# From content portability to data portability: when regulation overlaps with competition law and restrictions can be justified by intellectual property

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## 1. Introduction

'Portability' has become a buzzword. At least in the language of the Brussels insiders dealing with the so-called 'information society' (itself, an outdated buzzword). In the European Commission's *Digital Single Market Strategy* of May 6, 2015 (the 'DSM Strategy'), the term was used to refer to *content* portability as well as to *data* portability.

According to the DSM Strategy, "*as regards portability, when consumers cross an internal EU border they are often prevented, on grounds of copyright, from using the content services (e.g. video services) which they have acquired in their home country* ».[1] Content portability is meant to overcome the internal borders regarding protected works[2] – the fight is about fencing, it is here called geo-blocking. Geo-blocking permits content providers and distributors to restrict consumers from accessing their home service when they travel or from accessing content available in another Member State than the one where they reside. The geo-blocks which disallow access to a service from IP addresses located outside a particular territory enforce the contractual restrictions when rights in content are licensed on an exclusive territorial basis. This is often the case with audiovisual and premium sports content for example.[3] Geo-blocking aims to protect copyright (owners) by facilitating the exploitation of films over time (the «windows » of exploitation) and by making it possible to differentiate the pricing of content. Those technical barriers appear as restrictions to the freedom of services, but might be « justified » by the « protection of industrial and commercial property »[4]. Consumers who travel more and spend more time outside their home country have been complaining about the content portability limitations.

1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, COM(2015) 192 final, p. 7.

2 Content is thus synonymous with original works protected by copyright (or a related right). By contrast, data as such are not protected by copyright. However, as shown below, data portability often requires access to the data format which can be protected by intellectual property rights.

3 The widespread use of geo-blocking, mainly implemented through IP address verification, is confirmed by the 18 March 2016 Commission Staff Working Documents on *Geo-blocking practices in e-commerce* presenting the initial findings of the e-commerce sector inquiry conducted by DG Competition (see SWD(2016) 70 final, p. 3 and 45 ff. on geo-blocking of digital content).

4 This exception to the free movement of goods provided by Art. 36 TFEU also applies to the freedom to provide services under Art. 56 and 57 TFEU.

Portability is used by the Commission's DSM Strategy in another context: under the title 'Building a data economy', the DSM Strategy explains that « *(t)he lack of open and interoperable systems and services and of data portability between services represents another barrier for the cross-border flow of data and the development of new services* ».[5] Data portability is of concern to the Commission because of national restrictions, such as the Member States requirements to keep data inside their territory, or because of the contractual restrictions imposed by private (cloud) providers, making the online data not effectively portable. Data portability appears as a challenge for the development of the data-driven economy and the exploitation of Big Data across the continent.

Regarding *content* portability, the Commission, on 9 December 2015, presented a draft Regulation *on ensuring the cross-border portability of online content services in the internal market*[6] (hereafter the 'draft Regulation') which aims to respond to the consumer complaints. In the first part below, we examine this proposal.

To address the issue of *data* portability, the DSM Strategy has announced a European 'Free flow of data' initiative to tackle restrictions on the free movement of data for reasons other than the protection of personal data. The aim here is to remove unjustified restrictions on the location and transfer of data throughout Europe.

The *ex ante* regulation of the two types of *cross-border* portability envisaged by the Commission focuses on the freedom of services across the EU. Secondary legislation appears necessary to give more flesh to the requirements arising out of the Treaty provisions on freedom of services (Art. 56 and 57 TFEU).

Data portability, however, is a broader issue which has implications outside the cross-border context: in the field of data protection, data portability is a right for individuals to transfer their personal data from one provider to another one.[7] The data portability issue is also addressed by the draft directive on certain aspects concerning contracts for the supply of digital content.[8] In addition, data portability is essential in the context of the ex post regulation by competition law of unfair terms of use. The Bundeskartellamt investigation of Facebook seems to raise this issue.[9]

Although connected, those data portability issues are left out of the present contribution. We focus here on *content* portability that we envisage through the interplay between the ex ante regulation (part 2), the application of the Treaty provisions on freedom of services (part 3) and the competition rules (part 4). The aim is to show how the ex ante regulation, the principle of freedom of services and the competition rules interact. In the conclusion (part 5), we look again at data portability, a topic of growing importance because of the role of Big Data in the platform economy.

