



August 21, 2020

Federal Trade Commission,  
Ms. April Tabor  
Office of the Secretary  
Constitution Center  
400 7th St., SW, 5th Floor, Suite 5610  
Washington, DC 20024

Dear Ms. Tabor,

On behalf of the Center for Data Innovation ([datainnovation.org](http://datainnovation.org)), we are pleased to submit this response to the Federal Trade Commission's (FTC) request for comments on the potential benefits and challenges to consumers and competition raised by data portability.<sup>1</sup>

The Center for Data Innovation is the leading think tank studying the intersection of data, technology, and public policy. With staff in Washington, D.C., and Brussels, the Center formulates and promotes pragmatic public policies designed to maximize the benefits of data-driven innovation in the public and private sectors. It educates policymakers and the public about the opportunities and challenges associated with data, as well as important data-related technology trends. The Center is a non-profit, non-partisan research institute affiliated with the Information Technology and Innovation Foundation.

### **Summary**

Data portability refers to the ability of a user to obtain data from one service and move it to another. Data portability requires organizations to provide data in a standardized, machine-readable format, through either a direct download or an open application programming interface (API)—a set of functions a third-party can use to access data directly from a service when users request their data be ported to that third party. Data portability also requires that data be made available under an open license, with no restrictions on how it can be used.

Because data is an immensely valuable resource that enables innovation in both the public and private sector, policies that promote data portability can sometimes enable considerable economic benefits for consumers and businesses alike. In particular, data portability extracts more value from data by allowing data collected by one party to be reused by another, thereby enabling the

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<sup>1</sup> "FTC Announces September 22 Workshop on Data Portability," Federal Trade Commission, March 31, 2020, <https://www.ftc.gov/news-events/press-releases/2020/03/ftc-announces-september-22-workshop-data-portability>.



development of valuable third-party services. In addition, data portability fosters competition by reducing switching costs and avoiding vendor lock-in.

Some companies voluntarily provide consumers access to their own data in an open, electronic format. In addition, policymakers have fostered data portability in some industries not through regulatory mandates but through voluntary agreements, such as the Green Button Initiative to enable consumers to access their utility data. Because the costs of implementing data portability can be substantial, especially for large, old, complex, and non-digitized data, policymakers should avoid broad data portability mandates, such as those imposed by the Europe Union's General Data Protection Regulation (GDPR). In some cases, data portability requirements may reduce the value organizations can obtain from having exclusive access to data, making it less likely that they will collect and curate data. In light of these concerns, policymakers should pursue targeted data portability requirements where either there are clear opportunities to improve consumer welfare or the industry in question is highly regulated, such as healthcare, education, and financial services.

Data portability requirements can also create new security and privacy risks for consumers. In particular, many businesses do not have a secure and reliable means to authenticate the identity of their users. As a result, attackers can exploit data portability requirements to obtain sensitive information about individuals. Indeed, this has already happened in the European Union. Therefore, data portability requirements should always consider security and privacy risks to consumers.

Finally, calls for data portability should not be confused with much more problematic calls for interoperability among online platforms. Requiring a social network, for example, to allow third-parties to post and delete content, register and deregister users, and more, can create a number of unintended consequences, such as making it more difficult to block malicious users, stop spam, and protect children online, because third parties may not adhere to the same rules and monitoring those third parties may be difficult, if not impossible.

### **What have been the benefits and costs of data portability? What are the benefits and costs of achieving data portability through regulation?**

Data portability has become an increasingly important mechanism for giving consumers the ability to share their data, as well as a tool for promoting competition and encouraging the emergence of new services in the marketplace.

When consumers can easily access and export machine-readable data about themselves collected by companies or government agencies and then import this data into other services, the opportunities for data-driven innovation can increase. For example, by enabling consumers to access data about their utility usage from smart meters, consumers can make more informed decisions



about their electricity and water usage habits and leverage third-party analytics services to identify opportunities to conserve resources and lower their utility bills.

Increases in data portability can also promote competition in the marketplace and, in some cases, substantially reduce switching costs for consumers by making it easier for them to export their data and bring it to another service provider. This reduces the opportunity for companies to artificially “lock-in” customers by making it prohibitively expensive to move their data to another company, and instead encourages companies to retain customers by offering the most competitive services. Data portability can also provide more market transparency, such as by allowing consumers to easily discover if they are paying more for financial services at their current bank than they could with a competing one.<sup>2</sup>

Data portability can also increase market efficiency. It can be inefficient to have multiple companies collect the same data. Ideally, data would only be collected once and used many times. For example, in health care, patients do not want to have their blood drawn every time they visit a new doctor, they want to have one result that they can share with all their health care providers. Data portability is a useful mechanism for disseminating data to all the applications and services that can extract value from it while allowing users to remain in control of their information.

