

Data portability in cloud services and beyond

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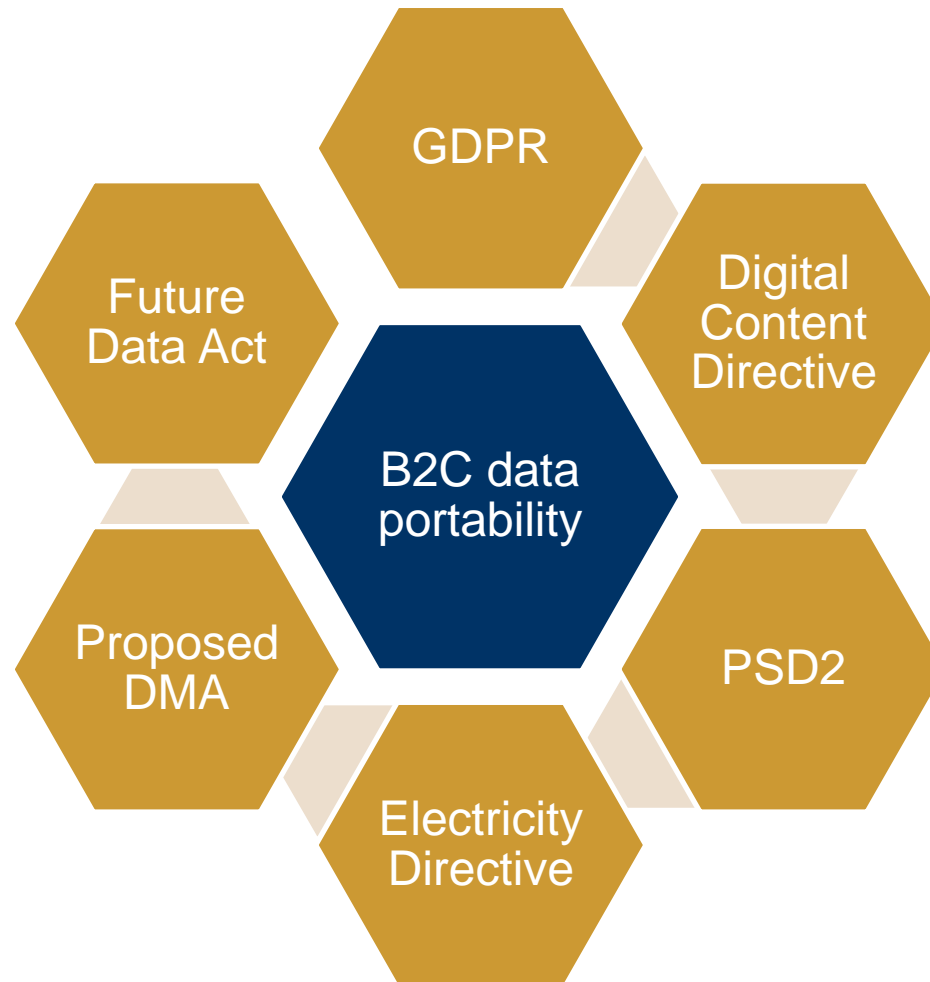
Outline

- Data portability as an emerging concept in EU law
- Current regulatory patchwork
- Challenges and lessons from experiences so far

Origins of the concept of data portability

- **Hybrid nature** of GDPR data portability:
 - Individual empowerment: fits with fundamental rights objective of data protection
 - Sharing and reuse of personal data: fits with internal market objective of data protection
- GDPR data portability is limited to personal data *'provided by'* the data subject and only facilitates direct transfers *'where technically feasible'*
- Impact of data portability on individual empowerment, competition and competition depends on implementation

Horizontal versus sector-specific frameworks



Legislation	Objectives	Beneficiaries	Standardisation
GDPR	Data protection, internal market for personal data	Data subjects (natural persons)	Structured, commonly used and machine-readable format – data controllers are encouraged to develop interoperable formats
Digital Content Directive	Internal market; consumer protection	Consumers (natural persons)	Commonly used and machine-readable format
PSD2	Internal market for payment services	Third-party payment initiation and account information service providers; payers	European Banking Authority specifies the requirements of common and open standards
Electricity Directive	Internal market for electricity; energy efficiency; consumer empowerment	Final customers; eligible parties to be specified by the Member States	Common data format at national and later EU level

B2B data portability in cloud services

- 2018 Regulation on the free flow of non-personal data
- Art. 6(1)(a): Commission will encourage and facilitate the development of **self-regulatory codes of conduct**, including best practices for facilitating switching of cloud service providers and porting of data – SWIPO Codes of Conduct
- EC Summary of public consultation on Data Act (Dec. 2021):
 - 52% in favour of including right to data portability in EU legislation, and 19% against
 - 46% consider high-level legal principles sufficient, while 29% see the need for more specific conditions of a contractual, technical, commercial and economic nature

Proposed EU Digital Markets Act

Article 6

Obligations for gatekeepers susceptible of being further specified

1. In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall:
 - (h) provide effective portability of data generated through the activity of a business user or end user and shall, in particular, provide tools for end users to facilitate the exercise of data portability, in line with Regulation EU 2016/679, including by the provision of continuous and real-time access ;

