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Consumer data rights and competition – Note by Spain

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/consumer-data-rights-and-competition.htm>

Please contact Ms Anna BARKER if you have questions about this document.
[Email: Anna.BARKER@oecd.org]

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Spain

1. This contribution by Spain's National Commission for Markets and Competition¹ (CNMC) addresses the subject of the roundtable on "Consumer Data Rights: Impacts on Competition", to be held in the June 2020 meeting of the Competition Committee.
2. It is structured as follows. The first section deals with the main ideas surrounding the question of how businesses use consumer data and the potential market failures². The second section includes the main takeaways from the perspective of competition law enforcement, relying on CNMC's experience³. The third and last section addresses the existing debates from the standpoint of competition advocacy and regulation⁴.

1. Firms' use of consumer data and potential market failures

3. Many sectors in the economy are being disrupted by digitisation: transport, tourism, finance, advertising, etc. The ability to collect, refine and manage/exploit data (not only consumers' but all kinds thereof) is becoming a key driver of competitive advantage.
4. Hence, consumer data can rarely be considered as a by-product of engaging in certain types of activities. Perhaps for some business, it started like that. But now all firms see the value of data: the 3 Vs of big data (a huge Volume and a wide Variety of data, exploited at a great Velocity) lead to a 4th V (Value). Now, for some businesses, data are an end in itself or, at least, a key input (for which they have to compete fiercely).
5. But firms, predominantly, tend to keep data in-house rather than selling them, even when the data obtained are useful to improve the provision of goods/services which are not at the core of the business (and even when the reasoning that data is sometimes a by-product could be valid). Businesses with a relevant market size try to exploit the data themselves, adopting an envelopment strategy to provide new products/services, be it through the firm's internal growth or through alliances with/acquisitions of external agents. Businesses with a small market size (not necessarily in terms of the volume of data but especially in terms of their value) will suffer from scale and coordination problems.
6. This points to the first factor for potential market failure attached to data: economies of scale. The collection, management and exploitation of data have small variable/marginal costs⁵, giving an advantage to bigger undertakings and suggesting a trend towards market concentration. But the comparative advantage of databases does not only rest on volume

¹ This contribution has been prepared by the staff of the CNMC and shall not be regarded as the official position of the CNMC unless it refers to CNMC approved documents. Part of the knowledge used to prepare sections 1 & 3 of this contribution relies on the understanding gained along the [ongoing CNMC's market study on online advertising](#) (initiated on April 2019 with a [first stage of public consultation](#)) and does not refer to any specific market or geographical area but to general trends, which may be different in some instances. Therefore, since the study is still ongoing, views expressed in this contribution on market structure and potential competition issues of online advertising are still of a preliminary nature and may change in the course of the investigation.

² Covered in the first block of questions of the OECD call for contributions (sections I & II of the Annex).

³ Covered in the second block of questions of the OECD call for contributions (section III of the Annex).

⁴ Covered in the third block of questions of the OECD call for contributions (section IV of the Annex).

⁵ Holzweber S. (2017). Market Definition for Multi-Sided Platforms: A Legal Reappraisal, "World Competition", No. 40.

but also on variety or quality (e.g. commercial interest), so the landscape is much more complex.

7. Economies of scale are not only static (the higher the volume, the lower the average cost) but also dynamic (the higher the accumulated output and experience, the lower the cost). In other words, learning economies can be considered the second factor for potential market failure. Artificial intelligence plays a key role in this regard: companies already in the market can fuel their algorithms with more data to improve their technology or their inference of consumer needs, attracting again more users and their data (in a feedback loop). Newcomers will have it more difficult in principle, although the quality of algorithms and staff skills are variables of competition and incumbents could be challenged by more competitive (even if smaller) rivals.

8. The third potential market failure linked to data is derived from the existence of scope economies⁶. As has been said above, sometimes firms get data which are valuable in activities well beyond their core. And that lays the foundation for integrating different services. And, when dealing with consumer data, digital advertising is typically one of those services. If a content provider is successful in attracting users' attention, one way to monetize that is by sending advertisements to those consumers. Besides, the data the provider has collected eases its ability to target/personalize that advertisement⁷.

