

## **RIGHT TO DATA PORTABILITY: A NEW TOOL TO UNLOCK DIGITAL COMPETITION?**

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### ***Abstract***

The Right to Data Portability crystallized under Art 20 of the General Data Protection Regulation (GDPR) by the European Union provides a right to the digital consumers to receive a copy of their submitted personal data in a structured and machine readable form and to transfer it from one controller to another without being prevented/restricted in doing so by the controller. Though GDPR has been an important legislation in enshrining personal data portability right, the key objective of the legislation was data protection and privacy of the individual and not competition. However, in the markets prone to tie-ins, data portability has huge potential to improve consumer choice and boost competition. At the same time there are some risks associated with a rigid application of data portability requirement. The right to data portability has to be interpreted consciously to avoid adverse effects on competition and innovation. The implications of the data portability on the competition law need to be studied for better enforcement of antitrust laws and for protecting the competition. The question which is pertinent to be asked is whether the new competition era will have to be understood in the light of the old classic concepts of competition or will the new rules replace them. This paper critically analyses the antitrust law interface with the right to data portability and tries to unearth its effects on competition in digital market.

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### **I. Introduction**

*“ANTITRUST LAW is not about protecting competing businesses from each other; it's about protecting competition itself on behalf of the public.”<sup>1</sup>*

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The exponential growth of the digital economy has enabled the rise of business models based on the collection and processing of “Data”.<sup>2</sup> Large amount of user’s data stored by the platform business models give them a competitive edge over other companies in designing efficient products and services. At times this act as a market barrier for other companies as the data cannot be extracted either by the user or the competitors. The companies try to use access to personal data to gain commercial advantage *vis-à-vis* users.<sup>3</sup> If customers are not allowed to switch platforms with their data, personal data may become a competition law issue. It may create access issues and a lock-in situation and may distort market competition. Further, in case of a dominant firm like Google or Facebook, refusal to data portability may amount to a kind of exclusionary abuse of market power. Restrictions or refusal to data portability in all such cases may invite competition law intervention.<sup>4</sup>

The competition policy of any country is entirely based on the market dynamics and in case of online markets business models, regulation and assessment of competition cannot be based on conventional methods and the economic analysis of market effects is done in a slightly different manner. Traditional antitrust concepts were formulated for tackling different circumstances and across different time zone, the competition policies were formed to deal with cartels, price fixation and breaking monopolies. Data driven economies have brought sea of changes at how we look at the antitrust enforcement. The market players have now moved from traditional brick and mortar stores to online vendors which are much more sophisticated in terms of technology and accessibility. The economic importance of data and privacy has been emerging in today’s time. Thus, the concepts of competition and its thresholds would have to be understood in the new light.

Data portability refers to an individual’s ability to easily move their personal information from one agency to another.<sup>5</sup> User’s right to data portability between online platforms

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<sup>1</sup> A.F Franken, "How Privacy Has Become an Antitrust Issue" *American Bar Association Antitrust Section*, available at: [www.huffingtonpost.com](http://www.huffingtonpost.com) (last visited on December 27, 2020).

<sup>2</sup> “Big data: Bringing Competition Policy to the Digital Era” OECD, available at: <http://www.oecd.org/competition/big-data-bringing-competition-policy-to-the-digital-era.htm> (last visited on December 10, 2020).

<sup>3</sup> Joaquín Almunia, “Competition and Personal Data Protection, A Privacy Platform Event”, Brussels, (2012), available at: [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_12\\_860](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_860) (ast visited on December 08, 2020).

<sup>4</sup> Barbara Engels., “Data Portability among Online Platforms” *5 Internet Policy Review (2)* (2016), available at: <http://policyreview.info/articles/analysis/data-portability-among-online-platforms> (last visited on November 20, 2020).

<sup>5</sup> K. Wilson, J Trezise (eds.), “A Right to Data Portability: Privacy and Competition Law Concerns” *New Zealand Law Society* (2017), available at: <https://www.lawsociety.org.nz/practice-resources/practice->

provides greater control over their personal data (right to receive copy of personal data from one controller) as well as gives more choice to the user as a customer to choose between services provided by different competitors in online market (right to transfer copy of personal data to another controller).

Though data portability is presumed to have reflections on levels of competition in the market, a direct analysis from competition law perspective is still very premature. This paper is an attempt to analyse the effects of data portability on competition in online business market. It will analyse closely the concept and nature of right to data portability and its interaction with competition law. Some suggestions on policy regulation of data portability in a manner conducive to competition and innovation are also highlighted in the paper.

