Organisation for Economic Co-operation and Development

DAF/COMP/WD(2021)33

Unclassified

English - Or. English

31 May 2021

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Data Portability, Interoperability and Competition – Note by BIAC

9 June 2021

This document reproduces a written contribution from Business at OECD (BIAC) submitted for Item 1 of the 135th OECD Competition Committee meeting on 9-11 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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JT03477355

Business at OECD (BIAC)

1. *Business at OECD* (BIAC) appreciates the opportunity to make this written contribution to the hearing on data portability, interoperability and competition.

1. Introduction

2. In June 2020, the OECD held a roundtable discussion on a related topic entitled "Consumer Data Rights and Competition."[1] Numerous scholars, enforcement agency officials, and other commentators have contributed to the discussion on that issue, as well as a related but separate issue on how best to protect data rights and promote competition at the same time. In this paper, BIAC discusses some of these commentaries and studies in general and the call for mandatory data portability and interoperability in particular.[2]

3. It is generally accepted, at least in theory, that data portability and interoperability may increase competition by reducing switching costs and lowering entry barriers. However, there is no consensus within the business community on when it is necessary to impose competition-based obligations to facilitate interoperability of data or to require sharing of data between or among various companies that possess data. There is also lack of consensus on the legal basis on which sharing of data can or should be compelled, the implications of data sharing for incentives to invest and innovate, and the implications for consumers.

4. Recently, a number of governmental and non-governmental studies and investigations as well as a number of commentators have proposed mandatory data potability and interoperability especially directed towards large online platforms. They believe that mandatory data portability and interoperability will reduce switching costs, lower entry barriers, and in turn promote more robust competition in the digital economy in light of their perceived dominance of large digital platforms.[3]

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[1] *Consumer Data Rights and Competition*, OECD, *available at* https://www.oecd.org/daf/competition/consumer-data-rights-and-competition.htm. *See also* OECD, Consumer data rights and competition—Note by BIAC, DAF/COMP/WD(2020)46 (May 28, 2020), *available at* https://one.oecd.org/document/DAF/COMP/WD(2020)46/en/pdf [hereinafter BIAC Consumer Data Rights and Competition Paper].

[2] Daniel L. Rubinfeld, *Data Portability*, CPI ANTITRUST CHRON. 2 (Nov. 2020), available at https://www.competitionpolicyinternational.com/wp-content/uploads/2020/11/3-Data-Portability-By-Daniel-L.-Rubinfeld.pdf ("data portability (the ability to transfer data without affecting its content) and interoperability (the ability to integrate two or more datasets) significantly affect the use of data, with important implications for antitrust policy").

[3] *See* Majority Staff of H. Comm. on Judiciary, Subcomm. on Antitrust, Commercial & Admin. Law, Rep. on Investigation of Competition in Digital Markets (Oct. 4, 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf [hereinafter House Majority Report]; Stigler Committee on Digital Platforms, Final Report (Sep. 2019), *available at* https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf [hereinafter Stigler Report]; Unlocking Digital Competition, Report of the Digital Competition Expert Panel (Mar. 2019), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf [hereinafter Furman Review]; Competition & Mkts. Auth., Online Platforms and Digital Advertising–Market Study Final Report

5. At the same time, others question whether there is a sufficiently proven and serious antitrust problem that requires the remedy of mandatory data portability & interoperability. They also point out that such an obligation may significantly reduce innovation, chill competition and result in a superficially equitable but not particularly efficient or optimal outcome.[4]

6. Both proponents and detractors of the concept of mandated data portability appear to recognize that there are practical difficulties and limitations that would have to be

(July 1, 2020), *available at* https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf [hereinafter CMA Final Report]; Michael Kades & Fiona Scott Morton, *Interoperability as a Competition Remedy for Digital Networks*, (Wash. Ctr. for Equitable Growth, Working Paper Series, Sep. 2020), *available at* https://equitablegrowth.org/working-papers/interoperability-as-a-competition-remedy-for-digital-networks/; Cristian Santesteban & Shayne Longpre, Invigorating Competition in Social Networking: An Interoperability Remedy that Addresses Data Network Effects and Privacy Concerns (Apr. 30, 2021), *available at* https://ssrn.com/abstract=3733851; Ian Brown, *Interoperability as a Tool for Competition Regulation*, OPENFORUM ACADEMY (Nov. 2020), *available at* https://openforumeurope.org/wp-content/uploads/2020/11/Ian_Brown_Interoperability_for_competition_regulation.pdf; *Deep Dive Episode 141 – Interoperability and Data Sharing: An Antitrust Remedy in Search of a Market Problem?—Remarks by Alex Petros*, THE FEDERALIST SOCIETY (Oct. 8, 2020), *available at* https://fedsoc.org/events/interoperability-and-data-sharing-an-antitrust-remedy-in-search-of-a-market-problem [hereinafter Petros Remarks]; Becky Chao & Ross Schulman, *Promoting Platform Interoperability*, NEW AMERICAN (May 13, 2020), *available at* https://www.newamerica.org/oti/reports/promoting-platform-interoperability/; Chris Riley, *Unpacking Interoperability in Competition*, 5 J. CYBER POLC'Y 94 (2020).

