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A Discussion of the Right to Data Portability from a Legal Perspective

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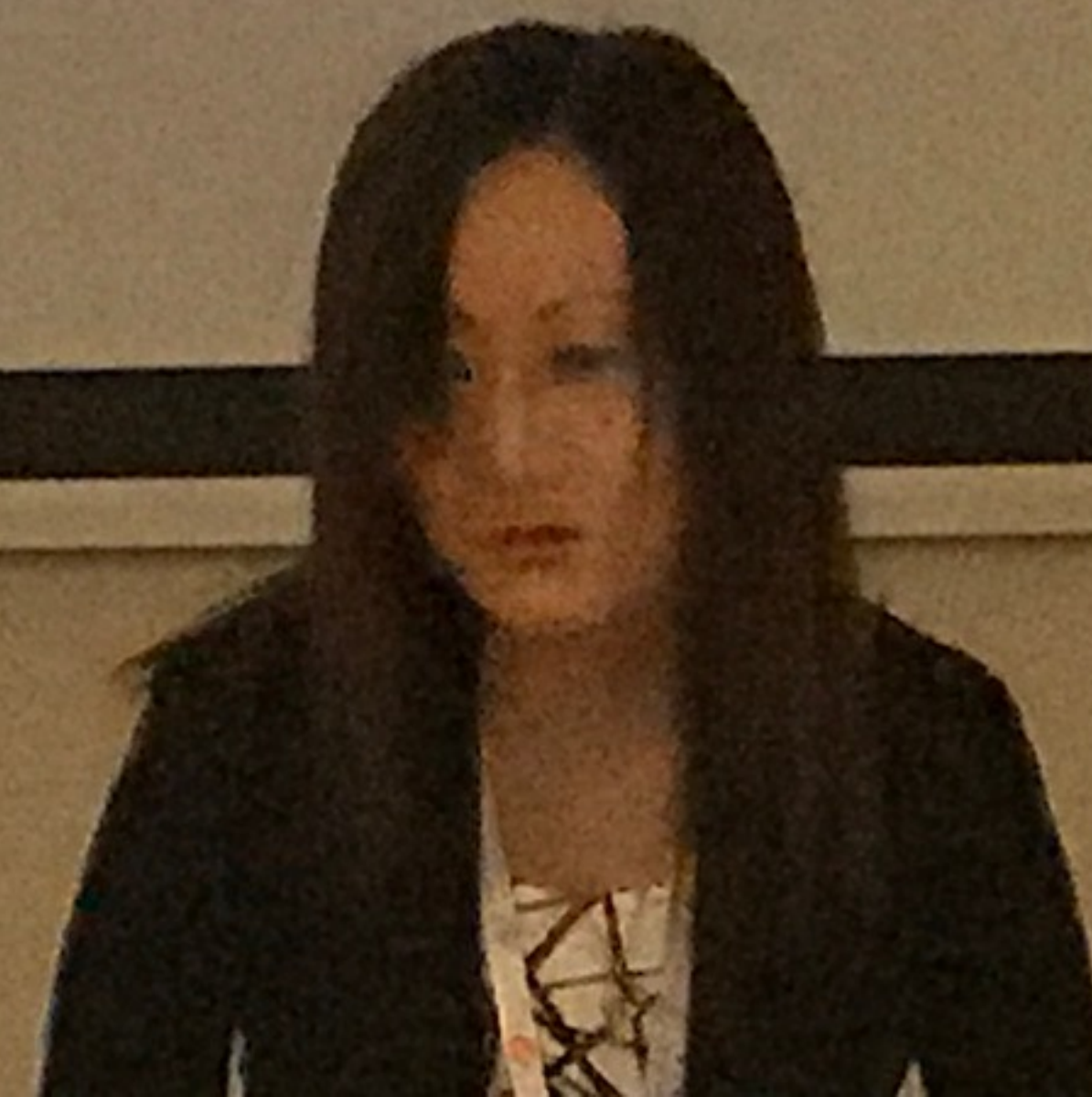