## II. (Right to) Data Portability: Concept and Meaning

*Data portability is a fluid concept capable of being used in multiple concepts and can be defined in many ways.*<sup>6</sup> Data portability, an emerging concept, has been introduced by GDPR under Data Protection laws as a legal right which allows user to retrieve the personal data submitted by them from the controller in a structured, commonly used and machine readable form and ability to transfer it between controllers without hindrance so far as technically feasible. Essentially data portability is the right to transfer personal data from *controller* to another organization or to the data subject in the context of digital personal data (*sets and subsets*) and automated processing.<sup>7</sup>

Prior to the legal domain under GDPR, data portability as a much wider concept emerged under Data Portability Project founded in 2007 (the [dataportability.org](http://dataportability.org), a commercial initiative to work out for unrestrained data portability in commercial environment).<sup>8</sup> The challenges to the protection of personal data were recognised by the European Council and called for a debate on existing legal framework in 2010 which led to the proposal for GDPR.

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[areas/privacy/a-right-to-data-portability-privacy-and-competition-law-concerns](#) (last visited on December 30, 2020).

<sup>6</sup> Helena Ursic, "Unfolding the New-Born Right to Data Portability: Four Gateways to Data Subject Control" 15 SCRIPTed 1 (2018), *available at*: <https://script-ed.org/article/unfolding-the-new-born-right-to-data-portability-four-gateways-to-data-subject-control/> (last visited on December 20, 2020); Data Portability under this commercial initiative was defined as "[t]he user is able to obtain her data and to transfer it to, or substitute data stored on, a compatible platform."

<sup>7</sup> Brett Brody, "Democratizing Data in 2019", Interoperable, *available at*: <https://medium.com/interoperable/democratizing-data-in-2019-3b194b6aaae2> (last visited on November 2, 2020).

<sup>8</sup> Barbara Van der Auwermeulen, "How to Attribute the Right to Data Portability in Europe: A Comparative Analysis of Legislations" 33 *Computer Law & Security Review* 57-72 (2017), *available at*: <https://www.sciencedirect.com/science/article/pii/S0267364916302175> (last visited on December 4, 2020).

Data portability as a right under GDPR is only applicable to the personal data of the person. Personal data is “any information relating to an identified or identifiable natural person”. The concept of data portability should not be confused with the data interoperability. Interoperability is the extent to which the data from one online platform can be used in another online platform. The infrastructure of digital platform plays a very important role in this.

Data portability essentially strengthens the framework of the consumer in the digital market, as they provide the choice to move. The data portability can be used as a concept to protect the consumers from the data being tied up in the silos or closed platforms which can be termed as walled gardens impermeable to each other, hence restricting and creating a lock-in situation. Apart from being capable of pursuing competition law objectives and consumer welfare, it can pursue the goal of data protection and individual privacy.

Several civil societies are viewing protection of digital data as proponents of a human right. Thus, there are several declarations which mentions data portability they are, to name a few these are; Right to Privacy on the Internet, Right to Digital Data Protection, Rights to Consumer Protection on the Internet, United Nations Guidelines for Consumer Protection.<sup>9</sup>

### **III. The Benefits and Risks of Right of Data Portability**

The vision of data mobility goes far beyond data portability as envisaged by the GDPR, enabling personal data to flow safely and efficiently to where it can create maximum value, with personal, social and economic benefits distributed more fairly.<sup>10</sup> If application of the right to data portability is considered, it can be concluded that it leads to efficiency and innovation in the market in the long run. The data portability implies that data is shared through an inter-operable form with various platforms and thus it helps in encouraging innovation, productivity and competition.

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<sup>9</sup> “The Charter of Human Rights and Principles for the Internet Educational Resource Guide (v2) (Internet Rights and Principles Coalition)”, IGF Internet Governance Forum, *available at*: <https://www.intgovforum.org/multilingual/content/preview-of-the-2017-dcpr-outcome-platform-regulations-dc-on-platform-responsibility> (last visited on November 15, 2020).

<sup>10</sup> David Pickering, “Building on Data Portability to deliver the big prize: Data Mobility”, *Ctrl-Shift*, (2018), *available at*: <https://www.ctrl-shift.co.uk/news/2018/12/03/building-on-data-portability-to-deliver-the-big-prize-data-mobility/> (last visited on December 10, 2020).