[4] *See* George L. Priest, *The Antitrust Attack on Big Tech*, CPI ANTITRUST CHRON. (Mar. 2021), *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2021/03/5-The-Antitrust-Attack-on-Big-Tech-By-George-L.-Priest.pdf; Thomas M. Lenard, *If Data Portability is the Solution, What's the Problem?*, TECH. POL'Y INST. (Jan. 2020), *available at* https://techpolicyinstitute.org/wp-content/uploads/2020/01/Lenard_If-Data-Portability.pdf; *Deep Dive Episode 141 – Interoperability and Data Sharing: An Antitrust Remedy in Search of a Market Problem?—Remarks by Bruce Hoffman & Jay Ezrielev*, THE FEDERALIST SOCIETY (Oct. 8, 2020), *available at* https://fedsoc.org/events/interoperability-and-data-sharing-an-antitrust-remedy-in-search-of-a-market-problem; Geoffrey A. Manne & Sam Bowman, *Data Portability and Interoperability–The Promise and Perils of Data Portability Mandates as a Competition Tool*, INT'L CTR. FOR LAW & ECON. (Sep. 10, 2020), *available at* https://laweconcenter.org/wp-content/uploads/2020/09/Data-Portability-Paper-v4-2020-09-03.pdf; Gus Hurwitz, *Digital Duty to Deal, Data Portability, and Interoperability*, *in* GAI REPORT ON THE DIGITAL ECONOMY (2020), *available at* https://gaidigitalreport.com/2020/10/04/digital-duty-to-deal-data-portability-and-interoperability/; Christopher Yoo, *Unpacking Data Portability*, CPI ANTITRUST CHRON. (Nov. 2020), *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2020/11/5-Unpacking-Data-Portability-By-Christopher-S.-Yoo.pdf; Jordi Casanova, *Online Search Competition and the Risk of Unintended Consequences of Data Access*, CPI ANTITRUST CHRON. (Nov. 2020), *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2020/11/7-Online-Search-Competition-and-the-Risk-of-Unintended-Consequences-of-Data-Access-By-Jordi-Casanova.pdf; Emanuele Giovannetti & Paolo Siciliani, *The Impact of Data Portability on Platform Competition*, CPI ANTITRUST CHRON. (Nov. 2020), *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2020/11/8-The-Impact-of-Data-Portability-on-Platform-Competition-By-Emanuele-Giovannetti-Paolo-Siciliani.pdf; Bjorn Lundqvist, *Data Access and Portability and EU Competition Law*, CPI ANTITRUST CHRON. (Nov. 2020), *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2020/11/10-Data-Access-and-Portability-and-EU-Competition-Law-By-Bj%C3%B6rn-Lundqvist.pdf.

surmounted to address mandated data portability. Moreover, there is a recognition that not all data and all platforms are the same, and the challenges inherent in understanding data portability under these various circumstances need to be properly understood.[5]

7. BIAC recommends that competition enforcement agencies consider data portability and interoperability from the standpoint of competition laws and principles, in particular the principles for remediation of competition violations. To the extent that governments are considering legislation that would impose data sharing or portability obligations based on decisions to regulate platform markets for reasons other than competition, BIAC recommends that these non-competition bases be clearly articulated so that the considerations are clear and separately identified.

8. In connection with these considerations, BIAC also suggests that competition agencies evaluate the impacts of data portability or interoperability mandates through enforcement or regulatory action on incentives to innovate, as well as the net implications for consumers.

2. Necessity for and Desirability of Mandatory Data Portability and Interoperability Rule

9. Recently, a number of official governmental studies and other institutional studies examined the digital economy and recommended mandated data portability and interoperability as part of a broader set of solutions to a perceived problem with the market power of large digital platforms. For example, in March 2019, after over six months of study, the Digital Competition Expert Panel headed by Jason Furman submitted its report entitled "Unlocking Digital Competition" to the Chancellor of the Exchequer and the Secretary of State for Business, Energy and Industry Strategy of the UK government (Furman Review).[6] It noted that it does not agree that "digital platforms are natural monopolies" requiring "utility-like regulation."[7] At the same time, it also does not believe "there is already adequate competition and no policy changes are needed."[8] The Furman Review recommended the creation of a new Digital Market Unit (DMU) with a specific

[5] *See* Inge Graef, *The Opportunities and Limits of Data Portability for Stimulating Competition and Innovation*, CPI ANTITRUST CHRON. (Nov. 2020), *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2020/11/6-The-Opportunities-and-Limits-of-Data-Portability-for-Stimulating-Competition-and-Innovation-By-Inge-Graef.pdf; Rubinfeld, *Data Portability*, *supra* note 2; Peter Swire & John Snyder, *Using the Portability and Other Required Transfers Impact Assessment ("PORT-IA") in Antitrust Law*, CPI ANTITRUST CHRON. (Nov. 2020), *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2020/11/4-Using-the-Portability-and-Other-Required-Transfers-Impact-Assessment-%E2%80%9CPort-Ia%E2%80%9D-in-Antitrust-Law-By-Peter-Swire-John-Snyder.pdf; Daniel Gill & Wolfgang Kerber, *Data Portability Rights: Limits, Opportunities, and the Need for Going Beyond the Portability of Personal Data*, CPI ANTITRUST CHRON. (Nov. 2020), *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2020/11/9-Data-Portability-Rights-Limits-Opportunities-and-the-Need-for-Going-Beyond-the-Portability-of-Personal-Data-By-Daniel-Gill-Wolfgang-Kerber.pdf; Massimo Motta & Martin Peitz, Intervention Triggers and Underlying Theories of Harm–Expert Advice for Impact Assessment of a New Competition Tool (Nov. 2020), *available at* https://ec.europa.eu/competition/consultations/2020_new_comp_tool/kd0420575enn.pdf; Wolfgang Kerber & Heike Schweitzer, *Interoperability in the Digital Economy*, 8 JIPITEC 39 (2017).

