

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Quality considerations in the zero-price economy - Summaries of Contributions**

**28 November 2018**

This document reproduces summaries of contributions 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](http://www.oecd.org/daf/competition/quality-considerations-in-the-zero-price-economy.htm)

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*Table of contents*

**Quality considerations in the zero-price economy - Summaries of Contributions..... 3**  
**BEUC..... 4**  
**BIAC..... 5**  
**Germany..... 6**  
**EU..... 7**  
**Hungary..... 8**  
**Israel..... 9**  
**Japan..... 10**  
**Mexico..... 11**  
**Russian Federation..... 13**  
**Spain\* ..... 14**  
**United Kingdom ..... 15**  
**United States\* ..... 17**

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*Quality considerations in the zero-price economy -  
Summaries of Contributions*

This document contains summaries of the various written contributions received for the discussion on Quality considerations in the zero-price economy (Joint meeting between the Competition Committee and the Committee on Consumer Policy on 28 November 2018). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an \*.

## *BEUC*

BEUC welcomes the discussion on quality considerations in zero-price markets. Although it has been challenging for authorities to incorporate quality considerations into competition assessments, in digital markets where consumers access products and services upon the collection of data or exposure to advertisement quality acquires a new dimension.

One of the areas of interest for competition and consumer authorities could relate to the identification of consumers expectations regarding quality standards of digital services through behavioural tests. This could allow not only identifying the value consumers attribute to their data or time (e.g. advertising exposure) in exchange for accessing such services but also what would they expect from them in terms of functionality and privacy standards.

Consumer organisations surveys and reports show that consumers are frustrated with the way digital firm treat their data and manipulate them to share continue sharing data. This has profound implications on their expectations about how firms should handle their data, especially when they are faced with little choice due to the lack of competition on the market or the existence of switching barriers given, for example, by strong network effects.

Thus, quality as an element of consumer choice can provide a prism for competition agencies to approach mergers in zero-price markets and cases of abuse of dominance when the dominant firm uses its market power to lock-in consumers to be able to extract data that is monetarised in the form of behavioural advertising.

## *BIAC*

This paper discusses the significance of quality considerations for competition in zero-priced markets, how they can be measured, and the challenges of developing policy responses. It also considers the interaction of competition law and other regulatory regimes in the context of zero-price markets.

Considerations of quality are not new. The growth of online services has nevertheless brought a particular focus on quality as a parameter of competition in zero-price markets. Quality is the primary parameter of competition in zero-price markets, and so it is essential to understand what quality means for consumers and what aspects of quality drives consumer choice.

Competition law regimes already have the tools to measure and protect competition in zero-price markets. The analytical framework nevertheless raises challenges. In particular where intervention would involve novel theories of harm, an analytically rigorous approach is essential.

As in positive-price markets, the primary dimension of competition on quality remains the quality or functionality of the product provided to consumers (such as the accuracy of a map, or the connectivity offered by a social network). These critical features may sit alongside others, such as privacy, data protection and security, and the quality and nature of advertising. Many online services already compete on privacy, along with a range of other non-price features. The weight afforded to privacy as an aspect of competition on quality should therefore be based on evidence of how variations in privacy protections influence consumer choices.

Similarly, any consideration of advertising as a measure of quality should be analysed carefully. An increase in advertising does not necessarily equal a reduction in quality. In many cases, the incentives of the service provider, advertisers and consumers are likely to be aligned.

Zero-priced markets have also raised questions about the nature of the consumer transaction. With respect to digital products and services, it can be tempting to suggest that data are a form of currency, but, in common with other ad funded business models, it would be more accurate to understand the transaction as consumers “paying” with their attention.

Measuring competitive constraints is also challenging. The SSNIP test is unlikely to be of use unless it is applied to a market for the sale of advertisements on the relevant platform. A quality-focused equivalent - measuring the effect of “small but significant non-transitory decrease in quality” (an SSNDQ) – has been suggested, but this also presents challenges. In fast-moving technology markets, the frequency and significance of product improvements and innovations may provide the best objective measure of competitive constraints.

While measuring quality aspects in an assessment of competition may be analytically challenging, doing so should not be the vehicle for regulating separate policy goals that are more properly addressed by other legal frameworks. In any event, before intervening on competition grounds, it needs to be firmly established that competition on quality is lacking and that the proposed intervention would be relevant to consumer choice.