Data portability eases the data flow which is required for innovation. As Brynjolfsson and McAfee in their book *The Second Machine Age* writes<sup>11</sup>:

..digital innovation is recombinant innovation in its purest form. Each development becomes a building block for future innovations. Progress doesn't run out; it accumulates. And the digital world doesn't respect any boundaries. It extends into the physical one, leading to cars and planes that drive themselves, printers that make parts, and so on....We'll call this the 'innovation-as-building-block' view of the world.

In matters related to personal data of the consumer, data portability has the potential to deliver better results for the personal and market growth.<sup>12</sup> Data being recombinant and non-rivalrous, data assets are characterised as distinct from physical assets in terms of their on-going value generation potential.<sup>13</sup> It opens doors of opportunities to the new service providers who are leveraging in recombinant innovation especially where integration of data from previously separate and different providers is required. The organisations using the data can build new trust-based relationships with empowered consumers, gaining new insights to innovate and improve services and products, and to enhance the effectiveness of marketing and operations.<sup>14</sup>

Data portability helps in better understanding of consumer behaviour and preferences by having access to the consumer's data which results in targeted advertising by the e-portals and more data driven innovation. It also in turn improves the quality of product and services which helps in consumer welfare.

The data portability creates benefits in terms of productive *efficiency* and recombinant innovation thus it in turn, the greater visibility of the value of data would likely beget a more vibrant data sharing environment, enabling businesses to unlock greater value from diverse data sets and derive additional insights for the benefit of consumers.<sup>15</sup> Higher

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<sup>11</sup> W. Stephenson, "IoT ideal example of "recombinant innovation"!" (September 19, 2014), *available at*: <http://www.stephensonstrategies.com/iot-ideal-example-of-recombinant-innovation/> (last visited on November 12, 2020).

<sup>12</sup> T. Fish, "Exploring the Nascent Personal Data {portability, sharing, mobility} Market Models, Players and Positioning", *Medium-My Data Journal*, July 5, 2018, *available at*: <https://medium.com/mydata/exploring-the-nascent-personal-data-portability-sharing-mobility-market-models-players-and-6afbc23898a2> (last visited on June 04, 2020).

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> "Data Portability Personal Data Protection Commission In collaboration with Competition and Consumer Commission of Singapore", Competition and Consumer Commission, *available at*:

productivity derived from the ease of combining data from different sources can lower the cost of producing data-enabled products and services.<sup>16</sup>

It has also been evident that data portability has a positive effect on the productivity and efficiency. Data portability favours the consumers in long run by increasing the scope of the use of personal data, and thereby increased sharing by individuals of their data can be used for the benefit of all consumers.<sup>17</sup> This in turn stimulates competition in the market and improves the dynamics of competition. The data portability supports mobility of data which in turn leads to greater consumer choices and fair and healthy markets. In this way we can say that the objectives of data portability and competition policy are aligned where consumers benefit from the individual right given under data portability framework and market competition is enhanced by existence of such rights.<sup>18</sup>

One very characteristic advantage of the data is that opening data sets to additional users does not deplete the volume of data; unlike any other resources.

The right to data portability can also encourage the adoptions of new technologies like Artificial Intelligence (AI) and Internet of things (IoT) by building data infrastructure for flourishing digital economy. Data portability helps in facilitating the data mobility readily from one platform to another which means it discourages concentration of data in organizational silos such as Google, Apple, and Facebook where only one organization controls it. The new technologies will also help in resolving systematic issues like data breach, consumer mistrust, uneven sharing of benefits.

However, there are certain risks involved in the data portability - they are the issues of safety and security. The data ported must be done in a safe and sound manner so as to minimise the threat of losing valuable data of the people. In our world of weak authentication and rampant

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<https://www.cccs.gov.sg/resources/publications/occasional-research-papers/pdpc-cccs-data-portability> (last visited on February 27, 2020).

<sup>16</sup> Chairman Aw, "Singapore Considers Introduction Of Data Portability", *Reed Smith (Worldwide)*, March 5, 2019, available at:

<http://www.mondaq.com/uk/x/786058/data+protection/Singapore+Considers+Introduction+Of+Data+Portability> (last visited on November 20, 2020).

<sup>17</sup> Michael Wohlfarth, "Data Portability on the Internet: An Economic Analysis", available at:

[https://www.researchgate.net/publication/320805461\\_Data\\_Portability\\_on\\_the\\_Internet\\_An\\_Economic\\_Analysis](https://www.researchgate.net/publication/320805461_Data_Portability_on_the_Internet_An_Economic_Analysis) (last visited on December 10, 2020).

