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Consumer data rights and competition – Note by Brazil

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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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1. It is widely acknowledged that businesses are increasingly using consumer data for their activities. At the same time (and maybe to a greater extent), issues regarding data collection and consumer privacy have arisen. Among these issues, the collection and sharing of data without consumer consent is one of the most serious, especially considering that the ultimate owner of the data is the consumer.

2. The aforementioned issue is even more harmful when consumers do not know whether information about them is being collected or shared by businesses. This scenario could get worse from the consumer point of view if it is unclear what the benefits of this information flow through worldwide clouds are and whether it represents an advantage for them.

3. However, it is not always the case that data collection and sharing entails consumer privacy issues. Firstly, because the flow of data can occur upon their conscious request and knowledge, should consumers believe they would be better off if their data is collected or shared among businesses. Secondly, because due to some information technology attributes, there are situations in which businesses that receive troves of data are incapable of exploiting the anonymized data in a negative way. In short, there could be efficiencies associated with data sharing that are far from representing harm to consumers' privacy.

4. When consumer privacy concerns are used as excuses for engaging in an anticompetitive conduct, the occasion calls for antitrust bodies to step in. However, it is crucial to highlight that what attracts the competence of the antitrust authority is the competition issue itself – refusal to deal, for instance – and not the consumer privacy concern. This latter is merely the claimed justification for the anticompetitive practice and could be substituted by various issues, such as security and technological compatibility concerns.

5. On the matter regarding access to consumer data, CADE (Brazil's Administrative Council For Economic Defense) has an ongoing investigation into the financial sector. On one hand, this sector has been for a long time a heavy user of personal and transactional data. On the other hand, it is highly concentrated in Brazil, as it is in various countries. In this sense, the impacts of avoiding data sharing must be assessed, including when the alleged reason is protecting consumers' privacy. If this is the case, the damages to privacy and to competition, which in the end cause backlashes against consumers, should be balanced. However, to the relief of antitrust authorities, which could be in a difficult position valuating competition and consumer privacy, that is not always the case. In other words, fostering competition by stimulating an increase in data sharing does not necessarily occur at the expense of consumer privacy.

6. The various aspects that arose throughout this investigation[1] could be a useful framework for the discussion on how consumer data rights (which encompass not only the right for privacy but also the right for portability) impact competition.

[1] The views expressed in this document do not necessarily represent CADE's opinion regarding the case at issue and are merely brought as a contribution to the discussion on consumer data rights and its impact on competition.

1. The use of consumer data in the financial sector

1.1. An important element for doing business

7. Collecting clients' data is inherent to the banking business. From a personal information form at the beginning of the client-business relationship to an extensive record on income, debts, investment, monthly expenditure, and checking account balance (transactional data), it is undeniable that the amount of data gathered by financial institutions is substantial. Furthermore, it is also true that all this information is linked to their activities and much needed inputs to provide their services more efficiently.

8. Possessing a dataset about a customer results in efficiencies in the sense that it allows financial institutions to charge lower rates and offer more services to a given client. When granting a loan to a customer it is acquainted with (due to provision of checking account services, for example), the financial institution has more elements to presume, for instance, whether this given customer is more likely to pay any debts timely, since the institution knows whether the customer has a good record in honoring past obligations.

9. However, there is an externality of this acquaintance that could negatively impact competition in this sector: a large bulk of information about their own clients could give banks a degree of market power that could potentially raise barriers to entry because clients are more prone to be locked in a financial institution that has a larger dataset about them. A 2015 report[2] on an investigation on the retail banking market by the Competition & Markets Authority from the United Kingdom has shown statistics on this: more than half of the respondents of the survey has had a relationship with their personal accounts provider for more than 10 years and less than 3% of the respondents had switched to a different provider over the year before the survey.

10. Transparency and informational asymmetry issues put aside, the low degree of switching between financial services providers might be linked to fear, on the customer side, that any potential new service provider does not have full access to said customer's past transactional data. Without these records, a new provider would offer its services at a suboptimal level (concerning both price and quantity) due to lack of information about its new client. Hence, the ownership or, more precisely, control of these records put incumbent financial institutions in a more favorable position comparing to its competitors. As an illustration, imagine that competitors can only see a potential new customer through the windshield, but never through the rearview mirror, which would be a valuable source of information (and an important input, in the end) to provide their services.

