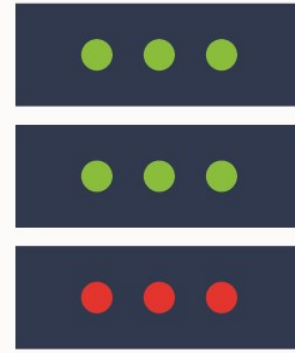


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# DATA PORTABILITY

September 22, 2020  
Washington, DC

# OPENING REMARKS

**Andrew Smith**

Federal Trade Commission  
*Bureau of Consumer Protection*



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# AN OVERVIEW OF DATA PORTABILITY: CONCEPTS AND TERMINOLOGY

**Professor Peter Swire**

*Scheller College of Business, Georgia Tech*

*Alston & Bird LLP*



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# Overview

- Swire background, current 125-page study
- Three reasons for current intense focus on data portability
- Terminology: PORT
  - “Portability” – transfer data of one person, Right to DP
  - “Other Required Transfers” – transfer data of more than one person
- Dilemma: antitrust tends to **open** data flows, but privacy/security tend to **close** them
- Proposed answer: the **Portability and Other Required Transfers Impact Assessment (PORT-IA)**
  - Show results from sectoral case studies, in U.S. and EU
  - Multi-disciplinary assessment needed



# Swire Background

- Now: Georgia Tech: Scheller College of Business
  - Senior Counsel, Alston & Bird LLP
- Privacy since mid-90's
  - Clinton Administration **Chief Counselor for Privacy**, in OMB, 1999-2001
  - Lead author **textbook for CIPP-US exam**
  - Professor of privacy, cybersecurity, and antitrust
- **Privacy and antitrust** FTC testimony 2007
  - Privacy as a non-price/quality aspect of competition
- Law review article on **data portability** 2013



# Reasons for Current Interest

- **Right to Data Portability (RtDP)** - new laws
  - GDPR, in effect 2018
  - California, in effect 2020
- Intense policy debates now about **digital platforms**, both privacy and antitrust, both U.S. and EU
- Multiple **sectors** in U.S. and EU now have mandated data flows
  - U.S. health care interoperability rule (new)
  - EU Payment Services Directive (new)



# Terminology: PORT

- RtDP is about an individual right to transfer data
  - “**portability**” is a **term of art** for transfers of data of one person
  - An individual right to transfer to self or 3d party
- Actual or proposed **mandates** to transfer databases, **more than one person**
  - In Europe, called “data sharing”; vague term, because data is shared in so many ways
  - My paper proposes “Other Required Transfers”
- **PORT**: Portability or Other Required Transfers
  - U.S. health care – a hospital has a right to transfer all of its records to a new software provider
  - EU Free Flow of Data Regulation - similar



# Terminology (2)

- **“Interoperability”**
  - Proposed definition - the **technical ability** of two or more systems to exchange information
    - Common data formats
    - Common communications protocols
    - Other technical mechanisms to enable operation of two or more systems
- **HHS Interoperability Rule (2020)** uses the term in 3 ways:
  - Term applies to the above
  - And individual portability of health records
  - And ORT, such as to new cloud provider





# RtDP and Privacy: Existing General Laws

- Article 20 **GDPR** Right to Data Portability (RtDP)
  - Data subjects have right to receive data they provided to controller
  - Transfer “without hindrance” to another controller
- **California** Consumer Privacy Act, §1798.100
  - Individual right to access data in a “portable” and “readily usable format”
- Conclusion: since 2018 implementation of GDPR, RtDP widely mandated in EU and U.S.



# The Dilemma: Open or Close Data Flows?

- **Antitrust/competition** – many reasons to **open data flows**
  - Assume some large, valuable databases
    - Easy to assume that in our data economy
  - Idea: if **more companies have access** to commercially valuable data, then more innovation and competition
- **Privacy and Cybersecurity** – **close data flows**
  - **What if data gets to the “wrong” people?**
  - Cybersecurity – focus on unauthorized access
  - Privacy – focus on what access should be authorized, and often be cautious unless there is user consent



# Antitrust: Strong Interest in Portability

- FTC Director of Competition, Ian Conner, in February:
  - “The breadth of additional relief that may be considered include **obligations to provide** ... access or other rights [or] **data** ... to one or more entrants on specified terms or a non-discriminatory basis.”
  - Today’s FTC workshop
- In Europe, Commissioner for Competition Margrethe Vestager discussed “**the prominent position of data in digital markets**”
  - “The need to ensure the possibility of entry may argue in favor of **mandating access to data.**”
  - Portability prominent in new European Data Strategy



# Responding to the Dilemma

- Create a well-designed **Portability and Other Required Transfers Impact Assessment** (“PORT-IA”)
  - Similar to Privacy Impact Assessment (U.S.) or Data Protection Impact Assessment (EU)
- New study: methodology
  - Draft “**structured questions**” for a systematic assessment
  - Test the draft questions against **multiple case studies**
  - **Validate** the structured questions based on the case studies



# PORT-IA: Case Studies to Develop It

- **US/EU Phone number** portability
  - Successful, but misleadingly easy case – most users want their (private) phone number made known to friends and colleagues
- **US/EU financial services**
  - Dodd-Frank requires portability for customer records
- **US/EU health care**
  - March 2020 HHS Inter-operability Rule
    - Individuals get portability to smartphone apps
    - Health IT requirements that a covered entity can PORT to a new health IT provider
- **Open Data** for government databases
- Arizona & other laws – **auto dealers**



# PORT-IA: The Structured Questions

- Q1: **Define** the challenge or opportunity that leads to a possible data portability or other required transfers (“PORT”)
  - Where does the data come from?
  - Where does it go?
  - What types of data are covered?
  - What specifically are the legal requirements?



