



UNITED STATES OF AMERICA
Federal Trade Commission

Prepared Remarks of Commissioner Noah Joshua Phillips

**Portability: An Event to Develop Rights and Uses
Commission Nationale de l'Informatique et des Libertés (France)**

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Good afternoon. I want to thank the CNIL, and in particular my friend President Marie-Laure Denis, for inviting me. Even in her relatively short time leading the CNIL, President Denis and her team have proven forceful advocates for privacy, in France and internationally.

Now is a critical time for all of us charged to protect privacy and data around the world, and it is my honor to be able to work with the CNIL.

I also want to thank those watching for humoring my need to speak in English. *J'ai étudié le Français au lycée, mais cela fait quelques années déjà, et maintenant j'oublie beaucoup.*

What some call the Fourth Industrial Revolution is upon us. Data collection and use are endemic to the lives of citizens, as well as global business, trade, and even modern cyber-crime and warfare. As a result, in the U.S., France, and the rest

of the world, the regulation of data and data flows is a matter of constant conversation.

Article 20 of the General Data Protection Regulation and regulatory and private sector portability efforts in countries like Singapore, Australia, and the U.S. together demonstrate that data portability is a critical part of that conversation. This conference, understanding the risks and benefits, different approaches, and reactions of industry and consumers thus far to portability efforts, will be an invaluable contribution. I am truly honored to join the incredible group assembled here today.

So, again, my sincere thanks for the invitation to participate, to share some of the learning we in the U.S. have been doing.

I am one of five commissioners at the U.S. Federal Trade Commission, a bipartisan, independent agency within the U.S. government that enforces competition and consumer protection law, including data privacy. My comments today are my own, and not necessarily the views of my fellow commissioners. But I'm sure all of us would agree that privacy and data security are getting renewed and vigorous focus, with enforcement actions in the last two years including those against TikTok, Facebook, YouTube, and, just recently, Zoom.

The FTC’s dual focus—including privacy and competition—makes data portability, and the related concept of interoperability, particularly worthy of attention. Portability and interoperability have the potential to give consumers access to, and control over, data. Homeowners can take data about their energy usage from the local utility to third parties that can incentivize reductions in usage, saving money and helping the environment. In the U.S., where healthcare—and health records—is privatized and decentralized, portability offers the promise of allowing patients to shop for better and less expensive care.

As scholars discuss and the OECD in its report “Enhancing Access to and Sharing of Data” has recognized, portability also holds potential: to reduce switching-costs between services, lessen network effects in digital markets, and spur innovation and choice.¹

¹ Gus Hurwitz, *Digital Duty to Deal, Data Portability, and Interoperability*, Report on the Digital Economy, Global Antitrust Institute (2020), <https://gaidigitalreport.com/2020/10/04/digital-duty-to-deal-data-portability-and-interoperability/> (“The basic economic rationales for these ideas are, respectively, to reduce switching costs and to reduce the barriers to entry that network effects can create.”); OECD, *Enhancing Access to and Sharing of Data: Reconciling Risks and Benefits for Data Re-use across Societies*, Ch. 2, OECD Publishing (2019), <https://www.oecd-ilibrary.org/sites/276aaca8-en/1/2/2/index.html?itemId=/content/publication/276aaca8-en&csp=a1e9fa54d39998ecc1d83f19b8b0fc34&itemIGO=oecd&itemContentType=book> (Portability “may enhance competition by i) reducing information asymmetries between individuals and the providers of goods and services; ii) limiting switching costs for individuals; and iii) potentially reducing barriers to market entry.”); Gabriel Nicholas & Michael Weinberg, *Data Portability and Platform Competition*, Engelberg Center for Innovation Law and Policy (Nov. 2019), <https://www.law.nyu.edu/centers/engelberg/pubs/2019-11-06-Data-Portability-And-Platform-Competition> at 5 (Noting Mark Zuckerberg’s comment that portability helps innovation and competition and testing that theory); Stigler Committee on Digital Platforms, Final Report, Stigler Center for the Study of the Economy and the State (2019), <https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report> at 113 (“[O]pen standards can slow down innovation that depends on the interface, but open standards will drastically reduce lock-in and market power, leading to greater incentive to innovate on the service itself.”).

But with all these potential benefits, portability also raises challenges for data privacy and protection, innovation, and even for intellectual property rights.

