where data are property, the ownership can be transferred, and new holders of data property rights enter the digital economy. "Third, the data controller, who enjoys possession rights over data products, should reach agreement with the user of those products regarding the relationship between the right of possession and the right of use. The transfer of data property rights through licensing forms an important part of the regime for the commercial use of data. Accordingly, the data controller's right and the limits of that right can be defined by making reference to the fair use and compulsory use systems, thereby striking a balance

26 Ibid.

27 RATTI, Matilde. *Personal-Data and Consumer Protection: What do They Have in Common?* Studies on Intellectual Property and Competition Law, (2018) 28 pp. 377–393.

28 DE HINGH, Anne. Some Reflections on Dignity as an Alternative Legal Concept in Data Protection Regulation. *German Law Journal*, (2018) 19, pp. 1269–1290.

29 YU, Xiaolan. – ZHAO, Yun. Dualism in data protection: Balancing the right to personal data and the data property right. *Computer Law & Security Review*, Volume 35, Issue 5, 2019, p. 10 ff.

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between private rights and public interests."[30] The proper legal system in which the data property would function as a type of ownership, must contain licensing opportunities for holders of data property right. Without licensing system in place, options for the use and monetisation for holders of data property right would be considerably limited. "Fourth, data controllers need to follow the principles identified above in the process of data transactions. Otherwise, they will be held contractually or tortuously liable. Contractual infringement of the right to personal data and the data property right leads to mental and punitive damages, respectively. In view of the low threshold for and complexity of data property infringement, tortious liability for such infringement is determined in accordance with the binary liability method of fault and presumption of fault (dualism). Such a regime, in which the infringer bears the burden of proof, best protects the victim's interests. Finally, the liability (including joint and indirect tortious liability) for the data exchanges taking place after the occurrence of disputes in data transactions are to be determined according to the extent of the subjective fault."[31] The authors, Xiaolan Yu and Yun Zhao, created a compact system where the data property right and the right to personal data can coexist together. They recognized new types of holders of data property right, also designed a licensing system and solved out the infringement of the data property right. According to these authors, the dual system of the data property right works through licenses with contractual and tortuous liability.

2.4 Doctrine of moral rights: The right control?

Although, the above mentioned proposed legal system accommodates the reality of the digital economy and deals with dualism in data in terms of holders of data property rights, it does not address the dualistic character of personal data itself. The dualistic character of data complicates the control over personal data. The control over data is the key element for the definition of personal data as an object of ownership. If a data subject or data controller is not enabled by law to control the object – data as his possession, the complex idea of ownership through data property right is not feasible. There is a workable solution for the control over the object with dualistic character as data. The solution lies in the interesting comparison of a control exercised under moral rights – the basic concept of Intellectual Property Law and under GDPR. Firstly, we notice "numerous observable similarities between moral rights and data protection rights. Despite moral rights and data protection rights being concerned with qualitatively different subject matter, they are both plainly concerned with the notion of control and ensuring individuals can exert control over certain things that are somehow personal to them or *intrinsically* linked to their identity. Both creative works, and personal data, can be accurately described as such."[32] Secondly, the justi-

30 Ibid.

31 Ibid.

32 PEARCE, Henry. Could the doctrine of moral rights be used as a basis for understanding

fication of a control stem from clear benefits arriving from the control. "The desire to establish individual control from both moral rights and data protection perspective is evidently heavily linked to the idea that doing so will allow the individual to manage important aspects of their identity and, concurrently, will provide wider societal benefits through ensuring the accuracy and integrity of certain types of information."[33] Thirdly, it is very important for the establishment of control to realize, how many similarities can be found between moral rights and data protection rights. "These similarities, however, run deeper than purely theoretical resemblances. Instead, when looking at the practical implementation of moral rights, we can see there are apparent practical similarities between the two."[34] The right of attribution and right of integrity appear to be similar to the rights of information and access, the right to be forgotten, the right of data portability and the rules regarding consent, because" insofar as they all represent legal mechanisms by which individuals can attempt to exert a connection to, or restrict the use of, something that is personal to them, but there is another key similarity that can also be identified. Notably, by giving the individual the ability to assert such connections and make such objections, the notions of control as envisaged by both the doctrine of moral rights and data protection law appear to place a heavy emphasis on the individual being a rational and autonomous agent."[35] The doctrine of moral rights and data subjects' rights understand a control over works and personal data as the highest prerogative of a person. In case of moral rights, it is a natural person – authors. In case of data subjects' rights, it is a data subject, again a natural person. "Both areas of law appear to view the individual as a figure who is presumed to have the capacity to make active and informed choices regarding the use of information or objects that are intrinsically linked to their identity. Given the apparent similarities between these two different areas of law and legal scholarship, both of which appear to be concerned with individual control, it can tentatively be concluded that by looking more thoroughly and extensively at how control is envisaged and treated within the doctrine of moral rights, an area of law that has existed for far longer, and is far more developed, than data protection law as we know it today, we might be able to learn more about the true nature of control as contained within data protection law which, as noted previously, is a concept which is poorly-understood and underdeveloped."[36] The question of the control over personal data is answered by the application of moral rights. The concept of moral rights exercises a control of author over his works in a manner like the control needed for exercising the data property right.

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the notion of control within data protection law? *Information & Communications Technology Law*, Volume 27, 2018, Issue 2, p. 164.

