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Summary of Discussion of the Roundtable on Data Portability, Interoperability and Competition

Annex to the Summary Record of the 135th meeting of the Competition Committee

9 June 2021

This document is the summary of discussion of the Roundtable on Data Portability, Interoperability and Competition, held by the Competition Committee on 9 June 2021.

More documents related to this discussion can be found at
https://www.oecd.org/daf/competition/data-portability-interoperability-and-competition.htm

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Summary of the Discussion of the Roundtable on Data Portability Interoperability and Competition

On 9 June 2021, the Competition Committee held a discussion on data portability, interoperability, and competition chaired by Professor Frédéric Jenny.

The Chair noted the timeliness of the discussion and explained that data portability and interoperability are often considered as solutions to vexing competition problems: portability may reduce switching costs for consumers and thus lower barriers to entry; interoperability, which allows consumers to preserve network effects even when using competitors' products, may facilitate multi-homing, and reduce switching costs and barriers to entry as well. However, imposing such measures does not necessarily resolve competition issues. For example, measures mandating the porting only of individual users' data are not necessarily sufficient to support the emergence of viable competitors, and coupling them with additional remedies, e.g., interoperability, may be required. Additionally, poorly designed portability and interoperability measures may harm competition by imposing unnecessary entry costs. Competition authorities may have to cooperate with other regulators, such as data protection regulators and sector regulators whose goals may differ. In this respect he noted that **Steve Wood**, chair of the OECD Working Party on Data Governance and Privacy in the Digital Economy (DGP) will participate in the discussion.

The Chair then introduced the expert speakers who took part in the discussion: **Michal Gal**, Professor and Director of the Center for Law and Technology, University of Haifa; **Inge Graef**, Associate Professor of Competition Law, Tilburg University; **Emily Hart**, Chief Operating Officer, MotionMobs; **Jan Krämer**, Professor of Information Systems and Chair of Internet and Telecommunications Business, University of Passau, and Academic Co-Director at the Centre on Regulation in Europe; and **Peter Swire**, Professor of Law and Ethics, Georgia Tech Scheller College of Business and Associate Director for Policy of the Georgia Tech Institute for Information Security and Privacy. He noted the discussion would focus on four issues: first, the effects of data portability and interoperability on competition; second, their use in competition enforcement; third, regulation mandating data portability and interoperability; and fourth, the balance between diverging policy objectives. The Chair invited Steve Wood to deliver his introductory remarks.

Steve Wood noted that, from his perspective as Deputy Commissioner at the UK Information Commissioner's Office, the intersection between competition, privacy, and other policy goals has never been sharper. Better cooperation between regulators would be beneficial, especially since privacy and competition regulators share common aims (e.g., consumer protection and support of economic growth and innovation). The discussion of this topic is rapidly evolving, with increasing numbers of policymakers from across the world implementing or at least considering adopting data portability and interoperability measures. Enough experience has been gained to begin assessing the effectiveness of different initiatives.

DGP has been periodically reviewing the OECD privacy guidelines, which informed many data protection and privacy guidelines around the world. The guidelines have been updated to reflect developments concerning consumer control over data and interactions with the digital economy. DGP has also focused on data portability in the context of its recommendations on enhanced access and data sharing and has produced an analytical report that sums up the taxonomy of data portability in term of the different characteristics

of current initiatives, and which draws on the opportunities and challenges associated with their implementation. While the DGP's work is focused on data portability, it has dealt with issues concerning the link between data portability and interoperability, and its effect on competition. Data portability may serve as a precursor to interoperability and may lead to an increase in consumer choice and competition, and competition policy is clearly playing an important role in driving data portability initiatives. However, portability regimes are often designed with policy goals that may conflict with competition (e.g., data protection) that one must be aware of; further, in some cases, data portability generates unintended adverse effects on market structure and disincentives to invest.

Among other things, data protection policymakers and regulators are concerned with innovation stimulation, with enabling new data services and "data trusts" to emerge, and with the development of the concept of "informational self-determination". In this environment cross-agency regulatory cooperation is clearly required. In the UK, a Digital Regulatory Cooperation Forum was set up with data portability being one of the issues in its focus. Policymakers may be required to clarify regulators' roles and responsibilities, and there may be room to establish a regulator with primary oversight or other mechanisms to support regulatory cooperation and conflict resolution. The European Data Protection Supervisor has produced an influential report that sets out different ways in which competition and data protection authorities can work together.

