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# Consumer data rights and competition – Note by Italy

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More documents related to this discussion can be found at
http://www.oecd.org/daf/competition/consumer-data-rights-and-competition.htm

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## 1. Introduction

1. The OECD Roundtable on "Consumer Data Rights: Impacts on Competition" offers a valuable opportunity for the Italian Competition Authority (the Authority or the ICA) to present its competition enforcement and consumer protection experience, and, in particular, the findings of the big data market study (the Study), conducted jointly with the Communications Authority (AGCOM) and the Data Protection Authority.[1]

2. The competition enforcement activity of the ICA with respect to consumers data rights concerns both traditional sectors such as the energy market, where it ascertained exclusionary abuses of dominant position based on traditional theories of harm, and innovative markets. Recently, the ICA has, indeed, opened a case for an alleged refusal to deal by a dominant player in the digital space.

3. The Authority recognizes that in the digital economy different policy objectives (competition, privacy, pluralism) coexist in relation to consumer data rights and that competition enforcement is not necessarily the only or the best instrument to pursue these objectives. It is crucial, therefore, to understand the different dimensions of consumer data rights and to ensure that the synergies and complementarity of regulators in charge of different policies are exploited.

4. For this reason, the ICA decided to privilege a multi-disciplinary approach undertaking the Study on big data together with the Communication Regulator (AGCOM) and the Data Protection Authority.

5. Starting from three different perspectives, the Study reaches the conclusion that the challenges posed by the digital economy cannot be effectively tackled without a common approach and it explores how synergies between the three institutions, equipped with complementary tools, can be effectively achieved whilst respecting each other's missions.

6. Lastly, consumer protection may play a relevant role in dealing with some of the issues that emerge when dealing with consumer data right, especially in reducing information asymmetry between users and digital operators during the data collection phase in order to allow consumers to exercise their choices knowingly and effectively. In this respect the ICA, as an authority with dual competences in competition and consumer protection, has already implemented effectively consumer protection tools in relation to messaging service providers and social networks.

7. The contribution is organized as follows. After analyzing the ICA's competition enforcement (section 2), the contribution discusses the findings of the Study (section 3) and consumer protection interventions (section 4), while the closing remarks will also highlight the guidelines that emerge from the Study (section 5).

[1] The final report of the Study n. *IC53 - BIG DATA*, decision n. 28051 published on the ICA Bulletin n. 9/2020 of March 2, 2020 and available (in Italian) at the following link: https://www.ICA.it/dotcmsdoc/bollettini/2020/9-20_all.pdf. An English version of the policy recommendations is available at the following link: https://en.ICA.it/dotcmsdoc/pressrelease/Big%20Data_Guidelines%20and%20policy%20recommendations.pdf.

## 2. Competition enforcement

8. The ICA has dealt with competition enforcement related to consumers data rights in abuses of dominant position in the energy sector. More specifically, interventions ascertained exclusionary abuses through the application of traditional theories of harm to the use of data by vertically integrated incumbents to extend dominance in adjacent markets. In these cases, the acquisition of users' data consent was aimed at exclusionary purposes in the retail electricity market (see Box 1 below).

### Box 1. The ICA competition enforcement at the data collection stage in the energy sector[1]

In December 2018, the Authority imposed a fine of € 93 million and € 16 million on Enel Group[2] and Acea Group[3], two major utilities in the energy sector, for a breach of Art. 102 of TFEU, by implementing an exclusionary strategy aimed at foreclosing new entrants in the retail market for domestic users which, at the time of the investigation, was expected to be fully liberalised in July 2019. The case was opened on the basis of complaints filed by the Industry Association AIGET, by Green Network and by several individual customers and a consumer association.

The two groups are among the main leaders operating in the Italian electricity sector, vertically integrated in the production, distribution and supply of electricity. In particular, the two groups own a concession for the distribution network in their exclusive areas and, at retail level, they are both active in the liberalized market (for industrial customers) as well as in the regulated markets (for domestic users and small businesses with tariffs set by the regulator), through separated subsidiaries, as imposed by the legal unbundling obligation. While, at the time of the investigation, domestic users and small companies could voluntarily switch to the liberalised market and choose their provider, the end of the regulated market was expected by July 2019.