The confluence of all these questions led the FTC to hold a workshop in September, to which we invited experts to reflect on potential benefits and challenges relating to data portability. For those interested in more than my remarks, a video and transcript of the workshop is available on our website, and our Staff intends to publish a summary soon.

Portability and Privacy and Security

Our workshop examined several promising data portability developments around the world. For example, in the U.S., the Department of Health and Human Services recently issued regulations setting technical standards for sharing electronic health information, with the potential to improve patient control over health data and coordination of care.² The United Kingdom’s Open Banking

² Don Rucker, Remarks at Data to Go: An FTC Workshop on Data Portability (“Data Portability Workshop”) (Sept. 22, 2020), https://www.ftc.gov/system/files/documents/public_events/1568699/transcript-data-portability-workshop-final.pdf at 89 (“And we believe that that will actually result in, over time, in a wide variety of apps and a true ability for patients to have economic control of their health; to take their data and to move it somewhere else if they’re not happy”); Anna D. Kraus et al., *HHS Finalizes Interoperability Rules* (Mar. 17, 2020), <https://www.covingtondigitalhealth.com/2020/03/hhs-finalizes-interoperability-rules/#:~:text=The%20rule%20requires%20hospitals%2C%20including,and%20groups%20identified%20by%20the>; Press Release, Dep’t of Health & Human Services, *HHS Finalizes Historic Rules to Provide Patients More Control of Their Health Data* (Mar. 9, 2020),

initiative is using common API standards to promote the growth of fintechs offering consumer-friendly and less expensive banking services.³ And in India, the government is promoting a data-sharing framework that would allow, for example, a lender to obtain transaction history to evaluate loans for small businesses for which posting collateral is not an option.⁴

Health and financial information are areas where portability can be useful, but they also highlight the fact that portability often involves sensitive data. That sensitivity raises security concerns. Participants in our workshop noted the opportunities for malicious actors to hijack these kinds of sensitive, personal

<https://www.hhs.gov/about/news/2020/03/09/hhs-finalizes-historic-rules-to-provide-patients-more-control-of-their-health-data.html>.

³ Bill Roberts, Remarks at Data Portability Workshop *supra* note 2 at 94-98 (PSD2 “kind of required some of the same things. It required data sharing between payment services. But it didn't specify the use of common standards for APIs, and that was the big difference with what we did in the UK.” As an example of a service enabled by this initiative, consider “sweeping services. These were services which would-- basically, if you had too much cash in your checking account at the beginning of the month, it would take that money-- the app would take some money out of your account and put it on deposit, guarantee that you would get a better rate than your bank was giving you. If you were running a bit into the red at the end of the month, then rather relying on a bank overdraft, the app would pay money into your account and guarantee it would charge you less than your bank would charge you.”).

⁴ Rahul Matthan, Remarks at Data Portability Workshop *supra* note 2 at 49 (The idea behind DEPA is to assist in developing “some way in which we can, in a digitally secure manner, present the information of transactions that your bank account has to the potential lender, that may be the basis on which the lender can give you a loan.”); Regina Mihindukulasuriya, *'Data rich' and looking for a loan? Niti, Aayog's new data-sharing framework could help*, The Print (Sept. 8, 2020), <https://theprint.in/economy/data-rich-and-looking-for-loan-niti-aayogs-new-data-sharing-framework-could-help/497587/> (“This architecture primarily aims to empower Indians who become data rich even before becoming economically wealthier to seamlessly and securely access their data and share it with third party institutions.... Under the proposed system, Data Empowerment and Protection Architecture (DEPA), Indians who have no access to formal credit due to lack of collateral will be able to apply for loans using several types of digital documents that are currently not accepted by a bank as proof of credit worthiness.”) (internal citations and quotations omitted).

records, threatening real, tangible harm.⁵ In a recent study, a significant proportion of organizations tested did not adequately verify access requests under the GDPR, which is important to ensure only the *right* people have access to personal data.⁶

Access need not mean weakness, however: the same study found that industries that regularly handle sensitive data, like airlines and financials (indeed, larger companies generally), seemed to perform better.⁷ And in the UK, there have been no reported material security incidents resulting from Open Banking.⁸

Beyond security and authentication, there are other tensions between privacy and security and portability. If we mandate portability that includes information about third parties, like social graphs or even message threads with friends, that raises questions about consent, notice, where legal risk and responsibility should lie, and so on.⁹ Our 2019 case against Facebook involved the company’s Graph API,

⁵ Stacy Schesser, Remarks at Data Portability Workshop *supra* note 2 at 44-45 (“Complete records of specific pieces of personal information could fall into the wrong hands, and then you could have something far worse than just stealing somebody’s identity but even committing great acts of harm.”).