11. Not so long ago, it would be costly to collect and share information related to past financial records of customers. Hence, if a competition authority faced this problem at a time before the *turbocharged digital era*, as characterized by Evans and Schmalensee[3], it would have to balance efficiencies against the costs to foster competition (in relation to the obligation to share data). Fortunately, it seems we do not have to face this tough choice anymore. Powerful informational technology tools make the sharing of information among agents not only possible but feasible at low transaction costs. We are experiencing a fast-increasing capacity to process and transmit huge troves of information at almost zero cost.

[2] https://assets.publishing.service.gov.uk/media/57ac9667e5274a0f6c00007a/retail-banking-market-investigation-full-final-report.pdf

[3] "The platform age is upon us because of the development of powerful information and communications technologies that have lowered the cost and increased the reach of connecting platform sides". Matchmakers: The New Economics of Multisided Platforms. Chapter 3.

As a result, there is a possibility of having efficiencies that cross the borders of incumbent financial institutions.

12. In other words, we could say that being restricted to a single institution was almost inevitable in the past analog era. It could not be worth incurring in the costs of gathering information and making in-person visits to various financial institutions in order to have the possibility of getting lower rates or an increased offer of products. However, in an era characterised by an intensive flow of information, which can dramatically reduce transaction costs, that lock-in reality cannot be considered irreversible anymore.

1.2. The emergence of fintechs

13. The possibility of gathering large amounts of information at a relatively low cost coincides with the emergence of fintechs. It is well known the existence of these institutions result in significant benefits to customers, which include cost reductions, efficiency enhancement, user-friendliness, more transparency, and financial inclusion.

14. The Comisión Nacional de los Mercados y la Competencia (CNMC), from Spain, acknowledged[4] that:

> *Considering that information is the most essential input of the financial activity, Fintech is but a breakthrough in capitalizing on information, hence its direct impact on the roots of the financial activity.*

15. That is, with the emergence of fintechs, customers can extract more value from their own information. This can be achieved not only through the cost reduction to share information, but also through the fostering of unbundling. The financial institution acquainted with a given client would no longer be the only business able to offer services at an optimal level nor would it be able to impose a bundle containing services that its clients do not necessarily want.

16. The attributes and rapid development of these new financial institutions can, however, be confronted with anticompetitive practices by those institutions whose dominant positions are increasingly challenged by the relevant competitive pressure imposed by fintechs.

2. Market failures, externalities and lack of competition

2.1. Incentives to hold information

17. In a recent study[5], the European Parliament mentioned some of these practices, which include *"a pursuit of non-interoperability that can act as a deterrence with anticompetitive effects if access to the market is difficult or costly"* and especially, the denial of that access that could result in:

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[4] E/CNMC/001/18 *Market Study on the Impact on Competition of Technological Innovation in The Financial Sector (Fintech)*, available at https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2018/181009%20Market%20Study%20on%20the%20impact%20on%20competition%20of%20technological%20innovation%20in%20the%20financial%20sector.pdf

[5] Competition issues in the area of financial technology (FinTech), available at: <http://www.europarl.europa.eu/RegData/etudes/STUD/2018/619027/IPOL_STU(2018)619027_EN.pdf>.

> *… exclusionary conduct when not allowing competitors to access data, the conclusion of exclusive contracts, if the incumbent uses its control over a particularly valuable dataset to create a network of contracts that forecloses competition, or tying and bundling of services, leveraging the firm's position and imposing the use of other services.*

18. To sum up, the matter related to consumer privacy and competition could be linked to the fact that an incumbent institution controls the financial data about its clients. Given that data is an important input for fintechs which, in their turn, can represent a competitive restraint for incumbent financial institutions, there are incentives to deny access to data. One of the alleged reasons used by the information gatekeepers to refuse access to the data they possess is the protection of their consumers' privacy.

19. There is an ongoing investigation in Brazil on this, which could provide a valuable framework to enrich the OECD Roundtable "Consumer Data Rights: impacts on competition".