9. And this gives rise to the fourth factor for potential market failure on data-intensive business: network effects. The (abovementioned) existence of learning economies together with the presence in multi-sided markets (such as online advertising) generates powerful indirect network externalities (demand interdependence) in data and digital activities. The more users a platform is able to attract (capturing their attention and data), the more valuable it is for advertisers. Even if indirect network effects are not always reciprocal (consumers do not necessarily want more advertisers), there are feedback loops in practice: platforms with more advertisers also attract more users, since they are better funded and they provide improved services (which attract again more users) combined, at the same time, with "better" advertising⁸ (less intrusive and more targeted/relevant).

10. All these factors create endogenous barriers to entry/growth for new/small entrants, pointing to dynamics of market tipping (chicken-and-egg traps for new/small firms) and concentration⁹ (winner-takes-it-all/most dynamics). Even if multi-homing is a reality in digital markets (and in theory consumer data are available to any undertaking offering an attractive service), this is generally offset by the abovementioned (scale, learning, scope and network) effects¹⁰. All these generate switching costs for consumers. And these endogenous dynamics turn into exogenous barriers to the extent that firms have the incentives to keep data in-house.

11. That is why alternative policy actions are on the cards, be it on the competition enforcement front (as we shall see in the second section of this contribution) or be it in the area of competition advocacy and pro-competitive regulatory measures (as we shall see in

⁶ Bourreau, M., & de Streel, A. (2019). Digital Conglomerates and EU Competition Policy. CERRE.

⁷ Attracting wide audiences' attention and being able to target advertising space are the two key drivers of comparative advantage in online advertising. Decarolis, F., Goldmanis, M., & Penta, A. (2018). Desarrollos recientes en las subastas de publicidad online. Papeles de economía española, 157, 85-108.

⁸ Evans, D. S. (2019). Advertising, Content, and Welfare. Retrieved from SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3466274.

⁹ Crémer, J., de Montjoye, Y.-A., & Schweitzer, H. (2019). Competition Policy for the digital era.

¹⁰ de Streel, A. (2020). Should digital antitrust be ordoliberal. *Concurrences*, 1-2020, 2-4.

the third section of this contribution), such as consumers' data rights in the form of actual portability of data, which may enhance choice (of consumers and other agents to change smoothly between platforms) and thereby the competitive process.

12. Another set of market failures could be related to asymmetric information, like (for example) consumers' lack of awareness of how their data are used. In multi-sided markets, platforms tend to subsidize use to the most price-elastic agents (e.g. consumers, which exhibit low willingness to pay in digital markets¹¹) to charge the cost to the other sides (e.g. advertisers). The fact that consumers' monetary price for some services (such as social media, search services...) is zero (or even negative¹²) does not imply that consumers do not pay. First, if advertisers are charged higher costs, that could translate into higher prices for final consumers of those goods and services. Second, consumers pay¹³ with the attention/time they devote and with the data they provide (the privacy loss). This also leads to debates in the field of competition enforcement¹⁴, to the extent that an excessive privacy loss could be analogous to an abusive price, and of competition advocacy and regulatory measures, considering consumer data rights in the form of privacy and consumer consent (to ensure agents' awareness and ownership over data).

2. The role for competition law enforcement

13. The Spanish Competition Authority, Comisión Nacional de los Mercados y la Competencia (CNMC), is very much aware of the concerns that arise regarding consumer data rights and their possible impact in terms of competition. In that sense, especially in recent years and taking into consideration the great evolution and development of digital markets, where data is a key element, the CNMC has assessed a number of cases in which issues related to data have played a relevant role, including consumer data rights linked to data protection and security.

14. It is important to point out that in this type of market, data is commonly one of the main features. Consequently, in mergers that affect those markets¹⁵ the CNMC typically assesses the rationality of the operation in order to detect whether one of the objectives of the merger is to acquire access to customer information that can give rise to concerns in the sense that it could place the acquirer's competitors at an unjustified disadvantage.

¹¹ Holzweber S. (2017), Market Definition for Multi-Sided Platforms: A Legal Reappraisal, "World Competition", No. 40.

¹² Monetary price is zero but the economic price can be considered to be negative to the extent that other valuable services are bundled and subsidized.

¹³ Prat, A., & Valletti, T. M. (2018). Attention Oligopoly. Retrieved from SSRN: <https://ssrn.com/abstract=3197930>.
Wu, T. (2018). Blind Spot: The Attention Economy and the Law. *Antitrust Law Journal*, 82(3).

¹⁴ Botta, M., & Wiedemann, K. (2019): "Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision" *Journal of European Competition Law & Practice*, 10 (8), 465–478.

