

The rise of global regulation of online platforms: Positive v. negative obligations

Panel 4: Interoperability obligations

Prof. Pier Luigi Parcu

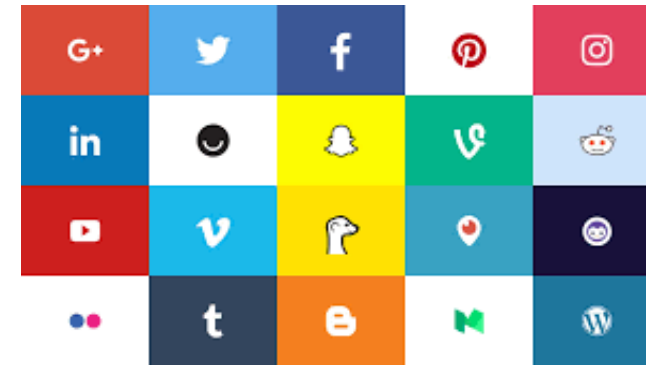
13 June 2022 EUI - OECD

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E-Mail



Social-media cross-posting



2019 announced integration of now Meta's messaging apps



Android third-party app stores





Technical definition of interoperability “I.”: *the ability to transfer and render useful data and other information across systems, applications, or components through interfaces* (Palfrey & Gasser, Standard Glossary of Software Engineering Terminology 2012, IEEE 610);



Legal definition Art. 2(29) DMA Trilogue: *the ability to exchange information (i.e., technical I.) and mutually use the information which has been exchanged (i.e., semantic I.) through interfaces or other solutions, so that all elements of hardware or software work with other hardware and software and with users in all the ways in which they are intended to function (i.e, full I. as opposed to partial I.) ;*

Technical standards: common specifications chosen *de facto*, *de consensu* or *de iure* (e.g., PDF, USB, IP, HTTP, XMPP, 5G, OAuth2.0, EN standards...);

Means of I.

Open APIs: restricted “sockets” to connect systems, applications or components;

Decompilation: reverse engineering to achieve software I..

Main distinction of I. considering the value chain position of the interoperable objects:

Horizontal I.



- **Btw competing products** (e.g., telecommunication devices);
- **Enables positive direct network effects:** the values of the interoperable products increase when the total network of users grows (the value of the whole network is greater than the sum of separated networks);
- **Example in the DMA:** Art. 7 interoperability obligation for gatekeepers' number-free communication apps;

Vertical I.

- **Btw complementary products** (e.g., OSs and third-party apps);
- **Enables positive indirect network effects:** the more the users of interoperable product A, the more the value of complementary interoperable product B;
- **Example in the DMA:** Art. 5(5) consumption of third-party purchases on gatekeepers' core platform services;



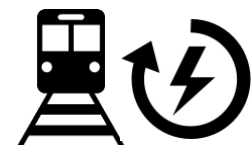


The telecommunications sector traditionally experienced **I. obligations**, now in the 2018 European Electronic Communications Code:

- **Access directive 2002/19** → I. of e-comms, universal service policy, SMP regime;
- **Framework directive 2002/21** → I. standardization and I. of digital TVs;
- **Universal service directive 2002/22** → network operators' must carry obligations;



The EU banking sector also features **I. obligations** in the form of **instant access and portability for payment service providers to users' payment accounts data** (PSD2 2015/2366 arts. 66/67 and 98)



Transport and energy sectors are also subject to EU I. regulation (e.g., Rail system interoperability directive 2016/797, Electricity directive 2019/944)



Software I. also justifies EU exceptions to intellectual property rights:

- **Software copyright decompilation exception if indispensable to achieve I. of non-competing software** (art. 6 Software copyright directive 2009/24/EC);
- **Computer-program patent limitation** if indispensable to achieve I. of non-competing programs (art. 27(k) Unified Patent Court Agreement);

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Certain **agreements that achieve I.** benefit from a **favourable assessment** within the **horizontal cooperation guidelines and technology-transfer block-exemption regulation**

- **Standardisation agreements;**
- **Information exchange agreements;**
- **Patent licenses** (spurring incremental innovation);

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Competition in adjacent markets – and so the **protection of I.** – lies behind several **leveraging dominance abuse cases:**

- **Exclusivity agreements** (e.g., '19 EC Google AdSense);
- **Essential facilities doctrine/refusal to license** (e.g., '07 GC Microsoft);
- **Margin squeeze** (e.g., '21 CJEU Slovak Telekom);
- **Self-preferencing** (e.g., '21 GC Google Shopping);
- **Tying/bundling/enveloping** (e.g., '18 EC Google Android);

**EU
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Concentrations often involve **foreclosure concerns related to I.** (e.g., Apple/Shazam), eventually **addressed by behavioural commitments** (e.g., Meta/Kustomer, Google/Fitbit, Microsoft/LinkedIn).

