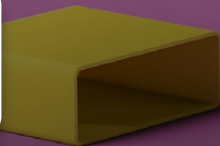


OPEN BANKING AND THE AMBIGUOUS COMPETITIVE EFFECTS OF DATA PORTABILITY



BY OSCAR BORGOGNO¹ & GIUSEPPE COLANGELO²



¹ Bank of Italy; PhD Candidate, University of Turin; MSc (Oxon); <https://orcid.org/0000-0003-0721-4442>; oscar.borgogno@unito.it.

² Jean Monnet Professor of EU Innovation Policy; Associate Professor of Law and Economics, University of Basilicata; TTLF Fellow, Stanford University and University of Vienna; <https://orcid.org/0000-0002-0089-3545>; giuseppe.colangelo1975@gmail.com.

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In recent years several interventions have been undertaken to encourage competition by promoting access to data and facilitating data sharing and portability. The banking sector has been usually designated as a testing ground. Indeed, data play a central role in the provision of FinTech-enabled services and, since transaction data are jealously conserved by legacy banks, the commercial viability of FinTech players is undermined by the lack of access to this essential resource. Against this backdrop, by reducing switching costs and promoting multi-homing the Open Banking has emerged as a new competitive paradigm which would allow firms and consumers to enjoy simultaneous and frictionless services and products offered by different providers. However, the sharing of account information may also favour the entry of large online platforms. Therefore, concerns have been raised about the effectiveness of data portability in fostering market competition.

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CPI Antitrust Chronicle April 2021

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I. INTRODUCTION: ECONOMIC RATIONALES AND UNINTENDED CONSEQUENCES

Technological innovation is opening up a new battleground for competition in the payment and banking industry. Emerging digital technologies bring new competitive tools and business models that could encourage consumer switching. More generally, data control could raise individuals' awareness of alternatives, thereby increasing their decision-making skills in digital markets.

This technology-led transition could prove useful with reference to the retail banking sector. For a long time, this industry has traditionally been characterized by low elasticity of demand, consumer adherence, and lock-in problems which allowed banks to enjoy economic rents.³ An established customer base gives an unfair competitive advantage to incumbents. They can exploit this group of consumers by offering them less favourable conditions compared to so-called front-book users, who are more prone to switching in search of a better deal. Against this backdrop, the rise of technological innovation in financial and banking services provides a remarkable opportunity to remedy bargaining power unbalances between incumbents and consumers. Indeed, financial technology ("FinTech") is expected to facilitate digital interactions and data flows between users and firms, thereby enabling access to finance through new means and at a lower cost.⁴ Further, FinTech-enabled products, such as price-comparison tools and targeted services, can significantly mitigate consumers' unwillingness and inability to engage with new providers as well as prompt them to look actively for the most convenient offers.

EU policy makers intended to harness the pro-competitive potential of FinTech through Directive 2366/2015 on payment services in the internal market ("PSD2").⁵ In its very essence, this legislative effort aims at fostering customers' bargaining power through enhanced control over their transaction data. As financial services are awash in data, the smooth implementation of big data technologies may serve various purposes, from profiling customers and identifying patterns of consumption to support compliance and risk control activities.⁶

Given the centrality of data, the business viability of new entrants is likely to be undermined by the lack of access to customer-transaction information. The PSD2 tried to overcome this issue by introducing a sector-specific portability rule (the access to account, or "XS2A" rule) which forces banks to share real-time data on customers' accounts if the user has provided explicit consent and the account is accessible online. This represented a crucial step by the European legislator towards unbundling retail payment markets to authorized newcomers, which now enjoy the right to request account information without any previous agreements with banks.

From a broader perspective, PSD2 is supposed to lay the foundations for Open Banking, which is understood as a new business environment characterized by smooth data flows and interoperability between service providers enabling lively competition to the benefit of consumers by reducing switching costs and promoting multi-homing. Indeed, within such an ecosystem, firms and individuals would be able to enjoy services and products offered by different firms. By means of a single digital interface, users could manage payment accounts together with other products like mortgages, pensions and investments.⁷

Open Banking hinges on a new competitive paradigm which has been increasingly embraced by policy makers around the world. In this regard, it is worth mentioning the UK Open Banking remedy enacted by the Competition and Market Authority ("CMA") following a market investigation on the British retail banking sector.⁸ In its very essence, such initiative is a comprehensive and original enforcement package complementary to the EU regulatory framework, explicitly designed to accelerate the implementation of the XS2A rule. The CMA mandated the nine major British banks to develop a single, open standardized set of application programming interfaces ("APIs") freely available for the whole industry.

