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Summary of Discussion on the Roundtable on Quality Considerations in Zero Price Markets

Annex to the Summary Record of the 130th Meeting of the Competition Committee held on 27-28 November 2018

This document is the summary of discussion of the roundtable on Quality Considerations in Zero Price Markets held during the joint meeting between the Competition Committee and the Committee on Consumer Policy on 28 November 2018.

More documents related to this discussion can be found at http://www.oecd.org/daf/competition/quality-considerations-in-the-zero-price-economy.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

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Summary of Discussion on the Roundtable on Quality Considerations in Zero Price Markets

By the Secretariat

The **Chairman** introduced the topic of the roundtable: quality considerations in zero-price economy. Zero-price markets are expanding and, while business models centred on the zero-price provision of products are not new, in the digital economy zero-price markets have appeared in great numbers and have unique characteristics that may raise competition law questions. In these markets, for instance, the most traditional indicator of market power, which is price, is lacking.

A first issue, in the context of zero price markets, is whether competition on price is replaced by competition on quality, which would result in the application of different enforcement tools. A second issue is whether consumers are able to assess quality in these markets and react to a degradation of quality that may be less obvious for them to appreciate than in other markets. A third issue arise in relation to the nature of the exchange and the cost in data that the exchange entails for the consumers. A fourth concern is linked to the fact that zero price markets are often associated with positive price markets. Zero price markets and positive price markets can be associated in two typical ways: as two sides of a multisided markets or in markets for two separate goods that are complementary. This circumstance results in additional complication and raises the issues of which markets to consider in the assessment. Finally, there is the question of what the respective roles of competition and consumer policy are and how they could coordinate their action.

The discussion was organised around three main topics:

1. Adapting the analytical and legal enforcement tools to digital zero-price markets;
2. Identifying demand-side factors that cause zero price markets to behave differently from other markets, and which may not be easily resolved through the traditional enforcement tools;
3. Identifying opportunities to improve agency cooperation and advocacy to address the full range of problems that may arise in zero price markets.

The **Secretariat** opened the discussion by describing the business models commonly found in zero price markets, and pointed out to some key motivations for firms to provide zero-price products. The main examples are sale of advertising and data acquisition that can be used for better target advertising, to improve the quality of the product, to sell positive price complements, or to sell data to third parties, like data brokers. Data can be also acquired to form a customer relationship that can be used to sell complements or other kind of revenue generating activities.

The **Secretariat** described dimensions of quality in zero price markets, such as privacy and data security. Privacy means the control of the consumer have over whether and how much data will be collected, how often it will be shared and how it will be used. Advertising content may be also a quality dimension, in those cases where advertising services provide beneficial content to consumers that helps consumers access to new products. In both of these cases, there is probably a substantial heterogeneity of consumers' preferences. In addition, the secretariat mentioned other dimensions of quality, like the ease of switching and choice in complement markets, as well innovation, ease of use and functionality.

The Secretariat identified two key groups of challenges that competition authorities face. The first group consists of the analytical challenges, such as the evaluation of market power, market definition, and the challenge of dealing with the companion positively priced side of a multi-sided market. The second group consists of the legal challenges, where in some jurisdictions a debate took place about whether competition law applies when there is a price of zero, and if it does, how agencies should adapt their tools and how should they develop meaningful remedies.

In addition to these challenges, there are also some demand-side problems, alongside information asymmetries, that are unique to zero-price markets. The "free effect", which consists in that once consumers enjoy a product for a price of zero they are less likely to accept a positive price for a similar good. Another potential bias consists in the so-called "privacy paradox": while many consumers report that they care about their privacy, it is unclear whether privacy really motivates their purchasing decisions and, if it does not, what is the reason for it.