[6] Furman Review, *supra* note 3.

[7] *Id.* at 2.

[8] *Id.*

mandate to carry out a number of recommended actions. Among other things, the Furman Review recommended that the DMU should promote "greater personal data mobility and systems with open standards where these tools will increase competition and consumer choice."[9] The DMU "would be able to advance data openness where access to non-personal or anonymised data will tackle the key barrier to entry in a digital market, while protecting privacy."[10] The DMU would decide on how to enforce the proposed data mobility (or data portability) and open standards (i.e., interoperability):

> *Data mobility and open standards are tools with great potential to secure greater competition. Where these solutions are not voluntarily agreed, deciding whether and how to require data mobility or open standards in a digital market will take engagement, expert skills, and careful analysis by the unit to decide when they will be proportionate and effective.*[11]

10. On September 16, 2019, the Stigler Center at the University of Chicago released the Final Report and Policy Brief of its Digital Platforms Committee, an independent and non-partisan committee of more than 30 academics, policymakers, and other experts (Stigler Report).[12] After spending over a year reviewing digital platforms, the Stigler Committee in its Report also recommends mandatory interoperability. It recommends various types and degrees of mandatory data portability and interoperability.[13]

11. The CMA Final Report, published in July 2020, also found the same problems with digital platforms.[14] Consistent with the Furman Review's recommendations, it also proposes creating a specialized agency (tentatively named the Digital Markets Unit, using the same term as the Furman Review) that should have as part of its toolkit the following:

- Increasing consumer control over data, which includes providing choices over the use of data and facilitating consumer-led data mobility;
- Mandating interoperability to overcome network effects and coordination failures;
- Mandating third-party access to data where data is valuable in overcoming barriers to entry and expansion and privacy concerns can be effectively managed; and
- Mandating data separation / data silos, in particular where the data has been collected by the platforms through the leveraging of market power.[15]

12. Then in October 2020, the Antitrust Subcommittee of the U.S. House of Representatives published its extensive Majority Staff Report and Recommendations (House Majority Report) on the results of its year-long investigation of competition in digital markets.[16] The Antitrust Subcommittee found that:

> *Over the past decade, the digital economy has become highly concentrated and prone to monopolization. Several markets investigated by the Subcommittee—such*

[9] *Id*. at 5.

[10] *Id*. at 6.

[11] *Id.* at 9.

[12] Stigler Report, *supra* note 3.

[13] *Id.*

[14] CMA Final Report, *supra* note 3.

[15] *Id.* at 24.

[16] House Majority Report, *supra* note 3.

> *as social networking, general online search, and online advertising—are dominated by just one or two firms. The companies investigated by the Subcommittee—Amazon, Apple, Facebook, and Google—have captured control over key channels of distribution and have come to function as gatekeepers.*[17]

13. The House Majority Report further noted that:

> *[D]igital markets have certain characteristics—such as network effects, switching costs, and other entry barriers—that make them prone to tipping in favor of a single dominant firm. As a result, these markets are no longer contestable by new entrants, and the competitive process shifts from "competition in the market to competition for the market."*[18]

14. Among various recommendations for further examination for possible legislation is "[i]nteroperability and data portability, requiring dominant platforms to make their services compatible with various networks and to make content and information easily portable between them."[19] More specifically, on the interoperability issue, the House Majority Report stated that:

> *Interoperability is fundamental to the open internet. . . . Telecommunications would not work without the ability of users on one carrier's network to interconnect with other carriers. And in the absence of interoperability, dominant carriers could foreclose new entrants from offering lower prices or better services, reinforcing their monopoly power while harming consumers and competition. . . . Foremost, interoperability "breaks the power of network effects" by allowing new entrants to take advantage of existing network effects "at the level of the market, not the level of the company." It would also lower switching costs for users by ensuring that they do not lose access to their network as a results of switching. The implementation cost of requiring interoperability by dominant firms would be relatively low. Unlike interconnecting in traditional communications markets, there is little direct cost associated with interoperating with dominant platforms. Finally, interoperability is an important complement, not substitute, to vigorous antitrust enforcement.*[20]

15. On the data portability issue, the House Majority Report noted that:

> *Data portability is also a remedy for high costs associated with leaving a dominant platform. These costs present another barrier to entry for competitors and a barrier to exit for consumers. Dominant platforms can maintain market power in part because consumers experience significant frictions when moving to a new product. Users contribute data to a platform, for example, but can find it hard to migrate that data to a rival platform. The difficulty of switching tends to keep users on incumbent platforms. Providing consumers and businesses with tools to easily port or rebuild their social graph, profile, or other relevant data on a competing platform would help address these concerns. Although complementary to interoperability, data portability alone would not fully address concerns related to network effects since consumers would still need to recreate their networks on a*

[17] *Id*. at 11.

