

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

Quality considerations in the zero-price economy – Note by Italy

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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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1. Introduction

1. The issue of quality considerations in zero-price economy is not new to the Italian Competition Authority (AGCM), which has had the opportunity to address it primarily in its activity in the field of consumer protection.

2. The development of the digital economy has expanded the platform business model in a unprecedented way. Platforms generally operate as "two-sided" or "multi-sided" markets that can be distinguished - among possible classifications - between attention and matching ones. Attention platforms normally provide free services subsidized by advertising, sustained by users data and attention, while matching platforms are essentially transaction marketplaces.¹ Especially with regard to attention platforms, quality and its different possible dimensions - in terms, for example, of privacy or advertising content - lie at the boundaries of different disciplines such as competition, consumer protection and privacy legislation that can, in principle, be applied complementarily.

3. The unlawful collection or the mismanagement of personal data by an online platform may constitute a breach of data protection legislation, whose scrutiny falls within the remit of the Data Protection Authority. However, if the acquisition of personal data was made in a manner suitable to alter consumers' economic choice, consumer protection rules apply and AGCM may intervene².

4. On the competition side, it is still unclear to what extent quality considerations such as data protection represent or may become significant competitive factors in the near future. At the same time, the free nature of the services raises the question whether the traditional antitrust toolbox, which mainly focuses on price, is entirely fit for purpose.

5. As an authority with a dual competence both on competition and consumer protection, AGCM has witnessed the increasing interplay between the two areas of activity, particularly as a result of the influence of the digital economy.

6. Therefore, the Authority welcomes the initiative of the OECD Competition Committee and Committee on Consumer Law and Policy to promote a joint debate on quality considerations in the zero-price economy, as a significant opportunity for experience sharing and cross fertilisation.

2. Quality considerations and consumer protection

7. In its activity in consumer protection, already in 2000 the Authority had the opportunity to define the synallagmatic nature of a transaction, even when it relates to a non-monetary exchange. This approach was confirmed in two recent proceedings against

¹ OECD (2016), "Big data: bringing competition policy to the digital era - Background note by the Secretariat".

² TAR Lazio, sez. I, Judgement of 11 April 2018, no. 5043, Samsung Electronics Italia S.p.A. vs. AGCM (click [here](#) or type goo.gl/SUoZhw).

WhatsApp following the acquisition by Facebook, whereby AGCM prevented the merging parties from lowering the quality of the service provided, in terms of data handling.

8. AGCM is consistent with European Commission's approach whereby "[p]ersonal data, consumer preferences and other user generated content, have a "de facto" economic value and are being sold to third parties" and, consequently, the nature of non-pecuniary consideration for the data is suitable to establish a consumer relationship between the trader and the user.

2.1. Even free services imply an economic transaction

9. In 2000, in the *Libero Infostrada* case, the Authority tackled an advertising message regarding a free subscription to online services, which in turn required subscribers to accept receiving advertising and authorising the provider to monitor their navigation.

10. In its decision, AGCM held that the message implied an "*economic transaction*" by which consumers accept a "*passive*" obligation to tolerate advertising in their mailbox and cede some personal data in exchange for the service. The Authority also specified that the fact that such data would need elaboration by the operator to become commercially exploitable did not exclude the economic relevance of the transaction.

11. The advertising message was deemed misleading insofar as it omitted to specify those terms of use, which played a significant role in the overall evaluation of the convenience of the offer³.

2.2. Unfair acquisition of data

12. More recently, in May 2017 the Italian Competition Authority closed two separate proceedings against WhatsApp, following the acquisition of the messaging platform by Facebook⁴. AGCM's intervention was meant to prevent the merging parties from lowering the quality of the service provided, in terms of data handling.

13. The first proceedings concerned the acquisition of data by WhatsApp and deemed several terms and conditions unfair, including the forum clause, the clause empowering the trader to change unilaterally the contractual conditions without any justification, the clause empowering the trader to terminate the service at any time and for any reasons.

Box 1. CV154 WhatsApp - Unfair Terms

AGCM ascertained the unfair nature of some contractual clauses included in WhatsApp Messenger's "Terms of Use".