⁶ James Pavur & Casey Knerr, *GDPArrrrr: Using Privacy Laws to Steal Identities*, Blackhat USA 2019 Whitepaper (2019) at 5-6, <https://i.blackhat.com/USA-19/Thursday/us-19-Pavur-GDPArrrrr-Using-Privacy-Laws-To-Steal-Identities-wp.pdf>.

⁷ *Id.* at 6. *See also*, Murray, Remarks at Data Portability Workshop *supra* note 2 at 207 (“[I]ncumbents, the utilities in my case, often inflate the real privacy risks.”).

⁸ Roberts, Remarks at Data Portability Workshop *supra* note 2 at 99.

⁹ Gabriela Zafir-Fortuna, Remarks at Data Portability Workshop *supra* note 2 at 64; Nicholas & Weinberg *supra* note 1 at 3 (noting that the most valuable data to export may be the data that implicates third-party privacy interests); Inge Graef, Remarks at Data Portability Workshop *supra* note 2 at 55 (noting issues around data that involve more than one person); Facebook, Public Comment to Data Portability Workshop (2020), <https://www.regulations.gov/document?D=FTC-2020-0062-0006> (noting questions about the responsibilities of the transferring entity).

which allowed apps to pull data about users' friends.¹⁰ Portability must also address questions about intellectual property, as shared data has the potential to expose, directly or by inference, trade secrets.¹¹

Portability and Competition

What of competition? Unlike privacy and data protection rules that vindicate certain data subject rights but—like many regulations—also can entrench incumbents by erecting barriers to entry, experts suggest that portability offers the promise of *stoking* competition.¹²

Does it work?

Policymakers in the U.S. often cite the 1996 and 2003 mandates allowing consumers to port their land and mobile telephone numbers from one plan to another as a successful example of a portability mandate. Certainly, consumers have taken advantage. But our health portability statute, the Health Insurance

¹⁰ *United States v. Facebook, Inc.*, No. 19-cv-2184 (D.D.C. July 24, 2019), <https://www.ftc.gov/enforcement/cases-proceedings/092-3184/facebook-inc>.

¹¹ Graef, Remarks at Data Portability Workshop *supra* note 2 at 55 (noting issues around data protected by intellectual property rights).

¹² Peter Swire, Remarks at Data Portability Workshop *supra* note 2 at 29 (“So, in conclusion, for opening up data flows, for transferring data, portability of data, there can be great benefits for competition, antitrust, to have innovation, to have freedom of individual choice. These are valuable reasons to consider portability.”); Karolina Mojzesowicz, Remarks at Data Portability Workshop Remarks at Data Portability Workshop *supra* note 2 at 36 (Portability “has the procompetitive effect for new commerce on the market for maybe also SMEs, small and medium size enterprises, and prevents the so-called locked-in consumers which already used for several years platforms, social media, and provided a lot of data.”).

Portability and Accountability Act (HIPAA) of 1996, is just as often experienced by Americans as a barrier to the very portability it promises.¹³ Just weeks ago, for example, a clinic refused to email me my son’s negative COVID-19 test results “because of HIPAA”. To be clear, that is not what the law commands, but sometimes, that is how it operates.

A recent New York University study took Facebook user data, shared them with developers, and found them “simultaneously insufficient to replicate Facebook and too tailored to Facebook to be useful for much else.”¹⁴ These portability tools allowed a form of data ownership, but were only useful to recreate a (poor) Facebook clone, and thus are unlikely to address competition or innovation without more.¹⁵

Others have expressed concern that increased data portability may in fact harm smaller firms, as data flows toward larger entities which can leverage network effects in their favor.¹⁶ Isabelle da Silva, head of the French Merger Authority—and a

¹³ Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 42 U.S.C. and 29 U.S.C.).

¹⁴ Nicholas & Weinberg, *supra* note 1 at 2.

