

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

The intersection between competition and data privacy – Note by Israel

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More documents related to this discussion can be found at
www.oecd.org/competition/intersection-between-competition-and-data-privacy.htm

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1. When data serves as a vital input for competitors in a market, the question of who has access to consumer data and to what extent can raise both competitive and privacy questions. The Israel Competition Authority (ICA) has recent experience with the interface between competition and privacy – both the complementarity and the potential tensions – both in the merger context and in the competition advocacy context. Therefore, this response will be divided into two sections, discussing each of these areas.

1. Advocacy – Data Portability

2. The ICA's experience indicates that in many cases, competition policy goals and data privacy goals can share common ground. This allows authorities to work together to promote reforms that serve both, although some details may highlight conflicts between the goals.

3. One leading example of the shared common ground is the basic principle that places the customer at the center and gives them control over their personal data – which also empowers consumer choice and eases mobility between different service providers.

4. To advance this principle, the ICA conducted a collaboration by establishing a joint team with the Israel Consumer Protection and Fair-Trade Authority and Israel Privacy Protection Authority. The joint team published a report recommending adopting a general right to data portability in Israeli law¹.

5. The report proposes recognizing a general right to data portability that would allow consumers to receive their personal data collected by various service providers in an online format. This right to data portability is important in terms of consumer protection and privacy protection, emphasizing the consumer's right to control the information accumulated about them and to dictate who will use the data and how. And it is important in terms of competition, as it creates an infrastructure for the development of new data-based competitors and reduces entry barriers for new and smaller players in data-driven markets. In addition, it increases competition in digital markets by reducing consumer switching costs, eliminating consumers' concern that they will lose their personal data history when changing providers. Beyond boosting competition, data portability can also spur innovation and new product development, as companies gain access to more diverse consumer data they can use to tailor their offerings.

6. Based on the international experience and the expected benefits for Israeli consumers, the joint team recommended adopting a general right to data portability in the Israeli legal system, in accordance with the following principles:

¹ The report is available (in Hebrew) at the following link: https://www.gov.il/BlobFolder/policy/dataportability/he/opinion_%D7%94%D7%96%D7%9B%D7%95%D7%AA%20%D7%9C%D7%A0%D7%99%D7%95%D7%93%20%D7%9E%D7%99%D7%93%D7%A2%20-%20%D7%9E%D7%A1%D7%9E%D7%9A%20%D7%9E%D7%93%D7%99%D7%A0%D7%99%D7%95%D7%AA.pdf

1. The right to data portability should apply only to personal and digital information and the information should be transmitted securely;
 2. The right to data portability should be granted at no additional cost to the consumer;
 3. The data subject to portability should be transmitted in an online, legible and standard format, which will allow additional or repeated use of the information;
 4. The right to data portability should apply to entities that meet a minimum threshold that will be determined, among other things, according to the scope of activity and number of customers.
7. In addition, the joint team recommended that in sectors where data portability is particularly important, an additional sector-specific regulation should be adopted to realize and implement this right.
8. Although the general right to personal data portability has not yet been enacted in Israeli legislation, the principles of the report were implemented in various reforms that the ICA led. One example is in the sector of banking within the framework of the Financial Data Service Law.

1.1. Financial Data Service Law²

9. The Financial Data Service Law was drafted by a joint inter-governmental committee, including the Israeli Competition Authority, and accompanied by the Israeli Privacy Protection Authority. This law aims to increase competition and consumer choice in the financial services sector by granting consumers the right to share their personal financial data with third-party service providers. The Financial Data Service Law is intended to spur innovation, enable new financial products and services and empower consumers to better manage their finances by facilitating the flow of financial data between institutions. It is part of a broader trend towards open finance and data portability in the financial sector. The law is based on the European PSD2, but it is broader in scope, including a wider range of data, for example data regarding securities trading accounts.

10. The Law states that consumers have the right to provide electronic access to their financial data (e.g. account information, transaction history, credit score) held by banks and other financial institutions to third-party providers of their choice. Financial institutions are required to develop open APIs to enable secure, standardized access to consumer financial data by authorized third-party providers.

11. During the drafting process, certain disagreements emerged between the ICA and Israel Privacy Protection Authority which illustrate the tension that may exist between competition and privacy goals, even when the overarching principle is shared.

12. For example, questions arose with regard to the portability of financial data relating to a joint account. While the principles of privacy protection support allowing access only with the explicit consent of all the joint account holders, the principles of competition support reducing friction when transferring data and thus support mechanisms that reduce the bureaucratic burden on consumers that might limit portability. Ultimately, a compromise was reached whereby consent to transfer data given by any of the account holders would be considered consent granted by all account holders. However, when consent is granted by only one account holder, financial institutions must promptly notify all joint account holders about the data transfer consent and their right to revoke it. For new accounts opened going forward, financial institutions will notify the account holders when

² Financial Data Service Law, 5782-2021.

opening the account that access authorization given by anyone of them will be considered access authorization granted by all account holders.

