

The Consumer Voice in Europe

SHAPING COMPETITION POLICY IN THE ERA OF DIGITALISATION

Response to public consultation



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Why it matters to consumers

Consumer welfare and well-being requires the existence of competitive markets driven by choice and innovation. The era of digitalisation has brought new opportunities for consumers. However, new forms of abuse and the accumulation of market power, algorithmic manipulation, gatekeeping and exploitative practices are threatening openness and innovation in numerous markets. This trend challenges not only the healthy development of markets, but also the well-being of consumers and of society as a whole by impacting fundamental EU values such as democracy and plurality. Therefore, there is a need to re-think and adopt a reinvigorated approach to competition policy in the EU to ensure that enforcers and courts are up to these challenges and can swiftly act to protect competition to the benefit of all Europeans.

1. General remarks

BEUC welcomes the European Commission's consultation on "shaping competition policy in the era of digitalisation". EU competition policy has played an essential role in shaping Europe's modern economy and in building the EU's Single Market by being a fundamental tool to promote innovation, increase consumer choice and generate competitive prices across Member States.

With the eruption of digital technologies and fast-developing digital markets, new opportunities and challenges emerge for consumers, the economy and society as a whole. The incorporation of technological solutions is, on one side, leading to the reduction of production and distribution costs and, on the other side, creating the conditions for new consumer markets offering innovative products and services. From both a company and consumer perspectives, these are welcome developments as they make markets more competitive and efficient to the benefit of consumers.

Challenges for competition law enforcement

Online markets present particularities that distinguish them from off-line markets e.g. zero-price transactions, where abuses are exacerbated by the market dynamics e.g. presence of strong network effects. Below, we have identified several elements that challenge the enforcement of competition laws in the digital economy and which deserve special attention from policy makers, enforcement authorities and courts:

- **Gatekeeping and interdependence:** Companies who are active in fast developing two¹ or multi-sided online markets² often depend on an intermediating platform to offer their products and services to their customers. In these two or multi-sided markets, the platform lays down the conditions for companies to engage with customers, thereby becoming the creator and controller of its own marketplace. This is not a problem in itself unless these

¹ Two-sided markets are characterised by the presence of a platform acting as an intermediary between two distinct users' group e.g. sellers and customers.

² Some prefer to refer to 'multi-sided markets' since the two-sidedness of the traditional conception is often challenged by the intervention of other market participants such as advertisers.

platforms make use of their market power to benefit their own services over those of competitors or apply unbalanced conditions that squeeze out smaller players – especially low-margin firms. As a result, consumers are deprived from wider choices and in the long-run from lower prices resulting from a healthy competitive process. In other words, platforms end up defining the market dynamics and weaken competition to the detriment of consumers. At EU level, such a situation has been put in evidence in several competition cases, including *Google Shopping* (AT.39740), *Amazon eBooks* (AT.40153) and the recent preliminary investigation into Amazon’s use of data about third merchants on its platform.

- **Data as an input to innovation:** In the digital economy, data is a fuel for innovation and technological progress. Therefore companies, particularly those active in zero-price markets, design their products with the aim of collecting as much data as possible from their users. The process of data aggregation can raise different competition concerns:
 - Firstly, when a company that has *de facto* control over data that is necessary for product and service development decides not to give its rivals access to the data to develop or improve competing services. In this scenario, it is not only rivals who suffer for not being able to compete on an equal footing with the undertakings, but also consumers who are deprived from innovative products and services. Under EU competition law, this practice could be considered as a “refusal to deal or to supply” as a sub-category of an abuse of dominance under Article 102 TFEU. However, intervention benchmarks for addressing this behaviour by means of antitrust enforcement are very high: first, it is necessary that the undertaking holding the data enjoys a dominant position in the relevant market and, secondly, that the refusal to supply relates to an indispensable input, something that is often difficult to prove.
 - Secondly, in order to gather vast amounts of user’s data, some companies often impose unfair contractual conditions (e.g. in the form of broad permissions to collect data). However, consumers are unlikely to change providers either due to lock-in effects (e.g. caused by high switching cost or strong network effects – on this issue see next point) or simply because there is no alternative. This concern has two legal consequences that are relevant for competition law considerations: on one side, the eventual breach of consumer law (as an unfair commercial practice or contract terms) and, on the other side, the exercise of an exploitative abuse in the terms of Article 102 TFEU, if the firm enjoys a dominant position. Both situations are being analysed in the

context of investigations opened in Italy³ and Germany⁴ against Facebook.

