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Open Banking

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LETTER FROM THE EDITOR

Dear Readers,

In this Chronicle, we examine the issue of Open Banking. Interoperability has long been an antitrust preoccupation. Traditionally, interoperability concerns have arisen with respect to the tech sector, as reflected in cases involving the so-called tech giants of the given day, dating back decades, to the very inception of antitrust rules.

In those contexts, antitrust enforcement resulted in remedies, such as the imposition of rules requiring dominant companies to provide for mechanisms for customers to easily export their data from one platform to another, or to provide for dominant companies to make available APIs allowing their competitors to interact with their offerings on an equal footing.

Today, a similar dynamic is playing out in the financial sector, but now under the rubric of “Open Banking.” Yet the principles are the same. As innovation grows in the so-called FinTech space, banking incumbents are facing growing pressure to facilitate market access by innovative competitors, which are often niche operators, and may provide unique consumer value. Despite these potential consumer benefits, the notion of Open Banking, as a concept of market regulation, is still nascent, and raises numerous practical regulatory issues, including from an antitrust perspective.

The articles in this Chronicle address several of the concerns raised by this live issue, based on the authors' considerable experience with these issues around the world.

As always, thank you to our great panel of authors.

Sincerely,

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SUMMARIES

07



Open Banking, the UK Experience

By Adam Land & Bill Roberts

The paper explains what open banking is, why the Competition and Markets Authority adopted it as a remedy and describes the arrangements the CMA required the 9 largest current account providers in Great Britain and Northern Ireland to put in place in order to implement it. The paper provides examples of open banking products which have been launched, both to save consumers and small businesses time and money and also to provide help and advice for financially stretched or vulnerable consumers. There are already over 3 million consumers and small businesses using these products each month and take-up has been particularly rapid among small businesses. The paper concludes with some learnings from the UK experience, the main one being that in the particular circumstances that the CMA encountered, the UK's burgeoning open banking ecosystem is unlikely to have been created on a voluntary basis.

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Maximizing the Competitive Potential of Open Banking: Insight from the Canadian Conversation

By Greg Lang

Open banking allows users to securely transfer information between financial service providers. This eases consumer switching and incentivizes the development of a range of innovative new financial service products. However, exchanging such sensitive information can require significant regulatory supervision to ensure privacy and data protection. This creates an opportunity for competition authorities to play a key role in ensuring that such regulations maximize competition and innovation while also satisfying these important public policy objectives. This article, which is based on the Competition Bureau's recent submission to the Canadian Advisory Council on Open Banking, examines current regulatory design issues from the Canadian experience, and proposes measures that will best support a pro-competitive and innovative open banking system.

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Why Data Interoperability Is Harder Than It Looks: The Open Banking Experience

By Sam Bowman

Many people hope that data interoperability can increase competition, by making it easier for customers to switch and multi-home across different products. The UK's Open Banking is the most important example of such a remedy imposed by a competition authority, but the experience demonstrates that such remedies are unlikely to be straightforward. The experience of Open Banking suggests that such remedies should be applied with focus and patience, may require ongoing regulatory oversight to work, and may be best suited to particular kinds of market where, like retail banking, the products are relatively homogeneous. But even then, they may not deliver the outcomes that many hopes for.

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Financial Data Exchange: Procompetitive Collaboration to Advance Permissioned Sharing of Consumer Financial Information and Spur Innovation and Competition

By Brad Jacobsen & David Kully

Financial Data Exchange ("FDX") is an industry standards body comprised of financial institutions, data access platforms, fintech companies, consumer organizations, and other interested parties organized to address the need for an industry-wide standard for the secure exchange of consumer-permissioned financial information among financial services companies. The availability of such a royalty-free standard promises to unleash innovation in the provision of financial services to consumers, bringing new competitors seeking to assist consumers in achieving their financial needs, better managing their finances, and improving their financial health. FDX's mission is one that can only be achieved efficiently through collaboration among industry participants, and the group approached its work from the outset with sensitivity to the requirements of the antitrust laws, delivering an unmistakably procompetitive outcome for consumers.

SUMMARIES

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Open Banking and the Ambiguous Competitive Effects of Data Portability

By Oscar Borgogno & Giuseppe Colangelo

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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Open Banking in Brazil: A “Disruptive Step” Towards the Increasing of Competition in the National Financial Sector and Consumers’ Welfare?

By Eduardo Caminati Anders, Marcio de C. S. Bueno, Guilherme Misale & Tatiane Siqui

Following an upward trend in the global agenda for digital-driven economies, Open Banking has emerged as a hot topic in Brazil. Since 2018, the Central Bank of Brazil has been playing a major role to stimulate debates and foster initiatives aimed at developing a national Open Banking framework as a measure with the potential to add new features and change the course of the Brazilian financial sector, so as to pave the way for a more competitive, efficient, innovative, transparent and inclusive financial system able to better address customers’ needs, besides empowering them with control over their personal data. However, in order to secure positive effects on both the national economy and society at large, the implementation of a suitable framework in Brazil requires that the protection of personal data, the financial awareness and the privacy rights remain at the foreground of the design of Open Banking products and services.

WHAT'S NEXT?

For May 2021, we will feature Chronicles focused on issues related to (1) **Healthcare**; and (2) **Section 230**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2021, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLES JUNE 2021

For June 2021, we will feature Chronicles focused on issues related to (1) **Buyer Cartels**; and (2) **Interoperability**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.



OPEN BANKING, THE UK EXPERIENCE

BY ADAM LAND & BILL ROBERTS¹



¹ Adam is a senior director at the Competition and Markets Authority ("CMA"), where he leads the Remedies, Business and Financial Analysis professional group. Bill is Head of Open Banking at the CMA.

I. INTRODUCTION

Open banking² allows consumers and small businesses to share their bank transaction data securely with trusted third parties who can then use this information to provide them with services that save them time or money.

The UK was the first country in the world to implement open banking but now around 60³ jurisdictions have either adopted it or are seriously considering doing so. This paper sets out the problems that the UK's Competition and Markets Authority ("CMA") was trying to address when we mandated open banking and the outcomes we were aiming for. It explains how we set about implementation, describes where we are now in terms of adoption and lists the lessons we have learnt along the way.

II. OUR AIMS

Since open banking measures have been adopted for a variety of reasons, it is worth noting at the outset that the CMA was seeking to address competition concerns in the retail banking market rather than, for example, seeking to bring more consumers or small businesses into the banking system or stimulate the Fintech sector, which have been important objectives in some other jurisdictions.

Unusually among competition regulators, as well as having the powers to prosecute cartels and review mergers between firms to see if they are likely to give rise to competition concerns, the CMA has the power to investigate certain markets if it considers that they are not functioning well. In 2014 it launched a Market Investigation into retail banking services provided to both consumers and small businesses. This investigation revealed that in 2016 the older and larger banks, which had accounted for over 80 percent of the retail banking market for many years, did not have to work hard enough to retain their existing customers and that it was difficult for new and smaller providers to attract new customers. It said that these failings were having a pronounced effect on certain groups of customers, particularly overdraft users and smaller businesses. It also meant that the sector was not as innovative or competitive as it needed to be. The CMA investigation concluded that banks would only invest in new products or services, or reduce their prices and improve service quality, if they expected to win business as a result, or feared losing business if they do not.

The idea of open banking had been around for a few years. In September 2014 the UK Treasury published a report it had commissioned from the Open Data Institute and Fingleton Associates entitled [Data Sharing and Open Data for Banks](#). This concluded that greater access to data had the potential to help improve competition in UK banking and that current policy interventions to promote access to data were steps in the right direction but could be taken further by the application of more widely-used technologies and standards for data sharing.

A first iteration of data sharing had been launched in 2015 by the 6 largest UK banks.⁴ This was, however, difficult to use because it required customers to first locate the relevant data on their bank's online banking site and then manually download a .CSV file of their data before uploading this data into an application they wanted to use. In addition, the software did not function on Apple devices. Consequently, take up of the service was very low.

A Government-Industry working group led by the Open Data Institute took the concept further and in 2016 published a guide to creating an open banking ecosystem based on common, open application programming interface ("API")⁵ standards and recommended the Government adopt open banking as a policy.⁶

2 In Canada the term "Consumer Directed Finance" is more commonly used, following the publication of the [Advisory Committee on Open Banking's report](#) in January 2020.

3 Australia, NZ, HK, Singapore, Malaysia, Vietnam, the Philippines, Indonesia, Japan, Korea, Taiwan, China, India, Pakistan, the Gulf States (Bahrain, Kuwait, UAE, Saudi Arabia, Qatar, Oman), Egypt, Israel, Nigeria, Ruanda, Kenya, S Africa, Brazil, Colombia, Chile, Mexico, Dominican Republic, USA, Canada, the EU, UK.

4 See [the assessment of the consumer testing magazine Which?](#)

5 APIs allow applications to talk to each other and share data and functionality. It was intended that they would replace "screen-scraping" which requires consumers to disclose their online credentials to third party intermediaries providing services based on data-sharing. APIs provided a much more secure way of sharing customer data.

6 [The Open Banking Standard](#).

At the same time, the second EU payment services Directive (“PSD2”) was being rolled out. This would, in effect, require account providers like banks to enable customers to share their bank account transaction data with trusted third parties using APIs but under PSD2 banks and other payment account providers were not required to adopt common or interoperable standards: banks were free to choose which standards to adopt. While potentially pro-competitive, allowing each bank to create their own APIs raised barriers to widespread and timely adoption of open banking by customers and intermediaries. In these circumstances, developers would either have to build applications which were capable of working with many different standards or use a technical service provider⁷ to link them up with lots of different banks.

Open banking was given fresh momentum in the UK when it was adopted by the CMA as a remedy following its market investigation into retail banking. The CMA went beyond PSD2 by not just requiring the major banks to facilitate data sharing but requiring that they adopt *common* and *open* API standards, data formats and security protocols.

While the CMA’s focus was on tackling the particular competition problems it had identified, open banking opened up the possibility of something a bit more radical: market transformation, by creating a new ecosystem of innovative products and suppliers, forcing incumbent banks to raise their own performance, benefitting customers.

III. HOW DOES THIS WORK?

At its simplest level, open banking facilitates choices between banking services offered by different providers, not all of whom will be banks. A small business, for example, could potentially save money by using an intermediary to whom it had granted access to its account history to calculate what bank charges it would have incurred if the transactions it had performed over the previous 12 months had been with another bank.⁸ If that small business used a cloud-based accounting system like [Quickbooks](#) or [Xero](#) it could automatically import bank and credit card transactions, saving time compared with doing this manually. And if it was looking for finance, by sharing its bank transaction data it could quickly be directed to lenders whose eligibility criteria it met.

Similarly, consumers can make use of open banking services to identify money saving opportunities through switching bank accounts and can check their eligibility for a mortgage with different lenders.⁹ Additionally, there are use cases which are aimed at protecting the more vulnerable (eg alerting carers to unusual purchase behaviour by the people they are looking after¹⁰) and facilitating access to financial services (eg helping people with a thin credit file borrow money at lower cost).¹¹

As well as making it easier to compare options, the inclusion of payment services within the scope of open banking makes it easier for customers to act on opportunities to secure better value. The CMA identified sweeping services as an example of this type of application, with the potential to be a particularly powerful source of competitive pressure on incumbent banks.

Sweeping services allow account holders to instruct an intermediary to automatically transfer cash balances out of their current (checking) accounts (which typically do not pay interest in the UK) into other accounts they hold, including those held at other banks, which do pay interest (eg savings accounts) when that cash is not needed.¹² Further, customers can avoid bank overdraft charges, which can be [around 40 percent](#) for retail consumers, by arranging for a short term loan from the intermediary concerned, if that intermediary guarantees that its rates will always be lower than the bank’s.

The CMA considered that this was a particularly important use-case from a consumer perspective, since consumers who retained large cash balances in their current accounts and who make frequent use of overdrafts had a powerful incentive to use these services in order to save money. They were also some of the banks’ most profitable customers so rivals targeting these customers would be likely to provoke a sharper competitive response from the larger, longer established banks.

Open banking would also enable new, more flexible and cheaper payment services to be made available to consumers and merchants in competition with card payments and thus putting competitive pressure on the interchange fees that banks charge on card transactions.

⁷ Firms like [Plaid](#), [Truelayer](#) and [OpenWrks](#) provide such services.

⁸ [Swoop](#), for example, offers this service.

⁹ See [Are we on the cusp of an open banking and mortgage revolution?](#), Mortgage Finance Gazette.

¹⁰ For example [Touco](#).

¹¹ For example [Credit Kudos](#) or [Tully](#).

¹² For example [SafetyNet](#).

IV. IMPLEMENTATION

The CMA's remedies, like those of economic and other regulators, usually specify in detail the obligations they are imposing on firms. In this case, however, the CMA was not in a position to specify the detailed technical standards that the banks should adopt since this was a major task that could not be completed within the statutory deadline for publishing the Order which provided the legal force behind the remedy package.

It chose, therefore, to create a forum in which the banks, third-party providers of open banking services, small business and consumer representatives could debate the appropriate standards and which would be supported by a technical staff who would draft the standards and manage their adoption by the 9 banks subject to the Order.¹³ This organisation, the Open Banking Implementation Entity ("OBIE"), was designed as a special purpose vehicle created purely for the purposes of delivering open banking implementation.

The Order required the "CMA9," as they became known, to make their best endeavours to reach agreement but it also obliged them, in the absence of a consensus, to accept the decision of an Implementation Trustee, whose appointment the CMA would approve, and who would play the role of executive chair of the OBIE.

