

Brussels, 3 September 2021

Subject: Public consultation on the proposed Data Act - Additional remarks

The COMMUNIA Association for the Public Domain welcomes the opportunity to provide feedback to the European Commission's plans for a Data Act. In this document we provide additional context on our answers to the consultation. We would like to emphasize the following four points:

1. No new exclusive rights in data

As a general principle the Data Act (including a possible review of the Database Directive) must not introduce any new exclusive rights of data. The introduction of the Sui Generis Database Right (SGDR) has shown that there are no societal (or even economic) benefits to grant new exclusive rights over data and it has also shown how difficult it is politically to retract new rights even when there is no evidence that they contribute to the assumptions and objectives that had originally justified their introduction.

This principle expressly includes changes to the scope of existing rights like the sui generis database right. In line with CJEU case law, databases that are the by-products of the main activity of an organisation must remain outside the scope of the SGDR.

2. Withdraw the Sui Generis Database Right for future cases

The sui generis right should be withdrawn for all future cases (grandfathered), since it imposes additional restrictions to the use of data and information without demonstrating any societal benefit.

The sui generis right creates an obstruction for the access to and reuse of basic data and information, by protecting them as property. Activities that depend on the availability of data and information, most notably academic and research activities and the activities of libraries and archives, are negatively impacted by this additional layer of rights. The two tier approach of the Directive produces a chilling effect on users, where they simply do not attempt to utilise databases out of confusion, or the fear that they may be infringing on a right that is difficult to understand. Uses that are outside the scope of the sui generis right are unjustifiably restricted to 'lawful users'. Furthermore, ambiguities around the concept of

'lawful user' create legal uncertainty around the use under the existing exceptions, which are also too restrictive. The sui generis right also leads to an enclosure of the commons of information: public domain data that could otherwise be accessed and re-used can be locked down by this right. In addition the sui generis regime allows databases to be potentially protected in perpetuity.

This level of protection of databases is not economically justified. There is no empirical evidence that the sui generis right has helped to create additional incentives in the production of databases in the EU. This fact is clearly acknowledged discussed in the 2005 and 2018 evaluation reports of the directive, both noting that there is no empirical evidence that the sui generis right has encouraged growth in the European database industry or significantly contributed to the competitiveness of the EU in the database industry market (namely in comparison with the US). In fact, the existence of this right seems to have no influence in the majority of database owners' decision "to invest in collecting and generating data, in setting up the database or in verifying its content" (see fig. 3, 2018 report).

3. Improve access to databases that are protected under existing sui generis rights

Existing databases should continue to benefit from sui generis protection for the remaining term of protection, subject to certain conditions.

a. Acquired rights shall be respected

Due regard for established or acquired rights is one of the general principles of EU law. Therefore, existing databases must continue to be protected until the expiry of the term of protection foreseen in Article 10(1).

b. No additional terms of protection

Article 10(3) should be repealed. The possibility of continuously renewing a right is a fundamental threat for the commons of information. Substantial changes to databases that have been grandfathered in should not benefit from an additional term of protection, as that would enable the possibility that such databases could be protected in perpetuity, preventing them from ever entering the public domain.

c. Delete the "lawful user" condition from Article 8(1)

Article 8(1) should be amended. The sui generis right only applies to substantial parts of a database. The act of extracting and re-using insubstantial parts of a database is outside the scope of protection of the sui generis right. This means that any user - and not only "lawful" users, as foreseen in Article 8(1) - can perform such acts.

d. Improve exception regime of the sui generis right

Article 9 should be updated. The private use exception in Article 7(a) should not be limited to non-electronic databases. The teaching and scientific research exceptions should cover the acts of re-utilization. Member States should be able to apply to the sui generis right all the exceptions and limitations contained in Article 5 of the Information Society Directive. Furthermore, all the exceptions to the sui generis right should be protected from contractual overrides.

e. Public sector databases should be made freely available for all to use and re-use without restrictions

Existing databases that were produced in the exercise of public tasks or with recourse to public funds should be available to the public without any restrictions.

4. Require strong public interest justification for B2G data sharing

Any measures aimed at improving or requiring the sharing of data from Business to Governments (B2G) should be limited to cases with a strong public interest justification. In line with the required public interest nature of such sharing arrangements data that is shared by Businesses in such cases should be made available to the public under open licenses. This would ensure that the data shared in the public is available to other stakeholders such as academic researchers, journalists and the civil society organisations.