3 European Commission, *FinTech Action plan: For a more competitive and innovative European financial sector*, COM(2018) 109 final, 8. See also Oscar Borgogno & Giuseppe Colangelo, *Consumer Inertia and Competition-Sensitive Data Governance: The Case of Open Banking*, 4 *Journal of European Consumer and Market Law* 143 (2020).

4 UK Competition and Markets Authority, *Tackling the loyalty penalty*, (2018) <https://www.gov.uk/government/news/cma-to-investigate-loyalty-penalty-super-complaint>.

5 OJ L 337/35 (2015).

6 European Supervisory Authorities, *The Use of Big Data by Financial Institutions*, (2016) 8-10, https://www.esma.europa.eu/sites/default/files/library/jc-2016-86_discussion_paper_big_data.pdf.

7 Euro Banking Association, *Open Banking: Advancing Customer-Centricity. Analysis and Overview*, (2017) https://www.abe-eba.eu/media/azure/production/1355/eba_open_banking_advancing_customer-centricity_march_2017.pdf; UK Open Banking Working Group, *Unlocking the potential of open banking to improve competition, efficiency and stimulate innovation*, (2016) <http://dgen.net/1/The-Open-Banking-Standard.pdf>.

8 UK Competition and Market Authority, *The Retail Banking Market Investigation Order 2017*, (2017) <https://www.gov.uk/government/publications/retail-banking-market-investigation-order-2017>.

More recently, the Australian Government approved the Consumer Data Right, which provides a sector-by-sector data portability right designed to be applied within the banking sector.⁹ Mirroring the UK experience, the Australian Competition and Consumer Commission has enacted rules requiring the four major banks to share product reference data with accredited data recipients.¹⁰ On a similar note, several jurisdictions have recently taken action to spur competition in retail payment and banking industries. Brazil, Japan, and Mexico have introduced access regimes to financial data through APIs meant to promote Open Banking. Canada is evaluating the merits of Open Banking. Hong Kong and Singapore have launched specific open API frameworks to foster the collaboration between banks and third-party service providers.

From a competition policy perspective, the European PSD2 framework and the UK Open Banking remedy share the purpose of the data portability right introduced with the General Data Protection Regulation (“GDPR”), namely to trigger and foster inter-platform competition by decreasing the transaction costs incurred by consumers. However, several studies question the effectiveness of data portability in enhancing competition. Some commentators warn against the unintended competitive effects of the GDPR, documenting that it has entrenched the market power of incumbents.¹¹ Similar concerns have been expressed about the entry of BigTech platforms into retail banking as a result of the XS2A rule introduced by the PSD2.¹² Indeed, by harnessing the massive quantities of data generated by their networks and benefiting from access to payment account information enabled by the PSD2, large platform-based technology companies could find appealing to enter retail-banking markets. Many fear that BigTech platforms could rapidly monopolize the market for financial services by combining different types of financial and non-financial services, ultimately engaging in self-preferencing (i.e. giving preferential treatment to their own products and services compared to those provided by incumbents and start-ups).

II. FINTECHS V. BIGTECHS: THE MISSING (GOOD) DISRUPTION V. THE FORTHCOMING (BAD) DISRUPTION?

There is no doubt that while the PSD2 was originally conceived to easy market access for small new entrants, it could favour the entry of BigTech platforms. Actually, the competitive impact of BigTech companies may be greater than that of small FinTechs. Indeed, the latter face significant competitive disadvantages vis-à-vis incumbent banks in terms of compliance costs, limited access to soft information about potential customers, brand recognition, lack of reputation and a relatively high cost of capital.¹³ It should not come as a surprise, therefore, that the relationship between banks and FinTechs has proved to be largely complementary and cooperative in nature.¹⁴ At the same time, banks are often open to set up partnerships with FinTech start-up so to avoid expenses and risky investments.¹⁵

Conversely, BigTechs, as challengers, pose serious concerns in terms of competitive pressure for incumbents. They already have established networks and enjoy reputation, considerable earnings, large installed customer bases, unfettered access to capital markets and widely recognized brands. On top of all this, they can easily harness proprietary data silos gathered through their platforms, to provide consumers with tailored offers. Furthermore, such firms benefit from cutting-edge data analytical skills together with the most advanced technologies. This would allow them to process transaction and consumer data so as to get the most out of their resources. By leveraging such competitive advantages, there are growing concerns that BigTech firms could scale up in financial markets very quickly, thereby posing a significant competitive threat to traditional banking. While their first steps are going to take place in the payment arena, they could rapidly expand into the provision of credit, insurance, savings and investment products.