The OBIE was created and the Implementation Trustee appointed in late 2016¹⁴ and, at the time of writing, the implementation process, as set out in its "Roadmap,"¹⁵ is nearing completion.

V. WHERE WE ARE NOW IN TERMS OF ADOPTION

For the open banking ecosystem to develop and flourish it required adoption by banks, including both those who were required to comply with the CMA Order and also those who saw voluntary adoption as a business opportunity; by Fintech intermediaries who could provide open banking services that deliver value sufficient to overcome consumers' natural caution over sharing sensitive personal information; and by end-users, whose adoption would provide the incentive to providers to enter and expand their open banking business.

A. Banks

As would be expected, adoption by the CMA9 is close to 100 percent¹⁶ but it is significant that they have almost all also launched open banking services themselves. In the main, these are "aggregator" services which allow customers to view transaction information relating to bank and credit card accounts they hold with other providers,¹⁷ through the bank's retail banking app. Some have also begun providing payment services using open banking (as an alternative to card payments, for example) including the ability to initiate a payment from an account held at another bank.¹⁸

As was envisaged by the CMA, current account providers other than those mandated to do so have adopted the open banking standards. The CMA reasoned that since these account providers would need to adopt APIs in order to comply with PSD2 it was likely that they would adopt the (free) standards rather than develop their own. As a result, close to 99 percent of current account consumers are using account service providers who have adopted the open banking standards.

¹³ The banks (and 1 building society/mutual) were the largest providers of current accounts in Britain and Northern Ireland respectively.

¹⁴ Sadly, the first Trustee, Andrew Pinder, died a few months after taking up the post. He was replaced by a new Trustee, Imran Gulamhuseinwala, in March 2017.

¹⁵ In the Order this is described as the Agreed Timetable and Project Plan, the current version of which is [here](#).

¹⁶ Several banks found the initial timetable challenging and one of the smallest banks has not yet fully adopted all of the requirements in Northern Ireland but the majors, whose collective market share is over 80 percent, have all fully met the obligations of the Order.

¹⁷ Over 40 percent of consumers in the UK have more than one current account. [FCA, Sector Views](#), January 2019, p 19.

¹⁸ For example [Payit](#) from NatWest and the equivalent service from [Barclays](#).

B. Fintechs

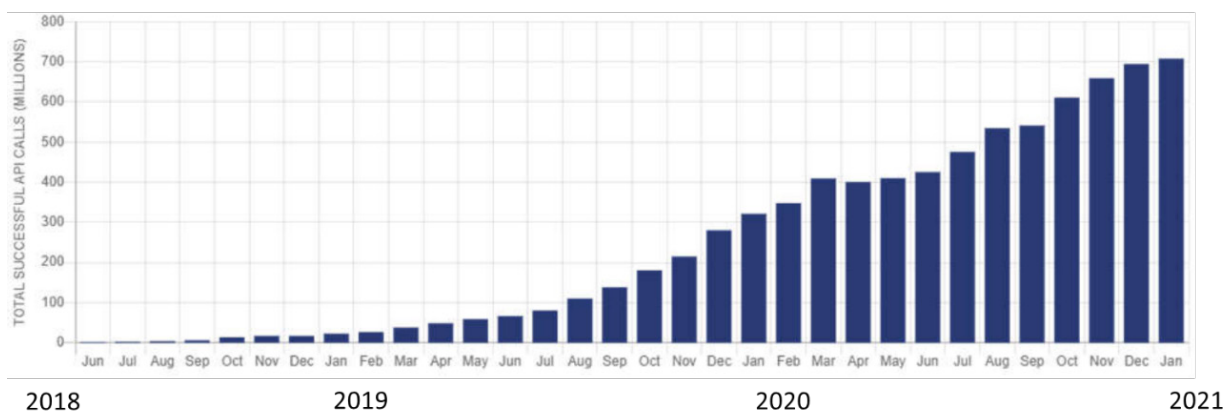
The number of third-party providers (“TPPs”) who are now active in the ecosystem is also extremely important to the effectiveness of the remedy as it is these new market participants who will be offering innovative services which put competitive pressure on incumbent providers. In March 2021 there are just over 130 TPPs with products generally available in the market, approximately 70 percent of whom provide account information services (such as aggregators or apps which assess creditworthiness or loan eligibility) and the remainder payment initiation services, enabling users to make single immediate or future or regular payments not using card systems but sending money directly from their bank account to the recipient’s.

Payment initiation services have been slower to develop but as the payment functionality of open banking has improved, with for example the addition of a refund capability, more PISPs have entered the market, including, as noted above, two bank and the major card companies.¹⁹ We expect open banking payment services to grow rapidly and, over the coming years, to put significant pressure on providers of card services.

C. End Users

Consumer adoption has been harder to measure accurately and initially OBIE and the CMA relied upon the volume of API calls to provide an indicator, albeit an oblique one. As can be seen from the diagram below, call volumes have increased steadily since launch and are now running at over 700 million calls a month.

API monthly call volumes, June 2018 to January 2021



Source: OBIE

More recently the OBIE has tried to measure individual active users on a monthly basis and its current estimate is that around 3 million people and businesses a month²⁰ are using open banking.

SME penetration is almost certainly higher than in consumer markets with perhaps 50 percent²¹ of SMEs using products that rely on open banking, driven particularly by the benefits that they can derive from automating input to their cloud-based accounting systems from their bank accounts and the ability of their advisors to model cash flows.

Adoption by SMEs is likely to be driven further still as the UK’s taxation authority (Her Majesty’s Revenue and Customs) starts accepting payments via open banking channels.²²

¹⁹ For example the [American Express Bank Transfer](#) product.

²⁰ See [Openbanking.org.uk](#).

²¹ See [OBIE survey](#) of December 2020.

²² [HMRC awarded the contract](#) to provide it with open banking payments services in February 2021.

VI. SOME LESSONS LEARNED

Much of the “heavy lifting” to introduce open banking in the UK has now been done, with considerable potential for future growth of the ecosystem, benefitting UK customers. Given the international interest in open banking, and the appetite for data-sharing interventions in other sectors, we conclude this piece with a few reflections on the implementation of open banking over the past six years.

- Jurisdictions have had different reasons for adopting open banking: financial inclusion/widening the tax net; boosting the Fintech Sector; stimulating competition. In the UK’s case the aim was to increase the competitive pressure faced by the major UK banks both from other banks and from non-banks offering banking services. In such circumstances it seems unlikely to us that a purely voluntary approach to the introduction of open banking would have succeeded, since the firms whose active cooperation is required to put in place open banking had both the ability and the incentive to frustrate it. Similar considerations also apply to the specification of individual parts of the ecosystem design. For example, if the design of a crucial element of the customer journey is left to an entity whose interest is in making that journey more difficult, it is likely to do so unless prevented. The mandatory implementation of open banking, including the role of OBIE, was one way of overcoming this conflict of incentives,
- SME adoption of open banking is likely to be faster than consumer adoption. The functionality that open banking offers SMEs can be easily added to and will enhance the performance of tools that SMEs are already using, for example cloud-based accounting systems. Such use cases do not therefore involve a big leap for SMEs and will immediately deliver benefits by making frequently performed tasks simpler, thus saving time.
- Both the risks and the benefits associated with payment initiation services are higher than those with account information services. As customers are allowed by open banking to grant PISPs the authority to move money safely out of their bank account to a merchant or savings account say, the possibilities of money going astray or being perceived as having gone missing, are greater. However, the “disruptive” nature of such service may mean they are likely to have a bigger competitive impact on the market and thus represent a greater commercial threat to incumbent banks, both directly (e.g. in putting pressure on overdraft charges) and indirectly (eg by allowing customers to avoid paying the interchange fees that card transactions generate). For these reasons, regulators will probably have to “push” harder to ensure that payment initiation delivers its full potential, that high standards of customer protection are maintained and that beneficial proposals, particularly relating to functionality, are not watered down in the face of industry opposition.
- The implementation model adopted in the UK (an implementation entity overseen by a Trustee with the power to require the adoption of particular standards in the absence of consensus) worked well for us but this may have been due to the particular circumstances we faced. As the first jurisdiction to adopt open banking we had little or no precedent to rely on and were therefore to an extent “feeling our way.” In the event, the technical side of standards adoption was relatively straightforward and the UK “tech stack”²³ has now been adopted in other jurisdictions. However, there were nonetheless elements of the process which had characteristics in common with the practice of creating a “minimum viable product” as the first step in the development journey.
- We found that some banks were able to adopt open banking standards faster than others, usually because of the configuration, including security standards, of their main banking platforms. We therefore faced a choice: should we set stretching targets and accept the fact that some banks would continually be in breach of our Order? Or should we set targets that all of them could meet? We chose the former and were quite explicit that we did not intend to move at the pace of the slowest provider. Had we not done so, implementation would have taken, literally, years longer.
- As we have noted more than once, the CMA’s objective in adopting open banking was to stimulate competition in retail banking, including providing tools for relatively “technologically savvy” consumers to use to save themselves money. However, a significant number of applications have been developed whose aim it is to protect the interests of more vulnerable consumers.²⁴ Regulators introducing open banking, and developers contemplating possible avenues of research, should be mindful of these opportunities that open banking presents for helping consumers who may not have been well-served by traditional models of supply.

²³ OAuth 2.0, ID Connect and FAPI.

²⁴ For some examples see the [OBFG \(open banking for good\) website](#). For more see the [open banking website listing consumer applications](#) classified under a variety of headings.

MAXIMIZING THE COMPETITIVE POTENTIAL OF OPEN BANKING: INSIGHT FROM THE CANADIAN CONVERSATION

BY GREG LANG¹



¹ Greg Lang is Major Case Director and Strategic Policy Advisor in the Competition Promotion Branch of the Canadian Competition Bureau. The views expressed in this article are those of the author, and do not necessarily reflect those of the Commissioner of Competition, the Competition Bureau, the Department of Justice Canada, the Public Prosecution Service of Canada, or Innovation, Science and Economic Development Canada. This article will not predetermine the Commissioner of Competition's position in any current or future investigation or intervention pursuant to the Canadian *Competition Act*. The author thanks Matthew Strathern (Bank of Canada) and Mathew McCarthy (Competition Bureau) for their excellent research assistance in preparing this article.

I. INTRODUCTION

Open banking enables greater competition and innovation.² By empowering customers to securely share their data between financial institutions, open banking simplifies switching and makes it easier for customers to find and choose the provider or product that best suits their needs. Encouraging switching places greater competitive pressure on incumbents, and supports the business models of new and innovative service providers. Additional financial services competition significantly enhances choice and brings about lower prices, increased convenience, and higher levels of innovation in an industry that is foundational for any economy.³

No open banking regime can effectively proceed without earning and keeping the trust of customers. Given that open banking involves the digital exchange of sensitive financial data, regulatory oversight can be necessary to ensure that market participants appropriately preserve consumer privacy and data security. Financial system regulators are therefore challenged to ensure a safe and secure open banking system, while also providing the maximum scope for businesses to bring about the beneficial competitive and innovative forces that are the intended outcomes of an open banking system. This creates a significant opportunity for competition authorities to play an important role in ensuring the development of effective open banking regulation.

This article examines how best to strike a regulatory balance between ensuring consumer privacy and data protection, and promoting greater competition and innovation. Informed by a preliminary examination of the development of open banking in the Canadian context, this article discusses some of the key design issues that have arisen in the Canadian regulatory discussion. Competition policy principles are then used as signposts to encourage pro-competitive open banking regulation.

II. OPEN BANKING IN CANADA

The Government of Canada took its first formal steps towards open banking in its 2018 Budget. Recognizing both the competitive and innovative potential of open banking, as well as international efforts to implement open banking regimes, the Government of Canada announced that it would review of the merits of a made-in-Canada open banking system.⁴ Shortly thereafter, the Canadian Minister of Finance appointed an expert panel, dubbed the Advisory Committee on Open Banking (“Advisory Committee”) to undertake this review.⁵ The Advisory Committee then published a consultation paper, in January 2019, to encourage a public conversation about the merits of open banking in Canada.⁶ In January 2020, following a year-long consultation process, the Advisory Committee recommended that Canada move forward to establish an open banking regime.⁷ The Minister of Finance then announced a second phase of work for the Advisory Council to continue to review implementation of a Canadian open banking system, with a particular focus on ensuring data security.⁸ This work was temporarily delayed by the COVID-19 pandemic, but the Advisory Council is currently in an advanced state of this second phase review.⁹

2 This article significantly reproduces the Competition Bureau’s recent submission to the Canadian Advisory Council on Open Banking. See Competition Bureau, *Supporting a Competitive and Innovative Open Banking System in Canada* (January 18, 2021), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04571.html>.

3 Competition Bureau, *Technology-led Innovation in the Canadian Financial Services Sector: A Market Study*, (December 14, 2017), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04322.html>.

4 Government of Canada, *Fostering Innovation and Competition, Review of Open Banking*, BUDGET 2018 (February 27, 2018), <https://www.budget.gc.ca/2018/docs/plan/toc-tdm-en.html>.

5 Press Release, Department of Finance Canada, Minister Morneau Launches Advisory Council on Open Banking (September 26, 2018), <https://www.canada.ca/en/department-finance/news/2018/09/minister-morneau-launches-advisory-committee-on-open-banking.html>.

6 Department of Finance Canada, *A Review into the Merits of Open Banking* (January 2019), <https://www.canada.ca/en/department-finance/programs/consultations/2019/open-banking.html>.

7 Advisory Committee on Open Banking, *Consumer-directed Finance: the Future of Financial Services* (January 31, 2020), <https://www.canada.ca/en/department-finance/programs/consultations/2019/open-banking/report.html>.