The Chair agreed that the design of systems, the multiplicity of objectives and the number of interested regulators raise important issues. He invited the Secretariat of the Directorate for Science, Technology, and Innovation (STI) to introduce the concepts and definitions of data portability and interoperability, and the Secretariat of the Competition Division to discuss its background paper.

The STI Secretariat defined data portability as the ability of a natural or legal person (user) to receive its own data from a data holder or to request that data be transferred to a specific third party, in a structured and commonly used format. This definition stresses the user's control over the transfer of data, and in that distinguishes data portability from other data access or data sharing regimes.

STI has identified five key dimensions of data portability, along which various types of such measures are differentiated. One dimension concerns the sectoral scope: while some data portability initiatives concern certain sectors (e.g., banking), others are broader and may even cover all sectors of the economy (e.g., the general data protection regulation (GDPR)). Another important dimension concerns the *modus operandi* of data transfer mechanisms, with some measures enabling add-on downloads or one-time transfers of data, while others allow for direct data transfers to third parties, e.g., through application programming interfaces (API). Yet another set of mechanisms are used to transfer data on a continuous, real time basis, and thus facilitate interoperability. STI's mapping of portability initiatives demonstrates a trend towards the latter type of mechanism, with interoperability becoming increasingly important.

The Competition Division Secretariat noted that Data portability has the potential to reduce consumer switching costs, facilitate multi-homing, mitigate market power concerns, and foster the development of new services. It may however fail to achieve its potential if, for example, the scope or frequency of data transfers are limited, the transfer process is riddled with problems, and most importantly, if data portability is implemented in markets characterised by strong network effects, especially as a stand-alone measure. In terms of enhancing competition, data portability is therefore most effective on its own in markets where network effects are relatively limited, and where individual level data sets are valuable and clearly defined.

Interoperability measures essentially identify standards for different systems to communicate with one another or share functionality. They have the potential of reducing lock-in effects and supporting market entry by allowing customers to retain network effects when moving to new services. They can also allow customers to unbundle and mix-and-match digital services. However, the implementation of interoperability measures poses certain risks, such as the curtailing of innovation and the entrenchment of existing standards set by incumbents, who may use their influence to maintain their positions in the market. Oversight over the design of standards and resolution of disputes related to their implementation is therefore required. Finally, the background paper introduces a wide range of relevant theories of harm and considers the possibility of administering data portability and interoperability measures as merger remedies, mainly in the context of vertical and conglomerate mergers.

The Chair noted that attempts to generalise data portability and interoperability measures are misleading, and that discussions must be focused on particular types of such measures. He then moved to the first topic of discussion concerning the effects of data portability and interoperability on competition and gave the floor to Jan Krämer.

Jan Krämer opined that data portability has two main effects on competition. One is a "learning effect" that can benefit incumbents' direct competitors and others as well. More data enables the development of better algorithms and services, which in turn attract consumers who provide additional data. These indirect network effects create entry barriers, and data portability regimes that ensure competitors' access to some data could be beneficial in this respect. But in contrast to the views expressed earlier, he believes data portability could also benefit those who are not currently in direct competition with incumbents, by fostering innovation and the development of new services. As the firms offering such services grow, they may ultimately compete with incumbents' offerings.

The second effect concerns the reducing of switching costs, which depends, among other things, on the scope of ported data. Data portability regimes should focus on porting collected data, since relatively few firms are in a position to directly collect data from consumers. In contrast, inferred data (e.g., through data analytics) is and should remain the subject of competition and should remain outside the scope of data portability measures. There are, however, trade-offs to consider: for example, consumers may be more inclined to provide more data if they believe it can be ported; ironically, however, this can entrench incumbents' dominance, increase firms' hunger for data and decrease incentives to develop data sparse services. Additionally, if implemented across the boards, data portability can impose a heavy burden especially on smaller firms.