## *Germany*

Companies in the zero-price economy primarily compete on non-price terms, such as the quality of their products and services among others. Therefore, the reformed national competition law contains a clarification that the assumption of a market shall not be invalidated by the fact that a good or service is provided free of charge. The novel provision reflects the conceptual groundwork of the Bundeskartellamt which illustrated that zero-price services can still constitute a market under competition law. A user group that uses the service for free should at least be considered a market under competition law if it shares a platform with a paying user group.

The Federal Ministry for Economic Affairs and Energy recently commissioned a study on the need to modernise the norms on abusive practices. According to the authors, a new provision could prohibit the abusive hindering of competitors by thwarting multi-homing and switching to other platforms even below the dominance threshold if such a conduct could foster market tipping. The study introduces the notion of “intermediation power” as a concept that highlights that dominance may not solely derive from a position as a buyer or supplier, but also from the strong position as a gatekeeping intermediary.

The marginalisation of smaller competitors due to differentiated data access might also be self-reinforcing: access to a larger amount of data may support better services, which in turn attract more customers – and more data (“spiral effects”). The above-mentioned study explores several options with regard to data as a parameter for competition and market power such as an evolution of the essential facility doctrine towards more flexibility. Hybrid platforms that act as an intermediary and service provider for third parties can realise data synergies beyond the data collected from their own commercial transactions with consumers.

In the zero-price economy, the question of privacy might become particularly relevant since a reduction of privacy might be the equivalent of a reduction of product quality. Last year, the Bundeskartellamt launched a sector inquiry into smart TVs. The inquiry focusses on the suppliers’ handling of user data. The aim of the sector inquiry is to find out if and to what extent the producers of such devices record, share and commercially exploit personal data, and if the affected persons are informed accordingly.

## EU

EU competition law is not only concerned with price, but with all five parameters of competition – price, output, quality, choice, and innovation. This applies to the enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union as well as EU merger control. In the digital sector, when there is no price expressed in money, and output does not play a decisive role (since marginal costs are often very low), there is a strong case for competition law to focus on the other three parameters of competition: quality, choice and innovation.

Many such services rely on the online ad-supported model. A large part of online advertising today is "targeted" advertising, i.e. advertising tailored to fit a person's interests, as indicated by that person's personal data collected over the internet or from other sources. In this context, some consumers may experience data collection and data protection as elements of the quality of a zero-price service.

Under EU competition law, the argument that a service which is "provided free of charge" is not subject to the EU competition rules was rejected as early as 1991, in the *Höfner* judgment, in relation to Germany's public-sector job placement agency. The EU courts have confirmed this principle on several occasions since then. The same applies under EU data protection law and EU consumer protection law.

In the online advertising-supported sector, the notion of harm to quality encompasses not only the intrinsic characteristics of a service – e.g. speed and accuracy of results in a search engine, or a browser's page rendering speed – but also all costs that the consumer has to bear to be able to use such services. First, online ads capture consumers' attention in terms of screen space devoted to ads. Second, some consumers may experience data collection as a degradation of quality in terms of data protection. Third, online ads also impose costs on consumers in terms of data traffic and battery power.

It matters little whether capturing consumers' attention and data, and using up consumers' data traffic and battery power, are seen as a "price", a "cost", "consideration", "counter-performance", or a degradation of quality. What matters is that while consumers enjoy value from some digital services, they may also experience a reduction of value in other – sometimes indirect and less obvious – ways from using such digital services. When such value reduction stems from an agreement, an abuse of dominant position, or a merger, there may be a case for competition enforcement.

With regard to EU antitrust cases, in *Microsoft I and II*, *Google Shopping*, and *Google Android*, the types of behaviour at issue made it more difficult for customers to choose services based on their own quality preferences. Customers were being offered services that suited the dominant firm's own interests, instead of competition on quality. Moreover, because such behaviour was exclusionary, it was likely to further reduce incentives to innovate and compete on quality in the longer term.

With regard to EU merger cases, especially in *Microsoft/Skype*, *Facebook/WhatsApp*, and *Microsoft/LinkedIn*, the European Commission assessed non-price considerations in terms of quality, including quality in terms of product functionalities and quality in terms of data protection, as well as quality improvements through innovation.

## *Hungary*

The GVH is not precluded from addressing any competition or consumer protection issue related to quality in zero price markets, as the general rules of consumer protection/competition law apply to investigations concerning these markets as well.

