

# **BIG DATA**

## **JOINT SURVEY**

### **GUIDELINES AND POLICY RECOMMENDATIONS**

July 2019

*Big Data are playing an increasingly leading role by facilitating the creation of new markets and revolutionising traditional ones. Consumers are an integral part of this rapidly and multisectoral changing scenario and may be seriously affected. Moreover, the data-driven economy favours the creation of new forms of market power which have social and democratic implications.*

*The relevant and different interests at stake require a multidisciplinary approach. This is why, on 30 May 2017, the Italian Competition Authority (hereinafter, AGCM), the Communications Authority (hereinafter AGCom) and the Data Protection Authority launched a joint inquiry in order to develop a thorough understanding of the impact of Big Data on the protection of personal data, market regulation, consumer protection and antitrust law.*

*For this purpose, the three Authorities worked closely, bringing together their expertise and approaches. They undertook around forty interviews with main actors of data-related, telecommunications, financial service and publishing industries and related experts and academics. Moreover, information requests have been forwarded to leading digital operators and numerous papers have been received. The Authorities could take advantage of the expertise developed during the proceedings related to data commercial exploitation as well as of the information concerning the role played by algorithmic profiling in the online advertising market and in video sharing platforms, search engines and marketplaces.*

*In June 2018, two preliminary surveys were published: a Big Data Interim report adopted by AGCom and a report describing the results of a survey carried out by AGCM which aimed at understanding online consumers' propensity to allow the use of their data in exchange of online services.*

*In July 2019, AGCM, AGCom and the Data Protection Authority reached a common view on how to tackle the issues raised by Big Data. This common view is developed through guidelines and 11 policy recommendations as described below. The final document that will gather the three Authorities' final reports will be published soon.*

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**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.**

- Although the intensive utilization of Big Data leads to undeniable benefits in terms of reduction of transaction costs for companies and citizens/consumers, new risks are emerging *vis-à-vis* markets' competitiveness, data protection and information pluralism. Notably, new concentrations of power have emerged from the commercial exploitation of data and algorithmic profiling, which entail not only 'market power', but, more generally, economic power *tout court*, affecting fundamental rights, competition, pluralism and democracy.
- The current institutional framework is adequate to protect fundamental rights, such as the right to the protection of personal data, and to promote competition. However, information pluralism in the modern digital society seems to be at risk. The protection of information pluralism traditionally focused on the supply side of the information flux whilst attention is now shifting to the demand side, with a particular emphasis on information overload, transparency of the sources and the consequences of user profiling on distribution of media content.

Thus, the three Authorities state that Government and Parliament are responsible for both ensuring the development of a data economy which respects fundamental rights and at the same time the implementation of a legal framework which guarantees the lawfulness and transparency use of data.

**2) Strengthen international cooperation for the governance of Big Data.**

- Coordination of EU competition authorities' enforcement actions is crucial. Indeed, data economy often imposes supra-national issues since markets and economies are increasingly interdependent.
- AGCM joined the European Competition Network (ECN), the European forum gathering the European Commission and the National Authorities in charge of enforcing European Competition Law. Within the ECN, the "*ECN Digital Markets*" working group allows NCAs to illustrate the main features of the ongoing proceedings concerning the digital economy thus fostering the cooperation between NCAs and facilitating the cases' allocation to the best placed Authority. In light of the rapid development of digital markets, Directive 2019/1 (known as ECN+) grants the European national competition authorities with more effective enforcement powers.
- Furthermore, AGCM took part into the network of regulatory authorities, policy makers and researchers known as *Digital Clearing House*. They actively contribute to an interdisciplinary dialogue and exchange of insights ultimately aiming at achieving a better view on the most effective enforcement policies within digital markets. Finally, the exchange of best practices with extra European enforcement bodies takes place within the Organization for Economic Co-operation and Development, the International Competition Network and the United Nation Conference on Trade and Development.

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- From a different angle, Article 60 of the General Data Protection Regulation provides for a mechanism of reinforced cooperation between the supervisory authorities. Furthermore, cooperation between data protection authorities may take place within the Global Privacy Enforcement Network – GPEN.
  - AGCom actively participates to the dialogues taking place between national regulatory authorities (NRAs) within the BEREC (Body of European Regulators for Electronic Communications). This last one plays a major role in guiding the NRAs during the draft of guidelines concerning net neutrality, in which particular emphasis is given to zero-rating practices and price discriminations grounded on the exchange of services in return to favourable personal data terms of use. BEREC shall further cope with the issue of data ownership generated from the fifth-generation wireless technology (5G) by firms active within different regulatory frameworks (e.g. energy, electronic communication, transport and medical industry) as well as the development of data standardization to enhance interoperable services. AGCom took as well part to the Digital Clearing House.