Lastly, the Secretariat presented some policy options to deal with these challenges. A first option focuses on enforcement cooperation, and on how competition, data protection and consumer protection regulators might better cooperate, find ways to refer more cases to each other and share information. A second option focuses on the idea of engaging in joint advocacy initiatives, such as enhancing consumer information or facilitating private actors' initiatives to make sure that consumers have access to choices.

The **Chairman** opened the discussion with the first topic, concerning the adaptation of analytical and legal enforcement tools to digital zero-price markets, and gave the floor to **Dr Marco BOTTA**, a Senior Research Fellow at the Max Planck Institute for Innovation and Competition in Munich.

Dr BOTTA discussed the main challenges in the enforcement of competition law in zero-pricing markets and the needs for updating competition analytical tools.

Firstly, he considered the market definition traditional tool, which is the SSNIP test, pointing out that two main problems arise in connection with the use of this tool in zero-price markets. When the reference price is zero, consumers switching to competing product in case of the imposition of a positive price may lead to an excessively broad definition of the relevant market. Second, SSNIP test does not catch multi-sided markets, in the sense that it will limit market definition to one side of the market. There are, however, some alternative tools, which follow a similar logic to the SSNIP test, that could provide more suitable analysis of zero-price markets. One could consider the personal data or the attention to advertisement paid by the consumers in exchange for the service as its 'cost' and that the additional cost of providing additional data and attention would lead consumers to switch to alternative products (also called the SSNIC test). Alternatively, one could consider the transfer of large amount of data by the consumers to online platforms as a decrease of privacy for consumers and therefore a decrease of the product quality (also called the SSNDQ test). While a number of competition authorities already adopted these tests, they raise some problems. There is an issue of quantification, because it is difficult to establish what is the increase in cost to take into consideration, but also an issue with considering very heterogeneous preferences of consumers. In addition, the use of these tools may be problematic because it considers the provision of data by consumers as part of the transaction to obtain a free service, but this is not always the case, because sometimes data are collected to improve the quality of the service.

Secondly, the analysis of market power is traditionally based on price and defined as the ability of the firm to raise prices above the competitive level. However, in zero-price markets, because of the 'free effect' paradox, which makes consumers be reluctant to pay for a product that was previously offered to them for a price of zero, it may not be possible for the firm to raise prices above zero. Consumer switching to other products, in these circumstances, would not signify that the firm has no market power. In addition, the presumption of market power based on market share cannot be adopted because sales do not provide an indication.

Alternatives factors have been individuated to assess market power in zero-price markets. One factor is the attention degree of users' on internet, by considering how much time users spend, for example in a social platform against other social platform, and taking consideration that amount of time is a scarce and limited resource. Other factors are the direct and indirect network externalities, when there is a large number of users on one side of a multisided market. This factor is ambivalent, because it can constitute a barrier to entry, but it can also have a positive impact on the product quality. Another factor is the possibility of multi-homing, which consumers share their personal data to different providers for different types of services, which could reduce platform's market power. Finally, another important factor to be considered is the degree of innovation in the market, depending on whether, for example, you can have radical innovation or potential new entrants in certain types of markets.

Dr BOTTA mentioned the need for updating the tools that are meant to capture anti-competitive conducts based on price. For instance, a cartel fixing a price at zero should not be subject to the traditional *per se* or by object analysis but to an effect-based analysis. Similarly, the EU presumption that, when a dominant firm imposes a price below the average marginal cost, the price is predatory would not be applicable. This presumption would therefore lead to a sort of fallacy in zero price markets so we should look at the other side of the market and at the possibility for the firm to recoup the losses incurred.

Dr BOTTA also raised the question of whether we should consider the application, particularly in the European Union, of the enforcement paradigm of exploitative conducts to these kind of markets. In digital markets, characterised by the elimination of intermediaries, the harm to consumers is generated not so much by the exclusion of competitors but by the activity itself of online markets. One of the potentially exploitative conducts is unilaterally imposing unfair contractual clauses, such as would be, for instance, a modification of the data protection terms and conditions to extract data from consumers in a way that is beyond the ordinary commercial business practise.