- **Strong network effects and switching barriers:** Digital markets are characterised by the presence of network effects. Popular platforms have grown exponentially in the last decade due to the fast increase of their customers' base. This growth can be explained by different factors including the popularity of the service among consumers, the expansion to adjacent markets as a result of mergers and acquisitions and the use of behavioural techniques, particularly experimentation with the users' interface to prevent switching and encourage users to bring peers into the network. Network effects are not bad per se. However, it is the use of network effects to raise barriers and lock-in consumers to extract more value from their data that raises serious concerns. A research by our UK member organisation Which? shows for example how data, particularly in the online advertising market, has reinforced 'winner takes all' market dynamics. For example, Facebook and Google can offer to advertisers a unique one-stop access to massive audiences that can be finely targeted within a closed ecosystem⁵.
- **Exploitation of consumers:** Related to the previous point, intermediation firms active in two or multi-sided markets rely on the network effects generated by the platform to increase their advertising revenues, continuously seeking to expand their customer base and nudging consumers to share more data than what is actually necessary for the provision of the service. Our Norwegian member organisation in a recent report showed how firms use default settings, techniques and features of interface design to push users towards privacy intrusive options⁶. Consumers are concerned about their privacy and how firms handle their data but they just end-up giving up to this constant manipulation by firms that want them to believe that they are in control of their data, while in reality they are not. This leads not only to consumers being disempowered about how their data is being handled, but also raises competition concerns because these firms have gained an advantage over their competitors, maximising network effects through the manipulation of users. Practices like excessive collection of users' data could be regarded as an exploitation of market power to the detriment of competitors and consumers, especially when these practices are illegal (e.g. violating consumer and data protection laws).
- **Long-term effects of the abuse:** Timing has been an issue of concern for competition investigations. With the fast development of digital markets, and the likelihood for firms to acquire significant market power very fast, timing

³ Autorità Garante Della Concorrenza E Del Mercato, "Misleading information for collection and use of data, investigation launched against Facebook" (2018), <<http://www.agcm.it/en/newsroom/press-releases/2455-misleading-information-for-collection-and-use-of-data,-investigation-launched-against-facebook.html>>

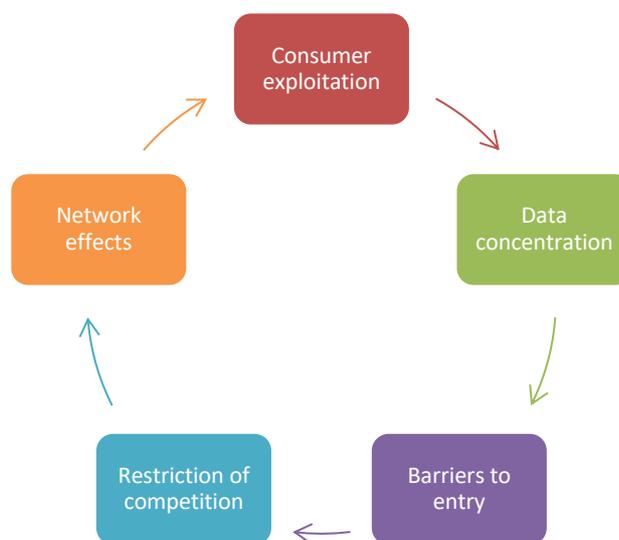
⁴ Bundeskartellamt, "Preliminary assessment in Facebook proceeding: Facebook's collection and use of data from third-party sources is abusive" (2017), <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html>

⁵ Which?, "Control, Alt or Delete? The Future of Consumer Data" (2018), Policy Report, <<https://www.which.co.uk/policy/digitisation/2659/control-alt-or-delete-the-future-of-consumer-data-main-report>>

⁶ Forbrukerrådet, "Deceived by Design. How tech companies use dark patterns to discourage us for exercising our privacy rights" (2018), <<https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf>>

acquires a new dimension. The longer the abusive conduct perpetuates, the harder it gets to revert its anti-competitive effects. We have seen this situation in the context of the Google Shopping case, in which firms that have been excluded because of Google’s illegal conduct, still today find it difficult – if not impossible – to be as competitive as they could have been in absence of the abuse. The same applies to consumers being directly harmed by the misuse of their data since they found themselves locked-in within a service with strong network effects and with limited chances to switch to competing services, if any.