**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.**

- The development of Big Data processes involves also entities pursuing public goals. In this regard, the collection of personal data shall be undertaken in compliance with privacy rules, also relying on the assistance of data protection officers.

**4) Reduce information asymmetries between digital corporations/platforms and their users (consumers and firms).**

- The reduction of information asymmetry is a crucial policy goal. Not only consumers should be informed about the use of their data but also on the extent their data are needed for the functioning of the service.
- Both data protection and consumer protection law may reduce such information asymmetry. These set of rules can indeed provide consumers with the adequate information concerning the goals of data collection and treatment in order to make purchase decisions.
- The interim report adopted by AGCom underlined the frequent inverse correlation between apps' price and the authorizations requested to the user. It is of the utmost importance that during purchase decisions and data transfers, users are aware of the connection between the consent necessary for the functioning of the app and the request of further authorization following data transfer. In this perspective, it would be desirable to implement measures aiming at raising consumers awareness while they give their consent to the processing of their personal data.
- It is essential to reduce the information asymmetries between online giants and firms operating on digital platforms with reference to the transparency criteria used for data analysis and data processing (i.e. visibility ranking placement on the platform).

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- Moreover, the entrance of new data intermediaries, vested with stronger contractual position regarding data commercial exploitation, should be encouraged.
  - Considering the above, supervisory authorities should employ data experts (i.e. data scientists) in order to pursue their public goals.

**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.**

- Before implementing Big Data analysis techniques, it must be assessed whether data are personal or not in order to identify the applicable rules.
- Furthermore, it must be seriously taken into account any chance that anonymized data, once processed, may lead to the identification of the person. As provided by the GDPR, this measure aims to strengthen the level of safety of data protection and at the same time it is consistent with national cybersecurity strategies.

**6) Promote online pluralism through new tools, transparency of content and user awareness of information provided on online platforms.**

- Despite a sound competitive market structure, information pluralism may be undermined by disinformation strategies and information self-selection. The latter being strengthened by confirmation biases, anchoring effects, echo chambers and groupthink effects.
- During the last few years, both the European Commission and the AGCom called major digital platforms to implement self-regulation and co-regulation via the adoption of codes of conduct. It is worth recalling the Action Plan against Disinformation adopted by the Commission on December 2018 enhancing the cooperation mechanisms between Member States and European Institutions on how to deal with online disinformation and how to preserve free thinking as for the formation of political orientation and expression of vote.
- In this regard, on November 2017 AGCom established a working group (*“Tavola per la garanzia del pluralismo e della correttezza dell'informazione sulle piattaforme digitali”*) aimed at implementing self-regulation codes of conduct and at sharing best practices tackling misinformation.
- These studies showed the difficulties of assessing the benefits of such measures in the absence of proper audit and inspection powers upon the surveillance authorities. In fact, these autonomous initiatives of self-regulation have not been assessed yet.
- National surveillance authorities should be empowered with appropriate audit and inspection powers of algorithm profiling for information and content selection. In addition, they should be vested with the possibility to assess the outcome of the internal rules adopted by digital platforms to cope with hate speech and false information.

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**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.**

- The fight against anticompetitive practices of major digital firms facilitated by software and complex algorithms is at the top of AGCM's priorities.
- Digital economy features require to strike a balance between the risk of discouraging innovation and the risk of underenforcement.
- Both user profiling and network effects may facilitate anticompetitive behaviours capable of reducing competitiveness between digital ecosystems, making their market power persistent over time. In this regard, due to the multifaced nature of the digital economy and the presence of major competitors within more than a single market, the assessment of the relevant market should be rethought.
- As demonstrated by the recently opened proceedings, major platforms' anticompetitive conducts are under the lens of AGCM. In this perspective, through competition law tools, consumer welfare goal should be pursued not only by considering conduct based on prices and quantities but also on other parameters such as quality, innovation and fairness.
- At least for global digital platforms, it is necessary to implement measures designed to increasing the awareness of user profiling for content delivery. On the same vein, in order to protect online pluralism, profiling opt-in mechanisms shall be introduced.

