

BIG DATA E CONCORRENZA

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DATA PORTABILITY AT THE CROSSROADS OF DATA PROTECTION AND COMPETITION POLICY

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Right to data portability

Article 20 of the General Data Protection Regulation provides data subjects with the right to receive 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 to transmit this data to another controller without hindrance from the controller to which the personal data has been provided. This right applies where the processing is carried out by automated means and is based on consent or on a contract.¹ Where technically feasible, the data subject also has the right to have the personal data transmitted directly from one controller to another.² While its main policy objective is to ensure that individuals are in control of their personal data and trust the online environment,³ the right to data portability may also reduce lock-in by enabling users to switch easily between services. In this regard, data portability also has a competition law angle.

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¹ Article 20(1) of the General Data Protection Regulation.

² Article 20(2) of the General Data Protection Regulation.

³ Commission Staff Working Paper — Impact Assessment accompanying the General Data Protection Regulation and the Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data (Impact Assessment report), SEC(2012) 72 final, p. 43.

Scope for competition enforcement

In fact, the previous Competition Commissioner argued in a speech that the proposed right to data portability '*goes to the heart of competition policy*' and that '*portability of data is important for those markets where effective competition requires that customers can switch by taking their own data with them*'. In a more general perspective, he stated that retention of data should not serve as barriers to switching in markets that build on users uploading their personal data. In addition, the previous Competition Commissioner argued that '*[c]ustomers should not be locked in to a particular company just because they once trusted them with their content*'. By stating '*[w]hether this is a matter for regulation or competition policy, only time will tell*', he acknowledged the right to data portability as a new tool under data protection law but at the same time did not eliminate competition law intervention for facilitating data portability. In particular, the previous Competition Commissioner explicitly noted that '*[i]n time, personal data may well become a competition issue; for instance, if customers were prevented from switching from a company to another because they cannot carry their data along*'.⁴

It therefore cannot be excluded that the European Commission will also intervene on the basis of competition law if a dominant firm does not allow users to take their data with them when switching services.⁵ In particular, a refusal of a dominant firm to facilitate data portability may constitute a form of abuse by exploiting consumers or excluding competitors. In the latter fashion, a lack of data portability may lead to entry barriers for competitors and violate Article 102(b) TFEU by limiting markets and technical development to the prejudice of consumers.⁶ In such a situation, the Commission can impose a duty on the dominant provider to give users the possibility to transfer their data to a competitor.

This can be illustrated by the *Google* case in which the Commission negotiated with Google about commitments which would force the search engine provider to stop imposing obligations on advertisers preventing them from moving their advertising campaigns to competing platforms.⁷ In the US, the Federal Trade Commission closed its investigation when Google offered voluntary concessions to remove restrictions on AdWords that make it

⁴ Speech former Competition Commissioner Almunia, 'Competition and personal data protection', Privacy Platform event: Competition and Privacy in Markets of Data Brussels, 26 November 2012, available at http://europa.eu/rapid/press-release_SPEECH-12-860_en.htm.

⁵ D. Meyer, 'Facebook beware? EU antitrust chief warns over data portability', 27 November 2012, available at <http://www.zdnet.com/facebook-beware-eu-antitrust-chief-warns-over-data-portability-7000007950/>. See also, D. GERADIN AND M. KUSCHEWSKY, "Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue", *SSRN Working Paper* February 2013, p. 11, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216088.

⁶ C.S. YOO, "When Antitrust Met Facebook", *George Mason Law Review* 2012, vol. 19, no. 5, (1147), p. 1154-1155 and D. GERADIN AND M. KUSCHEWSKY, "Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue", *SSRN Working Paper* February 2013, p. 11, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216088.

⁷ Commitments of Google in Case COMP/C-3/39.740 *Foundem and others*, 3 April 2013, para. 27-31, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_8608_5.pdf. In October 2013, Google offered improved commitments to the Commission which included a new proposal providing stronger guarantees against circumvention of the earlier commitments regarding portability of advertising campaigns. See speech former Competition Commissioner Almunia, 'The Google antitrust case: what is at stake?', 1 October 2013, available at http://europa.eu/rapid/press-release_SPEECH-13-768_en.htm.

difficult for advertisers to manage advertising campaigns across multiple platforms.⁸ By restricting the possibility of advertisers to move their campaigns to another advertising platform, providers create switching costs that may let advertisers decide to stay with their current provider for the sole reason that they find it too cumbersome to manually re-insert their advertising campaign in a new platform.

Comparing the data protection and competition law approaches

A number of differences can be identified between the enforcement of data portability under data protection and competition law. First of all, it is important to note that the General Data Protection Regulation gives data subjects a right to data portability, while competition authorities can impose a duty on dominant providers to enable data portability in case their behaviour amounts to abuse under Article 102 TFEU. Secondly, the scope of application of the two regimes is different. As it forms part of a data protection instrument, the right to data portability naturally only applies to transfers of personal data. Information that does not qualify as personal data falls outside the scope of the new right. In addition, one should note that not all personal data of a data subject is subject to the right to data portability. As Article 20(1) of the General Data Protection Regulation makes clear, a data subject is only entitled to port personal data which he or she has provided to a controller. But providers do not only possess personal data that has been provided by users themselves. They also obtain information about the behaviour of users on their platform (observed data) and create data for analytical purposes (inferred data). The latter type of data will most likely fall outside the scope of the right to data portability, but the situation with regard to observed data is less clear. As an illustration, reference can be made to the profile of sellers on e-commerce platforms.⁹ Whereas the contact information and the advertisements are provided by the seller him- or herself, the provider adds feedback scores to the seller's profile on the basis of the number of positive or negative ratings the seller has received. It is not clear whether the part of the seller's profile that involves the reputation that a seller has built on a particular e-commerce platform will also be portable under the right to data portability, since strictly interpreted it is not provided by the data subject.¹⁰

These limitations do not play a role in competition enforcement where action can potentially be taken against a lack of portability of all data irrespective of whether it relates to an identified or identifiable natural person and whether it is provided by this person. The scope of application of competition law in this regard is thus much wider. At the same time, it has to be kept in mind that action on the basis of Article 102 TFEU can only be taken if the restrictions on data portability qualify as abuse of dominance. In contrast, the right to data portability would apply generally to all forms of processing carried out by automated means

⁸ Press Release US Federal Trade Commission, 'Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search', 3 January 2013, available at <http://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>.

⁹ Reference is made here to natural persons who are acting as sellers on e-commerce platforms, as the General Data Protection Regulation would otherwise not be applicable.

¹⁰ See also P. SWIRE AND Y. LAGOS, "Why the Right to Data Portability Likely Reduces Consumer Welfare: Antitrust and Privacy Critique", *Maryland Law Review* 2013, vol. 72, no. 2, (335), p. 347-349.

and based on consent or on a contract.¹¹ No dominance or abuse will have to be established in order for users to be able to transfer their data under the General Data Protection Regulation.¹² As such, data protection and competition law complement each other in enabling data portability. Each of the two fields has its own strengths and limitations as a result of which it remains important to apply competition law in parallel to possible restrictions on the portability of data once the right to data portability under the General Data Protection Regulation comes into force.

¹¹ These are the preconditions for the right to data portability to apply under Article 20(1)(a) and (b) of the General Data Protection Regulation.

¹² I. GRAEF, J. VERSCHAKELEN AND P. VALCKE, "Putting the right to data portability into a competition law perspective", *Law. The Journal of the Higher School of Economics. Annual Review* 2013, (53), p. 7-8, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416537.