<sup>18</sup> "Data Portability: Personal Data Protection Commission", *In collaboration with Competition and Consumer Commission of Singapore*, February 25, 2019, available at: <https://www.pdpc.gov.sg/-/media/Files/PDPC/PDF-Files/Resource-for-Organisation/Data-Portability/PDPC-CCCS-Data-Portability-Discussion-Paper---250219.pdf> (last visited on December 2, 2020).

identity theft, moving all of a person's data to another system "without hindrance" creates security risks that can outweigh the portability benefits.<sup>19</sup>

There are also certain risks involved of the security of the data which might be not transferred, can be stolen and misused by the platforms, hence the procedure of data portability must be secure in this manner. The certification of data quality (as well as other value-adding processes such as data cleaning, transcribing into different formats) might be the nucleus of a functioning ecosystem for data.<sup>20</sup>

#### IV. Understanding the Right to Data Portability: A Right under GDPR

The right to data portability needs to be seen against the backdrop of a digital era of digitization and digital transformation whereby personal data have become part of virtually all areas of society, life, business and tons of processes, ranging from buying online to seeking online customer service and all the big data processes going on in myriad digital data processing activities.<sup>21</sup> Right to data portability is a right which is adjoined with the right to privacy. Data portability refers to an individual's ability to easily move their personal information from one agency to another.<sup>22</sup>

The definition of the right to data portability as given by Information Commissioner Office (UK)<sup>23</sup>:

The right to data portability gives individuals the right to receive personal data they have provided to a controller in a structured, commonly used and machine readable format. It also gives them the right to request that a controller transmits this data directly to another controller.

The right to data portability is one of the fundamental data subject rights in the General Data Protection Regulation (GDPR).<sup>24</sup> Data portability has been codified for the first time as a specific right under data privacy right of a consumer under article 20 of GDPR by the

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<sup>19</sup> P. Swire, Y. Lagos (eds.), "Why the Right to Data Portability Likely Reduces Consumer Welfare: Antitrust and Privacy Critique" *Maryland Law Review* 72 (2), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2159157](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2159157) (last visited on November 12, 2020).

<sup>20</sup> *Supra* note 16.

<sup>21</sup> "Data portability under the GDPR: The Right to Data Portability Explained", I-SCOOP, available at: <https://www.i-scoop.eu/gdpr/right-to-data-portability/> (last visited on November 12, 2020).

<sup>22</sup> *Supra* note 5.

<sup>23</sup> "Right to Data Portability", *Information Commissioner Office*, available at: <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-to-data-portability/> (last visited on December 08, 2020).

<sup>24</sup> *Supra* note 19.

European Union.<sup>25</sup> Under GDPR the right to data portability has a twofold structure. The primary component of the right which is laid under article 20(1) of GDPR is the data subject's right to, firstly, receive the personal data concerning him or her from the controller, and, secondly, to transfer this data to another controller. The second paragraph lays emphasis on the technical feasibility as important pre-requisite to exercise the right of the controller of data portability. The right to data portability under article 20 of GDPR applies where the data is processed on consent or contract.<sup>26</sup>

However, article 20 of GDPR leaves room for interpretation as to the data covered- whether covers the personal data provided by data subject explicitly (*i.e.* contact information, comments, uploaded information *etc.*) or implicitly (collected on the basis of conduct of user like use of a product or service *etc.*) also.

Many other jurisdictions have also adopted data portability in one or many forms. California enacted the California Consumer Privacy Act ("CCPA") in 2018 which provides for consumer access and data portability rights. The CCPA's data portability requirement provides that businesses that receive verifiable consumer requests must promptly take steps to disclose and deliver, free of charge to the consumer, the personal information requested by the consumer.<sup>27</sup>

Brazil's *Lei Geral de Proteção de Dados* (or LGPD) passed the in 2018, but was notified in February 2020; attempts to unify over 40 different statutes that currently govern personal data, both online and offline, by replacing certain regulations and supplementing others. This unification of previously disparate and oftentimes contradictory regulations is only one similarity it shares with the EU's General Data Protection Regulation, a document from which it clearly takes inspiration.<sup>28</sup>

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<sup>25</sup> GDPR, art. 20(1): Right to data portability: The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided, where:

- (a) the processing is based on consent pursuant to point (a) of art. 6(1) or point (a) of art. 9(2) or on a contract pursuant to point (b) of art. 6(1); and
- (b) the processing is carried out by automated means.