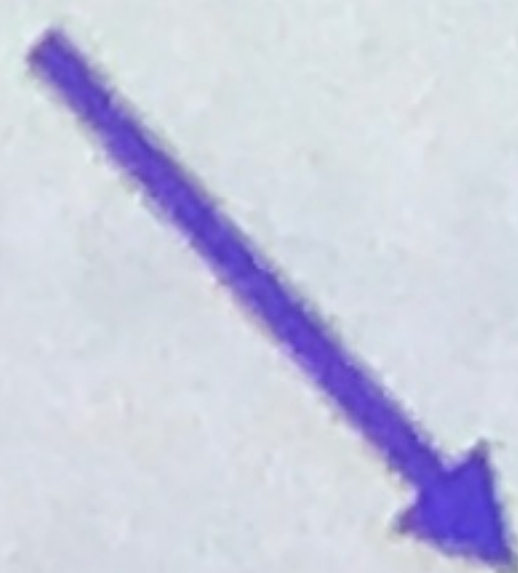
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The aim of this research

Personal data protection

Antitrust laws



The right to data portability

Research Background

The Google logo, featuring the word "Google" in its characteristic multi-colored font (blue, red, yellow, green, blue, red).

<https://www.google.co.jp/>

The Facebook logo, consisting of the word "facebook" in white lowercase letters on a dark blue rectangular background.

<https://www.facebook.com/>

The Amazon logo, featuring the word "amazon" in white lowercase letters on a dark brown rectangular background, with the orange curved arrow below it. To the right, the text "Try Prime" is written in blue.

<https://www.amazon.com/>



<https://www.apple.com/>

Two Legal Perspectives

Competition

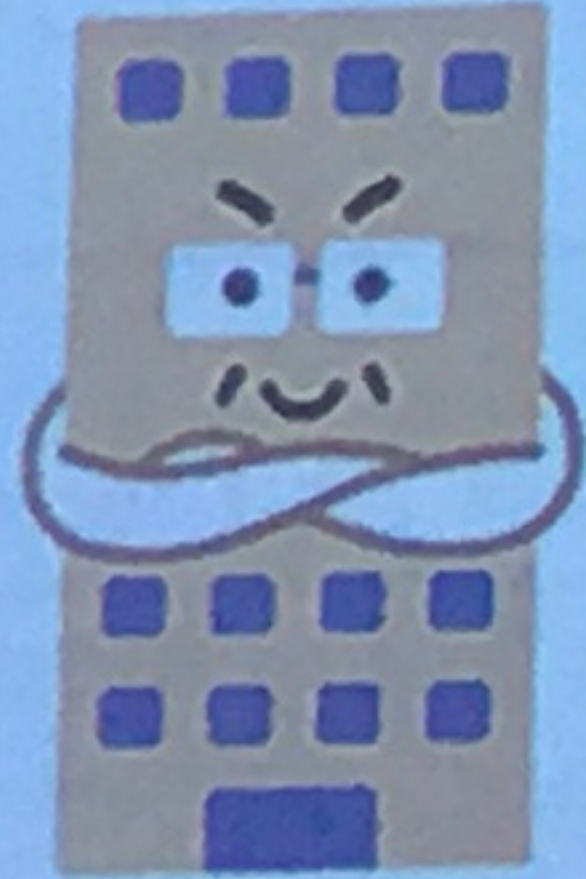
- Pursuing fair and free competition by prohibiting private monopolization, unreasonable restraint of trade, and unfair trade practices
- Facilitating IT providers may be preferable.
- A regulatory agency may insist on personal data sharing among competitors.