There are two distinct types of interoperability: one is the mere exchange of data, and the other is the ability of one party to trigger actions by another party. Most significantly, interoperability may allow competitors to share networks and network effects and thus drive competition. Another driver of competition enabled by interoperability is multi-homing, which allows the concurrent use of competing services. Interoperability, however, may lead to unintended consequences such as tacit collusion and coordination between cooperating firms. In addition, there is a trade-off between competition resulting from the opening-up of networks through interoperability, and the disincentives to innovate and create new networks such measures create. Finally, data sharing may create privacy risks for consumers.

The Chair asked Emily Hart to provide a business perspective of the issues under discussion.

Emily Hart noted that new application developers rely on interoperability with larger players. Such small businesses lack the resources to develop entirely new solutions, and

initially tend to develop unique differentiated features in order to gain a foothold in the market, and then build on top of that. For example, customer relationship management (CRM) software often offers excellent APIs that enable small developers to tailor differentiated solutions fit for specific businesses. Small developers can therefore compete in new places in the market, without having to provide the entire CRM service package, and without being subject to the regulation imposed on larger firms.

The Chair then asked the Netherlands to discuss its report on big-tech in the payment system.

The Netherlands' report focused on big-tech firms' involvement in the payment system, and recommended that payment service providers be granted access to the big-tech firms' services on a fair, reasonable and non-discriminatory (FRAND) basis. Big-tech firms do not have a strong position in the payment system sector, but that they are rapidly growing. Interestingly, the report found that the European Union's Payment Services Directive 2 (PSD2) was not the driver of big-tech's entry to the market, despite the data portability and interoperability measures that directive imposed. Rather, these firms' desire to complement their offerings with payment services in order to better compete with rival ecosystems was the main reason for their entry into the market. The main concern is that the big-tech firms' control over mobile phones and their dominance in adjacent markets will enable them to foreclose competitors from the payment system market. The Netherlands believes that the issues concerning big-tech firms, which have direct relationships with clients, should be addressed in the EU Payment Services Directive as well.

The Chair gave the floor to Peter Swire.

Peter Swire believes that in this context lock-in effects and switching costs are more significant than network effects. Focusing on the lock-in problems from competition and other perspectives can simplify the analysis and help determine where intervention is likely to be effective.

The Chair moved to the second part of the discussion which concerns enforcement and asked Brazil to discuss its experience with the Guiabolso-Bradesco case.

Brazil explained that this case began with a complaint alleging that Bradesco Bank abused its dominant position to disadvantage Guiabolso – a smartphone application that assesses users' personal bank information and provides financial management tools and credit services. Bradesco's implementation of a two-stage authentication system prevented Guiabolso from accessing Bardesco's clients' data. The Office of the Superintendent General found this conduct limited competition and rejected the bank's assertions that it was required to safeguard clients' information on the grounds clients' data was already being shared through other APIs. Bradesco ultimately undertook to cease its conduct and to implement interoperability mechanisms that would grant Guiabolso access to clients' data until the open banking regulations issued by the Central Bank of Brazil come into force. The proceedings against Bradesco were stayed in return for a financial contribution on its part and may be closed if it fulfils its obligations.

The Chair then gave the floor to Michal Gal.

Michal Gal began by stressing the importance of big data, and our ability to learn from it is positively correlated to the volume, variety and quality of the data. . While her presentation focused on non-voluntary transfers of data such as those mandated by law , she noted that antitrust offense can also arise in a wider set of cases, such as setting interoperability standards in the industry in a way which effectively raises rivals' costs.

Anti-trust concerns related to the degradation of data portability and interoperability arise when artificial barriers to data flow are created, access to data that they might have

otherwise legally accessed is foreclosed, and rivals' ability to compete is limited. Obstacles affecting access to private data may increase switching costs and lock-in effects, limit multi-homing and prevent users from enjoying the benefit of data. Such theories of harm can be assessed in the context of investigations of possible infringements or merger control.