In this context, the Authority's investigation found that Enel and Acea abused their individual dominant positions (in the captive markets) by inducing their captive customer base to switch from the regulated market to the liberalised one by signing contracts with their retail subsidiaries. In particular, the two groups used in a discriminatory manner the confidential and sensitive information gathered from their captive clients (by acquiring a "privacy" consent to be re-contacted for commercial purposes) for the sole benefit of their retail subsidiaries in the liberalised market. According to the ICA, the purpose of the Enel and Acea conducts was to retain their captive clients by hindering their possibility to switch to a different supplier in the liberalised market, thus making a pre-emption on the opening of the retail market, expected for July 2019.

Notes:
[1] See decisions of Cases No A511 - ENEL/CONDOTTE ANTICONCORRENZIALI NEL MERCATO DELLA VENDITA DI ENERGIA ELETTRICA and A513 - ACEA/CONDOTTE ANTICONCORRENZIALI NEL MERCATO DELLA VENDITA DI ENERGIA ELETTRICA, published in the ICA Bulletin n. 2/2019, available on the ICA website.
[2] The First Level Administrative Tribunal has upheld ICA's decision, while the judgment of the Council of State is pending.
[3] The First Level Administrative Tribunal has annulled ICA's decision, while the judgement of the Council of State is pending.

9. More recently, the ICA launched an investigation, which is still ongoing, into Google's alleged abuse of dominant position by refusing to integrate into its Android Auto

software an app for electric mobility services developed by the main national electricity company Enel in competition with its Google Maps service (see Box 2 below). The Authority has expressed a concern related to consumers' data collection since Google Maps has a huge number of users and is a main source of user generated data. In this perspective, Google would allegedly maintain and strengthen its data wealth through the conduct under investigation which might be aimed at protecting its horizontal service Google Maps from the arising of a vertical service. In this regard, in the opening decision, the ICA noted that in the alternative solutions that Google offered to Enel to integrate its app, the flow of data generated by Enel X Recharge users would be diverted to Google.

### Box 2. Google alleged abuse on apps for electric mobility services

In May 2019, the ICA launched an investigation against Alphabet Inc., Google LLC and Google Italy S.r.l. for an alleged abuse of dominant position, in breach of article 102 TFEU, by refusing to include into Android Auto software the "Enel X Recharge" app, that is an app for electric mobility services created by the electricity company Enel, the complainant. The investigation is still on-going.

In the opening decision[1], the ICA identified two relevant markets:

- the market for licensable smart mobile operating system; and,
- the market for electric mobility services.

In the first market, the ICA, relying on the European Commission decision on Google Android case (AT.40099), found that Google is dominant (market share > 95%, barriers to entry and indirect network effects, iOS insufficient competition constraint). In the second market, both Enel X Recharge and Google Maps provide information and utilities which have a local nature and have a national dimension.

Android is used both by manufactures of smart mobile devices and by app developers. Android Auto provides an interface between Android smartphones and cars allowing apps and mobile phone functions (call, SMS) to be used through built-in controls in the vehicle (display) and voice commands. For apps likely to be used during driving developers have to negotiate with Google/Android to have these apps published on Android Auto.

"Enel X Recharge" app developed by Enel have several functionalities. It (i) shows electric vehicle (EV) charging stations location, (ii) provides relevant information (type of socket, availability, etc.), (iii) allows users to search for and to book a charging station, (iv) shows routes to reach the station and (v) allows users to start, stop, monitor and pay for the charging session.

Since August 2018, Enel has asked Google to integrate the app "Enel X Recharge" into Android Auto. Google expressly refused it four times in the period September 2018 - January 2019. In the meantime, Google has started to make a first move in this new market, by showing on its Google Maps location some information related to EV charging stations. As a result, Google Maps is on both Google Play Store and on Android Auto while Enel X Recharge is available only on the former. Because Android Auto allows users to employ apps in an easy and safe way while driving, Google's refusal makes Enel X Recharge app less useful and appealing to users as compared to Google Maps. Delaying the access on Android Auto might undermine the possibility of success of any Google Maps' competing app since it would limit the growth of users due to the network effects.

