

The Right to Data Portability: Privacy and Antitrust Analysis

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DRAFT, July 2012

Overview

- EU Right of Data Portability (RDP) in draft Privacy Reg
 - Intuition that “you” should get “your” data back
 - Intuition that competition enhanced if data is not locked in
- Antitrust analysis of RDP
 - Unlikely that increases antitrust version of consumer welfare
- EU human rights perspective on RDP
- Open source perspective on RDP
- Disclaimer – still developing these thoughts

Art. 18: Right to Data Portability

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. “The data subject shall have the right to transmit those personal data and any other information provided by the data subject ... without hindrance from the controller.”

Getting “Your” Data Back

1. You get a copy of “your” data
2. You supplied it
3. Without hindrance from the controller
4. In a form that allows for further use
5. Only applies to electronic data
6. “In a structured and commonly used format”

Favorable intuitions:

1. RDP can reduce lock-in
2. RDP allows second and third movers to compete despite network effects

A Hypothetical (1 of 3)

- One type of software
- Another type of software
- Company decides to offer them together, as an integrated product
- OK under antitrust law?

A Hypothetical (2 of 3)

- One type of software: Calculator
- Another type of software: Operating System
- Company decides to offer them together, as an integrated product
- OK under antitrust law?
 - What's in your computer now?

A Hypothetical (3 of 3)

- One type of software: Operating System
- Another type of software: Browser
- Company decides to offer them together, as an integrated product
- OK under antitrust law?
 - What's in your computer now?

Platform Software & Antitrust

- Microsoft case:
 - Rule of reason for “tying arrangements involving platform software products”
 - Platforms are “structured formats” that are “commonly used”
 - Emphasizes efficiencies from integration & pervasive innovation
 - “Not only is integration common in such markets, but it is common among firms without market power”
 - Per se rule for tying has “undue risks of error and of deterring welfare-enhancing innovation”

Apply to Social Networks

- Microsoft: ROR “where the tying product is software whose major purpose is to serve as a platform for third-party applications and the tied product is complementary software functionality”
- Tying product: G+ or Facebook
- Tied product: software module for how data does/does not get exported
- Microsoft case rejected per se approach
- EU has per se approach in Article 18

Rule of Reason & Efficiencies

- Benefits to consider for software without RDP:
 - Integration efficiencies, but RDP would require costly coding
 - Pervasive innovation, but RDP reduces incentive to do costly coding for the next release
 - Avatars for each online game – should be portable?
 - Reduce incentive to produce the cool game that is sticky and keeps players?

Summary on Antitrust

- US antitrust law (and I think EU competition law) – reject per se rule against software integration
- Rule of reason looks at benefits as well as costs of tying arrangement/integration in each market
- Antitrust law does this with goal of enhancing consumer welfare

Response 1: Fundamental Right

- EU Data Protection approach – personal data implicates fundamental human rights
- Longstanding “right to access” to your own data
- “Right to data portability” an extension of principle that it is “your” data, not the controller’s

Fundamental Right

- Interesting question of how to create/assert/define a new fundamental human right
 - RDP not “originalist” right, not in ECHR, etc.
- Art. 18 admits doesn’t know how to define its scope
- Potential or likely loss of consumer welfare makes support for RDP more questionable

Response 2: Open is Good

- US tech community support for “data liberation” and “data portability”
- “Open data” a good fit with “open source”
- Tim Berners-Lee: unleash innovation and mobility if “our” data is open & portable
- Portability can empower users vis-à-vis software providers
- Concern about lock-in effect from suppliers with market power

Open is Good

- If accept the Microsoft case, then software writers can innovate and integrate better without intrusive regulatory intervention
- Fast-changing data formats and practices a bad fit for per se regulatory approach
- The debate deserves more thought between
 - “Open is good” and
 - “Integration & innovation are good” as in Microsoft case

Conclusion

- Intuition of “lock in” teams with human rights claims to support RDP
- Serious questions, however, about this per se rule under antitrust law
- The sweeping, per se rule under Article 18 deserves much greater scrutiny than it has received