Organisation for Economic Co-operation and Development

DAF/COMP/WD(2018)151

Unclassified **English - Or. English**

23 November 2018

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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

28 November 2018

This document reproduces a written contribution from BIAC 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

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

JT03440349

BIAC

1. *Business at OECD* appreciates the opportunity to submit these comments to the Joint Meeting of the OECD Competition Committee and the OECD Committee on Consumer Policy regarding quality considerations in digital zero-price markets.

1. Introduction

2. Quality is central to the competitive dynamic: "Product quality, alongside price, is a key determination of competition."[1] Indeed, "the main parameters of competition are price, quantity, quality, choice and innovation."[2] This is particularly the case in markets where the market price is zero—where consumers do not pay directly for the service they receive.

3. Considerations of quality, and its role in the competitive process, are not new. However, the growing economic importance of online products and services, and the prevalence of services where the market price is zero, has brought into sharper focus the question of how best to identify the appropriate analytical framework for assessing quality considerations, in particular in such "zero-price markets."

4. Before considering the issues raised by the Secretariat's Background Note,[3] *Business at OECD* offers the following preliminary remarks.

5. First, despite certain online services being free to the consumer, it is important not to generalize when discussing zero-price markets. They are not homogenous. This is important not just for their substantive analysis, but also when considering what remedies, if any, are appropriate to address competitive harm.

6. Second, especially in the online sector, offering services to consumers at a zero price may be a rational commercial strategy, and a firm may gain in other ways from offering some services free of charge (such as from the sale of advertising). In fact, earning revenue other than directly from the consumer paying for a product or service is not uncommon even in offline sectors.[4] However, it can be tempting to raise questions about,

[1] OECD, THE ROLE AND MEASUREMENT OF QUALITY IN COMPETITION ANALYSIS 5 (Oct. 28, 2013) [hereinafter OECD 2013 QUALITY REPORT], *available at* www.oecd.org/daf/competition/Quality-in-competition-analysis-2013.pdf.

[2] Johannes Laitenberger, EU Competition Law in Innovation and Digital Markets: Fairness and the Consumer Welfare Perspective, Address Before the MLex/Hogan Lovells Event 6 (Oct. 10, 2017), *available at* http://ec.europa.eu/competition/speeches/text/sp2017_15_en.pdf.

[3] OECD, *Quality Considerations in Digital Zero-Price Markets: Background Note by the Secretariat* (Oct. 9, 2018) [hereinafter *OECD 2018 Zero-Price Secretariat Note*], *available at* https://one.oecd.org/document/DAF/COMP(2018)14/en/pdf.

[4] Radio, free-to-air television, and free newspapers are examples, but there are other, less obvious ones. In credit card networks, for example, some cardholders can access the network and are able to use their cards for a price of zero, or even a negative when loyalty points or other rewards are included.

or be suspicious of, a given firm's motive for offering zero-priced services, or to act on the commercial concerns of rivals operating a different business model, especially if new business models have a disruptive effect. Understanding the relevant business strategy can also be challenging because, even among zero-price online services, there is a multitude of business models. Each of these has its own features. Some are non-profit-making but rely on the donation of inputs of time and even funds.[5] Some businesses adopt a "*freemium*" strategy, where a basic product or service is provided at a price of zero, and a product or service with additional features at a positive price. Some business models exist by combining zero-price or even negative-price products with positive price products. Some rely on advertising. Others combine these approaches.[6]

7. Third, where quality is the primary—and in many cases the sole—parameter of competition,[7] it is essential to understand exactly what quality means for consumers, and to ensure that the right analytical tools are applied when seeking to measure competitive effects. In seeking to measure and regulate how firms compete on quality, the challenge for competition law is to identify those aspects of quality that drive consumer choices. Further, whereas almost all consumers will value cheaper prices, the value different consumers may place on a given quality feature may vary.[8] As the Secretariat Note itself observes, it is important to understand what consumers actually value in terms of quality, rather than "inferring what consumers 'should' care about without sufficient basis."[9] Otherwise there is a risk of overlooking competition on quality in the primary functions of the service—such the accuracy of a map, or the utility of a social media platform—and focusing too much on considerations that have less competitive significance and are better regulated, if required, by other legal frameworks.