¹⁵ Along with the traditional turnover threshold there is a market share threshold in the Spanish Competition Act, which has enabled the CNMC to look into a number of mergers in the digital sphere. In 2019 the CNMC reviewed 8 mergers in digital markets ranging from online platforms (for motor vehicles, food delivery or financial products), to software solutions and apps.

2.1. Caixabank¹⁶

15. In this case the CNMC investigated a claim according to which a bank's (Caixabank) refusal to give a specific type of access to certain client data to a financial aggregator (Fintonic) infringed the Spanish Competition Act¹⁷. More specifically, according to the claim, Caixabank did not allow Fintonic's app to automatically update account movements, which made it impossible for the aggregator to provide its services to Caixabank's clients.

16. The claim was closed as no grounds for action were found in a decision where consumer rights regarding data played an important role.

17. The decision took into account that the regulation applicable to account information service providers (i.e. the Payment Service Directive 2), was at that time still to be developed, so that secure access conditions and rights and obligations for such providers were not yet defined to ensure legal certainty for them and for banks. The regulations in force at the time of the adoption of decision S/DC/0536/14 CAIXABANK in September 2015 (i.e. the Payment Services Directive) were interpreted strictly by the European Payments Council (representing Payment Service Providers), considering that under no circumstances should consumers share their security passwords with third parties.

18. Indeed, the CNMC considered that data protection and security against fraud could objectively justify Caixabank's refusal to give access to its client's data in the manner in which this access was required by Fintonic. The financial aggregator required access to the data using the client's passwords, which the client would share with the aggregator. However sharing passwords was against the bank's protocols as it could facilitate fraudulent conduct such as phishing and the bank took certain measures that included informing the clients of the risks associated with sharing passwords or including certain additional security protocols. In addition, it was personal data and Caixabank was responsible for the treatment of this data.

19. Secondly, the refusal was not considered critical for the aggregator as Caixabank's clients represented a limited percentage of its total customers and Fintonic had operated successfully without the access it demanded. Finally, Caixabank had offered Fintonic alternative ways to access the data.

2.2. Pharmaceutical Industry Market Studies¹⁸ (IMS)

20. *Pharmaceutical Industry Market Studies* has been another relevant case assessed by the CNMC in which consumer data was a significant issue. According to the claim filed by Health Market Research España, S.L. (HMR) against IMS Health, S.A. (IMS), IMS could be engaging in abusive conduct, related to the activity of providing sales information to the pharmaceutical industry, particularly by banning or at least significantly limiting data provision to other operators by pharmaceutical distributors, with the object and effect of having exclusive access to such distributors' sales data.

21. IMS provides different agents in the pharmaceutical sector (amongst others pharmaceutical labs, wholesalers and retailers) with pharmaceutical data, including information about sales, inventories, factors that influence demand for pharmaceutical

¹⁶ S/DC/0536/14 CAIXABANK, Decision by the CNMC of 29 September 2015.

¹⁷ More precisely article 3 of the Spanish Competition Act that prohibits acts of unfair competition that affect the public interest by distorting free competition.

¹⁸ S/DC/0567/15 Estudios de Mercado Industria Farmacéutica, Decision by the CNMC of 13 July 2017.

products and other relevant indicators. In parallel, it develops and distributes IT analytical solutions that enable market agents to manage and analyse information. It also provides consulting services.

22. The case focused on the agreements concluded by IMS Health and the main distributors of pharmaceutical products in Spain, which contained certain clauses specifically related to whether retailers provided data for aggregation purposes to companies other than IMS Health. These clauses enabled IMS to either terminate the contract with the retailer or request to be subject to the same economic conditions offered to the retailer by competing information services companies (most favoured nation clause) while reducing its payments.

23. Taking into consideration IMS's position on the national market for provision of pharmaceutical products sales tracking data, and given that the mentioned clauses could be said to hinder rivals' ability to enter the market and expand their activities, in its preliminary assessment the CNMC concluded that such behaviour could amount to an abuse of a dominant position. The fact that IMS can either terminate the contract or activate a most favoured nation clause if a wholesaler enters into an agreement with IMS's competitor was considered in the preliminary assessment to be potentially abusive because of its foreclosure effect: as the clause reduced the expected value of selling data to IMS, should a counterparty choose to also make its data available to a competitor of IMS, a competitor would have to offer a very high price for the data in order to compensate the potential loss. The procedure was ultimately closed once IMS accepted to remove the contentious clauses from its contracts. As these commitments met the concerns expressed by the CNMC in its preliminary assessment, there was no formal decision finding an infringement.