On remedies, **Dr BOTTA** argued that the traditional imposition of fines or structural remedies would not be very effective. This latter, in particular, would risk having a negative impact on direct network externalities and could harm product quality. Behavioural remedies, because of their tailor-made nature and the possibility of periodic revisions to adapt them to market dynamics, would be more appropriate in zero-price markets. However, the cost of monitoring and the risk of an unsuitable overlap with market regulation by means of data protection and consumer law need to be taken into account. Examples of behavioural remedies in zero-price markets could be i) increasing transparency and consumers' awareness, for instance by providing information about the personal data collected; ii) fixing minimum standards of data protection terms such as maximum duration of data storage, giving consumers the opportunity to revise periodically the consent to the processing of their personal data; and iii) the right of data portability, which is the right to transfer the data to other platforms.

Behavioural remedies open the question of the overlap of data protection, consumer law and competition law. However, behavioural remedies in competition law could clarify unclear aspects of the data protection and consumer law, for instance, the right of data portability, which is under the data protection regulation. There are a lot of unclear aspects of how it should take place in practice. This would require cooperation with the data protection and the consumer law authorities in terms of exchanging information, consultation in designing the behavioural remedies.

Finally, **Dr BOTTA** mentioned that several authorities have double roles, competition and consumer protection roles and that often they will choose whether to adopt remedies under the consumer protection mandate or the competition law mandate. Authorities which have the consumer protection mandate often take the consumer protection path, because it does not require the definition of the relevant market and the definition of the market power, which are quite complex assessment to be made in these types of markets. However, it is important to consider the deterrence of the remedies adopted, where competition enforcement typically offers more severe sanctions. When choosing the direction between competition law and consumer protection law, not only what is the easy way to prove the case but also what are the most effective remedies to solve the case must be taken into account.

The **Chairman** thanked **Dr BOTTA** and opened the floor for questions and comments.

The **European Commission** asked **Dr BOTTA** if he suggested skipping the market definition stage in the analysis and go straight to the stage of assessing market power in these markets. **Dr BOTTA** replied that market definition should remain an essential step in the competition assessment, but that the alternative tools to the SSNIP test generate a number of questions. Therefore, it is necessary to consider the two sides of the market and we should revise the tools that we have at our disposal to do so.

The **Chairman** then turned to delegates to explore the analytical and legal enforcement tools in digital zero-price markets, starting by asking **Spain** to describe and identify the relevant dimensions of quality in zero-price markets.

Spain first mentioned that perhaps it is more accurate talking about non-positive pricing than talking about zero pricing. Sometimes, prices are even negative because products are not only free but also include additional services. **Spain** explained that in situations with non-positive pricing is necessary to identify all other relevant product characteristics to infer the "actual price", factoring in quality considerations. However, while identifying quality is not such a different challenge in markets with positive and non-positive pricing, the real challenge is identifying quality in digital markets. In digital markets, many services are intangible, so quality is much more difficult to measure than when dealing with tangible goods, such as, years of guarantee, different varieties, power and energy efficiency, or with services, such as waiting times, duration, frequency and energy consumption. In addition, **Spain** explained that in digital markets, scope economies and, especially, network externalities are much more frequent than in brick-and-mortar business, so services are often tied and bundled and this makes quality very difficult to assess. However, and, despite the fact that in digital markets quality assessment is complex and more challenging, there are still various valid proxies of quality. Some proxies, such as personal data provided, time of attention, amount and density of advertising and cost of premium services, can be quantified. Therefore, changes in those variables can be assessed and compared, and actual and counterfactual scenario can be analysed. When these variables are rather qualitative, for instance, consumer inconvenience or privacy loss, they can be even transformed into quantitative or degree variables through various techniques, like consumer polls.