8. Fourth, especially where competition law enforcement would involve novel theories of harm, as can be the case in considering zero-priced markets and untraditional business models, an analytically rigorous approach is essential.[10] Enforcement must be based on sound antitrust principles and evidence.

9. Fifth, zero-price online services may also raise issues under consumer protection and data protection laws. For example, if a consumer is viewed as having given no

[5] For example, Wikipedia, which, while having some paid staff, relies on volunteers for the substance of its service.

[6] *See*, in particular, John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PENN. L. REV. 149 (2015).

[7] Ariel Ezrachi & Maurice E. Stucke, *When Competition Fails to Optimize Quality: A Look at Search Engines*, 18(1) YALE J. L. & TECH. Art. 3 (2017).

[8] The OECD's 2013 Quality Background Paper observed that quality "is a multi-dimensional, subjective factor. Consumers may disagree on what better quality means with respect to a certain product *at any price*." And that, as a result, "[i]t is not obvious how to incorporate quality considerations into actual competition analysis." OECD 2013 QUALITY REPORT, *supra* note 1, at 11.

[9] *OECD 2018 Zero-Price Secretariat Note*, *supra* note 3, ¶ 101.

[10] As *Business at OECD* observed in its comments to the OECD Competition Committee for its session on non-price effects of mergers, "BIAC advises against the use of economic theories that establish a *de facto* presumption of the presence of negative effects in a loosely defined category of cases." Business at OECD, Discussion Points Presented by Business at OECD (BIAC) Competition Committee to the OECD Competition Committee: Non-Price Effects of Mergers ¶ 52 (June 6, 2018), *available at* http://biac.org/wp-content/uploads/2018/05/BIAC_CC_Non-Price-Effects-of-Mergers_2018-05-22_FINAL1.pdf.

consideration for the service, the supplier's obligations to that consumer may be lower (or perceived to be lower). Since many OECD countries have well developed consumer protection and data protection regimes (which, in the former case, are often entrusted to competition agencies), it is vital to recognize that these regimes may have differing policy goals from competition law. While coordination among agencies can be helpful to ensure efficient and solution-oriented outcomes, a blurring of laws and policy goals across the regimes risks leading to sub-optimal outcomes for consumers and legal uncertainty for businesses.

10. This paper will discuss (i) how we understand quality in zero-priced markets; (ii) the interaction of competition law and other regulatory regimes in this context; (iii) the challenges for a substantive analysis of zero-price markets; and (iv) considerations in identifying policy responses in zero-price markets.

2. Understanding Quality in Zero-Priced Markets

11. While competition law may provide a legal framework that requires us to understand quality, what actually constitutes quality will vary between markets, and may even be product-specific. In particular, factors that traditionally have been used to evaluate quality may not all apply in online zero-price markets. The OECD has previously proposed the following working definition of quality: "Quality is a multidimensional concept that encompasses, *inter alia*, the durability, reliability, location, design and aesthetic appeal, performance and safety of a product."[11] While the concepts of durability, reliability, location, design and aesthetic appeal, performance and safety may be more readily understood in the context of physical goods, the approach of primarily seeking to understand quality in terms of what consumers value—and what drives consumer choice—applies equally to online, zero-price markets.

2.1. Starting with the Drivers of Consumer Choice

12. In any given market, competition authorities will look "at which parameters of competition are important and valued by customers in a specific market and industry."[12] If regulators are to intervene where there is an opportunity to deliver welfare rewards for consumers, the relevant question is: what aspect of quality drives consumer choice?[13]

13. Looked at in this light, the relevant quality considerations in zero-price markets are no different from non-price considerations in positive-price markets. The primary dimension of competition remains the quality of the product provided to consumers (such as the accuracy of a map, or the connectivity afforded by a social network). In online services more generally, tangible metrics such as page loading speed, and product

[11] OECD 2013 QUALITY REPORT, *supra* note 1, at 6.

[12] European Comm'n, *Non-Price Effects of Mergers–Note by the European Union*, DAF/COMP/WD(2018)14, ¶ 19 (June 1, 2018), *available at* https://one.oecd.org/document/DAF/COMP/WD(2018)14/en/pdf.

[13] *See* Newman, *supra* note 6, at 198 ("In zero-price product markets—as in all markets—the overarching goal of antitrust law is to ensure that firms are incentivized to increase quality, lower costs, or innovate so that consumers ultimately reap welfare benefits.").

functionality and design, are an important part of the consumer experience. These features may sit alongside others such as privacy, data protection and security, and the quality and nature of advertising to which users are subject, as important to the exercise of consumer choice in a market.