¹⁵ Gabriel Nicholas, *The New Portability*, Engelberg Center for Innovation Law and Policy (2020), <https://www.law.nyu.edu/centers/engelberg/pubs/2020-09-01-the-new-portability> at 10 (“Data portability has enormous unrealized potential to improve competition in the tech sector. It can create opportunities for new market entrants to compete with existing hegemonic software services and build their own innovative products on top of existing data. To realize this potential, data portability rules and guidelines must ensure that users can easily port their data and competitors can integrate that data into their products.”).

¹⁶ *See, e.g.*, Graef, Remarks at Data Portability Workshop *supra* note 2 at 57 (“I also now see concerns being expressed that data portability could actually strengthen the position of established players by letting users invoke the right to data portability to get even more data. And this would

participant today—reported hearing complaints that portability would make it easier for larger music streaming services to take market share from smaller players.¹⁷

Questions like these about the efficacy of portability lead some to suggest going beyond portability toward greater technical interoperability requirements, and even “full protocol interoperability,” requiring companies to permit competitors to interconnect, similar to the way different telecoms share networks, allowing me seamlessly to call a Verizon mobile phone from an AT&T handset.

While notionally appealing, such proposals are not without costs, in particular for innovation. Where companies must share the fruits of their labor, they may have less ability to protect their intellectual property and, critically, less incentive to innovate.¹⁸ Moreover, the increased standardization necessary for interoperability may also reduce differentiation: companies have to do the same

then lower competition because smaller firms could then see their users move to the established players with their data.”).

¹⁷ PaRR, Presentation, *ABA Antitrust Spring Meeting* (2019), https://www.acuris.com/assets/PaRRABAreport2019_1.pdf (“The Autorité then heard from music streaming service Deezer that if users are allowed to leave with a whole list of music they created, it might make it easier for Apple or other big actors to take over the user, de Silva said.”).

¹⁸ *Id.* (“[C]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.... The duty to deal itself reduces the expected flow (that is, net present value) of future revenues from successful innovations—which, in turn, will reduce the amount that firms are willing to invest in potentially disruptive innovation.”).

things to meet the standards.¹⁹ This is particularly relevant in winner-take-all technology markets, where threats to incumbents may be more likely to come from differentiated products, not clones. And, of course, there is a cost for new entrants to implement and manage compliant systems. For these reasons, some reserve interoperability mandates—particularly full platform integration—as a remedy for anti-competitive conduct in specific cases—where market mechanisms have already been disrupted—rather than as an *ex ante* rule.²⁰

¹⁹ Crémer et al., *Competition Policy for the Digital Era*, Eur. Comm’n (2019), <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> at 59 (“[F]ull protocol interoperability can come at a high price: the need for strong standardisation across several competing platforms could significantly dampen their ability to innovate and to differentiate the type(s) of service(s) they provide. One of the most important grounds for continuing competition between platforms, and possibly for competition for the market, could therefore be weakened or even eliminated.”); Hurwitz, *supra* note 1 (“For instance, a firm that avails itself of its dominant competitor’s network will need to maintain some level of compatibility with that network in order to maintain the benefits of the network effects that result from interoperability. The competitor, therefore, will have less ability to compete by offering new or improved core functionalities; instead, it will focus on repackaging or reselling the services already offered by the dominant firm.”); Michael Kades & Fiona Scott Morton, *Interoperability as a competition remedy for digital networks*, Wash. Center for Equitable Growth (Sept. 2020), <https://equitablegrowth.org/working-papers/interoperability-as-a-competition-remedy-for-digital-networks/> at 25 (“[A]s we described above, standardization can promote innovation ‘in the non-standardized functionality.’ On the other hand, there could be less innovation on the functionality that is incorporated into the standard.”); Graef, et al., *Data Portability and Data Control: Lessons for an Emerging Concept in EU Law*, 19 German L.J. 1359, 1387-88, <https://www.cambridge.org/core/journals/german-law-journal/article/data-portability-and-data-control-lessons-for-an-emerging-concept-in-eu-law/5904FB88DDC1B9E6EC651A7F89058433> (“Standardization can help to implement the RtDP in a cost-effective way and thus increase its positive effects. A possible negative consequence of standardization, however, is that once a particular standard is chosen, the development of new technologies stagnates. This is because market players will be inclined to provide products and services complying with the agreed standard. While the exact impact of the RtDP on the competitive landscape remains to be seen, it is clear that its implementation will influence innovation incentives and innovation paths depending on the breadth of its scope of application as well as the resolution of its trade-off with IP rights.”).

