

Unclassified

English - Or. English

3 June 2021

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Data portability, interoperability and digital platform competition – Summaries of contributions

9 June 2021

This document reproduces summaries of contributions submitted for Item 1 of the 135th OECD Competition Committee meeting on 9-11 June 2021.

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

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JT03477561

Table of contents

Summaries of contributions 3
BIAC..... 4
Brazil 5
India..... 6
Israel* 7
Romania 8
Russian Federation..... 9
TUAC 10

Summaries of contributions

This document contains summaries of the various written contributions received for the discussion on Data portability, interoperability and digital platform competition (135th Meeting of the Competition Committee on 9-11 June 2021). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

BIAC

In June 2020, the OECD held a roundtable discussion on a related topic entitled “Consumer Data Rights and Competition.” 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, *Business at OECD* discusses some of these commentaries and studies in general and the call for mandatory data portability and interoperability in particular.

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.

Recently, a number of governmental and non-governmental studies and investigations as well as a number of commentators have proposed mandatory data portability and interoperability especially directed towards large online platforms. They believe that such measures 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.

At the same time, others question whether there is a sufficiently proven and serious antitrust problem that requires the remedy of mandatory data portability and 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.

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 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.

Business at OECD 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, *Business at OECD* recommends that these non-competition bases be clearly articulated so that the considerations are clear and separately identified.

In connection with these considerations, *Business at OECD* 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.

Brazil

The Brazilian data portability and interoperability regulatory framework encompasses different laws and regulations. The most important legislation is the Brazilian Data Protection Law (Law 13709/2018), which came into effect in 2020 and sets forth the right to data portability. In addition, over the years, different regulatory authorities have made efforts to promote data portability within their sectors, such as the Brazilian National Telecommunications Agency (ANATEL) and the Central Bank of Brazil (BACEN).

In merger review or abuse of dominance cases, the Brazilian Competition Law allows CADE to impose any remedies and restrictions necessary to mitigate actual or potential harmful effects on relevant markets. Therefore, CADE can impose data portability and interoperability, should it be necessary to mitigate anticompetitive effects of mergers or abusive practices. In addition, CADE has increasingly handled cases involving competition concerns related to data portability and interoperability in recent years.

Examples of cases recently reviewed by CADE include (i) the GuiaBolso/Bradesco Case (Administrative Proceeding 08700.004201/2018-38), (ii) the Credit Bureau Case (Merger Case 08700.002792/2016-47), (iii) the Stone/Linx Case (Merger Case 08700.003969/2020-17), still pending clearance from CADE's Tribunal, and (iv) the Google Shopping Case (Administrative Proceeding 08012.010483/2011-94).

In summary, as indicated by the cases analyzed, in CADE's recent experience, the authority had to assess whether there are unreasonable restrictions to data access or unjustifiable barriers to portability and interoperability by a dominant player. In these cases, imposing remedies may be important to mitigate or eliminate possible competitive issues. Nonetheless, remedies should be imposed according to the relevance of a given data set for the dynamics of the market and contractual relationships.

India

Role of CCI, as a market regulator, is overarching and cuts across all the sectors of the economy including those that have sectoral regulators discharging their assigned mandate. Such architecture may require constant consultations and co-ordination between CCI and the sectoral regulators, for greater harmony in enforcing their respective mandates. The dynamic and evolving nature of markets, makes it further imperative that such co-ordination takes place in a swift manner for prompt market corrections. Such collaborative efforts will result in greater efficiency in regulatory enforcements.

Given the importance of data as a competition metric in gig economy, role of Competition Agencies is going to assume critical importance in maintaining and ensuring that markets remain competitive and contestable. The anti-trust law framework is an important regulatory tool to address the exploitative and exclusionary behaviour arising out of data accumulation and privacy standards by the entities commanding market power.

A harmonious and symbiotic relationship and modus vivendi between the anti-trust agencies and the sectoral regulators would be sine qua non for efficient working of the markets. The inter-regulatory consultative mechanism provided in the statute would go a long way in harmonious application of laws.

*Israel**

A Policy Paper on the Right to Data Portability was published in January 2021 by a Joint Team of the Israel Privacy Protection Authority, the Israel Competition Authority, and the Consumer Protection & Fair Trading Authority.

The Joint Team was established in September 2019 for the purpose of addressing issues arising out of the challenges of the digital economy. The right to data portability is at the core of the issues that are common to the areas of operation of the three Authorities, since it relates to the personal information and privacy field, but has a significant impact on the areas of competition and consumer protection as well.

In the Policy Paper, the Joint Team recommends the adoption of the general right to personal data portability in Israeli law, and specifies the main considerations to take into account regarding such right.