8 Press Release, Department of Finance Canada, Minister Morneau announces second phase of open banking review with a focus on data security in financial services (January 31, 2020), <https://www.canada.ca/en/department-finance/news/2020/01/minister-morneau-announces-second-phase-of-open-banking-review-with-a-focus-on-data-security-in-financial-services.html>.

9 Isabelle Kirkwood, *Following Delay, Federal Government To Reopen Virtual Consultations On Open Banking*, BETAKIT (November 4, 2020), <https://betakit.com/following-delay-federal-government-to-reopen-virtual-consultations-on-open-banking/>.

As Canada's competition authority, the Competition Bureau ("Bureau") has actively participated in the development of Canada's open banking regime. The Bureau initially studied open banking as part of its FinTech Market Study, conducted during 2016-17.¹⁰ In its market study report, the Bureau supported greater open access to systems and data, including open banking, as a key driver of competition and innovation in the financial sector.¹¹

The Bureau then made follow-on submissions in support of open banking to the Minister of Finance in October 2017, and to the Advisory Council in February 2019.^{12,13} The Bureau's most recent submission — in response to the Advisory Council's second phase review — was made in January 2021.¹⁴ At present, stakeholders await the outcomes of that second phase review.

III. COMPETITION PRINCIPLES FOR OPEN BANKING DESIGN

Effective regulation is crafted with a clear understanding of the policy goals it seeks to achieve. Financial industry regulators are responsible for ensuring the stability of a country's financial system and, in the particular case of open banking, for managing customer privacy and data protection issues. However, beyond such immediate goals, decision makers should always seek to understand the effects that proposed regulation may have more broadly. A key area of importance for all regulators is ensuring that regulations support a competitive and innovative economy.¹⁵

A. Competition in the Canadian Financial Sector

The Canadian financial sector is relatively concentrated. Canada's five largest banks enjoy substantial market shares across much of the financial services industry, and there is tight regulatory control over both entry and operations.¹⁶ Accordingly, Canadian customers show weak competitive engagement with banks — relatively few Canadians switch their banking providers each year, and relatively few Canadians have tried innovative new banking products, relative to their international peers.¹⁷ Open banking is an important means of stimulating greater competitive engagement between customers and financial service providers.

B. Open Banking Supports Competition and Innovation

Canadian regulators prioritize financial system stability through a high degree of regulatory control.¹⁸ This is obviously an important objective, and this focus has allowed Canada to weather some significant financial crises.¹⁹ However, restraints on entry and business conduct can also act counter to market forces, insulating incumbents from competition, and generally making it more challenging for businesses to introduce new products, expand their current product offerings, or grow into new territories.

¹⁰ Competition Bureau, *FinTech Market Study Portal*, <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04188.html>.

¹¹ Competition Bureau, *supra* note 3.

¹² Competition Bureau, *Potential Policy Measures to Support a Strong and Growing Economy: Positioning Canada's Financial Sector for the Future* (October 12, 2017), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04313.html>.

¹³ Competition Bureau, *Submission by the Interim Commissioner of Competition to the Department of Finance Canada – Review into the merits of open banking* (February 11, 2019), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04416.html>.

¹⁴ Competition Bureau, *Supporting a Competitive and Innovative Open Banking System in Canada* (January 18, 2021), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04571.html>.

¹⁵ Competition Bureau, *Strengthening Canada's Economy through Pro-Creative Policies* (August 20, 2020), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04546.html>.

¹⁶ Office of the Superintendent for Financial Institutions Canada, *Oversight of Canada's Financial System*, https://www.osfi-bsif.gc.ca/Documents/WET3/FinSystem/eng/FinSystem-Infographic_eng.pdf.

¹⁷ Competition Bureau, *supra* note 12.

¹⁸ Office of the Superintendent for Financial Institutions Canada, *supra* note 16.

¹⁹ Jean Boivin, Former Deputy Governor, Bank of Canada, *The "Great" Recession in Canada: Perception vs. Reality*, Remarks at Montréal CFA Society (March 28, 2011), <https://www.bankofcanada.ca/2011/03/great-recession-canada-perception-reality/>.

By promoting greater customer mobility in the financial sector, open banking can enable greater competitive vibrancy.²⁰ When switching is easier, customers are more able to take advantage of competitive alternatives, which in turn incentivizes businesses to bring valuable new offers to market.²¹ A greater openness to switching increases competitive vigor between incumbent service providers, and promotes the entry and expansion of new and innovative service providers. These effects allow customers to benefit from additional options, lower prices, and greater levels of innovation.

IV. PRO-COMPETITIVE ELEMENTS OF OPEN BANKING DESIGN

Each design element of an open banking system has the potential to affect competition and innovation. Ensuring a maximally effective system requires decision makers to assess the competitive impacts of each proposed rule, and adapt such elements where necessary. This is the idea of competition assessment: the methodical and conscious evaluation and adjustment of regulation to achieve pro-competitive and innovative outcomes.²²

The Bureau's January 2021 submission to the Advisory Council identified six general areas in which an open banking regulatory framework could affect competition.²³ They are: (i) universal principles that apply generally to open banking regulatory design; (ii) API standard setting; (iii) accreditation requirements for participation in the open banking system; (iv) treatment of liability in case of security or privacy breaches; (v) ensuring that data access is provided on a reciprocal basis; and (vi) methods of redress when the system requires regulatory intervention.

A. Universal Principles

The Bureau's 2017 FinTech Market Study Report elaborates a number of broad recommendations for decision makers to consider when crafting pro-competitive financial industry regulation.²⁴ Six of these recommendations apply directly to the design of an open banking regime. In particular, regulations should be:

- (i) Technology-neutral and device-agnostic: regulatory language should be sufficiently flexible to accommodate and encourage new and yet-to-be developed technologies.
- (ii) Principles-based, rather than prescriptive: regulation should be aimed at achieving a policy goal and, wherever possible, should neither specify nor endorse any one particular method of business operations.
- (iii) Based on the function an entity carries out: service providers should compete on a level playing field. Wherever possible, customers of any given product should have the same protections regardless of a provider's business model.
- (iv) Proportional to risk: regulatory oversight and control should be a function of the risk that an activity may bring to the financial system, with lower-risk activities being granted greater regulatory freedom.
- (v) Harmonized across geographical boundaries: correspondence of regulation between jurisdictions makes it easier for firms to enter and operate across borders.
- (vi) Reviewed frequently: regulations should be reviewed regularly to ensure that they are achieving their policy goals and responding appropriately to marketplace developments. This is of even greater importance in areas where there is significant technological innovation.

20 At the same time, open banking may not be sufficient, on its own, to ensure widespread entry in respect of all Canadian financial services products. New financial service providers, or existing providers who wish to expand into a new product line, face a number of significant barriers to entry.

21 See, for example, Paul Klemperer, *Competition when Consumers have Switching Costs: An Overview with Applications to Industrial Organization, Macroeconomics and International Trade*, 62 *REVIEW OF ECONOMIC STUDIES*, 515-39 (1995), <https://www.nuffield.ox.ac.uk/users/klemperer/competition.pdf>.

22 Competition Bureau, *supra* note 15.

23 Competition Bureau, *supra* note 14.

24 Competition Bureau, *supra* note 3.

B. API Standard Setting

An Application Programming Interface (“API”) is a digital means of exchanging information between financial service providers.²⁵ APIs require a standard to present data in a consistent and predictable fashion and, therefore, regulators may wish to require or endorse one particular standard as the basis for an open banking system. There are two extreme approaches that can be taken to API standard setting. One approach involves a regulator defining a universal standard for information exchange that would apply to participants in an open banking regime (“Common Standard”). This is the approach that has been taken in the United Kingdom and Australia.^{26,27} A second approach allows API standards to vary between service providers (“Individual Standard”). This has been the approach adopted in Japan and Europe.^{28,29}

By analogy with verbal communication, a Common Standard approach requires that each service provider’s system speak the same language, whereas an Individual Standard allows each system to speak a unique language. In both cases, the same information is being transmitted but, under an Individual Standard, a degree of translation is required.³⁰

A Common Standard most directly facilitates entry by non-incumbent, competitive financial services providers (“Competitive Providers”). Under a Common Standard, a Competitive Provider would need only to develop a system that accommodates information compliant with the Common Standard. Under an Individual Standard, that same Competitive Provider would need to translate information between the sender’s API format and the data format used by the Competitive Provider’s system. Adding even greater complexity is the fact that these systems would then have to be adapted every time that any service provider changes its API standard. In this sense, a Common Standard reduces the time, cost, effort, and complexity for Competitive Providers, easing their business case to compete.^{31,32}

Having said that, a Common Standard can negatively impact innovation and dynamic competition between standards. Common Standards are by definition rigid, and deviation from these standards, even in circumstances where there may be value in doing so, could require a number of bi-lateral agreements between financial service providers to act outside of a pre-determined Common Standard.³³ This lack of flexibility can reduce the incentives for service providers to bring about innovative ways of exchanging data, to the detriment of dynamic competition.³⁴

25 Advisory Committee on Open Banking, *supra* note 7.

26 Open Banking Implementation Entity, *Open Banking Guidelines for Open Data Participants* (July 2018), <https://www.openbanking.org.uk/wp-content/uploads/Guidelines-for-Open-Data-Participants.pdf>.

27 Australian Competition and Consumer Commission, *Explanatory Statement Proposed Competition and Consumer Rules*, (August 2019), <https://www.accc.gov.au/system/files/Proposed%20CDR%20rules%20-%20Explanatory%20Statement%20-%20August%202019.pdf>.

28 Deloitte, *Open Banking Around the World: Towards a Cross-Industry Data Sharing Ecosystem* (November 29, 2018), <https://blogs.deloitte.co.uk/financialservices/2018/11/open-banking-around-the-world-towards-a-cross-industry-data-sharing-ecosystem.html>.

29 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, recital 93, (2015), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32015L2366>.

30 Diana Milanese, *A New Banking Paradigm: The State of Open Banking in Europe, the United Kingdom, and the United States*, TFL WORKING PAPERS No. 29 (2017), <https://law.stanford.edu/publications/a-new-banking-paradigm-the-state-of-open-banking-in-europe-the-united-kingdom-and-the-united-states/>.

31 Giuseppe Colanegelo and Oscar Borgogno, *Data, Innovation and Transatlantic Competition in Finance: The Case of the Access to Account Rule*, EU LAW WORKING PAPERS No. 35 (2018), <https://law.stanford.edu/publications/no-35-data-innovation-and-transatlantic-competition-in-finance-the-case-of-the-access-to-account-rule/>.

32 Several Canadian service providers are moving to adopt a Common Standard. See James Bradshaw, *Canadian Financial Institutions join Data Exchange to Speed Up Development of Open Banking*, THE GLOBE AND MAIL (July 29, 2020), <https://www.theglobeandmail.com/business/article-canadian-financial-institutions-join-data-exchange-to-speed-up/>.

33 Colanegelo & Borgogno, *supra* note 31.

34 Open Banking Implementation Entity, *supra* note 26.

A middle-ground approach may be most favorable in respect of both competition today, and the adaptability of competition in the future. Entry into downstream financial services is most ably facilitated today by a Common Standard that specifies mandatory data fields, performance specifications, and technical documentation.³⁵ However, any adoption of Common Standards should be done with flexibility as a key objective to enable new and innovative use cases.³⁶ Ultimately, a well-designed system will incentivize rapid entry by Competitive Providers today, while providing sufficient scope for a dynamic competitive process to ensure that a Common Standard system can accommodate valuable innovation in the future.³⁷

C. Accreditation Requirements

Open banking requires service providers to exchange sensitive customer financial information. In order to safeguard this information, it may be necessary for service providers in an open banking system to be accredited — that is, for each service provider to demonstrate that its systems are sufficiently robust, and that it has proper compliance measures in place, to minimize risks associated with data transmission.

Accreditation typically involves a centralized accreditation body. Such an accreditation body reviews the systems and business processes of a service provider, and approves service providers to participate in the open banking system. The UK, EU, Japan, and Australia have all adopted some form of centralized accreditation.³⁸

Accreditation requirements must be carefully tailored to support competition and innovation. Overly strict requirements could establish significant regulatory burdens that: (i) make it difficult for Competitive Providers to enter and compete, or (ii) are wholly incompatible with a Competitive Provider's business model.³⁹

Additionally, the composition of any accrediting body is important to competition. Accrediting bodies, in their role of approving participants in the open banking system, have the power to exercise significant control over marketplace outcomes. The Bureau's *Interac* abuse of dominance case provides an illustrative example.⁴⁰ Interac is an electronic interbank system that, among other things, facilitates Canada's debit card payment system. In this case, a number of Canadian financial service providers, through their joint control of the Interac system, promulgated rules that had the effect of preventing other service providers from accessing the Interac network. To avoid similar exclusionary behavior in the context of open banking, any accrediting body should be independently-led, and no party or group of parties that has a stake in the commercial outcomes of an accreditation decision should be able, on its own, to determine accreditation.

Finally, in order to encourage competition and innovation, an accrediting body may wish to use a form of provisional or tier-based accreditation. Such an approach could provide some degree of conditional or preliminary accreditation to Competitive Providers, permitting them to enter the system sooner in their product development lifecycle, even when they have not yet satisfied every ultimate regulatory requirement. This would allow Competitive Providers the flexibility to meet accreditation requirements as their use-case expands.