1.2. Pension Clearing System

13. Another example of implementing the principles of data portability in the financial sector is the ICA's recommendation to the Capital Market, Insurance and Savings Authority regarding the renewal of the license for the operation of a centralized pension clearing system (CPCS).³ The CPCS is a central information system designed to enable the transfer of data regarding all pension savings of employees in the Israeli economy, established in 2013. The CPCS allows insurance agents and employees contributing funds to life insurance, disability insurance, pension funds etc. to receive information on all their savings, including accrual amounts, management fees, insurance coverage, returns and more. The CPCS also clears funds, so that transfers of pension and insurance funds by the employer for their employees can go directly to the employees' funds. Every action in CPCS involves a fee.

14. While the ICA recognized that establishing the CPCS helped advance competition in the pension sector by reducing switching costs between pension providers, its position was that the current model, with a single monopoly provider of pension data services, is no longer suitable for the market's current and future needs. Therefore, the ICA recommended transitioning to a more open and competitive model.

15. In the long term, the ICA proposed a shift towards a model where consumers' pension data portability right is significantly enhanced, allowing them to access and share their data with various service providers. Instead of limiting access to the system to highly regulated pension advisors and insurance brokers, the ICA suggested providing access to a wider range of data intermediaries. In addition, the technological infrastructure should be shifted from a bilateral, asynchronous model to an API-based and more interoperable model.

16. The ICA added that moving to an API infrastructure and integrating this infrastructure within the framework of the Financial Data Service Law will enable a transition from an "open banking" world to an "open finance" world, and will allow the customer to access and transfer all of their financial information in one place. The ICA concluded that implementing these recommendations will ensure a more competitive and innovative market for pension clearing services, which will ultimately increase competition in the pension market, as well as benefiting consumers.

2. Merger review

17. Data plays a prominent role in various theories of harm, particularly in digital markets, due to the continuous development of the digital economy where there is an abundance of available data.

18. When assessing merger cases involving data-based concerns, the ICA considers the data privacy policy of the merging companies, as well as Israeli data protection regulation. However, the ICA is hesitant to rely on internal policies, privacy regulation or even

³ The recommendation is available (in Hebrew) at the following link: <https://www.gov.il/he/pages/opinion-pensionclearingsystem>

behavioral remedies to alleviate competitive concerns that may arise when a merger creates incentives to circumvent these limitations.

19. A recent merger case examined by the ICA between two Israeli companies in the financial sector raised a data-based theory of harm, which the ICA determined could not be addressed adequately through behavioral remedies. Therefore, the merger was blocked by the ICA in January 2024.⁴

20. The proposed merger involved Harel, a leading insurance and pensions company and the largest provider of private health insurance in Israel, seeking to acquire Isracard, Israel's largest and oldest credit card companies.

21. The ICA found that the merger raised a competitive concern in the private health insurance sector. This sector is characterized by a competitive dynamic centered around the interplay among insurance companies, agents, and customers. Insurance agents are the primary distribution channel for private health insurance products, making them the focal point of competition among insurance companies. The relationship between agents and insurance companies directly impacts the economic incentives of agents, thereby shaping their guidance to clients in selecting insurance providers.

22. Harel holds the largest market share in private health insurance in terms of premiums (both in term of total market share of existing policies and in terms of new policies sold). Moreover, the company enjoys high brand reputation and leads in agent commission payments, as well as in engagement rate with both insurance agents and agencies operating within this sector.

23. Isracard's main area of business involves issuing credit cards. According to Israeli legislation, banks are permitted to issue credit cards, but large banks must collaborate with an "issuance operator" to manage the ongoing interaction with cardholders, such as sending statements and addressing inquiries. Therefore, in practice, all bank-issued credit cards (the overwhelming majority of the cards in Israel) are administered by one of three credit card companies: Isracard, Max and CAL. These companies also issue non-bank credit cards.

24. Isracard holds the largest market share among these companies, issuing or administering approximately 42% of the active credit cards in circulation – around 3.5 million customers and around 4.4 million active cards.⁵

25. Information held by credit card companies includes detailed monthly purchase histories for each cardholder throughout the entire period of the card ownership. Additionally, credit card companies also hold data on customer's credit limit and utilization.