## 2. The draft Regulation on Content Portability

As stressed by the Commission in its 9 December 2015 Communication *Towards a modern, more European copyright framework*, the EU should strive for a broad availability of online content services 'without frontiers', but the Digital Single Market is not a reality when it comes to copyright-protected content crossing borders.[10] The Commission

5 Communication, op. cit. (note 1), p. 14.

6 COM(2015) 627 final of Dec. 9, 2015.

7 Article 18 of the General Data Protection Regulation (or GDPR), adopted by the European Parliament on 14 April 2016 (following the adoption by the Council at first reading on 8 April 2016), allows individuals to re-use their personal data which the data controller would have to provide « in a structured and commonly used and machine-readable format ». Individuals have also the right to transmit the data to another controller without hindrance. Some commentators have criticized the inclusion of this provision in the GDPR as portability is a matter for anti-trust law and data protection law shall not become a « 'Trojan horse' for anti-trust regulation » (N. Härting and J. Schneider, *Data Protection in Europe: An Alternative Draft for a General Data Protection Regulation*, in *CRi Supplement* 1/2013, p. 16). Bruno Lasserre, president of the French Competition Authority, acknowledges that the requirement of data portability has competition implications and that there is an overlap with the regulation of privacy (see his presentation at the March 8, 2016 conference on *Les données et la concurrence dans l'économie numérique*, Paris, ENA, accessible on https://www.youtube.com/watch?v=OZy8MamaVcQ).

8 The European Commission aims to address data portability in the context of the regulation of contracts: the recent draft directive on certain aspects concerning contracts for the supply of digital content (COM(2015) 634 final of Dec. 9, 2015) contains several provisions (art. 13(2)(c) and 16(4) on termination of contracts) which impose on the supplier to allow the consumer to retrieve the data « without inconvenience, in reasonable time and in a commonly used data format ».

9 See the press release of the German Competition Authority, *Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules*, 2 March 2016 (available on www.bundeskartellamt.de).

10 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a modern, more European copyright framework*, 9 Dec. 2015, COM(2015) 626 final, p. 3.

proposes a gradual approach to remove the obstacles to the circulation of content, and the first step is the 2015 draft Regulation.[11] This piece of legislation aims to enhance access to content, mainly premium sporting and audiovisual content, which the right holders commonly license country by country, thus making the services providing this content not portable across borders.[12] By contrast, consumers, when travelling across Europe, can usually access and use online music services or video games, which, normally, are licensed without a territorial exclusivity. (For content, such as e-books, the distribution model involves a download and the access to the downloaded content is ensured for those who bring their e-reader across borders). Although sporting events as such are not protected by copyright or related rights, the transmission of such event is accompanied by copyright-protected elements, such as opening or closing video sequences or music, and there is also a related right of the broadcasting organizations when the signal of the broadcast is transmitted. Most, if not all, online services include a mix of protected and non-protected elements.

To ensure portability *across borders* when portability is already offered *'at home'*[13], the draft Regulation (i) imposes a service obligation on online content providers and (ii) regulates the contracts up and down in the chain.

**2.1. The service provider obligation.**

The first part of the draft Regulation obliges the online content service providers to "enable a subscriber who is *temporarily present* in a Member State to access and use the online content service" (Art. 3(1)). There will be discussion about what a temporary presence abroad means. The draft Regulation does not provide guidance on how to interpret this requirement, nor does it specify how to assess the customer's country of residence. A strict interpretation would make the draft Regulation applicable solely to short-term travellers and tourists, and the rule could then be viewed as a sort of "roaming for Netflix".[14] Making the link, the Commission, in its explanatory memorandum, finds its draft Regulation timely because of the forthcoming end of roaming charges for travelers within the EU.