35 Robert Bodle, *Regimes of Sharing: Open APIs, Interoperability, and Facebook*, 14 INFORMATION, COMMUNICATION & SOCIETY 3, 320-37 (2010), <https://www.tandfonline.com/doi/abs/10.1080/1369118X.2010.542825>.

36 Luís A. Bastião Silva, Carlos Costa, and José Luís Oliveira, *A Common API for Delivering Services over Multi-Vendor Cloud Resources*, 86 JOURNAL OF SYSTEMS AND SOFTWARE 9 (2013), <https://www.sciencedirect.com/science/article/abs/pii/S0164121213001052>.

37 Such changes could be affected through a redress mechanism discussed in greater detail below.

38 Accreditation could also be performed through bilateral contracts between individual data providers; however, this model features significant exclusionary incentives, and also involves less direct supervision of service providers.

39 Deloitte, *supra* note 28.

40 *Director of Investigation and Research v. Bank of Montreal et al.*, Competition Tribunal CT-1995-002, <https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/462733/index.do>.

D. Treatment of Liability

Since open banking requires the exchange of sensitive customer financial information, a question arises of how customers could be made whole in the case of a security or privacy breach.⁴¹ Regardless of which party — the initiator or the receiver of the data — is ultimately liable, there are two main approaches to ensuring that customers can be compensated for any resulting losses. First, service providers could be required to hold capital balances that would be used to cover losses from a security breach. Second, service providers could be required to carry insurance against such losses.

In either case, regulatory requirements must be carefully designed to avoid negative effects to competition and innovation. If potential entrants face high capital requirements to take part in open banking, this will impose entry barriers that may limit innovation and have a negative impact on competition.⁴² If mandatory insurance is required, then regulators must first ensure that a robust insurance market exists, and carefully consider the role that large financial institutions play in that market. For example, if incumbents underwrite the insurance policies of Competitive Providers, these incumbents may have the ability and incentive to raise premiums as a means of limiting entry.⁴³

E. Reciprocity of Data Access

Reciprocity is the concept of allowing flow of financial information between all participants in the open banking system. Reciprocity can drive greater competition between service providers, and bring about incentives for a broader range of firms to participate in open banking.^{44,45}

Key to an effective reciprocity regime is the appropriate distinction between “proprietary” and “non-proprietary” data. In this context, non-proprietary data is required by an open banking system to be made available between service providers, whereas proprietary data is not shared from one service provider to another. The ability to designate certain information as proprietary is central to a service provider’s incentive to invest in innovative products; without such protection, competing service providers could free ride on that innovation.⁴⁶ However, improperly designating data as proprietary can obscure competitively important information from rivals, making them less able to use customer data to deliver competitive financial products.

Regulators may therefore be charged with making a clear distinction between proprietary and non-proprietary data that is sufficiently flexible across many potential use cases. The Bureau’s experience, including in its *Toronto Real Estate Board* abuse of dominance case, is that businesses could illegitimately claim that certain data is proprietary as a means of frustrating the competitive process.⁴⁷ Accordingly, regulators should ensure that there is demonstrated evidence to legitimize claims that certain data should be not be shared.

41 See, for example, Australian Competition and Consumer Commission, *Competition and Consumer (Consumer Data Right) Rules 2019* (August 2019), <https://www.accc.gov.au/system/files/Proposed%20CDR%20rules%20-%20August%202019.pdf>; and European Commission, *Payment Services Directive: Frequently Asked Questions* (January 12, 2018), https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_15_5793.

42 U.K. Competition & Markets Authority, *Retail Banking Market Investigation: Barriers to Entry and Expansion* (July 14 2015), https://assets.publishing.service.gov.uk/media/55a4eb9040f0b61560000005/Barriers_to_entry_and_expansion_-_capital_requirements__IT_and_payment_systems.pdf.

43 For a further discussion of these effects, see Competition Bureau, *Non-Horizontal Mergers* in MERGER ENFORCEMENT GUIDELINES (2011), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html#s11_0.

44 Advisory Committee on Open Banking, *supra* note 7.

45 Implementing reciprocity conditions can be complex. Some jurisdictions, like Australia, are currently exploring the meaning of reciprocity between many different classes of service providers. See, for example, Australian Competition and Consumer Commission, *Consumer Data Right Rules Framework* (September 2018), https://consultation.accc.gov.au/communications-1/consumer-data-right-rules-framework-consultation/supporting_documents/ACCCConsumerDataRightRulesFramework.pdf.

46 In this sense, the fact that other service providers can profit from the innovations of others decreases the return to those innovations, therefore making them less likely.

47 *Commissioner of Competition vs. Toronto Real Estate Board et al.*, Competition Tribunal CT-2011-003, <https://decisions.ct-tc.gc.ca/ct-tc/cd/en/item/462552/index.do>.

F. Methods of Redress

Even the most well-designed regulations are challenged by unanticipated circumstances. For example, a regulatory rule may fail to foresee a new technology, or an accreditation criteria may prove unsuitable for a certain class of providers. It is, therefore, paramount that an effective redress system be put in place to settle issues as they arise. Failing to do so may result in the benefits of competition being either delayed or denied.

There are many models of effective redress. One model would be to have a regulatory body empowered to hear and decide disputes. Another could involve decision-making by an expert committee, recognizing that some matters may require significant technical or marketplace expertise to resolve.⁴⁸ From a competition perspective, similar to the discussion of accreditation bodies above, any redress body should be independently-led, and no party or group of parties that has a stake in the commercial outcomes of a redress decision should be able, on its own, to determine a matter.

V. CONCLUSION

A successful open banking regime is one that maximizes competition and innovation. A conscious focus on prioritizing pro-competitive considerations through the regulatory design process will ensure that open banking brings about the lower prices, increased convenience, and higher levels of innovation that are characteristic of competitive markets. By communicating and advocating for these benefits, competition authorities have an important role to play in ensuring that open banking regimes can successfully deliver on their competitive and innovative potential.

The Canadian regulatory discussion has identified a number of key areas where regulations should be tuned to best deliver these competitive and innovative outcomes. Regulators should be focused on adequately supporting both static competition today, by incentivizing rapid entry by new firms and products, and dynamic entry in the longer term, by ensuring that regulations are sufficiently flexible to adapt to disruptive developments. These factors carry through a wide range of specific regulatory elements: API standard setting, accreditation, liability, reciprocity, and mechanisms of redress.

⁴⁸ This is similar to Canada's competition law model, where the Competition Tribunal is a quasi-judicial administrative body that determines matters with a panel comprised of at least one member of the Federal Court and at least one lay member, who is not a judge but is rather a knowledgeable individual appointed by the government. This system recognizes that some matters may require specialized knowledge or experience beyond that expected of a Federal Court judge. For more information, see *Competition Tribunal Act* (R.S.C., 1985, c. 19 (2nd Supp.)), <https://laws.justice.gc.ca/eng/acts/C-36.4/FullText.html>.

WHY DATA INTEROPERABILITY IS HARDER THAN IT LOOKS: THE OPEN BANKING EXPERIENCE

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Data portability and interoperability tools allow customers to easily move their data between competing services, either on a one-off or an ongoing basis. Some see these tools as offering the potential to strengthen competition in digital markets; customers who feel locked in to services that they have provided data to might be more likely to switch to competitors if they could move that data more easily.² This would be particularly true, advocates hope, where network effects grant existing services value that new rivals cannot emulate or where one of the barriers to switching services is the cost of re-entering personal data.

The UK's Open Banking system is one of the most mature and important examples of this kind of policy in practice. As such, the UK's experience to date may offer useful clues as to the potential for similar policies in other markets, for which the UK's Furman Report has cited Open Banking as a model.³ But fans of interoperability sometimes gloss over the difficulties and limitations that Open Banking has faced, which are just as important as the potential benefits.

In this article, I argue that Open Banking provides lessons that should both give hope to optimists about data portability and interoperability, as well as temper some of the enthusiasm for applying it too broadly and readily.

I draw on my experiences as part of the team that produced the industry review "Open Banking: Preparing For Lift Off" in 2019.⁴ That report concluded that Open Banking, though promising, needed several additional reforms to succeed, a few of which I discuss in this piece. I was also the co-author of a white paper that argued for an Open Banking-like remedy in the UK's retail electricity market, which I discuss briefly below. All views expressed here are my own.⁵

I argue that there are three main lessons to draw from Open Banking for considerations of similar remedies in other markets:

1. Implementation is difficult and iterative, and probably requires *de facto* regulatory oversight if it is to be implemented effectively, with all the attendant costs and risks that entails.
2. The outcomes that interoperability produces may differ from those policymakers have in mind, and may not mean more switching of core services.
3. If Open Banking does succeed, it will be thanks to features of the UK banking market that may not be present in other markets where similar interoperability is being proposed.

I conclude that Open Banking has not yet led to noticeably stronger competition in the UK banking sector. Implementation challenges suggest that taking an equivalent approach to other markets would require more time, investment and effort than many advocates of interoperability requirements usually concede and may not deliver the anticipated benefits. To the extent that Open Banking is to be a model, it would be best applied as a focused approach in markets that bear particular characteristics and where the costs are outweighed by the benefits, rather than a blanket measure that can be applied to every market where customer data matters.

2 Joseph Farrell and Paul Klemperer, "Coordination and Lock-In: Competition with Switching Costs and Network Effects", *Handbook of Industrial Organization* (Volume 3, 2007, Pages 1967-2072) <https://www.sciencedirect.com/science/article/pii/S1573448X06030317>.

3 HM Treasury, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel*, (March 2019), p. 69. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

4 Open Banking Ltd, *Open banking, preparing for lift off*, (July 2019). <https://www.openbanking.org.uk/wp-content/uploads/open-banking-report-150719.pdf>.

5 Federation of Small Businesses, *Open energy: Using data to create a smarter, cheaper and fairer energy market*, (September 2018). <https://www.fsb.org.uk/resources-page/open-energy-using-data-to-create-a-smarter--cheaper-and-fairer-energy-market-pdf.html>.

I. IMPLEMENTATION IS DIFFICULT AND ITERATIVE

Open Banking was launched in 2018, following the Competition and Markets Authority's Retail Banking Market Investigation, which concluded that low customer-switching rates were a cause of weak competition in UK retail banking.⁶ It followed an abortive earlier attempt at an open data standard for regulated sectors of the UK economy called Midata that offered customers CSV files giving snapshots of their transactions history with certain third parties, such as their energy company. The hope was that this would make price comparisons easier and more tailored to “change personal banking forever.”⁷ Unfortunately, Midata was a complete failure. It was cumbersome for users, relied on one-off snapshots of data that limited what it could be used for, and allowed customers to edit the data themselves, making it useless for purposes like credit scoring.

Open Banking was built with many of these failings in mind. It also had the power of a CMA Market Investigation Reference behind it, as well as the European Second Payments Directive (“PSD2”). The effort required the nine largest banks to make their retail and small-business customers’ banking data available to approved third parties through a secure API. This allowed those customers to share elements of their bank details with services like aggregators that combine accounts from several different banks on a single dashboard, as well as to initiate and schedule payments (thus incorporating PSD2’s requirements). Both the API and the security and user-authorization framework around it were designed by a CMA-governed body called the Open Banking Implementation Entity (“OBIE”).

Open Banking allows third parties to read user account balance information, transaction history, information about regular payments, and a few other related items.⁸ It also allows customers to give third parties the ability to make and schedule bank-to-bank payments.⁹ These allow customers to share “read” and “write” privileges with third party apps, an authorization they can also grant separately. For example, a small-business customer could share her account details and transaction history with an accounting app that automatically categorizes transactions and gives an estimate of payable tax. Or a customer could authorize a third-party app to make a payment from their account to a currency-exchange service or an online merchant, rather than making a card payment or having to enter bank details manually for a bank-to-bank payment.

This data must be provided by banks for free. And it is important to note that this data is relatively simple and uniform across all banks, which may not be the case in other markets. Even where banks employ different internal codes for transaction data, making the data legible for external sharing only requires them translating a few items of information widely understood by all financial institutions, such as the amounts of money involved, the address and name of the body giving or receiving the funds, the date of the transaction, and so on.¹⁰

Nevertheless, implementing Open Banking has been a long, laborious process. Most banks missed the initial rollout deadline, and many missed subsequent deadlines related to product improvements. Many of the problems have stemmed from the incentives that banks face. If Open Banking succeeded on its own terms, incumbents would lose customers to competitors. If the new system suffered breaches or other service problems, customers might blame the banks themselves. And since the banks had to pay for both the OBIE and for the implementation in their own systems, most regarded the process as a costly burden.

The customer authorization process, through which a user authorizes a third-party provider to access their data, was widely considered to be incredibly offputting to customers in the early stages. Banks required customers to navigate as many as 12 screens of intimidating warnings and caveats. Launched in 2018, by which point most bank customers had become accustomed to using mobile apps to manage their banking, Open Banking used an out-of-date browser-based process that required that users log in repeatedly. The OBIE responded to the ensuing customer dissatisfaction by imposing new guidelines on the banks, which heavily controlled and directed the authorization process. The improved process now works app-to-app on mobile; users are brought from a third-party provider’s app to their bank’s app, where they can authorize the TPP, and then brought back again.

6 Competition and Markets Authority, *Retail banking market investigation: Final report* (August 2016), p. xxiii. <https://assets.publishing.service.gov.uk/media/57ac9667e5274a0f-6c00007a/retail-banking-market-investigation-full-final-report.pdf>.

7 Department for Business, Innovation & Skills, *The midata vision of consumer empowerment* (November 2011). <https://www.gov.uk/government/news/the-midata-vision-of-consumer-empowerment>.