<sup>26</sup> *Id.*, at art. 6.1(a) and (b) and Ruth Janal, "Data Portability-A Tale of Two Concepts" *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2017), available at: <https://www.jipitec.eu/issues/jipitec-8-1-2017/4532/citation> (last visited on December 10, 2020).

<sup>27</sup> *Supra* note 16.

<sup>28</sup> GDPR.EU, available at: <https://gdpr.eu/gdpr-vs-lgpd/> (last visited on November 15, 2020).



India under proposed “The Personal Data Protection Bill 2018”, section 26 provides right to data portability by the *data principal* which has been generated in the course of provision of services or use of goods by the *data fiduciary*. Some countries like Singapore, Australia and Switzerland are contemplating GDPR like legislation and also to include right to data portability.

### **Hybrid Nature of the Right to Data Portability**

The nature of right to data portability if seen from the application point of view is always attached with some controversy, mainly because of its hybrid nature. The hybrid nature of this right can be explained due to its utility in two dimensions; the first dimension is that of protection the personal data and privacy of an individual in *online* medium and the second dimension can be the right of data portability as an *instrument to enhance competition*, by allowing the consumers to switch their personal data to the competitors. This aspect of the right to data portability can be called to be a functional aspect for the competition enforcement.<sup>29</sup>

It can be used as a possible hybrid *regulatory* tool to deal with competition law as well as data protection issues under it. The right to data portability can emerge as a kind of sector specific regulation tool for the online environment when it identifies and protects ‘personal data’ which is a marketable good on one hand and ensure better consumer welfare and market functioning on the other. The right to data portability also helps market achieve efficiency by preventing market barriers for entry for small scale companies and SMEs on the basis of requirements and standardising of technology.<sup>30</sup> It can be stated very objectively that ‘personal data’ is utilised as a marketable good. The competitors will thus due to right of data portability will have equal access to data of the consumers and prevents lock-ins situation which leads to monopoly formations. This will imply that new entrants are not restricted from entering the market and it will increase the market participants which will again be advantageous to the consumers by giving them an option to choose.

Thus there have been plenty of experiences from other market sectors which indicate that data portability is a key factor for effective competition. It acts as an additional regulatory

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<sup>29</sup> Paul Hert, V Papakonstantinou, (et al.), “The Right to Data Portability in the GDPR: Towards User-Centric Interoperability of Digital Services” 34 *Computer Law & Security Review* 2 (2018), available at: <https://www.sciencedirect.com/science/article/pii/S0267364917303333> (last visited December 10, 2020).

<sup>30</sup> Radina Stoykova, “The Right to Data Portability as a Market Tool”, (2018) *CriOnline* 2/2018, 44-49, available at: [http://www.cr-online.de/50304\\_MzI4.htm](http://www.cr-online.de/50304_MzI4.htm) (last visited on December 10, 2020).

measure to competition law enforcement and address lock-in situations in these sectors which have very different legal nature.

The application of data portability as a tool to enhance functioning of the market has been used quite often in previous instances and it can be seen to address monopoly issues, for example in *tele-communications* and Digital content portability as part of *copyright law* under European Union legal regime<sup>31</sup>.

### V. The Interface: Right to Data Portability and Competition Law

Right to data portability under Data Protection regime and Competition Law might be two legislations dealing with two different areas but they are overlapping in many ways and serve common objective of consumer welfare. They are complementary to each other and yet supplementing the remedies for an efficient market and contribute in controlling anticompetitive behaviour in certain cases. The interface between right to data portability and competition law may be divided in three broad categories:

#### Can ‘Right to Data Portability’ and ‘Data Portability’ under Competition Law co-exist?

Since the overlap between data portability and competition laws is so obvious, competition law perspectives should be taken into consideration while implementing a data portability requirement. Right to data portability is a right which is closely linked to the competition law enforcement and both can be said to have impact on each other while co-existing harmoniously for the benefits of the market. By imposing restrictions on the extent to which market players can process personal data, data protection law structures markets and influences the competitive process.<sup>32</sup>

The application of competition law and right to data portability is not concentric circles but *congruent* circles, that it they may not have the same centre but have the same radius, as they may differ in its *scope* of application but the *purpose* of both is welfare of the consumers and maintaining efficiency in the market. The relevance of application of competition law and the data portability is to a large extent crucial for maintaining the balance of both the rights. Although both the proposed right to data portability and competition enforcement for