Both content and data portability are at the core of the Digital Single Market Strategy and its objective to facilitate cross-border services.

There are several relevant conditions (and irrelevant criteria) to determine the service providers to which the obligation applies. First, an "online content service" is a service (i) that a service provider is lawfully providing on a portable basis 'at home' and (ii) that is provided by an audiovisual media service in the sense of the Audiovisual Media Service (AVMS) Directive 2010/13/EU. An "online content service" also covers a service "the main feature of which is the provision of access to and use of" protected subject matter; on the contrary, the services that use works in an ancillary manner, such as graphical elements or music as a background integrated in a website the main purpose of which is the sale of goods (see recital 14), are not subject to the obligation. Second, for the service provider to be subject to the portability

11 The Commission admits that « a long-term target » to avoid (contractual) fragmentation of the EU along the national copyright borders would be « a single copyright title » with « a single copyright jurisdiction » allowing « uniform application of the rules » (see COM(2015) 626 final, p. 12).

12 The Impact Assessment gives examples among which: the users of the Belgian IPTV service Proximus TV Partout who can watch their favourite channels on tablets and smartphones, but only in Belgium ; the subscribers of HBO Nordic who, when staying in France or Italy, will not be able to watch films, as the service 'is only available in Sweden, Norway, Denmark and Finland' (SWD(2015) 270 final, p. 8).

13 For the requirement of portability to apply *across borders*, the portability must first be guaranteed *in the Member State of residence* of the subscriber. In the draft Regulation (Art. 2(f)), « 'portable' means that subscribers can effectively access and use the online content service in the Member State of residence without being limited to a specific location ».

14 G. Mazzitoti and F. Simonelli, Regulation on 'cross-border portability' of online content services : Roaming for Netflix or the end of copyright territoriality ?, CEPS Commentary, 15 Febr. 2016, available on https://www.ceps.eu/publications/regulation-'cross-border-portability'-online-content-services-roaming-netflix-or-end. Those commentators fear that a loose interpretation would "lead to a significant erosion of the principle of copyright territoriality". The Parliament has already indicated that the territoriality principle should be maintained, and one can thus expect that a strict definition of the temporary presence will be added during the legislative process.

obligation, it does not matter whether the online content service is provided for a fee or for free, but a contract must exist. The fee can be paid directly to the online content service provider or through an operator offering a telecommunications service. If there is no payment, then the service is not subject to the Regulation if the consumer's State of residence is not verified.[15] For the Regulation to apply, a simple registration to receive content alerts or a mere acceptance of cookies is not considered as a contract (see recital 13). Third, the obligation is independent from the technology used. The content might be provided by streaming, downloading or any other techniques. The portable *subscription services* offered by Netflix or Amazon Prime for films, Spotify or Deezer for music, are clearly covered. The *transactional services* involving the sale of a particular file are also subject to the obligation when the copy purchased is only accessible through a digital locker or a cloud-based technology. By contrast, there is no portability obligation – but no need either – when a film or song bought on Google Play or iTunes is downloaded on a tablet.

As to the substance of the obligation, the service provider must guarantee to the consumers temporarily abroad "access to the same content on the same range and number of devices, for the same number of users and with the same range of functionalities" than 'at home' (see recital 18). This might create some practical difficulties. The service provider, however, is not obliged to offer the same quality of service abroad (Art. 3(2)).

### 2.2. Regulation of various contracts.

The draft Regulation essentially is an instrument to regulate contracts, making anti-portability provisions 'unenforceable' (Art. 5(1)). Two types of contracts might be (partly) unenforceable: first, the licenses between the rights holders and the service providers (commercial contracts); second, the contracts between the service providers and the subscribers (consumer contracts). Usually, the territorial restrictions contained in the consumer contracts reflect the restrictions imposed higher in the chain. By regulating the contracts the draft Regulation operates in a similar way as competition rules, but ex ante and with more detailed obligations.

