

**ARTICLE 19 submission to the DG COMP
call for contributions about
'Shaping competition policy in the era of digitisation'**

September 2018

Introduction

ARTICLE 19 is an international human rights organisation founded in 1987 that defends and promotes the right to freedom of expression and freedom of information (freedom of expression) worldwide. It takes its mandate from the Universal Declaration of Human Rights, which guarantees the right to freedom of expression and information.

An increasingly important means of expression and to seek, receive, and impart information is through information and communication technologies such as the Internet. ARTICLE 19 has been promoting Internet freedoms for over 10 years and is active in developments of policy and practice concerning freedom of expression and the Internet through our network of partners, associates and expert contacts, including those related to media regulators and technical standard setting bodies.

ARTICLE 19 considers that business actors in digital economy - such as device manufacturers, telecom operators, ISPs, online platforms - have responsibilities with regards to human rights. Those responsibilities reflect the critical role these businesses play in enabling individuals to exercise their right to freedom of expression. This submission explores the role that competition policy shall have in shaping the contours of these responsibilities.

More in particular, this submission addresses the following challenges, providing suggestions on how to overtake them:

- Why competition needs to consider human rights, including the right to freedom of expression;
- Why market concentration is problematic for protection of freedom of expression of users and media pluralism;
- Why consumers' welfare shall include consideration of non-economic values;
- Why consumers' empowerment is a priority for fair and open markets;
- Why internet infrastructure competition has to be preserved to guarantee consumers' choice and rights;
- Why more attention has to be dedicated to exploitative abuses;
- Why emerging technologies raise challenges related to big data.

Why competition needs to consider human rights

In the past decades, a discussion around human rights as upheld by private and public market actors has emerged in a number of fora. It is positive that, in particular digital companies have started to examine the human rights impact of their activities but there remains much to be done. States often lack an adequate framework for the protection of peoples' rights towards businesses. At the same time, companies often do not match the transparency and accountability standards that would guarantee protection of users' human rights.¹

ARTICLE 19 believes that competition policy, which applies horizontally to all sectors and

markets, shall also embrace the approach which is based on protection of human rights. Such a claim does not attribute new competences to the European Commission. In support of these arguments, we refer to the following international and regional standards that support such approach:

- The **UN Guiding Principles on Business and Human Rights** (the Guiding Principles),² and the UN Human Rights Council's Resolution 32/13 of 2016 stressing that "the same rights that people have offline must also be protected online," particularly with regards to the freedom of expression and privacy.³
- The **EU Action Plan on Human Rights and Democracy 2015-2019**,⁴ and the continued focus of the European Commission to incorporate human rights in Commission impact assessments for a number of proposals related to the digital markets.⁵ This approach does not imply to oblige the European Commission to enforce right to freedom of expression, privacy and data protection or other specific rules that protect individuals' human rights. Rather, it suggests that the Commission shall take into account fundamental rights while shaping competition policies and enforcing competition rules.
- **Article 51 of the Charter of Fundamental Rights** clearly establishes that the EU institutions "shall (...) respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."⁶ As evident from its wording, Article 51 imposes two obligations on the Commission. The first, not to enforce any binding acts (decisions) that infringe or undermine any of the fundamental rights guaranteed by the Charter. The second, to actively pursue the enforcement of those rights in its action.
- Finally, we also highlight that all members of the European Commission, when appointed, pledged to uphold the Charter in a solemn declaration before the Court of Justice.

Recommendations:

Against this background, ARTICLE 19:

- Calls DG COMP to include a human rights dimension in its assessments of competitive restraints and their effects on consumers;
- Urges DG COMP to ensure that its efforts to uphold competition rules are compliant with the EU Charter;
- Asks DG COMP to direct its advocacy efforts towards building the capacity of private sector companies acting in the digital environment to recognise and prioritise fundamental rights, and in particular the rights to freedom of opinion and expression in their corporate endeavours.