According to the Mid-term Digital Consumer Protection Strategy of the Hungarian Competition Authority (hereinafter GVH) published in 2018, when dealing with digital markets the GVH shall apply its practice that it has acquired over its twenty years of operation. For instance, its practice relating to consumers' freedom of choice and informed transactional decision-making shall be applied to transactions, regardless of the nature of the goods concerned; however, the new challenges arising from certain markets and communication platforms will need to be addressed via new approaches and forms of action. To deal with these challenges, the consumer protection strategy has been formulated to enable the more efficient, faster and focused handling of the already existing or potential infringements of consumer interests.

Even though the GVH has both competition law and consumer protection enforcement tools, as a first step, the GVH believes that consumer protection enforcement can ensure a faster, more active intervention and enforcement in a timely manner. Consequently, the GVH has taken steps in the area of consumer protection enforcement, and it is for this reason that the present contribution deals with the topic of personalised pricing from a consumer protection perspective.

The GVH has launched a number of investigations concerning communications relating to “free” products, in connection with both offline and online products/services. In such cases it is important that even if no monetary compensation is available that consumers are informed of the exact form and extent of the available compensation, as required by the general rules of consumer protection/competition law. In this contribution we detail three cases of the GVH from different sectors. The first case concerned an offline market and in this case the GVH established that the provision of data in itself amounts to compensation. In the other two cases commercial practices regarding online services were investigated (communication practices of a dating site and of Google). Since the services were free, the infringements investigated occurred in relation to other features of the services – which were considered to be relevant for consumers by the GVH.



## *Israel*

In recent years, The Israel Antitrust Authority (hereinafter: "**the IAA**") has dealt with quality considerations in zero-price markets, or in markets where the price is set by the regulator, and parties compete on quality parameter - in several cases. This contribution presents three of these cases.

The first case is a merger proposal between two media purchasing agencies. These companies operate in a multi-sided market, and this paper focuses on the segment between the broadcast television channels and the viewers, where the service provided is free of charge. It was argued that the merger would increase bargaining power of media purchasing agencies against TV channels, and the consequent advertisement price decrease would lead to a decrease in broadcast quality to viewers. Quality measures considered in this context are the amount of investment in content quality made by the channels; rating points; the amount of re-broadcast programs; and the amount of advertising.

The second example is the proposed merger between the operator of public bus lines and the operator of the rail train in the city of Jerusalem. In order to address the horizontal concerns of the merger, it was important to determine whether bus and light rail are substitute products. Because the price of public transportation is defined by the regulator, the standard SSNIP test could not be used. Instead, the IAA based its analysis on expected changes in quality. The parameter chosen was the amount of time the light rail takes to reach its destination, i.e., its average speed, which enables calculating the cross-elasticity of demand between light rail and buses.

The third case is the proposed merger between the owners of two pumped-storage hydroelectricity (PSH) stations. Also in this case, the price paid to the operators was previously defined by the regulator, so the competition between the stations is expected to be reflected in aspects of the quality of service provided by them. Examples of quality measures are the response time of a PSH station to electricity demand, and the number of times a station is able to provide energy over a given period of time.

## *Japan*

There have been several cases that JFTC has addressed taking quality considerations in digital zero-price markets; it defined a multi-sided market including a zero-price market and calculated market shares in consideration of quality competition.

In addition, JFTC formed the “Study Group on Data and Competition Policy” (hereinafter referred to as “Study Group”) and the Study Group published the Report in June 2017, which covered a basic and holistic approach regarding how to define the relevant market and how to analyse anti-competitive effect in zero-price markets under the Antimonopoly Act (“AMA”).

Although there might be a room for development of methods and theories for quality considerations, an existing framework of the AMA is applicable to zero-price markets in light of the previous cases and the Report.

## Mexico

### COFECE\*

Quality, being a subjective concept requires competition agencies to define the horizontal and vertical differentiation case by case to identify anticompetitive practices, which implies working closer with users. In markets involving zero price products, competition enforcement paradigms will need to consider costs to users such as time, attention paid, and personal data.

Of the approaches to the assessment of quality dimensions, 1. Sector-specific experts in quality; 2. Qualitative approaches, and; 3. Quantitative approaches; COFECE has made use of these in traditional markets. It stands to reason that the Commission is adapting the approaches to its current probe in e-commerce platforms which will pave the way to future investigations in the digital economy, specifically, the definition of quality dimensions of zero-price products.