**Does data portability work better in some contexts than others (e.g., banking, health, social media)? Does it work better for particular types of information over others (e.g., information the consumer provides to the business vs. all information the business has about the consumer, information about the consumer alone vs. information that implicates others such as photos of multiple people, comment threads)?**

Data portability has costs, so it is important that the benefits of data portability outweigh these costs. These costs include not only the direct costs of providing the data, but also the indirect costs to a company if it loses exclusive access to data to which it has added value. In some cases, companies may invest less in collecting and curating data if they lose exclusive access to data.

Often the sectors in which data portability would lead to the most benefits are those where the value of data is not fully aligned with who holds the data, and the greater this discrepancy is, the greater the need for data portability. In particular, health care, education, and financial services, stand out as examples of where there are likely substantial consumer benefits.

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<sup>2</sup> Daniel Castro and Michael Steinberg, “Blocked: Why Some Companies Restrict Data Access to Reduce Competition and How Open APIs Can Help,” Center for Data Innovation (November 6, 2017), <http://www2.datainnovation.org/2017-open-apis.pdf>.



In some cases, data portability is unlikely to encourage competitors to create more innovative products because the ported data is too platform-specific to be useful in creating a new, competitive service elsewhere.<sup>3</sup> This is likely to be true in most social networks.

For instance, Gabriel Nicholas and Michael Weinberg from NYU School of Law brought together a range of individuals from the New York City technology community to identify what new products they could develop with anonymized Facebook data downloaded via Facebook's portability tool.<sup>4</sup> As expected, they found that the data participants were able to use, namely only the comments made by a user but not the full conversation or identity of other participants, was insufficient to develop a competing social network. In fact, the authors of the study noted, "trying to use exported user data to reproduce Facebook would be like trying to use furniture to reproduce the office building it came from."<sup>5</sup> In particular, the study found that not only is ported data insufficient to replicate a social networking platform like Facebook, but it is also too tailored to be useful for much else.

A data portability regime designed to maximize competition could force social networking platforms to export data that includes entire comment threads as well as data uploaded by others that relates to the exporting user, such as a photo of the exporting user's face, taken by someone else. This would certainly make it easier for the exporting user to replicate her experience and reconstruct her social network on a new platform, however this would obviously implicate the privacy and security of other users who produced that data.<sup>6</sup>

However, a number of social media sites have long offered forms of data portability voluntarily. For example, Facebook has allowed users to access their information via its "Download Your Information" tool since 2010, and Google users have been able to download their personal data held by Google via its "Takeout" tool, now called "Download Your Data" since 2011.<sup>7</sup> The key to these firms' dominant position is not due to a lack of data portability but the fact that they offer superior products and services than their competitors.

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<sup>3</sup> Daniel L. and Gal, Michal, "Access Barriers to Big Data," *Arizona Law Review*, vol. 59 339 (2017), <http://dx.doi.org/10.2139/ssrn.2830586>.

<sup>4</sup> Nicholas, G. and M. Weinberg, "Data Portability and Platform Competition: Is User Data Exported from Facebook Actually Useful to Competitors?", November 2019 (paper published by the NYU School of Law). <https://www.law.nyu.edu/centers/engelberg/pubs/2019-11-06-Data-Portability-And-Platform-Competition>.

<sup>5</sup> Ibid.

<sup>6</sup> "Charting A Way Forward: Data Portability and Privacy," September 4, 2019, <https://about.fb.com/news/2019/09/privacy-and-data-portability/>.

<sup>7</sup> "Introducing Data Transfer Project: an open source platform promoting universal data portability", July 20, 2018, <https://opensource.googleblog.com/2018/07/introducing-data-transfer-project.html>.



Data portability regulations should not make organizations give up ownership of their data. In particular, they should not require organizations to give up proprietary data or non-customer data. Data portability requirements should only apply to data produced by users. Finally, in cases where the costs of data portability are likely to be high or generate few benefits, organizations should be allowed to recover reasonable costs to comply with data portability requests from users.

