Data portability and EU competition law

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Damien Geradin

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Data portability – The concept

- Data portability: the ability for people to reuse their data across devices and services
- From a competition law perspective, data portability can:
  - address a “lock-in” or switching costs problem
  - hence, improving competition in the market, so that new services can innovate and attract customers away from the original device or service
- Other rationales for data portability, include:
  - a right to own one own’s data and dispose of it as you wish (as part of an the individual “right” in data protection)
  - the need to encourage interoperability in itself.

Ensuring data portability: Available tools

- Data portability can be ensured either:
  - in an *ex ante* manner through regulatory intervention
  - in an *ex post* manner through antitrust enforcement
- Imposing data portability through the enforcement of EU competition rules requires that:
  - the company holding the data owns a dominant position on a given market
  - its refusal to ensure data portability excludes competitors
  - the absence of objective justification or countervailing efficiencies
- Regulatory intervention does not in itself require that these conditions be met:
  - It can be as broad or narrow as the legislator decides
  - In other words, no requirement of dominance is needed and no abuse needs to be identified

Data portability and competition law

- The prevention of “switching cost” or “lock-in” as a barrier to entry is not a new concern for the Commission:
  - See, for instance, the *IMS* and *Microsoft* cases
- This issue has, however, raised a lot of attention in the context of “cloud computing” where commentators have expressed concern that
  - “interoperability and data portability constraints impede on the possibility for consumers to use complementary cloud services alongside each other, and migrate their data from one cloud to another.” (Sluijs et al. 2011)
- Note that the imposition of switching cost or lock-in may be self-defeating as it may discourage users to use the service

Enforcing data portability through competition rules

- Commission Almunia (November 2012:
  - Data portability "goes to the heart of competition policy"
  - "In those markets that build on users uploading their personal data or their personal content, retention of these data should not serve as barriers to switching. Customers should not be locked into a particular company just because they once trusted them with their content."
  - "Whether this is a matter for regulation or competition policy, only time will tell."
- This suggests that DG COMP seems to be willing to enforce data portability through competition rules when it impedes competition.

The Commission's investigation of *Google* conduct

- Among the various concerns expressed by the Commission figure the fact that:
  - Google contractually restricts the possibility to transfer online search advertising campaigns away from Google's AdWords and to simultaneously manage such campaigns on competing online search advertising platforms.
  - these restrictions create artificial switching costs that discourage advertisers using Google's AdWords from running parallel online search advertising campaigns on competing platforms, thereby reducing consumer choice.
- In its commitments, Google proposes to address that by:
  - no longer imposing obligations that would prevent advertisers from managing search advertising campaigns across competing advertising platforms.
  - See paragraphs 33-37 of the leaked Google commitments (January 2014)

Enforcing data portability through regulatory intervention

- Competition law intervention is not necessarily the right tool to ensure that users will be able to port their data across devices and services:
  - as it is done on an ad hoc basis (although an infringement decision in one specific case can create broader effects through deterrence).
  - it will be focused on markets with dominant players.
- The Commission decided to integrate data portability principles in its draft proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the draft General Data Protection Regulation)

The Commission's initial proposal …

- "1. The data subject shall have the right, where personal data are processed by electronic means and in a structured and commonly used format, to obtain from the controller a copy of data undergoing processing in an electronic and structured format which is commonly used and allows for further use by the data subject.
- 2. Where the data subject has provided the personal data and the processing is based on consent or on a contract, the data subject shall have the right to transmit those personal data and any other information provided by the data subject and retained by an automated processing system, into another one, in an electronic format which is commonly used, without hindrance from the controller from whom the personal data are withdrawn."

… was heavily criticized by many

- A number of scholars and industry commentators criticized that proposal on the ground that Article 18 :
  - could be subject to differing interpretations
  - is over-broad as it impose an obligation of data portability on any business independently of dominance and size. There is thus a risk that this obligation will:
    - Impose a very heavy compliance burden on small companies
    - Could possibly reduce innovation
  - contrary to what happens in competition law, the potential harm would not be balanced with potential efficiencies

European Parliament legislative resolution of 12 March 2014

- Article 18 has been deleted and replaced by Article 15.2.a, which provides that:

  "Where the data subject has provided the personal data where the personal data are processed by electronic means, the data subject shall have the right to obtain from the controller a copy of the provided personal data in an electronic and interoperable format which is commonly used and allows for further use by the data subject without hindrance from the controller from whom the personal data are withdrawn. Where technically feasible and available, the data shall be transferred directly from controller to controller at the request of the data subject."

- Also note recital 55:

  "Data controllers should be encouraged to develop interoperable formats that enable data portability."

Conclusions

- The justification for “data portability” may be different under EU competition law and regulation.
- The scope of application of the two regimes different:
  - On the one hand, the scope of regulation is potentially much broader as no showing of dominance is needed
  - On the other hand, the right to data portability under the Draft Regulation is limited to “personal data”
- The imposition of an extensive right of data portability may be disproportionate in markets not characterized by consumer lock-in.
- The European Parliament will negotiate with the Council and try to reach agreement on the final text of the General Data Protection Regulation.