Although consumers in Mexico have reported to be worried and interested in protecting their personal data, the use of apps that require users to submit or even surrender control over their private information is an issue. This presents an opportunity for collaboration, not only to better understand what personal information is being exchanged and perhaps a dimension that could be valuable to COFECE to improve the privacy assessment of quality dimensions, but also to intensify a competition culture through a proactive consumer base that can better exert competitive pressure on firms that offer zero-price products.

Competition enforcement presents several challenges along the lines of the developing tools or the adaptation of tools for quality assessment, accurate mapping of the service or product, quality dimensions on the zero-price side of platform (if it is a multisided market), striking the balance between innovation and protecting competition and free market access. Considering the multifaceted nature of zero-price products, overlapping efforts with the Mexican data protection and consumer protection agencies is a matter that deserves attention, as the duplication of efforts may result in hindering objectives in each agency or to the contrary, over limiting the scope of action could lead to gaps in enforcement. To avoid overlapping and duplicating work, which could ultimately hinder competition and consumer protection, COFECE is looking to increase collaborative efforts with PROFECO, the Mexican consumer protection agency. This collaboration could also result in improved competition advocacy through the strengthening of competition culture in Mexico.

### IFT

In telecommunications and broadcasting, the zero price schemes are present in traditional and digital goods and services (product). In this contribution, the Federal Telecommunications Institute (IFT) presents its considerations about the use of zero pricing and the application of competition tools to analyze those practices under different platforms, environments and business models in telecommunications and broadcasting in Mexico.

The IFT identifies that methodological tools must evolve to address the relevant features of the transforming digital economy, pricing trends and quality dimension of competition

in order to intervene, based on evidence, either by enforcement or advocacy, when necessary.

In this regard, the Federal Law of Economic Competition (LFCE) and judiciary criteria provide sound basis to define markets, market power and theory of harm for conducts and mergers that involve zero pricing in order to determine whether they are anticompetitive or they are not. They also provide for collaboration and advocacy to address competition concerns through regulation or policies (i.e. consumer protection).

In the study of zero pricing, especially to assess substitution and market power in plans and offers, the IFT has developed tools to gather information regarding pricing strategies of mobile carriers. Through a public online platform, all telecommunication carriers must register their usage plan offers. This information is public and it is used to carry out market's monitoring and assessment for competition and regulatory purposes.

In that regard, the IFT as competition authority and sectoral regulator has undertaken unilateral and collaborative actions in order to provide information to final users and a guide for their choices, ultimately reducing asymmetries. The IFT, as part of its collaboration with the consumer protection authority, has settled mechanisms for automatic exchange of information between them and with telecom suppliers in order to abbreviate the time to respond users' complaints, and to plan and coordinate joint actions in defense of consumers.

The IFT identifies that the main challenge in the analysis of markets that involve the provision of goods or services at zero price corresponds to the inclusion of non-price elements into the analysis of conducts and mergers relevant to point out and to assess the features and dynamics of competition process, especially in innovative markets.

## *Russian Federation*

In the modern world, information is one of the most valuable resources of society, along with such traditional material resources as oil, gas, minerals, etc., which means that the method of its processing, by analogy with the methods of processing material resources, can be perceived as technology.

The rapid development of information technology in the modern world has created the conditions for a significant change in the turnover of goods in the formation of competitive advantage.

Thus, a new type of product has appeared on the market, which is offered to the market for the purpose of acquisition, use or consumption.

According to the legislation of the Russian Federation, a product is an object of civil rights (including work, service), intended for sale, exchange or other introduction into circulation, and it does not matter whether it is paid or not.

The product as an economic category has the unity of consumer and exchange value.

The main elements of the market are the product, demand, supply and price.

Goods can be viewed in the context of a variety of ways to monetize a business.

At first glance, many products of the digital era are provided to users "for free" in the usual sense of the word, that is, without charging money. On the other hand, many of the free services bring their owners indirect benefits, which can take many different forms.

Various models of attracting customers with "free lunch" have been known to the economy for a long time, but today the scale and target setting of this phenomenon have changed. From one-time stocks, free goods and services become a long-term strategy. A habitual model can be considered when free goods or services play the role of an advertising insert, which increases the demand for a commercial object. The core of a business model is a free product or service that provides a stable audience, i.e. potential market. If we talk about the software market, here the model of free use of the product is often used in exchange for paid related services, primarily technical support.