33 Ibid.

34 Ibid.

35 Ibid.

36 Ibid.

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2.5 Data property right with erga omnes effect

What should be the character of data property right? Shall the right be designed as traditional ownership typical for Member states with Civil law? Or should we design it as quasi property right accommodating only certain, best fitted aspects of ownership? In 2011, Nadehzda Purtova in the detailed study Property rights in personal data[37] thoroughly analysed the process of propertisation of personal data in Europe. The study examines every angle of propertisation of personal data. The study concludes that "that the principal possibility to introduce property rights in personal data and the allowed scope of those rights are two different issues. Although the existing data protection framework does not rule out and, even more so, encourages the introduction of rights in personal data that have erga omnes effect, it is an entirely different question what the allowed scope of those rights would be. As to the limits of propertisation in the EU legal order, although information selfdetermination and control are a common denominator in the bulk of the data protection laws in Europe[38], the purpose of which is to enable an individual to have a degree of freedom to choose what happens to his personal data, that does not suggest that the allowed degree of control allows absolute dominium over personal data, including free and unlimited alienation of control rights."[39] Nadezhda Purtova updated her theory of the possible propertisation of personal data in article from 2017[40], where she „revisited the European debate on the introduction of property rights in personal data in order to include the newest developments in law and data processing practices, such as the advances in Big Data."[41] She reinforced her initial position from 2011 by arguing "that there are clear indications that the idea of property in personal data should be given a serious consideration: the protective potential of the property rights to work as an alternative legal tool to enforce individual control over personal data, the need to acknowledge the economic value and function of personal data as a resource both for the information industry and for individuals, and finally, the de facto presence of the property-like claims of the information industry in personal data, and the need to take measures to ensure that the data-generated wealth is shared fairly."[42] Although she still considers personal data the object of property right, she identified serious problems related to the propertisation of data. "Namely, personal data cannot be considered as

37 PURTOVA, Nadezhda. Do property rights in personal data make sense after the Big Data turn? Individual control and transparency. *Journal of Law and Economic Regulation,* November 2017, 10(2).

38 BYGRAVE, Lee. *Data Protection Law: Approaching Its Rationale, Logic and Limits*. Kluwer Law International; 1st edition, 2002.

39 PURTOVA, Nadezhda. Do property rights in personal data make sense after the Big Data turn? Individual control and transparency. *Journal of Law and Economic Regulation,* November 2017, 10(2), p. 260.

40 Ibid.

41 Ibid, p. 17

42 Ibid.

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concerning just an individual anymore; data processing resulting from a decision of one person will inevitably have spill over effects on others, e.g. as a result of profiling, or as a result of the same piece of data relating to a group of people, e.g. genetic data. Therefore, true individual control over personal data and also the effective enforcement of the individual property rights in personal data are difficult if not impossible to achieve. At the same time, the reasons to create erga omnes protection of data grounded in the data economic value and sharing of the data generated wealth still stand."[43] According to Nadezhda Purtova, all these problems "points to the necessity to consider collective property rights in data and collective data management."[44]

The authors also identify problems pointed out by Nadezhda Purtova and consider a system of collective data property rights as the most workable solution, because a similar system functions for years in the area of Copyright. Obviously, there is a necessity to define the rights to be collectively managed, but that can be easily achieved.

3 Perspective of EU Data Law

As already partially discussed above, EU data law falls short in terms of effective concerning providing data property rights to data subjects. However, we are of the opinion that careful consideration of the hypothesis shall be provided taking into account relevant data subject´s right according to General Data Protection Regulation and provisions of forthcoming data legislation, namely Data Governance Act[45] and Data Act.

3.1. Data subject´s individual rights and control in General Data Protection Regulation

General Data Protection Regulation (GDPR) does not regulate ownership of personal data. The aim of the legislation is to provide free flow of personal data in the EU, set out the rules for processing personal data and provides protection of data subjects.[46] It applies to wide range of processing operations[47] with per-

43 Ibid, p. 18

44 Ibid, p. 18.

45 European Union. Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on European data governance (Data Governance Act). COM/2020/767 final.

46 GDPR, Article 1.

47 GDPR, Article 4 (2): "processing means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction." In the context of surveillance see e.g. CARPENTER, Christine. Privacy and Proportionality: Examining Mass Electronic Surveillance under Article 8 and the Fourth Amendment. *International and Comparative Law Review*, vol.20, no.1, 2020, pp. 27–57.

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sonal data. The notion of personal data is the cornerstone of the regulation. Personal data is defined as "any information relating to an identified or identifiable natural person."[48] The provision further stipulates demonstrative list of direct or indirect identifiers including "name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person."[49] In the context of identifiability, "account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments."[50] The definition is further supported by interpretation provided by Article 29 Data Protection Working Party[51] and decisions of the Court of Justice of the European Union.[52] The current understanding of the notion of personal data is extensive and even information about weather may qualify as a personal data.[53] The landmark decision I in this context is represented by case *Patrick Breyer v Germany*.[54] The decision explained the concept of identifiability requiring *legality* of the process of identifiability as enshrined in the test of reasonable likeliness to identify according to Recital 26 GDPR.[55] Concluding remarks towards the notion of personal data and material scope of GDPR, the protection is provided to wide range of information processed by controllers or processors.

