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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Executive Summary of the roundtable on Consumer data rights and competition

Annex to the Summary Record of the 133rd Meeting of the Competition Committee, held virtually on 10-16 June 2020

12 June 2020

This executive summary by the OECD Secretariat contains the key findings from the discussion on Consumer data rights and competition held during the 133rd meeting of the Competition Committee.

More documents related to this discussion can be found at:

<http://www.oecd.org/daf/competition/consumer-data-rights-and-competition.htm>

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Executive Summary of the roundtable on Consumer data rights and competition

By the Secretariat*

From the [discussion](#) at the Roundtable on Consumer Data Rights and Competition held on 12 June 2020, the delegates' written contributions and the Secretariat's [background paper](#), several key points emerged:

1. While many businesses have collected and used consumer data for some time, it is an increasingly important input into numerous business models, especially in the digital economy.

Many businesses now collect and use a wide range of consumer data. The term “consumer data” is intended to capture data concerning individual consumers, where such data have been collected, traded or used as part of a commercial relationship (including for zero-priced digital services). Such data can include personal data, as well as transactional data. Consumer data is particularly important for businesses in the digital economy, and it underpins a range of new business models, including zero-price goods and services.

Businesses use consumer data for a variety of purposes. For example, businesses can use consumer data to improve or personalise products. It is also a key input for targeted digital advertising, which is one of the main sources of revenue for many of the larger online platforms across the globe today. Further, the analysis of consumer data by artificial intelligence (AI) systems can produce new predictions and uncover new insights in a range of markets. Businesses can also collect and sell consumer data to third parties.

These multiple uses of consumer data make it particularly valuable. Some say that there is a feedback loop in that businesses that are able to collect more consumer data have a better ability to improve their products, which attracts more consumers, bringing more consumer data, and so on. This means that businesses have an incentive to collect ever-increasing amounts of consumer data.

2. The collection, use and sharing of consumer data has implications for competition and privacy outcomes.

The way that businesses collect, use and share consumer data has implications for privacy, depending for example if the data is collected and stored on hardware owned by the individual (to which she can refuse access) or on hardware owned by the services provider (to which the individual has no access). For this reason, many OECD countries have privacy and data protection laws (consistent with the framework set out in the OECD Privacy Guidelines) to give consumers more control over how their data can be collected, used and shared.

The collection, use and sharing of consumer data can also affect competition. A business' ability to recreate or otherwise access similar consumer data as held by a competitor can potentially affect competition in the relevant market. In particular, access to a unique and extensive consumer dataset may provide a business a competitive advantage. Access to

* This executive summary does not necessarily represent the consensus view of the Competition Committee. It does however identify key points from the discussion at the Roundtable on Consumer Data Rights and Competition, including the views of the expert panellists, delegates' oral and written contributions and the background note prepared by the OECD Secretariat.

such a data set might also be relevant to determining whether a business holds a dominant position, and in assessing barriers to entry in the relevant market.

Business decisions regarding how and where data is stored can also influence competition and privacy outcomes. Such decisions include whether personal data collected from an Internet-connected device is stored on the device or externally (e.g. with the manufacturer or in the cloud). Data that is stored locally on a consumer's device that is not accessible by any other parties without explicit consent is less likely to raise privacy concerns. However, benefits that could potentially arise from broader analysis and use of this data might not be realised. On the other hand, data held by the manufacturer or in the cloud, has more potential to raise privacy concerns. If businesses do not share such data more broadly, again, this may limit the benefits that could arise from widespread use of the data.

3. Several theories of harm may be relevant to the collection and use of consumer data.

In relation to mergers, the collection, use and/or sharing of consumer data, or access to a consumer data set, may raise concerns where:

- The combining of consumer data sets raises barriers to entry or raises rivals costs, which could potentially harm competition in the relevant market.
- The two businesses compete on privacy pre-merger and the merger would lessen this competition leading to a reduction in privacy (or an increase in the amount of data collected or shared) in the market post-merger.

In relation to dominance, there could potentially be concerns where a dominant firm:

- Withholds access to consumer data from competitors, which in some jurisdictions could constitute an abuse of dominance under a narrow set of circumstances (including the indispensability of the data in order to compete and the feasibility of providing access to such data). Any such cases would need to carefully balance potential competition concerns with the effect on investment incentives and privacy of remedies requiring data sharing.
- Reduces the level of privacy and data protection offered to consumers or increases the amount of data collected or shared, with no offsetting benefit for consumers, which could be considered an abuse of dominance in some jurisdictions.

Regarding cartels and collusion, competitive harm could potentially result where competitors agree on the level of privacy offered to consumers, or agree to provide services at zero-price on the basis that this will maximise the collection and use of consumer data. In addition, sharing of consumer data between competitors in some circumstances could raise competition concerns.

4. While numerous competition authorities have taken competition cases involving concerns about gathering and usage of consumer data, theories of harm relating to privacy are more novel.