[18] *Id*. at 384 (emphasis in original) (internal citations omitted).

[19] *Id*. at 20.

[20] *Id* at 384-386 (internal citations omitted).

> *new platform and would not be able to communicate with their network on the incumbent platform.*[21]

16. There are two separate Minority Reports by the Republican members on the Antitrust Subcommittee. Republicans agreed with the findings and recommendations in the House Majority Report in some respects. For example, Representative Ken Buck's Minority Report supports the Majority Report's recommendation "empowering consumers to take control of their user data through data portability and interoperability standards."[22] The Buck Minority Report noted that:

> *In a perfect world, consumer-oriented data portability and interoperability policies will further facilitate competition in the marketplace as similar changes served to further competition in the cellular telephone marketplace. . . . However, questions remain regarding how to operationalize data portability while avoiding unintended consequences. . . . [T]he language must be exact to prevent regulators from stretching Congressional intent to regulate Internet data companies as public utilities under Title II of the Communications Act of 1934, similar to net neutrality. The current proposal lacks this clarity and should be further refined to prevent the potentially disastrous unintended consequences of unleashing a massive regulatory regime on Internet-based companies.*[23]

17. As noted, other commentators question whether there is a proven antitrust problem that requires mandatory data portability to solve.[24] They also point that mandatory data portability may significantly reduce innovation, chill competition and result in inefficient or sub-optimal outcome.[25]

18. BIAC endorses the use of enforcement tools in the face of abuses: "Enforcement actions may be necessary to stem competitive abuses but should focus on identifying situations where there is demonstrable competitive harm and be based on economically

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[21] *Id* at 386 (internal citations omitted).

[22] Rep. Ken Buck, The Third Way, H. Comm. on the Judiciary, Subcomm. on Antitrust, Commercial & Admin. Law, at 5 (Oct. 6, 2020), https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf.

[23] *Id*. at 9.

[24] The terms "data portability" and "data interoperability" differ: "Data portability generally refers to a one-off transfer—the removal of data from one service and its transfer to another service—whereas interoperability refers to an ongoing transfer or alignment of data as it is created on one service with another. . . . [T]he distinction is smaller than it may appear: ultimately interoperability means giving customers the ability to 'port' their data on an ongoing basis without leaving the original service."

Manne & Bowman, *supra* note 4, at 2 (internal citations omitted).

[25] Remarks by Bruce Hoffman, *supra* note 4 ("So if you allow data portability, then you could resolve those kinds of concerns, but, on the other hand, if you do that, then you're perhaps going to suppress the incentives of firms to collect and do things with that data in the first place. . . . But data sharing is more of a requirement I think can be better viewed as imposing your requirement on firms to share data with their potential rivals, even where the customers haven't requested it. . . . But the risk there is quite high that you're essentially imposing on firms a duty to help their rivals and particularly to help the rivals that are less effective or less innovative, less successful, which I think is highly problematic. . . . [T]he best setting in which you employ these kind of tools is where you have demonstrated anticompetitive harm.").

sound theories of harm."[26] As BIAC has noted in the past, imposing a competition remedy must stem from a competition harm, not the mere size of the actor:

> *Competition policy has long recognized the idea that "big" is not inherently "bad." A firm may have a large market share as a result of aggressive competition (e.g., innovation, efficiency, quality products or services, or a novel business model). In the context of certain digital markets, where "winning" firms can seemingly "take all," creating market "losers," competition authorities must remain vigilant to protect competition and not competitors (in other words, avoid conflating success with abuse).*[27]

19. BIAC further has stated that tools for abuse of dominance cases are appropriate to address digital market issues:

> *While competition laws prohibiting abuse of dominance vary across jurisdictions, they generally require that a dominant firm is or has engaged in anti-competitive conduct. Years of international experience have established certain practices as abuses. While these do not form a closed list, the economic analysis and standards of proof that underlies them guides the application of abuse of dominance more broadly. Business at OECD views the current abuse of dominance standard as appropriate for prohibiting unilateral conduct of businesses participating in digital markets.*[28]

3. Evaluating the Essentiality of Data

20. More recently, attention has focused on forced data sharing as a means to address the market positions of large technology platforms.[29] This approach is often discussed in the context of considering *ex ante* regulatory requirements rather than as a remedy for a specific exclusionary practice.[30]

21. It is worth noting that the current market conditions—perceived anticompetitive conditions where few incumbents had access to a large amount of data to the exclusion of

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[26] OECD, *Abuse of Dominance in Digital Markets—Contribution from BIAC*, DAF/COMP/GF/WD(2020)38, ¶ 12 (Nov. 25, 2020), *available at* https://one.oecd.org/document/DAF/COMP/GF/WD(2020)38/en/pdf [hereinafter BIAC Abuse of Dominance in Digital Markets Paper].

