

# THE ROLE OF CONSUMER DATA IN COMPETITION ENFORCEMENT

## ASCOLA CONFERENCE

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15/06/2017

# CONSUMER DATA: ANY RELEVANCE TO COMPETITION ENFORCEMENT?

## Perhaps no relevance at all...

- Data protection issues may “taint” purity of efficiency-driven analysis

**Q:** Is this really what we should focus on?

-See e.g. *Asnef/Equifax, Facebook/Whatsapp*, etc.

-See *Google/DoubleClick*, FTC File No. 071-0170

- Consumers are in the position to assess the risks of disclosure or misuse of their information

**Q:** Is this really the case?

-See e.g. *Pew RC (2014), Moretti and Naughton (2014)*, etc.

# MARKET DEFINITION: DATA PROTECTION AS A QUALITY PARAMETER

Is decisional practice useful?

**-No money? No market**

See, for instance, *EC NewsCorp/Telepiù*, *DoJ United States v. Bain Capital*, *EC Facebook/Whatsapp*, etc.

**Q:** Shortcomings of the 'trade relationship' criterion?

-Quality considerations (e.g. level of data protection) are cast aside. See e.g. *Pew RC* (2016)

-See e.g. *UPS/TNT* (express v. slower delivery services), *Universal/Sara Lee* (deodorant's skin-care attributes), etc.

**-Sol'n:** Consumer surveys (conjoint analysis). See e.g. *Ryanair/Aer Lingus*

# COLLECTION & PROCESSING OF USER DATA AS EXPLOITATIVE ABUSE

## Case of 'excessive data'?

- 'Traditional' case law (e.g. *United Brands*)

Excessive prices: Prices that have 'no reasonable relation to the economic value of the product supplied' (**profit margin is 'excessive'**, and **price is 'unfair'**)

- Is 'traditional' case law irrelevant?

NOT if we take a closer look at:

- **New methodologies** (see e.g. OECD 2013),

- **Data protection regulation** (see e.g. Data Protection Directive, Article 6(1)(b))

- Are 'transparency' remedies new to competition enforcement? See e.g. Case AT.39398, *VISA MIF*

# MERGER CONTROL: 'DATA CONCENTRATION'

## -Contractual restrictions preventing data sharing

-See e.g. *FTC Google/DoubleClick* and *EC Facebook/Whatsapp*

## -Good luck enforcing that!

See e.g. *EC Facebook/Whatsapp (2017)*

## -Level of protection afforded by data protection rules

-See e.g. *EC Microsoft/LinkedIn*

-**Anticipated regulatory developments** can (and should) be considered....

-See e.g. *E.ON/MOL* & *NYSE Euronext/Deutsche Börse*

-.....But only when meaningfully assessed

# EXCLUSIONARY CONDUCT: DATA PORTABILITY RESTRICTIONS

## -Relevance for competition law?

Switching costs = lock-in effects = barriers to enter and expand

## -The (bad) example of Google's restrictions on advertisers:

-Were Google advertisers prevented from advertising with other platforms? **NO**

-Were advertisers prevented from using their own data portability tools? **NO**

-Put 2+2 together: Should Google be forced to lift data portability restrictions? ....

# CONCLUSIONS

- Consumer data considerations **not** irrelevant to competition enforcement
  - Markets evolve so should competition policy!
- Digital markets are moving **fast!**
  - Difficult to *strike the right balance* between:  
**ACCURACY** (why punish a successful firm?) &  
**SPEED** (network effects = difficult to challenge offender)

Anything we can do?

- **Information is king** (sector inquiries, close cooperation with experts & regulators, the industry, etc.)
- **Commitments route** is faster but BEWARE:
  - Remedies must be ‘adequate’ to address competition concerns
  - General framework must enable CAs to modify remedies *ex post*