Why market concentration is problematic for consumers' rights and media plurality

In recent years, there has been a significant increase of market concentration in many sectors. ARTICLE 19 believes that a thoughtful analysis of the impact of increasing concentration in digital markets should take into account its costs for consumers and for society.

For consumers, excessive concentration might result in reduction of choices, services foregone, an adverse impact on innovation and a real **threat to the enjoyment of**

individuals' human rights as well as economic and non-economic freedoms.

For society, concentration is a problem because monopolies and oligopolies might cause **rising assets inequity and a lack of flexibility**. For example, in January 2018, unfortunate security problems were discovered by European security researchers in certain processors; this caused the vast majority of the world's computer systems to suddenly be vulnerable to interception of cryptographic keys.⁷ A more diverse range of market players may have mitigated the exposure to vendor-specific security problems.

Digital market concentration may lead to the **establishment of gatekeepers**. The European Commission's previous decisions in the Microsoft and Google Android cases⁸ exemplify this issue. In addition, ancillary difficulties may be raised, concerning the terms of service and policies associated with a particularly dominant app for the distribution of other apps. In these cases, the terms of service (ToS) and policies may themselves act as a competitive restraint on downstream markets, and they impact the fundamental rights to do business and to express oneself.

ARTICLE 19 is particularly concerned by the fact that if a company controls access to, for example, the social media market, it acts not only as "economic" gatekeeper, but also as "**human rights" gatekeeper**, with particular impact on the rights to freedom of expression and privacy. This does not only manifest itself in this company's ability to dictate standard ToS for its users, but it also raises concerns where governments are able to pressure these gatekeepers into changing their ToS or implementing ToS in way which is not compliant with human rights⁹.

Social media platforms represent one of the main channels which EU citizens and inhabitants rely on when exercising their right to freedom of expression. Therefore, allowing a single player to foreclose the social media market negatively affects the ability of citizens to exercise their freedom of expression.

Moreover, at community level social media platforms with market dominance can exert decisive influence on public debate, which raises issues in relation to **diversity and pluralisms in the online environment**. It is of utmost importance that media freedom and media pluralism are guaranteed online as they are offline.

While positive developments are following in the wake of the General Data Protection Regulation¹⁰, such as standardisation of data portability requirements, substantial work remains to be done.

Recommendations:

ARTICLE 19:

- Urges DG COMP to keep markets open to new entries, by intervening at an earlier stage of market concentration and by targeting conducts of dominant players that have the effect of raising barriers to access and/or of locking-in consumers;
- Calls DG COMP to perform in depth analysis of mergers leading to excessive market concentration. More specifically, when mergers involve media actors, including actors that have control over the flow, availability, findability and accessibility of information and other content online, DG COMP should include in the assessment the mergers' impact on media pluralism, and take appropriate measures to protect the latter to

the benefit of individuals' freedom of expression and access to information.

Why consumer welfare has to include non-economic values

The rise of market concentration imposes also a deep reflection about the goals of competition law and policy. The interpretation of the consumer welfare standard as strictly focused on short-term benefits in terms of prices and quantity has allowed companies to grow and concentrate.

Furthermore, ARTICLE 19 believes that the goal of competition rules cannot be strictly limited to the protection of markets' economic efficiency, but have to embrace the legitimacy of primarily non-economic values of society, such as the creation of fair and open markets, which provide adequate respect for individuals' human rights.

Recommendations:

- ARTICLE 19 urges DG COMP to shift from this traditional consumer welfare standard, to an approach that duly considers, in addition, quality, choice, innovation, and the respect of consumers' human rights in the short, as well as in the long term.

Consumers' empowerment is a priority for fair and open markets

In healthy markets, demand drives supply and products and services are designed to meet consumer needs. For this to happen, consumers should have a certain level of bargaining power towards suppliers. Absent that power, suppliers can impose their own terms and conditions without running the risk of losing customers.