# PORT-IA: (Top-Level Questions)

- Data PORTability **Benefits:**
  - Q2: Assess PORT rationales based on **competition**
  - Q3: Assess **innovation** and other commercial benefits due to the PORT
  - Q4: Assess **non-commercial benefits** due to the PORT (user control)
  - Q5: Assess **regulatory** or legal benefits of the initiative
  - Q6: Assess any reduced benefits due to lack of technical or market **feasibility**
- Q7: Assess **incentives** for those presenting evidence of benefits



# PORT-IA: Risks and Costs

## Data PORTability Risks and Costs:

Q8: Assess **privacy** risks from the PORT

Q9: Assess **security** risks from the PORT

Q10: Assess risks from the PORT that may arise for either security or privacy  
(**onward transfer; discriminatory standards**)

Q11: Assess **risks to competition** from the PORT

Q12: Assess **regulatory** or legal risks of the initiative

Q13: Assess any other significant costs or risks from the PORT, including  
**obstacles to adoption**

Q14: Assess **incentives** for those presenting evidence of risks or cost





# Distinction 1: Before or After Violation?

- Require portability before or after a violation occurs?
  - **Ex ante regulation**
    - No need to find an antitrust violation
    - US Dodd-Frank, portability for financial records
  - **Ex post remedy**
    - Much antitrust discussion in U.S. to date
    - If an antitrust violation, then court can order portability, which is less intrusive than breaking up the company



# Distinction 2: General or Sectoral?

- **General** PORTability rule – applies broadly
  - GDPR RtDP
  - CCPA RtDP
- **Sectoral**, in U.S.
  - Phone number portability
  - Financial services
  - HHS interoperability rule
  - Arizona and other auto dealer statutes



# Reasons to consider using a PORT-IA

- Numerous PORT **new laws** and proposals
- Most individuals are not expert in privacy, cybersecurity, and antitrust
  - **Need a team to assess PORTability proposals**
- PORT-IA provides a systematic technique to assess
  - **Antitrust regulators** can realize privacy or security is not simply an excuse
  - **Privacy regulators** can realize how competition benefits individuals, and be open to consent for PORTability
  - **Private sector** can assess the most promising PORT initiatives



# Conclusion

- **Opening up data flows** – transferring data – can have great benefits, for competition, innovation, freedom of choice, etc.
- **Closing data flows** – for privacy and cybersecurity – also can have great benefits
- **PORT-IA** provides a method that is **agnostic** about each proposal
  - What are the **benefits and costs** from this required transfer?
  - Can we **increase the benefits**? (such as focusing transfers where will help competition)
  - Can we **reduce the costs**? (such as tailored privacy rules)
- For this complex and increasingly important topic, the PORT-IA can assist policy-makers and companies to reach better decisions



# DATA PORTABILITY INITIATIVES IN THE EU, CALIFORNIA, AND INDIA

## **Panel Discussion:**

Inge Graef, Rahul Matthan, Karolina Mojzesowicz,  
Stacey D. Schesser, and Gabriela Zanfir-Fortuna

## **Moderator:**

Guilherme Roschke



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# QUESTIONS?

*Email [DataPortability@ftc.gov](mailto:DataPortability@ftc.gov)*



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# BREAK

*Return at 10:30 AM (EST)*



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# FINANCIAL AND HEALTH PORTABILITY REGIMES

## **Panel Discussion:**

Michael S. Barr, Dan Horbatt,  
Bill Roberts, and Don Rucker

## **Moderator:**

Katherine White



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# QUESTIONS?

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# BREAK

*Return at 12 PM (EST)*



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# RECONCILING THE BENEFITS AND RISKS OF DATA PORTABILITY

## **Panel Discussion:**

Pam Dixon, Ali Lange, Gabriel Nicholas,  
Hodan Omaar, and Peter Swire

## **Moderator:**

Ryan K. Quillian



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# QUESTIONS?

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# BREAK

*Return at 1:30 PM (EST)*



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# REALIZING DATA PORTABILITY'S POTENTIAL: MATERIAL CHALLENGES AND SOLUTIONS

## **Panel Discussion:**

Erika Brown Lee, Sara Collins, Bennett Cyphers,  
Michael Murray, and Julian Ranger

## **Moderator:**

Jarad Brown



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# QUESTIONS?

*Email [DataPortability@ftc.gov](mailto:DataPortability@ftc.gov)*



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# CLOSING REMARKS

**Ian Conner**

Federal Trade Commission  
*Bureau of Competition*



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# THANKS!



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