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<sup>31</sup> *Ibid.*

<sup>32</sup> Inge Graef, Martin Husovec, *et al.*, “Data Portability and Data Control: Lessons for an Emerging Concept in EU Law” 19 *German Law Journal* 6 (2019), available at: <https://www.cambridge.org/core/journals/german-law-journal/article/data-portability-and-data-control-lessons-for-an-emerging-concept-in-eu-law/5904FB88DDC1B9E6EC651A7F89058433> (last visited on December 12, 2020).

facilitating data portability will diminish switching costs for users, there are differences between the scopes of application of the two regimes.<sup>33</sup>

The possible enforcement of data portability under competition law differs from the way in which the right to data portability is to be implemented under data protection law. Competition Law has a wider scope in application in the data driven market that it applies to all kinds of data that is, “data” is not restricted to personal data or only data acquired from the consumers which they have willingly submitted, but to all kinds of data which may be possessed by the e-commerce companies or social networking sites, etc. The right to data portability as crystallized under the GDPR on the other hand applies only to the ‘personal data’ of the consumer concerning him or her.<sup>34</sup> Competition law on the other hand does not differentiate between different data sets available online or whether it is acquired or not.

Under competition law regime, actions can be taken against a lack of portability of any data, irrespective of whether it relates to a natural person or not and when it was provided as long as it qualifies as anticompetitive behaviour.<sup>35</sup> Thus we can say that under competition law, action can potentially be taken against a lack of portability of any data, the scope of application of competition law in this regard is thus much wider.<sup>36</sup> Data portability under Competition law regime can only be taken when it is proven that there might be some infringement by the market players such as proven abuse of dominance. The data portability under competition law works in a *reasonable* approach rather than *per se* approach. In contrast, the right to data portability applies generally to all forms of data processing carried out by both automated means and the ones which are based on consent or on a contract irrespective of the purpose for which portability is sought, there will be no requirement of dominance or abuse for users to be able to transfer their data under the GDPR. Thus the Right to Data Portability under GDPR is a *per se* right which needs no intervention or no prerequisites of abuse by the monopolies for it to be replaced. Since the right would apply in the

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<sup>33</sup> Inge Graef, Jeroen Verschakelen, *et al.*, “Putting the Right to Data Portability into a Competition Law Perspective”, Research Gate, (2013) *available at*: [https://www.researchgate.net/publication/281092445\\_Putting\\_the\\_right\\_to\\_data\\_portability\\_into\\_a\\_competition\\_law\\_perspective](https://www.researchgate.net/publication/281092445_Putting_the_right_to_data_portability_into_a_competition_law_perspective) (last visited on December 10, 2020).

<sup>34</sup> *Supra* note 23.

<sup>35</sup> Inge Graef, “Mandating portability and interoperability in online social networks: Regulatory and competition law issues in the European Union” 39 *Telecommunications Policy* 502-514 (2015), *available at*: <https://www.sciencedirect.com/science/article/abs/pii/S0308596115000579> (last visited on December 10, 2020).

<sup>36</sup> G. Nicholas, M. Weinberg, *et al.*, “Data Portability and Platform Competition: Is User Data Exported from Facebook Actually Useful to Competitors?” *NYU School of Law Engelberg Centre*, *available at*: <https://www.law.nyu.edu/centers/engelberg/pubs/2019-11-06-Data-Portability-And-Platform-Competition> (last visited on November 08, 2020).

absence of market power and without taking efficiency arguments into account, it is said to reduce dynamic efficiency and lower incentives to innovate. A too extensive right to data portability could indeed have a negative effect on innovation, since it may place a disproportionate burden on small companies.<sup>37</sup>

### **Does Competition in the Market helps in realizing the Right to Data Portability?**

The Competition Commission<sup>38</sup> has from the beginning maintained the position that the adoption of sector-specific regulation does not preclude the applications of competition law to agreements and behaviour in the communication sector provided that national legislation, including national telecom regulation, does not preclude undertakings from engaging in an autonomous conduct. Competition Law could therefore be argued that without expressly stating it a silent understanding that given priority to sector specific regulation over general competition law in the event of an overlap.<sup>39</sup> There is a need to establish a fact that competition law regime does not run contrary to the enforcement of the right to data portability which is a sector specific regulation and hence the data portability under competition law, rather competition in the market helps in realising the promotion and growth of the right of data portability in the long run.

Data portability under GDPR provides free flow of the information and contributes to the singularity of the market, equating the value of data as any other property and hence its importance and significance as competitive value. Privacy and data protection does have a competitive advantage if it is looked from the vantage point of the economic activities.

