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Data Portability, Interoperability and Competition – Note by Romania

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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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1. Introduction

1. Authorities and regulators around the world are exploring the issues raised by a lack of interoperability and data portability and the competition law implications. As such, there are several possible subjects that can be addressed in a discussion regarding these concepts.

2. In Romania, the enforcement of data portability and interoperability in regards to the application of competition laws is new and untested. At the European level, several regulations have been enforced and will continue being enforced – the General Data Protection Regulation (portability of personal data), the Platform-to-Business ('P2B') Regulation (imposes transparency obligations on platforms) and the forthcoming Digital Markets Act.

3. This paper will discuss the competition problems arising as a result of a lack of interoperability and data portability and the crossover between privacy concerns and the European competition law's focus on the consumer welfare standard in order to determine whether competition law is a right tool that can address interoperability and data portability. Following that, the paper inquires whether competition law is a good mechanism for implementing data portability and interoperability measures, or whether a regulatory approach would be better suited or not.

4. The Romanian Competition Council welcomes the OECD's initative to determine what method is appropiate for the implementation of data portability and interoperability. To that end, we leverage our experience with the P2B Regulation, the proposed Digital Markets Act Regulation, emerging case law, as well as empirical studies conducted by expert groups across the world.

2. Interoperability & data portability in online platforms

5. Interoperability is described as being '*fundamental to the open internet*' and a '*core technical structure of the Internet*'. As a standard, it is present in many communication systems, such as telephones or telegraph. Telecommunication systems would not be feasible without the ability to interconnect to other users[1]. Interoperability has been defined as the '*ability of a system, product or service to communicate and function with other (technically different) systems, products or services*'[2]. Data portability is a similar concept referring to the ability of the users to download a snapshot of their data in order to upload it to a different service.

6. Therefore, the main difference between the two is that interoperability lies in the hands of the service providers and the agreements between them, whereas data portability

[1] Michael Kades & Fiona Scott Morton, Interoperability as a Competition Remedy for Digital Networks 13–14 (Sept. 2020).

[2] W. Kerber and H. Schweitzer, *Interoperability in the Digital Economy*, Journal of Intellectual Property, Information Technology and E-commerce Law (JIPITEC) 8 (1) 2017. Accessed at: https://www.jipitec.eu/issues/jipitec-8-1-2017/4531

shifts the power in the hands of the users, enabling them to freely exercise their will in selecting which service, or services, they want to use.

7. In their 2021 paper regarding interoperability and data portability, Langenfeld, Ring, and Clark[3] draw attention to the US Federal Trade Commission's (FTC) investigation of Facebook's alleged anticompetitive behaviour centered around its decision to *selectively interoperate*.

8. According to the proceedings, Facebook only allowed parties creating application programming interfaces (APIs) to access critical data if the third-party apps did not compete with Facebook's features or promote Facebook's competitors[4]. At the time of writing, the case is still pending[5], but the allegations are certainly interesting and may point to the idea that using interoperability as a means to open up competition in the market may be a double edged sword. In this sense, the following part of the present paper will address the consumer welfare issues arising out of Facebook's selective interoperability practices.

9. Similar to the example above, Facebook also provides an 'Account Kit' through which third-party websites can offer a Facebook login on their site that enables users to log in or create an account using their existing Facebook registration data. According to the German Federal Cartel Office's Facebook decision[6] ('*Decision*'), it is unclear to what extent a large amount of data about user behaviour on a third-party website needs to flow each time a user accesses the third-party website[7].

3. Competition issues

10. The *Decision*[8] holds that Facebook has superior access to data relevant for competition, particularly concerning the personal data of users[9]. Similarly, academic literature points out several competition issues arising from the use of large data sets, such as exclusionary conduct resulting in foreclosure in data-driven markets by successfully restricting competitors' access to data and harming consumer welfare. Furthermore, the '*selective interoperability*' mentioned above has the effect of **disincentivizing software developers from competing** with Facebook and **hindering potential competition**[10].

3 *Regulating digital platforms: interoperability and data portability*. James Langenfeld, Chris Ring, and Samuel Clark. Published in The new US antitrust administration, 12 January 2021 Concurrences N. 1-2021. Accessed at: https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#langenfeld

4 FTC Complaint, para. 23, 136-149; State Attorney General Complaint, para. 199-205.

5 https://www.ftc.gov/enforcement/cases-proceedings/191-0134/facebook-inc-ftc-v.