Nevertheless, it shall be highlighted again that the aim of GDPR is not to provide controlling rights over personal data. This is evident in limited autonomy in provision of data considering different legal grounds in GDPR. Data subject does not always have the choice considering provision of personal data. This is especially apparent in case of legal obligations[56] or processing in the public interest[57] pursued by controllers. When these obligations apply, personal data is processed regardless the will of data subjects and limited options are available in

48 GDPR, Article 4 (1).

49 Ibid.

50 GDPR, Recital 26.

51 Article 29 Data Protection Working Party. *Opinion 4/2007 on the concept of personal data.* [online]. Available at: <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf> Accessed 15.10.2021.

52 Court of Justice of the European Union. C-582/14 *Patrick Breyer v Bundesrepublik Deutschland.* 19 October 2016. Court of Justice of the European Union. C-434/16 *Peter Nowak v Data Protection Commissioner*. 20 December 2017.

53 PURTOVA, Nadezhda. Health Data for Common Good: Defining the Boundaries and Social Dilemmas of Data Commons. LEENES, Ronald et al (eds). *Under Observation – The Interplay Between eHealth and Surveillance*, 2017 Springer.

54 Court of Justice of the European Union. C-582/14 *Patrick Breyer v Bundesrepublik Deutschland.* 19 October 2016.

55 Ibid.

56 GDPR, Article 6 (1) c).

57 GDPR, Article 6 (1) e).

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the context of control. GDPR then provides specific limitations and obligations of processing for controllers and processors.

However, GDPR provides a range of individual rights *after* personal data is provided allowing some degree of control. The fundamental individual rights forming prerequisite for further actions are right to information under Article 13–14 GDPR and right to access under Article 15 GDPR. Without these rights, data subjects would have no information and knowledge regarding personal data processing resulting in impossibility to exercise other individual rights. Right to information corresponds to information obligations of controllers. In practice, controllers shall disclose specific information about processing of personal data[58] prior the commencement of processing. However, this information is general and does not relate specifically to concrete data subject. To access specific information in the possession of controller, right to access according to Article 15 shall be exercised. The controller is then obliged to provide a data subject with specific information concerning him or her. GDPR provisions one exception to the specific modality of right to access in the form the right to obtain a copy of personal data in case that provision of the copy would adversely affect the rights and freedoms of others.[59] Right to access as such does not affect the processing of personal data on the side of the controller. It merely requires controllers to disclose what they had collected concerning specific data subject. Only further actions including exercise of other individual rights by data subject may influence processing of personal data.

More relevant rights in terms of control over personal data are right to erasure and right to data portability allowing data subjects specific actions. Right to erasure is provided in the Article 17 GDPR: "data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay."[60] The rationale and policy underpinning of the rights partially stems from landmark decisions of the CJEU in the case of *Google Spain*.[61] Additionally, the right to erasure is not automatic and one of the requirements shall apply: personal data are no longer necessary with regard to the purpose of processing, withdrawing (explicit) consent, successful objection towards processing of personal data, unlawfulness of processing, compliance with legal obligation or digital consent of children.[62] These requirements are interpreted restrictively. Furthermore, if one of the exceptions to the right applies, controller shall deny the exercise of the right. Exceptions relate to balancing freedom of expression, compliance with legal obligation, reasons of pub-

58 See GDPR, Article 13 and 14 respectively.

59 GDPR, Article 15 (4).

60 GDPR, Article 17 (1).

61 Court of Justice of the European Union. C-131/12. *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González.* 13 May 2014.

62 Ibid.

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lic interest in the area of public health; archiving purposes in the public interest, statistical or scientific or historical research purposes or establishment, exercise or defence of legal claims.[63] This in practice means, that not every request for erasure is successful and controllers have many legal options how to deny the exercise of the right in case of one of the requirement does not apply or one of the exception is applicable. The real control of personal data via right to erasure is therefore very limited. For example, Google received 4,544,621 requests for deletion until 11.10.2021, but only 1,169,880 requests were successful (47.9 %).[64]

From the point of view of controllership over personal data, more interesting is the right to data portability under Article 20 GDPR. It is the new right in the EU data protection law, previously not covered by EU directive on personal data processing.[65] As enshrined in the Recital 68, one of the fundamental aims of the right to data portability is strengthening the control and *ownership* of data.[66] Article 20 (1) GDPR stipulates the foundations of right to data portability: "The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided." Similarly, to right to erasure, the right may be exercised if one of two requirements regarding legal ground for processing applies. For successful exercise of the right the processing must be based on (explicit) consent or on a contract. This condition automatically excludes exercise of the right when the processing is based on other legal grounds e.g., legal obligations or legitimate interest. Additionally, the processing shall be carried out by automated means[67] meaning that manual processing of paper files is excluding from the scope. Further limitation was provided by the Article 29 Data Protection Working Party in its guidelines[68] concerning type of personal data. Guidelines acknowledges that right to data portability applies to personal data directly *provided* by data subject and *observed* by controller. Right to data portability does not apply to inferred or derived personal data by a controller as data is covered by intellectual protec-

63 GDPR, Article 17 (3).

64 Google. *EU Transparency Report*. [online]. Available at: <https://transparencyreport.google.com/eu-privacy/overview?hl=en> Accessed 15.10.2021.