A “vicious circle”



The different elements described in the previous section are part of a vicious circle that weakens the competitive process and therefore directly and indirectly harms consumers. Through the exploitation of consumer biases (e.g. relying on default options or designing the user interface to deceive consumers), companies gather data in order to innovate and boost their own services. However, since these undertakings have no incentive to let rivals develop competing services that might weaken their customer base and network effects, barriers to entry are likely to be raised as a result of the refusal to grant access to data as a necessary input for product and service innovation. The refusal to access data leads to a restriction of competition that is exacerbated by the network effects generated by the dominant firm, whose continuous growth depends on keeping consumers engaged with its services sharing data. To do so, these firms apply behavioural techniques that nudge consumers into accepting privacy invasive settings or developing a need (e.g. exacerbating addiction) to constantly engage with the service in which the return for the data and time spent on the platforms is questionable⁷.

2. Consumer harm(s) in zero-price markets

Consumers can be harmed directly or indirectly by an anti-competitive behaviour. This includes both financial and non-financial losses. In digital markets, where consumers access advertised-based services that rely on the collection and processing of personal data and the continuous engagement of consumers with the platform’s services, consumer

⁷ See among others, Centre for Humane Technology, “our society is being hijacked by technology” (2018), <<http://humanetech.com/problem>>

harm is not always easy to quantify, and such a situation has been used to argue against a pro-enforcement stance.

Some also argue that since zero-price services are widely used and seemingly accepted by consumers, enforcement agencies should refrain from intervening. At first this might sound reasonable, but the opposite is true: The fact that the harm is difficult to quantify in economic terms or that a service is popular amongst consumers does not mean that consumers are not negatively affected by the abusive conduct. On the contrary, the long-term effects of these behaviours can be more harmful than any individually measurable economic loss⁸.

Three concrete forms of consumer harm should be kept in mind by competition agencies and courts when approaching digital markets:

- **less quality:** This can affect different aspects of a digital service and the consumer experience, including the reduction of privacy standards to enable a greater collection of personal data, especially when privacy is seen as a competitive parameter in zero-price markets (e.g. *Microsoft/LinkedIn* (M.8124)), and the degradation of functionalities. The latter can happen for instance in the search market when a company, looking to give prominence to its own services, manipulates the search results to demote rival firms – especially when the risk of consumers doing multi-homing is little⁹.
- **less choice:** This is particularly relevant when an undertaking or its affiliates offers vertically-integrated services and deploys measures to promote those services thereby excluding competitors and preventing consumers from accessing wider choices. An example would be when an app store provider excludes certain applications that directly compete with their own services from the app store.
- **less innovation:** When a company in a dominant position prevents rivals from competing on the merits and innovating, it basically impedes new products from entering the market and consumers from buying innovative products. It is worth highlighting that the fact that consumers 'choose' or widely use the services from an undertaking, does not mean that the highest levels of innovation have been reached since in a counterfactual scenario – in which all firms are capable to compete on the merits – it is a race for gaining the consumer's trust that drives innovation. In such scenario of well-functioning competition several dimensions of measures aiming at consumer protection policies (e.g. strong data protection policies) could very well constitute relevant factors for competitive advantages of a service.

Alongside these forms of consumer harm, in digital markets the **respect and exercise of fundamental rights** are closely related to how markets function and the freedom to choose (e.g. possibility to access different news sources or services competing to offer higher privacy standards to its users). As pointed out by the European Data Protection Board, the increasing level of market concentration is a threat to Europeans rights and

⁸ This was recognized by Robert Bork who once said that "economists, like other people, will measure what is susceptible of measurement and will tend to forget what is not, though what is forgotten may be far more important than what is measured" (Robert H. Bork, *The Antitrust Paradox*)

⁹ The European Commission in its Google Shopping decision indicated that "Google could alter the quality of its general search service to a certain degree without running the risk that a substantial fraction of its users would switch to alternative general search engines" (paragraph 324).

freedoms¹⁰. Thus, it is important to acknowledge the role that competition policy has in ensuring that markets do not undermine fundamental values of the EU.

3. Legal foundations of EU competition law and its relevance for the digital economy

The different forms of abuse and harm described above are empirical matters. The question is now whether we should accept those conducts and, most importantly, whether they are tolerated under the existing competition law framework. This is a normative question that requires a normative answer. To do so, we need first to look at the goals and values of EU competition law to understand what these laws and the enforcement authorities in Europe stand for.

Although some believe that the main objective of competition law enforcement is the efficient allocation of resources, there are in fact multiple economic and non-economic goals (market efficiency being only one of them) that should inform the enforcement and application of EU competition laws¹¹.