14. As such, the analysis of quality requires accepting, not second-guessing, the consumer preferences that drive innovation and on which firms compete.[14] When considering competition between search engines, for example, research by the European Commission found that eight out of ten Internet users would probably change search engine if the results with which they were provided were not useful.[15] For those users, an important dimension of quality among search engines was, plainly, the usefulness of the results.

15. While it is important to start any analysis with what aspect of quality drives consumer choice, considered empirically, we discuss below the specific, we discuss below the aspects of quality discussed by the Secretariat's Background Note.

2.2. Privacy and Data as Aspects of Quality

16. The Secretariat Note discusses privacy and advertising as aspects of quality. Some of the analysis of zero-price markets proceeds from the assumption that the collection of data by online service providers is either a part (or all) of the consideration that is provided by users of zero-price services.[16] How different providers collect and use consumer data might therefore be considered a parameter of competition.

17. To the extent that levels of privacy are taken into account in an assessment of quality competition within a marketplace, many online services, including zero-price services, already compete on privacy, along with a range of other non-price features. Similarly, data security and encryption techniques may be important differentiators of quality, particularly in light of increasing public awareness of cyber-attacks.

18. This has been recognized by competition authorities. In *Facebook/WhatsApp*, for example, the European Commission noted that firms in the market for consumer communication services were competing by introducing new features that addressed customers' concerns as to privacy.[17] In that case, the Commission's competitive analysis

[14] In this regard *Business at OECD* has previously observed that "[a]pplying economic analysis is crucial; the assessment of quality in competition cases would otherwise be at risk of subjective assessment by the reviewing authority." OECD 2013 QUALITY REPORT, *supra* note 1, at 133. *Business at OECD* has also cautioned "against a too liberal or ill-informed use of measures intended to influence consumers' conduct that may, in reality, misdirect consumer demand." Business at OECD, *supra* note 10, ¶ 22.

[15] EUROPEAN COMM'N, SPECIAL EUROBAROMETER 447: REPORT – ONLINE PLATFORMS 16 (June 2016), [hereinafter EC EUROBAROMETER REPORT] *available at* http://ec.europa.eu/information_society/newsroom/image/document/2016-24/ebs_447_en_16136.pdf ("Nearly eight in ten Internet users **would probably change search engine if the search results provided were not useful** (78%, vs. 17% who disagree).").

[16] Wolfgang Kerber, *Digital Markets, Data, and Privacy: Competition Law, Consumer Law and Data Protection*, 11(11) J. INTELL. PROP. L. & PRAC. 856 (2016); Newman, *supra* note 6.

[17] Case COMP/M.7217—Facebook/WhatsApp, Comm'n Decision, ¶ 87 (Oct. 3, 2014), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

included consideration of the merging parties' different privacy policies, and the uses to which they placed customer data.[18]

19. Where the competitive analysis of a particular zero-price market is concerned, however, the weight afforded to privacy as an aspect of quality needs to be based on evidence of how variations in privacy protections influence consumer choices. Firms may compete on privacy protections, but this will likely be alongside other aspects of quality driving consumer choices. Such markets work well when consumers make informed choices about quality features and firms continually invest in improving quality.

2.3. Advertising as an Aspect of Quality

20. The Secretariat Note also observes that the amount and intrusiveness of advertising may also be a dimension of quality of competitive significance. To the extent this may be the case, it would not be unique to zero-price markets: paid-for newspapers, television stations, and websites contain adverts as well. Pure advertising-funded models are nevertheless common (although by no means ubiquitous) among zero-price markets, and the weight to be accorded to advertising as a factor in any competitive analysis may be (alongside all aspects of quality) magnified where firms do not compete on price. It would, though, be wrong to assume that there is a negative, linear relationship between volume or intrusiveness of advertising and quality.

21. First, advertisements are not necessarily detrimental to consumers. Advertising may fund free or cheaper products and services for consumers. Advertisements can also more directly provide consumer benefits. Advertising can draw consumers' attention to new products or services: "advertising allows producers to inform consumers about new products, facilitating the consummation of mutually beneficial trades."[19] Further, just as data and time are not the same as currency, the amount of advertising displayed is not a proxy for price. Fewer adverts are not always generative of higher levels of consumer surplus: less is not necessarily more.