In multi-sided markets which are advertising based, consumers do not pay the supplier directly, and therefore they only exert weak power over the supplier's incentives. This is the case, for example, of the majority of online platform markets today. In this situation, markets are not driven by users' demands, welfare is reduced and, because of network externalities, users' become assets of online platforms with market power, which can then exploit this power by, among others, setting the ToS based on their own needs rather than on the protection of users' human rights.

ARTICLE 19 believes that the European Commission should enhance policies that support users' empowerment, in order to guarantee that the latter maintain the necessary bargaining power towards suppliers. The current companies' approach, which ask users' to accept rigid and opaque ToS often not in line with international standards on freedom of expression and privacy, do not constitute a form of fair agreement, but rather a unilateral imposition, especially in the absence of suitable alternatives.¹¹

Recommendations:

ARTICLE 19:

- Calls on DG COMP to adopt policies that strongly encourage competition on quality and choice, underpinned by protection of human rights, rather than price;
- Urges DG COMP to enhance policies that support consumers' empowerment, to guarantee that the latter maintain the necessary bargaining power towards suppliers.

Internet infrastructure competition has to be preserved to guarantee consumers' choice and rights

Access to the Internet, as well as digital connectivity more broadly, has become an

essential requirement for all, regardless of economic or educational status; and often a key tool to enable to exercise of a broad range of human rights. The European Commission's policy commitment is to establish the conditions for a "European Gigabit society", which is supposed to meet very ambitious connectivity targets by 2025¹².

Against this background, there is a growing role of electronic communications network providers and electronic communications services providers in connecting individuals with the complex infrastructure of wires, cables, satellites and wireless technologies that enable them to "go online."

In the past decade, we have seen two trends in the sector, encouraged by relevant competition policy: a push towards consolidation, and a favourable approach to vertical integration. In many markets, consolidation has led to a few mobile network operators (MNOs) wielding vast market power.¹³ Nevertheless, it remains doubtful that having less than four (4) operators on the market commonly results in efficiencies. A cursory overview of the European Commission's own visualisations of digital sector data¹⁴ does not inspire the confidence that consolidation down to three market players has boosted investments or improved consumer access, prices or use.

Nevertheless, rarely, if ever, the assessment of the dichotomous relationship between fewer and larger providers, or more and smaller ones, has taken into account the impact on consumers' choice or on the enjoyment of their human rights, in particular their freedom of expression. On the contrary, it has usually stayed on economic efficiency considerations for the actors already on the market.

ARTICLE 19 reiterates that excessive consolidation (and thus concentration) results in excessive diminution of consumer choice, and tends to impair the balance between demand and supply bargaining power to the detriment of fairness in the market and often, of the quality of the products and services provided, including the respect of consumers' human rights, such as freedom of expression and privacy.

Moreover, a small number of providers is likely to experience relatively larger difficulty in resisting State rules and pressure that are not in line with international human rights standards, or to oppose to State surveillance measures.

Recommendations:

All this considered, ARTICLE 19:

- Urges DG COMP to protect competition on infrastructure markets, and to implement policies that support market entry of new players;
- Calls on DG COMP to take into account the impact on human rights while assessing the dichotomy among fewer bigger players or smaller players on a market.

More attention has to be dedicated to exploitative abuses

Since 2008, the European Commission has been concentrating on a more economic approach to Article 102 of the Treaty on the Functioning of the European Union (TFEU), scrutinising a conduct based on its effects on the market. With the issuing of its Guidance Paper (2008),¹⁵ the European Commission's enforcement priorities have been limited to exclusionary abuses.

In fact, the Guidance Paper explicitly leaves the exploitative abuses outside its scope, and since 2008 the case law on this type of abuses has been quite rare. Nevertheless, as already recognised by Commissioner Kroes back in 2008, "exclusion is often at the basis

of later exploitation of customers.”¹⁶ Moreover, given that the ultimate objective of Article 102 TFEU is consumer welfare, *a fortiori* this provision should include an assessment of exploitative abuses, given that the latter have the potential to immediately and directly harm consumers.