Six main requirements must be fulfilled in order to establish such a theory of harm in a given case. First, data must be important for competition in the relevant market. This includes the feasibility of its collection as well as its use by rivals. Data need not be essential, rather it is sufficient if limited access can raise rivals' costs significantly. Second, significant barriers to data access should exist (e.g., technological, legal, or financial barriers) that may not be circumvented by employing more efficient algorithms or data scraping methods; such barriers may be presumed when data transfers are mandated by law. Third, data transfers are not limited by legal constraints (e.g. security, privacy, data ownership etc.). Fourth, data transfers should increase welfare in terms of enhanced competition, data synergies or network effects. The analysis should focus on the long term' including effects on motivations to collect data; the burden to prove any potential long-term negative effects on data collection lies with dominant incumbents. Once again where data transfer is mandated by law, this can be assumed. Fifth, the infringer's actions significantly limit data transfers and the ability of one's data to be used by others. Finally, the infringer directly or indirectly gains a comparative advantage as a result of its actions. The assessment of these requirements necessitates a technological approach, and cooperation with data scientists should be considered.

Data portability and interoperability may also serve as remedies in cases where enforcement is directed against the degradation or limitation of interoperability or portability, but they can also be included as part of a larger remedy package, and even as an alternative to structural remedies. They bring about many benefits: such remedies may limit anticompetitive conduct and its consequences, introduce competition in the market or for the market (both between firms and between ecosystems), and tmay be tailored to address particular concerns. such remedies have, however, many limitations, some of which can be worked around once acknowledged. For example, timeliness is essential – competition law proceeding often take too long for remedies to be relevant and effective. Additionally, competition law remedies apply to specific cases, and do not establish market-wide standards. Further, remedy design and oversight are complex: firms often engage in so called "pretend sharing" and it may be necessary to standardize data, mitigate data protection concerns etc. Moreover, remedies pose additional risks such as increased market transparency that may facilitate collusion, disincentives to invest in data collection, and the risk that intervention favours certain firms over others. Finally, in some circumstances alternative remedies, e.g., the sharing of algorithms, rather than data, may be more effective, and in some markets economies of scale from data transfers might be limited.

The Chair asked the United States to share its experience with such remedies.

The United States Federal Trade Commission (FTC) noted that competition and consumer protection laws and policies are intertwined, and changes in one field have profound implications on the other.

Data Portability can only be effective if there exist rivals to which data can be ported. Further, the format in which data is provided can significantly limit the effectiveness of portability. While Interoperability has greater potential to promote competition, it may lead to competitive harm. For example, in its complaint against Facebook, the FTC alleges that while Facebook encouraged software developers to build and entire ecosystem, apps and tools that would interoperate with Facebook, their access to Facebook's key interconnections and APIs was granted on the condition they would not develop competing

functionalities or promote other social networks. Facebook allegedly punished developers that violated these conditions by limiting their access to important APIs and their ability to grow into stronger competitive threats.

The United Stated Department of Justice stressed the importance of the interplay between competition and other policies such as privacy, consumer protection and intellectual property, and noted that the consideration of data portability and interoperability measures requires complex judgments regarding their effects on a wide range of market participants. While data portability and interoperability may enhance competition by facilitating switching or entry, there is little practical experience that could shed light on the effectiveness of such measures, in particular in the context of an industry-wide regulatory mandate, and they should be therefore considered very carefully. In the enforcement context, where there is more time to consider the link between data portability and interoperability and competitive harm, there may be more confidence about employing such measures as remedies.

The Chair asked Emily Hart whether she had any comments to share.

Emily Hart noted that the issue of user data privacy is brought up in different contexts. Users' privacy should be guaranteed, they should not be surprised by their data flowing away to unpredicted places, and they should be allowed access to their own data. However, whereas in the healthcare industry regulations concerning interoperability standards and patients' requests to receive their own data are being enforced, the situation is different in respect of social media. On one hand, private data is publicly available on social network platforms, but on the other hand, extracted data is hardly valuable to competitors because of the interactive nature of social networks and is very difficult to port to other services.

The Chair asked whether Emily Hart believes that data portability is of limited usefulness in the context of social networks because of its specificity to particular interactions on a given social network.

Emily Hart replied that one should distinguish between standardised data such as the one stored by healthcare providers as well as some personal data that is stored on social platforms, and feature specific data that is very particular, such as posts or reactions on social platforms, whose portability is limited.

The Chair followed up, asking Emily Hart what types of data on Facebook, for example, could be characterized as standardised as opposed to platform specific.

