

Data Portability Rights: Options, Limits, and the Need for Flexible Solutions

Wolfgang Kerber

(Professor of Economics, University of Marburg)

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1. Data Portability and Data Access: The Big Picture

- More access / sharing / reuse of data => more competition / innovation
(economic characteristic: non-rivalry in using data)
- Mandatory solutions: analysis of benefits and costs (list of criteria)
 - + benefits of more data access for competition / innovation
 - + incentives for data production
 - + participation in generation of data, cogenerated data
 - + other rights (IP/business secrets, privacy rights, ...)
 - + risks and costs of data access / sharing

=> necessity of specific (also economic) analysis !
- What is the best instrument for mandatory data access / sharing?
 - + data access claims based upon competition law, ...
 - + sector-specific regulations
 - + **data portability rights** (as one option among others)

=> specific analysis necessary about the most suitable instrument !

2. Data Portability Rights (1)

Data portability rights (DPRs) of individuals / firms:

- right to move/share "their" data from one firm to another:
 - + what is "their" data? scope of portable data? conditions for portability?
 - privacy law-based DPRs: e.g. Art. 20 GDPR: regarding personal data
 - DPRs outside privacy laws: e.g., as part of
 - + consumer data rights in Australia (portability of consumer data)
 - + sector-specific regulations (banking, health, ...)
 - Important: What problems should be solved by them?
 - + competition policy: solving competition problems
 - + innovation policy: making more data available for innovation
 - + privacy/data protection law: more control of personal data
 - + consumer policy: consumer empowerment
- => optimal design of DPRs depends on what we want to achieve ...

2. Data Portability Rights (2)

EU: Policy discussion about data portability right of Art. 20 GDPR

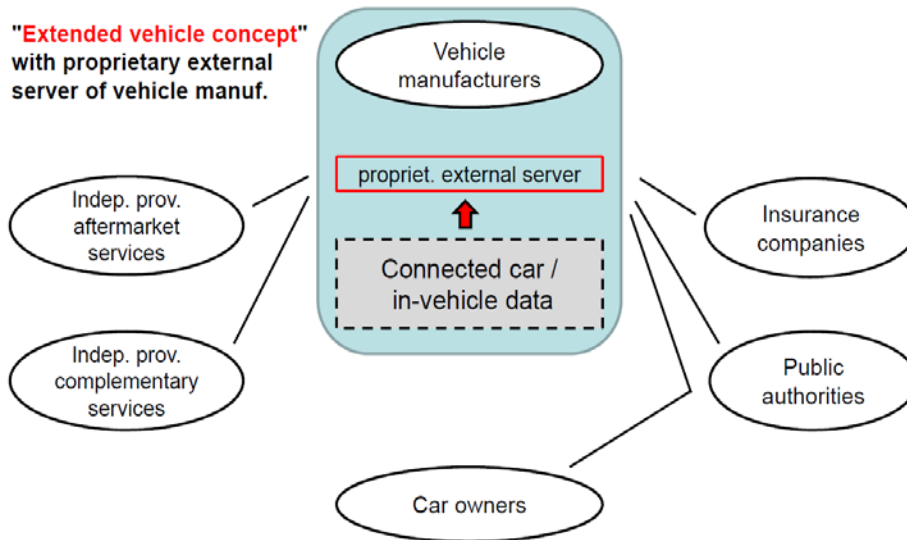
- Problem: so far it does not work well, because rarely used and usable
 - + it does not fulfill expectations of also fostering competition / innovation
- How to make the data portability right of Art. 20 GDPR more effective for solving better competition and innovation problems due to a lack of data access?
(Communication: A European Strategy for Data, 2020)
- specific problems (legal uncertainties, e.g. about scope, lacking data interoperability, no real-time portability, not enough enforcement etc.) and proposals (continuous data portability, mandatory technical interfaces)
(see, e.g., Krämer et al 2020; Communication: Data Protection as a Pillar of Citizens' Empowerment, 2020)

In the following:

Case study: Can data portability right of Art. 20 GDPR solve competition and innovation problems regarding data in connected cars?
(based upon: Kerber 2018, Kerber/Gill 2019, Gill/Kerber 2020)

3. Data governance problems in connected cars (1)

Current governance concept of vehicle manufacturers (VM):



- all data directly transmitted to proprietary server of VMs
 - VMs have exclusive control of
 - 1) access to in-vehicle data and
 - 2) technical access to the car (closed system / no interoperability)
- => gatekeeper position