In the opening decision, the ICA considered Google's reasons for the refusal conduct to be prima facie unjustified and the proposed alternative solutions offered by Google to Enel appeared to substantiate a de facto refusal to deal: the investigation will further analyse this aspect. In addition, the ICA was concerned as to whether Google's might hinder competition on the merit, by eliminating a competitor (Enel), and reducing innovation by obstructing the developing of a "vertical" service (Enel X Recharge) as opposed to the "horizontal" model of Google Maps (which contain mainly user generated data on all sorts of services), limiting supply and consumer choice.

Note: [1] See the ICA decision n. 27771 of the Case n. A529 - GOOGLE/COMPATIBILITÀ APP ENEL X ITALIA CON SISTEMA ANDROID AUTO, published on the ICA bulletin n.20/2019 of 08/05/2019, and available at the following link:
https://www.ICA.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/9B9C38241DBA0058C125840000581ADF/$File/p27771.pd

## 3. Study into big data at the intersection between competition, consumer protection, privacy and pluralism

10. In December 2019 the Authority concluded the joint Study with the Communication and Data Privacy regulators exploring from different perspectives the main issues arising in the collection and use of consumers data, in order to strengthen complementarities as well as to recognize and reconcile possible trade-offs. The objective of the Study was helping to select the best placed authority when addressing specific critical issues which are on the border line between the different competences.

11. In the course of the Study, the relevant legal and economic literature has been reviewed and included in the analysis to provide an accurate theoretical framework. The Authority conducted hearings with academic experts and collected contributions of numerous market operators active in sectors such as telecommunications, media, digital platforms, information technology, insurance and banking. The hearings were supplemented with several requests of information. Finally, the Authority 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.

12. The final report summarising the findings of the Study consists of five chapters and a conclusive list of guidelines and policy recommendations. Chapter 1 introduces the scope of the Study and provides a definition and a description of the main characteristics of big data. Chapter 2 sums up the main issues that emerged from hearings and contributions of the participants to the Study and their impact on the operations of firms. Chapter 3, 4 and 5 tackle the considerations of the AGCOM, the Data Protection Authority and the ICA related to the impact of big data on, respectively, the sector of electronic communications and media, personal data rights and measures to be adopted, antitrust and consumer protection. Lastly, the conclusive chapter provides guidelines and policy recommendations.

13. First of all, the Study outlines the structure of the markets in which big data are used and identifies three macro-categories: i) markets in which the use of big data has a minimal role in supplying the product/service (these are markets in which big data are similar to other inputs used by companies); ii) markets in which the use of big data can affect the conditions of the supply, in terms of quality, for example, and directly affects the supplier-user relationship; iii) markets in which big data are essential, being fundamental

characteristics of the product/service that depend on them, in particular in terms of innovation and/or personalisation.

14. In general, the Study notes that, beyond the acquisition of data as such, the information and knowledge that can be generated through big data might be even more relevant from a competitive point of view. Furthermore, the three authorities are mindful of the importance of other dimensions such as the nature, quality and quantity of data needed to compete effectively, as well as the number/variety of sources that can be used.

15. From the users' perspective, the Study shows the low awareness of consumers about the economic value of the data they provide, especially when the service is provided "free of charge", that is, when personal data become the only value exchanged for the service itself. The ability to decide the degree to which the use of personal data is a component of the price or quality of a service assumes that users are not only aware that they are providing their personal data, but also of the economic value of their personal data. Such an awareness does not, however, appear to be so widespread, as can be seen from the results of the consumer survey conducted by the ICA during the Study (see Box 3 below). The existence of a privacy paradox, consisting in a discrepancy between expressed privacy concerns and actual online behaviour, can be inferred from the findings of the survey. Almost 93% of the interviewed users declared to be interested in their privacy protection, but only one third of them denies consent to the collection and utilisation of their data.

### Box 3. The Privacy Paradox

The ICA 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[1].

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.

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 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.

Note: 1 For more information, see the English version of the press release of 8 June 2018, available on the ICA website.

16. Based on the contributions gathered during the enquiry from market operators sectoral experts as well as the review of the pertinent legal and economic review, the Study has provided a useful perspective also on some other significant aspects that concern consumer data rights and their competitive impact.

