

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Quality considerations in the zero-price economy – Note by BEUC****28 November 2018**

This document reproduces a written contribution from BEUC submitted for item 2 of the joint meeting between the Competition Committee and the Committee on Consumer Policy on 28 November 2018.

More documentation related to this discussion can be found at:

www.oecd.org/daf/competition/quality-considerations-in-the-zero-price-economy.htm

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BEUC

1. Introduction

1. BEUC welcomes the discussion on quality consideration in zero-price markets. Although business models based on the promotion of ‘free’ goods or services are not new, digital markets have brought a new dimension to zero-price markets. The rise of platforms offering services to consumers for ‘free’ while monetising their attention and personal data by means of behavioural advertising, pose new challenges to consumers and enforcement authorities.

2. The most prominent debate in this context relates to non-monetary considerations of these services. These considerations could have different dimensions: for example, while data protection law is concerned about the legal conditions for the collection and processing of consumers’ personal information, consumer law looks at the fairness of the practices surrounding the transaction and competition law at choice and quality aspects of the concerned services in a relevant market.

3. The authorities responsible for the enforcement of consumer, competition and data protection laws do not operate in a vacuum: a same business conduct can trigger the application of these three areas of law, amounting to concurring infringements. Thus, it is important to highlight that agencies do not exclude but complement each other in trying to bring the infringements of the respective laws to an end.

4. The background paper prepared by the secretariat provides a clear outline of the challenges in the enforcement of competition and consumer protection laws in digital markets. Thus, this contribution aims at providing some additional insights from consumer organisations concerning the assessments of zero-price services and it explores whether behavioural economics could contribute to a better enforcement of competition and consumer laws.

2. Experience from national consumer organisations

5. Consumer organisations have been looking at consumer’s interactions with zero-price markets and how firms are creating an illusion of ‘free’ while consumers access such services upon the collection of their personal data and the exposure to advertisements.

2.1. Norwegian Consumer Council study “Deceived by Design”

6. Our Norwegian member has conducted several studies about how firms operating in zero-price markets comply with consumer and data protection laws¹. Their latest study,

¹ *E.g.* in the report “Appfail – Threats to Consumers in Mobile Apps”, The Norwegian Consumer Council assessed the terms of 20 mobile apps to uncover potential threats to consumer protection hidden in the end-user terms and privacy policies of apps <<https://fil.forbrukerradet.no/wp-content/uploads/2016/03/Appfail-Report-2016.pdf>> (accessed on 13 November 2018)

“Deceived by Designed”,² explains how firms use default settings, techniques and features of interface design to push consumers towards privacy intrusive options.

7. The Norwegian Consumer Council analysed a sample of settings in Facebook, Google and Windows 10, showing how default settings and dark patterns, techniques and features of interface design meant to manipulate users. The findings included privacy intrusive default settings, misleading wording, giving users an illusion of control, hiding away privacy-friendly choices, take-it-or-leave-it choices, and choice architectures where choosing the privacy friendly option requires more effort for the users.

8. Examples of this includes Facebook and Google imposing intrusive defaults, where users who want the privacy friendly option must to go through a significantly longer process. The popups from Facebook, Google and Windows 10 have design, symbols and wording that nudge users away from the privacy friendly choices. Choices are worded to compel users to make certain choices, while key information is omitted or downplayed. Furthermore, Facebook and Google threaten users with loss of functionality or deletion of the user account if the user does not choose the privacy intrusive option.

9. Facebook and Google give an illusion of control to users over their personal data while in reality the this is very limited: Facebook gives the user an impression of control over use of third-party data to show ads, while it turns out that the control is much more limited than it initially appears. Secondly, Google’s privacy dashboard promises to let the user easily delete user data, but the dashboard turns out to be difficult to navigate, more resembling a maze than a tool for user control.

	Facebook	Google	Windows
No privacy intrusive default settings in popups	✗	✗	✓
Equal ease (number of clicks) for privacy friendly options in popups	✗	✗	✓
Design (colours and symbols) does not lead toward privacy intrusive option in popups	✗	✗	✗
Language does not lead toward privacy intrusive option in popups	✗	✗	✗
Privacy friendly options in popups come without “warnings”	✗	✗	✓
Users can clearly postpone the decision while accessing the service in the meantime	✗	✗	✗

Source: Norwegian Consumer Council, 2018

² Forbrukerrådet, “Deceived by Design. How tech companies use dark patterns to discourage us for exercising our privacy rights” (2018), < <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>> (accessed on 13 November 2018)

2.2. UK consumer organisation Which? “Control, Alt or Delete?” report

10. In June 2018, the UK consumer organisation Which? published its report “Control, Alt or Delete? The future of consumer data”³. It looks at the use of commercial data by firms and how they interact with consumers. The results show that consumers feel powerless about how firms handle their personal data. The report identified three forms of potential and actual consumer harm from the commercial use of data, including:

- Financial harms in the form of losses that arise from breaches and growing potential for the use of data to price discriminate in unfair or hidden ways.
- Non-financial harms such as exacerbating addiction or discrimination access to information and services and,
- Foregone benefit given by the lower uptake of digital services due to consumer concerns, or the market power that access to consumer data gives big tech companies. This reinforces the winner takes all market dynamics by offering advertisers one-stop access to massive audiences that can be finely targeted⁴.