Data Protection

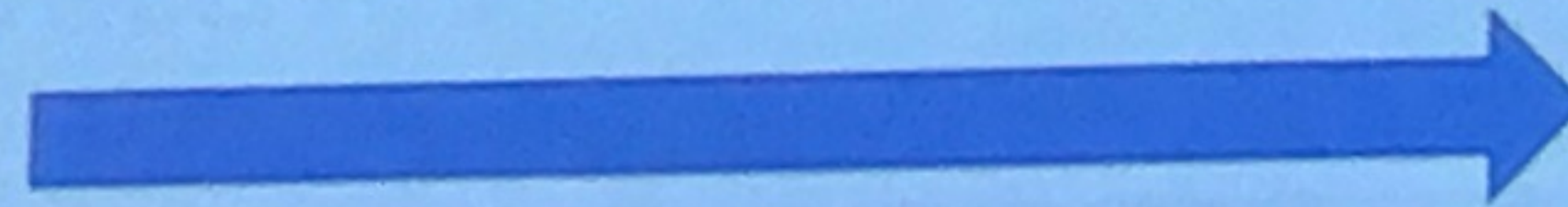
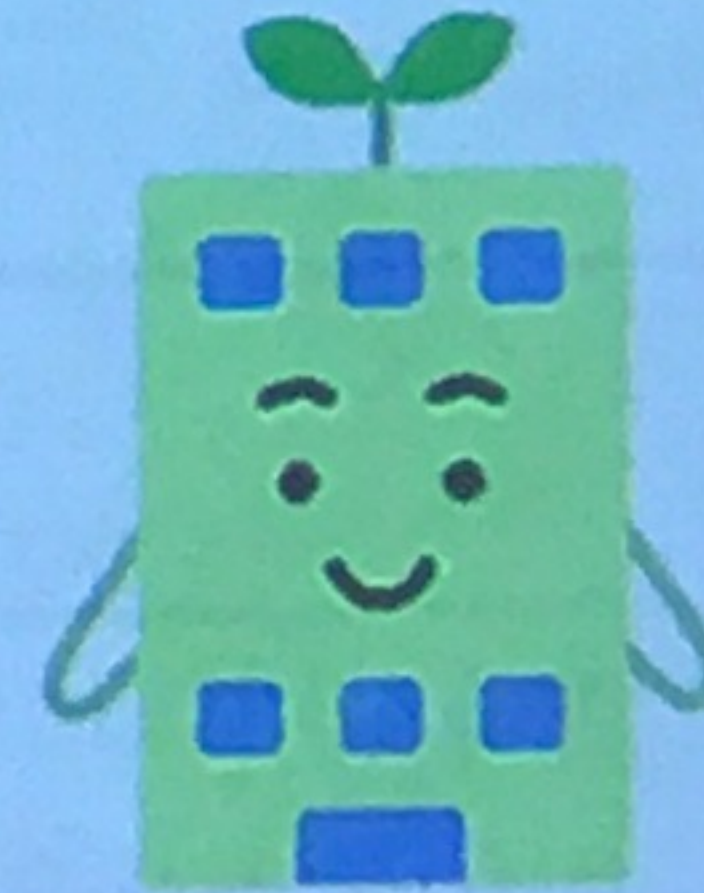
- Protecting personal data by granting rights to data subjects.
- Data transactions are permitted only when the data subject's control is warranted.
- A data protection authority may impose restrictions on personal data transactions.

The Right to Data Portability (Article 20)