[27] *Id.*, ¶ 10.

[28] *Id.*, ¶ 20 (internal citation omitted).

[29] Remarks by Jay Ezrielev, *supra* note 4 ("these antitrust remedies are premised on this notion that large technology firms are holding large quantities of data and that smaller firms and entrants need access to that data to compete effectively. I believe this notion is misguided. Data are non-rivalrous. This means that the use of data of one firm does not preclude another firm from using the same data. If a user gives his data to a service provider, he can just as easily give the same data to another provider. Access to incumbent's data is not necessary for successful entry."). *See also* Priest, *supra* note 4.

[30] Lundqvist, *supra* note 4, at 61 ("the EU Commission seems very keen on granting access and portability right to data under newly enacted sector specific regulations, without any scrutiny in reference to the competitive effects of such rights. *See also* Petros Remarks, *supra* note 3 ("So I am here to defend data portability and interoperability. To me, these are objectively good things not just for competition writ large but consumers too . . . data portability and interoperability are about freedom. It's about freedom to own your own data. Freedom to take your data to the companies you want.").

new entrants and other competitors—may not have been caused by the incumbent firms. For example, Massimo Motta and Martin Peitz in essence propose a "no fault" mandatory data access intervention after recognizing "no fault" on the part of the incumbents. "It is important to stress that these market features are often not caused by the incumbent firms, although their conduct may possibly exacerbate those features or their effects, and as such would generally be difficult for 'traditional' competition law provisions to deal with."[31]

22. Motta and Peitz further explain and clarify that:

> *Still, on point (i) a situation where entrants may successfully introduce competing standards may be a very unlikely counterfactual. And on point (ii) the success of the incumbent may not be due to innovations which are worth protecting at the cost of locking the market forever. Consider for instance the telecom incumbents' claim of ownership of the telephone number of their clients, which at the beginning of the liberalization program greatly hindered the chances of new firms to attract clients (because everyone would like to keep one's number when changing telephone provider): it would be hard to claim that assigning phone numbers was an innovation worth protecting, and accordingly the imposition of mobile number portability was certainly a good policy.*[32]

23. Moreover, not all platforms are of the same nature. For example, Santesteban and Longpre appear to accept an assumption that the digital platform economy should be reformed and propose a broad scope and extent for interoperability, specifically for social networking platforms:

> *The persistent dominance of the largest digital platforms has led many scholars and policymakers to generate proposals to invigorate competition in these markets. . . . A primary goal of interoperability is to erode the barriers to entry that exist due to the presence of network effects. . . . Without access to a broad continuous stream of user data, a social network is merely a static interface, with limited capacity to serve engaging or personalized content.*[33]

24. An examination of whether a particular set of data is necessary for competition to occur is necessary but is not always fully understood.[34] BIAC has noted that:

> *A criterion sometimes applied for dominance is the control of an essential facility or allegedly "indispensable" input. However, different jurisdictions often have very different requirements that must be met to prove that a facility is essential.*

[31] Motta & Peitz, *supra* note 5, at 8.

[32] *Id*. at 11-12.

[33] Santesteban & Longpre, *supra* note 3, at 2-3. *See also* Graef, *supra* note 5, at 8 ("Data portability has a hybrid nature. What emerged as a data protection concept is now also becoming part of policies aiming to stimulate competition and innovation. To reap the full benefits of data portability, this article has argued that there is a need for regulators to steer its implementation and to provide guidance on how data controllers should handle tensions between different interests and overlapping legal entitlements. Data portability can empower individuals and business users to make better choices but more asymmetric enforcement is needed to ensure that data portability will stimulate competition.").

[34] *See* D. Daniel Sokol & Roisin E. Comerford, *Antitrust and Regulating Big Data*, 23 GEO. MASON L. REV. 1129 (2016). *See also* Greg Sivinski, Alex Okuliar, & Lars Kjolbye, *Is Big Data A Big Deal? An Antitrust Law Approach To Big Data*, 13 EUR. COMPETITION J. 199 (2017).

> *Moreover, what may be essential or indispensable in order to compete in a digital market may be far from obvious.*[35]

25. Many consumer-facing digital platforms provide differentiated services and collect a range of data in different contexts for various purposes. These differences may stem from the underlying consumer features, different target audiences and different monetization strategies of the platform service. Thus, the competitive value of a certain dataset, as well as the value of portability, may differ among the transferor and transferee of the data. For instance, a social network's user-generated content in long article form may have little use or competitive value for another social networks focus on short-form video content. Also, a users' ad engagement data from an ad-funded online review platform may lack relevance for another user's subscriptions-based model. These differences may not, of themselves, determine appropriate policy with respect to the application of data portability as a competition remedy or regulatory mechanism, but should be well-understood in considering and designing any such action.