Emily Hart replied that some users store personal information (e.g., pictures, videos, etc.) on Facebook, and that those files can be ported to other services. The issue is much more complex when it comes to interactions, and one must consider end user licence agreements in this respect. She opined that it is possible to come up with reasonably good standards as long they account for the distinctions and nuances discussed above.

The Chair gave the floor to Jan Krämer.

Jan Krämer expressed the view that, despite several potential unintended consequences, on balance, data portability has very positive procompetitive effects. One current problem is that the scope of ported data is too limited; one solution that can be beneficial for competition social media platforms is a regime mandating the porting of information concerning the context of ported personal data.

Another problem is the assertion that data portability is only beneficial if there is a receiving competitor in place – an assertion that is erroneous because data may be used in different contexts and because competitors may not be visible at the time a data portability mandate is imposed, but they might nevertheless exist or even emerge as a result of the mandate, as

experience from the financial services sector demonstrates. A third problem concerns frequency – typically, the frequency of ports is too low; new businesses are more likely to build on continuous real-time data portability.

The Chair asked how competition authorities can determine the proper scope of data portability.

Jan Krämer replied that he was discussing observed data and that may indeed be complex. The obligations should by asymmetric and target large firms, but the specific boundaries should be determined on a case-by-case basis, with regard to legal limits on data sharing, some of which can be overcome with technology.

The Chair gave the floor to the United States FTC.

The United States Federal Trade Commission agreed with Jan Krämer's point that portability can facilitate entry and clarified that the requirement should be for competitors to be able to be in place (rather than to currently be in place). The delegate nevertheless asserted that portability alone cannot create competition if there are no competitors and there exist additional barriers to entry.

The Chair asked if the requirements should be that there be an entity is interested in the data and that is able to exploit it in order to compete.

The United States Federal Trade Commission clarified that mere ideas about how to exploit data are insufficient, and that the ability to overcome barriers to entry and compete is required.

The Chair then moved to third topic of discussion concerning regulation mandating data portability and interoperability and he asked Inge Graef to provide a regulatory perspective on this topic.

Inge Graef discussed her research which compares the GDPR with sector specific data portability regimes adopted in the EU, namely the Digital Content Directive, PSD2 and the Electricity Directive. These regimes differ in terms of objectives, beneficiaries, and standardisation requirements. The existence of different regulations raises questions as to what data portability regime applies, which regulator has the power to enforce portability, and creates coordination problems. However, some of the sector specific regimes, which are tailored to the peculiarities of their respective sector, appear to be more effective than horizontal regimes that apply across many sectors and even than *ex post* competition law interventions. For example, while the data portability standards developed under PSD2 were designed to foster the development of payment initiation and account information services, the ported data is relevant to the development of other services as well. In theory, sector specific regulation may have spill-over effects in the sense that the standards and infrastructure used for their implementation may support a broader interpretation of horizontal data portability mandates. Such effects enhance overall portability and create opportunities to develop data-based services more effectively.

Most sector-specific data portability regimes focus on the micro level and on the empowerment of users in their relationships with data holders. The degree to which competition could be thus promoted depends on users invoking their powers, and authorities should therefore consider data sharing measures beyond mere data portability. The EU's proposed legislation concerning the regulation of data access represents a move in this direction.

Asymmetric regulation targeting the big market players is required to reduce the burden on new entrants, who should not be required to spend their limited resources on complying with the technical requirements of data portability regimes. But regulation should be

asymmetric also in terms of benefits – large firms should be prevented from taking advantage of sector-specific data regimes to extract even more data and use it to expand their ecosystem in a manner detrimental to competition and innovation.

The Chair noted that Inge Graef mentioned that the GDPR contains some form of data portability and asked Michal Gal to comment on the link between the GDPR and competition.

Michal Gal began by stressing the importance of big data, and our ability to learn from it is positively correlated to the volume, variety and quality of the data. . While her presentation focused on non-voluntary transfers of data such as those mandated by law , she noted that antitrust offense can also arise in a wider set of cases, such as setting interoperability standards in the industry in a way which effectively raises rivals' costs.

Anti-trust concerns related to the degradation of data portability and interoperability arise when artificial barriers to data flow are created, access to data that they might have otherwise legally accessed is foreclosed, and rivals' ability to compete is limited. Obstacles affecting access to private data may increase switching costs and lock-in effects, limit multi-homing and prevent users from enjoying the benefit of data. Such theories of harm can be assessed in the context of investigations of possible infringements or merger control.