Controller A

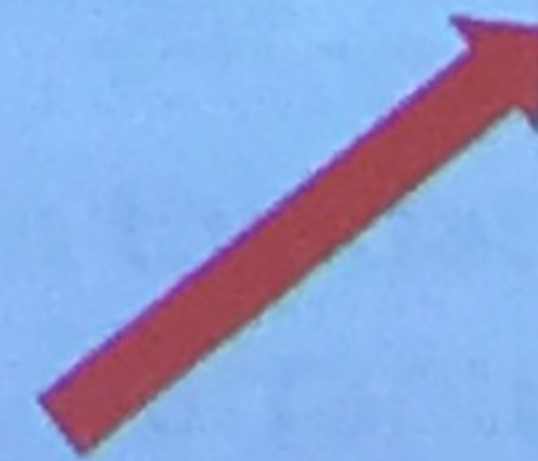


Controller B



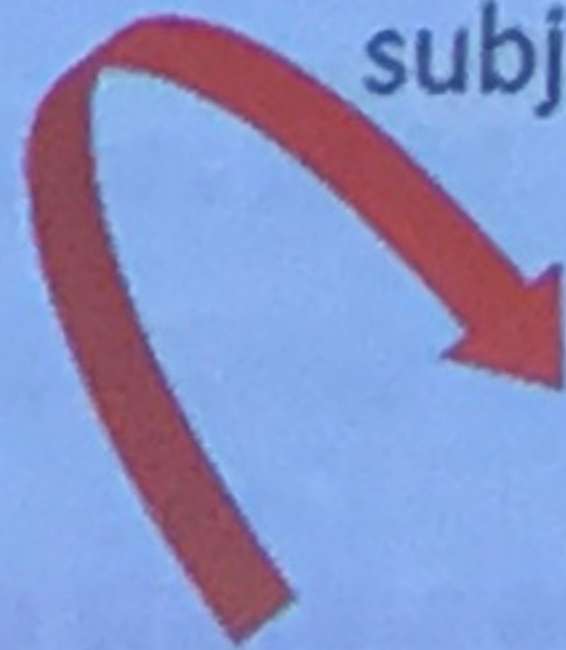
Data has to be transmitted where "technically feasible"