Healthy competition in the market helps in providing new entrants in the markets and eradicating entry barriers and thereby giving consumer's welfare, that is the ultimate goal of competition law and also for the right to data portability. Consumers have a fair share of options available for them to choose from and also at competitive prices, boosting better quality of services and goods. The right to data portability can thrive only in cases where there is a healthy competition. If there is an existence of monopoly or duopoly in the market the right of data portability would be a futile exercise and hence of no use.

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<sup>37</sup> *Supra* note 31.

<sup>38</sup> European Competition Commission.

<sup>39</sup> Christian Bergqvist, "Sector Specific Regulation vs. General Competition Law", *SSRN*, July 27, 2004, available at: *SSRN*: <https://ssrn.com/abstract=2257468> or <http://dx.doi.org/10.2139/ssrn.2257468> (last visited on December 10, 2020).

Thus a conclusion can be drawn that Competition in the market is necessary to say the least for successful application of right of data portability.

### **Can Right to Data Portability be used as a tool for competition enforcement?**

The proposed right to data portability ‘goes to the heart of competition policy’, that is it can be used as a tool for competition enforcement. The right to Data portability will encourage online competition by providing remedies for various situations and by rectifying the anti-competitive activities of the data driven companies.

This can be done in many ways, firstly by breaking up the user lock-in patterns that is by providing the new entrants equal opportunities as the established data-rich companies to get access to the user’s data as they will find it easier to switch platforms with ease and promptness. This will decrease the switching costs of the consumers benefiting them to choose from various platforms available rather than putting them in a lock-in situation.

Data portability addresses a very important element of the competition market, which is elimination of *status quo* of the customers who are willing to switch over to a new network, web service provider or social media website but refrain from it due to the high cost of leaving behind their personal data creating a strong ‘*lock-in*’ effect. Thus the switching cost of the consumers is minimised. Certain companies have been using this lock-in as an anticompetitive practice to hinder the entry of other competitors in the market and hence this led to monopolistic markets.

The switching cost of the consumers from one platform to another is negated as the consumer is able to port his data from one platform to another. A lack of data mobility may also be an obstacle for new start-up companies who may be obliged to offer heavily discounted rates in order to compensate consumers for the difficulty or expense of making the switch.<sup>40</sup> Thus, it will be advantageous for the consumers and for the competitive markets.

The data portability creates benefits in terms of productive *efficiency* and recombinant innovation thus it in turn, the greater visibility of the value of data would likely beget a more vibrant data sharing environment, enabling businesses to unlock greater value from diverse data sets and derive additional insights for the benefit of consumers.<sup>41</sup> Higher

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<sup>40</sup> *Supra* note 5.

<sup>41</sup> *Supra* note 13.

productivity derived from the ease of combining data from different sources can lower the cost of producing data-enabled products and services.<sup>42</sup>

## VI. Right to Data Portability: A Competition Law Assessment

Data portability intersects not only with the privacy rights and intellectual property rights but also crosses path with the competition in the market. This right of data portability; if implemented on the multi-sided online platforms such as social networks, search services and trading sites then it would lead to the creation of the enormous benefits for societies and economies, but they may also give rise to many antitrust concerns. This is many a times overlooked by many regulatory authorities and the importance of data for competition assessment is not paid heed to, but they play a very important role in any economic policy analysis.

If the right to data portability is looked at from the perspective of the competition concern, we would be able to find that concern such as entry barriers, switching costs, efficiency questions, lock-in effect, network effects, innovation and competition balancing in data driven economy would have to be examined for implementation of effective regulations. There is one sector of the economists who think that data portability is an instrument to regulate competition, while others view it to have potential adverse effects on the market.<sup>43</sup>

In competition law, a successful case would need to establish three elements: dominant market power, an exclusionary practice, and no efficiencies to offset the harms of the exclusionary practice. Compared with these basic requirements of an antitrust claim, the RDP is over-broad. It applies even in the absence of market power. It does not take into consideration the substantial efficiency arguments that apply in many settings.

If we consider data portability only as a competition regulator, it will be believed that its positive effect on competition might be significantly reduced on those markets, which are not well defined and require tailor made rules in order to ensure effective competition.<sup>44</sup>

However, while a lack of data portability may make it more difficult for consumers to switch providers; this does not amount to anti-competitive conduct, for which agencies should be penalised. Some commentators have argued that creating a “per se” lock-in

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<sup>42</sup> *Supra* note 14.

<sup>43</sup> *Supra* note 17.