26. In addition, not all data are of the same type. In particular, differences between "structured" data and "unstructured" data may be directly relevant to the question of whether a particular set or type of data is likely to be "essential" and not available from our sources:[36]

> *More importantly for purposes of competition law, structured and unstructured data have different economic characteristics relevant to the essential facilities doctrine. Empirical studies have shown the scale economies with respect to structured data to be modest enough that relatively small competitors should be able to achieve them on their own without gaining access to the resources of others. That fact would tend to vitiate claims that the facility is essential. The scale economies for unstructured data are more significant, but the number of alternative sources of the demographic and other information used to create advertising profiles are legion. Indeed, industry observers suggest that more than 80 percent of all available data is unstructured data.*[37]

27. In addition, many digital platforms may involve more than one type of data. For instance, a single social networking platform could entail all three data permutations: (i) structured data (e.g., user name, profile picture, basic personal information, such as location, birthday, and occupation); (ii) unstructured data (e.g., social feed data in various formats across platforms); and (iii) semi-structured data (e.g., one-to-one or one-to-multiple messages).

28. Some jurisdictions initially appeared to have equated "Big Data" to be an "essential facility" but, upon further consideration, have retreated to a more neutral position. In late 2018, the Korea Fair Trade Commission (KFTC) announced its plans to revise its merger guidelines, with a proposed draft revision specifically including the term "Big Data"

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[35] BIAC Abuse of Dominance in Digital Markets Paper, *supra* note 26, ¶16.

[36] Yoo, *supra* note 4, at 3 ("There is another more important distinction that has yet to arise in competition law circles but has begun to attract attention among academics: the distinction between structured and unstructured data. *Structured data* are collected intentionally to inform a specific model. Examples include traditional column-row databases that record names, dates, addresses, and transaction histories, which represent the type of data with which people are most familiar. *Unstructured data* are collected incidentally and used to inform emergent models. Examples include video, audio, social media feeds, photos, and sensor data. *Semi-structured data*, which are structured data used to inform other, emergent models, represent an intermediate case. A common example of semi-structured data is email analyzed for purposes other than person-to-person communications.").

[37] *Id*.

defined as "high volumes of information assets that are collected by businesses to be comprehensively managed, analyzed and used for various purposes."[38] After a public comment period, the KFTC announced a revised set of Merger Guidelines embracing the concept of innovation market competition, and replacing the term "Big Data" with a simpler and neutral term "information asset."[39]

29. Similarly, in announcing its final version of Big Tech Guidelines in early 2021, China decided not to accord presumptive essential facility treatment to data. While it has decided that online platforms may constitute an essential facility under certain circumstances, China decided to defer its position on whether data may be an essential facility until after the issue of "who owns the data to begin with" has been further examined and resolved.[40]

30. Interestingly, there may be another reason for China not to embrace a mandatory data portability rule at this time. Specifically, a "national and timing difference" has been cited as one of the reasons why China should not require mandatory data portability. The fact that China has a large number of Internet companies (including already large and well-known online platforms and numerous new start-ups) and may wish not to diminish their international competitiveness is a further factor:

> *In the era of data-driven digital economy, it is not appropriate to set too high standards for data protection, nor to impose excessive responsibilities and obligations on enterprises, so as not to hinder the development and international competitiveness of data enterprises.*[41]

31. In evaluating the need for mandated data access, the analysis should go beyond the volume of data possessed by the incumbent. "[D]ominant positions may not be the result of differences in the amount of data that search engines collect, but rather of the difference in the amount of research and innovation that they conduct to train their search algorithms with the data collected."[42]

32. Entry conditions may equally depend on more than availability of data. Giovannetti and Siciliani note that:

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[38] Choi Hyung-jo & Ron Lubosco, *South Korean regulator eyes bigger role in global deals, grapples with data, innovation issues in new merger guidelines*, MLEX (Dec. 7, 2018), *available at* https://content.mlex.com/#/content/1048020; *see also* Choi Hyung-jo & Ron Lubosco, *South Korean tech merger review rules set for update*, MLEX (Nov. 16, 2018), *available at* https://content.mlex.com/#/content/1041226.

[39] Choi Hyung-jo & Wooyoung Lee, *Revisions to South Korean merger guidelines intended to better review tech deals to take effect Feb. 27*, MLEX (Feb. 26, 2019), *available at* https://content.mlex.com/#/content/1068713.

[40] *See* Yonnex Li, *Data not discussed as 'essential facility' in China's finalized Big Tech guidelines*, MLEX (Feb. 8, 2021), *available at* https://content.mlex.com/#/content/1263070); *see also* Catherine E. Tucker, *Digital Data as an Essential Facility: Control*, CPI ANTITRUST CHRON. (Feb. 2020), *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2020/02/CPI-Tucker.pdf.

[41] Meiling Xu & Wei Han, *"Data Portability" in China: The Controversy, the Status Quo, and Future Prospects*, CPI 3 (Jan. 2021), *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2021/01/Asia-Column-February-2021.pdf (internal citation omitted) (emphasis added).

[42] Casanova, *supra* note 4, at 3 (emphasis omitted).

> *[T]he case for entry depends on the range of heterogeneous switching costs. In particular, the preponderance of this demand-side friction over the intensity of cross-group network benefits is a requirement to avert tipping equilibria whereby the incumbency advantage is buttressed by the presence of favorable beliefs regarding the expected network size.*[43]

33. BIAC has previously noted that data can help confer market power in some cases, and that addressing that market power required focus on a number of related effects.[44] We noted that "[e]nforced sharing of consumer data for general use may decrease incentives to collect and innovate using consumer data" and that this could "reduce or eliminate the significant efficiencies generated by data use by businesses and, with it, the benefits realized by consumers."[45] Thus, there are reasons for enforcers to consider these potential negative effects so that any data portability remedy will enhance the competitive process and benefit consumers.