Of course, the draft Regulation does not affect the application of article 101 TFEU, neither the requirements deriving from the Treaty provisions on freedom of services, which could address other situations.

## 3. Content portability and access under the freedom of services

Content *portability* is rather narrowly defined in the draft Regulation; it must be distinguished from the broader issue of cross-border *access* to online content services. This last issue remains governed by the principles of the Treaty, including freedom of services and free competition.

The territoriality of copyright in principle justifies contractual restrictions between right owners and service providers that might have the effect that residents in one Member State cannot access a service offered in another Member State. Copyright is territorial in the sense that the exclusive rights which are comprised within copyright are acquired and enforceable on a country-by-country basis under each national copyright law. The territoriality of copyright, which implies that different entities might hold the national copyright in each Member State, thereby often leads to territorial licensing and possibly the segmentation of national markets, which appears contrary to the objectives of the Treaty. In an online context, a copyright owner (holding the copyrights for all Member States) could thus allow various distributors to set up an online content service on a strictly national basis, for example by including the obligation to only serve customers residing in the Member State where the distributor operates.

Intellectual property may justify restrictions to the free provision of services. Such restriction must, however, not go beyond what is necessary and is in fact only allowed to the extent that it is required to safeguard the specific subject-matter of the concerned intellectual property right[16].

15 Some free services do not rely on an express contract and do not involve any verification of the residence of the consumer (e.g. www.rtv.es/television/ and www.rtbf.be/video/ ).

16 See *inter alia* CJEU, 31 October 1974, C-16/74, ECLI:EU:C:1974:115 (*Centrafarm v Winthorp*), para 7 (on trademarks); CJEU, 22 June 1976, C-119/75, ECLI:EU:C:1976:94 (*Terrapin v Terranova*), para 5 (trademarks); CJEU, 17 October 1990, C-10/89, ECLI:EU:C:1990:359 (*SA CNL SUCAL NV v HAG GF AG*), para 12 (trademarks).

Several CJEU decisions have defined the subject-matter of copyright, sometimes relying on the related notion of the essential function of the right. According to *Musik Vertrieb*, the specific subject matter of copyright, which constitutes a source of remuneration and a form of control on marketing, is to ensure the commercial exploitation of the copyrighted works.[17] In *Phil Collins*, the Court ruled that "the specific subject-matter" of copyright and the related rights "*as governed by national legislation, is to ensure the protection of the moral and economic rights of their holders. (...) Copyright and related rights are (...) economic in nature, in that they confer the right to exploit commercially the marketing of the protected work, particularly in the form of licences granted in return for payment of royalties.*"[18]

Like competition law, the draft Content Portability Regulation regulates contracts making territorial restrictions unenforceable.

In the context of services, the Court of Justice, in *Coditel I*, decided that the freedom to provide services can indeed be restricted to allow "*certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States.*"[19] The protection of intellectual property would not go as far as to allow the parties to create "artificial barriers to trade between Member States". The CJEU stated that copyright allows the right holder to require fees for "*any showing or performance" of protected subject matter (which is part of the "essential function" of copyright*[20]*) and the parties to a contract can agree on geographical limits to protect the author and the licensees without such agreement amounting automatically to a prohibited restriction of the freedom to provide services, considering the context of television broadcasts*". Moreover, "*the mere fact that those geographical limits may coincide with national frontiers does not point to a different solution in a situation where television is organized in the Member States largely on the basis of legal broadcasting monopolies, which indicates that a limitation other than the geographical field of application of an assignment is often impracticable*".[21] In *Coditel I*, it was decided that the holder of the right to screen a film in Belgium was entitled to oppose the cable retransmission of that work by a cable operator in the same Member State: this was not considered as an unjustified restriction to the freedom to provide services.