In addition, **Spain** described another issue, which is the level of user data needed to enjoy some services up to a point where it can be considered an exploitative abuse. Since the price of these services is zero or even negative, the exploitation of consumers would arise from the interpretation that the loss of privacy is equivalent to a deterioration of quality.

Then, **Spain** stressed that other more modern and complex explanations for zero pricing, such as advertising or data accumulation, are of utmost importance because they are connected with the multi-sidedness of digital markets. In those cases, network economies can raise endogenous barriers to entry, together with learning, scope and scale economies, and growth in those markets. Authorities must monitor these dynamics more closely. In addition, actual and potential competitors do not arise only from demand substitutability but also from supply-side substitutability, because firms can rely on similar technologies to produce similar goods and services, even if they are not producing them.

Finally, **Spain** concluded that zero pricing in digital markets adds several challenges to competition policy. However, these challenges normally imply the need to tweak, update and improve tools rather than revamping the conventional framework. So competition policy, with its current tools and flexibility, is equipped to deal with those challenges.

The **Chairman** commented that, even if some indicators of quality exist and can be measured, it is difficult to weigh them, particularly in order to find what is the level of improvement in privacy or in quality that would compensate a reduction of competition.

The **Chairman** then asked **Japan** about the practical challenges that the JFTC encountered in its merger analysis in the online travel reservation service market, in which the JFTC calculated market shares based on the volume of transactions made through the website. In particular, he asked **Japan** to describe the rational for this approach, and whether there are any downsides to using transaction volume-based market shares.

Japan explained that in the online travel reservation service, a consumer can use the platform for free and the hotel businesses can put advertisement on their hotels on the platform for free. Therefore, it is not possible to calculate the market share based on the amount of consumers' usage fee or listing fee for the hotel business. The JFTC considered three factors, first was the fact that the revenues of online travel reservation services are commissions derived from transactions between hotel businesses and consumers through their websites. The other two factors are related to the two sidedness of the online travel reservation service market. In one market, the online services compete with each other for hotel businesses in terms of the number of the customers and the volume of transactions generated through their websites. In the other market, which provide services for consumers, they compete in terms of the number of hotel businesses listed on the website, and by awarding their consumers with points according to the transaction volume. Therefore, JFTC determined that the market share based on the transaction volume reflects their competitive positions in both of the two markets or services that the online website offers. The JFTC also added that it has not heard any argument against this method from anywhere so far.

Japan also mentioned that in one of the session of the ICN Merger Workshop held in Tokyo in November 2018, it emerged that the use of questionnaires and survey, as well as the use of internal documents, to identify the scope of relevant markets when reviewing mergers in zero-price markets is of crucial importance.

The **Chairman** then turned to **Israel**, asking how an authority should weigh the effects of a merger, where the effects of a merger on the paid side of a platform differ significantly from the effect on the unpaid side.

Israel described the merger between two media purchasing agencies, which purchase advertisement time from TV channels and sell them to advertisers. There are four main set of players in the market: advertisers, media purchasing agencies, TV commercial channels and the viewers. Regarding the quality issue, **Israel** explained that the relevant side of the market is the one between the TV commercial channels and the viewers, since the service provided is free of charge. The parameter the authority used to assess quality is the amount of investment in quality made by the channels, under the assumption that the higher the investment the higher the quality of the contents. **Israel** mentioned also other quality parameters, such as the rating points due to viewer's preferences, and the amount of rebroadcast contents, negatively related to quality. **Israel** explained that both of these parameters are suitable but the amount of investment is more comprehensive, and highly correlated with these other two parameters. Therefore, the authority choose the amount of investment parameter as the quality measure. Advertising time could in theory be a good measure of quality but the relation is in fact dubious, because while for consumers content time is better than advertising time, for channels more advertising time means more revenue, which may attract more quality of content. The authority did not quantified the impact of the merger on quality, but analysed it through structural point of view and with qualitative evidence.