The direct harm to consumers is thus the main characteristic of an exploitative abuse, which can be put in place through unfair pricing, or through unfair trading conditions.

In multi-sided markets, where users on one side of the market do not pay any monetary price for the service they use, the exploitative conduct may thus concern trading conditions. In other words, what may constitute an abuse is the ToS that the dominant player imposes on its customers.

The courts within the EU have provided an interpretation of “fairness” in trading conditions, referring to a balancing exercise among the rights and obligations of contract parties. A condition going beyond what is absolutely necessary for the achievement of one party’s objective has been considered as an “unfair” limitation of the freedom of the other party, and thus abusive if enacted by a dominant player. Therefore, the courts in the EU countries have shaped fairness referring to an indispensability test, linked to a sort of equity test.

As ARTICLE 19 mentioned earlier, in many digital markets consumers seem to have lost, or at least to have significantly reduced, their bargaining power towards suppliers. As a consequence, suppliers can more easily impose unfair ToS, which consumers have no choice but to accept. This dynamic is made all the more serious by the presence, in the markets at stake, of gatekeepers, and thus of high barriers to the entry of new players, which could constitute a valid alternative for consumers and put competitive pressure on dominant players.

The ToS can result unfair for a number of reasons; by way of example, because they excessively limit consumers’ freedom of expression, or because they collect from consumers an amount of data that is disproportionate and not necessary with respect to the service the company offers.

Recommendations:

Against this background, ARTICLE 19:

- Urges DG COMP to rethink its priorities in the application of Article 102 of the TFEU, to dedicate more attention to exploitative abuses put in place by dominant players in digital markets, particularly those related to unfair trading conditions, and to consider a zero-tolerance policy against abusive exploitation of consumers. This policy should be coupled with measures that, as suggested in previous sessions, aim to lower entry barriers and keep markets open;
- Suggests DG COMP to direct its advocacy efforts to build, among private companies, a common understanding of fairness in trading conditions, and, through this, to help markets in setting ToS standards which are compliant with the international standards on the protection of individuals’ human rights.

Emerging technologies raise challenges related to big data

ARTICLE 19 acknowledges that the need for sophisticated technology and highly trained technologists is a growing pain associated with any competitive technology sector. Nevertheless, given that presently, artificial intelligence (AI) systems predominantly use machine learning, a pre-requisite to compete in the field is access to large amounts of

data. However, currently, only a handful of companies worldwide have access to this amounts of data. In other words, data is the new infrastructure for data-driven innovation, therefore its control might lead to market power.

Moreover, data can be collected in different ways, some of which are less or not at all compliant with EU rules on privacy and data protection¹⁷.

One particular challenge, which the European Commission faces also in its assessments of the advertisement sector, is how to deal with personal data assets. We find that while there is a weak assumption under EU law that personal data "belongs to" an individual as such, it is clear that massive accumulations of data are more often considered assets and resources as such.

Recommendations:

Against this background, ARTICLE 19:

- Urges DG COMP to carefully assess, on a case-by-case basis, the availability and the value of data assets, in order to identify cases where these assets can raise barriers to entry and other obstacles to effective competition in the market. The assessment shall be performed both in cases under Article 101 and 102 of the TFEU, and in merger cases;
- Calls on DG COMP to establish effective remedies to anti-competitive data concentration.

¹ See, for example, Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the UN Human Rights Council, Freedom of expression and the private sector in the digital age, A/HRC/32/38.

² UN Guiding Principles Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy' Framework, developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 7 April 2008, A/HRC/8/5A/HRC/17/31. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

³ UN Human Rights Council 32/13, The promotion, protection and enjoyment of human rights on the Internet, 18 July 2016, A/HRC/RES/32/13, para 1.