24. It is important to point out that, in terms of leveraging market power, the very high market shares enjoyed by IMS (above 80%), were not deemed decisive. In this sense, according to the final decision, the ability of the firm to behave in an independent way from rivals and customers emerged from the fact that it was the only firm on the relevant market obtaining data from two separate sources – wholesalers and retailers. As a result of this substantial competitive advantage (and the volume of data that it was able to gather and process), rivals found themselves unable to exercise effective competitive pressure on IMS.

25. However, the remedies did not require IMS to share its data with rivals (or to pool data), which is an approach that has been advocated in recent years. In this regard, the decision was based on the idea that IMS' competitive advantage was not impossible to replicate and that the ability to access the raw data would enable rivals to compete on the merits with the incumbent. Thus, the authority was satisfied with commitments focusing on the contentious clauses, which would in essence allow distributors to deal with IMS' competitors without fear of being penalised for doing so.

2.3. Apple/Shazam¹⁹

26. In this particular case, Spain joined a referral request sent to the European Commission by Austria, (followed by France, Iceland, Italy, Norway, and Sweden), which had formally requested the Commission to examine, pursuant to Article 22(3) of the Merger Regulation, a proposed transaction whereby Apple, Inc. (Apple) was willing to acquire sole control of Shazam Entertainment Ltd. (Shazam). The proposed transaction was initially notified to Austria for regulatory clearance, as the transaction did not meet the turnover thresholds of the EU Merger Regulation.

¹⁹ M.8788 – APPLE / SHAZAM.

27. Such operation involved the acquisition of the leading operator in mobile music recognition applications in Spain (and probably in the EEA) by one of the main European -and global provider of music streaming services (Apple), which, under CNMC's and other Member State's point of view, threatened to significantly affect competition on the relevant market by an anti-competitive foreclosure.

28. Taking into consideration that Shazam had access to valuable information and that its app included a recommendation functionality that could make a streaming music service more attractive than another, the CNMC considered it necessary to enter in a deeper evaluation of the impact in terms of big data that such operation was capable of having on the digital music distribution market.

29. Although the transaction was finally cleared without commitments, the Commission had initial concerns that were in line with those of the CNMC. The fundamental concern was that following the takeover of Shazam, Apple would obtain access to commercially sensitive data about customers of its competitors for the provision of music streaming services in the EEA. Access to such data could allow Apple to directly target its competitors' customers and encourage them to switch to Apple Music. As a result, competing music streaming services could be put at a competitive disadvantage.

30. However, these concerns were ultimately dismissed as the potential access to commercially sensitive information of Apple's competitors would not materially increase Apple's ability to encourage clients to switch provider. In addition, the Commission considered that access to Shazam's data would not confer Apple a significant advantage as the data was not unique and Apple's rivals could access similar databases.²⁰

2.4. Schibsted / Milanuncios²¹

31. Another operation assessed by the CNMC in which data issues were involved was the one that consisted in the acquisition by the multinational Schibsted of the online platform specialized in classified ads Milanuncios S.L.U., which operated the successful platform "milanuncios.com".

32. The merger was finally cleared with several commitments. Although the parties overlapped in a number of markets, potential anticompetitive effects were only identified in regard to professional advertisers in the market for free access platforms for online motor classified advertisements. In this market the main concerns of the CNMC aroused from the fact that there was significant overlap and the transaction amounted to the elimination of a substantial source of competitive pressure. This resulted as much from the considerable parties' market shares as from the fact that they were close competitors with comparable strategies.

33. Consequently, the CNMC considered that, absent remedial intervention, the operation would lead to the strengthening of the market power Schibsted already had, and that anticompetitive effects would be reflected in an increase of prices of classified ads for professional advertisers, the imposition of payment obligations for advertisements published on the platform, or the establishment of minimum purchase obligations for the volume of advertisements.