6 Decision under Section 32(1) German Competition ACT (GWB), 6th Decision Division, B6-22/16, para. 52 https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5

7 Para. 810 of the *Decision*.

8 Para. 52 of the *Decision*.

9 Para. 481 of the *Decision*.

10 *Regulating digital platforms: interoperability and data portability*. James Langenfeld, Chris Ring, and Samuel Clark. Published in The new US antitrust administration, 12 January 2021

11. Therefore, Facebook's selective interoperability practices could amount to exclusionary conduct with the effect of hindering potential competition, through which it gains access to large amounts of data, consolidating its market power, and endangering users' privacy and their awareness. Whether a user's privacy can be considered a consumer welfare concern will be discussed below.

4. Consumer welfare concerns

12. Before deciding whether competition law or regulation is better suited to ensure implementation of data portability and interoperability, this paper addresses whether the consumer welfare standard is satisfied. Because competition law, ultimately, is meant to ensure consumer welfare, and because privacy is an integral aspect of the issues surrounding digital platforms, especially social networking platforms, privacy considerations (which affect the end user) are not unrelated[11] to competition considerations.

13. In a paper published in December 2011, author Heng Xu[12] points out that out of a number of 1800 most popular applications available through Facebook, 1305 of those requested data acces from users. In most cases, permission is granted – however, the paper posits that the user is, ultimately, unaware of the actual effects. For instance, the paper underlines that there have been situations in which users' global settings were overridden by an app's request, and, as a result, informationthat was intended to be kept private is now accessible. This is a privacy violation in which the third-party app overrides users' global privacy settings.

14. If we consider privacy violations as lowering consumer welfare, then Facebook's selective interoperability practices may fall under the scope of European competition law. This may also be true for platforms causing similar privacy concerns.

15. Therefore, interoperability practices which harm incentives to innovate and reduce consumer welfare through reduced control over privacy may fall under the scope of competition law. Assuming that to be true, the question then becomes, whether competition enforcement is enough to keep these behaviours at bay, or could there be future regulatory approaches aiming to resolve these issues.

5. Existing competition tools

16. In most jurisdictions, competition tools are used as an *ex-post* method of ensuring that markets are kept open, contestable, and for the good of the consumer. An exception lies in merger review, where enforcement is *ex-ante* and seeks to ensure that mergers with or without significant structural modifications of the market will not impede effective

Concurrences N. 1-2021. Accessed at: https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en#langenfeld

[11] As seen in the German Federal Office's complaint against Facebook which corellates an abusive data policy with an exploitative abuse of its dominant market position to the detriment of private users and competitors: https://www.linklaters.com/en/insights/publications/2019/april/facebook-bundeskartellamt-s-landmark-decision.

[12] Wang, Na & Xu, Heng & Grossklags, Jens. (2011). Third-party apps on Facebook: Privacy and the illusion of control. 10.1145/2076444.2076448. Accessed at: https://www.researchgate.net/publication/239761048_Third-party_apps_on_Facebook_Privacy_and_the_illusion_of_control.

competition and will transfer benefits to the final consumer. In the European Union, the Treaty on the Functioning of the European Union governs these aspects through Articles 101 and 102.

17. This is true for Romania, as well. Articles 5 and 6 of the *Competition Law*[13] prohibit anticompetitive agreements and abuses of a dominant position, respectively. These are the *ex-post* competition tools at our disposal.

18. By their nature, these articles can only be enforced after detection of an anticompetitive practice and following an in-depth investigation, respectively, which can take months, if not years. Such a lengthy period of time is critical to the rise and fall of incumbents and new market players.

19. As such, *ex-post* enforcement may not be the best method of combating competition issues arising out of lack of interoperability or data portability, especially considering that once the data is gained, its value does not deplete after a prohibition decision and the resulting market power benefits do not fade. In short, the harm does not disappear, and the sanctioned firm may even be better off purposefully infringing competition law if the gains are higher than the eventual losses.

20. *Ex-ante* competition tools comprise the merger control instruments, which enable the review of any foreseen concentrations by relevant competition authorities, if they fulfill the national thresholds for notification.

21. In Romania, Article 13 of the *Competition Law* oversees the notification of mergers fulfilling the financial tresholds.

22. The central issue to merger control and digital markets is whether existing tresholds are sufficient to be able to catch future competition concerns, arising out of incumbents merging with start-ups who have not yet generated sufficient turnover in order to notify competition authorities. By doing so, incumbents can either (a) eliminate potential competition or (b) enter into adjacent markets.

23. These concerns have been articulated in studies done by several competition authorities and legislation is catching up. For instance, the mergers between *Apple/Shazam* and *Facebook/Whatsapp* were notifiable under Spain's tresholds, specifically because the mergers resulted in creating or consolidating market share with 30% or more in the national geographic market. Subsequently, these mergers were referred to the European Commission. Similarly, the United Kingdom's competition authority was notified of the mergers between *Facebook/Instagram* and *Google/Waze* under a share of supply test.

24. Furthermore, the European Commission's recent proposal for the Digital Markets Act ('DMA') contains a provision regarding the obligation to inform about concentrations between gatekeepers[14] which involve another provider of *core platform services*[15] or of any other services provided in the digital sector.

