This article raises questions about the Right to Data Portability (RDP) that is included as Article 18 of the European Union Draft Data Protection Regulation. The Regulation states: “The data subject shall have the right, where personal data are processed by electronic means and in a structured and commonly used format, to obtain from the controller a copy of data undergoing processing in an electronic and structured format which is commonly used and allows for further use by the data subject.”

Supporters of the RDP state that it extends the right to access of one’s personal information, long recognized in the EU Data Protection Directive. Supporters also emphasize the intuition that competition and consumer welfare will be enhanced if data is not locked into one platform, but instead can be openly and easily shifted to other platforms.

This article critiques the view that consumer welfare is likely to be enhanced by the RDP. It begins with a hypothetical software supplier that wishes to combine one piece of software with another into a bundled software offering. For instance, we might imagine a company offering an operating system as well as an Internet browser. In the Microsoft case, of course, the U.S. courts held that the rule of reason should apply to such bundling of software; there are large potential advantages to consumers from integrated software, although facts in a particular setting (notably including dominant market power) might lead to a holding of antitrust violation.

I propose that the RDP should be understood as a per se rule against bundling of software, which the Microsoft court found would have “undue risks of error and of deterring welfare-enhancing innovation.” Under the RDP, there would be per se bans, even in the absence of market power, of software with one function (game, social network, etc.) that does not interact with software precisely as required by EU law.

The goal of antitrust law is enhancing consumer welfare, and the Microsoft case (correctly, I believe) found a rule of reason appropriate for bundling of software. Justifications for the RDP based on consumer welfare thus are subject to serious doubt. Perhaps proponents can justify the RDP on a fundamental human rights approach, as has been suggested in Europe. Or perhaps arguments that can be developed that government rules mandating a certain sort of openness are justified to regulate software bundling. But the burden should be on those who wish to impose this new regime on software operating in the EU, in light of the likely effects of reducing consumer welfare.