Regarding the question about how to weigh the upstream and downstream effects in this case, **Israel** explained that in the pre-merger situation, the agencies side of the market was already highly concentrated and covered many advertisers, while the TV channels side was very competitive and depended highly on the revenues from the media purchasing agencies. Therefore, the concern was that further consolidation of media purchasing companies would further increase the bargaining power of media purchasing agencies against TV channels, leading to a decrease in broadcast quality to viewers.

The Chairman then turned to the United States and asked about the analytical approach in zero-price markets. The United States explained that, in general, competition law tools and the fundamental principles of the antitrust doctrine are adequate for dealing with quality issues in the zero-price economy. The antitrust laws, including the prohibition on anticompetitive agreements, monopolization, and mergers, should be applied in order to protect competition and to maximise the consumer welfare, regardless of whether the specific products or services at issue are partly or entirely sold at a zero price. In determining the competitive effects in zero-price markets, the Department of Justice continues to rely on the consumer welfare standard, because it is flexible enough under US laws to adapt to multi-sided markets and to the zero-price economy. Based on US Supreme Court rulings, the consumer welfare standard also takes into account, in addition to price and quantity, the effects on quality, consumer choice and innovation. Quality is particularly important when analysing competitive effects in markets with a zero-price product or service. When competing products or services in an antitrust market are not differentiated with respect to price, they are often instead differentiated in other ways, such as quality, that are particularly significant for the consumers. Nevertheless, it may be hard to measure or estimate market power or competitive effects in such circumstances, as mentioned by the previous speakers.

The **United States** explained that one source of the complexity is in the multi-sided platforms, and that in certain multi-sided platforms it may be necessary to analyse all of the different sides to understand the competitive effects of the conduct or transaction in issue. In the recent American Express case, the US Supreme Court emphasized this issue. The court held it was necessary to evaluate both sides of two sided credit card transaction platforms to determine whether or not the plaintiffs have demonstrated the anticompetitive

effects of the challenged conduct. However the court limited, in the language used, when and in what markets that rule applied. For instance, if it is a product or a service that consumers use to complete the transaction, like a credit card service, that would be considered as multi-sided platforms and the rule would apply. On the other hand, for instance, when you go on a search engine website you are not there to search for advertisement and therefore the rule would not apply. The Supreme Court held that even conduct that involves or results in a price increase on one side of a multi-sided platform may nevertheless lead to an overall increase in output and an improvement in consumer welfare. However, in other circumstances, activities on different sides of a multi-sided platform may fall into separate antitrust markets and it highly depends on the facts and the circumstances of the specific case.

The **Chairman** then moved to the second part of the discussion, concerning the demand-side market problems in the zero-price economy. He asked **Germany** to describe the types of demand-side concerns the authority has observed in digital markets, in particular, in the Facebook case.

After noting that the Facebook case was still ongoing, **Germany** explained that the Bundeskartellamt assumed that Facebook was dominant on the German market for social networks. While the SSNIP test was not the most suitable tool to define the relevant market, the agency used the concept of demand side substitutability as starting point for the Facebook case. **Germany** explained that Facebook made use of its social network conditional on the possibility for it to collect data generated by using third parties websites, including Apps belonging to Facebook, like WhatsApp. Facebook used that data and merged it with users' Facebook accounts. Facebook can obtain data on every website with the Facebook button, even if the user did not click on the button, and this is most likely unknown to users. Facebook used that data and merged it with users' Facebook accounts.

Germany clarified that in general business models where a company offers a product or service for free and monetises it through data-based targeted advertising, is not a concern for the authority. On Facebook, users can considerably influence the extent to which the data are being collected, and the proceedings did not concern the collection and use of that data collected on the Facebook network itself. Other types of data collection by Facebook outside the social network are instead obscure to the user, who cannot opt out of them. Because of Facebook's market power, users do not have the option to avoid the merging of their data, they are locked in if they want to use the Facebook network. Therefore, the authority considered that Facebook engaged in an exploitative abuse by imposing unfair and excessive terms and conditions.