Receive his/her own data to the data subject

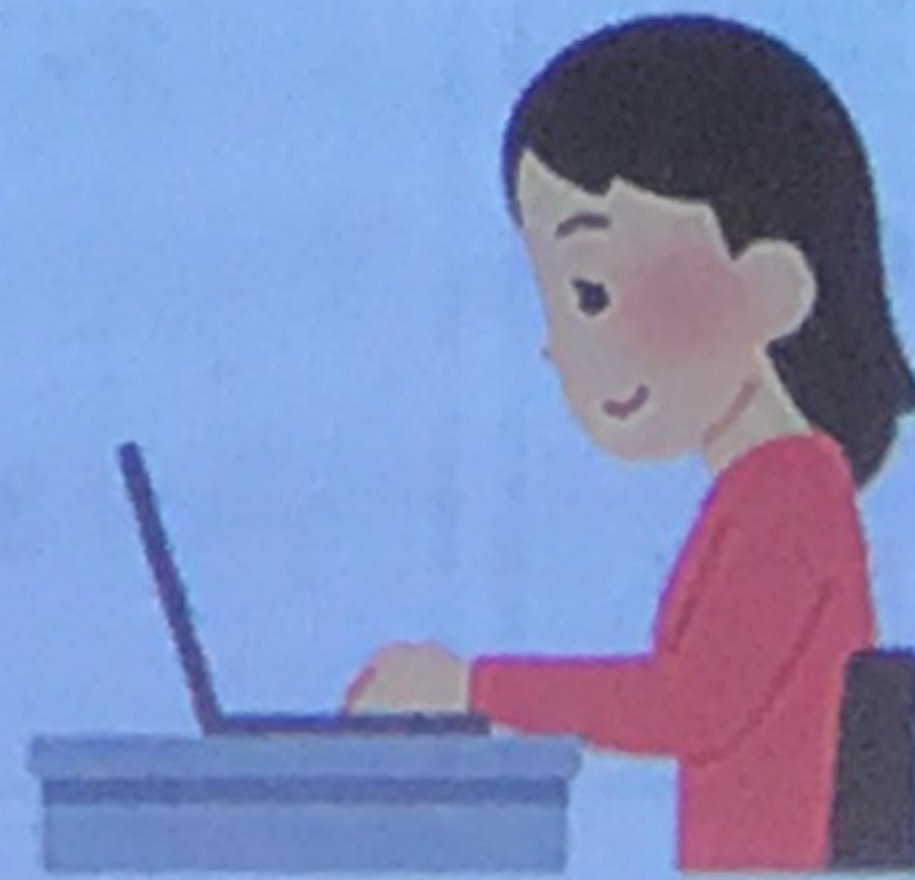


Data is transmittable

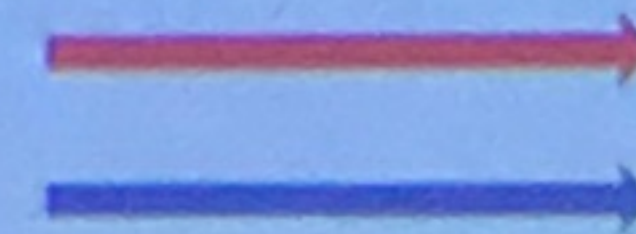
Originally the data was provided by the data subject.



Structured, commonly used, and machine readable format



Data subject



Paragraph 1

Paragraph 2

WP 29 Guidelines on the Right to Data Portability

- “Provided by the data subject”
 - Data actively and knowingly provided by the data subject (for example, mailing address, user name, age, etc.)
 - Observed data provided by the data subject by virtue of the use of the service or the device.
- “Inferred data” or “derived data”
 - E.g., the outcome of an assessment regarding the health of a user or the profile created in the context of risk management and financial regulations (e.g. to assign a credit score or comply with anti-money laundering rules)
- Portability aims to produce “interoperable systems,” not “compatible systems.”

Article 29 Data Protection Working Party (2017) Guidelines on the right to data portability. Retrieved from http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50083.

Cont'd

- While the right to personal data portability may also enhance competition between services (by facilitating service switching), the GDPR regulates personal data and not competition.
- In particular, Article 20 does not limit portable data to those which are necessary or useful for switching services.

Efforts in Member Countries

- French Digital Republic Act (Art. 48)
- SelfData Initiatives
 - Midata project in the U.K.
 - MesInfos project in France
- My Data initiatives in the U.S.

1890 Sherman Act (15 U.S.C. §§ 1, 2)

- Article 1 punishes any contract in restraint of trade or commerce.
- Article 2 punishes monopolizations.

“Refusal of deal” is deemed unlawful in exceptional circumstances.
“...we have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm ... the few existing exceptions from the proposition that there is no duty to aid competitors.”

Verizon Communications, Inc. v. Law Office of Curtis v. Trinko, LLP, 540 U.S. 398 (2004)

Essential Facilities Doctrine

- One of the most famous theories that underpin the doctrine argues that “where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility”.

Neale AD (2d ed., 1970) The Antitrust Laws of the United States of America.

The U.S. Supreme Court Decision

- The Trinko decision in the U.S. Supreme Court refused to apply the doctrine as it had never recognized or intended to recognize it.

Even if the Supreme Court considered to be established law the "essential facilities" doctrine crafted by some lower courts-- which doctrine the Supreme Court had never recognized and found no need to recognize, or to repudiate, in the case at hand-- the 1996 Act's extensive provision for network access made it unnecessary to impose such a judicial doctrine of forced access.

Verizon Communications, Inc. v. Law Office of Curtis v. Trinko, LLP, 540 U.S. 398 (2004).

The Treaty on the Functioning of the European Union (TFEU)

- Article 101 prohibits agreements, decisions, and concerted practices that may affect trade between Member States and prevent competition.
- Article 102 prohibits abuse by one or more undertakings in a dominant position.

A dominant firm's refusal to enable data portability can be seen as a form of exclusionary abuse.

Essential Facilities Doctrine in the EU

- This principle applies only if the refusal to give access has serious anticompetitive effects, if access is essential to enable competitors to compete, and if there is no legitimate business justification for the refusal.

Lang JT (1999) Competition Law and Regulation Law from an EC perspective, *Fordham International Law Journal* 23(6): S118.