**8) Reform merger control regulation so as to strengthen the effectiveness of the authorities' intervention.**

- In light of the diffusion of Big Data, mergers control is of the utmost importance. With the purpose of enhancing the effectiveness of national competition authorities' mergers regulation, it is desirable:
  - i. A national and international reform allowing competition authorities to examine those concentrations that do not meet the thresholds which trigger the obligation to give prior notification but that are still capable of reducing potential competition (such as the acquisition by major digital firms of innovative start-ups – i.e. “killing acquisitions”);
  - ii. The amendment of Article 6(1) of Law n. 287/90 introducing an evaluation standard grounded on the SIEC criteria (“*Substantial impediment to effective competition*”) that is commonly considered more suitable to tackle digital economy's challenges.

**9) Facilitate data portability and data mobility between platforms through the adoption of open and interoperable standards.**

- Along with the discipline contained in Article 20 of the GDPR, fully open and interoperable standards may further increase market competitiveness.
- Moreover, bearing in mind the importance to respect individual data protection rights, competition law enforcement could lead towards additional portability and mobility

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data obligations. In this regard, data portability should be extended – besides Article 20 GDPR – through the adoption of measures which both enhance data access competition and strengthen consumer protection.

- Thus, European legislative initiatives should regulate technological platforms interoperability to enable users to take full advantage of their portability rights.

**10) Strengthen investigative powers of the AGCM and AGCom outside proceedings and increase the maximum financial penalties for the violation of consumer protection law.**

- Consumer protection law may apply during user data acquisition, processing and treatment. Compliance with data protection rules does not exempt firms to abide by unfair commercial practices rules. In fact, rather than alternative, these two set of rules are complementary. Undoubtedly, it is underlined that consumer protection and privacy policies are fundamental ingredients for fair competition.
- Given the size of many digital firms, in order to pursue a real deterrent effect, financial penalties imposed for the breach of consumer protection law should be increased, without any prejudice to the discipline contained in the GDPR.
- With the aim to overcome the ongoing developments put forward by digital economy, both AGCM and AGCom should be vested with investigative powers enforceable outside formal proceedings (sector inquiries and preliminary investigations). Refusal or delay to provide information and the reception of misleading or omissive information should be financially sanctioned by the above-mentioned authorities.

**11) Establish a “permanent coordination” between the Authorities.**

- An effective Big Data and digital economy policy should be grounded not only on law enforcement but also on advocacy activities. With this in mind, the three Authorities joint survey aims at:
  - i. Tackling those regulative frameworks shielding traditional market structures from the innovations brought by digitalization, ultimately with the aim to enhance competitiveness and consumer welfare;
  - ii. Implementing a level playing field for the digital ecosystem by removing unfair fiscal advantages and industrial relations of main digital platforms within markets they operate directly or as intermediaries;
  - iii. Enhancing public awareness with regard to the underlying risks and advantages the digitalization of economy may lead to.
- As for data access, the synergy between competition enforcement and regulation can be valuable:
  - i. Competition law provides that a dominant firm can be obliged to grant access to essential and non-replicable data to safeguard the competitiveness of the relevant market;
  - ii. Conversely, whether public goals other than competition have to be pursued or if competition law enforcement proved to be insufficient, regulatory measures concerning data access might be more effective;

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- iii. In this regard, referring to AGCom's competences, it will be evaluated the impact of the new European Electronic Communications Code which specifies that *"the processing of personal data by electronic communications services, whether as remuneration or otherwise, should comply with Regulation (EU) 2016/679 of the European Parliament and of the Council"* and that *"electronic communications services are often supplied to the end-user not only for money, but increasingly and in particular for the provision of personal data or other data"*. Finally, the Directive underlines that the concept of remuneration should *"also encompass situations in which the end-user is exposed to advertisements as a condition for gaining access to the service, or situations in which the service provider monetises personal data it has collected in accordance with Regulation (EU) 2016/679"*;
  - iv. If access to data has to be granted for public goals (public health and safety, environment protection and mobility), regulatory measures granting public bodies with the right to access private companies' databases would avoid costly duplication of existing data and thus it will be more effective;
  - v. Making specific data also available and replicable for entities which provide audience surveys, would make online advertising markets based on users' algorithmic profiling (i.e. programmatic advertising) more competitive and might ensure a higher quality of information supply;
  - vi. In any event, regulatory interventions on data access should be proportionate as well as consistent with the characteristics of each specific market;
  - vii. Obligations to provide access to personal data – in terms of scope and modalities – shall be duly balanced with data protection rules.
- More generally, the challenges posed by the digital and data-driven economy require a sound implementation of *ex ante* and *ex post* assessments' synergies in order to safeguard privacy, competition, consumer welfare and pluralism.
  - Bearing in mind each expertise and working closely, AGCM, AGCom and the Data Protection Authority can better pursue their institutional goals. To this end, the three Authorities will strengthen their cooperation by signing a *memorandum of understanding*.