65 GRAEF, Inge. – HUSOVEC, Martin – PURTOVA, Nadezhda. Data Portability and Data Control: Lessons for an Emerging Concept in EU Law. *German Law Journal* 2018, vol. 19 no. 6, p. 1359–1398.

66 GDPR, Recital 68: "To further strengthen the control over his or her own data, where the processing of personal data is carried out by automated means, the data subject should also be allowed to receive personal data concerning him or her which he or she has provided to a controller in a structured, commonly used, machine-readable and interoperable format, and to transmit it to another controller."

67 GDPR, Article 20 (1).

68 Article 29 Data Protection Working Party. *Guidelines on the right to "data portability"*. [online]. Available at: <https://ec.europa.eu/newsroom/article29/items/611233/en> Accessed 15.10.2021.

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tion rights.[69] This limitation in practice means that if a data subject exercises the right toward search engine, he or she will receive personal data directly provided by him or her (service registration data e.g., name and surname, address, e-mail address etc.) and data observed by controller based on directly provided data (data from the activity e.g. searched terms, searched results etc.). Exclusion of inferred and derived data stems from the exception provided in Article 20 (4) GDPR. Similarly, as in case of right to access, right to data portability does not apply when the exercise would adversely affect the rights and freedoms of others. The final limitation of the right consists of specific format of portable data. Personal data for the purpose of data portability shall be "in a structured, commonly used and machine-readable format."[70] The obligation means providing data in commonly used open format e.g., XML, JSON, CSV etc.[71]

In general, right to data portability provides an opportunity for limited data control. However, due to its limitations and scope is far from absolute control over personal data of data subjects.

3.2 Measures for control of data in the proposal of Data Governance Act

In November 2020 the European Commission introduced a proposal for a regulation of the European Parliament and the Council on European data governance commonly referred to as Data Governance Act or DGA (further as "DGA proposal").[72] DGA proposal complements already revised legislation on re-use of public sector information as the directive[73] does not apply to personal data or information protected by intellectual property rights. This gap shall be mitigated by the proposed DGA.

The main aims of DGA oscillates around data sharing and data re-use. From the point of subject matter of the article two goals of the legislation shall be highlighted: (1) conceptualizing harmonized rules for conditions for the re-use of certain categories of data held by public sector bodies in the EU and (2) establishing a framework for voluntary registration of entities which collect, and process data made available for altruistic purposes.[74]

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69 Ibid, pp. 10–11.

70 GDPR, Article 20 (4).

71 Article 29 Data Protection Working Party. *Guidelines on the right to "data portability"*. [online]. Available at: <https://ec.europa.eu/newsroom/article29/items/611233/en> Accessed 15.10.2021, pp. 17–18.

72 *Proposal for Data Governance* Act. [online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0767>. Brussels, 25.11.2020. COM (2020) 767 final. 2020/0340(COD).

73 European Union. Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information. PE/28/2019/REV/1. OJ L 172, 26.6.2019, p. 56–83.

74 DGA proposal, Article 1 (1).

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From the point of scope of DGA proposal, it shall be noted that the proposal does not apply only to personal data, but also to non-personal data. For this purpose, the proposal defines data as "any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording."[75] Additionally, from the point of personal scope the act shall be applicable primarily to public sector bodies holding specific categories of data therefore limiting the scope.

Concerning re-use of public sector information containing specific categories of data (including personal data), public authorities are under obligation to disclose conditions for re-use of such data they are holding. The dispassion of data by public sector bodies is closely connected to the notion of data holders being "legal person or data subject who, in accordance with applicable Union or national law, has the right to grant access to or to share certain personal or non-personal data under its control."[76] The definition is unclear in the context of EU data protection law as it presumes "right to grant access or share data." It is unlikely that the scope of the right would be the same as right to access under Article 15 GDPR. DGA proposal presumes the right in question in the moment of disclosure of data in the context of data subject and not to the situation where data are already processed by other entities. Furthermore, the Explanatory memorandum to DGA proposal states as one of the aims of the act to "empower natural and legal persons by giving them a better overview of and control over their data." The scope of the right is unclear and not further defined in the DGA proposal.[77]

More interestingly, DGA proposal contains *actio revendicatio* on data in terms of data sharing services.[78] Data sharing services represent specific intermediaries for the purpose of efficient and safe data sharing under strict conditions including notification to competent bodies.[79] In terms of data subjects, data sharing services *inter alia* serve as "intermediation services between data subjects that seek to make their personal data available and potential data users, including making available the technical or other means to enable such services, *in the exercise of the rights provided in GDPR* (emphasis added)."[80] One of the specific conditions for providers of data sharing services is to provide sufficient guarantees "that allow data holders and data users to obtain access to their data in case of insolvency."[81] The provision thus indirectly protects data of data hold-

75 DGA proposal, Article 2 (1).
76 DGA proposal, Article 2 (5).
77 See more BALOUP, Julie. et al. *White Paper on the Data Governance Act*. [online]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3872703> Accessed 15.10.2021, p. 12–13.
78 Ibid, p. 36.
79 DGA proposal, Article 9 and 10.
80 DGA proposal, Article 9 (1) b).
81 DGA proposal, Article 11 (6).

