Data portability in cloud services and beyond

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GRUR Webinar
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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

- GDPR
- Future Data Act
- Proposed DMA
- Digital Content Directive
- Electricity Directive
- PSD2

B2C data portability
<table>
<thead>
<tr>
<th>Legislation</th>
<th>Objectives</th>
<th>Beneficiaries</th>
<th>Standardisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>GDPR</td>
<td>Data protection, internal market for personal data</td>
<td>Data subjects (natural persons)</td>
<td>Structured, commonly used and machine-readable format – data controllers are encouraged to develop interoperable formats</td>
</tr>
<tr>
<td>Digital Content Directive</td>
<td>Internal market; consumer protection</td>
<td>Consumers (natural persons)</td>
<td>Commonly used and machine-readable format</td>
</tr>
<tr>
<td>PSD2</td>
<td>Internal market for payment services</td>
<td>Third-party payment initiation and account information service providers; payers</td>
<td>European Banking Authority specifies the requirements of common and open standards</td>
</tr>
<tr>
<td>Electricity Directive</td>
<td>Internal market for electricity; energy efficiency; consumer empowerment</td>
<td>Final customers; eligible parties to be specified by the Member States</td>
<td>Common data format at national and later EU level</td>
</tr>
</tbody>
</table>
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
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;
<table>
<thead>
<tr>
<th>Data type / Entitlement</th>
<th>Business-to-consumer (B2C)</th>
<th>Business-to-business (B2B)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Personal data</strong></td>
<td>General purpose: GDPR: RtDP (only covers personal data provided by the data subject)</td>
<td>Specific purpose: Competition law (exploitation of consumers)</td>
</tr>
<tr>
<td><strong>Non-personal data</strong></td>
<td>General purpose: Digital Content Directive (data retrieval obligations)</td>
<td>Specific purpose: Competition law (exploitation of consumers)</td>
</tr>
</tbody>
</table>

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

Overall competition and innovation

Data holder

User

Data holder

User

User

User

User

User

User

User

User
References