The fact that end-users are prohibited to access online services has to be factored in the analysis based on the freedom of services. For instance, in *Liga Portuguesa de Futebol and Bwin International v. Departamento de Jogos*, the CJEU indicates that freedom to provide services is for the benefit of both *providers* and *recipients* of services. It is accepted that the legislation of a Member State which prohibits providers established in other Member States from offering via the internet services in the territory of that first Member State constitutes a restriction on the freedom to provide services and also imposes a restriction on the freedom of the residents of the Member State concerned to enjoy, via the internet, services which are offered in other Member States.[22] The Court thus includes in the freedom of services the freedom of end-users *to enjoy and access* those services.

In *Premier League*[23], the practice of the Football Association Premier League (FAPL) to grant licenses for the live transmissions of matches on a territorial basis was at stake. Each licensed broadcaster has the exclusive right to broadcast in a given Member State. To enforce this exclusivity, each broadcaster is required to encrypt its broadcast, and is prohibited from supplying decryption devices (decoders) for use outside

17 CJEU, joined C-55/80 and 57/80, ECLI:EU:C:1981:10 (*Musik-Vertrieb membran v GEMA*), para 13.

18 CJEU, 20 Oct. 1993, C-326/92, ECLI:EU:C:1993:847 (*Phil Collins v Imtrat Handelsgesellschaft mbH et alii*), para 20.

19 CJEU, 18 March 1980, C-62/79, ECLI:EU:C:1980:84 (*SA Compagnie générale pour la diffusion de la télévision, Coditel v Ciné Vog Films*), para 15 (Coditel I).

20 Idem, para 14.

21 Idem, para 16.

22 CJEU, 8 Sept. 2009, C-42/07, ECLI:EU:C:2009:519 (*Liga Portuguesa de Futebol and Bwin International v. Departamento de Jogos*), para 51.

23 CJEU, 4 October 2011, joined C-403/08 and C-429/08, ECLI:EU:C:2011:631 (*Football Association Premier League v QC Leisure and others and Karen Murphy v Media Protection Services*).

the licensed territory. FAPL sued both the pub operators and the suppliers of the decoders in the UK courts, alleging among other claims that their activity violated a section of the UK's Copyright Act prohibiting the trade of foreign decoding devices. Regarding freedom of services, the CJEU concluded that the UK law, by prohibiting the supply and use of decoders, in reality prevented UK residents from receiving broadcast services from other Member States in violation of Article 56 TFEU. The CJEU added that national laws restricting free movement could be justified in certain situations – including where necessary to safeguard intellectual property. However, the CJEU concluded that the protection of intellectual property was not a justification here for two reasons: first, there was no copyright in the underlying football match; second, while the CJEU acknowledged that Member States were free to confer protections on sporting events (via related rights), it concluded that even then, such protections would not necessarily justify laws prohibiting the supply of decoders. As the CJEU explained, national laws restricting free movement must not go beyond what is necessary to protect the owner's rights – e.g. the right to exploit the work commercially. In the CJEU's view, a prohibition on foreign decoders *exceeded* what was necessary. Specifically, the prohibition was not necessary to ensure that holders of rights in sporting events received *appropriate remuneration* for the use of their copyrighted works – but instead, the law was designed to *maximize* remuneration by generating a premium from broadcasters who wanted territorial exclusivity.[24] In the CJEU's view, protecting intellectual property "*does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration*."[25]

*Premier League* deals with territorial licensing in the context of satellite broadcasting. The decision does not say that the same conclusions apply to the online distribution of copyrighted content. However, there is no compelling reason to distinguish broadcasting services from online services.

Beyond content portability, the Treaty provisions on freedom to provide services require cross-border access to online content services unless it is justified by the protection of copyright.

## 4. Content portability and access under competition law

In *Premier League*, the CJEU also considered whether restrictive FAPL license provisions were anti-competitive. In the context of competition law, the same concept of specific subject matter of the intellectual property right has been used to determine whether restrictions are justified. The Court confirmed that, in principle, granting a sole licensee the exclusive right to broadcast a match via satellite from a single Member State was not in and of itself anti-competitive. However, the CJEU held that *additional license terms* that imposed *absolute bars on the cross-border provision of services* – such as prohibitions on the supply of decoders for use outside the licensed territory – were anti-competitive and violated Article 101 of the TFEU. Those clauses grant an absolute territorial exclusivity which eliminates all competition between broadcasters.