The Chairman mentioned that **Russian Federation** also analysed a zero-price market in the Google Play case, and then turned to **Hungary** to discuss a consumer protection case involving a Google Chat application, which raised similar issues. The GVH investigated the communications practices of Google, among others, in relation to its data processing of 'Allo' chat line. The case was closed with commitments. The GVH investigated whether consumers had received the information necessary to be able to make value from decisions about the data processing activity of Google, which is an essential aspect of Google's products, and whether the lack of proper information about that could constitute unfair commercial practices. The GVH did not assess the communication practice of Google's products from a data protection point of view, but based on consumer protection law. The GVH reached the conclusion that a potential violation could be efficiently remedied by the commitment package submitted by Google. The commitments included the setting up of a page concerning the data processing of Allo under the 'Allo Help' website, which will be

accessible both from the installation process description of Allo and from the description available in Allo Google Play and IOS App Store. Google undertook to draft this page in plain language and in a balanced manner. Furthermore, it has also undertaken that in the descriptions of the webstores this information will be easily accessible, without long scrolling. In accordance with the commitments, Google was obliged to send the hyperlink of the data management's sub-page within the application of Allo to the users of the product in Hungary. In addition, in the fourth quarter of 2018 Google must publish a one-day graphical educational banner on its YouTube channel highlighting that Google collects and handles consumers' personal data and recommending that consumers review the privacy policies and settings. Google has also undertaken to verify that it has implemented the above-stated measures, and also that the information will not be communicated in a less noticeable way and that it will not reduce the awareness level of consumers in the future. According to the GVH, the commercial practice that has been modified as a result of the submitted commitments extends beyond this immediate case, the data management subpage will be translated in 44 languages at the same time, furthermore the undertaking can reach a larger Hungarian group of consumers than the users of Allo chat client. **Hungary** said that the compliance with the commitments have been checked, within the framework of ex-post investigation, by the GVH and concluded that they tackle the problems well.

The **Chairman** asked Hungary if the GVH considered that consumer law was more adequate and maybe easier to use than competition law for solving these problems. After pointing out that the answer to this question really depends on the case, **Hungary** replied that in this case the GHV came to the conclusion that consumer protection rules provide a fast solution and suitable remedies.

The **Chairman** then turned to BEUC and asked about the limitation that consumer law has, in those cases where competition law may be affected even if consumers have complete information about a product. **BEUC** started by stressing that there seems to be a common understanding among policy makers and among consumers that the products offered in zero-price markets are actually not for free, they are accessed as a results of data collection or exposure to advertising. It is extremely difficult to assess the fairness of the transaction. **BEUC** mentioned that the Norwegian Consumer Council published a study called "Deceived by Design", which looked at how services in zero-price markets, particularly involving companies with a significant market share, designed their products with two main objectives: i) to keep users in the network, by making it difficult to switch or to delete their accounts; ii) to stimulate the sharing of more data. The UK consumer organisation "Which?" published its report "Control, Alt or Delete?" showed how consumers display a high level of resignation. Consumers, in other words, share their data because they need to in order to access to the service, in a situation of limited choice. This situation is particularly problematic when there are strong network effects or a dominant position. To address these situations, consumer law may not be the only tool, and other type of remedies may be considered.

The **Chairman** asked **BEUC** what types of measures they were suggesting.

BUEC gave the example of preventing the use of certain default options, in a way analogous, for example, to the ban on pre-ticked boxes introduced in the EU in the context of price services.

The **Chairman** then moved to the final part of the discussion, by asking the UK about innovative measures that agencies can take to address demand-side problems in zero price

markets. In particular, he asked how the CMA would approach the issue of consumers' inertia.

