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## Mandating portability and interoperability in online social networks: Regulatory and competition law issues in the European Union



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### ABSTRACT

Due to the relatively concentrated nature of the market and the predominance of Facebook, online social networking may be the next digital service facing scrutiny by the European Commission. This article analyzes two potential competition problems in online social networks from a legal perspective. Attention is paid to the extent to which switching costs and network effects give rise to data portability and social network interoperability issues. It is discussed whether competition enforcement or newly devised regulation may serve to resolve these potential competition issues. A comparison is made with the telecommunication sector where similar concerns were addressed by way of regulation imposing obligations of number portability and network interoperability on all market players. Because of this similarity, it is worth considering if any lessons can be drawn from the regulatory approach applied in telecommunications for online social networking. The fact that the portability and interoperability issues in social networks relate to personal data and not 'merely' to technology like in the telecommunication sector, leads to additional considerations in the data protection regime. As a result, data protection concerns also have to be taken into account when devising remedies for the online social network industry.

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### 1. Introduction

Online social networking seems to a certain extent to be replacing classical communication services that have always been provided by telecommunication providers. For example, Skype enables users to make free calls over the internet and applications like Facebook Messenger let users send free internet messages without having to rely on the telephone network of their telecom operator. With the advancement of social networking and the rise of prevalent social networking providers like Facebook, the scope for potential competition concerns is growing. In the light of the similarities between social networking and telecommunication services, the question can be posed whether the approach that has been applied to address market distortions in the telecommunication sector may serve as a roadmap for the social networking environment.

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From this perspective, the article discusses two potential competition issues relating to online social networks that have also occurred in the telecommunication sector. Although other possible competition problems in social networking may also deserve discussion, the choice is made to focus on portability and interoperability to see if any lessons can be drawn from the regulatory approach which has been applied in the telecommunication sector to address similar concerns in the telecommunication market. No standpoint is taken on whether certain social network providers are dominant in a given market, abuse their position or should be subject to regulation. Instead, it is the aim of the article to consider what type of remedies may be appropriate and which considerations have to be taken into account when intervention on the basis of regulation or competition law is deemed necessary in the online social networking sector. The first issue that is addressed concerns the practical inability of users to move personal data uploaded in a social network to a competing service. Because of the time invested in building a profile, users may become locked-in to a particular social networking site when it is not possible to transfer their data to another platform. In this light, the right to data portability that has been introduced in the proposal for a General Data Protection Regulation by the European Commission (Para. 2 of Art. 18, [General Data Protection Regulation, 2012](#))<sup>1</sup> is analysed and compared with number portability as imposed in the telecommunication sector. Secondly, the issue of social network interoperability is discussed. Interoperability between online social networks would enable users to connect with each other irrespective of their social network provider. This would mean that, for example, a Facebook user can directly post a message or upload materials on someone's Google+ page. The situation of social networks in this regard is compared with the telecommunication sector where network interoperability was imposed by way of regulation.

For both the portability and interoperability concerns, a distinction is made between remedies relying on competition law enforcement and remedies on the basis of regulation, for which a parallel is drawn with the telecommunication sector. It will be shown that although these potential competition problems can be solved by applying the regulatory approach used in telecommunications, additional issues arise for social networking in the field of data protection. Before analysing these issues in further detail, attention is paid to the characterization of online social networks.

## 2. Characterizing online social networks

Two different customer groups can be identified on social networks. In addition to users who employ the functionality offered by social network providers to build online communities, advertisers are present who are interested in displaying advertisements to users in the hope of selling their advertised products or services. As will be discussed below, the multi-sided network effect that users exert on advertisers tends to make the market in which online social networks operate quite concentrated as a result of which potential competition concerns may arise.

### 2.1. Role of users and advertisers in online social networks

Social networks offer users various means to communicate and share content including profiles, messages, photos and videos. In this article, social networks are understood as services enabling users to create a public or semi-public profile and a list of friends or contacts. These are the two essential functionalities of a social networking service according to the – in the European Commission's words – '*overwhelming majority of respondents to the market investigation*' conducted in the context of the review of Facebook's acquisition of WhatsApp. Other important features, which according to the respondents to the market investigation in *Facebook/WhatsApp*, however, do not all have to be present for a service to be qualified as a social network, include exchanging messages, sharing information, commenting on postings and recommending friends ([Facebook/WhatsApp, 2014](#), para. 51). A definition of social networks commonly used in the literature is that of Boyd and Ellison: '*web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system*' ([Boyd & Ellison, 2007](#), p. 211).

For a full characterization of online social networks it is required to look beyond the functionality provided to users and to consider the business model behind the creation of online communities by users. In order to finance the typically free provision of social networking features to users, social network providers sell targeted advertising services. Social networks can be seen as platforms or intermediaries enabling advertisers and users to interact. Companies bringing different customer groups together are referred to as two-sided, or in case more than two groups of customers are present, multi-sided businesses. The essential feature which makes a business multi-sided is the existence of an indirect network effect between the customer groups ([Evans, 2003](#), pp. 331–333; [Filistrucchi, Geradin, & Van Damme, 2013](#), pp. 37–39). Network effects occur when the utility that a customer derives from consumption of a good or service increases with the number of consumers purchasing the same good or service. A network effect is either direct when a product or service becomes more valuable as the number of users grows, or indirect when the increasing number of users of a good leads to more complementary products or services that raises the value of the network ([Katz & Shapiro, 1985](#), pp. 424–425). In the case of

<sup>1</sup> In January 2012, the European Commission adopted a proposal for a General Data Protection Regulation that would replace Directive 95/46 which was adopted in 1995 and needed to be updated in order to adequately deal with technological developments that have brought new challenges for the protection of personal data.

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