22. Second, and more fundamentally, any evaluation of the quality of a product by reference to the amount or type of advertising it carries will be premised on a particular view on the supposed optimal level of advertising for a given product or service.

23. When considering advertisements, it is therefore necessary to take a considered approach. Firms that aim to maximize profit over the long term do not face a "trade-off with general consumer preferences to see fewer advertisements." Websites that serve too many or too obtrusive adverts will lose users. Where services monetized through

[18] *Id.*, ¶ 102. Similarly, in *Microsoft/LinkedIn*, the Commission found that privacy was an important parameter of competition in the market for professional social networks. *See* Case M.8124—Microsoft/LinkedIn, Comm'n Decision (Dec. 6, 2016), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf.

[19] Simon P. Anderson & Stephen Coate, *Market Provision of Public Goods: The Case of Broadcasting* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 7513, 2000), *available at* www.nber.org/papers/w7513.pdf.

advertising lose users, they lose money. Suppliers have no incentive to decrease the quality of their services if that would result in a loss of advertising revenue.[20]

24. There is, therefore, an alignment of incentives between the firm and the consumer: firms will not, in the long-term, find it profitable to serve adverts that are detrimental to the user's experience of their service. This relationship is all the stronger where an advertising provider is compensated on a pay-per-click basis. In those cases, the firm is only compensated if the user chooses to click on the result – if the user thinks the advertisement is relevant. In that context, even in the short term, the firm cannot profit by serving irrelevant or excessive advertisements. If adverts are detrimental to the user's experience, the user will turn off and the advertiser will direct their investment elsewhere.

3. The Interaction of Competition Law with Other Regulatory Regimes

25. Traditionally, the litmus test for competition law's intervention has been where intervention is necessary to ensure competition "on the merits," and thereby protect consumer welfare.[21] As the European Court of Justice has stated, "the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers."[22] As such, while competition agencies may assess the extent to which competition occurs on qualitative factors, such as data privacy, and analyse the impact that any reduction in such competition has on consumer welfare, applying competition law in order to achieve data protection goals actually risks distorting competition. [23]

26. First, privacy should only be considered as part of a competitive analysis of a market to the extent that it is considered by a sufficiently large and relevant number of consumers to be an aspect of quality. If it is, it is also to be weighed against other aspects of quality that are considered important by consumers.

27. Second, and relatedly, privacy is a distinct value, serving different purposes, to free competition. Privacy concerns the right to keep certain aspects of one's life private. In the EU, for example, the law ascribes to privacy a fundamental value, generally irrespective of the weight placed on it by consumers.[24] This value to be ascribed to privacy is not responsive to the market power of the person collecting the data: if the protection of a particular type of data is valuable, then it should be protected notwithstanding market power.

[20] James D. Ratliff & Daniel L. Rubinfeld, *Is There a Market for Organic Search Engine Results and Can Their Manipulation Give Rise to Antitrust Liability?,* 10 J. COMPETITION L. & ECON. 517 (2014).

[21] *See, e.g.*, Case AT.39740—Google Search (Shopping), Comm'n Decision, ¶ 332 (June 27, 2017), *available at* http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

[22] Joined Cases T-213/01 & T-214/01, Österreichische Postsparkasse v Comm'n, 2006 E.C.R. II-01601, ¶ 115 (Eur. Ct. Justice).

[23] *See* Case C-238/05, Ansef-Equifax v. Ausbanc, 2006 E.C.R. I-11125, ¶ 63 (Eur. Ct. Justice) ("any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection.").

[24] See *e.g.*, Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391, arts. 7, 8.

28. Third, there may also be direct tensions between goals of privacy and competition laws. In zero-price markets funded by advertising, as discussed above, there may be an optimal level of advertising. When adverts are served, the market will be operating most efficiently when advertisements are targeted in the most relevant possible way. To the extent a society seeks to protect users from targeted advertisements,[25] this goal is better achieved on its own terms, rather than by trying to adapt competition law analysis, especially against conduct that could otherwise be accretive to consumer welfare.

