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How to attribute the right to data portability in Europe: A comparative analysis of legislations



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A B S T R A C T

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The number of online services is constantly growing, offering numerous and unprecedented advantages for consumers. Often, the access to these services requires the disclosure of personal information. This personal data is very valuable as it concedes significant advantages over competitors, allowing better answers to the customer's needs and therefore offering services of a better quality. For some services, analysing the customers' data is at the core of their business model. Furthermore, personal data has a monetary value as it enables the service providers to pursue targeted advertising. Usually, the first companies who provide a service will benefit from large volumes of data and might create market entrance barriers for new online providers, thus preventing users from the benefits of competition. Furthermore, by holding a grip on this personal data, they are making it more expensive or burdensome for the user to shift to a new service. Because of this value, online services tend to keep collected information and impede their users to reuse the personal data they have provided. This behaviour results in the creation of a lock-in effect. Upcoming awareness for this problem has led to the demand of a right to data portability. The aim of this paper is to analyse the different legislative systems that exist or have been recently created in this regard that would grant a right to data portability. Firstly, this article draws up the framework of data portability, explaining its origin, general aspects, advantages as well as its possible downfalls. Secondly, the core of the article is approached as the different ways of granting data portability are analysed. In this regard, the possible application of European Competition Law to prohibit restrictions to data portability is examined. Afterwards, an examination of the application of U.S. Antitrust Law is made to determine whether it could be a source of inspiration for European legislators. Finally, an analysis of the new General Data Protection Regulation is made with respect to the development of data portability throughout the European legislative procedure. This article makes a cross-examination of legislations, compares them with one another in order to offer a reflection on the future of portable data in Europe, and finally attempts to identify the best approach to attribute data portability.

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1. Introduction

Today, there exist a number of online services, which provide numerous advantages for consumers, offering social connections, innovations, and efficient problem solving like never before in the past.¹ Access to these online services often requires the disclosure of personal information. This personal data is very valuable as it concedes significant advantages over competitors, allowing better answers to the customer's needs and therefore offering services of a better quality.² For some services, analysing the customers' data is at the core of their business model. Furthermore, personal data has a monetary value as it enables the service providers to pursue targeted advertising.³ Usually, the first companies who provide a service will benefit from large volumes of data and might create market entrance barriers for new online providers, thus preventing users from the benefits of competition.⁴ Furthermore, by holding a grip on this personal data, they are making it more expensive or burdensome for the user to shift to a new service. Because of this value, online services tend to keep collected information and impede their users to reuse the personal data they have provided. This behaviour results in the creation of a lock-in effect.

Upcoming awareness for this problem has led to the demand of a right to data portability. The general aspects of this right as well as the advantages and downfalls it generates are introduced in this contribution in order to provide a general overview of the topic.

The focus of this contribution resides nevertheless in analysing the different legislative systems in order to identify the best approach to grant data portability. In this regard, an analysis of the first possible legislative way of attributing data portability is made, namely through European Competition Law. This part of the contribution does not aim at enunciating all the European Competition Law principles but focuses on the possible enforceability of data portability through competition law. Because this constitutes many difficulties, an analysis of U.S. antitrust law is made to see if there are principles that can be useful to European Competition Law.

Subsequently, privacy regulation will be examined. In 2012, the European Commission (EC) revealed its intention to include a right to data portability in its proposal for a General Data

Protection Regulation (GDPR).⁵ Since then, many changes have been made in this regard. The way the European Commission proposes to attribute this right, the modifications made by the European Parliament (EP) and the Council of the European Union as well as the concerns raised by the integration of data portability in the GDPR are discussed in this contribution. This is finally followed by a reflection on the future of data portability in Europe and an attempt to identify the best approach to attributing data portability.

2. Data portability: origin, general aspects, advantages and drawbacks

2.1. Origin

The debate about data portability originated with the Internet users' need to transfer data they had been building up such as e-mail, friends' lists or address books from one service to another service.⁶ Later on, it appeared that next to the primary aim of enabling users to easily move their data, it was also regarded as a mechanism that was necessary in order to prevent unfair competition and make data protection of individuals effective.⁷ In 2007, a first claim for freedom and control of personal data was brought forward through a 'Bill of Rights for Users of the Social Web'.⁸ Although it had no legal force, it was a first step to a right for data portability. A few months later, the 'Data Portability Project'⁹ was founded with the ambition to discuss and work on solutions to unconstrained data portability. The success was imminent and one year later, Google and Facebook became members of the Project.¹⁰

At that time, data portability was not considered legislatively by the European Union's institutions and constituted a new challenge in the perspective of protection of personal data.¹¹ Indeed, the already existing directive 95/46/EC¹² does not cope with the new challenges for the protection of personal data. Measuring the importance of the subject, the European

¹ European Data Protection Supervisor, 'Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy' (Preliminary Opinion) (March 2014) 6 <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2014/14-03-26_competition_law_big_data_EN.pdf> accessed 10 November 2015.

² Damien Geradin & Monika Kuschewsky, 'Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue' (February 12, 2013) SSRN 1, 2 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216088> accessed 10 November 2015.

³ *ibid.*

⁴ *ibid.*

⁵ Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)' COM (2012) 11 final.

⁶ Gabriela Zanfir, 'The right to data portability in the context of the EU data protection reform' Vol 2(3) International Data Privacy Law, Oxford University Press 149.

⁷ *ibid.*

⁸ Joseph Smarr, Marc Canter, Robert Scoble, Michael Arrington and others, 'A Bill of Rights for Users of the Social Web' (Template.org, 4 September 2007) <http://www.template.org/?page_id=599> accessed 21 May 2016.

⁹ See <<http://dataportability.org/>> accessed 21 May 2016.

¹⁰ Duncan Riley, 'Facebook, Google and Plaxo Join the Data Portability Workgroup' (Techcrunch, 8 January 2008) <<http://techcrunch.com/2008/01/08/this-day-will-be-remembered-facebook-google-and-plaxo-join-the-dataportability-workgroup/>> accessed 21 May 2016.

¹¹ Zanfir (n 6) 149.

¹² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (1995) OJ L281/31.

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