Preliminary, the Authority clarified that for the purpose of qualifying the relationship between users and WhatsApp as a contract, as well as for the purpose of the assessment of

³ Decision no. 8051 – PI2671 Libero Infostrada of 17 February 2000 (click [here](#) or type goo.gl/VqxNkh)

⁴ Decision no. 26596 – CV154 Whatsapp-Clausole vessatorie of 11 May 2017 (click [here](#) or type goo.gl/1Ddt3q) and decision no. 26597 – PS10601 Whatsapp-Trasferimento dati a Facebook of 11 May 2017 (click [here](#) or type goo.gl/ea3sgA). For the press release in English click [here](#) (or type goo.gl/KpLLKQ).

the fairness of the contract clauses, it is irrelevant that the service is provided without an economic remuneration. In fact, as noted by the European Commission in its Guidance on the implementation/application of directive 2005/29/EC on unfair commercial practices, “[p]ersonal data, consumer preferences and other user generated content, have a ‘de facto’ economic value and are being sold to third parties”. AGCM also observed that the economic value of the data was further confirmed by the statements of the company, according which its business model is based on data collection of users, which is able to generate revenues⁵.

The Italian Consumer Code contains a list of terms that are presumed “unfair”, unless proved otherwise, and a broader provision, which states that “[i]n contracts entered into between consumers and professionals, terms shall be considered unfair where, contrary to good faith, they cause a significant imbalance in the rights and obligations arising under the contract, to the detriment of the consumer”. The Consumer Code also requires that Terms are drafted in plain and intelligible language so that consumers are informed in a clear and understandable manner about their rights⁶.

AGCM assessed as illicit under the Consumer Code the following contract terms related to the provision of WhatsApp Messenger’s services. The Authority deemed unfair the very broad and general exclusions and limitations of responsibility in favour of WhatsApp, including for intentional or gross operator misconduct, as well as the option to unilaterally interrupt service for any reasons and without warning or to unilaterally terminate a contract at any moment and for any reason. In addition, the general right that WhatsApp reserved to itself to introduce changes, including of economic nature, to the Terms of Service without informing consumers was considered unfair. Finally, AGCM held that also the choice of the law of the State of California as the only one competent in case of disputes and general predominance of the English version of the contract over the Italian one (which is the only one accepted by Italian users) were in breach of the Consumer Code.

14. The second procedure related to the sharing of personal data between WhatsApp and Facebook. AGCM found a breach of the unfair commercial practices legislation, in that WhatsApp nudged consumers into accepting that their data be shared with Facebook on the incorrect assumption that they would otherwise be unable to use the messenger services any longer.

Box 2. PS10601 WhatsApp - Sharing personal data with Facebook

AGCM ascertained that WhatsApp had de facto forced WhatsApp Messenger’s users to accept new Terms of Service, including the provision to share their personal data with Facebook.

The Authority claimed that users were misled to believe that without granting their consent they would no longer have been able to use the service. In AGCM’s view, the practice was implemented through: a) an emphasis on the need to subscribe the new conditions within the following 30 days, failing which they would have lost the opportunity to use the service;

⁵ §62 of the Decision.

⁶ See article 33 of the Consumer Code, Legislative Decree no. 206/2005 (click [here](#) or type goo.gl/odxfiM).

b) inadequate information on the option of denying consent to share personal data with Facebook; c) the pre-selection of the option to share the data (users should deselect the box to opt-out).

The described commercial practice was deemed unfair and a fine was imposed on the company.

15. Notably, AGCM held that WhatsApp services are provided in exchange of personal data and content generated by the users. During the proceedings, the party objected that AGCM's assumption were erroneous because personal data would not have an economic value and hence the acquisition of consent by users would not qualify as a commercial practice. AGCM objected that, as stated by the party itself, the sharing of personal data with Facebook would result in improved advertising activity and generate revenues for Facebook. As a consequence, the data of WhatsApp users, utilized for the profiling of the users for commercial and marketing purposes acquire an economic value suitable to qualify the behaviour as a commercial practice.

16. As indicated, AGCM's decision underlined that this evaluation was consistent with the position of the European Commission. AGCM's decision also considered the case law of the European Commission in the field of competition enforcement, emphasizing that in the review of the acquisition of WhatsApp by Facebook, great emphasis was put on the economic value of personal data of consumer communications customers, insofar as the Commission considered the relevant economic value of data collected from WhatsApp users with a view to assessing whether the transaction could have the effect of strengthening Facebook's position in the online advertising market. Moreover, the Commission acknowledged that, in the market for consumer communications Apps, the economic value of personal data is enhanced by the existence of network effects.

2.3. Quality and online comparison tools

17. Quality considerations are also a key feature in the assessment of the transparency of comparison tools. In fact, in the case of online comparison tools, the quality of the service has a direct impact on the subsequent consumer choice. Since the task of comparison tools is to help consumers to "match" their needs with the options available in the market, the quality of the service depends on the capacity of the provider to identify and rank the most suitable offers.