In the digital economy, dominant companies often appeal to the efficiencies generated and the attractiveness of their services among consumers to disregard exclusionary and exploitative concerns raised by competition agencies, rivals and users. This view seems to be fuelled by a misconception of the role of the European Commission's "more economic approach" to competition law enforcement in Europe, which argues for the intervention of competition agencies in cases where the anti-competitiveness of the conduct depends on narrowly defined negative welfare effects. However, both competition authorities and courts should never disregard the normative considerations on which a prohibition of abuse is based upon.

The answer to the question of whether a certain practice entails a competition problem – irrespective of the efficiencies it might generate or how popular the concerned undertaking is amongst its customers – depends on the legal foundations of EU competition law. This means that an efficiency analysis can never displace a normative assessment.

4. Competition, consumer and data protection authorities working in tandem

Competition policy should not be seen as an isolated policy. Especially in the digital environment, it is closely related to other EU policies, and in particular to consumer policy. This is because both competition and consumer policies are instrumental to the achievement of the same goal: the establishment of a social market economy (Article 3.3 TEU) with a high level of consumer protection. While competition policy seeks to protect the competitive process to ensure that companies can compete on the merits and therefore offer a wide range of innovative products and services to consumers, consumer policy is about ensuring that consumers are able to make informed choices and their freewill is not

¹⁰ The EDPB noted in a statement that "[i]ncreased market concentration in digital markets has the potential to threaten the level of data protection and freedom enjoyed by consumers of digital services. The data protection and privacy interests of individuals are relevant to any assessment of potential abuse of dominance as well as mergers of companies, which may accumulate or which have accumulated significant informational power." <https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_economic_concentration_en.pdf>

¹¹ Ariel Ezrachi, "The Goals of EU Competition Law and the Digital Economy" (2018), discussion paper written for BEUC <<https://www.beuc.eu/press-media/news-events/discussion-paper-eu-competition-law-and-digital-economy>>

manipulated by firms to generate an anti-competitive advantage over rivals or to unfairly extract more value from consumers (e.g. excessive data collection).

For this reason, it is important that there is a consistent approach in the enforcement of both competition and consumers laws. For example, an exclusionary practice (e.g. by demoting rivals in a ranking for the sake of giving prominence to the undertakings, affiliates or its own vertically-integrated services) can also amount to an unfair commercial practice by a misleading omission in the sense of Article 7 of the Unfair Commercial Practices Directive if consumers are not aware about that situation. This is particularly important for the design of behavioural remedies: from the perspective of consumer and a competition law, remedies need to be designed and implemented in full compliance with both areas of law.

Further to this, competition and consumer policy can benefit from the contribution of other disciplines – such as consumer and data protection and behavioural sciences – that are necessary to understand how consumers behave in digital markets. For example, data protection law can provide legal standards for the development of products and services and behavioural sciences can contribute to the design and testing of consumer-facing remedies to reduce search and switching costs and facilitate switching and multi-homing opportunities. Additionally, a more proactive use of behavioural insights can help enforcers to identify the exploitation of consumer biases by undertakings that aim at undermining competition or extorting consumers (e.g. by collecting excessive amounts of data).

5. A 'reinvigorated' approach to competition policy in the era of digitalisation

The legal foundations of EU competition law are fit for purpose for the digital age. The abstract and dateless nature of the normative principles set out in the EU Treaties make the prohibitions of Article 101 and 102 TFEU broad enough to capture anticompetitive conducts occurring in digital markets. However, their effective implementation requires rethinking and elaborating theories of harm that in the specific cases reflect the Union's goals and values within the remits of competition law. This does not amount to a dramatic change – at least in the EU – of competition law. Instead, it is a call for reinvigorating its enforcement to face the challenges of the digital environment. This has two main consequences:

- On one side, this means adopting a more holistic approach to competition law enforcement through the integration of disciplines that so far have been marginalised by a narrow economic assessment.
- On the other side, to ensure the effectiveness of competition law enforcement through:
 - acceleration of procedures, or if the complexity of the case does not allow a swift resolution, a more proactive use of interim measures;
 - a broader assessment of market power in digital markets and stricter merger control;
 - an empirical design and testing of behavioural remedies and,
 - post-implementation assessment of remedies, not only for legal compliance but also on the market response (e.g. have the anti-competitive effects of the abusive conduct been mitigated).

Competition law enforcement should be seen as complementary to the adoption of ex-ante measures designed to address market failures that go beyond the conduct of one

undertaking. This is particularly important when such market failures constitute an endemic problem that requires the adoption of general *erga omnes* measures.