8 Open Banking Ltd, *Account and Transaction API Profile - v3.1.7*. <https://openbankinguk.github.io/read-write-api-site3/v3.1.7/profiles/account-and-transaction-api-profile.html>.

9 Open Banking Ltd, *Payment Initiation API Profile - v3.1.7*. <https://openbankinguk.github.io/read-write-api-site3/v3.1.7/profiles/payment-initiation-api-profile.html>.

10 Open Banking Ltd, *Transactions - v3.1.7*. <https://openbankinguk.github.io/read-write-api-site3/v3.1.7/resources-and-data-models/aisp/Transactions.html>.

The OBIE also provides guidelines about the amount of time APIs can be offline, either for updates or other maintenance, or because of errors. This is extremely important to third parties that build apps on Open Banking. If the APIs they use are unreliable, users will just not use their services. The OBIE's detailed guidelines define exactly how downtime should be calculated ("when five consecutive requests for access to information for the provision of payment initiation services, account information services or confirmation of availability of funds are not replied to within a total timeframe of 30 seconds"). Although its target of 0.5 percent downtime per month has only been met twice since June 2018, service quality is improving, and is usually above 98 percent.¹¹

Open Banking has had an impressive security record, with no mass data breaches occurring since its rollout. The main risks have been phishing-related, such as rogue websites tricking users into making payments to them via Open Banking's payments functions. While this is not, by itself, a flaw in Open Banking, it highlights deficiencies in Open Banking's design — namely, the inability to recall payments through the payments APIs. Some of Open Banking's security success is down to the requirement that participating apps be approved by the financial regulator and added to a whitelist of services by the OBIE before they can operate in the market.¹²

Open Banking's implementation has involved ongoing design and oversight that has changed the system throughout its rollout. The process has been long, difficult, and required significant ongoing management by a quasi-regulatory agency. Doing this hasn't been simple, obvious, quick, or easy, and it has not been a mere exercise in "standards setting" — the design decisions have all involved trade-offs and judgements about what trade-offs are most reasonable. The incentives of the parties involved are often at cross-purposes, with important participants sometimes required to do things they really don't want to do, and dragging their heels whenever they get the chance. That doesn't mean it can't be done, but it's not straightforward.

II. OPEN BANKING HASN'T DELIVERED OBVIOUS COMPETITION BENEFITS (YET)

By some accounts, Open Banking has already proven a roaring success. According to the Open Banking Implementation Entity, as of January 2021, 2.5 million people in the UK use Open Banking-enabled products, nearly 6 billion API calls were made in 2020, and 300 third-party providers have signed up to the whitelist to have access to Open Banking APIs.

The Open Banking "App Store" lists over 100 apps that use the service, and the OBIE says over 300 firms are active in the market, with another 450 on the way.¹³ Some promising examples include Credit Kudos, which uses transaction data to measure creditworthiness, in competition with the incumbent credit-scoring companies; Moneybox, which rounds up card payments to the nearest pound and puts the difference into an investment account; Money Dashboard, which allows customers to view and manage financial accounts with different providers on a single interface; Tully, which helps people budget and manage debts; and Xero, the accounting software that draws transactions from small-business accounts to automatically populate accountancy tables. Many other apps provide similar services to these.

These are impressive accomplishments, and it is indisputable that many useful services now rely on Open Banking in ways that are good for consumers. Many of these had used a much less secure and user-friendly approach called "screen scraping" to access this data, where the customer gave their bank login details to the service and allowed it to log in to their account on their behalf. This practice is now banned, and some fintechs have complained that Open Banking does not replace some of the functionality that screen scraping allowed.

But is this enough to call Open Banking a success? There are 54.7 million bank account customers in the UK, so 2.5 million users represents adoption by about 4.5 percent of these.¹⁴ The service is growing at a rate of about 1 million customers every six months, but it's too early to say whether this rate will accelerate as more services enter the market or decelerate as the early adopter segment becomes saturated.¹⁵

¹¹ Open Banking Ltd, *Open Banking APIs Performance*. <https://www.openbanking.org.uk/providers/account-providers/api-performance/>.

¹² Open Banking Ltd, *Open Banking: Guidelines for read/write participants* (May 2018), p. 18. <https://www.openbanking.org.uk/wp-content/uploads/Guidelines-for-Read-Write-Participants.pdf>.

¹³ Open Banking Ltd, *Annual Report* (2020), p. 4. <https://assets.foleon.com/eu-west-2/uploads-7e3kk3/48197/obie-ra-artwork-10096a5716bf30-2.5853a6c2c203.pdf>.

¹⁴ Statista, *Number of customers at selected banks in the United Kingdom (UK) from 2007 to 2020*. <https://www.statista.com/statistics/940560/number-of-customers-at-select-banks-in-the-united-kingdom/>.

¹⁵ Open Banking Ltd, *Three years since PSD2 marked the start of Open Banking, the UK has built a world-leading ecosystem* (January 2021). <https://www.openbanking.org.uk/about-us/latest-news/three-years-since-psd2-marked-the-start-of-open-banking-the-uk-has-built-a-world-leading-ecosystem/>.

There is no indication that Open Banking has increased switching between current account providers, but this might be the wrong goal, anyway. Although the original HM Treasury report that proposed Open Banking suggested that it would drive increased switching, and it has been one of the main promises made by advocates of similar interoperability in other markets, the CMA's order is more focused on improving customer control over their money.¹⁶

But there is still no use case that changes in a significant way how most users manage their money. One of the most promising potential applications — services that automatically borrow from lower-cost lenders instead of bringing customers into expensive overdrafts — has still not arrived. Nor is there much sign of services using Open Banking's payments tools to undercut the card-payment networks.

As a competition remedy, then, it is hard to say that Open Banking has been a clear success. Interoperability has clearly been somewhat useful in UK banking, but the primary benefits realized, three years in, have been in greater access to ancillary services such as overdraft lending, accounting services and other money-management apps. If the ability to easily share customer banking history has not, as it turns out, led to more customers changing banks, it is difficult to conclude from the Open Banking experience that being able to share a list of your social-media contacts will increase adoption of and switching to new social-media services.

III. BANKING MAY NOT BE A GOOD MODEL FOR OTHER MARKETS

The UK banking market is not an obvious model for measures that may apply in other markets. It is highly regulated, with banks required to maintain equity capital of at least 8% to 11% of weighted assets.¹⁷ Incumbent banks also benefit from large implicit (and sometimes explicit) subsidies in the form of bailouts, exclusive access to reserve accounts and Lender of Last Resort facilities, and deposit guarantees. Though obviously some or all of these may be necessary for financial stability, they likely also have the effect of reducing competition in banking, as the CMA concluded.¹⁸ Although some new challengers have entered the UK banking market, they have struggled to compete with incumbents, whose dominance of the retail-banking market is largely unchanged since the CMA's market investigation.

Bank customers in the UK also largely treat their banks' offerings as a single bundle of products. Many customers use the same bank that provides their current account for credit cards, mortgages, loans, and savings and investment accounts, even when these are much more expensive than alternatives offered by third parties. This is likely to be at least partially because it is more convenient to manage these services through one screen, because their home bank already holds the data on them to assess their creditworthiness for many of these services, and because doing so as a bundle reduces search costs for consumers. In these cases, the customers who switch home bank accounts the least are also likely to be the ones who shop around for alternative third-party services least as well.

This means that the potential for interoperability may be greatest in this sort of market, where normal competitive pressures do not push incumbent firms to provide data-sharing, even though customers may want it, and where the bundled nature of the offering means easier data-sharing with third parties may allow customers to access cheaper and better ancillary services. In markets where such ancillary services are less important, data interoperability may have fewer potential benefits.

The data affected by Open Banking is also incidental to an existing commercial relationship. Banks, for the most part, do not consider collecting transaction data to be the point of the relationship. This is not the case in markets where user data is relatively more valuable. Supermarkets, for example, effectively pay customers for data about their shopping habits through loyalty card programs. The same may be true in digital markets that employ user data for product improvement and ad-targeting purposes, where user data is part of the "return" from providing a free service.

The incentive effects of mandatory data-sharing in these markets may be very different to the effects on UK banking, which are themselves ambiguous. If mandatory data-sharing was imposed on supermarket loyalty card schemes, for example, one supermarket could free ride on another's loyalty card scheme by convincing customers to share data provided to the original scheme with them. This would erode the incentive to collect this data in the first place. The same may be true in certain digital markets, where free services become charged-for. This does not mean that such an approach would necessarily be harmful, on balance, but it is a potential trade-off that has to be weighed.

¹⁶ Fingleton Associates and the Open Data Institute, *Data Sharing and Open Data for Banks: A report for HM Treasury and Cabinet Office* (September 2014), p. 32. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/382273/141202_API_Report_FINAL.PDF.

¹⁷ Bank of England, *Financial stability report* (December 2015), p. 8. <https://www.bankofengland.co.uk/-/media/boe/files/financial-stability-report/2015/december-2015.pdf?la=en&hash=79D815F673187E150A4DB75159EBF82E991E332F>.

¹⁸ *Retail banking market investigation*, p. xxviii.

A bigger risk may be the effect of state-specified standards on data services offered in the market, which the UK government's smart data impact assessment highlights.¹⁹ A mandatory standard could undermine the incentive firms have to differentiate themselves on the basis of their own interoperability standards or of the security around those standards. And it could lock in market participants to a subpar standard, especially if the standard has been built under the influence of incumbents. For example, if card networks can help to shape payments-processing interoperability standards in the United States, and those standards are made mandatory for banks, new entrants like Plaid may find it harder to compete by offering their own, superior standards.

Because of these factors, even if the UK's Open Banking project is eventually a success, it does not follow that a similar approach would be beneficial in all other markets. Instead, it may be best to consider what features in other markets would make mandatory data-sharing particularly useful. Some features may be high barriers to customer switching for a core product, combined with important ancillary services that are usually bundled with the core product, and confidence that intervention would not erode important incentives to provide a valuable service and/or collect user data in the first place, or preclude a better data sharing standard from emerging spontaneously.

One market where a similar intervention may work is electricity, where smart meters that enable sophisticated demand-management products (like home batteries and other tools for shifting use to off-peak times) could help customers significantly reduce their bills, but incumbent providers may have little incentive to provide them.²⁰ In this and certain other natural monopoly markets, interoperability may be a natural fit with existing regulations to drive competition.

Note, however, that in the UK, smart meters are being rolled out mandatorily. A measure that imposed data-sharing requirements in markets where smart meters are provided by electricity companies as part of their competitive offering may undermine the incentives those firms have to offer them in the first place.

Data-sharing of this kind may also suit markets where there is a high degree of price discrimination between engaged marginal customers who switch often to take advantage of switching deals, and disengaged inframarginal ones who do not and suffer expensive "loyalty pricing" as a result. In these cases, data-sharing may allow intermediaries to enter and switch services on behalf of the currently "loyal" customers, improving outcomes for disengaged customers.

IV. CONCLUSION

It is probably too early to judge whether Open Banking has succeeded in its aims, but the experience demonstrates that any similar intervention would be a significant undertaking that would require ongoing regulatory oversight. In the UK, the CMA is currently consulting on the future of this oversight,²¹ and considering a governance model where the non-oversight functions of the OBIE are transferred to an industry-run body.²²

Those hoping that Open Banking-style interoperability will drive competition in digital markets may want to curb their enthusiasm, given that Open Banking has not, so far, led to the outcomes they seek. There are many features of the UK's retail banking sector that may make it unusually good for this kind of intervention, including that it largely entails sharing relatively uniform and simple sets of data.

Similar interventions in markets where data is significantly more complex and heterogeneous across different providers would presumably require even more involved regulatory oversight and decision-making about product design. It is misleading to present this process, or similar processes, as just being about "standards setting" — Open Banking is a mandatory competition remedy, the CMA's goals for it are at odds with many large incumbent banks, and it has required a regulator to make important decisions about product design and pricing that come with trade-offs. Nor is it clear that Open Banking has succeeded compared to other remedies the CMA could have imposed on the retail banking market, or that equivalent measures in other markets would be better for competition than other remedies.

If Open Banking succeeds, which I dearly hope it will, it will have been a long, hard slog, and led to a different kind of competition to the kind envisaged by many proponents of mandatory interoperability in other markets. It is likely to be best used in narrow, focused circumstances, not as a generic fix for any market suffering from weak competition.

19 Department for Business, Energy & Industrial Strategy, *Regulatory Powers for Smart Data Initiatives* (September 2020), p. 25. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915974/smart-data-impact-assessment.pdf.

20 *Open Energy*. <https://www.fsb.org.uk/resources-page/open-energy-using-data-to-create-a-smarter--cheaper-and-fairer-energy-market-pdf.html>.

21 Competition and Markets Authority, Consultation launched on the future governance of open banking (March 2021). <https://www.gov.uk/government/news/consultation-launched-on-the-future-governance-of-open-banking>.

22 UK Finance, Open banking futures: blueprint and transition plan (March 2021). <https://www.ukfinance.org.uk/policy-and-guidance/reports-publications/open-banking-futures-blueprint-and-transition-plan>.

FINANCIAL DATA EXCHANGE: PROCOMPETITIVE COLLABORATION TO ADVANCE PERMISSIONED SHARING OF CONSUMER FINANCIAL INFORMATION AND SPUR INNOVATION AND COMPETITION



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I. BACKGROUND

On a cold day in March 2017, in the skiing village of Park City, Utah, a group of financial industry participants gathered to discuss how to better improve the permissioned sharing of financial data. The group referred to itself as “Initiative X” and would later become the “Financial Data Exchange” (“FDX”) when it launched on October 18, 2018. FDX addressed a critical need for the development of a standard to allow the secure exchange of consumer financial information among financial institutions, fintech companies, and other participants in the financial services industry. Data access platforms (often referred to in the past as “data aggregators”) and other industry participants at that time offered innovative services to consumers, but acquired information with the permission of customers without the benefit of a common and accepted approach that satisfied all the parties involved in the data exchange,² as well as ensuring the highest standards of reliability and security for consumers. The creation and adoption of a uniform interoperability standard promised to unleash innovation in financial service offerings for consumers and competition for their attention.

