OPENING REMARKS

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AN OVERVIEW OF DATA PORTABILITY: CONCEPTS AND TERMINOLOGY

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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 policymakers 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
QUESTIONS?

Email DataPortability@ftc.gov
BREAK

Return at 10:30 AM (EST)
FINANCIAL AND HEALTH PORTABILITY REGIMES

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

Moderator:
Katherine White
QUESTIONS?

Email DataPortability@ftc.gov
BREAK

Return at 12 PM (EST)
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
QUESTIONS?

Email DataPortability@ftc.gov
BREAK
Return at 1:30 PM (EST)
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
QUESTIONS?

Email DataPortability@ftc.gov
THANKS!