34. In this case, a traditional remedy would have been a structural divestiture. However, the CNMC considered that the proposed commitments, which consisted in an exclusive

²⁰ Another case that was referred (pursuant to Article 4(5) of the Merger Regulation) to the European Commission inter alia by the CNMC and where data played a role was M.7217 FACEBOOK/WHATSAPP

²¹ C/0573/14: SCHIBSTED / MILANUNCIOS.

licensing agreement of the Milanuncios platform with an upfront licensee, for the exclusive operation of online classified ads published by professional advertisers in the motor section of the portal milanuncios.com, was sufficient and proportionate to the identified risks for competition. This was based on the fact that the license would enable the third party to leverage on Milanuncios' brand image and critical mass thus gaining sufficient network effects to exert competitive pressure on the resulting entity once the term of the license expired. The commitments were also considered proportionate, as the competition concerns were limited to professional advertisers.

35. One of the most relevant features in this sense is that, among other requirements, the new entity committed to giving exclusive automatic and real time access to professional advertisers' data that were using Milanuncios at the time of the exclusive licensing agreement. This would ultimately strengthen the licensee's market position by growing its professional advertiser's database and strengthening its market image. Additionally, the parties committed to allowing the licensee to redirect the traffic to its own online platform.

36. Such kind of remedies reflect the fact that, especially in cases related with platforms and digital markets, the CNMC is aware of many issues that can arise concerning the trade-off that sometimes emerges involving consumer privacy and data portability.

3. The role for competition advocacy

3.1. CNMC's work on data issues

37. Competition advocacy and better regulation can also offer possible solutions to potential concerns in data-fuelled markets. CNMC's Advocacy Department has been working on sectors and business models disrupted by data and digitization since 2014.

38. The initial scope was the sharing economy, which boomed in the areas of transportation and touristic accommodation but quickly spilled over into other sectors. An initial public consultation was launched at the end of 2014 with some tentative questions on the sharing economy and new digital business, followed by a second public consultation in 2016 on preliminary conclusions. One of the preliminary conclusions drawn from the study of these business models was that data portability is one of the key drivers of competition in digital markets. Even if multi-homing is an actual option (technologically feasible and convenient and rarely hindered by platforms), powerful network externalities (of multi-sided platforms) and learning effects (of big data) may generate dynamics of concentration and significant switching costs: agents will rarely move to a different platform if that implies losing their 3R (reviews, recommendations and reputation) history. However, if portability is a reality and agents can move data easily across platforms, competition is going to be more effective.

39. Another activity analysed by the CNMC's Advocacy Department is Fintech: the disruptive application of new technologies to the financial sector. A market study on Fintech was released at the end of 2018. In this case, a specific assessment on the role of data was carried out, with an emphasis on the area of payments and the potential barriers to access data faced by new business models (payment initiation services and account information services).

40. These new services have the potential to foster competition, reducing margins in the payments industry. And the increase of efficiency is not only static (compressing costs and mark-ups) but also dynamic. Endowed with more information, consumers can take more sensible decisions, increasing switching (between financial/payment services providers) when needed. This also promotes financial inclusion and literacy. And the entry

of new payment services providers and business modes can introduce other value added services (such as more tailored financial services or rebates/discounts from merchants).

41. That is why the CNMC endorsed the principles of technological neutrality, interoperability and non-discrimination attached to the policies of open banking and insurance, in order to ensure that new competitors could enter the market (by accessing the data) to compete with incumbents in the areas of payment initiation and account information. Nonetheless, the application of these principles to other activities or sectors must be considered on a case-by-case basis, following the principles of good regulation, mainly necessity and proportionality.

42. Currently, the CNMC is focusing on the analysis of online advertising with an ongoing market study (initiated on April 2019 with a first stage of public consultation). Online advertising is a paradigmatic example of the relevance of data and its market failures (addressed in section 1 of this contribution), because of these reasons:

- Data are a key driver of competitive advantage among digital platforms as publishers, which monetize their inventory by selling advertisements to the audience whose attention they have attracted. Since they enjoy high-quality data about these audiences, advertising is better (less annoying and more targeted and relevant), increasing the ability to attract more audiences (improving their data and algorithms through learning effects) and hence more advertisers (through network effects).
- The ad tech intermediate exchange market exhibits network effects too. Advertisers (or demand-side platforms thereof) value having more publishers (or supply-side platforms thereof) on the other side and viceversa. Network effects also arise because of cookie matching²² (companies which are able to track users across the web and not only on a single domain can offer better targeted advertising) or due to the learning economies of data analytics.
- The ad serving market can also exhibit learning economies and switching costs²³.