2.2. Bradesco/Guiabolso – ongoing investigation in Brazil

20. CADE's investigation started after a request by the former Secretariat of Economic Monitoring from the Ministry of Finance of Brazil. In short, it accused Bradesco, one of the largest Brazilian retail banks, of hindering the development of the Brazilian fintech Guiabolso, which could potentially harm not only the new company itself but also Brazilian customers of banking services in general.

21. Guiabolso is a fintech that provides Personal Finance Management (PFM) services. After registering in the platform, users authorise, by manifesting their agreement and providing the passwords of their banking accounts, the application to scan their financial records kept by the institutions to which they are associated. As a result, Guiabolso users can have access to their financial status in an organised fashion and have a clearer knowledge about the actual prices they pay for banking services in general and, possibly, how much they could save if they changed financial habits or even switched to other financial institutions.

22. Furthermore, Guiabolso became a two-sided platform that connects its users, on one side, to credit institutions, on the other side. In doing so, it has the potential to break the tendency of restraining clients to a single institution by reducing transaction costs. Customers can have their financial records and transactional data available and are thus able to negotiate better rates for personal loans offered by businesses other than the banks that provide their personal account service, for example. The lenders, in their turn, besides increasing their capacity to reach new clients, can benefit from the reduction of informational asymmetry and offer more credit at lower rates, since they have better knowledge of customers' likelihood to honour their debts.

23. This virtuous cycle of efficiencies and increase in competition can, however, be interrupted by the lack of ability of entrants to collect data. Therefore, they will be less attractive from their potential users' point of view. In other words, should important financial institutions withhold data, it could result in a damaging *negative feedback loop* for the platform. As stated by the OECD[6]:

> *Because network effects create interdependencies among the groups on a multisided platform, a feedback loop may develop when membership of one side of the platform grows or shrinks. To illustrate, assume a platform raises the price of*

[6] https://one.oecd.org/document/DAF/COMP/WD(2017)40/FINAL/en/pdf

platform access for suppliers of some good or service. If some of those suppliers leave, the platform becomes less valuable to customers on the other side of the market, who in turn also leave, further reducing the platform's value to the remaining suppliers, and so forth. These dynamics need not be perpetual or irreversible, but at some point, they can go far enough to tip a platform market toward failure or dominance. As discussed below, the effects of this feedback loop may have important implications for both conduct and merger analyses.

24. The Bradesco/Guiabolso investigation is still ongoing. However, CADE has already tackled the issue of consumer data in the financial sector. For instance, in 2016 the agency approved a joint venture between Banco do Brasil, Bradesco, Caixa Econômica Federal, Itaú, and Santander (the five largest retail banks in Brazil) that created a new credit bureau[7]. The approval, however, was conditioned upon the signature of a Merger Control Agreement in order to eliminate competition concerns regarding the vertical integration between the parties and the new credit bureau.

25. The nature of that merger's vertical integration was linked to an upstream information control (by the banks) and a downstream usage of that information (by credit bureaus). The following quote of the General Superintendence Opinion[8] on that merger elucidates this concern:

"(…) A credit bureau that only possesses information about a given sector or group of businesses is not attractive for the businesses that consult it. A bureau that does not receive information about defaults from the financial sector would offer less attractive services for its consultants since the debtors of that sector would not be encompassed in the consultation. Therefore, it would generate false positives, situations when the consultation results in "no debt" even though, actually, there is a debt"

26. The Merger Control Agreement, by its turn, sets forth, among other obligations, *guarantees of non-discrimination* for competing credit bureaus accessing credit information. It acknowledged that the flow of information was an important attribute for the functioning of that market.

2.3. Information and market failures in the financial sector

27. There is an old Brazilian saying that states "gold is only given to the ones that have silver". In its simplicity, it summarises an important market failure associated with consumer data in the credit market: asymmetric information, in the sense that the lender does not know much about the borrower. As a result, it is straightforward that the amount of credit available is often below the expected in a situation with complete (or, at least, less incomplete) information among agents.