9 Australian Government, *Consumer Data Right Report*, (2019), <https://treasury.gov.au/consumer-data-right>.

10 Australian Competition and Consumer Commission, *Competition and Consumer (Consumer Data Right) Rules 2020*, (2020) <https://www.accc.gov.au/media-release/consumer-data-right-rules-made-by-accc>.

11 See e.g. Michal Gal and Oshrit Aviv, *The Unintended Competitive Effects of the GDPR*, 16 *Journal of Competition Law and Economics* 349 (2020).

12 See Oscar Borgogno & Giuseppe Colangelo, *The data sharing paradox: BigTechs in finance*, with O. Borgogno, 16 *European Competition Journal* 492 (2020); Oscar Borgogno and Giuseppe Colangelo, *Data, Innovation and Competition in Finance: The Case of the Access to Account Rule*, 31 *European Business Law Review* 573 (2020); Miguel de la Mano & Jorge Padilla, *Big Tech Banking*, 14 *Journal of Competition Law and Economics* 494 (2018).

13 See Aluma Zernik, *The (Unfulfilled) Fintech Potential*, 1 *Notre Dame Journal on Emerging Technology* 352 (2020); and René M Stulz, *FinTech, BigTech, and the Future of Banks*, 31 *Journal of Applied Corporate Finance* 86 (2019).

14 Rebel A. Cole, Douglas J. Cumming, & Jon Taylor, *Does FinTech Compete with or Complement Bank Finance?*, (2019) <https://ssrn.com/abstract=3302975>; Financial Stability Board, *FinTech and market structure in financial services: Market developments and potential financial stability implications*, (2019) <http://www.fsb.org/2019/02/fintech-and-market-structure-in-financial-services-market-developments-and-potential-financial-stability-implications/>.

15 Benedict J. Drasch, André Schweizer, & Nils Urbach, *Integrating the ‘Troublemakers’: A taxonomy for cooperation between banks and fintechs*, 100 *Journal of Economics and Business* 26 (2018).

In order to tackle the unintended competitive effects of data sharing mechanisms, an increasing number of policy makers have considered intervening with further regulatory measures. This could take the form of *ad hoc* provisions to prevent anti-competitive practices by BigTech platforms, instead of relying on antitrust law to oversee the digital transition of financial markets.

Notably, the Expert Group on Regulatory Obstacles to Financial Innovation appointed by the European Commission has recommended the introduction of *ex ante* rules to prevent large, vertically integrated platforms from discriminating against product and service provision by third parties.¹⁶ In particular, the Expert Group listed three main scenarios, referring to: (a) large technology companies with access to significant social media, search history and other data, leveraging their preferential data access to enter the market for financial services and benefiting from access to payment account information, as facilitated pursuant to the PSD2; (b) providers of smartphone operating systems not providing access to the relevant devices' interface for competing payment applications; and (c) providers giving access to devices or software under conditions that can create inefficiencies, such as prohibiting the use of other consumer interfaces or demoting rivals' financial products and services in search engine results.

This proposal echoes the approach adopted by the European Commission on a broader scale within the European strategy for data.¹⁷ In the recent Digital Markets Act (“DMA”) proposal, the European Commission argued that, as gatekeepers frequently provide the portfolio of their services as part of an integrated ecosystem, they are likely to have an increased ability and incentive to leverage their power from their core platform services to ancillary services, such as identification or payment services and technical services which support the provision of payment services.¹⁸ Therefore, the *ex ante* obligations for gatekeepers set by the DMA also include the need to allow business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available or used in the provision by the gatekeeper of any ancillary services.¹⁹ Indeed, given that in certain cases gatekeepers play a dual role as developers of operating systems and device manufacturers, they may restrict access to some of the functionalities in their devices, such as near-field communication technology and the software used to operate that technology, which may be required for the effective provision of an ancillary service by the gatekeeper as well as by any potential third party provider of such an ancillary service.²⁰

On a similar note, the new Section 58a of the German Payment Services Supervisory Act (also known as “Lex Apple Pay”), attempted to push forward the pro-competitive objective underlying the XS2A rule. This new piece of legislation grants e-money issuers and mobile payment service providers a right to access platform-based technical infrastructure, namely the functionalities of the operating systems of online devices and the respective near-field communication interface technical infrastructure integrated in mobile phones and other devices.