11. One aspect highlighted in the report is the lack of transparency in which the data industry operates which makes difficult for consumers, their advocates and policy makers to understand the scale of potential detriment. Thus, the authorities should use the powers that they have at hand to investigate these markets in order to identify the markets structures and potential illegal practices. The French competition authority⁵ has already carried out a sector investigation into online advertising and the German authority is looking into this sector⁶. The European Commission could also use the powers under Article 17 of Regulation 1/2003 and start its own market sector inquiry into online advertising covering the EEA.

12. However, while transparency is necessary, it is not enough to empower consumers when it comes to the proceeding of their data. This is because while people dislike the way firms handle their personal information, they feel resigned and powerless to do anything about it. Thus, specific measures are needed to revert that situation beyond mere disclosure.

13. This last point is also important concerning the broader implication of the misuse of data and consumers’ attention related to online manipulation to steer public debates and influence democratic processes (e.g. online disinformation). This phenomenon highlights the permeability between markets and society, consumers are citizens⁷.

³ Which?, “Control, Alt or Delete? The Future of Consumer Data” (2018), Policy Report, <<https://www.which.co.uk/policy/digitisation/2659/control-alt-or-delete-the-future-of-consumer-data-main-report>> (accessed on 13 November 2018)

⁴ Page 32

⁵ Autorité de la concurrence, sector specific investigation into online advertising <http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=684&id_article=3133&lang=en> (accessed on 13 November 2018)

⁶ Bundeskartellamt launches sector inquiry into market conditions in online advertising sector, <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/01_02_2018_SU_Online_Werbung.html> (accessed on 13 November 2018)

⁷ See BEUC’s infographic “What is the link between behavioral advertising and fake news?” <<https://www.beuc.eu/publications/beuc-x-2018->

3. How to incorporate quality considerations in competition and consumer law proceedings?

14. These reports from consumer organisations provide useful insights about consumer attitudes towards firms offering zero-price services. The understanding of consumer expectations on these markets and how businesses operate to extract more value from the consumers data could contribute to a more evidence-based enforcement.

15. For example, understanding consumers privacy expectations would allow enforcement authorities identify to what extent privacy is a parameter of choice in zero-price markets. This choice approach could provide competition agencies with a prism to assess mergers involving firms providing zero-price products, as we have seen in recent European Commission decisions⁸. This approach would also enable authorities to identify the level of consumer trust in zero-price markets and their attitude when it comes to allow firms to process their data for the provision of zero-price services: currently consumers seems to be resigned to firms collecting and using their data as they please therefore undermining long-term consumers' trust not only in relation to digital services but to the technology itself.

16. Similarly, behavioural insights can be used to identify consumer biases that increase consumer switching costs. Gebicka and Heinemann suggest, for example, adopting a Small but Significant Non-transitory Decrease in the Quality (SSNDQ) market definition test⁹. This test could determine whether consumers would switch from service A to service B if the company providing service A violates users' privacy or its service presents a downgrade of functionalities (e.g. people face regular problems logging in or sharing content on social media) or main characteristics (e.g. privacy standards). It is worth noting that the degradation of privacy does not require a breach of data protection and privacy laws to be relevant for a competition assessment. It is enough that privacy is a parameter of consumer choice.

17. Quality considerations can also play a role in the enforcement of laws addressing unfair commercial practices. In the EU, the Unfair Commercial Practices Directive (UCPD)¹⁰ prohibits practices that aim at misleading consumers about the main characteristics of the product. Therefore, not disclosing information regarding the privacy standard of goods and services could be considered as a misleading omission in the sense of Article 7 as long as the provision of this information would have an impact on the consumers' economic behaviour. This is confirmed by the Commission's guidance document on the Unfair Commercial Practices Directive stating that "*under Article 7(2) and No 22 of Annex I UCPD if the trader does not inform a consumer that the data he is*

[036_what_is_the_relation_between_behavioural_advertising_and_fake_news.pdf](#)> and EDPS opinionn3/2018 on online manipulation and personal data <https://edps.europa.eu/sites/edp/files/publication/18-03-19_online_manipulation_en.pdf> (accessed on 13 November 2018)

⁸ In the Microsoft/LinkedIn decision the Commission noted that "*the results of the market investigation have indeed revealed that privacy is an important parameter of competition and driver of customer choice in the market for PSN [Professional Social Networking] services*" (footnote 330)

⁹ Aleksandra Gebicka and Andreas Heinemann, "Social Media & Competition Law" (2014), 37 *World Competition Law and Economics Review* 2:149

¹⁰ Directive 2005/29/EC

required to provide to the trader in order to access the service will be used for commercial purposes, this could be considered a misleading omission of material information.”¹¹

Behavioural research can help to understand what is the role of privacy settings in the consumers’ economic behaviour and therefore inform the enforcement of this provision.

18. Finally, qualitative research, consumer surveys, panels and field trials can serve to identify biases and test the effectiveness of different remedies to choose the most appropriate one. This is because when the mitigation of anti-competitive effects generated by the abusive conduct depends on changing consumers’ behaviours, authorities should rely on behavioural insights to increase the effectiveness of the consumer-facing remedies¹².

¹¹ Page 25 of the Guidance Document

¹² See BEUC’s contribution to the European Commission’s consultation on the shaping of competition policy in the era of digitalisation <https://www.beuc.eu/publications/beuc-x-2018-084_beuc_response_shaping_of_competition_policy.pdf>