17. First of all, compliance with privacy rules can also have competitive implications. The Study outlines that the consumer data rights, such as the principles of data minimisation, purpose limitation and storage limitation, appear to be unsuitable for massive collections of data. They may actually be necessary for the provision of the service, but that could also be reused in the future for undisclosed further purposes. EU Regulation 2016/679 on the protection of personal data (the "GDPR"), applicable in Italy, although it does not concern itself directly big data, includes provisions that address the potential risks from profiling and automated decision-making and that protect the fundamental rights of data subjects, with restrictions where big data could have a significant impact on individuals.

18. During the Study it emerged that data are often processed for purposes that are defined in general terms only: indeed, the mass acquisition of data can make it difficult to specifically identify ex ante the purposes for such processing. Innovative solutions have been proposed by some stakeholders during the Study to encourage the individual to participate in the processing of his/her data that uses big data techniques, such as dynamic consent (whereby an individual initially gives their broad consent to a general notice regarding the possible purposes for processing their data, to subsequently receive more detailed information with a request to give additional and more specific consent).

19. On the other hand, data acquisition is significant for businesses insofar as it allows them to obtain information that, in turn, helps them deliver a more competitive product/service. At this stage, while a prerequisite for the protection of a user's personal data, compliance with the privacy rules may also make it more difficult for businesses who do not benefit from a direct relationship with the user to access their data. A tension might, consequently, arise between the need to protect personal data and the one to encourage the circulation of data and, with it, more open competition between undertakings. In that respect, the Study analyses several possible remedies: data portability, data transfers and data access.

20. The right to data portability could help avoid technological lock-in and increase competition between businesses providing digital services. However, there are a number of obstacles to the effective development of data portability, linked in particular to a general lack of awareness amongst users of the existence of this right, the constraints on their mobility (also due to the presence of outside network effects) and the still uncertain boundaries of data portability, which includes only part of the data collected and processed by businesses.

21. Developing common data transfer standards could be key to avoiding a situation in which users only make use of their right to data portability in limited circumstances. As one of the recommendations (see Box 4 below), the three authorities welcome the adoption of open and interoperable standards, to encourage competition in the various areas where data can be exploited economically.

22. With regard to data access, synergies between competition and regulation can also be useful. Under antitrust law, a dominant undertaking may be required only exceptionally to provide access to data that are indispensable and not easily duplicated in order to safeguard competition in one or more markets. If, though, the aim is to protect the public interest, other than that of promoting competition, then limited regulatory measures regarding data access can be effective. In any case, the ICA believes that any regulatory interventions regarding access to data must be necessary and proportionate, and they must consider the specific nature of the service/market, as well as the social aims connected to them and which are subject to regulatory supervision.

### Box 4. Policy recommendations of the big data Study

At the end of the joint initiatives, the ICA, AGCOM and the Data Protection Authority have reached a common view on how to tackle the issues raised by big data. This common view formed the basis for the 11 policy recommendations reported below.

1. Government and Parliament should consider implementing an appropriate legal framework that addresses the issue of effective and transparent use of personal data in relation to both individuals and society as a whole.
2. Strengthen international cooperation for the governance of big data.
3. Promote a single and transparent policy on the mining, accessibility and use of public data in order to draft public policies which benefit firms and citizens. Coordination between these policies and EU strategies for the EU Digital Single Market will be necessary.
4. Reduce information asymmetries between digital corporations/platforms and their users (consumers and firms).
5. Identify the nature and ownership of the data prior to processing. Moreover, the possibility of identifying the data subject on the basis of anonymized data should be assessed.
6. Promote online pluralism through new tools, transparency of content and user awareness of information provided on online platforms.
7. Pursue the goal of consumer welfare with the aid of antitrust law tools. Consumer welfare may imply the evaluation of factors other than price and quantity, such as quality, innovation and fairness.
8. Reform merger control regulation so as to strengthen the effectiveness of the authorities' intervention.
9. Facilitate data portability and data mobility between platforms through the adoption of open and interoperable standards.
10. Strengthen investigative powers of the ICA and AGCOM outside proceedings and increase the maximum financial penalties for the violation of consumer protection law.
11. Establish a "permanent coordination" between the Authorities.

## 4. Consumer protection enforcement

23. Reducing information asymmetry between users and digital operators during the data collection phase is a fundamental policy aim in order to ensure that consumers receive adequate, precise and immediate information on why their data are collected and how they will be used, and that users are able to exercise their consumer choices knowingly and effectively.