28. However, the lack of information about a given set of customers is not uniform among competitors in the credit market. As mentioned before, a bank acquainted with a given number of clients holds much more information about their financial records and their likelihood to honour any debts in comparison to its competitors. In other words, in this market, control over consumers' transactional data can constitute a barrier to entry. Hence, a bank that controls troves of information about a given set of clients is capable of

[7] http://www.cade.gov.br/cade_english/press-releases/cade-approves-with-restrictions-joint-venture-between-banks-in-the-sector-of-credit-information-services

[8] (SEI) reference number 0238352 at the Merger and Acquisition Process n. 08700.002792/2016-47

either offering more credit or having a higher markup in this activity. Without competitive pressure, the latter is more likely to occur.

29. In this regard, the Autoriteit Consument & Markt from the Netherlands provided valuable insight in a publication[9] about fintechs and the risk of foreclosure:

> *This unique bank-customer relationship and the confidentiality of the information arising from it mean that, in the case of front-end providers, there is no generic market for payment accounts. The relevant upstream market can be defined as the market for information about the payment accounts of a specific customer. It follows from this definition of the market that banks have a dominant position, since, for every payment account, there is only one bank that possesses the information about that account.*

30. A recent study[10] about bank competition and the cost of credit in Brazil, in addition to highlighting the importance of asymmetric information as one of the main factors that determine interest rates, stated that:

> *We show that a reduction in bank competition increases lending spreads (the difference between lending and deposit rates) and decreases credit volume, all considered in relative terms. The decrease in volume occurs fully through the extensive margin — i.e., fewer loans in equilibrium, and not smaller loans.*
>
> *Among other counterfactuals, we show that if Brazilian spreads fell to world levels, output would increase by approximately 5%.*

31. As usual, the market tries to adapt itself and work around asymmetric information. In the credit sector, this occurred through the use of collaterals as surrogates for transactional data. The Central Bank of Brazil 2018 Banking Report[11] shows statistics that highlight the importance of collaterals in reducing the chance of default and, therefore, the cost of credit, which is reflected in interest rates. In the table below, it is possible to see the significant difference between interest rates when the credit is collateralised (such as payroll loans, vehicles, real estate) and when it is not (non-payroll personal loans and revolving credit):

Table 1. Interest rates for distinct categories of credit operations

Category of credit operation	Yearly interest rate (%)
Revolving credit	271,0
Non-payroll loans without a warrant of payment	111,2
Non-payroll loans with a warrant of payment	30,5
Payroll loans	27,4
Vehicles	24,1
Real estate	9,3

Source: Central Bank of Brazil - 2018 Banking Report

[9] https://www.acm.nl/sites/default/files/documents/2018-02/acm-study-fintechs-in-the-payment-market-the-risk-of-foreclosure.pdf

[10] Working paper 508. Bank Competition, Cost of Credit and Economic Activity: evidence from Brazil, available at https://www.bcb.gov.br/pec/wps/ingl/wps508.pdf

[11] https://www.bcb.gov.br/content/publicacoes/relatorioeconomiabancaria/reb_2018.pdf (p. 48, in Portuguese)

32. It is still the case that non-collateralised credit is extremely expensive in Brazil. In competition terms, there is an efficiency issue still to pursue. What if the whole banking industry could know the amount of “silver” (as an illustration for transactional data) its potential customers have? These customers would be better off, since more financial institutions would be able to offer them credit at potential lower rates. The financial institutions that would then be able to serve such clients would also benefit, as they would be able to increase their output.

33. The banks, however, could have incentives to hold information about the clients they are acquainted with. Sharing information could mean both losing the ability to charge higher prices or decreasing output. Hence, given the potential efficiencies generated, with the emergence of fintechs and upon agreement by its users, would it be reasonable to impose the duty to share data as requested by customers? What are the impacts and the considerations that competition authorities should observe?

3. Competition law enforcement

3.1. Data holding and vertical restraints

34. An assessment from a competition law enforcer is suitable when a retail bank controls an input that is both important for providing its services and important for its competitors to provide their services. Thus, there is a potential theory of harm related to exclusionary practices carried out by the incumbent at the expense of new or potential entrants in the market. More specifically, this vertical restraint could be classified as a *refusal to deal* related to an important input for the provision of downstream services.