Assessing the scope of the practices that are justified by the protection of intellectual property rights also requires to take into account other legitimate EU objectives, such as the flowering of cultures of the Member States. According to some studies "*the practice of territorial licensing of audiovisual works*" is "*the prevailing outcome of the arms-length negotiations between rightholders and licensees*". Territorial licensing in this sector can be justified by key structural factors: "*the linguistic and cultural preferences of target audiences in the presence of 24 official languages; the national footprint*

24 Idem, para 114 to 117 : "*a premium paid to the right holders in order to guarantee absolute territorial exclusivity*" which is such as "*to result in artificial price differences between the partitioned national markets*" "*cannot be regarded as forming part of the appropriate remuneration*".
25 Idem, para 108.

*of broadcasting (other than by satellite) and telecom networks; public service broadcasting and subsidies to audiovisual works; the national organisations of advertising markets and the specific commercial opportunities that arise in each market for audiovisual content due to its history*".[26] All those factors might indeed play a significant, if not leading role, in the prevalence of the territorial model for licensing audiovisual works and might justify some licensing and geo-blocking practices.[27] Some of those factors (for ex. the national financing schemes) might not be relevant for the distribution of content other than audiovisual works. In any case, there is no reason to adopt rules that would impose a pan-European model for licensing (all types of) content in all Member States. But some contractual practices go beyond what is justified by the protection of intellectual property and/or by additional overriding objectives.

Following an investigation initiated in 2014, the Commission sent in July 2015 a statement of objections to Sky UK and six major US film studios (including Disney, Paramount Pictures, Twentieth Century Fox and Warner Bros) which are suspected of bilaterally agreeing to put in place contractual restrictions that prevent Sky UK from allowing EU consumers located elsewhere to access, via satellite or online, pay-TV services available in the UK and Ireland.[28] The Commission has identified clauses in the licensing agreements which require Sky UK to block access to films through its online pay-TV services to consumers outside its licensed territory (i.e. by "geo-blocking"). Such clauses restrict Sky UK's ability to accept unsolicited requests for its pay-TV services from consumers located abroad, i.e. from consumers located in Member States where Sky UK is not actively promoting or advertising its services (so-called "passive sales"). As in *Premier League*, the issue is whether the disputed clauses grant an absolute territorial exclusivity which eliminates cross-border competition and partition the internal market. Paramount Pictures has offered a number of commitments to address competition concerns regarding its licenses with the broadcasters in the EEA on which the Commission is seeking feedback since April 22, 2016.[29] This might indicate that the studio is ready to cease to geo-block its content, but, without the creation of an EU copyright title, it will remain difficult to limit some territorial partitioning because of the possibility to rely on the intellectual property justification for contractual restrictions.

## 5. From content portability to data portability: a new frontier for regulation and competition law

In the past, content portability and content access issues have been addressed through the rules of freedom of services and free competition. The objective of the draft Regulation (see point 2 above) is to ensure, by a set of detailed rules defined ex ante, the cross-border portability of content.

Content portability is not unrelated to the newly discussed issue of data portability which appears as a new frontier for regulation and competition law. When national rules (for ex. imposing to store data on local servers) or private contracts prevent the free flow of data across the EU, *cross-border* data portability issues arise, and some ex ante regulation justified by the freedom to provide services might be required. The Commission, in its 2015 DSM Strategy, has alluded to this issue, but the DSM « Free flow of data » initiative has not yet taken shape.[30]

Data portability issues can also exist in the absence of cross-border transfer of data, for instance when a small business cannot switch its cloud provider or an individual cannot move its personal data from a social networking provider to another one. Competition law or consumer law, rather than freedom of services, comes in when such a data-based lock-in effect exists. DG Competition however so far seems to consider that the data privacy issues have been over-played and that Europe does not need a new competition rulebook for 'big data'.[31] By contrast, the German