25. Therefore, merger tools may be sufficient in order to efficiently discover mergers that may pose a threat to effective competition.

[13] Legea concurenței nr. 21/1996, republicată, cu modificările și completările ulterioare.

[14] Defined in Article 3 of the Digital Markets Act.

[15] Defined in Article 2(2) of the Digital Markets Act.

6. New regulatory approach

26. For a regulation to be implemented, first it must be made clear which approach regulators may wish to take. On the one hand, regulators may want to focus on implementing interoperability requirements. On the other, they may instead opt to switch control of data over to the user by using data portability. They may wish to address both.

27. The European Commission has chosen to regulate digital markets and improve contestability of core platform services (and the broader digital sector) by including directly applicable obligations in its proposal for the DMA. Its provisions include interoperability obligations (such as Article 5(e) which prohibits gatekeepers from requiring business users to interoperate with an identification service offered by a gatekeeper) as well as data portability obligations (such as Article 6(1)(h) under which gatekeepers must provide effective portability of data to facilitate the exercise of data portability).

28. The proposed Regulation seeks to address the issues that *ex-post* enforcement entails, providing for the timely intervention for problematic practices identified in the Commission's past investigations by shifting the burden from *ex-post* enforcement to a list of prohibited practices. Furthermore, as mentioned above, it adapts *ex-ante* merger control so that all mergers between gatekeepers and providers of services in the digital sector do not escape scrutiny.

29. It is estimated that the main costs of the proposed Regulation relate to compliance costs for gatekeepers as a result of new rules. That being said, there is the question of whether the proposed Regulation will also incur higher administrative costs for the Commission, acting as the competent regulatory body. In any case, harmonised rules applicable across the European Union will result in higher legal certainty, eliminating the risk of fragmented approaches across Member States.

30. Prior to the DMA, the European Commission adopted the P2B Regulation, which is enforceable by the Member States. In this context, the Romanian Competition Council has been chosen to enforce the P2B Regulation at the national level. Article 9 of the Regulation aims to improve transparency regarding the terms of access to data by providers of platform intermediation services, which may, in the future, provide valuable insights into platforms' larger practices regarding data.

31. Beyond the European Union's initiative with the DMA and the transparency sought by the P2B Regulation, it may be useful that a larger data regime be implemented which might have as its purpose the harmonization of interoperability and, especially, data portability.

32. Data portability may be a powerful tool moving forward. By giving the end-users the ability to easily shift from one gatekeeper to the other, and give or take their data in doing so, competition will be flourishing because the switching costs associated with creating a new account will be eliminated. In this sense, instead of Facebook becoming the *de facto* login service to the internet, the user actively owns their data and chooses where they go with it, using it as a sort of digital identification.

33. In any case, regulatory approaches to the problems arising out of interoperability and data portability are only at their beginning stages. Authorities and regulators around the world are analysing the issue and there is no clear-cut answer to the question addressing the mechanism for implementing data portability or interoperability that would be better suited. The Romanian Competition Council will remain an active collaborator to the European Commission, both in reporting and enforcing the P2B Regulation, but also in analyzing the DMA and being a member of the Working Party which seeks to fine-tune the proposed Regulation to ensure that it is proportionate and effective.

7. Conclusions

34. This paper has discussed, first, the concepts of interoperability and data portability. Second, it has focused on the competition law aspects generated by a lack of interoperability and data portability and addressed the question of whether the loss of privacy generated by the aforementioned aspects can amount to a loss in overall consumer welfare, thus falling under the scope of competition law. Finally, the paper has addressed the two possibilities for implementing interoperability and data portability: either through existing competition authority tools, which is possible in merger control cases, or through a new regulatory approach, which is favoured due to lower costs, a more harmonious approach and higher certainty in the markets.

35. As a result of the discussion, the paper has identified that a new regulatory approach may be the best way forward in order to succesfully and economically implement interoperability and data portability.

36. Data portability has been identified as a powerful tool moving forward, placing the power directly in the hands of the consumer and allowing him to choose among competing providers by reducing switching costs.

37. In its activity, the Romanian Competition Council will continue to enforce the P2B Regulation – we hope that, in time, it may bring with it useful insights into the data practices of platforms in regards to business users. This may, in turn, inform the Romanian Competition Council's analysis of whether existing merger tools are sufficient in order to properly assess the effects of data portability and interoperability. Finally, the Romanian Competition Council welcomes and will continue to be a an active contributor to the European Working Party on the Digital Markets Act.

38. Data portability and interoperability are new subjects, but the growing discussion regarding the best mechanisms for implementations is highly valuable and the Romanian Competition Council aims to contribute, through its own experience and analyses, every step of the way.