### **To what extent has data portability increased or decreased competition?**

Competition is a means, not an end. The end is overall increase in economic welfare, including the benefit to consumers, and more or less competition may be required to maximize it.<sup>8</sup> The question that the FTC should be focused on is not whether data portability has increased or decreased competition, but rather to what extent data portability can have maximized overall economic and consumer welfare.

In some markets, data portability maximizes consumer benefit by increasing competition, but in other industries that are more concentrated by nature, higher concentration maximizes innovation.<sup>9</sup> Policymakers should first evaluate whether there are clear opportunities to improve consumer welfare by introducing data portability requirements, and then introduce industry-specific rules that address particular issues.

For example, the U.S. Department of Health and Human Services (HHS) finalized a rule in early 2020 requiring health care providers give patients free access to their health data through secure, standards-based APIs. Previously, patients had a right to access their medical records, but providers could charge patients to obtain copies and did not have to provide it in a standard online format. Now, certified EHR systems must have APIs that allow patients to easily access clinical and payment information through any third-party application they choose, including mobile apps. Further, these APIs must not only be able to export data for a single patient but must also be able to export data for multiple patients for providers who want to change their EHR system vendor. These changes will help improve access to data for patients, providers, and others delivering value, developing innovative health IT applications, and improving outcomes in health care.<sup>10</sup>

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<sup>8</sup> Joe Kennedy, “Why the Consumer Welfare Standard Remains the Best Guide for Promoting Competition” (Information Technology and Innovation Foundation, January 2019), <https://itif.org/publications/2019/01/27/why-consumer-welfare-standard-remains-best-guide-promoting-competition>.

<sup>9</sup> Joe Kennedy, “Monopoly Myths: Do Internet Platforms Threaten Competition?” (Information Technology and Innovation Foundation, July 2020), <https://itif.org/publications/2020/07/23/monopoly-myths-do-internet-platforms-threaten-competition>.

<sup>10</sup> Hodan Omaar, “Department of Health and Human Service’s Finalized Rules Support Interoperability,” Center for Data Innovation (May 5, 2020), <https://www.datainnovation.org/2020/05/department-of-health-and-human-services-finalized-rules-support-interoperability/>.



## **How can interoperability among services best be achieved? What are the costs of interoperability? Who should be responsible for achieving interoperability?**

Interoperability should not be confused with data portability. Whereas data portability involves exporting consumer data to another platform, interoperability can entail a service provider granting third parties full access to key components of their systems, such as messaging platforms on social networks. Interoperability requirements can be substantially more complex and raise new risks for online platforms as well as limit the potential for innovation.

First, interoperability requirements can make it more difficult for a platform to create a secure, reliable, and trustworthy environment. For example, if third parties have access to the platform, it may be difficult to monitor for malicious behavior among its users. As a result, problems such as spam, abuse, and misinformation may be more difficult to address on these platforms or even become greater problems.

Second, interoperability requirements can limit innovation on digital platforms either because changes must occur slower to address potential impact on third parties or because platforms' incentive to innovate may decrease when they must share their own innovations with competitors. For instance, the Unicode Consortium is an organization that encodes, maintains, and publishes the global standard for text and symbols used on all systems and apps to support the worldwide interchange and display of symbols.<sup>11</sup> If a social networking site wants to introduce a new emoji in order to improve engagement on its platform, it must first submit the new icon to the standard, but this means all platforms will benefit from their innovation. In 2017, Facebook's most used emoji, as well as Oxford Dictionary's 2015 word of the year, was the "Face with Tears of Joy" emoji; an emoji sourced from datasets introduced by a Japanese mobile phone company.<sup>12</sup> This company captured next to none of the value its innovation added to the creative commons, evidencing the drawbacks to innovation digital companies face by sharing.

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<sup>11</sup> Unicode overview page, accessed August 19, 2020, <https://home.unicode.org/basic-info/overview/>.

<sup>12</sup> Megan Farokhmanesh, "Facebook's most-used emoji accurately sum up the platform: hearts and tears," *The Verge*, July 17, 2017, <https://www.theverge.com/2017/7/17/15984204/facebooks-most-used-emoji-hearts-tears>; and Victor Luckerson, "Meet the 63-Year-Old in Charge of Approving New Emojis," *Time*, March 2, 2016, <https://time.com/4244795/emoji-consortium-mark-davis/>.