FDX was founded by a group of the most innovative companies and engaged individuals operating in the financial services ecosystem and involved in consumer permissioned financial data access. FDX’s founding members represented over \$2 trillion in market capitalization at the time of launch and included major financial institutions, data access platforms and fintech companies, as well as organizations specifically representing the interests of consumers. These founding members brought deep experience in consumer permissioned data-sharing issues, including involvement in industry efforts to promote market solutions and in providing input and education to regulators and law makers.³

The work of this group, which included competitors in various sectors of the financial services industry, helped advance the adoption and promotion of an industry standard for the permissioned sharing of consumer financial information. FDX acted with sensitivity to potential antitrust concerns from the outset and achieved an important and procompetitive solution for the industry and consumers.

A. FDX Solved a Problem That Denied Consumers the Full Benefits of Competition Among Financial Services Companies

FDX was organized with the consumer in mind to ensure that financial institutions, permissioned application providers/developers, financial data access platforms, and other fintech companies can more readily and securely assist consumers in achieving their financial needs, better managing their finances and improving their financial health.

Consumers are increasingly using online financial management, payments, credit decisioning, and related services that are provided by companies that are often not affiliated with their primary financial institution (where consumer financial information has been located traditionally). To take advantage of the innovative services offered by these entities, consumers need the ability to authorize their financial institutions to provide access to their data in a convenient, secure, and reliable manner.

In order to provide access to their financial records, consumers have historically shared their login credentials with financial applications or data access platforms. In most cases, financial apps do not store the keys, but instead pass these credentials via an application programming interface (“API”) to the data access platforms, which can then access the financial institution’s website and retrieve the consumers’ data (through a process known as screen scraping). While this process occurred only with consumers’ explicit authorization, experts believed that the ease, reliability, and security of the process could be improved through the use of APIs and token-based mechanisms. Individual companies, however, were reluctant to invest in the development of improved approaches, or in businesses that depended on those mechanisms, without some assurance that the industry might coalesce around their chosen solution. FDX was established to address this problem, a solution to which was necessary before consumers could receive the full benefits of the services that industry participants and new innovators were poised to offer.

Although others had previously sought to tackle the challenges that FDX confronted, FDX involved the most comprehensive industry effort to address this need. FDX’s founding members believed that an industry-led initiative offered the shortest path to realizing the benefits of secure, consumer-permissioned data sharing.

FDX sought, through the development and promotion of a common standard, to facilitate the secure exchange of information and accelerate innovation while giving consumers greater control of their data and better awareness of how it is used. The availability of the standard will mean more opportunities for innovative financial services companies to compete to provide improved financial services to consumers.

² These parties are generally the data recipients, such as fintechs, financial apps and other service providers, and data providers, such as banks and other financial institutions.

³ FDX is a technical standards body and does not lobby for policy positions, however, FDX does provide information and education to regulators, law makers and the market to ensure that interested parties understand the issues, risks and technical language involved in the consumer permissioned data-sharing ecosystem.

B. FDX's Origins, Mission, and Structure

FDX had its origins in early 2017 as a grassroots effort of financial institutions, fintech companies, and data access platforms seeking to find common ground for a secure, consumer-focused data sharing framework. Recognizing the significant progress already made by FS-ISAC's Aggregation Working Group in the 2015-2017 time period with its Durable Data Application Programming Interface ("DDA") standard, FDX aligned with FS-ISAC and became a wholly owned, independent subsidiary of FS-ISAC in 2018. FS-ISAC assigned the DDA (now known as the FDX API) standard to FDX in October 2018 in connection with FDX's launch in October 2018. FDX implements and oversees this interoperability standard and operating framework, continuing the development, improvement, and promotion of the FDX API. The FDX API has been improved and modified from the DDA since FDX's launch from the original FDX API 3.0 to the most recent iteration, FDX API 4.6, currently under member review.

The mission of FDX is to unify the financial industry around a common, interoperable, royalty-free standard for secure and convenient consumer and business access to their financial data. Doing so will empower consumers to make information-based decisions about their personal finances and help increase financial literacy. FDX will accomplish its mission through execution of the following specific objectives:

- **Define Use Case Profiles:** FDX will define use case profiles describing consumer-permissioned scenarios within the financial data ecosystem. FDX will adopt and promote principles for data sharing across all use case profiles. Members will be able to qualify their solutions for one or more profiles.
- **Adopt, Promote and Improve Data-Sharing Standards:** FDX will develop and promote the FDX API standard and brand to help ensure financial data is timely, consistent, and accurate. Membership in FDX will allow use of and/or contribution to the specifications.
- **Adopt, Promote and Improve Secure Authentication Standards:** Consumers should not have to reveal their account login credentials to third parties to share financial data in the applications they choose. FDX will adopt modern standards in the FDX API specification in accordance with industry best practices with regard to authentication, authorization, data privacy and security in order to eventually do away with sharing login credentials with third parties to reduce risk to consumers.
- **Develop a Certification Program:** FDX will create a qualification and certification program to ensure common implementation and interoperability. Products (i.e., programs and apps for consumer-permissioned financial data sharing) will be approved by FDX through the certification program, to test the technical compatibility/interoperability, prior to being marketed as a compliant product, or getting access to certain intellectual property rights.
- **Develop User Experience and Consent Guidelines Best Practices:** FDX will document the steps and show examples of recommended user experiences across the end-to-end data sharing workflow to permit users to establish their financial data sharing connections with ease and full transparency and control. These steps will span across the lifecycle of creating a connection, managing a connection, and revoking a connection, including the steps of disclosure, authentication and authorization.
- **Seek Broad Adoption of the FDX API Standard:** FDX will seek universal adoption of the FDX API standard. Significant adoption by financial industry participants will be required to realize the full benefit of establishing a unifying standard.
- **Future Applications:** Achieving FDX's mission and objectives through its operating principles and broad adoption of the FDX API standard may further support the development of a liability framework by the appropriate parties as encouraged by the U.S. Department of Treasury.

FDX is comprised of committees, working groups, and task forces focused on promoting the adoption of the FDX API standard and ensuring interoperability. In addition to financial institutions, data access platforms, and other fintech companies, membership in FDX is also open broadly to individuals, non-profits, and consumer groups with an interest in furthering FDX's mission and objectives. FDX encourages all members to join working groups and participate at FDX events so that the voices of all interested members can be heard, with a "best idea wins" mentality, so that all members can contribute to the successful and broad adoption of the FDX API standard. Members are encouraged (but not required) to adopt and promote the standards released by FDX. FDX anticipates that, once its certification programs and procedures are established, widespread adoption of the FDX API will benefit consumers through consistent standards across platforms related to control, access, transparency, traceability and security of their financial data.

FDX will promote royalty-free technology specifications – ensuring greater adoption – and intends to provide a certification program for parties wishing to mark their financial products and programs as compliant to applicable FDX API certification standards.

Other industries have successfully created similar groups to address industry challenges. The Bluetooth Special Interest Group, the FIDO Alliance, and the Mortgage Industry Standards and Maintenance Organization (“MISMO”) are good examples of interested parties coming together to create a common standard. Although FDX was preceded by similar efforts in other industries, its mission and approach are unique to any financial industry forum. It is the first industry group with a broad range of support and active membership by companies across the financial services industry, as well as important participation by consumer groups. This level of participation will maximize the likelihood that FDX will succeed in achieving its mission, with consumers as the ultimate beneficiaries.

II. FINANCIAL DATA EXCHANGE IS A PROCOMPETITIVE COLLABORATION

As with any organization involving companies that might compete with one another, FDX must be and has been sensitive to antitrust concerns and has been careful from the outset to ensure that, in any activities relating to the work of FDX, participants avoid the exchange of any competitively sensitive information concerning the activities of their own businesses. But when it comes to the development, enhancement, and adoption of the FDX API, FDX members collaborate in pursuit of the organization’s procompetitive goal of establishing and promoting an interoperability standard for the secure access to user permissioned financial data.

The collaboration through FDX of a wide array of financial-industry participants allowed the group to accomplish together an objective that no single member could have achieved on its own. While individual organizations could have written their own specifications that, as a technical matter, could have (if adopted) permitted the exchange of financial data, the joint work in an open and unbiased environment invited participants to supply their best ideas and critical thinking in pursuit of a solution in which all participants could have trust and confidence.

Procompetitive collaborations of this nature, which provide solutions likely unavailable without competitors working together, avoid flat condemnation under the antitrust laws and are often found to be perfectly permissible.⁴ The activity in which FDX was engaged – establishing an interoperability standard for the permissioned exchange of consumer financial information – is just that kind of a procompetitive collaboration.⁵ But FDX recognized that similar organizations with procompetitive purposes had still confronted antitrust issues in the past, and it was careful to conduct its operations in a way that invited broad participation and excluded no one, did not limit the activities of any members outside of the their involvement in FDX, and ensured that its standards-development activities were not subject to anticompetitive misuse by any competitor. FDX approached its activities committed to developing and promoting the FDX API and ensuring prompt adoption. The growth of FDX’s membership base to 180 entities and significant progress in the adoption of the FDX API demonstrate that the group’s approach and collective efforts succeeded in supplying a solution to what had been an unresolved problem. The beneficiaries will be consumers, who will find themselves able to take advantage of innovations in the delivery of financial services across multiple platforms.

A. FDX Opened Its Doors to All Individuals and Entities Interested in Contributing to Its Efforts

FDX from the outset was interested in ensuring that it considered all viewpoints as it evaluated how best to tackle the challenges before it. Its founding members notably included not only representatives from every segment of the financial services industry, but also consumer advocacy organizations that provided critical perspective and input into privacy and user experience issues implicated by the group’s work. When FDX was launched formally, its membership policies permitted the involvement of all entities, individuals, and groups interested in contributing to its mission. FDX has excluded no one (other than parties not permitted under applicable law, such as OFAC sanctioned parties), and all members not only have the opportunity, but are also encouraged, to contribute to FDX’s standards work.

⁴ See Fed. Trade Comm’n and U.S. Dep’t of Justice, *ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS* (April 2000) at 1 (“In order to compete in modern markets, competitors sometimes need to collaborate. . . . Such collaborations often are not only benign but procompetitive.”); see also *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 21-23 (1979) (finding that a collaboration among competing songwriters to offer a blanket license to their works created a “new product” with unique characteristics, where the “whole is truly greater than the sum of its parts” and the agreement between them was “necessary to market the product at all”).

⁵ See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (“When . . . private associations promulgate . . . standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, . . . those private standards can have significant procompetitive advantages.” (citation omitted)).

B. FDX Membership is Non-Exclusive

Although it is FDX's desire and intention to develop a standard for the secure exchange of consumer financial data that receives widespread adoption and unleashes competition and innovation across the financial services ecosystem, FDX's founding members recognized that others might be pursuing similar activities and that the goal of an industrywide standard would be accomplished even if FDX's approach ultimately failed to become the de facto standard around which the financial services industry coalesced. Other than restrictions on the disclosure outside of FDX of confidential information concerning the organization's activities, FDX placed no limitations on members' involvement with other organizations.

C. FDX Adopted a Royalty-Free Licensing Approach to Encourage Widespread Adoption of Its Standard

One impediment to adoption of industry standards can be the assertion of intellectual property rights and unreasonable licensing demands by entities whose rights would be infringed by the use of a standard. To avoid the potential for "hold up," FDX's founders decided to follow the lead of the Bluetooth Special Interest Group and require that FDX members commit to licensing intellectual property rights that would be infringed by the practice of the standard on a royalty-free basis.⁶ All of the founding organizations, representing a cross-section of financial services entities, agreed that this obligation would facilitate widespread adoption of the FDX standard, the goal all set out to achieve.

D. FDX Adopted Procedural Protections to Ensure Its Standards Development Cannot Be Hijacked and Deployed for Anticompetitive Purposes

Standards organizations have faced antitrust challenges in instances in which incumbent competitors have succeeded in misusing the standards development processes to exclude new technologies or competitors.⁷ FDX has established procedures to avoid efforts to establish biased standards that exclude competitors. In addition to encouraging broad participation by entities across the financial services industry, which itself reduces the risk of any one group dominating its processes, FDX's committees and working groups must be co-chaired by one financial institution ("FI") representative and one non-bank/FI representative. Further, items that are included in the FDX API require two-thirds support in FDX's working groups, as well as the affirmative votes of two-thirds of FDX's board. No individual entity, interest, or group can wield power to force the adoption of standards not widely supported by others and in the overall interest of FDX and consistent with its mission.

III. CONCLUSION

FDX remains committed to the development and promotion of a standard for the secure exchange of consumer financial information, but also equally committed to proceeding in way that ensures that it continues to promote competition among providers of financial services to consumers. Interested parties are invited to learn more by visiting www.financialdataexchange.org.

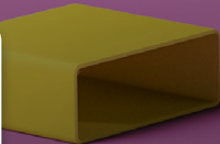
⁶ See Bluetooth Patent/Copyright License Agreement, available at <https://www.bluetooth.com/wp-content/uploads/2019/03/PCLA-ESign-Version-Version-11.pdf>.