Six main requirements must be fulfilled in order to establish such a theory of harm in a given case. First, data must be important for competition in the relevant market. This includes the feasibility of its collection as well as its use by rivals. Data need not be essential, rather it is sufficient if limited access can raise rivals' costs significantly. Second, significant barriers to data access should exist (e.g., technological, legal, or financial barriers) that may not be circumvented by employing more efficient algorithms or data scraping methods; such barriers may be presumed when data transfers are mandated by law. Third, data transfers are not limited by legal constraints (e.g. security, privacy, data ownership etc.). Fourth, data transfers should increase welfare in terms of enhanced competition, data synergies or network effects. The analysis should focus on the long term' including effects on motivations to collect data; the burden to prove any potential long-term negative effects on data collection lies with dominant incumbents. Once again where data transfer is mandated by law, this can be assumed. Fifth, the infringer's actions significantly limit data transfers and the ability of one's data to be used by others. Finally, the infringer directly or indirectly gains a comparative advantage as a result of its actions. The assessment of these requirements necessitates a technological approach, and cooperation with data scientists should be considered.

Data portability and interoperability may also serve as remedies in cases where enforcement is directed against the degradation or limitation of interoperability or portability, but they can also be included as part of a larger remedy package, and even as an alternative to structural remedies. They bring about many benefits: such remedies may limit anticompetitive conduct and its consequences, introduce competition in the market or for the market (both between firms and between ecosystems), and tmay be tailored to address particular concerns. such remedies have, however, many limitations, some of which can be worked around once acknowledged. For example, timeliness is essential – competition law proceeding often take too long for remedies to be relevant and effective. Additionally, competition law remedies apply to specific cases, and do not establish market-wide standards. Further, remedy design and oversight are complex: firms often engage in so called "pretend sharing" and it may be necessary to standardize data, mitigate data protection concerns etc. Moreover, remedies pose additional risks such as increased market transparency that may facilitate collusion, disincentives to invest in data collection, and the risk that intervention favours certain firms over others. Finally, in some circumstances alternative remedies, e.g., the sharing of algorithms, rather than data, may

be more effective, and in some markets economies of scale from data transfers might be limited.

The Chair questioned whether competition authorities are well positioned to consider all these elements.

Michal Gal replied that it may be challenging for competition authorities, but that there may be cases that are worth investing in, and that incorporating computer and data scientists in competition authorities' teams could ease the burden and inform competition authorities' enforcement policies.

The Chair asked Australia to share its experience with consumer data rights (CDR) regulation.

Australia explained that the Australian Competition and Consumer Commission (ACCC) holds a dual mandate to protect CDR and promote competition. CDR essentially revolves around consumers' trust in the system and control over their own data. Implementation is moving fast, and the ACCC has had to invest in the implementation of systems and in the hiring of data scientists. The ACCC is now considering how to meet the objective of allowing cross-sectoral interoperability by enabling the sharing of data between sectors within the system. The ACCC is also considering advocating for a change of regulation that would allow accredited persons, who have access to users' data, to not only be able to read it, but to edit it as well, believing this could foster innovation.

The implementation of the CDR Act is phased, and began with the banking sector, where market participants have the most sophisticated digital systems; the energy, telecommunications and other sectors will follow. The burden imposed on firms subject to CDR regulation is significant, as they are required to invest in IT and comply with users' requests to port their data immediately. The benefits for consumers are very significant, both in terms of consumer protection and promotion of competition. For example, whereas in the past it was very difficult to get mortgage rate quotes from banks, it is now possible to transfer data from one bank to another and receive new quotes immediately. Beyond price competition, these measures promote innovation by allowing new data recipients to develop new fin-tech services that may compete with traditional bank services, and similar exciting developments are expected to occur within the electricity and telecommunication sectors. While data portability mandates may play an important role in promoting competition, Australia is sceptical about the effectivity of CDR in promoting competition against big digital platforms, since consumers are unlikely to agree to share the types of data that could be most useful for emerging competitors (e.g., location data).

The Chair asked the UK to share its experience with the implementation of data portability and interoperability in the banking sector.

