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Consumer data rights and competition – Note by Portugal

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This document reproduces a written contribution from Portugal submitted for Item 3 of the 133rd OECD Competition Committee meeting on 10-16 June 2020.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/consumer-data-rights-and-competition.htm>

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1. Introduction

1. The collection and use of data have become widespread among digital firms. The Autoridade da Concorrência (the Portuguese Competition Authority, AdC) has followed these developments closely and taken an interest on how they may impact the way in which competition plays out in (digital) markets.

2. In some sectors, or for some business models, access to data is a key element for firms to be able to compete in the market. One of these market circumstances is that of technological innovation applied to financial services – FinTech – and insurance markets – InsurTech. In 2018, the AdC published an *Issues Paper on Technological Innovation and Competition in the Financial Sector in Portugal*, addressing barriers to entry and expansion for FinTech and InsurTech firms in Portugal¹.

3. The 2015 Second Payments Service Directive² (PSD2) aimed precisely at reducing barriers to competition and innovation in the financial sector. Among other things, PSD2 established that, upon client request, client account data should be provided to third-party service providers. The AdC identified risks regarding the implementation of this directive that could prevent it from being effective. In particular, risks of foreclosure for FinTech entrants may remain, depending on how the APIs and user interfaces necessary for data access would operate. As such, the AdC recommended that secondary legislation introduce as few degrees of freedom as possible to incumbents in how they give access to data, so as to avoid the creation of strategic barriers to grant access to client data.

4. In 2019, the AdC published an *Issues Paper on Digital Ecosystems, Big Data and Algorithms*³. This Issues Paper highlights how data can be a source of competitive advantage for digital firms and, hence, how lack of access to data, both in a timely fashion and in a sufficient extent, may pose significant barriers to entry and expansion. In addition, it also describes how and what data is collected by firms about their users and how this information may be used to find and exploit consumer behavioural biases.

5. The aim of this contribution is to present some of the insights explored in these two Issues Papers and expand on them based on recent experience and developments in the competition community. Section 2 develops on how data may be valuable for firms and how it may give rise to barriers to entry and expansion. In turn, the role that consumer data rights, and more specifically data portability, may play in mitigating data related competition concerns is dealt in section 3. Section 4 discusses the limitations of data portability in promoting competition, with an emphasis on the General Data Protection Regulation (GDPR). Lastly, section 5 explores the interplay between privacy and competition.

¹ Available at: http://www.concorrencia.pt/vEN/Estudos_e_Publicacoes/Estudos_Economicos/Banca_e_Seguros/Pages/Executive-Summary-Issues-Paper.aspx?lst=1

² Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

³ Available at: http://www.concorrencia.pt/vPT/Estudos_e_Publicacoes/Estudos_Economicos/Outros/Documents/Digital%20Ecosystems,%20Big%20Data%20and%20Algorithms%20-%20Issues%20Paper.pdf

2. Value of data for digital firms

6. Digital firms may use the data they collect about their users to increase the quality of the services they provide. Using collected data, firms may better tailor their products to consumers' preferences or expand the features of their services, such as more detailed maps in map search and visualisation services. Data may also be used to improve the performance of algorithms that facilitate interactions between users, bringing the different sides of a multi-sided market together, as is the case of search in marketplaces.

7. Data is not valuable in itself. Rather than simply owning or controlling datasets, firms must be able to extract useful insights from the data they collect. This requires firms to have access to large and varied datasets, but also the infrastructure and know-how to properly analyse this data.

8. Datasets can be varied in two senses. They may cover a diverse set of observations, including a sufficient number of typical and less common observations. In addition, datasets may measure their observations over a larger array of variables, thus including more information per observation.

9. Data also has many forms and uses, and its value may depend on how it is used with other data. Therefore, although digital firms may all be collecting data, they are often gathering different information and using it for different purposes.

10. Digital platforms collect data as consumers use their services, by monitoring their behaviour. Hence, the more users one platform has, or the more active the users are, the larger the volume and the more varied the datasets at the disposal of digital platforms. This mechanism is a data-driven network effect that may create a significant competitive advantage for the digital firm.

11. Data-driven network effects also create an incentive for digital platforms to be integrated in digital ecosystems, which combine several digital platforms, one-sided or multi-sided. By being organized in such ecosystems, digital platforms may share the data they collect about users with each other and reinforce their competitive advantages.

12. The nature of data as an input in digital services and the possibility of data-driven network effects imply that lack of access to data may raise significant barriers to entry and expansion in digital markets.

13. Measures promoting multi-homing or platform interoperability (e.g. standards for instant messaging similar to those used for e-mails or SMS) may mitigate the competitive advantages created by data.

3. Consumer data rights, data portability and its benefits

14. Consumer data rights can mitigate barriers to entry and expansion in digital markets related to data by effectively giving ownership of data to consumers and allow them a greater control over how their data is used.

15. In particular, consumer data rights legislation may establish a right of data portability, such as article 20 of the GDPR in the EU. Under the GDPR, users may download their data and copy it to another platform, or they may ask the digital platform holding their data to send their data to another platform.

16. These data transfers can significantly increase the volume and variety of data held and used by entrants in two ways. On the one hand, users' data activity from outside an entrant's platform becomes usable, as users could transfer it at any time, or even automatically, through an application programming interface (API). On the other hand,

users' historical data may also become available, so that entrants can use information dating back from before they entered the market. As such, these data transfers may be used to put entrants on par with incumbents in terms of services that rely on particular datasets.