18. If the comparison tool is a pure multi-sided platform that endeavours to expand its customer base in order to attract eyeballs or collect personal data, it will have incentives to list the most satisfactory options for users: the high quality of the service provided will retain current users and attract additional ones. However, if the comparison tool provider is actually remunerated by one or some "sponsors" that offer the good sought by the user, the comparison tool provider would have an interest to favour those sponsors, even if their offers are manifestly not ideal for the user, thus worsening the quality of the results.

19. Therefore, in 2015 AGCM carried out two investigations concerning car insurance comparison websites, which acted as brokers for some insurance companies. Consumers were not aware that the comparison websites were not presenting all the offers on the market and that the products compared were not always homogeneous. The Authority held that the unfairness of the practice consisted in the lack of transparency on the parameters affecting the results of the searches and obliged the parties to display detailed information

about the business model of the comparison tool⁷. Other similar cases were conducted by the Authority in 2017 and 2018 with regard to comparison websites for insurance policies, loans, mortgages, as well as telephone and energy services⁸.

20. It should be noted that, in AGCM's view, the assessment of these cases is not always straightforward. Search and comparison tools display a rank of offers for consumers, in terms of price and quality. But often the quality of an offer depends on a set of factors (e.g., reliability of the seller, guarantee, terms and conditions, travel time, immediate availability). In many cases, platforms have to discretionally weigh each factor to come to a ranking of the offers and it may be controversial for a consumer protection authority to assess whether certain parameters and their relative importance are appropriate or not.

3. Quality considerations and competition

21. While quality considerations are more easily assessed in the context of consumer protection, it is harder to include them in the traditional framework of competition assessment.

22. Until now, AGCM has not carried out formal antitrust investigations on online platforms that implied the appreciation of quality factors such as privacy, although quality considerations regarding multi-sided platforms have been scrutinised, particularly in the case of mergers.

23. However, the Authority is aware that the development of the zero-price economy calls for a better understanding of the significance that quality issues play in driving consumer behaviour, also in light of possible consumers biases. Over time, antitrust toolbox has proven flexible enough to take novel factors into account. In the zero-price economy, the challenge seems to be to gain a thorough understanding of the competitive implications of variables – such as privacy – that do not have in themselves a pure antitrust nature.

24. In the light of the above, and recognising that these issues require a multidisciplinary approach, the Authority decided to carry out a Sector Inquiry on “Big Data”, in cooperation with the Communications Authority and the Italian Data Protection Authority.

3.1. Sector Inquiry on “Big Data”

25. The purpose of the Sector Inquiry on “Big Data”, which was initiated in May 2017, is to (i) assess whether and under what conditions Big Data may provide market power, (ii) analyse possible abusive or collusive conducts by online operators stemming from Big

⁷ See also OECD, Implications of E-commerce for Competition Policy - Note by Italy, 6 June 2018, (click [here](#) or type goo.gl/nirxbk).

⁸ See, among others, PS10785 – Facile.it - Sweep plus 2016 (bulletin [6/2018](#) – type goo.gl/sWfXmL), PS10786 – SOS Tariffe - Sweep plus 2016 (bulletin [16/2018](#) – type goo.gl/jdn8zK), PS10808 – Segugio.it - Sweep plus 2016 (bulletin [17/2018](#) – type goo.gl/th4ZHW), PS10809 – Carte di pagamento.com - Sweep plus 2016 (bulletin [16/2018](#) – type goo.gl/thbsKr).

Data, (iii) understand the competitive relevance of privacy and (iv) and identify regulatory frameworks suitable to foster static and dynamic competition.

26. In its opening decision of the inquiry⁹, the three authorities acknowledged that gathering and processing of Big Data play a key role in most online markets and underlie platforms' capabilities to generate value and provide innovative services. At the same time, AGCM noted that the use of Big Data may raise serious concerns both for competition and for individuals' privacy. In particular, Big Data represent a huge information asset and may lead to very sophisticated user profiling, thus allowing new forms of discrimination.

27. Against this background, the purpose of the joint inquiry from the competition perspective is to assess whether, and under which circumstances, access to Big Data might constitute an entry barrier, or in any case facilitate anticompetitive practices that could possibly hinder development and technological progress.