The United Kingdom explained that all nine major banks were mandated by law to adopt the read/write standards that were agreed upon in January 2018, and the largest ones introduced their own open banking products. In addition, all payment service providers in the UK that were mandated to provide access to third parties under PSD2 adopted the same standards; as a result, virtually all payment accounts in the UK are covered by the same standards. There are currently 140 active third-party providers in the market, and an additional 300 in the regulatory pipeline. Initially, most providers offered read-only account information applications, but there is an increase in the number of payment applications due to improved payment-side functionality, and an estimated 3.5 million consumers utilise these services daily. Surprisingly, small businesses were very quick to subscribe to these services, which link perfectly with cloud-based accounting services they tend to use. Even more surprising was the implementation of such services by the UK Government, which led to great savings. While it is still too early to assess the effectiveness

of these measure, there are many positive indications, and the UK is considering applying the same data portability and interoperability measures in other regulated and non-regulated sectors.

The Chair then gave the floor to Peter Swire.

Peter Swire noted that while he agrees with Inge Graef that implementing technical standards in certain sectors may produce positive spill-over effect in other sectors, it is important to remember that sharing standards, data fields and sectors differ from one another, that standards will not always easily translate, and that a sector-by-sector approach may be required. He also noted that competition authorities should be mindful of the risks posed by the role incumbents play in standard setting.

The Chair noted that BIAC favours measures imposed *ex post* over *ex ante* regulatory mandates, which place a heavy burden on market participants. He asked BIAC to discuss its position and asked whether asymmetric regulation targeting the larger firms would not address its concerns.

BIAC noted that its members' views on data portability and interoperability differ and depend on whether they are likely to be on the transferring or receiving end. BIAC is consistent in its position that competition law enforcement should relate to clear and demonstrable violations, and that remedies should be tailored to restore competition. It is important not to blur competition policy with other types of policies and to clearly state the objectives of regulations unrelated to competition enforcement.

BIAC reserved its comments regarding asymmetrical regulations, as its members reside on both sides of the issue. BIAC is however concerned about the burden on businesses, the effect of unifying around certain data standards which could slow innovation, and the risk that data sharing could facilitate collusion. It is important to consider whether portability resolves competition concerns: an abundance of data sometimes leads to market power; however, there are cases where market power leads to abundance of data. Another contentious issue concerns the delineation of the data subject to portability: it may be challenging to discern between collected user data and data that is the product of the platform's analysis.

The Chair noted that the link between data and power is becoming increasingly clear and asked BIAC to clarify whether there indeed exist different types of cases that require different solutions.

BIAC replied that the virtuous cycle between data and power does not always exist, and that every case should be considered separately.

The Chair then moved to the last part of the discussion concerning trade-offs between competition policy and other policy goals and asked Peter Swire to discuss the balance between them.

Peter Swire explained that typically, competition policy seeks to open data flows, while privacy and security policies push in the other direction. In Europe, the term "portability" refers to individuals' rights to transfer data, whereas mandates to transfer databases or a data on a group of users have been termed "data sharing", but this is a rather vague term. While "interoperability" is a clearer term than "data sharing", it should not be interpreted in the narrow sense given to it the world of computer science. He suggests discussing the issue in terms of "portability or other required transfers" (PORT).

Opening up data flows may foster innovation and enhance competition through the mitigation of lock-in effects and the reduction of switching costs. On the other hand, from a privacy and security perspective there are concerns that data may be transferred to the

wrong hands, or that third-party data will be transferred without consent. This kind of dilemma can be addressed through a data portability impact assessment, which is similar to data protection and privacy impact assessments. One of the papers Peter Swire authored considers 14 such structured questions and tests them against multiple case studies in the EU and US. This method can inform general decisions concerning the implementation of portability regimes and help determine which institutions should regulate them and can also inform individual firms and competition authorities' assessments and decisions in concrete matters.

The Chair asked who should conduct such impact assessments.

Peter Swire replied that competition authorities should be responsible for competition assessments but must also account for data protection, privacy, and security considerations. Typically, data protection regulators do not consider themselves competent to perform competition assessments, so their involvement ultimately depends on their ability to cooperate with the competition authorities.