<sup>44</sup> *Supra* note 28.

remedy, ignoring factors such as a company's position within the relevant market or the possible creation of efficiencies means onerous obligations may be placed on companies without a consumer benefit that is strong enough to justify it.

The data portability will also have implications on mergers. If the right to data portability is provided then by combining data sources might exacerbate the impact of a merger on market structure and give rise to competition concerns even if conventional market share does not appear to be a competition concern. For example a small company might acquire data sets and merge with another company to affect the market by hindering new entrants in the market.

Abuse of dominance might also occur due to the data portability in the long run due to the companies with data undertaking price discrimination and discriminatory access to the data by the other companies and also with the consumers. There might be internal exclusive contracts with the consumers for providing their personal data which might lead to refusal to supply, therefore foreclosing the market.

Data portability might be easy for big companies, but to make personal information readily obtainable, the costs which are applicable to agencies may be substantial. Some small and medium enterprises may need to rewrite existing programmes to enable such transferability. This will lead to the compliance costs being disproportionate which will ultimately affect smaller agencies and start-ups, whereas larger agencies are likely to be better able to comply, and willing to complain if they encounter a smaller agency that is not sufficiently meeting its obligations. The requirement of interoperability could impose high costs on small companies relative to the size of their market. Thus it will again lead to competition concerns as SMEs will have additional administrative burdens and potential market entry barrier which will be burdensome.

Data portability might also be a potential obstacle to innovation as to develop something there would be a need for the consumers to stick to a particular platform for a while, as otherwise the profitability to innovate to enter would be reduced. But on the other hand if data portability is used by the providers and by consumers will be very beneficial as consumers will have the ease of entering the data once and re-using the ported data simultaneously.

Data portability might affect network effects caused by the online platforms. Network effects occurs when the utility that a consumer derives from a product or good increases when others

also purchase the same products or services. Network effects presently only are happening on dominant platforms. But data portability might change network effects for platforms offering non-substitutive services by allowing them to happen on a broader scale between different platforms which may or may not provide similar services. This may happen due to data being inter-operable between them, which increase the value for customers of both of them.

## **VII. Conclusion**

By establishing effective individual control over personal data through right to retrieve and transfer personal data from one data subject to another, right to data portability could enhance personal data protection and control over personal data. At the same time it also reinforces goals of competition policy and consumer welfare.

Data portability goes to the heart of competition policy as consumers can effectively switch from one service provider to another, taking their data along only in a healthy competitive environment. Data portability undoubtedly can help in avoiding consumer lock-in and switching costs along with facilitating market access and alleviating network effects.

However, there are some potential adverse consequences of data portability on small and medium enterprises and innovation as highlighted in this paper. Data portability under GDPR and within the competition law framework works by supplementing each other, and bringing a competency in the market which results in efficiency. The result however might not be the same in each case, it is seen that data portability might encourage innovation by providing mobility in the digital market readily available for use, but on the other hand it may also hamper innovation by making data too readily available to the platforms which may reduce incentives for innovating.

The major issue of compliance of the right of data portability is weighted down by the cost of technical compliance and hence it becomes a major issue for SMEs and start-ups. This availability of data in the nascent stages of development of the enterprise is too expensive to adhere too. The regulators should keep these dis-appropriate costs in mind before adoption of such laws, as this would be burdensome for the already burdened businesses. The key to resolving this conflict would be balancing the manner in which data portability would be implemented and the standards that should be adopted.

Another major issue in application of data portability is the adoption of a safe mechanism which will be spill-proof to protect any kind of breaches of the safety and security of the



consumer's data. The safeguards must be in place for prevention of the individual's data being subjected to the multiple frauds which can cause serious damages and breach the individual's right to privacy defeating its main purpose.

From the enforcement of the right of data portability perspective, it should be kept in mind that, apart from the ex-antes regulation (before the violation) of the right to data portability, the ex post (after the violation) enforcement of antitrust violations through competition law is also possible. The right of data portability is a much broader right in the sense of application as it will be applicable irrespective of the violation or not. The data portability under competition law remedy is applicable only in cases where there is a clear antitrust violation such as breaking up a cartel, abuse of dominance, *etc.* The right to data portability is narrower in the sense of data than the competition law regime, as under right to data portability only the personal data is to be ported, but under competition law no such distinction is there.

The right to data portability can be seen as an innovative legislative move, which may be utilized to provide adequate protection to individual's data, and thus likewise also open new horizons for the digital market by innovative regulatory approaches, which can only be seen as the time progresses.