28. In June 2018, AGCM and the Communications Authority issued preliminary information notices on the analysis conducted that far, following hearings with leading players of the digital economy, including Over-The-Top (OTT) operators, incumbents in sectors strongly affected by Big Data (e.g., publishing companies, credit scoring companies, banking groups and insurance companies), as well as experts and scholars¹⁰.

29. In particular, a survey conducted by AGCM on a sample of two thousand Internet users seems to confirm the existence of the privacy paradox, i.e., a discrepancy between expressed privacy concerns and actual online behaviour. In fact, despite claiming that information notices are usually unclear, only a tiny minority of users reads them and typically devotes a very short time. Moreover, only 60% of the users declared to be aware that their online actions generate data that can be used to analyse and predict their behaviour. The findings of the research show a low willingness to pay by users of free services in order to avoid the use of their personal data for advertising purposes.

30. That said, the results of the analysis conducted in parallel by the Communication Regulator AGCOM, based an empirical research on APPs, suggest that the acquisition of personal data plays a critical role in the setting of prices and might become a key competitive factor in the future. Indeed, AGCOM found a negative correlation between the price of APPs and the number of personal data collected, confirming the implicit exchange "free services for personal data" of zero-price transactions.

Box 3. IC53 - Sector Inquiry on Big data – preliminary information notices

AGCM conducted an online survey on a sample of more than two thousand Italian users, to investigate the non-monetary relationship between the users who provide personal data and the companies that provide digital services.

The survey addressed three issues: i) the degree of user awareness of digital platforms in relation to the transfer and use of their individual data; ii) the willingness of users to provide their personal data as a form of payment for online services; iii) the portability of data from one platform to another.

⁹ See press release in English on the AGCM [website](http://goo.gl/Ehnm2) (goo.gl/Ehnm2).

¹⁰ See press release in English on AGCM [website](http://goo.gl/Z6D5ke) (goo.gl/Z6D5ke).

The findings show that approximately 60% of the users are aware that their online actions generate data that can be used to analyse and predict their behaviour, and are also aware of the possible extent of pervasiveness of the data collection mechanism (e.g., geo-localisation and access of different apps to features such as contacts, microphone and video cameras), as well as the possibility of exploitation of data by data collections companies.

Furthermore, the survey seems to indicate that there are areas for improvement for user awareness, insofar as only a tiny minority (13%) claims to entirely read the information notices, whereas most users either read only part (54%) or do not read them at all (33%). In addition, only 8% of those who thoroughly read the information provided finds it clear.

Overall, approximately 40% of users are aware of the close relationship between giving consent and the free nature of a service. Noteworthy, 23% of the interviewed users declare that they would be willing to forego free services and apps to prevent their data from being collected, processed and possibly sold on, whereas 24% would not. The remaining 53% of the sample stated that their decision would depend on the type of service and the price level. That said, the willingness to pay for data protection seems to be limited: to the question whether they would be willing to pay for currently free services or apps in order to avoid the use of their personal data for advertising purposes, only 10% of the sample replied affirmatively, while 49% replied negatively and 41% argued that their decision would depend on the type of service and the price level.

For its part, the Italian Communications Authority (AGCOM) conducted an empirical research on a dataset with over a million applications¹¹.

A first conclusion of AGCOM's study is that the free provision of an APP implies the provision, through the permissions system, of a greater number of individual data. It can be therefore inferred that there exists an implicit exchange between users and internet providers that affects the primary commercial relationship concerning the purchase and sale of APPs.

In addition, two important trends emerged. On the one hand, the price of APPs decreases with the increase in the average number of permissions required: on the other hand, the most frequently downloaded APPs are characterized by a greater presence of permissions related to individual data. At the same time, non-free APPs are typically associated with a lower demand for permissions.

In conclusion, the empirical study carried out by AGCOM highlights that the permissions system is the tool through which data are exchanged between businesses and consumers.

31. The second phase of the survey will address topics such as: *i)* analysis of market power and the effects of concentrations, including conglomerates, in the digital economy; *ii)* the qualitative dimension of competition in markets where services are offered for free; *iii)* the role of portability in reducing switching costs and ensuring market contendibility; *iv)* the effects of using data for profiling and offering users customized services and sales conditions.

¹¹ See the English version of AGCOM's report on AGCOM [website](http://goo.gl/jiyebv) (goo.gl/jiyebv).

3.2. Quality considerations in merger review

32. In addition to the findings of the Sector Inquiry on “Big Data”, AGCM can benefit from the experience developed in more traditional two-sided markets, where nevertheless quality considerations in the face of non-monetary transactions play a role.