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ers and data subjects in limited cases (insolvency) "by providing them with one 'stick of the bundle' of property rights, without having to engage in a sensitive "all or nothing" discussion on whether there should be ownership rights in data."[82]

Finally, DGA proposal introduces the concept of data altruism defined as "*the consent by data subjects to process personal data pertaining to them*, or permissions of other data holders to allow the use of their non-personal data without seeking a reward, for purposes of general interest, such as scientific research purposes or improving public services (emphasis added)."[83] The idea behind the concept is that data subject (or data holder) may decide to entrust its data based on consent to specific organization and data shall be used for the purposes of general interest including research or improvement of public services. This allows data subject for a certain level of autonomy in the context of the decision of providing or not-providing data for the purposes mentioned above. However, consent mechanism as currently foreseen by DGA proposal is widely criticised to be not in compliance with requirements in GDPR.[84]

To sum up controllership mechanisms for data in DGA proposal, the scope of the proposed act is narrow as it applies only to specific mechanisms and specific bodies. Data subjects have an unclear right to grant access. Moreover, proposal for *actio revendicatio* on data is limited to the cases of insolvency and does not apply universally. The concept of data altruism stands on the autonomy of data subject to decide concerning collection of data.

It shall be highlighted that the European Commission will introduce the proposal for Data Act in late 2021. Data Act will provide a revised framework for databases and data sharing. Portability of data is discussed as one of the potential issues regulated by the act.[85] Empowering data subjects with extended data portability right and creating personal data spaces is also proposed in the European Data Strategy.[86]

4 Proposal for the dualistic Data Property Right

Personal data and its rising prominence signal the inevitability of its further positioning in the legal systems of Member states. Given the fact that the protec-

82 Ibid.

83 DGA proposal, Article 2 (10).

84 BALOUP, Julie et al. *White Paper on the Data Governance Act*. [online]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3872703> Accessed 15.10.2021, p. 38 ff.

85 Data Protection Report. *EU's possible Data Act: What can we anticipate from the Inception Impact Assessment and the Consultation?* [online]. Available at: <https://www.dataprotectionreport.com/2021/07/eus-possible-data-act-what-can-we-anticipate-from-the-inception-impact-assessment-and-the-consultation/> Accessed 15.10.2021.

86 European Union. *European Data Strategy*. [online]. Available at: <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy> Accessed 15.10.2021.

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tion of personal data under Data protection law is strong thanks to GDPR, the economic value of data needs to be addressed as well. The authors distinguish the execution of data protection rights and execution of property-like aspects of personal data. The process of propertisation has already began. In fact, personal data are already treated as property[87], regardless of the general hesitance to define personal data as a property. The law is once again behind the development of society. Individuals already treat personal data as a property, we see the establishment of the data property right "from the bottom" that reflects the theory of *revised bottom-up approach.* However, official authorities, like Member States and EU, have not yet directly acknowledged the existence of *de facto* data property right. Personal data have a dualistic character because it encompasses the data on a data subject and a certain economic value of the data. Personal data gained the economic value due to the expansion of digital economy. The idea of selling personal data to a private company would have been unthinkable several decades ago. Yet we arrived to the age of selling personal data without a suitable legal structure. The absence of clear legal guidance might cause havoc. Although EU provided a solid protection of personal data through GDPR, the economic aspects of personal data remain mainly untouched on EU level as discussed in the part 3. The gradual process of introducing personal data in the legislation of EU might be the right approach. Firstly, EU protects personal data, then it should protect the economic value embedded in personal data. As outlined above, a recent social development and theories agree on the inevitability of definition of personal data as an object of ownership. The dualistic character of personal data is a key feature that makes personal data worthy of protection by data protection law and at the same time, it makes personal data an object of ownership, a valuable property in the digital economy. How to address the dualism typical for personal data in terms of enabling data subject and other involved actors to fully enjoy the property-like qualities of personal data?

4.1 The structure of dualistic data property right

The authors are of opinion that the dualistic data property right is the most suitable way of accommodating all aspects of personal data. Firstly, the dualistic data property right (further also "DDPR") would function independently from data subject's rights according to GDPR. The absence of overlap is caused by separating DDPR from rights of a data subject. The DDPR is designed to allow a full management of personal data as a property. The exercise of data subject's rights would not interfere with the execution of DDPR, because a data subject is able to exercise all the rights under GDPR whether there is a DDPR or not. In other words, some data subjects might not commercialize their data and still be able to exercise their rights guaranteed by GDPR.

87 ROSTOW, Theodore. What Happens When an Acquaintance Buys Your Data? A New Privacy Harm in the Age of Data Brokers. *Yale Journal. on Regulation*, 2017, 34.