⁷ See *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 570 (1982) (finding standards organization liable for member's use of its position within the organization to "manipulat[e] [its] codes" and harm competitors); *Allied Tube*, 486 U.S. 492, 496-97 (1988) (upholding liability for incumbent competitor that packed standards body with its supporters and blocked expansion of standard to include new entrants' products).

OPEN BANKING AND THE AMBIGUOUS COMPETITIVE EFFECTS OF DATA PORTABILITY



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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 ease 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 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.

OPEN BANKING IN BRAZIL: A “DISRUPTIVE” STEP TOWARDS INCREASING COMPETITION IN THE NATIONAL FINANCIAL SECTOR, AND CONSUMERS' WELFARE?

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I. THE ROLLOUT AND IMPLEMENTATION OF OPEN BANKING IN BRAZIL, IN A NUTSHELL

Open Banking has emerged as a worldwide agenda regarding the financial sector and is a buzzword when discussing policy frameworks to promote competition among financial players.²

As a matter of fact, the Brazilian landscape reflects this take. In recent years, both regulatory and competition authorities and customers have witnessed the consolidation of the national financial sector and an increase of verticalization, creating a fertile ground for debates about Open Banking to flourish nationwide. As a result, since 2018, the Central Bank of Brazil (“BCB,” in its Portuguese acronym) has been mapping initiatives and discussing with representative bodies on the subject at hand;³ in the first semester of 2019, the BCB publicly announced its intention to articulate the development of a national Open Banking framework.⁴

On April 24, 2019, the BCB issued the Official Communication No. 33,455⁵ to establish core concepts, regulatory strategies and deployment measures that shall guide Brazil’s project to an intended more efficient, competitive, reliable, and inclusive credit and payment systems.

According to the BCB, Open Banking is defined as “[...] *the sharing of data, products and services by financial institutions and other licensed institutions, at the customers’ discretion as far as their own data is concerned, through the opening and integration of platforms and infrastructures of information systems, in a safe, agile and convenient manner.*”⁶ In practical terms, Open Banking allows the shifting from a traditional closed banking business model to a more customer-centric model, potentially impacting on competition dynamics, since customers’ willing and consent to share their personal data through integrated banking ecosystems may enable all sizes and types of financial players to compete more directly and on equal terms by removing information asymmetries, as will be detailed below.

In a continuous effort as regards the development of an Open Banking system, in November 2019, a Public Consultation was opened to collect third-parties’ feedback on the existing drafts aimed at structuring the implementation of an Open Banking framework,⁷ which was followed by the publication of Joint Resolution No. 1 issued by the BCB and the National Monetary Council (“NMC,” in its Portuguese acronym) – the first normative instrument for the regulation of Open Banking in Brazil.⁸ In parallel, in March 2020, a working group formed by the BCB and various other interested associations,⁹ was created for the purpose of assessing technological standards and operational procedures, improving channels for submission of customer claims and mitigating conflicts between interested parties.¹⁰

2 SAWAYA, Alexandre; CRADDOCK, Christopher; CARLUCCIO, Joana; MANSUR, Marina. *O futuro do setor bancário brasileiro em um cenário disruptivo de pós-crise*. McKinsey & Company, June, 2020, p. 10. Available at https://www.mckinsey.com.br/~media/McKinsey/Locations/South%20America/Brazil/Our%20Insights/0%20Futuro%20do%20Setor%20Bancario/McK_Artigo_Futuro_Setor_Bancario_v01.pdf.

3 BCB. *Voto 73/2019-BCB*, April 23, 2019. Available at https://www.bcb.gov.br/pre/normativos/busca/downloadVoto.asp?arquivo=/Votos/BCB/201973/Voto_0732019_BCB.pdf.

4 It is worth noting that the Open Banking initiative is part of BCB’s broader agenda to stimulate a more inclusive and democratic financial ecosystem – known as the “*Agenda BCB*.” As a first step to enforce such agenda and in parallel to the discussions on Open Banking, in November 2020, the BCB implemented the Brazilian instant payment scheme (“PIX,” in its Portuguese acronym) that allows transfers and payments — between individuals, companies and the government — in a few seconds and on a 24/7 basis, speeding up and simplifying financial transactions. For more information, see https://www.bcb.gov.br/en/financiastability/spi_en.

5 Available at <https://www.in.gov.br/en/web/dou/-/comunicado-n%C2%BA-33.455-de-24-de-abril-de-2019-85378506>.

6 See <https://www.bcb.gov.br/en/pressdetail/2284/nota>.

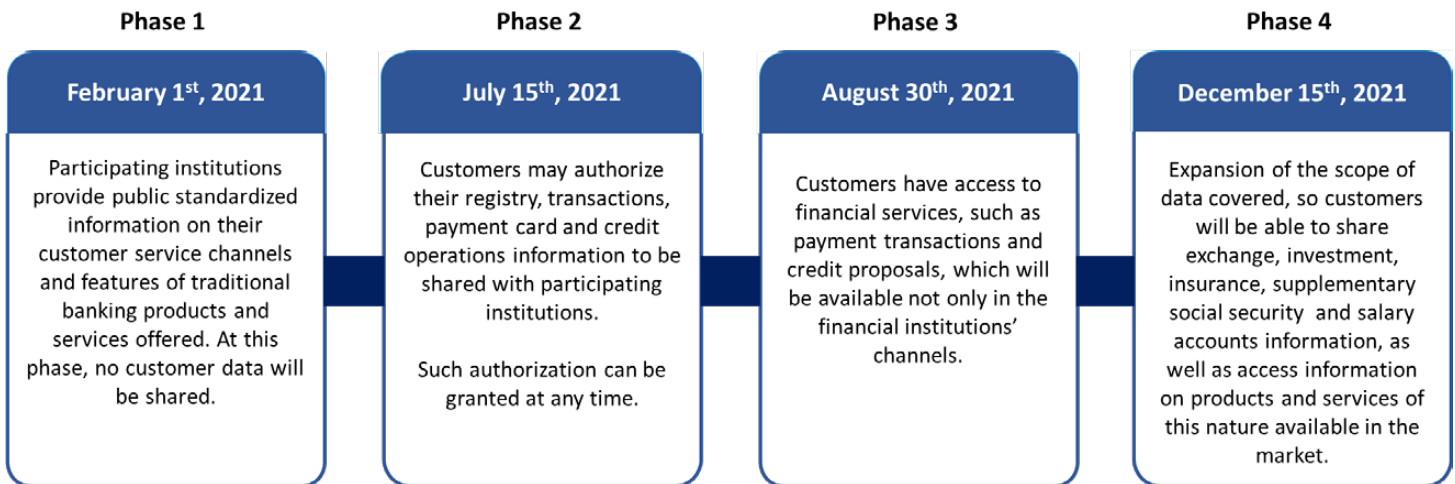
7 See <https://www3.bcb.gov.br/audpub/AudienciasEncerradas?2>.

8 Available at [https://www.in.gov.br/en/web/dou/-/resolucao-conjunta-n-1-de-4-de-maio-de-2020-255165055#:~:text=Disp%C3%B5e%20sobre%20a%20implementa%C3%A7%C3%A3o%20do%20Sistema%20Financeiro%20Aberto%20\(Open%20Banking\).&text=1%C2%BA%20Esta%20Resolu%C3%A7%C3%A3o%20Conjunta%20disp%C3%B5e,pelo%20Banco%20Central%20do%20Brasil](https://www.in.gov.br/en/web/dou/-/resolucao-conjunta-n-1-de-4-de-maio-de-2020-255165055#:~:text=Disp%C3%B5e%20sobre%20a%20implementa%C3%A7%C3%A3o%20do%20Sistema%20Financeiro%20Aberto%20(Open%20Banking).&text=1%C2%BA%20Esta%20Resolu%C3%A7%C3%A3o%20Conjunta%20disp%C3%B5e,pelo%20Banco%20Central%20do%20Brasil).

9 The referred associations are the following: Associação Brasileira das Empresas de Cartões de Crédito e Serviços (“ABECS”), Associação Brasileira de Bancos (“ABBC”), Associação Brasileira de Crédito Digital (“ABCD”), Associação Brasileira de Fintechs (“ABFintech”), Associação Brasileira de Instituições de Pagamento (“Abipag”), Associação Brasileira de Internet (“Abranet”), Câmara Brasileira da Economia Digital (“CâmaraNet”), Federação Brasileira de Bancos (“Febraban”), and Organização das Cooperativas Brasileiras (“OCB”).

10 BCB. *Banco Central cria Grupo de Trabalho para propor governança do Open Banking no Brasil*. March 2, 2020. Available at <https://www.bcb.gov.br/detalhenoticia/415/noticia>.

Based on the BCB's timetable, Open Banking should be fully implemented in Brazil by the end of 2021 based on four phases, as illustrated below:



Source: Own elaboration, based on current BCB information.¹¹

II. SOME POTENTIAL BENEFITS OF OPEN BANKING IN BRAZIL

During a public hearing in 2018,¹² Mr. Alexandre Barreto, the current president of the Brazilian Antitrust Authority (“CADE,” in its Portuguese acronym), acknowledged the demand for greater involvement of CADE in discussion processes on potential remedies to boost competition in the national financial sector, “[...] not only by specific measures in the context of investigations, but also by raising competitive aspects and submitting recommendations to legislators and regulators in order to contribute with the promotion of competition and, as a result, to the improvement of services quality and the reduction of costs to consumers.”¹³

Such statement reflects CADE’s concerns with the Brazilian credit and payment market’s competition dynamics. Indeed, the association between commonplace features of the financial sector – e.g. high barrier entries, low demand elasticity, network and lock-in effects, and abuse of dominant position – and the grown tendency of verticalization among financial institutions active in Brazil have created a scenario that may contribute for players’ incentives and abilities to unilaterally or in coordination adopt practices to avoid competition.¹⁴ As a result, the financial sector has become one of CADE’s main targets for investigation, having the Brazilian authority opened, since 2015, at least 17 (seventeen) proceedings against financial institutions.¹⁵⁻¹⁶

Against this backdrop, Open Banking arises as an interesting measure with the potential to add features, change the current course and pave the way for a more efficient, competitive, and innovation-driven financial system able to better address customers’ needs. In simple terms, it means that the power of Open Banking depends on its ability to disrupt the market.¹⁷

¹¹ See <https://openbankingbrasil.org.br/> and <https://www.bcb.gov.br/estabilidadefinanceira/openbanking>.

¹² Available at <https://www.youtube.com/watch?v=IGt8VCN-4yg>.

¹³ On February 28, 2018, BCB and CADE entered into a Memorandum of Understanding (“MoU”) to establish provisions on their roles concerning the review of merger cases and investigations of anticompetitive conducts involving financial institutions, as well as on potential cooperation works related to the sharing of information and data, editing of guidelines, and organizing seminars and joint studies. Available at https://www.bcb.gov.br/content/estabilidadefinanceira/Organizacao/memorando_cade_bc_28022018.pdf.

¹⁴ BANQUEIRO, Paula de Andrade; SILVEIRA, Paula Farani de Azevedo. *Open Banking: impactos sobre a concorrência e o bem-estar do consumidor*. July 11, 2020. Available at <https://www.conjur.com.br/2020-jul-11/opiniao-impacto-open-banking-concorrenca-consumidor>.

¹⁵ O ESTADO DE S. PAULO. *Bancos entram na mira do Cade, com abertura de 17 inquéritos em três anos*. August 23, 2018. Available at <https://economia.estadao.com.br/noticias/negocios,bancos-entram-na-mira-do-cade-com-abertura-de-17-inqueritos-em-tres-anos,70002469189>.

¹⁶ VALOR ECONÔMICO. *Cade investiga bancos por práticas prejudiciais a corretoras de criptomoedas*. May, 20, 2020. Available at <https://valorinveste.globo.com/produtos/servicos-financeiros/noticia/2020/05/20/cade-investiga-bancos-por-praticas-prejudiciais-a-corretoras-de-criptomoedas.ghtml>.

¹⁷ REYNOLDS, Faith. *Open Banking: A Consumer Perspective*. January, 2017. <https://www.openbanking.org.uk/wp-content/uploads/Open-Banking-A-Consumer-Perspective.pdf>.

Although it is still an incipient measure in its early phase, one could underline that Open Banking is linked to a spectrum of potential positive impacts by enabling economies to overcome the concentration of banking data – the financial sector’s main input. In this respect, some noteworthy potential benefits are summarized below:¹⁸

- i. In digital economies, data became a relevant asset for players to compete more effectively and therefore are considered a competitive advantage.¹⁹ To the extent Open Banking allows data to flow between different economic agents – regardless of their size and economic power – issues with information asymmetry and entry barriers are in principle minimized and, as a consequence, competitive pressure against consolidated players is intensified;
- ii. In reference to item “i” above, Open Banking can contribute to reduce concentration levels in the Brazilian financial sector,²⁰ stimulating the emergence and expansion of “alternative” market participants, mainly fintechs;
- iii. Since data access and flow are eased, players would compete to offer products and services with higher quality and efficiency, which could result in cost reduction to customers and thus financial inclusion, in what could be seen as a more democratic landscape;
- iv. Integrated banking datasets can reduce customers’ switching costs due to data portability;
- v. While on the supply-side the access to a greater pool of financial data will enable players to offer better and more precise – i.e. tailored – products and services to meet their customers’ needs, on the demand-side Open Banking can also enhance customers’ choice and convenience, since products and services are offered and displayed based on their individual behaviors and lifestyle patterns; and,
- vi. Open Banking has as a “golden rule” the premise that data is owned by the individuals – not by institutions – therefore customers are free to decide how, when and who can have access to their personal and banking information.