24. In that regard, the ICA's experience underlines the effectiveness of consumer protection tools, which have already been implemented by the Authority in relation to messaging service providers, for *de facto* forcing the user to accept new terms of service, and social networks, for not providing clear and accurate information on the commercial purposes of data collection (see Box 5 below). In reviewing this enforcement actions, the Courts had the opportunity to explicitly recognise the exploitation of the economic value of user data as a key feature of the digital economy, outlining the complementarity between privacy protection and consumer protection. Consumer protection law can, in fact, be enforced across a multitude of aspects of the commercial relationship between operators and users during the data acquisition phase. Furthermore, the enforcement of consumer protection rules will not only provide direct protection for consumers, but also assume a pro-competition role to the extent that users are put in a position to (more) consciously and actively exercise their consumer choices.

### Box 5. The ICA's consumer protection enforcement at the data collection stage

**WhatsApp Case: Sharing personal data with Facebook[1]**

In May 2017, the ICA 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. This commercial practice was deemed unfair by the ICA and a 3 million of euro sanction was imposed on the company.

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 the ICA'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; 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).

Notably, the ICA held that WhatsApp services are provided in exchange of personal data and content generated by the users. During the proceedings, the party objected that the ICA'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. The ICA 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[2].

**Facebook case: Default option for sharing data[3]**

In November 2018, the Authority imposed a sanction of 10 million of euro on Facebook for its unfair commercial practices in the collection of subscribers' data, by ascertaining,

under the Italian Consumer Code, both a misleading and aggressive nature of Facebook conducts.

First of all, the ICA found that Facebook.com does not adequately and immediately inform users when they create an account that the data they provide will be used for commercial purposes. More generally, at the moment of registration Facebook emphasizes the free nature of the service but not the commercial objectives that underlie the provision of the social network service, thus misleading users in the sense that they are induced into making a transactional decision that they would not have taken otherwise (i.e., to register in the social network and to continue using it). The information provided is in fact general and incomplete and does not adequately make a distinction between the use of data to personalize the service (in order to connect "consumer" users with each other) and the use of data to carry out advertising campaigns aimed at specific targets.

The ICA also found that Facebook commercial practices are aggressive in the sense that Facebook exerts undue influence on registered consumers in order to obtain the transmission of their data from Facebook to third-party websites/apps for commercial purposes, and vice versa, without an express and a prior consent from them and therefore unconsciously and automatically. The undue influence stems from not only the default option imposed by Facebook to the broadest consent to data sharing but also to the circumstance that, when users decide to limit their consent, they are faced with significant restrictions on the use of the social network and third-party websites / apps, which induce users to maintain the default choice

In consideration of the relevant effects of the practice on consumers, the ICA also requested Facebook to publish - pursuant to art. 27, paragraph 8, of the Consumer Code - an amending declaration on its website and App[4].

Notes:
[1] See ICA decision no. 26597 on case n. 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).
[2] Facebook's appeal against the ICA's decision is pending.
[3] See the ICA decision n. 27432on case n. PS11112 - Facebook-Condivisione Dati Con Terzi of (click here). For the press release in English click here.
[4] The First Level Administrative Tribunal has partially upheld ICA's decision, while the judgement of the Council of State is pending.

## 5. Concluding remarks

25. The complexity of the issues that emerge when consumer data rights are a relevant consideration requires not only enforcement, but also adequate advocacy in order to define an appropriate regulatory framework.

26. Moreover, the challenges presented by big data require existing synergies between ex-ante and ex-post tools to be exploited fully. In relation to consumer data rights, the three authorities jointly undertaking the Study have made significant recommendations to policymakers, such as measures aimed at reducing information asymmetry at the data collection stage and facilitating data portability also through the development of interoperable standards. As a result of this joint initiative, the three Authorities have committed to sign a Memorandum of Understanding in order to cooperate in a permanent manner in the area of big data.

27. Agencies tasked with a dual competence in the antitrust and consumer protection fields may be facilitated in dealing with consumer data rights, as coordination costs of the two policies can be in principle substantially lower and the assessment of the issues at the intersection can occur even at the case level.

28. Lastly, the Covid-19 pandemic may add the protection of public health as another public policy objective to the access to and utilization of consumer data rights. Responses to the current crisis might exacerbate some of the trade-offs that have so far been acknowledged, in particular between competition and privacy.