The **UK** explained that the CMA is provided with a broad toolkit, being able to look at competition and consumer issues and having the ability to look at quality as well as price in assessing the effectiveness of competition in the market through mergers tools and, similarly, in the analysis conducted under UK consumer protection law, and in market investigations. In the UK Market Guidelines, the CMA recognise that firms with market power may be able to maintain quality below competitive levels without the consequent loss of sales becoming unprofitable. In the UK, market investigations can be also used to impose binding remedies on market players. The **UK** mentioned some examples of enforcements action when the CMA considered quality of products 'free of charge', including a merger between two food ordering digital platforms, Just Eat and Hungryhouse. The **UK** also mentioned the market investigation into retail banking, where the CMA intervened to help consumers better compare the quality of goods and services in a market that is typically zero-priced in the UK if you are in credit. In the investigation, they found that many consumers consider all banks to deliver similar levels of service, but there was a lack of comparable data to enable them to make well-informed comparisons. Therefore, the CMA required banks, firstly, to publish service quality data showing the willingness of their customers to make recommendations about their different accounts. Secondly, to make the underlying service data available to third parties using open, standard APIs, to facilitate entry and the emergence of new products to help consumers better compare available bank accounts.

The **Chairman** asked the **UK** if they thought that the same kind of instruments could be used in other zero-priced markets. The **UK** replied that they certainly found that the market tools is very adaptable to many different concerns and it could be used.

The **Chairman** commented that market investigations particularly could help solved out some of those problems, and also for showing that there can be an integration between consumer policy and competition policy.

The **Chairman** then turned to Mexico and asked about the cooperation framework between competition policy and consumer protection policy. In particular, he asked about the specific procedure to that effect.

Mexico highlighted the importance of inter sectoral governmental work in matters concerning the digital economy. Regarding inter agency cooperation in Mexico, COFECE, which is the competition agency, has signed in 2014 an agreement with the consumer protection agency, which is called PROFECO, and both agencies have agreed for sharing information and generate mechanisms as a base for joint enforcement, and the agencies should meet twice a year to talk about this issues. However, in practice, although this is a first step, they need to work harder on strengthening their ties, and also need to start having conversations with the national institute of transparency, access to information and personal data protection. **Mexico** mentioned as a virtuous example that of the US Federal Trade Commission, which brings three disciplines together in one agency and can start an investigation under one mandate and continue it under another if necessary. Mexico mentioned that their institutional design is more complicated and that, in the future, some of institutional changes may have to be done to accommodate the enforcement needs of these markets.

The **Chairman** then turned to the **European Commission**, asking to explain the context of the call by the European Data Protection Supervisor for competition authorities to use data protection and consumer protection standards when developing their theories of harm.

The **European Commission** restated that quality is an important parameter for competition, and EU competition law is concerned with possible degradations in quality brought by conducts and transactions. This also applies to zero-price services, which are clearly subject to EU competition law. It was established by the Court of Justice already in 1991, in the *Höfner* judgment, that competition law applies to services that are provided for free and confirmed in later cases. The same applies to EU data protection law. The General Data Protection Regulation (GDPR) applies irrespective of whether payment of the data subject is required and the same applies to EU protection law. The proposal for a Digital Content Directive (DCD), which introduces a high level of protection for consumers, also applies to situations where no monetary compensation is paid. Free services are specifically taken into consideration by the proposed amendment of the Consumer Rights Directive that is part of the New Deal package.

In general, in the sector of online advertising, where there is no monetary compensation on the side of the consumers, degradation of quality is not only felt on the intrinsic characteristics of the service offered, such as slower or less accurate results in search engine, but also an increase in the costs that the consumer bears when using the service, such as for instance, the longer time that the consumer needs to see additional ads. When this additional cost is a result of an agreement, abuse or transaction, there is a case for competition enforcement.