35. According to the Brazilian competition case law, to put it briefly, a unilateral conduct results in a violation of competition law when three elements are simultaneously present: dominant position, potential anticompetitive effects that outweigh associated efficiencies, and a practice that cannot be regarded as a regular business strategy.

36. The first element has already been explored in this document. When assessing a company’s dominant position in this market, as for measuring capacity, it is important to bear in mind the insight provided by the Netherlands competition authority: in the upstream, each bank is almost a monopolist in the market of its clients’ information; in the downstream, to assess incentives, the agencies must verify what is (besides other factors such as entry barriers) the market share of the bank that is allegedly holding the data, for example, in the market for personal loans or other markets where the entrants do business.

37. The impacts of the lack of information on prices and output in this market constitute the second element. Therefore, the existence of anticompetitive effects caused by information withholding is straightforward and closely linked to what was shown in the previous section of this document.

38. It is within the third element that the discussion surrounding competition and consumer privacy belongs. That is, the incumbent could claim its goal in refusing to share its clients’ data with other businesses is to protect client privacy, which is consistent with a “regular business strategy”.

39. However, as previously mentioned, data sharing does not always represent a risk for consumer privacy. The Application Programing Interfaces (APIs) have the ability to connect, without human intervention, data warehouses of two enterprises, not only allowing data sharing, but also mitigating the risks of leakages that could harm consumer privacy. Furthermore, the APIs can also deal with another issue related to data protection: they can

signal to data gatekeepers that there is a valid authorisation by a customer for the sharing of a given set of information to a certain set of businesses. This is crucial for data-holders to safely share information about their clients without being accused of mismanaging it.

40. To sum it up, powered by the technological tools that we currently have, consumer privacy and the fostering of competition by data-sharing are not necessarily conflicting values. Thus, whenever it is possible to verify that there are consumers willing to have their data shared among businesses and there is the possibility of establishing a safety technological framework to support this flow of data, it is a warning signal for competition authorities to assess data holding as a potential *refusal do deal*.

3.2. Refusal to deal: theory of input foreclosure

41. The first challenge that a competition enforcer faces when assessing a potential refusal to deal is discerning between conducts that harm competition and the freedom of trade, which is a legitimate right and a cornerstone of free markets. Hence, the first task of a competition authority is to point out the damages to competition that could potentially result from the alleged conduct. The impacts of withholding data in this market were already mentioned in this document.

42. Secondly, the input that is the object of the potential refusal must be *indispensable*. In this sense, in a paradigmatic decision[12], the European Court of Justice decided that stating that a foreclosed input is economically profitable is not enough to characterise it as indispensable, therefore not constituting a refusal to deal. It is necessary to take a step forward and prove there are neither available substitutes nor is it reasonable that the allegedly harmed competitor produces the input at its own expense.

43. Furthermore, to be characterised as a refusal to deal, both objective reasons and efficiency gains related to the refusal must be absent. In this regard, the economic notion of opportunity cost is useful for assessing companies' claims that their conduct does not have anticompetitive effects.

44. Finally, considering that the straightforward remedy for a refusal to deal is an obligation to supply, it is important to assess the dynamic effects of that possible obligation. That is, would it discourage investments and innovation? These aspects are often warning signals to competition authorities when intervening in the market, since investment and innovation are intricately linked to efficiencies and increase in society's welfare.

45. Due to the specificities of an allegedly foreclosed input, consumer data, the latter three aspects deserve a more in-depth analysis, as follows.

3.3. Refusal to deal: economic aspects of data

46. Differently from most inputs, which are tangible and were used for the development of the theory of refusal to deal, data has a unique feature: it is a *non-rival good*. That is, its supply is not affected by consumption, in the sense that consumption by an agent or a group of agents does not reduce the amount of data available for the consumption of other agents in the market.

47. Due to this non-rival aspect, that is, given that its consumption does not subtract the amount available for future consumption (by either the holder of the data and other businesses that could potentially use it), a duplicate production of the input by the harmed

[12] Case 7/97, *Oscar Bronner v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-7791, [1999] 4 CMLR 112, paras. 57-58, 69.

competitor is, by definition, inefficient. There would be an increase in overall production costs (instead of one, two or more agents would have to "produce" it) without an increment in the amount available for consumption (the same set of data would be available).