43. Therefore, the advertising industry has been disrupted by digitization and the role of consumer data (and the learning effects associated with their management) has exacerbated network effects.

44. As a result of the existence of potential competition concerns in different markets several policy responses are being considered.

3.2. The role (and potential limitations) of alternative regulatory approaches

45. Horizontal regulation has had a leading role in recent years in the regulatory response to data issues, mainly from the privacy and consumer protection fields.

46. The Organic Law on Data Protection (LOPD) is the Spanish privacy framework legislation²⁴. It was recently amended as a result of the approval of the new EU General

²² Geradin, D., & Katsifis, D. (2020). Taking a Dive Into Google's Chrome Cookie Ban.

²³ Geradin, D., & Katsifis, D. (2019). An EU competition law analysis of online display advertising in the programmatic age. *European Competition Journal*, 15(1), 55-96.

²⁴ [Organic Law 3/2018 on Data Protection and Digital Rights guarantee](#) amended the Organic Law 15/1999 on Data Protection.

Data Protection Regulation (GDPR)²⁵, which entered into force in 2018. It introduced some important novelties, most prominent among which are:

- The right to data portability, which comprises the right to receive a copy of the data provided to the data holder, the right to transmit those data to another controller, as well as the right to request a direct transfer from one controller to another²⁶. This data should be transmitted in a structured, commonly used and machine-readable format, directly to the other data holders (at the request of the consumer) when technically feasible.
- A reinforcement on the concept of *consent*, which has to be specific, informed, unequivocal²⁷ and, in some cases – special categories-, explicit. Unlike previous regulations, forms of tacit consent or consent by default are not permitted, as they are based on inaction.

47. Another change that Spain will have to implement²⁸ is the transposition of the EU Public Sector Information Directive (“Open Data Directive”)²⁹, aiming to encourage Member States to facilitate the re-use of public sector data with minimal or no legal, technical and financial restraint. The Directive introduces the concept of “high value datasets”³⁰, which are subject to a separate set of rules ensuring their availability free of charge, in machine-readable formats, provided via Application Programming Interfaces (APIs) and, where relevant, as bulk download.

48. From the perspective of consumer protection, the Spanish regulatory framework is quite complex, as the competence in this field is shared between the EU, the State, the regional governments and even municipalities. The national regulatory body emanates from article 51 of the Spanish Constitution, according to which “*public authorities shall ensure the defence of consumers and users, protecting, through effective procedures, their safety, health and legitimate economic interests*”.

49. The frame regulation is the Law 1/2007 for the Protection of Consumers and Users³¹, which has been amended in various occasions in order to consolidate national legislation and transpose EU Directives and regulations.

50. For the moment, the Spanish consumer protection regulations do not explicitly include data protection clauses, Nevertheless, the announced plans of the European Commission will involve future updates³².

51. The role of horizontal regulation has therefore been of extreme importance for the development of competition in the digital arena. Horizontal regulation serves pro-

²⁵ [Regulation \(EU\) 2016/679](#) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

²⁶ Article 17 LOPD.

²⁷ Article 6 LOPD.

²⁸ This Directive is pending for transposition in Spain (Member States have to do it by 16 July 2021).

²⁹ [Directive \(EU\) 2019/1024](#) on open data and the re-use of public sector information

³⁰ Defined as “documents the re-use of which is associated with important benefits for the society and economy” (article 2)

³¹ [Royal Decree 1/2007 which approves the General Law for the Protection of Consumers and Users](#)

³² The European Commission has launched the so-called “[New Deal for Consumers](#)”, a package of revisions of all EU consumer regulations to be developed from 2020 onwards, with the aim of adapting them to the realities of the digital age, strengthening transparency obligations and ensuring effective compliance.

competitive purposes, by facilitating portability or interoperability (whereby a user could take his or her history to another platform).

52. However, horizontal regulation also has limitations to address competition issues. Under horizontal regulation, obligations imposed on operators are typically not modulated according to sector specificities or market features such as market power. Horizontal regulation can also have unintended effects, e.g. distorting competition by favouring large platforms, which can obtain consent more straightforwardly as well as assume and understand the costs of regulation more easily.

53. This is why the regulatory response to competition issues related to data needs to be complemented with sector-specific regulation inspired in competition law principles and analytical tools. Indeed, sector-specific regulations on data access have been adopted in some fields to address identified market failures, such as payment electricity network data³³, or intelligent transport systems³⁴ or more recently, service providers (PSP2)³⁵, which have helped boost competition in the banking sector.