6. BEUC recommendations

6.1. Need to better understand the dynamics of digital markets

The European Commission should make use of its prerogative to carry-out market investigations in key sectors of the economy to better understand the impact of practices and agreements that shape digital markets. In particular, DG Competition should, as a matter of priority, initiate a sector inquiry into online advertising – as done by some of its national counterparts – to gather data and information about how undertakings and firms are shaping this important market for the provision of zero-price services by consumers.

6.2. Speeding up procedures and pro-active use of interim measures

While it is important to ensure due process and the right of defence of undertakings under investigation, there is a need to make administrative procedures faster and efficient. When this is not possible due to the complexity of the cases, the European Commission should make use of interim measures to prevent that the abusive conduct caused an irreparable harm on competition.

6.3. A broader assessment of market power in digital markets

Following the recent reform of the German Act against Restraints of Competition, the EU should consider adopting similar criteria to assess market power of firms. In this regard, the control of data necessary for the creation and provisions of services should be seen as a proxy for the existence of market power, for example, in the context of the Commission's Guidance document on Article 102 TFEU.

6.4. An assessment of the anti-competitive effects of tacit collusion powered by algorithms

BEUC suggests that the Commission evaluates the existing competition law with respect to its ability to ensure that in the case of (tacit) collusion clear liability can be assigned to the responsible parties involved¹².

6.5. Stricter merger control

BEUC suggests adapting the jurisdiction thresholds of merger control to allow the European Commission to assess acquisitions based on the number of consumers impacted by the merger and the value of the transactions¹³. Additionally, the "potential competition" test should be applied more consistently to prevent that bigger firms absorb small companies like start-ups that in the future could become competitors.

¹² This is in line of the recent recommendations of the German Monopolies Commission (Monopolkommission): *"If, in the context of market observation, concrete indications were to arise that the use of price algorithms favours collusive market results to a considerable extent and that the enforcement of the competition rules is insufficient, a reversal of the burden of proof with regard to the damage caused by an infringement of competition law could be considered. In that way, the liability for financial losses which the collusive use of price algorithms can entail could, in case of doubt, be assigned to the users of such algorithms."*

<http://www.monopolkommission.de/images/HG22/HGXXII_Summary.pdf>

¹³ See BEUC's response to the European Commission's consultation on procedural and jurisdictional aspects of EU merger control <<https://www.beuc.eu/press-media/news-events/updating-eu-merger-rules-would-benefit-consumers>>

6.6. Closer co-operation with consumer and data protection authorities

Digital markets require a multi-disciplinary approach. An anti-competitive conduct is likely to amount to a breach of other areas of law such as data protection and consumer laws. Thus, it is necessary that the different competent authorities work together to provide a coherent and efficient response. For example, the effective implementation of the portability right under the GDPR could have pro-competitive effects by enabling switching. The EDPS Clearing House initiative is a step in the right direction, but a stronger commitment is needed by the authorities concerned.

6.7. Design and testing of consumer-facing remedies

The mitigation of anti-competitive effects generated by the abusive conduct will depend on the appropriate design and testing of remedies, and in particular, consumer-facing remedies where the reparation of the harm depends on changing consumers' behaviours. BEUC recommends that the European Commission when designing a consumer remedy incorporates behavioural insights to increase its effectiveness. In this regard, DG Competition could integrate a unit of behavioural scientists like some national competition agencies have done in the recent years.

6.8. Public policy considerations in competition assessments

As highlighted above, the enforcement work of competition authorities and courts in the European Union should be guided by the principles and values of EU competition law embedded in the treaties. There are however areas in EU law such as merger control in which public policy considerations are excluded even though such controls exist in several Member States. Thus, the European Commission should consider whether there is a need to review the Merger Regulation to allow a scrutiny of an acquisition from a European public policy viewpoint. This is an important element across policy areas (not exclusive to digital markets) to allow a broader assessment of the risks of data concentration resulting from a merger to the exercise of fundamental rights, democracy and pluralism.

6.9. Reparation of the harm caused to consumers and competition

Consumers, as those ultimately affected by abusive conducts, have little or no chances to obtain redress in case of competition law infringements. A more effective collective enforcement mechanism than the current Damages Action Directive should be put in place to obtain compensation for the affected consumers. Unfortunately, the recently proposed Directive on representative actions for the protection of the collective interests of consumers¹⁴ does not apply to competition law infringements. Further to this, part of the fines imposed on companies for breaches of competition law should contribute to projects and initiatives aiming at creating a culture of compliance and helping consumers to reap the benefits of competitive markets.

END

¹⁴ Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM/2018/0184 final)



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