29. While the Secretariat Note refers to a number of policies that might stimulate competition on privacy,[26] these are necessarily premised on privacy being a factor that significantly affects consumers' purchasing decisions. While some regulations may increase competition (such as rules on data portability lowering switching costs), any additional regulation may increase costs and may act as a barrier to entry for smaller firms.

30. Similar considerations may be engaged when considering advertising as a dimension of quality. There are some aspects of advertising quality that may not be amenable to regulation through competition law. Consumer protection law, for example, may be a better tool to protect consumers from inaccurate or misleading advertisements. It is prospective, preventing a clear harm before it occurs, rather than detecting it as a symptom of a competitive imbalance. Like the privacy rules referred to above, it also lays down a benchmark for all market participants, irrespective of market power.

4. Challenges for a Substantive Analysis of Zero-Price Markets

31. In addition to the difficulties in analyzing quality as an aspect of competition discussed above, there are other, more general difficulties, in measuring competition in zero-price markets.

32. As a preliminary point, it should be noted that to the extent a competition agency seeks to take into account quality considerations in its analysis, the majority of competition law regimes are already equipped with the necessary tools. Competition law is, in general, sufficiently equipped to take account of zero-priced markets—new laws do not need to be enacted. However, the analytical framework raises some very significant challenges[27] and, in particular because any analysis in this area may be novel, an analytically rigorous and evidence-based approach is essential.

4.1. Understanding the "Transaction"

33. Understanding quality allows us to gain a sense of how consumers choose between zero-priced services, and how providers compete to be chosen. It is also useful to

---

[25] EC EUROBAROMETER REPORT, *supra* note 15, at 4 ("Only a minority (30%) are comfortable that search engine use information about their online activity and personal data to tailor advertisements or content to their interests.").

[26] *OECD 2018 Zero-Price Secretariat Note*, *supra* note 3, ¶ 154.

[27] In this regard, *Business at OECD* has previously questioned "whether the analytical framework currently available to competition authorities to assess non-price effects is sufficiently developed to identify and predict, with a sufficient degree of certainty (and at reasonable enforcement costs), anticompetitive [non-price effects] arising from mergers." Business at OECD, *supra* note 10, ¶ 3.

understand what consumers are "giving" in return for a zero-priced product/service. However, as a preliminary point, it is important not to conflate the two: what consumers qualitatively value about a product or service may be distinct from what they are "giving" in return.

34. It is often said that customers "pay" by giving their data to firms.[28] There are a number of reasons why this is approach is misguided. Data is fundamentally different from money, which is scarce and can be spent only once. Data is non-exclusive—the same data can be shared with more than one supplier, without being "used up"—and ubiquitous. Unlike currency, the value of data largely derives from the ability to analyze that data and act on insights, not from the data alone.[29]

35. On the other hand, the recognition that data is not an equivalent replacement for currency does not mean that zero-price goods are in all cases generative of significant consumer surplus.[30] There are a number of alternative views. As Newman has argued, the "customers literally *pay attention* to obtain the product delivered along with the advertisements."[31] This is more convincing than the reliance on data. Attention is rivalrous: an individual can only pay attention to one thing at a time. It is also scarce: an individual only has so much attention to give, and there is no secondary market, or manner in which that attention can be sold. That reasoning, though, does not account for all zero-price markets. As explained above, there are different business models. What is true for an advertising-funded model will not be true for one reliant on bundling or "freemium" sales. And when models are combined, the analysis becomes yet more complex.

4.2. Assessing the Competitiveness of That Exchange

36. Even if the medium of exchange can be identified, zero-price markets present particular challenges for the substantive analysis of competition—both in defining the market and understand its competitive dynamics. In particular, the quantitative tools used in positive-price markets may not be applicable.

37. Analyzing competition by measuring the effect of a price rise is far more difficult in a zero-price market. Suppose that using a zero-price search engine competes with other search engines for users' attention to its organic and sponsored results. The SSNIP test will not be of use to a competition authority: a ten percent increase in the price it charges—zero—will still be zero. The SSNIP test is also not easily applicable to the other forms of consideration that have been proposed, such as data or attention. A ten percent increase in the attention demanded of a user is likely to be almost impossible to measure. As for data, it may not make sense to think of a percentage increase in the data collected. If a firm charges $1 more for a particular product, that is a quantifiable percentage increase in the

[28] *See e.g.*, Natarajan Chandresekaran, *Is Data the New Currency?*, WORLD ECON. FORUM (Aug. 14, 2015), *available at* www.weforum.org/agenda/2015/08/is-data-the-new-currency/.