4. Limitations of data portability in promoting competition

17. Data portability legislation, nonetheless, may have several limitations that hamper its ability to reduce barriers to entry and to expansion due to the lack of access to data.

18. Firms that collect and hold a lot of user data have an incentive to impose costs or to exploit consumer behavioural biases to limit the number of data transfers or the volume of data transferred to other platforms, under data portability. This may be done by strategically imposing to users unnecessary additional hurdles to download or to transfer their data, such as additional buttons or windows to click through, unfriendly user interfaces, or additional authentication steps.

19. If users are only given the option to download and copy their own data to other platforms, significant barriers may persist. The requirement for users to download and upload large volumes of data (up to several gigabytes) may be a significant hurdle for many consumers, both due to behavioural biases, but also because many users may not be capable of transferring the data themselves. As it stands, users can only download their data in bulk from the major ecosystems, and it is not clear whether and how users may ask these firms to transfer their data to other platforms.

20. Questions may be raised as to what extent article 20 of the GDPR is met by firms simply by providing an option for users to download their data. Developing and maintain working APIs, or other channels for digital platforms to transmit data between each other, may be costly for digital firms. In addition, it may be necessary to define open standards for data sharing, akin to what happened with the Regulatory Technical Standards for the FinTech sector after PSD2.

21. The exploitation of consumer behavioural biases can be curtailed by reducing the degrees of freedom digital platforms have in how they design the proceedings for data transfer requests, the user interfaces or consent forms. It should also be clear and visible how users may ask digital platforms to transmit their data, and this process should not require users to e-mail or to phone the platform holding their data.

22. Data heterogeneity may limit the benefits of data portability. Since data collected by digital firms is often tailored to their specific needs and products, it could be less useful to other firms.

23. It may also be the case that one can only extract valuable insights from data subject to data portability, if it is analysed in conjunction with other data not subject to data portability.

24. More data intensive services may require a continuous feed of short-lived data, e.g. information on car traffic. More limited APIs that, for instance, limit the frequency of data transfers, would severely hamper the quality of these services or render their provision impossible, unless the competitor platform collected its own data.

25. A great portion of the value firms may be able to extract from data is the result of specific investments in algorithm development. The major challenge for firms is optimizing the algorithm and ensuring its good performance on a number of relevant metrics. During this process, firms test and compare different algorithms and filter which data is useful or not for the firm. Algorithm development may take a long time, follow a trial and error approach, or require direct human input. The ability to go through this process may require significant "data producing" capabilities that are not easily replicable by entrants. One such

example is a large user base, necessary to both get the data to “train” algorithms but also to test and compare algorithms. Data portability may not be enough to surmount this barrier, as, even though an incumbent would be able to collect the data the entrant needs to develop its algorithms, it may not be in its interest to do so.

26. For this reason, there is a risk that data portability is only able to reduce barriers to services that are less data intensive (e.g. relying on simple descriptive statistics, instead of developing and optimizing more complex algorithms). Moreover, if data is the only key input required to provide the entrant’s services, it may be easily replicable by the incumbent, which may spot and exploit these business opportunities long before the entrant.

5. Privacy and competition

27. Data may be used to increase the quality of digital services but there may be a complex interplay between privacy and competition that may make the effect of additional data collection on consumer welfare more complex.

28. Consumers can prefer to use platforms that collect less data about them, all else the same. Indeed, some digital services make privacy their selling point. In such cases, privacy would be considered another dimension of product quality. Since the collection of additional data to improve algorithms and ensuring more privacy clash, the effect on consumer welfare may be ambiguous.

29. The degree of consumer privacy may also shape how competition plays in the market, namely by allowing firms to focus on more captive consumers, on less informed consumers or on consumers more subject to behavioural biases.

30. Digital firms may use their “data producing” capabilities to do online experiments, such as A/B testing, to find and optimize strategies that rely on the exploitation of consumer behavioural biases. These strategies are known in the industry as dark patterns, are highly prevalent and may serve different purposes. They may grab consumers’ attention, induce behaviour or even mislead consumers.

31. Bias exploitation can be employed to reduce competition or induce users into making unwanted purchases, as firms learn how to better divert consumers to certain products. Vertically integrated e-commerce platforms or marketplaces have, for example, an incentive to privilege their own brands, and may highlight them on search results. Firms may also have an incentive to divert consumers to higher-margin products by, for instance, manipulating user interfaces. If carried out by a dominant firm in a gatekeeper position, to implement strategies of leveraging or self-preferencing, this may raise serious competition concerns.

32. Consumer behavioural biases may also be exploited so that firms can collect more data about their users. Many websites, for instance, make it especially cumbersome for users to express in consent forms that they do not want firms to collect their data. Consent forms may have, for example, several unnecessary windows. They may also highlight buttons that, if clicked, allow the firm to collect the most data possible. Conversely, they may not include buttons that, if clicked, allow users to express they do not wish any data to be collected. In these cases, consumers must deny data collection firm by firm.

33. Firms may also use their “data producing” capabilities to adopt market segmentation strategies, and potentially limit the extent of competition in the market and extract more surplus. In particular, firms may use collected data to gauge consumers’ willingness to pay, and use this information to target specific customers or to implement personalised pricing.