33. It is worth mentioning a merger decision of April 2016 concerning the acquisition of a number of radio channels by a company active in the radio and television industries belonging to the Fininvest RTI group¹², in the context of a consolidation process triggered by digitalisation changes.

34. In line with the well-established EU and national case law, AGCM identified several national relevant markets: free-to-air television and the related TV advertising, radio broadcasting and radio advertising, online advertising and hosting infrastructures for radio broadcasting. In the Authority’s view the notified transaction would create the strongest player in the radio advertisement market, insofar as the resulting entity would be able to cover an unparalleled range of users of both genders and across all ages.

35. On top of finding a significant combined market share in radio broadcasting, AGCM emphasised quality effects in the supply of radio advertising. In particular, after observing that radio advertising is a typical example of two-sided market by which advertisers reach radio listeners, the Authority highlighted that the resulting group of 17 radio stations would be able to attract “*any target within the Italian population between 15 and 64 (commercial target)*”, and particularly in the targets of female and young radio listeners, thus acquiring a market position that would not be comparable to any other competitor. As a result, the new entity would enjoy a market power that allow unconditional behaviour from any competitive pressure and hence likely to affect competition in the market. Moreover, AGCM held that the resulting entity could bundle its advertising services on radio stations and TV channels, therefore foreclosing competitors in those segments.

36. The Authority concluded that the concentration would result in weakened incentives to compete between radio broadcasters suitable to “*affect competition and consumer welfare in terms of price, quality, variety and degree of innovation*”¹³.

37. To address the competition concerns, AGCM requested a set of measures, including the obligation by the Fininvest RTI group to abstain from acquiring radio advertising contracts or the property of other national radios until 2020 and the obligation to carry out the activities of television advertising collection, on the one hand, and radio advertising collection, on the other, through separate subsidiaries.

4. Conclusions

38. The experience developed by AGCM in the zero-price economy shows that quality considerations require a complex analysis that often entails a multidisciplinary approach.

39. In the field of consumer protection, which enables interventions directly targeted to consumers, the Authority has focussed its action on transparency, as a necessary requisite

¹² C12017 RTI/Finelco Group. See press release on the AGCM [website](http://goo.gl/G9uQvX) (goo.gl/G9uQvX).

¹³ See paragraph 113 of the decision.

for users to make aware and appropriate economic choices. Fairness and clarity on the collection and use of personal data provided in exchange for free services also resulted particularly relevant.

40. In the area of competition enforcement, it is more difficult to assess which non-monetary elements have an impact on market dynamics and how relevant each of these elements are or might become in the future. Therefore, AGCM endeavours to improve its understanding, even with respect to factors – such as privacy – that do not immediately fall within the competition landscape. This is the rationale of the on-going Sector Inquiry on “Big Data”, which was initiated in May 2017 in cooperation with the Communications Authority and the Italian Data Protection Authority.

41. The preliminary findings of the inquiry seem to confirm the interplay between different disciplines. For example, it emerged that the functioning of digital platforms, particularly in the case of attention platform characterized by non-monetary transactions on one side, may be affected by demand-side behavioural biases such as the so-called privacy paradox, which highlights a gap between consumers’ stated preferences and their consequent behaviour. Indeed, despite their concern about privacy as an important dimension of product quality, only a tiny fraction of consumers express a willingness to pay to improve their digital privacy, potentially blurring the lines between consumer and competition protection.

42. This seems to confirm AGCM’s opinion that competition and consumer policies may reinforce one another and represent interdependent instruments, each capable to advance the goals pursued by the other. This is all the more true in the zero-price economy, which comprises fast-growing and highly innovative markets. As highlighted by the OECD, *“competition policy, by keeping markets effectively competitive, can reduce the work that needs to be done by consumer policy; consumer policy, by enhancing the ability of consumers to exercise choice, can help make markets more effectively competitive and force firms to compete on the merits, thereby supporting the ends of competition policy”*¹⁴.

43. These virtuous outcomes of co-ordination are particularly evident when enforcement responsibilities are located within a single institution, as in the case of AGCM. On the one hand, the knowledge acquired in one field can be profitably used in the other; on the other hand, the Authority is able to select the instrument that can better respond to the issues and lead to more effective results.

¹⁴ OECD, Global Forum on Competition, The Interface between Competition and Consumer Policies, June 2008 (click [here](https://www.oecd.org/competition/competition-and-consumer-policies/) or type [goo.gl/yJ86FJ](https://www.oecd.org/competition/competition-and-consumer-policies/)).