The right to data portability provides consumers autonomy and control over their personal information and restores some balance to the dynamic between consumers and providers of digital services. In addition, the right to data portability is expected to increase competition and the range of options for consumers in digital markets. Data portability makes it easier for consumers to switch between providers, and for new providers to offer tailored products or services based on prior information. Several markets in the digital economy are characterized by a high degree of concentration, and data portability is likely to limit switching barriers in these markets, and thus help to increase competition. These and other benefits of the right to data portability are of greatest significance in view of the growing relevance of the data resource in digital markets.

In view of the accumulated international experience of data portability, as well as academic literature review on the issue and the expected benefits to the Israeli consumer, the Joint Team recommended the adoption of this general right by the Israeli legal system, inter alia according to the following principles:

- The right will apply only to personal and digital information, which will be sent to the user in a secure manner;
- The right will be granted at no additional cost to the consumer;
- Information will be transferred to users in a digital, commonly used and machine-readable format, so that it can be used for other purposes;
- The right will apply to certain entities that meet a minimal threshold which will be defined, among other things, according to the scope of their activity and number of customers.

The Joint Team also recommended that, in the case of sectors where data plays a significant role, additional specific regulation should be defined to promote assimilation and implementation of the right. This Policy Paper was published for public comments, and the Joint Team is currently acting to advance regulation on data portability in the Israeli Law.

Romania

The paper below seeks to contribute to the OECD's Roundtable on Data portability, interoperability and competition, as part of the Competition Committee of June 2021. The perspective explored here is from the Romanian Competition Council's standpoint, taking into consideration the experience with the P2B Regulation, the proposed Digital Markets Act Regulation, as well as empirical studies and emerging relevant case law. The paper explores first the meaning of interoperability and data portability and its practical application with regard to Facebook's 'selective interoperability'. Second, it continues by identifying the anticompetitive behaviours that could be generated as a result of lack of interoperability and data portability. Third, it considers the question of whether consumer privacy may satisfy the European Union's 'consumer welfare' standard. Fourth, it inquires whether existing competition tools are sufficient to resolve the competition and consumer welfare issues identified in the first part. Fifth, the paper assesses the possibility of a new regulatory approach, discussing the European Commission's proposal for the Digital Markets Act. Finally, it concludes that while merger tools may only need an update to be effective, ex-post enforcement of competition law may not be quick enough in order to fully counteract the effects of a lack of interoperability and data portability. The paper does not claim to have exhausted all possible anticompetitive effects resulting from lack of interoperability and data portability, but it has considered the areas in which competition policy is well equipped to handle these challenges, as well as where a new regulatory approach may be better suited.

Russian Federation

Digital services are becoming more widespread, while their functioning and further development are based primarily on the collection and processing of data.

From the point of view of competition, particular concern is the growing economic concentration in certain areas, including the processes of differentiation (in terms of participants and/or services provided) of digital platforms and their transformation into digital ecosystems.

In this context, questions about data portability contained in various services and on digital platforms, as well as their interoperability, are becoming more relevant and require special attention from the competition authorities.

Given the lack of industry regulation and the importance of data portability and interoperability issues to ensure competition in the digital economy, the FAS Russia in its practice pays special attention to issues related to access to data and their impact on the market power of business entities.

Currently, the Government of the Russian Federation is considering amendments to the Federal Law of July 26, 2006 No. 135-FZ "On Protection of Competition" (the so-called "fifth antimonopoly package").

The adoption of the amendments will allow the antimonopoly authority to respond in a timely and flexible manner to the challenges of the digital economy, including issues related to data circulation.

TUAC

The workplace is typically not at the forefront of data governance and competition debates. This is an omission in terms of resolving data rights, collection, access and sharing issues, but also concerning anti-competitive effects on job mobility and quality.

A high amount of data is generated on-the-job, both in the public and private sector. Employer's control over recruitment and on-the-job data, limitations to data portability and ownership rights result in an unfair position of workers vis-à-vis their employer in terms of access to data and the sharing of its value. This can lead to adverse practices affecting the livelihoods, health and safety of workers.

Enforcement of proper data portability rights is particularly important for platform workers. The business model of platform work is based on ratings and reviews that result in an online CV for workers attesting to the quality of their work and allowing them to get more clients. Therefore, if workers are not able to fully access and use their data, they are tied to a unique platform.

The accumulation and misuse of workplace data clearly feed into labour market monopsonies. In particular, heightened control, interference with remuneration and the use of data to deter employees from looking for another employer all constitute anti-competitive practices designed to accentuate the asymmetry between employer and employee further. The increasing ability of employers to pay wages below normal market conditions without losing their workforce, while gaining from data-driven productivity, is a source of concern.

Current standards and approaches are insufficient to cover the workplace and to resolve balance of power, network effect and other lock-in issues, including in the platform economy.

To operationalise data portability that works for workers, consumers, citizens and firms, data policy makers and regulators need to work hand in hand with competition authorities. They also need to expand the notion and legal base for data portability and devise stand-alone regulation on data access and sharing.

Competition policies should provide remedies if data access and sharing provisions are not respected. This should especially be the case if one entity accumulates, uses and shares data in a way that brings them in a dominant market position.