4. Limitations of Mandatory Data Portability and Interoperability

34. Proponents of mandatory data portability and interoperability firmly believe that it is an effective remedy for perceived competition problems.[46] They argue that mandatory data portability and interoperability is necessary and effective in today's changing world. For example, Chris Riley observes that:

> *Competition and antitrust laws are changing. Grounding future policy and legislative changes in the unique nature and varieties of gatekeeping in the digital era will help promote longer-term and more sustainable competition. Interoperability is a major factor determining the effective cost of market entry and the ongoing costs associated with growth and competition. And interoperability, as an element of the structure of a sector of the internet, determines whether a dominant market player will be able to stifle nascent competition and disruptive innovation. Through the coming changes, promoting competition and promoting interoperability will go hand in hand in the internet economy.*[47]

35. Riley further asserts that "[n]either antitrust, nor communications offer a perfect legal paradigm to capture the internet and the digital platform economy. This, more than anything, explains the efforts by multiple governments around the world over the past few

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[43] Giovannetti & Siciliani, *supra* note 4, at 6.

[44] BIAC Consumer Data Rights and Competition Paper, *supra* note 1, ¶ 39 ("Data, in conjunction with other inputs, can confer market power where such data—particularly B2B data—is an essential input for downstream competitors . . . and may act as a barrier to entry into and expansion within a market.").

[45] *Id.*, ¶ 40 (internal citation omitted).

[46] For example, Michael Kades and Fiona Scott Morton argue that interoperability will be an effective remedy as applied to the social network platforms. They draw their prediction from the AT&T example and believe it will not be too costly. *See* Kades & Scott Morton, *supra* note 3. On this other hand, Hurwitz states that the AT&T experience shows how it is extremely difficult, costly and time-consuming even for a dedicated regulatory agency like the U.S. Federal Communications Commission, observing that "[t]he 1996 Telecom Act was the greatest experiment in a regulatory duty to deal ever undertaken. . . . The lesson of this history is simply that it is far easier to establish that there is a 'duty to deal' than it is to define what that duty actually entails." *See* Hurwitz, *supra* note 4.

[47] Riley, *supra* note 3, at 104.

years to come to grips with the challenges posed by increasingly centralized markets in technology."[48]

36. But even proponents of a data portability and/or interoperability rule recognize that there are significant difficulties and limitations in designing and implementing the mandatory rule or express doubts.[49] For example, Christopher Yoo opines that there will be complications at the implementation stage. In particular, if indeed data were to be deemed essential and thus warranting mandatory access, then "access mandates would force companies to design and implement new systems to make that access possible."[50] Yoo further explains that:

> *In short, a data portability mandate would require firms to establish new systems for ordering and provisioning request for data. Court[s] considering implementing such mandates will need to decide how much metadata will be disclosed. If the data are substantial, the process may take some time and require considerable resources to transfer the data. Past experience has shown that antitrust courts will have to supervise an increasing scope of the business relationship when the quality of the product varies and when the interfaces are complex.*[51]

37. Yoo also noted that challenges regarding compatibility will have to be addressed: "The fact that firms base their operations on different and often incompatible data structures means that simply mandating data portability will require competitors to fit the proverbial square peg into a round hole."[52]

38. The highly dynamic nature of digital platform services adds an addition dimension to the consideration of data portability and interoperability. For instance, platforms deprecate or update existing features and products as well as develop new features that implicate new data types and underlying regulatory compliance measures in an ongoing manner, such as for GDPR. In the context of data portability, this could require ongoing modifications to standardization for the datasets and the technical mechanisms to facilitate the transfers. The burdens that this could impose on both the data transferors and transferees in attempt to maintain a compatible data schema and a workable transfer mechanism would need to be carefully considered in any remedial or regulatory scheme. At the same time, authorities should weigh whether these burdens could stagnate developments and inadvertently stifle companies' incentives to innovate and develop new products or features. A mechanism to address data portability would need to be crafted to ensure that such problems do not arise that could have potentially adverse impacts on innovation. The need to differentiate between structured and unstructured data; and the ordering, provisioning, and compatibility of data are all important considerations relating to data

[48] *Id.* at 96; *see also id.*, n.2 ("The European Commission and the governments of the United States, France, Germany, the United Kingdom, Australia, India, Israel, and likely others by the time of publication of this paper, have all undertaken processes to explore modernisation of competition policy with respect to technology and the internet.").

[49] Graef, *supra* note 5, at 5 ("It is still unclear what impact the GDPR's right to data portability exactly has on competition and innovation and if it can indeed foster competition between data controllers and encourage data-driven innovation, as was expected as a positive side effect of the new right at the time of adoption.").

[50] Yoo, *supra* note 4, at 4.

[51] *Id.* at 5 (citing Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 414 (2004); 3B Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 774e, at 275-79 (3d ed. 2008)).