[29] European Comm'n, Expert Group on Taxation of the Digital Economy, Working Paper: Digital Economy–Facts & Figures, at 9, TAXUD D1/JT (Mar. 4, 2014), *available at* https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/gen_info/good_governance_matters/digital/2014-03-13_fact_figures.pdf ("The existence of data *alone* is not sufficient to generate value; the value comes from maximising the efficacy of use from the data.").

[30] *E.g.*, Michal S. Gal & Daniel Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 Antitrust L.J. 521, 523 (2016).

[31] Newman, *supra* note 6, at 171.

price. If a company in a zero-price market starts to collect a new data point—say, it starts to record a users' location—that cannot sensibly be expressed as a percentage of the data that it holds already.

38. One solution may be to apply the SSNIP test to the related market for the sale of advertisements on the relevant platform, thereby focusing the analysis on the side of the market where money does change hands. If a firm has no power over advertisers, it is unlikely to be able to reduce the quality or increase the price of its consumer-facing service without this leading to a decrease in advertising revenue. This has been the longstanding approach to analyzing concentration in traditional media markets. However, while this may be a useful tool in reviewing advertising markets, it is not a clear proxy for users. The market definition in respect of advertisement services may be broader than that for, say, social networks, and advertisers' demand for advertising on a particular type of platform (such as search engines or social networks) may well be more elastic than that of consumers' demand for the use of the same platform. It is, for example, conceivable that an advert on a social networking site is a substitute for an advert on a search engine, even if those websites are not considered substitutes from a user's perspective.

39. One suggested alternative to the use of the SSNIP test, ill-suited to zero-price markets, is the use of a SSNDQ test. In other words, assessing the effect of "small but significant non-transitory decrease in quality."[32] This is not an approach confined to zero-price markets. Some writers have noted that, in markets where firms compete on price and also on quality (and in which customers may prefer a product due to its qualitative features alone), the SSNIP test may result in an overly narrow market definition.[33] However, the SSNDQ test suffers some of the same flaws in zero-price markets as it does in others: changes in quality and performance are more difficult to quantify than changes in price, because they are "multi-dimensional."[34] In other words, evaluating the effect of a change in quality requires not just being able to quantify the change in that particular aspect of quality (itself a challenging analysis), but also the relative importance of that particular aspect of quality. Given the challenges of applying an SSNDQ test, further empirical work would be needed to consider the suitability of other analytical techniques.

40. If quantitative techniques do not adequately equip authorities to evaluate competition in zero-price markets, it can be tempting to take a more contextual view. A purely contextual analysis of quality, on its own, does not currently offer the analytical rigor required of competition law. As *Business at OECD* has previously observed, "While quality may be an important competitive parameter, with firms competing on product and service attributes that reflect different price/value propositions, quality considerations, as well as likely changes to quality are difficult (if not impossible), to factor directly into the competitive assessment of business transactions."[35]

41. However, even taking a contextual look, it is clear that there are a number of common features of zero-price markets (especially those on the internet) that may contribute to the competitiveness of such markets.

[32] OECD 2013 QUALITY REPORT, *supra* note 1, at 14.

[33] Raymond Hartman, David Teece, Will Mitchell & Thomas Jorde, *Assessing Market Power in Regimes of Rapid Technological Change*, 2 INDUS. & CORP. CHANGE 317 (1993).

[34] OECD 2013 QUALITY REPORT, *supra* note 1.

[35] Business at OECD, *supra* note 10, ¶ 15.

42. Many technology markets where the market price is zero are fast moving. Consider, for example, rapid improvements in the quality of online maps over the last decade. These technology markets are characterized by short development cycles, high levels of innovation, and, consequently, constant product improvements. These are all good evidence of there being pressure on firms to improve the quality of their products and, therefore, of competition. That does not mean that technology markets are immune from competition concerns. The frequency and significance of product improvements and innovations, for example, can provide an objective measure of the competitive constraints acting on firms in a zero-price market, and how competitive that market is.