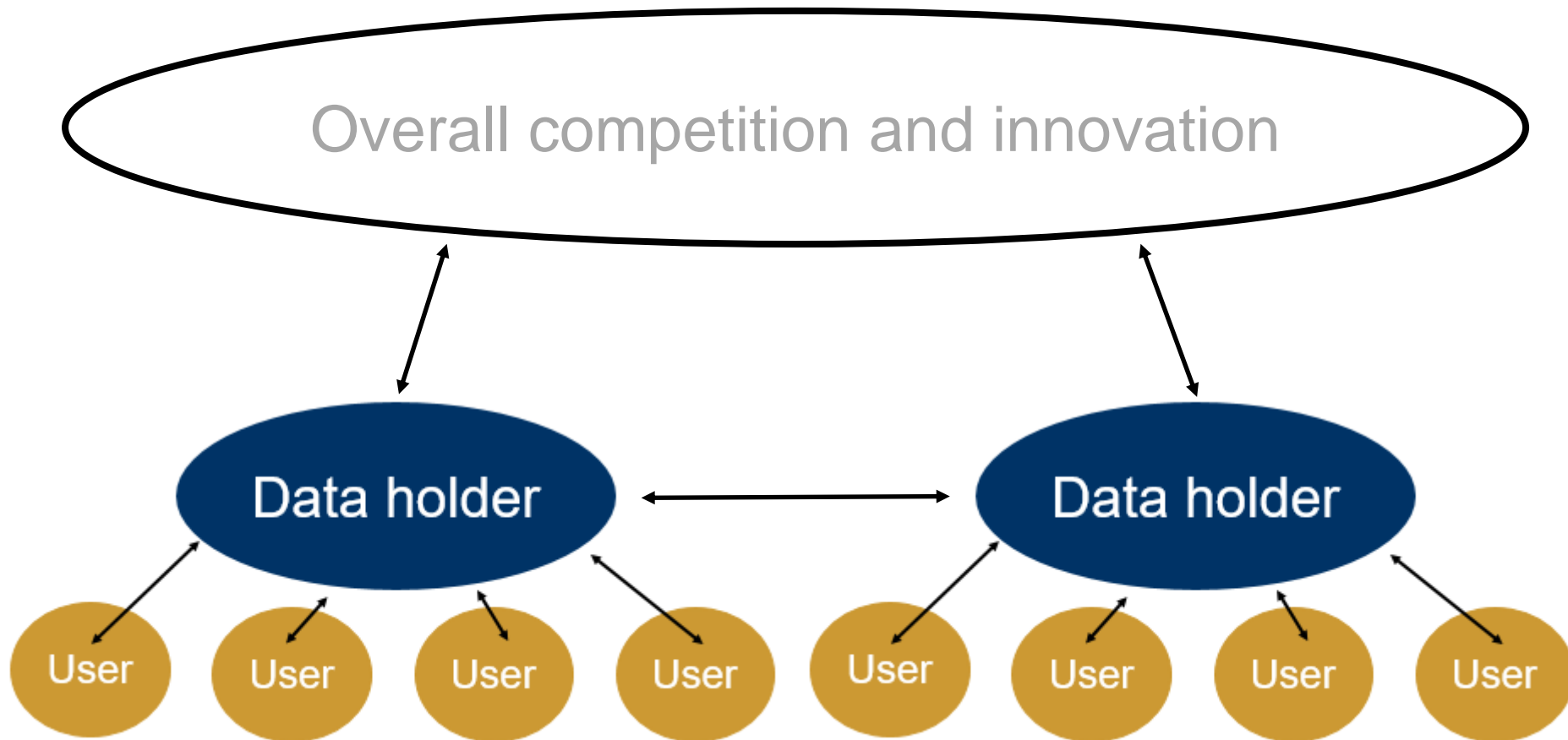
I. Graef, M. Husovec & N. Purtova, 'Data Portability and Data Control: Lessons for an Emerging Concept in EU Law', *German Law Journal* 2018, vol. 19 no. 6, p. 1359-1398, available [here](#).

Data type / Entitlement	Business-to-consumer (B2C)		Business-to-business (B2B)	
Personal data	<u>General purpose:</u> GDPR: RtDP (only covers personal data provided by the data subject)	<u>Specific purpose:</u> Competition law (exploitation of consumers)	<u>General purpose:</u> GDPR: RtDP (only covers personal data provided by the data subject – applicable in a B2B setting as well when a business user acts as a natural person)	<u>Specific purpose:</u> Competition law (exclusion of competitors)
	<u>General purpose:</u> Digital Content Directive (data retrieval obligations)	<u>Specific purpose:</u> Competition law (exploitation of consumers)	<u>General purpose:</u> Regulation on the free flow of non-personal data (self-regulation for facilitating the switching of providers)	<u>Specific purpose:</u> Competition law (exclusion of competitors)
Non-personal data				

Challenges

- Impact of data portability so far seems limited:
 - Dependent on existence of effective standards
 - Dependent on how actively invoked by users
- Data portability versus data sharing
- Sector-specific implementation with eventual **spill-over effects** across industries?
- Prevent undesirable side effects: **asymmetric regulation** both at the side of addressees and beneficiaries? Seems desirable for B2B data sharing, less so for portability

Impact of data portability at micro and macro level



References

- I. Graef (2020). The opportunities and limits of data portability for stimulating competition and innovation, *Competition Policy International – Antitrust Chronicle* November 2020, p. 1-8
- I. Graef, M. Husovec & J. van den Boom (2020). Spill-overs in data governance: Uncovering the uneasy relationship between the GDPR's right to data portability and EU sector-specific data access regimes, *Journal of European Consumer and Market Law*, vol. 9 no. 1, p. 3-16
- I. Graef & J. Prüfer (2021). Governance of data sharing: A law & economics proposal, *Research Policy*, vol. 50 no. 9, available at <https://doi.org/10.1016/j.respol.2021.104330>

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