[52] *Id.*

portability and interoperability. Competition authorities should carefully consider and address these issues when considering data portability and interoperability remedies.[53]

5. The Cost and Price of Data Portability and Data Access

39. Supporters of data sharing, as well as detractors, have noted that doing so comes with costs. "Data portability rights can be a valuable instrument in the toolbox of policymakers in the data economy. However, . . . they can come with considerable costs and problems, and might require additional regulatory solutions as preconditions for their effectiveness."[54]

40. Graef recognizes that:

> *A recent review of economic literature expects data portability not to lead less or more competition in established digital markets by itself, but does point at its ability to encourage innovation in complementary and new digital markets by letting innovation at the service and at the data analytics levels take place with different firms at the same time.*[55]

41. Therefore, Graef recommends "asymmetric regulation and enforcement."[56] In other words, "powerful firms (which could for instance be determined by looking at whether they hold market power from the perspective of competition law) would be subject to stricter requirements for enabling data portability. The GDPR's risk-based approach already provides room for such an approach."[57] Graef further provides that:

> *Illustrative here is that the UK Competition and Markets Authority ("CMA") recommended in its July 2020 market study into online platforms and digital advertising to require Google to open up its click and query data to allow rival search engines to properly compete by improving their algorithms. According to the UK CMA, such an intervention can be designed in a way that does not involve the transfer of personal data to prevent data protection concerns.*[58]

42. However, Manne and Bowman, at least partially based on the UK Open Banking experience, counsel caution:

> *Because of this, we recommend that policymakers exercise great caution and avoid attempting to impose data portability on broad swathes of the economy. Where data portability is imposed at all, it should be done so only in targeted circumstances where there is good evidence that the intervention will reduce barriers to switching and ensure that the trade-offs are worth it. Where broad-based portability is viable, it should come from voluntary programs like the Data Transfer Project. . . . While*

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[53] BIAC Abuse of Dominance in Digital Markets Paper, *supra* note 26, ¶ 29, n.41 (internal citations omitted).

[54] Gill & Kerber, *supra* note 5, at 7.

[55] Graef, *supra* note 5, at 5, (citing Jan Kramer, Pierre Senellart & Alexandre de Streel, Making data portability more effective for the digital economy: Economic implications and regulatory challenges," CERRE report June 2020, p. 55-64, *available at* https://cerre.eu/publications/report-making-data-portability-more-effective-digital-economy/).

[56] *Id*. at 5.

[57] *Id*.

[58] *Id*. at 8 (citing CMA Final Report, *supra* note 3, at 365-367).

> *data portability may seem like an attractive option in certain markets, experience suggests it is not simple to impose even in cases where the trade-offs seem small. For markets that are defined by innovation and business models designed to offer customers valuable services in exchange for the collection of data, the trade-offs are likely to be significantly higher, and implementation even more complex.*[59]

43. Another issue to be considered is whether there is a price to be paid for data that is shared by the incumbent platform. Past cases involving mandated access, even those involving an essential facility, have not forced the owner to provide open access to its assets without charge. To the extent that the data or other shared information is exclusively the data of the user (i.e., consumer), then the data to be transferred may not be an asset of the platform subject to compensation. In other cases, the data or shared information may not be the data of the consumer but may be the asset of the platform, e.g., data that originates from the application of the platform's algorithms or an amalgam of information derived from the platform's data analytics. The foundational competition cases that have forced access to a dominant firm's resources, including essential facilities cases, have required other companies accessing the assets to pay for those resources.[60]

44. In any event, as we have noted in the past, a remedy should be proportionate to the demonstrated infringement:

> *Business at OECD recommends competition authorities focus—even at the outset of an investigation—on the anti-competitive effects of impugned conduct to ensure that remedial actions are proportionate to the scope of the abuse, will be successful and will benefit competition in the impugned market as a whole. Remedies should not be designed to or have the effect of merely propping up competitors but should ensure exclusionary abuses are prevented or remedied in the relevant market.*[61]

6. Conclusion

45. BIAC recommends that competition enforcement agencies consider data portability and interoperability from the standpoint of competition laws and principles, in particular the principles for remediation of competition violations. To the extent that governments are considering legislation that would impose data sharing, interoperability or portability obligations based on decisions to regulate platform markets for reasons other than competition, BIAC recommends that these non-competition bases be clearly articulated so that these considerations are separately identified. We caution against the co-mingling of competition and non-competition considerations without proper articulation.

46. Regardless of whether an *ex ante* regulation or expanding antitrust enforcement (in essence, enlarging the scope and outer reach of abuse of dominance jurisprudence) approach is selected, there will need to be a realistic assessment of practical difficulties and limitations on how to actually design, implement, monitor and enforce a mandatory data portability and interoperability rule.

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[59] Manne & Bowman, *supra* note 4, at 25-26.

[60] For example, trains using an essential bridge, teams using an essential sports arena, and ski resorts offering access to a competitor's slopes, all were required to pay the incumbent firm a fee. Indeed, in Aspen Skiing the Supreme Court noted that the exclusionary conduct was evident by virtue of the dominant firm's refusal to sell its tickets at a retail price. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) (emphasis added).

[61] BIAC Abuse of Dominance in Digital Markets Paper, *supra* note 26, ¶ 26.