26 Enders Analysis, *The value of territorial licensing to the EU*, 8 Oct. 2013, p. 2.

27 See A. Ohly, *Geoblocking zwischen Wirtschafts-, Kultur-, Verbraucher und Europapolitik*, ZUM, 2015, p. 942-950.

28 European Commission, Press release (13 January 2014), "Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services" (http://europa.eu/rapid/press-release_IP-14-15_en.htm) and European Commission, Press release (23 July 2015), "Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland" (http://europa.eu/rapid/press-release_IP-15-5432_en.htm).

29 See the European Commission press release of 22 April 2016, *Antitrust: Commission seeks feedback on commitments offered by Paramount Pictures in pay-TV investigation*, available at http://europa.eu/rapid/press-release_IP-16-1530_en.htm .

30 The recently leaked Communication from the Commission on *Online Platform and the Digital Single Market* (dated 25 May 2016) does not present the cross-border data portability initiative.

31 See the summary of Margrethe Vestager's speech in Munich in Jan. 2016 prepared by Bristows LLP under the title *Is 'big data' the new*

Bundeskartellamt is willing to address the role of (personal) data aggregation and (unfair) terms of use in building market dominance, as it appears from its announcement of the *Facebook* probe on March 2, 2016.[32] When the data portability issue involves personal data, data protection legislation also plays in.[33]

Data portability does not only require the transfer of (personal) data: quite often, the reuse of metadata or data format is more crucial for achieving true portability. For instance, if an SME wants, or is forced, to switch cloud providers, retrieving the structure into which the data has been entered is often as essential as the data itself.[34] In addition, the data structure might be protected by intellectual property[35], and a balance with the protection of intellectual property has to be found here, as in the case of content portability.

There is thus a continuity between the cases involving content and data portability, and a balance with the protection of intellectual property must be struck. Beyond competition law, new ex ante regulations are starting to deal with both issues.

If the draft Regulation aims to ensure a sort of « roaming for audiovisual services », the data portability requirement has been compared with the obligation of number portability in the telecom sector – the analogy works only partly because achieving « roaming for Netflix » or making data portable is much more complex in practice.

> If content portability aims to achieve « roaming for audiovisual services », data portability has been compared with the number portability requirement in the telecom sector – but those analogies are partly misleading because of the possible justification by intellectual property of some limitations to content or data portability.

*frontier for competition law ?*, Jan. 20, 2016 (available on Lexology.com). DG Competition has not seriously considered the data accumulation issues in the two merger decisions when it approved Google's acquisition of DoubleClick in 2008 and Facebook's purchase of WhatsApp in 2014 (see para. 70 till 72 of the Commission decision in the Case M.7217 – *Facebook/WhatsApp*).

32 See http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html . The European Data Protection Supervisor already stressed the impact of data protection in its Preliminary Opinion on *Privacy and competitiveness in the age of big data : The interplay between data protection, competition law and consumer protection in the digital economy*, March 2014 (available at https://secure.edps.europa.eu/EDPSWEB/edps/Consultation/big_data). See also D. Geradin and M. Kuschewsky, *Competition Law and Personal Data : Preliminary Thoughts on a Complex Issues*, in *New frontiers of antitrust 2013*, Bruylant, 2013.

33 The recently adopted General Data Protection Regulation (GDPR) contains a far-reaching, and difficult to implement, obligation of data portability : according to Article 18 GDPR, « *The data subject shall have the right to receive the personal data concerning him or her which he or she has provided to a controller in a structured and commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the data have been provided (…)*".

34 As underlined by an often quoted example, to retrieve the accounting data in a pdf file is for example not particularly useful.

35 See the leading CJEU case involving the protection of data structure: CJEU, 29 April 2004, C-418/01 ECLI:EU:C:2004:257 (*IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*).