**What lessons and best practices can be learned from the implementation of the data portability requirements in the GDPR and CCPA? Has the implementation of these requirements affected competition and, if so, in what ways?**

One-size-fits-all rules on data portability have several significant shortcomings and unintended consequences that can hurt businesses, consumers, and innovation.

First, data portability as envisioned in the GDPR raises barriers to entry and thus impedes competition. For example, article 20 of the GDPR requires an online service to write specialized code that will export data from that service and import it to another service.<sup>13</sup> But many small and medium-sized companies do not have the legal resources to fully understand or comply with the GDPR, nor do they have the technical capacity to write such code to move data to another provider.

Second, data portability requirements, such as those the GDPR imposes, come with high compliance costs. These include data processing costs, user authentication costs, as well as the costs for implementing APIs or other interfaces for direct downloads. ITIF estimated that the total cost of data portability requirements for all U.S. organizations that handle personal data would be roughly \$510 million.<sup>14</sup> This could lead to a decrease in the supply of many products and services.

Before policymakers in the United States create similar data portability rules, they need to explore the costs involved in such rules. These costs should be measured against the economic benefits data portability can bring, and only in those industries and markets where the benefits outweigh the costs should data portability rules be applied.

**Who should be responsible for the security of personal data in transit between businesses? Should there be data security standards for transmitting personal data between businesses? Who should develop these standards?**

Current data portability laws such as the GDPR, provide little guidance on how data controllers should protect against third parties misusing data. Article 29 of the GDPR for example states that a data controller is responsible for “taking all the security measures needed to ensure not only that personal data is securely transmitted (by the use of end-to-end or data encryption) to the right destination (by the use of strong authentication measures)” While the GDPR does suggest ways to

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<sup>13</sup> Aysem Diker Vanberg, and Mehmet Bilal Ünver, “The right to data portability in the GDPR and EU competition law: odd couple or dynamic duo?”, *European Journal of Law and Technology* Vol 8, no. 1 (2017). <http://www.ejlt.org/index.php/ejlt/article/view/546/726>.

<sup>14</sup> Alan McQuinn and Daniel Castro, “The Costs of an Unnecessarily Stringent Federal Data Privacy Law” (Information Technology and Innovation Foundation, August 2019), <https://itif.org/publications/2019/08/05/costs-unnecessarily-stringent-federal-data-privacy-law>.



mitigate risk, such as using additional authentication information, or suspending or freezing transmission if there is suspicion that an account has been compromised, these security measures “must not be obstructive in nature and must not prevent users from exercising their rights[.]”

Confusion over data access requirements in the GDPR has led to security incidents that have compromised the privacy of consumer data. For example, Oxford University researcher James Pavur demonstrated that a substantial number of organizations responded inappropriately to a malicious data request, including approximately 1 in 4 that turned over personally identifiable information.<sup>15</sup>

A potential lighter-touch solution could be the creation of a portability-focused code of conduct administered by an independent organization. The Personal Data Protection Commission (PDPC) of Singapore recently announced that it will prescribe binding codes of practice for sectors related to consumer safeguards, counterparty assurance, interoperability, and security of data.<sup>16</sup> This code of conduct requires entities to implement privacy and security safeguards before receiving user-requested data.<sup>17</sup> PDPC intends for this code of conduct to apply to “white-listed datasets” that it will identify jointly with industry stakeholders and any relevant sectoral regulators. The Singapore approach may be a useful model for U.S. policymakers to consider, as it is important to work with industry stakeholders to understand specific exemptions that need to be made for sensitive commercial data.

Sincerely,

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15 James Pavur and Casey Knerr, “GDPArrrrr: Using Privacy Laws to Steal Identities” (technical paper associated with Black Hat USA 2019 Briefing), <https://i.blackhat.com/USA-19/Thursday/us-19-Pavur-GDPArrrrr-Using-Privacy-Laws-To-Steal-Identities-wp.pdf>

16 Personal Data Protection Commission (PDPC) Singapore, *Response to the Feedback on the Public Consultation on Proposed Data Portability and Data Innovation Provisions*, (Singapore: PDPC: 2020), <https://www.pdpc.gov.sg/-/media/Files/PDPC/PDF-Files/Legislation-and-Guidelines/Response-to-Feedback-for-3rd-Public-Consultation-on-Data-Portability-Innovation-200120.pdf>.

17 “Charting A Way Forward: Data Portability and Privacy,” September 4, 2019, <https://about.fb.com/news/2019/09/privacy-and-data-portability/>.