54. The experience with data-related regulation in the payments sector points to the fact that implementation issues are critical but at the same time very complex. Third Party Providers (payment initiation services and account information services) have cautioned that a flawed implementation of open banking principles can unduly restrict competition³⁶. That is why the CNMC, in its [market study on Fintech](#), warned³⁷ about a theory of harm by which banks have the incentives to unduly restrict access to data in order to lessen competition. The CNMC called³⁸ for a procompetitive interpretation (by financial regulators) of conflict of access to data and account information³⁹.

55. Therefore, in order for sector-specific regulation to be effective, there is a need for continuous market supervision and adjustment of regulation and obligations imposed if needed. All this suggests that the design of sector-specific regulation needs to take account of governance issues.

3.3. Data regulation governance issues

56. The complexity and transversal nature of the challenges posed by digitisation may require the involvement of several jurisdictions and therefore a number of institutions, as boundaries between them are increasingly hard to draw. Even though some competition authorities have competences also in consumer protection fields (not the CNMC), the debate on the need of cross-jurisdictional and flexible responses and the advisability of a new independent digital authority/regulator with multidisciplinary competences are still open.

³³ [Commission Regulation \(EU\) 2017/1485](#), [Commission Regulation \(EU\) 2015/703](#).

³⁴ [Directive 2010/40/EU](#).

³⁵ In Spain, [Real Decreto-ley 19/2018, de 23 de noviembre, de servicios de pago y otras medidas urgentes en materia financiera](#), transposing [Directive \(EU\) 2015/2366](#)

³⁶ ETPPA (2019): “[The Unintended Consequences of PSD2 RTS](#)”

³⁷ See, in particular, paragraph 4.55 of the CNMC’s [market study on Fintech](#).

³⁸ See, in particular, paragraph 4.67 of the CNMC’s [market study on Fintech](#).

³⁹ Other Competition Authorities (such as the [Bundeskartellamt](#)) have also stated their concerns in this regard.

57. Indeed, inter-administrative cooperation mechanisms can be a first step in approaching the issue and some proposals are already on the table⁴⁰. Independent expert reports, such as the Stigler Report⁴¹, recommend either the creation of an independent digital regulator or the introduction of a digital unit/department within the competition authority, as suggested by the Furman Review⁴² on the subject by the Competition and Markets Authority (UK).

58. CNMC, as an independent authority with *ex ante* and *ex post* powers, has a competitive advantage in addressing some of the challenges the data economy raises. During its seven-year existence the CNMC has gained relevant experience in analysing complex issues (e.g. market power assessments, interoperability, access obligations, etc.) combining *ex ante* and *ex post* tools and this experience can definitively be useful to tackle issues such as data portability or the need to strike the right balance between incentives for innovation and promoting competition.

59. Moreover, given the global scope of these markets and operators, international co-operation seems crucial to maintain a coherent intervention. Cross-border harmonisation appear to be also essential, at least at EU level, to minimise the risk of inconsistency in markets and services that are cross-border and where potential competition problems are common to all jurisdictions.

60. In conclusion, data governance is one of the main issues that the ongoing digital revolution has brought in the past years. Indeed, the data economy is characterised by a number of potential market failures that present multiple dimensions, which should be approached either via competition law, privacy or consumer protection. Regulations from different fields are on the rise, which requires harmonisation and co-operation efforts from the authorities/institutions involved.

⁴⁰ Approaches adopted by some countries can be interesting in this regard. In Italy, the competition authority together with the telecommunications regulator and the data protection authority recently announced that they are elaborating a document with conclusions and recommendations on how to improve the response to the big data challenge, which includes, among other things, permanent institutional cooperation mechanisms, competition policy reforms (such as in merger control) and ensuring data portability. For its part, the United Kingdom has recently created a taskforce also between these three authorities (led by the Competition Authority) to discuss the application of possible *ex ante* regulatory regimes.

⁴¹ An independent report for the UK Government, led by Jason Furman «[Unlocking digital competition, Report of the Digital Competition Expert Panel: An independent report on the state of competition in digital markets, with proposals to boost competition and innovation for the benefit of consumers and businesses](#)» (2019)

⁴² [Stigler Committee on Digital Platforms, Final Report](#). Chicago's Stigler Center for the Study of the Economy and the State at the University of Chicago Booth of Business (2019)