There is also an opinion that if a product is listed with a zero price and its turnover is made free of charge, then a commodity market is not formed.

The case of the FAS Russia against Google Inc., Google Ireland Limited, Google LLC has just refuted this point of view.

## *Spain\**

In situations of non-positive pricing, it is necessary to identify all other relevant product characteristics to infer the “actual price”, factoring in quality considerations. But this is not so different from other cases where price is positive. For instance, competition authorities do not focus only on prices (be it a in a merger or in a conduct case). They also analyze quality (waiting times, duration of a trip, years of guarantee, different varieties...). If prices fall but quality goes down even more then there is an evidence of potential harm to consumers and total welfare.

Therefore, identifying quality is not such a different challenge in markets with positive and non-positive pricing. It is important in both contexts and it should not be necessarily more difficult where price is zero or below.

The tricky issue is not identifying quality in non-positive pricing contexts but 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 or services. Besides, 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.

Even if identifying quality in digital markets is complex, there are still various valid options: personal data provided (a proxy of the privacy loss), time of attention, amount (e.g. number of banners or pop-ups) or time of advertising, the equivalent cost of premium services with higher quality (with stronger privacy or less ads), etc.

Another related challenge in digital markets for competition policy practitioners is market definition. Conventional tests for market definition rely on prices to assess demand substitutability, so an alternative tool is needed to assess demand substitutability depending on quality. Understanding the actual rationale for the zero price strategy is therefore key.

More traditional explanations (building a consumer base or increasing the attractiveness of the firm) are not so relevant for market definition and the assessment of market power. In principle, these strategies are accessible to all firms without endogenous barriers, except for the fact that size normally can provide several advantages in this regard (given lower financial costs or agglomeration economies).

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 (together with learning, scope and scale economies) can raise endogenous barriers to entry and growth in those markets, through chicken-and-egg and winner-takes-it-all dynamics. In other words, these strategies of zero pricing are not equally accessible to every competitor, so authorities must monitor them more closely.

To sum up, zero pricing in digital markets adds several challenges to competition policy. But 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.

## *United Kingdom*

This UK submission provides an overview of the CMA’s experience of assessing quality in its competition and consumer work in the zero-price economy. It also sets out the importance of consumers being able to adequately observe quality in order to make informed decisions and gives examples of remedies to ensure consumers are able to do this.

In well-functioning and competitive markets, businesses innovate and compete by offering lower prices and better quality products and services in order to attract customers. Consumers are able to make informed choices between different suppliers. This drives further competition and innovation in a ‘virtuous circle.’

Quality is therefore a key parameter on which firms compete. The CMA will consider quality, as well as price, competition when assessing the effectiveness of competition in a market. For example:

- Our Merger Assessment Guidelines<sup>1</sup> note that competition creates incentives for firms to improve product quality as well as to cut price, increase output, enhance efficiency or introduce new and better products. Our approach to considering non-price effects of mergers was considered in a previous OECD submission.<sup>2</sup>
- Our Market Investigation guidelines<sup>3</sup> note that firms with market power may be able to maintain quality below competitive levels without the consequent loss of sales becoming unprofitable.

Quality is also an important focus of the CMA’s consumer work. In particular, consumer protection laws can be used to reinforce competition by ensuring consumers are able to make informed decisions between providers, as well as to safeguard minimum standards of quality. For example:

- As set out in the CMA’s unfair contract terms guidance<sup>4</sup>, the Consumer Rights Act 2015 blacklists various terms in contracts for a trader to supply goods, digital content and services to consumers. The kind of terms covered include those which aim to relieve traders from their ordinary obligations under the Act to ensure their products are of satisfactory quality and that their services are provided with reasonable care.

This submission outlines practical examples of where the CMA has considered quality in both its consumer and competition work. This includes taking enforcement action to ensure consumers can trust online reviews which are key in helping consumers compare the quality of goods and services, as well as imposing a remedy in the retail banking market to help consumers better assess the quality of their bank account and provider.

Quality is a particularly important dimension of competition when products and services are provided ‘free’ of charge. This is often the case in two-sided markets such as platforms

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<sup>1</sup> OFT, 2010, Adopted by the CMA: [Merger Assessment Guidelines](#)

<sup>2</sup> CMA submission to OECD roundtable on [non-price effects of mergers](#), 2018.