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Debated Pros and Cons of Interoperability



- ↑ **Production scale and scope economies**
- ↑ **Positive network effects**
- ↑ **Markets integration**
- ↑ **Modularisation of components**
(mix & match, sustainability, customization)
- ↑ **Follow-on & open innovation**
- ↑ **Intra-technology competition**
(→↓ Entry barriers)
- ↓ **Transaction & information costs**
- ↓ **Downstream lock-in/Market tipping**



- ↓ **Product choice**
- ↓ **Technological risk differentiation**
- ↓ **Disruptive innovation**
- ↓ **Multi-homing**
(→↑ Upstream lock-in to static standards/APIs)
- ↓ **Inter-technology competition**
(path-dependency, backward compatibility)
- ↓ **Control of reliability, security and privacy**
- ↓ **Appropriability of R&D investments**
(free riding, weak IPRs)
- ↑ **Implementation costs (technology & €)**

Negative I. Obligations

Art. 5(7) refrain from tying the use of business users' services to gatekeepers' identification services, web browsers or payment services;

Art. 5(8) refrain from tying gatekeepers' different core platform services together;

Art. 6(5) prohibition of self-preferencing.

Positive I. Obligations...

Art. 5(5) I. of core-platform services with third-party content/subscriptions/features and items regardless of their purchase path;

Art. 6(3) allow end users to un-install native apps and change default settings;

Arts. 6(4) I. of third-party software (including app stores) and (art. 6(7)) I. of hardware with the gatekeepers' OSs and virtual assistants;

... *Positive I. Obligations*

Art. 6(6) allow end users to **switch and subscribe to different apps and services using the gatekeepers' core platform services** (art. 6(13) including **effective termination right**);

Art. 6(9)-(10) Ensure end users' effective data portability and business users' data access (already discussed);

Art. 6(12) **FRAND access conditions for business users** to app stores/search engines/socials;

Art. 7 **I. obligation for number-free messaging apps** (evolution of Art. 61(2)(c) EECC, probably the most horizontal I. obligation in the DMA).

and beyond the DMA

Data Act proposal: arts. 28ff I. of data processing services;

Data Governance Act proposal: art. 11(4) data format conversion only to enhance I. of data sharing services;

Questions for the Debate

1. Interoperability obligations are traditional regulatory instruments, such as in telco or banking: may they really **stimulate fairness and contestability in digital markets as well?**
2. **Better mandating interoperability than facilitating multi-homing?**
3. Are **ex-ante interoperability obligations** just a new form of **top-down standardisation?**
4. **Open APIs or consensus-based industry standards**, what is the best **governance framework to ensure interoperability?**
5. **Are end-users and business users ready for interoperability?** In particular, can small business users take advantage of the interoperability offered?
6. Are **data protection and cybersecurity actual hurdles** for interoperability?

- Alexander and Stutz, 'Interoperability in Antitrust Law & Competition Policy' CPI Antitrust Chronicle (2021);
- Borgogno and Colangelo, 'Data sharing and interoperability: fostering innovation and competition through APIs' (2019) 35 Computer Law & Security Review;
- Bostoen, 'Online platforms and vertical integration: the return of margin squeeze?' (2018) 6 Journal of Antitrust Enforcement 355;
- Bourreau, Krämer and Buiten, *Interoperability in Digital Markets* (CERRE, 2022);
- Gal and Rubinfeld, 'Data Standardization' (2019) 94 NYU Law Review;
- Hoffmann and Otero, 'Demystifying the role of data interoperability in the access and sharing debate' (2020) 11 JIPITEC 252;
- Kades and Scott Morton, *Interoperability as a competition remedy for digital networks* (2020);
- Kerber and Schweitzer, 'Interoperability in the Digital Economy' (2017) 8 JIPITEC 39;
- Krämer, 'Personal Data Portability in the Platform Economy: Economic Implications and Policy Recommendations' (2020) Journal of Competition Law and Economics;
- OECD, *Data Portability, interoperability and digital platform competition* (2021);
- Riley, 'Unpacking interoperability in competition' (2020) 5 Journal of Cyber Policy 94;
- Scott Morton et al, *Equitable Interoperability: the "Super Tool" of Digital Platform Governance* (2021);
- ...

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Thank you!



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