Moreover, in the U.S., it was introduced before the House of Representatives a Bill whose title is self-explanatory (“Keep Big Tech out of Finance Act”).²¹ If enacted, the Bill would prohibit technology companies that have an annual global revenue of over twenty-five billion dollars from either acting as a financial institution or being affiliated with a financial institution. Additionally, the Bill would ban BigTechs from establishing, maintaining or operating a digital asset that is intended to be widely used as medium of exchange, unit of account, store of value, or any other similar function, thus effectively banning virtual currencies.

Finally, questioning whether a one-size-fits-all data sharing rule is well-suited and proportionate for both startups and BigTechs, some commentators have proposed to complement this rule with a reciprocity obligation between BigTechs and banks.²² To put it briefly, if the beneficiary is a large digital company, the access to account rule should be integrated with a corresponding right of the bank to access BigTech data that may equally be used to enhance digital payment services.

16 Expert Group on Regulatory Obstacles to Financial Innovation, “*Thirty Recommendations on Regulation, Innovation and Finance*,” (2019) 79-80, https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/191113-report-expert-group-regulatory-obstacles-financial-innovation_en.pdf.

17 European Commission, *Communication “A European strategy for data,”* COM(2020) 66 final, 13.

18 European Commission, *Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act),* Recital 14, COM(2020) 842 final.

19 *Ibid.* Article 6.

20 *Ibid.* Recital 52.

21 H.R. 4813, 116th U.S. Congress, <https://www.congress.gov/bill/116th-congress/house-bill/4813?s=1&r=6>.

22 de la Mano & Padilla, *supra* note 12.

These proposals mimic the European strategy for data at the level of retail banking by introducing asymmetric regulation aimed at limiting BigTechs' data power over incumbent banks. However, instead of addressing BigTechs' economic hegemony within their own ecosystems, these proposals focus on Open Banking environments, which are still at a very early stage of development. When it comes to this topic, banks play a gatekeeper role in the payment and financial industry, while BigTechs are challengers as well as FinTech entrants. Indeed, because information is a key input to compete in financial services, financial intermediaries, as keepers of customers' wealth, hold the most valuable data to promote innovation and competition in the market.

As matters stand, it is not yet possible to predict if BigTechs are going to disrupt retail banking markets. At the same time, as FinTech start-ups seem more likely to work alongside incumbent banks rather than compete with them, limiting the entry of BigTechs may remove the only effective source of competitive pressure for traditional banks. Hence, early *ex ante* regulatory measures specifically envisaged to water down the PSD2 regulatory tools to the detriment of BigTechs could end up frustrating the pro-competitive aim of Open Banking. Indeed, large incumbent banks would be protected from BigTechs' potential competition, but still free to harness FinTech-enabled solutions to drive out of the market small local banks unable to bear the cost of the Open Banking transition.

III. CONCLUSION: BE CAREFUL WHAT YOU WISH FOR

Since Open Banking epitomizes the competitive virtues of effective interoperability in digital markets, it could serve as a blueprint for data portability legislation. In this regard, the debate around the unintended consequences of data sharing provisions, such as those introduced by the Open Banking initiatives, highlights two main risks associated with the regulation of digital markets.²³

First, it shows the inherent limitations of regulation, which are heightened when dealing with emerging technologies. Predicting how these technologies will evolve is an unmanageable task even for the most illuminated policymaker. Thus, the final outcome may be remarkably different from the starting goal, especially where the technicalities are not adequately addressed.

The concerns about the possibility that large online platforms may prevail hide the second major risk associated with top-down solutions. That is, regulation of digital markets should revolve around principles rather than outcomes. Indeed, regulatory proposals aimed at asymmetrically targeting specific entities (i.e. banning BigTechs from operating in financial markets or *ex ante* preventing them from adopting certain practices) could jeopardize the very original purpose of previous pro-competitive initiatives. Since policy makers widely believe that data sharing and interoperability are key to unlocking competition and innovation in specific markets, such as the banking and financial industry, where data represent a real bottleneck that does not allow a level playing field, then they should refrain from trying to pick winners and losers in the marketplace.

Thanks to the data portability and Open Banking initiatives, incumbents will no longer be able to use the competitive advantages deriving from data to defend their market positions. Rather, they will be forced to compete only on their services and products. Against this backdrop, the potential market disruption should be welcomed regardless of whether BigTechs, rather than FinTech start-ups, ultimately prevail.

²³ Giuseppe Colangelo, *Evaluating the Case for Regulation of Digital Platforms*, Global Antitrust Institute Report on the Digital Economy (2020) 905, 951, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733741.

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