26. The ICA's investigation indicated that the information held by credit card companies can be used to distinguish between different types of health insurance customers based on their spending patterns and provides a rough estimation of customers' overall price sensitivity. Isracard, due to its scale, holds extensive amounts of information compared to other credit card companies. The extensive customer base and information repository held

⁴ Reasons for objection by the Competition Commissioner to the merger between Harel Insurance Investments and Financial Services Ltd. and Isracard Ltd., 7 February 2024. Available (in Hebrew) at the following link: https://www.gov.il/BlobFolder/legalinfo/cases2023-008372/he/cases_%D7%A0%D7%99%D7%9E%D7%95%D7%A7%D7%99%20%D7%94%D7%AA%D7%A0%D7%92%D7%93%D7%95%D7%AA%20%D7%9E%D7%99%D7%96%D7%95%D7%92%20%D7%99%D7%A9%D7%A8%D7%90%D7%9B%D7%A8%D7%98%20%D7%94%D7%A8%D7%90%D7%9C_0224.pdf

⁵ Out of approximately 11 million active credit cards in Israel.

by Isracard are perceived as important assets, significantly enhancing the company's value to potential buyers.

27. According to the investigation, the merged company would have the ability to use existing and forthcoming technological solutions to extract insights about Isracard's customers. This would enable Harel to implement personalized pricing strategies based, inter alia, on customers' willingness to pay for insurance products. According to the ICA's investigation, the merged company could develop a pricing model tailored to the characteristics of different customers. The pricing model could then be applied to the customer base as a whole.

28. Thus, the ICA concluded that the merged company would be able to utilize the information held by Isracard about its customers, in addition to Harel's own customer data, in order to engage in price discrimination. This practice would enable the merged company to capture a greater portion of consumer surplus by anticipating their willingness to pay for insurance services and identifying customers with relatively low insurance risk.

29. The ICA investigation indicated that personalized pricing models, which analyze individual customer data, are becoming increasingly significant for insurance companies. These models have the potential to increase sales volume, maximize profits, and improve agent closure rate (the likelihood of successfully closing a sale with a client and retaining that client) and thereby increasing both their sales volume and profit. Consequently, the adoption of such personalized pricing model would allow the merged company to offer a superior value proposition to agents compared to its competitors.

30. Competing insurance companies would struggle to develop and implement similar pricing models due to the lack of access to information of comparable scope and quality held by the merged company. This could ultimately lead to the merged company foreclosing or at least harming the competitive ability of its competitors in the health insurance sector, and limiting their ability to restrain its conduct in the market.

31. In terms of privacy protection considerations, the ICA thoroughly examined potential limitations on the merged company's ability to use customers' data, as well as considering behavioral remedies to restrict the company's ability to use said data. However, the ICA ultimately concluded that these measures could not alleviate the competitive concerns.

32. Under Israeli Privacy Protection Law,⁶ the transfer and use of data are largely dependent on explicit customer consent. Each company obtain customer consent for specific data uses, typically outlined in an internal privacy policy. For instance, Isracard's privacy policy (to which customers must agree to receive services) permits the company to utilize customer data for marketing and selling insurance products, with the consent remaining valid even in the event of structural changes or a merger. Consequently, the existing data protection regulations were deemed insufficient to address the competitive concerns.

33. The ICA also examined limitations imposed by the sectoral regulator (the Insurance Commissioner) on the merging companies regarding the use and transfer of customer data for sales purposes. However, the ICA determined that it could not approve a merger that raised reasonable concern of significant harm to competition, relying solely on sectoral regulation, without a structural remedy that can nullify the incentives of the merged

⁶ Privacy Protection Law, 5741-1981.

company. Sectoral regulations are subject to changes at any time by the regulator based on various considerations, which are not limited to competitive concerns.

34. Additionally, the ICA considered the possibility of approving the merger with behavioral commitments that would prohibit the sharing of information between the merging parties and the utilization of customer data from both companies, except as permitted under the Financial Data Service Law (see above). These commitments would be enforced by an external monitor with expertise in information technology.

35. However, the ICA found that such behavioral remedies were not adequate to alleviate the concern, given the parties' ability and incentive to circumvent the prohibition, as well as the inherent challenges in monitoring compliance with these commitments, especially given the rapid evolution of technology surrounding data usage.

3. Conclusion

36. As demonstrated above, the ICA has often found that competition goals and data privacy goals can complement each other. Reforms that give the consumer control over their data have the potential to strengthen both data privacy and competition by reducing barriers to data transfer and entry. However, it is important to recognize that these goals are not always aligned, and in some cases, tension may arise between them. For example, data privacy's emphasis on consumer consent may not fully align with competition considerations.

37. This tension is relevant not only in advocacy contexts but also in merger review processes. Data privacy protections may not necessarily address competitive concerns arising from a merger, as their emphasis and remedies differ from those considered by a competition authority.