European Commission decision

- B&I Line Plc v. Sealink Harbours Ltd. and Sealink Stena Ltd. (1992)
 - “a dominant undertaking which both owns or controls and itself uses an essential facility, i.e., a facility or infrastructure without access to which competitors cannot provide services to their customers, and which refuses its competitors access to that facility or grants access to competitors only on terms less favorable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes Article 86, if the other conditions of that article are met”

Court Cases

- The denial of a deal owing to abuse of a dominant position
 - Commercial Solvents Corporation v. Commission (1974)
 - Radio Telefis Eireann and Independent Television Publications Ltd v. Commission (so-called “Magill case”) (1995)
- Restrictive conditions that result in a refusal to deal are treated as abuse.
 - IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG, (2004)

Merger Cases Bridging Privacy and Anti-Competition

- Google-DoubleClick (2008)
 - Internet service providers track all of the online behavior of their users.
 - Large Internet service providers can team up with advertisers to use such data, in exchange for a lower price.
- Facebook-WhatsApp (2014)
 - The change in WhatsApp's privacy policy contradicts Facebook's previous commitment to not establish automated matching between Facebook and WhatsApp users' accounts.
- Microsoft-LinkedIn (2016)
 - Data privacy was an important parameter of competition in the SNS service market.

Misleading Practices Resulting in Fines

- The EU Commission fined Facebook €110 million for providing misleading information about the WhatsApp takeover (2017).
- The European Commission fined Google €2.42 billion for breaching EU antitrust rules (2017).

Is an online platform an essential facility?

- The definition of a platform is “a combination of hardware and software on the basis of which other companies (software vendors in the Microsoft case, and advertisers in the Google case) offer products and services to end customers in competition with one another.”
- Microsoft’s “platform” is its own Windows operating system.
- In the case of Google, the “platform” is the Internet.
- Differences between Microsoft and Google platforms: offering free services, consumer availability, switching costs, network effects

Lang JT (2016) Comparing Microsoft and Google: The Concept of Exclusionary Abuse, World Competition 39(1) p. 7-8.

Discussion Issues

1. Is the right to data portability in the GDPR effective?
2. Should the right to data portability be legally regulated?
3. Can the right be regulated from an antitrust perspective?

Is the right to data portability in the GDPR effective?

- Many critiques:

- a. Limitations on data generated by the data controller;
- b. Privacy rights of third parties;
- c. Technical feasibility of data transfer;
- d. Disproportionate costs and efforts;
- e. Transfer of data may compromise valuable proprietary information and intellectual privacy;
- f. Enforcement issues pertaining to the right to data portability;
- g. Privacy and data security.

Vanberg, AD & Ünver, MB, (2017) The right to data portability in the GDPR and EU competition law: odd couple or dynamic duo?. *European Journal of Law and Technology* 8(1).

Should the Right to Data Portability be Legally Regulated?

- Controller–controller portability cannot be a legal obligation, from a data protection perspective.
- The term “technically feasible” in the GDPR
- Introducing a general right to data portability for non-personal data would stimulate data sharing and avoid vendor lock-in.

When should a dominant company be liable?

- The company is the dominant power in a certain market,
- Data collected through business activities in the market play an indispensable role in businesses, and
- Obtaining alternative data is technically and economically difficult.



Unreasonably rejecting others' request for data access may violate an antitrust law.

Can the Right be Regulated from an Antitrust Perspective?

	Effect on concentration	Search engines	Online marketplaces	Social networks
Direct network effects	+	low 1	low	high
Indirect network effects	+	high 3	high	medium
Economies of Scale	+	high 3	high	medium
Differentiation	-	low 3	high	high
Congestion	-	low 3	medium	medium
Switching Costs	+	medium 2	high	high
Market concentration (score)		high (2.5)	medium (2.17)	medium (2.17)

Engels B (2016) Internet Policy Review 5(2), p.11, <https://policyreview.info/node/408/pdf>

Conclusions

1. The right to data portability in the GDPR is the first promising provision. It has also given rise to several issues.
2. If controller-controller portability is called for, an antitrust perspective is preferable to a data protection perspective.
3. As the data protection and antitrust perspectives differ significantly, it will be difficult to combine them into a single law.
4. When it comes to establish data portability scheme from antitrust perspective, data portability should be obliged depending on the kinds of platform.