- allows VM to control all secondary markets and foreclose independent service providers and leverage market power to these markets
- negative effects on competition, innovation, and consumer choice on secondary markets (no fair and undistorted competition)
- [problem not solved by current motor vehicle type approval regulation with its access regime to essential repair and maintenance information 2018/858 (Kerber/Gill 2019)]

3. Data governance problems in connected cars (2)

Alternative solutions for access to in-vehicle data:

- "shared server" operated by neutral entity (data trustee solution)
 - open interoperable telematics platforms: data stored in the car, and car user can directly decide whom to give access to data and the car
- => both solutions would eliminate gatekeeper position of VM
(TRL study 2017: both solutions superior to "extended vehicle" concept)

EU Commission: acknowledged the problem but so far no solution
(despite huge policy debate about fair access to car data)

Other options for data access:

- data access claims based upon competition law (Kerber 2019)
- additional reform of type approval regulation (planned by EU Commission)
- **using data portability right of Art. 20 GDPR:**
car users would exert their data portability right for making data available to independent service providers

3. Data governance problems in connected cars (3)

Why data portability right of Art. 20 GDPR is not sufficient (Gill/Kerber 2020):

- unclear scope of portable data (legal uncertainty) and too narrow scope of portable data (only personal data)
 - no access to real-time data (no continuous data access):
would be necessary for many new innovative remote services
 - no obligation for enabling technical feasibility of data portability, e.g. by developing industry-standards for data formats and interfaces (e.g. APIs)
 - no obligation for interoperability of the car with complementary services of independent firms, e.g. remote repair and maintenance etc.
 - no provisions for ensuring safety and security of data transmission / access to car
 - transaction costs for exerting this right for car users much too high
 - independent service providers might also need aggregate level-data for developing new services (or training algorithms), which can hardly be provided by using data portability rights of individuals (collective action problem)
- => current data portability right of Art. 20 GDPR offers no effective solution !

4. Data Portability Rights: Some Conclusions (1)

Thesis: Effectiveness of data portability rights for fostering competition and innovation might require complementary (quasi-)regulatory solutions

(1) Interoperability:

- a) Data interoperability: common data formats / technical interfaces for data exchange (standardised APIs etc.)
- b) Interoperability of complementary products and services with technical system, e.g. for running / uploading software etc. (remote repair, ...)

(2) Mandatory minimum standards for safety, cybersecurity, and privacy

- also mandatory certification of service providers (regarding cybersecurity / compliance with privacy laws)

(3) Standardised processes (and model contracts) for minimizing transaction costs

- e.g., service providers can initiate use of DPR (individuals only consent)

=> key role of minimum standards and (technical) standardisation policy

- often necessary: integrated and tailored approach of data portability rights and complementary regulatory solutions

4. Data Portability Rights: Some Conclusions (2)

General (horizontal) vs. sector-specific data portability rights

- advantages and disadvantages of horizontal and sectoral solutions
- horizontal (cross-sector) solutions for data portability rights for fostering competition and innovation are difficult
(different requirements for scope, conditions, complementary regulatory solutions)
- sector-specific solutions allow for more integrated and tailored solutions
- very interesting: Australian consumer data rights approach is a hybrid solution
(horizontal approach with sector-specific implementation that allows for tailored solutions of design of DPR and complementary regulations/standards)

Consumer data rights approach (OECD 2020):

- What set of rights should consumers have regarding their "consumer data"?
 - important: independent from "personal data" (as defined in privacy laws)
- => much more flexible (and open) concept for finding suitable solutions
(links competition policy with consumer policy and consumer empowerment)

4. Data Portability Rights: Some Conclusions (3)

Should data portability rights for helping competition and innovation be based upon privacy / data protection laws (as Art. 20 GDPR)?

- very difficult, because only for personal data (often too narrow), and it is hard to adapt these DPRs to specific conditions of different sectors
 - privacy law-based data portability rights are very important (for individual control of personal data for protecting privacy)
 - + using and improving them (as now Art. 20 GDPR) is helpful
 - + but danger of over-burdening them with the complex task of fostering competition and innovation
- => let us think also much more about data portability rights beyond privacy laws

Necessity of rethinking the "division of labor" and collaboration of different policies

- What is the specific role of competition policy, consumer policy, privacy / data protection policy in the digital era, and
- how can they better collaborate with each other in a more integrated approach?

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