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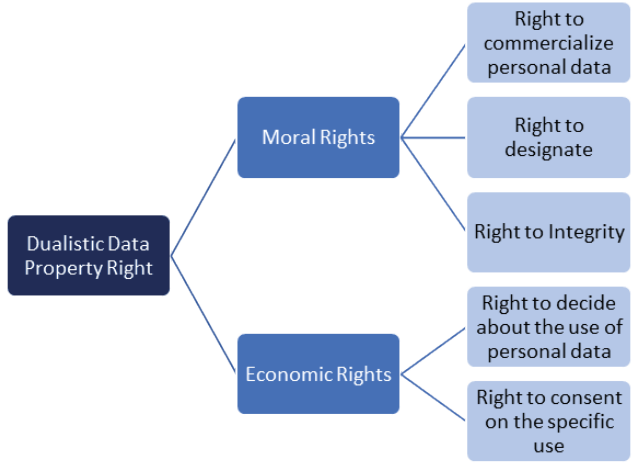
Secondly, DDPR is built as a dualistic right that contains two sets of rights: moral and economic rights. This structure mirrors the structure of Copyright. The authors consider the structure as the most suitable for two reasons. First reason is that personal data and works protected by Copyright are both intangible properties. Authors consider personal data to be a *sui generis* intangible property waiting for the recognition in the system of Civil law. Second reason is a similar character of personal data and works, both representing something very close, an integral part of a person. The concept of moral rights in DDPR mirror the unalienable aspect of personality or person imprinted in personal data. It correlates with a personal imprint left in every work protected by Copyright. Moreover, the moral rights in Copyright vest in an author a control over the works even when economic rights of an author are exercised by a third party – an order party or employer. This type of control is required for personal data as well, if the proper commercialization of personal data is about to happen. Data subjects should have moral rights allowing them to control personal data to a certain degree, even after licensing them to third parties – a data processor, data purchaser. For all those opponents of moral rights who would argue that moral rights impede the trade, we have a solution in the form of a waiver. According to Copyright rules, an author can wave moral rights. The waiver has to be in the written form, whereas the extent and way of limitation of moral rights have to be clearly stated and the waiver is revocable, if the waiver does not state otherwise.[88] The same system would be applied with DDPR, data subjects could waive moral rights if they wish so.

Structure of dualistic data property right



Source: Own creation of authors

88 For example, of Slovakia, see par. 18 sub. 5 of the Act No. 185/2015 of the Coll., the Copyright Act.

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4.2 Moral rights of a data subject

The aim of moral rights in DDPR is about the control of personality-like aspects of data. The implementation of moral rights is inspired by morals rights from Copyright. Moral rights are an international concept, stemming from article 6bis of Berne Convention.[89] According to article 6 bis subsection 1, independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to "claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." Subsection 2 prolongs the duration of moral rights after the death of an author, at least until the expiry of the economic rights. Moral rights have not been harmonized in EU therefore the extent of moral rights can vary. "It is true that moral rights in some continental European countries go far beyond the minimum set out in Article 6bis and cannot be totally waived nor assigned. However, here again, disparities should not be overestimated. On the one hand, moral rights, even in the UK, are not assignable. On the other hand, contractual limitations of moral rights, even in countries like Germany or France, which have a long tradition of strong protection, are tolerated if not well accepted."[90] Traditionally, the right to authorship, the right of attribution and the right to integrity are recognized by Member states. The right to claim authorship means that the author has the right to her/his work. The right to attribution means that a creator is entitled to be designated as the author and decide on the method of such designation. The integrity right usually corresponds with the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation from Berne Convention. These moral rights, namely the right to claim authorship, the right to attribution and the integrity right are applicable to within DDPR conceptually. The DDPR would contain similar moral rights with modifications. The first moral rights, that mirrors the right to claim authorship, would be the right to commercialize personal data. This data represents a data subject´s right to control his or her personal data and right to decide whether a data subject wants to commercialize personal data. The right as proposed is far more extensive than right to data portability according to GDPR. The second moral right would be the right to designate, which would mirror the right to attribution. According to this right, a data subject would be able to designate her/his personal data by her/his name. Third moral right would be the integrity right in DDPR. It would have the same function as in Copyright. Under this right, a data subject would be able to object to any distortion, mutilation or other

89 Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979).

90 SCHLOETTER, A. Lucas. *EU Copyright law, A Commentary*. Is there a concept of European copyright law? History, evolution, policies and politics and the acquis Communautaire. Edward Elgar Publishing Limited, 2014, p.14

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modification of, or other derogatory action in relation to, his or her personal data, which would be prejudicial to her/his honour or reputation. This right is again more general than right to object enshrined in the GDPR as only limited number of processing operations and legal grounds are covered with the right in the EU data protection law.[91]

Under these moral rights, a data subject would be able to control personality-like aspect of data, such as to firmly designate all his personal data by a name, to decide whether she or he wishes to commercialize personal data and finally, a data subject would be able to prevent any unwanted change or addition to personal data that would damage his honour or reputation. This control which would last even after licensing of economic rights, would correspond with the obligations of data processors and purchasers. These entities would be obliged to process or license personal data always with the designation of data subject (unless anonymised) and would not be able to commercially use the data without the consent of data subject. Moreover, the use of personal data as agreed by a data subject in case of alterations by data processors and purchasers could not be prejudicial to the honour or reputation of a data subject. For example, many data subjects whose data were used in the infamous case of Cambridge Analytica, would be able to object such use under the integrity right in DDPR. Above mentioned qualities of moral rights within DDPR would not function properly without establishing that moral rights cannot be transferred to another person. What shall happen with moral rights after the death of a data subject? Given to fact that personal data are firmly linked up to a data subject, moral rights would expire after the death of a data subject.

4.3 Economic rights of a data subject

The aim of economic rights in Copyright is to allow an author to fully commercialize a work. Economic rights in DDPR have the same aim – to enable a data subject to commercialize personal data. The main economic right of a data subject should be a right decide about the use of personal data, namely a right to use personal data and right to give consent for specific use of personal data. The monopoly of a data subject to use her or his personal data is based on the notion that data subject's personal data should be used only with the clear consent of a data subject. The particular use of personal data subject, its details and purpose would be defined individually by a third party interested in the use of data – data processor or purchaser (both covered by GDPR) on case-by-case basis. The use would be a result of an agreement between a data subject and third party. As proposed by Xiaolan Yu and Yun Zhao these details would be defined in a data licensing agreement between a data subject and third party. Although such agreements might be currently possible under the GDPR, precise delineation of moral and economic rights as proposed is not covered by any law.