²⁰ Kades & Morton, *supra* note 19 (discussing this type of interoperability as a remedy in markets characterized by network effects, where the risk of inhibiting innovation is less because the market is already functioning inefficiently). Others question the wisdom and efficacy of such obligations. See Hurwitz, *supra* note 1 (“Imposing a duty to deal, whether as an antitrust remedy or through a regulation requiring interoperability or data portability, risks reducing the incentives that competition law is designed to promote. U.S. antitrust law seeks to avoid false positives in its duty to deal jurisprudence for precisely this reason. Moreover, the history of trying to implement a duty to

Recommendations

While some portability mandates have been around a while, we are still in the early days; and facing new challenges. Markets and consumers have not yet evolved to facilitate or take advantage of all the data sharing capabilities available, and we do not know whether portability can achieve its goals.²¹ While U.K. Open Banking has seen a million users and 700 institutional participants,²² one large data controller recently shared with me that of the millions of monthly visitors who access its privacy options, only between 500 to 1000 request data exporting.

One thing that suggests to me is that portability aimed at solving specific user needs—as opposed to the desires of competing firms, generalized concerns about competition, or attempts at industrial planning—has a better chance of success. Focusing on consumer needs responds to demand and so can catch on and even create markets. In the U.S., consumers wanted to keep their phone numbers when they changed plans—and porting was a success.

deal for AT&T during its years as a regulated monopoly shows the practical difficulty of enforcing that duty. The agencies considering interoperability and data portability requirements in the U.S. and the E.U. should proceed with caution—and those arguing for them should bear a heavy burden to demonstrate those requirements are needed and will likely prove beneficial to competition.”).

²¹ Nicholas, Remarks at Data Portability Workshop *supra* note 2 at 147; Hurwitz, *supra* note 1 (“The Australian Competition & Consumer Commission (ACCC) Digital Platforms Inquiry considered the benefits of data portability and interoperability requirements but did not recommend them because it did not think they would either significantly reduce the network effects of online platforms or reduce barriers to entry.”).

²² Roberts, Remarks at Data Portability Workshop *supra* note 2 at 99.

As several experts expressed at our workshop, sector-specific approaches may offer more opportunities for early success. Industries like healthcare and banking are already tackling some of the thornier issues like authentication or may have data more suited to portability; and starting with a targeted approach may allow for the design of more concrete requirements and common standards.²³ But above all, portability options in those areas are responding to real and immediate demand and provide tangible consumer benefit. I want my lender to have ready access to my banking information to offer credit products; I do not necessarily have the same need to move my historical social media information to a new provider. Whether you share that view or not, the point is that a targeted approach is worth considering.

As we consider portability mandates, we should not neglect the other government mandates that may impede portability or make it less efficacious. Regulatory limitations – like requirements for third-party consent or concerns about antitrust liability – may make it more difficult to share data than may be necessary to protect consumers.

²³ Swire, Remarks at Data Portability Workshop *supra* note 2 at 170 (“In Europe, there are these general rules in the background. So if it went from a health provider, who might be under stricter rules, to someone else, there’s still GDPR in place. In the United States, if it goes from a HIPAA entity, relatively strict, to some other entity outside of the sector, maybe the FTC can enforce for deceptive practices. But in practice, there’s a much lower level of requirements. And so the risks to privacy when you don’t have a national law are higher when it goes out of the sector by sector.”); Graef, Remarks at Data Portability Workshop *supra* note 2 at 79.

The same can be said for barriers on data flows between countries. The success of data portability goals will depend in substantial part on the availability of options for consumers—that is, places to which the data can be ported. The broader the possibilities, the better the chance of portability succeeding. To my mind, that means encouraging efforts to permit data flows, between nations—like the U.S. and France—with fundamentally common values. That is part of why I hope that the U.S. and the E.U. can find a path forward to continue to share data, for our common good. At the FTC, we stand ready to protect the data of users, at home and abroad.

Like the U.S., France values innovation, technology, growth, competition, and privacy. The excellent leadership and staff at the CNIL reflect that commitment. So I am, again, humbled to join all of you here today. And I am confident all of us have much to learn from these proceedings.

Merci