⁴ EU Action Plan on Human Rights and Democracy 2015-2019, JOIN(2015) 16 final, Brussels, 28.4.2015.

⁵ For example, the 2015 Regulation on trademarks establishes that rules should be applied in a way "that ensures full respect of fundamental rights and freedoms, and in particular the freedom of expression;" see Regulation EU (2015)/2424, whereas 21). The same holds true for the Commission's legislative proposal on audio visual media services, which states that the "Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to freedom of expression, the freedom to conduct a business, the right to judicial review and to promote the application of the rights of the child enshrined in the Charter of Fundamental Rights of the European Union;" see the European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287 final, whereas 39. Furthermore, the Commission, in its proposal for a Directive for a European Electronic Communications Code, declares that "The proposal also takes full account of the fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union. In particular, the proposed measures aim at achieving higher levels of connectivity with a modernised set of end-user protection rules. This will in turn ensure non-discriminatory access to any content and service, including public services, help promote freedom of expression, ease of business, and enable Member States to comply with the Charter at a much lower cost in the future;" see the European Commission, Proposal for a Directive of the European

Parliament and of the Council establishing the European Electronic Communications Code, COM(2016) 590 final/2.

⁶ Charter of Fundamental Rights of the European Union (2000/C 364/01).

⁷ Reference is made to the Meltdown and Spectre vulnerabilities found in Intel chips in January 2018. Meltdown was independently discovered and reported by three teams, while Spectre was independently discovered and reported by two people. For more information, available at <https://meltdownattack.com>.

⁸ European Commission, Case No. COMP/C-3/37.792 – Microsoft; European Commission, Case No. AT.40099 – Google Android.

⁹ The potential challenge raised in the text is explored, among others, in the Council of Europe Commissioner for Human Rights Issue Paper “The rule of law on the internet and the wider digital world”, 2014, available at <http://www.statewatch.org/news/2014/dec/coe-hr-comm-rule-of-law-on-the%20internet-summary.pdf>. See also ARTICLE 19, Side-stepping rights: Regulating speech by contact, Policy Brief, 2018, available at <https://www.article19.org/wp-content/uploads/2018/06/Regulating-speech-by-contract-WEB-v2.pdf>

¹⁰ Regulation (EU) 2016/679, OJ L 119, 04 May 2016.

¹¹ On this topic see, *inter alia*, ARTICLE 19, Side-stepping rights, *op.cit.*; Ben Wagner, Free Expression? Dominant Information Intermediaries as Arbiters of Internet Speech, in Digital Dominance. The power of Google, Amazon, Facebook and Apple, edited by Martin Moore and Damian Tambini, 2018.

¹² European Commission, Communication – Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society COM(2016) 587 final.

¹³ Among others, the European Commission has recently cleared 4 to 3 mergers in the following countries: Austria (case M.6497 Hutchison 3G Austria/Orange), Belgium (case M.7637 Liberty Global/BASE) The Netherlands (case M.7978 Liberty Global/Vodafone/Dutch JV); Ireland (M. 6992 Hutchison 3G UK/Telefónica Ireland), Germany (case M.7018 Telefónica Deutschland/E-Plus) and Italy (case M.7758 Hutchison 3G Italy/WIND/JV).

¹⁴ See Digital Agenda Scoreboard, key indicators, available at <https://bit.ly/2xVZkTb>.

¹⁵ Communication from the Commission: Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C 45, 24 February 2009, p. 7–20.

¹⁶ N Kroes, ‘Tackling Exclusionary Practices to Avoid Exploitation of Market Power: Some Preliminary Thoughts on the Policy Review of Article 82’ in B Hawk (ed.) *International Antitrust Law and Policy: Fordham Corporate Law Institute Annual Proceedings 2005* (New York Juris Publishing 2006) 384.

¹⁷ Directive 2002/58/EC, OJ L 201, 12 July 2002; Regulation (EU) 2016/679, *cit.*.