91 See GDPR, Article 18.

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Economic rights in DDPR would not expire after giving a consent with the use, would not be transferable and would not be possible to waive them. The impossibility of transfer and of a waiver would guarantee that third parties, companies like Facebook would not be able to somehow strip data subjects from their rights by forcing them to sign a waiver or to transfer economic rights. Companies like Facebook or Google might condition providing certain services by giving the consent with the use. In this situation, data subjects are indirectly forced to consent therefore would receive at least a financial compensation for the use. If a waiver would be lawful, powerful companies would simply force data subject to sign a waiver as a condition of providing services. The same scenario is applicable to the transfer of economic rights. Economic rights would not expire after the death of a subject, these rights would be heritable. The duration of economic rights would be the life of a data subject and several decades after her/his death. Generally, the duration of economic rights after the dead of an author is 70 years. In this situation, authors are of opinion that the duration of economic rights in DDPR should be based on scientific research that would reasonable asses the duration of economic rights after the dead of a data subject in order to renumerate justly a data subject.

5 Conclusion

DDPR encompasses most of the concerns related to a commercial use of personal data by data subjects and third parties. DDPR addresses the control, personality-like aspects of personal data and commercialization of personal data. It also addresses the question of personal data processed by a third party – processor/purchaser. According to DDPR, a data subject would be able to control only raw (provided) or original data – personal data belonging to her orhim such as name, address, food preferences, likes, shopping habits. In other words, a data subject would be able to licence original data about her/him without any added information or value.

Licensed personal data (raw or original data) processed by a third party would be an object of DDPR of a third party, because a third party lawfully obtained a consent for the use from a data subject and by processing, a third party would create new data – processed data. Processed data are data different from raw or original data, because these data contain different information than raw/original data and a third party by processing it, also added a new value to raw/original data. The authors assume that license agreements would contain the consent of a data subject to process personal data for a defined purpose. If a third party would acquire a consent for processing, this party would also create a new type of data – processed personal data. The third party would only hold economic rights to processed personal data for a single reason. The reason is that moral rights can only belong to a natural person who consented with the use of raw/original data, therefore a third person not personally linked to raw/original data cannot hold

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morals to data that do not belong her/him. Also, the authors assume that most of these third parties seeking consent will be legal persons – companies without the personal link to processed personal data. However, third parties will be able to fully enjoy financial reward for the use of processed personal data even without moral rights.

DDPR also solves out the question whether a data subject can control the use of extrinsically and intrinsically personal data. DDPR provide for control over all personal data of a data subject, the distinction between extrinsically and intrinsically personal data is not crucial, because if a data subject does not wish to use intrinsically personal data such as DNA sequence, she orhe is not obliged to. If a data subject decides to use intrinsically personal data, through a licence she orhe can control the purpose of the use and through the moral right of integrity she or he can object the use as well.

Regarding the type of ownership provided by DDPR, the authors suggest the ownership with erga omnes effect. This ownership typical for Civil law is better suited to encompass a full control over personal data required by data subjects. DDPR presents a full control over every property-like aspect of personal data. DDPR protects a property in data.

The transfer of property rights to personal data is not allowed under DDPR. The transfer of moral rights is not supported by the fact, that moral rights are firmly tied to a person – data subject, therefore, notionally moral rights are not transferable. Regarding the transfer of economic rights, the authors do not consider the transfer of economic rights beneficial for data subjects due to economic value of personal data that can rise and is not limited by time. Also, it allows a data subject to license economic rights to more subjects, which might stimulate digital economy and contribute to a fair competition in digital economy.

DDPR as designed would properly function in the legal system backed by licensing and collective management of chosen economic rights. The whole "property system" would complement "protection system" of EU already in place. The authors think that the whole "data system" in EU cannot flourish without acknowledging the property in personal data.

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List of references

AKKERMANS, Bram. *The Principle of Numerous Clausus in European Property Law.* Intersentia, 2008.

Article 29 Data Protection Working Party. *Opinion 4/2007 on the concept of personal data.* [online]. Available at: <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf> Accessed 15.10.2021.

BALOUP, Julie. et al. *White Paper on the Data Governance Act*. [online]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3872703> Accessed 15.10.2021, p. 12–13.

BIRCH, Kean – COCHRANE, DT – WARD. Callum. Data as asset? The measurement, governance, and valuation of digital personal data by Big Tech. *Big Data & Society*, January–June: 1–15.

PIERRE, Barbara. Classification of Property and Conceptions of Ownershipin Civil and Common Law. *Revue générale de droit*, 28(2), 1997, pp. 235–274.

BYGRAVE, Lee. *Data Protection Law: Approaching Its Rationale, Logic and Limits*. Kluwer Law International; 1st edition, 2002.

CARPENTER, Christian. Privacy and Proportionality: Examining Mass Electronic Surveillance under Article 8 and the Fourth Amendment. *International and Comparative Law Review*, vol.20, no.1, 2020, pp. 27–57. <https://doi.org/10.2478/iclr-2020-0002>.