The Chair asked Israel to discuss inter-agency cooperation in this context.

Israel submitted a report authored jointly by the Israel Competition Authority (ICA), the Consumer Protection and the Privacy Protection authority as its contribution to this roundtable. The report advocates for relevant legislation and offers the three authorities' perspectives concerning various regulatory dilemmas. The cooperation between the authorities is broader than represented by the joint report and was initiated by the ICA after it quickly became clear a multi-disciplinary approach is required to address the issues in digital markets. Maintaining this relationship requires patience and open-mindedness, and it is helpful to have one agency take responsibility over the technical aspects of the cooperation. Israel noted that it is currently considering whether a specialized digital platform regulator should be established, and that it would welcome any relevant insights the participants have.

The Chair asked Steve Wood to react to the discussion.

Steve Wood was particularly interested by Israel's attempt to bring together relevant agencies, since inter-agency cooperation is key to the successful implementation of all types of data portability and interoperability regimes. He believes the regulatory community should strive to join-up portability impact assessments with privacy impact assessments, but that there should be a move away from the language of trade-offs, as these can be avoided if enough consideration is given to the issues at hand. Ensuring consumer confidence is also vital, and regulators should attempt to understand consumers' perspective and concerns in a holistic way. Finally, "regulatory sandbox" measures that support small companies and innovators who seek data may be beneficial, especially in the context of horizontal portability regimes.

The Chair gave the floor to TUAC.

TUAC noted that vast amounts of data are collected in the workplace, and that its use may affect working conditions and labour mobility. Workers are put in an unfair position: their workplace data rights are limited, they are prevented from sharing the value of the data they provide, and its distribution often occurs without their consent. In addition, platform workers' rights to data portability are often restricted, and gig workers are thus prevented from switching to other platforms. are effectively locked-in and their revenue is affected. The inability to exercise data portability rights may lead to the emergence of labour market monopsonies. TUAC believes that inter-agency cooperation is required as competition authorities may be unable to intervene unless regulation on data portability, access and sharing is clear.

From a worker's perspective, one of the main limitations of current data portability regulations is the reliance on consent – employees are not in a position to refuse to allow collection of data by employers. Further, employees are at a disadvantage because employers may have legitimate interests to refrain from providing employees with their data. In addition, the current definition of data encompasses personal data, but TUAC believes it should include collective data for workers, in order to enable unions to use it effectively for collective bargaining, and in particular to bargain over the value of data and how it can be made portable. The definition of data should refer to observed data, because this is the type of data most heavily collected at the workplace. Portability rights should be about more than one-off transfers and should allow for real-time transfers that could ultimately empower workers.

The Chair asked the expert speakers to share their final comments.

Michal Gal stressed the importance of a holistic and synergetic regulatory regime, of setting priorities between policy goals, of determining the sources of market failures and the regulator which is best positioned to address them, and of the interface between regulators and their ability to learn from one another. She added that focusing only on personal data may be insufficient, as this type of data is sometimes combined with non-personal data whose transfer is required to resolve competition issues.

Emily Hart stressed the importance of considering the cost of compliance with data portability and interoperability regulations, in particular the burden on small businesses.

Inge Graef noted that data portability has the potential to promote competition and that there are clear synergies between competition enforcement and sector-specific regulation. Competition authorities can build on existing regimes to open up data-driven markets even more.

Peter Swire believes that having teams that include competition, technical, privacy and cyber security experts will lead to better outcomes.

The Chair noted he was struck by the fact that the empowerment of consumers will not guarantee the effectiveness of data portability in terms of promoting competition. Further, there seems to be a trade-off between consumers' interests and competitors' interests (which raises interesting questions concerning consumer welfare standards), as well as other trade-offs such as the ones between static and dynamic competition, and the ones between different policy goals. While there are some positive indications, there still is insufficient experience to distinguish between effective and ineffective measures. All these considerations render remedy design very complex.

Competition authorities are often reluctant to cooperate with other regulators, but it seems that the idea that they should do so in this context enjoys some consensus. It seems that the relevant regulators are open to co-operation, considering the multitude of policy goals, trade-offs, complexities, and uncertainties in this area.

The Chair thanked the speakers, the secretariat and the participants and concluded the discussion.