The **European Commission** mentioned four abuse of dominance cases, Microsoft I and II, Google Shopping, and Google Android. In these cases, because of some practices the consumers were deprived the possibility to enjoy better services based on their owned preferences, including with regard to quality. These abusive conducts made it more difficult for customers to choose different and probably better services. In merger control, non-price effects can play a role in three areas: the market definition, the competitive assessment, and the assessment of efficiencies. As regards market definition, for instance, in the *Microsoft/ LinkedIn* merger*,* the Commission found that professional social networks were different because of their different functionalities, features and use case. As regards the competitive assessment, non-price elements can also be relevant to determine whether the parties are close competitors or not. When it comes to the efficiencies, while quantifying non-price efficiencies can be challenging, the **European Commission** assesses qualitative evidence in their support.

Data protection issues may be relevant in the Commission's merger analysis in two main ways. Firstly, privacy can be considered as an important element of quality of a product or service, which may be degraded following the merger. Secondly, data may be a necessary input for other products or services, which can be foreclosed post-transaction. For example, in the *Microsoft/LinkedIn* case, the **European Commission** found that privacy was an important parameter of competition among different professional social networks that would be indirectly impaired by the transaction. Moreover, it considered a theory of harm which saw data as an input, but the investigation did not confirm this concern.

The **Chairman** then turned to **Italy**, asking how the consumer protection aspects complement the competition aspects.

Italy replied that the Italian competition authority's dual competence on competition and consumer protection matters empowered the authority to tackle the issues raised by zero-

price economy from both the demand and the supply perspective. The authority so far dealt with these cases mainly under its consumer protection mandate. In two recent proceedings against WhatsApp following the acquisition by Facebook, the agency prevented the merging parties from lowering the quality of the service provided, in terms of data handling. The Italian competition authority followed the European commission's approach according to which personal data, consumer preferences and other user-generated content, have a *de facto* economic value and are sold to third parties. The authority considered the exchange of data and attention by consumers as an economic transaction, establishing a contractual relationship between the provider and the user characterised by unfair contractual terms. After restating that quality considerations are taken into account by the authority, in particular in merger cases, the delegate from Italy mentioned the launch of the joint sector enquiry on big data launched by the Italian Competition Authority, the Italian Data Protection Authority and the Communications Authority. The midterm report of this market enquiry illustrated that users are affected by certain demand side behavioural biases, such as the so-called privacy paradox. Only a minority of consumers express a willingness to pay to improve their digital privacy.

The **Chairman** asked the Italian delegate what reasons drove the choice to deal with the cases under the consumer protection mandate. Italy confirmed that the investigated cases had been initiated as consumer protection cases, and pointed that this approach has, in addition to other pros and cons, the benefit of reducing the risk of hampering innovation but the analysis is perhaps less sophisticated than in antitrust cases and thus may play a less prominent role of guidance for future cases.

The **Chairman** then turned to **BIAC**, which questioned the role of cooperation. **BIAC** started by pointing out that it is important to understand what features of quality drive the competition between market players. Often competition on the merits is driven by the intrinsic characteristics of a product, and it may be a challenge to measure the competitive dynamics based on those parameters. In this sense, it is more worthwhile to see if we can improve the analytical tools, than fundamentally changing the policy objectives of competition law. The blurring between the objectives of competition law and other regimes should not occur under the pretext of cooperation between authorities. Any blurring of the lines between the different objectives may result in legal and market uncertainty, but also distort the incentives in the competitive process. While there is a huge value in authorities across different regimes engaging with each other, this approach also carries significant risks.

The **Chairman** pointed out that cooperation between authorities and the combination of the competition and consumer approaches could however enhance the design of remedies and provide more effective solutions to these issues.

Dr Botta concluded the discussion by remarking that, while it is interesting to note that in various jurisdictions these issues have been tackled under the consumer protection mandate, it is disputable whether the ensuing fines were deterrent enough and would be effective as a fine issued by competition enforcement. The nature of the remedy could be a factor driving the choice of which instrument to adopt to address the issues arising in zero-price markets.