Court of Justice of the European Union. C-131/12. *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González.* 13 May 2014.

Court of Justice of the European Union. C-434/16 *Peter Nowak v Data Protection Commissioner*. 20 December 2017.

Court of Justice of the European Union. C-582/14 *Patrick Breyer v Bundesrepublik Deutschland.* 19 October 2016.

Data Protection Report. *EU's possible Data Act: What can we anticipate from the Inception Impact Assessment and the Consultation?* [online]. Available at: <https://www.dataprotectionreport.com/2021/07/eus-possible-data-act-what-can-we-anticipate-from-the-inception-impact-assessment-and-the-consultation/> Accessed 15.10.2021.

DE HINGH, Anne. Some Reflections on Dignity as an Alternative Legal Concept in Data Protection Regulation' *German Law Journal*, (2018) 19, pp. 1269–1290.

European Commission. *COMMISSION STAFF WORKING DOCUMENT on the free flow of data and emerging issues of the European data economy*, point. 4. [online].

European Union. *European Data Strategy*. [online]. Available at: <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy>. Accessed 15.10.2021.

European Union. Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on European data governance (Data Governance Act). COM/2020/767 final.

FUNTA, Rastislav. Obchodovanie s osobnými údajmi z pohľadu hospodárskej súťaže (essential facility). *Justičná Revue*, 1/2020, 2020.

GÁBRIŠ, Tomáš – HAMUĽÁK, Ondrej. Pandemics in Cyberspace – Empire in Search of a Sovereign? *Baltic Journal of Law & Politics*, vol.14, no.1, 2021, pp.103–123.

Google. *EU Transparency Report*. [online]. Available at: <https://transparencyreport.google.com/eu-privacy/overview?hl=en> Accessed 15.10.2021.

GORDLEY, James. *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*. Oxford University Press, 2016.

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601

GRAEF, Inge – HUSOVEC, Martin – PURTOVA, Nadezhda. Data Portability and Data Control: Lessons for an Emerging Concept in EU Law. *German Law Journal* 2018, vol. 19 no. 6, p. 1359–1398.

HAMUĽÁK, Ondrej – KISS, Lilla Nóra – GÁBRIŠ, Tomáš – KOCHARYAN, Hovsep. This Content is not Available in your Country. A General Summary on Geo-Blocking in and Outside the European Union. *International and Comparative Law Review*. 2021;21(1): 153–183. <https://doi.org/10.2478/iclr-2021-0006>.

JANEČEK, Václav. Ownership of Personal Data in the Internet of Things. *Computer Law & Security Review*, 2018, 34(5).

JEŽOVÁ, Daniela. Sharing Economy in Digital Single Market EU – a Phenomena with Future Potential. *European Studies*, vol. 7, 2020, pp. 218–236.

KASPER, Agnes – KRASZNAY, Csaba. Towards Pollution-Control in Cyberspa-ce: Problem Structure and Institutional Design. International Cybersecurity. *International and Comparative Law Review*, 2019, vol. 19, no. 2, pp. 76–96.

SCHLOETTER, A. Lucas. *EU Copyright law, A Commentary*. Is there a concept of European copyright law? History, evolution, policies and politics and the acquis Communautaire. Edward Elgar Publishing Limited, 2014, p.14.

OECD. *The Economics of Personal Data and Privacy: 30 Years after the OECD Privacy Guidelines*. [online]. Available at: <https://www.oecd.org/sti/ieconomy/theeconomicsofpersonaldataandprivacy30yearsaftertheoecdprivacyguidelines.htm> Accessed 15.10.2021.

PEARCE, Henry. Could the doctrine of moral rights be used as a basis for understanding the notion of control within data protection law? *Information & Communications Technology Law*, Volume 27, 2018, Issue 2.

PURTOVA, Nadezhda. Do property rights in personal data make sense after the Big Data turn? Individual control and transparency. *Journal of Law and Economic Regulation* November 2017, 10(2).

PURTOVA, Nadezhda. Health Data for Common Good: Defining the Boundaries and Social Dilemmas of Data Commons. LEENES, Ronald et al (eds). *Under Observation – The Interplay Between eHealth and Surveillance*, 2017 Springer.

RATTI, Mathilde. *Personal-Data and Consumer Protection: What do They Have in Common?* Studies on Intellectual Property and Competition Law, (2018) 28 pp. 377–393.

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).

ROSTOW, Theodore. What Happens When an Acquaintance Buys Your Data? A New Privacy Harm in the Age of Data Brokers. *Yale Jornal on Regulation,* 2017, 34.

The Guardian. *Facebook launches app that will pay users for their data.* [online].

VIERIA, Helena. *The economic value of personal data for online platforms, firms and consumers*. [online]. Available at: <https://blogs.lse.ac.uk/businessreview/2016/01/19/the-economic-value-of-personal-data-for-online-platforms-firms-and-consumers/>. Accessed 15.10.2021.

YU, Xiaolan. – ZHAO, Yun. Dualism in data protection: Balancing the right to personal data and the data property right, *Computer Law & Security Review,* Volume 35, Issue 5, 2019.

Published by Palacký University Olomouc, Czech Republic, 2021.
ISSN (print): 1213-8770; ISSN (online): 2464-6601