Notwithstanding the outlook noted above, data access and data sharing is still a contentious matter among financial institutions in Brazil, as one can infer from the debates raised during CADE’s investigation on the practice of alleged anticompetitive conducts by Bradesco against the fintech Guiabolso, an app developed to access consumers’ banking information under prior authorization and provide its users with both financial management mechanisms and credit services offering.²¹ As such, Bradesco’s customers, as well as other financial institutions’ customers, while using Guiabolso, are able to compare costs of potential credit providers and thus contract credit services from a financial institution that is not necessarily Bradesco.

18 See BAHIA, Ana Leticia A. C.; BISELLI, Esther Collet Janny Teixeira; SCANDIUZZI, Stephanie. *Open Banking and Competition: overview of the regulatory framework and impacts in the financial and banking markets from an antitrust perspective*. In MAIOLINO, Isabela (Coord). *Mulheres no Antitruste*. Vol. II. São Paulo: Singular, 2019, p. 348-385. Available at <https://biblioteca.cade.gov.br/cgi-bin/koha/opac-retrieve-file.pl?id=fcc7ce6b30667f222b60ea18531cf8cc>; AUSTRALIAN GOVERNMENT. *Open Banking: Customers Choice Convenience Confidence*. December, 2017. Available at <https://cdn.treasury.gov.au/uploads/sites/1/2018/02/Review-into-Open-Banking-For-web-1.pdf>; and BANQUEIRO, Paula de Andrade; SILVEIRA, Paula Farani de Azevedo. *Open Banking: impactos sobre a concorrência e o bem-estar do consumido*. July 11st, 2020. Available at <https://www.conjur.com.br/2020-jul-11/opiniao-impacto-open-banking-concorrancia-consumidor>.

19 “Digitalization expands matching capabilities and can give rise to cost structures with low marginal costs, and data become a critical input to the development of successful algorithms, including matching, prediction and pricing, thanks to increases in computing power and growing sophistication in data analytics and AI. According to the Economist, ‘data are to this century what oil was to the last one: driver of growth and change. Flows of data have created new infrastructure, new businesses, new monopolies, new politics and – crucially – new economics. [...] Data are particularly associated with increasing levels of market concentration because the data chain value, from collection to analysis, is characterized by important economies of scale and scope. The larger the amount of data, the more refined the algorithm applying them can become, generating a positive feedback loop as more users generate more data, which, in turn, means higher service quality. When this takes place, the quality-adjusted cost of data collection and analysis can become smaller for larger platforms. The importance of data and access to larger datasets depends on the context-specific minimum point of efficient scale and the marginal value of adding additional data. For certain purposes, the point of minimum efficient scale may, for example, be easy to reach, as it is in the case of data on very popular queries for a general-purpose search engine; in other cases, such as tail queries, platforms with smaller datasets may instead not be able to reach the point of optimality. In its merger with Yahoo, for instance, Microsoft argued that merging datasets and having access to a larger index would have positive effects on competition due to scale economies enabling stronger competition with Google. Data collection and analysis can also benefit from economies of scope, whereby the aggregation of different types of data from a variety of sources can make a significant difference in the improvement of algorithms more than the simple accumulation of general data alone.” DOCCI, Francesco. *Natural Monopolies in Digital Platform Markets*. Cambridge University Press, 2020, p. 21-22.

20 According to BCB’s most recent estimates, the five major banks active in Brazil hold together 77.6% of the deposits and 69.8% of the credit operations in the country. See BCB. *Relatório de Economia Bancária*. June 4, 2020, p. 126. Available at <https://www.bcb.gov.br/publicacoes/relatorioeconomiabancaria>.

21 Administrative Inquiry No. 08700.004201/2018-38.

In this regard, CADE's General Superintendence concluded that the “*competition level [within the financial services market] can be measured by the reduction of barriers for the exchange of consumers' bank information. The freer the information flows, the easier it will be for consumers to compare costs of the various services offered, [...] result[ing] in lower switching costs, which ultimately denotes the effectiveness of competition in this market. In order for these benefits to be noted, however, it is mandatory to hinder a potential market foreclosure by banks [...]. Conversely, [...] in addition to consumers, not only the platforms already active in the market are jeopardized, but also those who intend to enter the market and are indecisive to do so due to the risk of input [i.e., data] unavailable.*”²²

In December 2020, Bradesco entered into a Settlement Agreement with CADE,²³ according to which the bank committed to develop connection interfaces aimed to enable Guiabolso to offer and receive the consent of its users who are also Bradesco's customers and to access Bradesco's systems through previously established encrypted communication. At last, Bradesco agreed on the payment of a pecuniary contribution to the amount of approx. BRL 23.9 million (approx. USD 4.6 million).²⁴

III. THE INTERSECTION BETWEEN PRIVACY AND COMPETITION

If the effectiveness of Open Banking depends on the ability to disrupt the market, its success relies heavily on the ability to enhance the customer experience without compromising information privacy and security, assuming that customers are expected to engage with Open Banking if they trust and understand it.²⁵

Despite Open Banking's positive impacts on both economic agents and consumers, as described above, the increased footprint of data flow sheds light on a sensitive risk related to its misuse: potential diminishment and damage to security of customers' banking data. In other words, Open Banking highlights a challenging and complex tradeoff between privacy and competition.

Digital economies can be seen as a “no turning back reality” and one cannot disregard a hypothesis whether individuals' data be used by economic agents for monetization purposes. At the same time, Open Banking initiatives aim to bring customers to the spotlight as protagonists, since they are the ones who decide on their data flows – i.e. which benefits they intent to receive in exchange for the sharing of their personal data. Therefore, such empowerment of customers may conflict with economic agents' interest to have broad and unlimited access to data,²⁶ making policy-makers to question on how to design tools to stimulate competition and innovation in the financial sector without jeopardizing individuals' rights to data protection and well-being, for example.

22 Free translation of the following excerpt: “87. [...] a competição pode ser medida pela redução de barreiras para o trânsito de informações bancárias de consumidores. Quanto mais livre for a circulação dessas informações, mais fácil será para os consumidores compararem os custos dos diversos serviços oferecidos, [...] reverte[ndo] em menores custos de troca o que, em última instância, denota a efetividade da concorrência neste mercado. 98. Para que essas vantagens sejam observadas, entretanto, é necessário que um eventual fechamento de mercado executado pelos bancos não se concretize [...]. Em sentido oposto, com o fechamento, além dos consumidores, ficam prejudicadas não apenas as plataformas já em atividade, mas também aquelas que pretendem ingressar no mercado e hesitam em fazê-lo pelo risco de indisponibilidade do insumo essencial para suas atividades.” Technical Note No. 17/2019/CGAA2/SGA1/SG/CADE in the context of the Administrative Inquiry No. 08700.004201/2018-38. Available at https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?mYbVb954ULaAV-MRkzMwwbd5g_PuAKStTInGp-jtcH5MdmPeznqYAOxKmGO9r4mCfJITXx-QMN01pTgFwPLudA2e41gXHDcVdyK-JSzf2hCwesuyf8wq-k2tDAnrpbda4.

23 Settlement Agreement No. 08700.003425/2020-47. Available at https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?mYbVb954ULaAV-MRkzMwwbd5g_PuAKStTInGp-jtcH5MdmPeznqYAOxKmGO9r4mCfJITXx-QMN01pTgFwPLudA8eXfQvB3UqET7Z1uPVf803dpOnwxBLclgor1KGHWqL7.

24 Exchange rate as of December 31, 2020. 1 BRL = 0,1924298 USD. Available at <https://www.bcb.gov.br/conversao>.

25 DELOITTE. *Open Banking: Privacy at the epicenter*. June, 2018, p. 2. Available at <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/financial-services/deloitte-au-fs-open-banking-privacy-epicentre-170718.pdf>.

26 “As consumers navigate the modern digital economy, they generate vast amounts of data (now measured in zettabytes (10²¹ bytes) annually). Day-by-day computers, smart phones, digital assistants, social media, wearable technology, home appliances, and cars become more interconnected. Meanwhile, dramatic advances in data storage and retrieval, paired with equally dramatic advances in processing power and system architecture, allow computers to solve tasks to extraordinary computational complexity. This has paved the way for sophisticated and rapidly deployable predictive analytics and artificial intelligence that is more widely available than ever before. This, in turn, opens the door to groundbreaking innovation – new products and services that can improve the lives of millions. At the same time, however those with access to such data and analytical tools are often privy to disconcertingly accurate insights into how we are likely to act, where we are likely to go, who we are likely to be with, our state of mind, and what we will likely buy and consume. The privacy implications are significant. This implications for market power, the realm of antitrust law, are equally significant. In short, data can be a very valuable resource and the digital economy prospectors that are digging in these mines are frequently discovering rich new veins of data gold. This presents a legal policy dilemma. Increasing privacy protections by limiting the spread of data can reduce the benefits of competition by denying rivals access to the data they need to compete, simultaneously entrenching incumbent that hold such data (who may already be dominant). Locking down data, in this view, is considered tantamount to raising a barrier to entry and expansion. Conversely, attempting to bolster competition by ensuring that competition rivals have access to personal data can diminish privacy by sharing data in ways that consumers may not anticipate or want.” (OHLHAUSEN, Maureen K.; and HUSTON, Peter. *hiQ v. Linkedln: A clash between privacy and competition*. In EVANS, David S.; FELLS, Allan; and TUCKER, Catherine. *Evolution of Antitrust in the Digital Era*. Vol. 1. Boston: Competition Policy International, 2020. p. 38).

In Brazil, pursuant to the Complementary Law No. 105, of January 10, 2001, financial information on customers' transaction operations is protected under bank secrecy duty and its breach constitutes a criminal offence, with some exceptions provided by law, such as, express authorization of the customer for disclosure. More recently, in 2020, alongside the rollout of Open Banking's regulatory framework in Brazil and in connection with the bank secrecy legislation, came into force the Brazilian Data Protection Law ("*Lei Geral de Proteção de Dados*" or "LGPD," in its Portuguese acronym), which establishes general rules on collecting, storing, sharing and processing of personal data.

In summary, the LGPD sets forth that customers' consent must be prior and explicit and refer to specific purposes – generic authorizations for personal data processing are void. Also, pursuant to its Article 18, it is ensured to consumers – as data subjects – the following rights against third-parties responsible for data processing:

- i. Right to confirmation of the existence of the processing;
- ii. Right to access the data;
- iii. Right to rectify/amend incomplete, inaccurate and out-of-date data;
- iv. Right to anonymize, block, or delete unnecessary, excessive or processed in noncompliant with the LGPD;
- v. Right to the portability of data to another service or product provider, by means of an express request, respecting commercial and industrial secrecy, according to the regulations of the controlling body;
- vi. Right to delete personal data processed with the consent of the data subject;
- vii. Right to be informed about public and private entities with which the third-party has shared data;
- viii. Right to be informed about the possibility of denying consent and the consequences of such denial; and
- ix. Right to revoke consent.

In light of the above, the Open Banking framework to be developed and implemented in Brazil shall abide by LGPD provisions in order to avoid potential consent breaches that may put customers' individual rights in jeopardy. Competition policy is not divorced from citizens' well-being²⁷ and thus Open Banking system cannot be restricted to attend and prioritize financial institutions' interests. Based on that understanding, consumers' autonomy will depend strongly on the promotion of awareness and education programs by the Brazilian government (think tanks, business community and civil associations' initiatives can also play a relevant role on that), intended to empower the public with knowledge for instructing the secure sharing of their data and unlocking its value to financial players.²⁸

27 STUCKE, Maurice E.; GRUNES, Allen P. *Big Data and Competition Policy*. Oxford University Press, 2016, p. 271.

28 AUSTRALIAN GOVERNMENT. *Open Banking: Customers Choice Convenience Confidence*. December, 2017, p. 100. Available at <https://cdn.treasury.gov.au/uploads/sites/1/2018/02/Review-into-Open-Banking-For-web-1.pdf>.

IV. FINAL REMARKS

All in all, we believe that Open Banking has the potential to “disrupt” the traditional financial services market. As stated, it essentially aims at promoting competition and innovation, as well as to empower customers by giving them control over their personal data. In that vein, Open Banking has become a relevant and hot topic for debates on digital-driven economies, already anticipating and posing some discussions on the future of competition in the financial sector.

As pointed, Open Banking is still an incipient measure; some of its envisaged positive and negative impacts to economic agents and consumers are under meticulous study and analysis on a nation- and worldwide basis. “*Open Banking is for the financial system as the internet is for society. Its benefits and use will be visible over the next few months and years,*” as stated by BCB’s current president, Mr. Roberto Campos Neto.²⁹

In order to build and implement a suitable Open Banking framework in Brazil, the protection of personal data, the financial awareness/ education and privacy rights must remain at the foreground of the design of Open Banking products and services,³⁰ so both economic agents and consumers would benefit from a desired more competitive, efficient, innovative, transparent and inclusive financial sector. Ultimately, this would give rise to positive results from the perspective of both economy and society.

29 BCB. *Lançamento da 1ª fase do Open Banking integra “sistema financeiro do futuro”, diz Presidente do BC*. February 2, 2021. Available at <https://www.bcb.gov.br/detalhenoticia/511/noticia>.

30 BANQUEIRO, Paula de Andrade; SILVEIRA, Paula Farani de Azevedo. *Open Banking: impactos sobre a concorrência e o bem-estar do consumidor*. July 11, 2020. Available at <https://www.conjur.com.br/2020-jul-11/opiniao-impacto-open-banking-concorrencia-consumidor>.

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