48. Furthermore, especially if it is possible to verify the aforementioned consumer privacy protection attributes (e.g. API), the only reasonable economic rationale for a refusal to share data is an anticompetitive intent. The data holder could share it without lessening the amount of data available for its own use, as opposed to what is observed in the supply of tangible goods or inputs when there are costs[13] involved.

49. As mentioned before, a competition authority must be cautious with regards to the dynamic effects of any intervention. When assessing refusals to deal related to data, it should be verified whether imposing a *duty to share* could reduce incentives to investments and innovation. First, as stated before, it should be assessed whether the input that is the object of the refusal is not only essential for its holders but also inherent to their businesses. Thus, a reduction in the collection of information from present and future clients is not an expected result from the imposition of a duty to share.

50. Furthermore, on the other hand, it is noteworthy that the innovative hype is more intense among the companies that depend on the information that would be shared (fintechs, in general). Some of these innovations were mentioned in this document, such as organising personal finances and reducing transaction costs for both users and other companies, fostering transparency and mitigating asymmetries of information. In conclusion, it is not the duty to share that should be a source of concern about the dynamic effects on this market, but the refusal to share that jeopardises the flourishment and development of innovative companies in this sector. A strong signal that there will not be a shortage of inputs represents less uncertainty for new entrants.

51. It is undeniable that antitrust authorities can play a fundamental role in promoting competition in this usually highly concentrated market by anticipating some of the results pursued by open banking initiatives. However, their action in this matter is likely to be limited to particular cases: it usually starts with a complaint and is not necessarily time effective, that is, before making a decision, the authority must go through the rule of reason stages. In this sense, a horizontal and definitive solution ought to come from regulators.

4. Regulation policies: data protection and open banking initiatives in Brazil

52. Despite granting consumers the property of their data for a long time (since the Consumer Protection Act was enacted in 1990), the Brazilian law only recently evolved to set forth clearer provisions on consumer data and rights. In this sense, and related to what has been mentioned throughout this text, the recently enacted Brazilian General Data Protection Act expressly grants consumers (owners of their own personal data) the right of data portability.

53. Specifically, on financial data, the Central Bank of Brazil (BCB in its acronym in Portuguese) defines[14] open banking as:

[13] When a firm does not use an input (which consumption is rival) in its own production plant in order to supply it, there is, at least, opportunity cost involved.

[14] Communiqué 33,455 of April 24th, 2019. Available at: https://www.bcb.gov.br/content/config/Documents/BCB_Open_Banking_Communique-April-2019.pdf

> *… the sharing of data, products and services by financial institutions and other licensed institutions, at the customers' discretion as far as their own data is concerned, through the opening and integration of platforms and infrastructures of information systems, in a safe, agile and convenient manner.*

54. The BCB's Board of Governors published the fundamental requirements for the implementation of open banking in Brazil in April 2019. These requirements encompass the objective, definition, regulatory strategy, and actions for the implementation of open banking. More specifically, it provides for the scope of the Brazilian open banking financial system, the definition of customers' personal and transactional data to be shared, and its phased implementation approach.

55. The effective implementation of open banking in Brazil is still to come. The first phase is planned to occur in the second semester of 2020. Before that, public consultation and a working group whose participants come from various market agents (including associations, banking institutions, payment processors, fintechs, and others) are ongoing.

56. At the end of the implementation process, the BCB's main goal is to allow, at the customers' discretion, that financial institutions process customers' personal and transactional data held by other financial institutions. One of the main expected benefits, according to the monetary authority, is[15]:

> *Promoting more competition: the financial institutions are able to offer to other institutions' customers better products and services, at lower costs and/or more favorable conditions.*

57. The aforementioned objective coincides with one of the main roles of a competition authority. In this sense, an antitrust intervention in this market, far from conflicting with the objective of the financial market regulator, anticipates its benefits, which are even more relevant when concentration and prices are high, which is the case of the market for credit.

[15] https://www.bcb.gov.br/en/pressdetail/2284/nota