43. Consistent with this, there are many examples of online firms quickly gaining high market shares and then losing customers to new competitors over short periods of time, where new services were of superior quality. The decline of Yahoo! as the leading internet search provider is an example. Its rise and fall is a testament to the intensity of competition on quality that can characterize zero-price markets online. One possible measure of the intensity of competition in an online market is the level of research and development ("R&D"). Frequent product innovations can be indicative of a competitive market, whereas a lack of R&D may suggest a lack of competition in the market or, at least, a lack of competitive effort.

44. There are also a number of characteristics that may be relevant to certain online services—whether zero-price or not—that intensify competition. In particular, there are may be very low barriers to users switching between competing services and multi-homing is may be easier where consumers have invested nothing in paying for services. For example, in the case of apps, in many circumstances, users "can pass from one to another in no-time."[36] It would be wrong to assume that what may appear to be limited switching reflects customer inertia; it may be indicative of consumer satisfaction.

5. Identifying Policy Responses Requires Caution

45. It may be difficult to identify an effective policy response to competition concerns in zero-priced markets, where business models may vary substantially between competitors, even in the same market.

46. Sometimes, a product offered at zero-price may be offered alongside other products and calibrated such that the combination of products is together capable of being sustainably offered at a zero-price. Taken alone, it may not be sustainable to offer the product for free. Just as one could not unbundle a free newspaper from the adverts contained in it, there may be sets of technology products that cannot easily be pried apart. In these situations, intervention requires careful consideration: "free goods often provide real benefits to consumers and are clearly procompetitive."[37] Designing a remedy means taking into account a broader ecosystem of products, and the welfare benefits associated with the free provision of a useful product or service mean that the risk associated with a false positive is heightened.

---

[36] Case COMP/M.7217—Facebook/WhatsApp, Comm'n Decision, ¶ 109 (Oct. 3, 2014), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

[37] Gal & Rubinfeld, *supra* note 30, at 3.

47. The tools already exist to carry out this analysis. Antitrust laws are flexible and effects-based. They should aim to strike a balance between encouraging innovation and allowing authorities to intervene if problems arise. In markets that require enhanced sensitivity in the measurement of consumer preferences, there should be a bias against greater intervention and *ex ante* regulation.[38]

48. The Secretariat Note suggests a number of possible measures that may stimulate privacy competition with consumer information.[39] Informed consumers make better choices, which in turn enhances competition. The Note therefore suggests a range of possible options for allowing consumers greater insight into, and control over, how their data is used. Before intervening in this way, however, it needs to be firmly established that competition on quality is already lacking and that the information in question is relevant to consumer choice. The analysis of consumer data has facilitated significant innovation across almost every industry. Preventing firms from using and analyzing data could stifle this innovation, without any discernible competitive benefit, if competition is driven by other parameters of quality.

6. Conclusion

49. As the Secretariat Note makes clear, "competition analysis should not start incorporating dimensions of quality which consumers 'should,' from an analyst's perspective, care about."[40] The starting point in online zero-price markets, as it is offline, should be in looking at those factors that are also prioritized by consumers.

50. These may include those raised by the Secretariat Note, such as privacy, data protection, security against cyber-attack, and advertising, each of which may be an important dimension of quality in a given case. However, it is important not to ignore, or relegate, more fundamental quality aspects such as innovative features, relevance, speed, and the essential functionality of a product or service, which are often core to the exercise of consumer choice and the competitive process. Similarly, data portability can be effective in facilitating competition and new entry, (particularly where the service provider hosts user information, such as photographs and contacts).

51. Fundamentally, the tools exist to assess competition in zero-price markets as they do in positive-price markets. The consideration of quality aspects in an assessment of competition should not, however, be the vehicle for regulating separate policy goals into enforcement that are more properly addressed by other legal frameworks.

[38] For example, the UK Competition and Markets Authority concluded, following its study into the Commercial Use of Consumer Data in June 2015: "we see no reason, at present, why our existing competition and markets tools would not be effective at tackling conduct that gave rise to competition concerns in these markets." UNITED KINGDOM, COMPETITION & MKTS. AUTH., THE COMMERCIAL USE OF CONSUMER DATA: REPORT ON THE CMA'S CALL FOR INFORMATION 10 (June 2015), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/435817/The_commercial_use_of_consumer_data.pdf.

[39] *OECD 2018 Zero-Price Secretariat Note*, *supra* note 3, ¶ 153- 155.

[40] *Id.*, ¶ 34.