In practice, there have been numerous competition cases that involve concerns relating to access to a particular consumer data set. In the merger context, the theory of harm has been that the merged party's data set would provide it with a competitive advantage, which could raise barriers to entry and rivals' costs, thus lessening competition. In abuse of dominance cases, the concern is usually about the dominant company withholding access to or engaging in self-preferencing in relation to its data set.

In contrast, few cases exist where the theory of harm involves a reduction to the level of privacy. One example is the German competition authority's ongoing abuse of dominance case against Facebook. In this case, the theory of harm is that Facebook abused its

dominance to collect personal information from Facebook users while those users were on third-party websites and apps.

5. There are a number of analytical challenges in bringing competition cases involving consumer data.

Analytical challenges include the identification of barriers to entry, assessing how to deal with consumers' concerns regarding the expanded use of their personal data, and assessing whether businesses compete on privacy. Opinions differ when it comes to assessing the value of a particular consumer data set, which is relevant to determining whether access to that consumer data set is a barrier to entry. Relevant factors to consider are whether the data set is unique (that is, whether the same consumer data can be obtained from other sources), and whether the data set is easily replicable. It will also be important to consider whether there are economies of scale and scope associated with the collection, use and storage of that data, and whether there is lock-in that prevents the data from being interoperable.

A number of demand-side challenges also raise analytical challenges for theories of harm involving privacy. In particular, consumer attitudes towards privacy tend to be context specific. Further, many consumers do not understand how businesses collect and use their data, which may undermine competition with respect to privacy. To the extent that there are problems with competition in the market, consumers may also have little choice other than to agree with whatever dominant businesses require in terms of data collection and use. Even if competition agencies can establish that consumers value privacy, it may be difficult to determine whether businesses in some markets compete on privacy. However, consumer surveys and internal business analysis could potentially assist in determining these factors.

6. Remedies to address these issues have varied but often involve divestment of the relevant data, granting of access to the relevant data, or restrictions on the use of such data (in the case of vertically integrated businesses).

Since most of the relevant competition cases involving consumer data are about access to consumer data, the remedies usually seek to put competitors on a level playing field in respect of access to the relevant data set. Competition agencies can broadly achieve this by ensuring that all parties have the same access to the data. This might involve the data set being divested (either from the merged entity or the dominant firm), or through a behavioural commitment to require the (merged or dominant) firm to provide its competitors with access to the data set on a fair, reasonable and non-discriminatory (FRAND) basis.

While the essential facilities doctrine (EFD) could potentially be used to grant access to a consumer data set, few jurisdictions have chosen this route, though legislative changes in Germany may make this option more plausible in the future. Privacy and data protection laws, may mandate greater consumer control of data through sector-specific or economy-wide regulations, such as, for example, through data portability rights, or interoperability more broadly. Consumer protection policies that prohibit deceptive and misleading data practices and empower consumers to make better choices with their data may similarly be better placed to alleviate market failures relating to information asymmetries. Policy makers should assess the likely costs and benefits of such policies in determining their appropriateness and scope.

7. Competition, privacy and data protection, and consumer protection policies and enforcement increasingly overlap on issues involving consumer data, especially in the digital economy.

Increasingly, the use of consumer data by businesses raises issues across multiple policy areas and the intersection of these areas is difficult to navigate. For example:

- The way that data protection and privacy (and potentially consumer) policies are drafted and implemented has the potential to affect competitive outcomes in markets subject to those policies.
- Some forms of business conduct that may raise competition concerns (for example, a dominant firm refusing to share consumer data with competing or downstream businesses) may be defended by the business on the grounds of protecting consumer privacy.
- Remedies under one policy area have the potential to affect outcomes in other policy areas (for example, a competition remedy that requires data sharing could have implications for privacy).
- Certain forms of conduct could arguably be contrary to each of competition, consumer and data protection laws. For example, in some jurisdictions consumer protection cases have been taken against certain platforms in respect of their data practices, whereas in other jurisdictions this has been taken under competition law. In some circumstances, such conduct could also be contrary to data protection laws.
- Understanding consumer behaviour is particularly relevant to cases involving consumer data, and may be an area where consumer and data protection agencies have more experience and knowledge than competition agencies.

8. There is a need for increased co-operation both across policy areas, as well as across borders.

Co-ordination across various policy areas is generally more straightforward in jurisdictions that have these responsibilities tasked to one common agency. Notwithstanding this, some jurisdictions are trialling new models to improve co-operation and co-ordination across competition, data protection and privacy, and consumer protection policy and enforcement. In some cases, this involves more formal arrangements and agreements, which can be facilitated under regulation or through Memorandum of Understanding (MoUs) between the relevant agencies. In addition, a number of jurisdictions have founded teams to look at emerging issues associated with digital platforms, which in some cases has involved a multidisciplinary team from the various competent regulators (for example, representing the competition, consumer, privacy and telecommunications regulators). Less formal means of co-operation are also available. For example, Europe's Digital Clearinghouse facilitates both cross-policy and cross-border co-operation on some of the issues raised in relation to consumer data.

International co-operation is also of increasing importance especially in the digital economy. In this regard, forums such as the OECD remain an important place for discussing these emerging issues and facilitating greater co-operation.