<sup>3</sup> Competition Commission, 2013, Adopted by the CMA: [Guidelines for Market Investigations](#)

<sup>4</sup> CMA, 2015, [Unfair Contract Terms Guidance](#)

operating in the digital economy. In such markets, considering quality is likely to be key in assessing the effect of competition on consumer welfare.

The challenges for competition and consumer authorities, as well as for consumers in assessing quality are, on the whole, not new and, although particularly key in the zero-price economy, are not significantly different from those which exist in other markets. The exception is in relation to considering privacy as an aspect of quality which is increasingly important in the zero-price economy.

The CMA is keen to better understand how consumers perceive quality in the digital economy and believe there would be benefit in further research in this regard, particularly that which draws on behavioural insights. We also see merit in exploring remedies which enable consumers to better assess quality, in particular those which make aspects of quality such as privacy more transparent for consumers.



## *United States\**

Zero-price products and services are increasingly significant, particularly in the context of economic activity on or across multi-sided platforms, where zero (or negative) pricing is often observed on the side or sides exhibiting higher levels of demand elasticity. Zero pricing also can be observed in other contexts, including, for example: the supply of complementary products and services; the so-called “freemium” model, in which a supplier offers a free version as well as a higher quality paid-for version; short-term strategies (e.g., promotions); or strategies driven by motives other than profit. Nevertheless, it may be a mistake to think of a separate or distinct “zero price economy” – zero-price products and services may meet similar or identical needs to paid-for products and services, and under appropriate conditions, zero-price products and services may compete to at least some extent against paid-for products and services.

Quality can be an important dimension of output in antitrust analysis for zero-price products and services. This is because when competing products or services in an antitrust market are not differentiated with respect to price, other forms of differentiation may acquire particular significance in decisions made by consumers or intermediate purchasers. Among other things, this means that antitrust doctrine and enforcement should be sensitive to the risk that, in markets in which products and services are sometimes or typically supplied at zero price, competitive effects may manifest in the form of effects on quality.

U.S. antitrust and consumer protection laws apply in full to zero-price products and services, and to the markets in which such products and services are supplied. Nevertheless, special challenges may arise for antitrust or competition law and policy when products or services are provided at a zero price. For example, it may be hard to measure or estimate market power or competitive effects in such circumstances.

One source of complexity in such cases is the need to analyse different sides of a multi-sided platform before reaching any conclusions regarding market definition, anticompetitive effects, or procompetitive efficiencies. 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. The U.S. Supreme Court recently emphasized this point in the *Ohio v. American Express* decision.

The Agencies believe that the interests of consumers are best served, and that a vigorous, innovative, and competitive economy is best maintained, when the distinction between antitrust law and consumer protection law is maintained.

This approach to antitrust enforcement reflects an appreciation that antitrust enforcement represents an extraordinarily powerful tool that must be applied with great care, and with as much transparency and predictability as possible, lest its social costs exceed its social benefits. In particular, vague, ambiguous, or politically pliable standards of antitrust legality would deter, and perhaps punish, a great deal of activity that benefits consumers, including by promoting lower prices and higher quality for everyday goods and services throughout the economy.

Certain forms of conduct regarding the maintenance of consumers’ personal or other data may also implicate consumer protection law or a specialized data privacy and security law. Data concerns may be particularly acute in markets characterized by zero pricing, including because access to consumer data may form part of a business model that partly or

completely subsidizes the provision of some zero-price products or services to consumers (e.g., through the sale of individually targeted advertising). However, in the absence of actual or likely harm to competition, the misuse or abuse of consumer data does not present a mandate for intervention under the U.S. antitrust laws, and the Agencies believe that this ultimately serves the interests of consumers. On the other hand, to the extent that firms compete with one another to offer effective protection of consumer data—a non-price dimension of competition—conduct that restrains competition on that basis (e.g., an agreement not to offer certain kinds of data protection) could give rise to an antitrust violation. That analysis would be separate from the evaluation of privacy violations, as such, as a consumer protection concern.

In some areas the concerns of consumer protection and competition law may overlap. For instance, the free flow of truthful advertising regarding products and services is essential to a well-functioning market for goods and services, and private restrictions between competitors to limit the sharing of truthful information can harm competition and violate the antitrust laws even without directly affecting prices. Consumer protection law responds directly to advertising claims that are unfair or deceptive, while antitrust law generally prevents competitors from agreeing not to engage in truthful advertising that would otherwise permit consumers to accurately evaluate different product or service offerings.