

ARTICLE 19 submission to the FTC “Competition and Consumer Protection in the 21st Century Hearings”, Project Number P181201

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 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 developing policy and practice concerning freedom of expression and the Internet through our wide-reaching 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 the digital economy - such as device manufacturers, telecom operators, Internet service providers (ISPs), and online platforms - have responsibilities with regards to human rights. These responsibilities reflect the critical role that businesses play in enabling individuals to exercise their right to freedom of expression.

While thanking the Federal Trade Commission (FTC) for the welcomed invitation to submit comments, ARTICLE 19 contributes to the hearings and public comment process suggesting which role competition law and policy shall have in shaping the contours of the above mentioned business actors' responsibilities.

Question #1: Whether the consumer welfare standard is the appropriate standard for antitrust law and, if not, whether other standards, including a total welfare standard, should be preferred.

The rise of market concentration imposes a deep reflection about the goals of competition law and policy. The interpretation of the consumer welfare standard adopted in the past two decades has strictly focused on short-term benefits in terms of prices and quantity. The consequence of this has been to allow companies to grow and concentrate.

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.

A wider interpretation of the consumer welfare standard is not a novelty in numerous jurisdictions. For example, competition law in the EU has protected consumer welfare as measured in terms of not only prices and volumes of production, but also, and perhaps more significantly, in terms of the “quality”, “variety” and “innovation” of the product

exchanged in the market. This broad (and potentially expansive) understanding of the concept of consumer welfare permeates both the decisional practice of the European Commissionⁱ and the case law of Court of Justice of the European Union (CJEU).ⁱⁱ

The CJEU, in particular, has emphasised that one of the primary goals of competition law is to preserve the consumers' "freedom to choose" in the market,ⁱⁱⁱ both in the short and the long term.^{iv} By conceptualising competition law as a system of protection of individual freedoms, the CJEU has opened the door to use the legal framework provided by competition law to protect other fundamental freedoms, such as the right to privacy of consumers or their right to freedom of expression and information.

Other examples of this can be seen with the national competition authorities of France and Germany, which have already taken significant steps in this direction by recognising that the application of competition law in the digital market can serve as an important tool to protect the right to data protection of online users.^v

Recommendations:

Against this background, ARTICLE 19:

- Urges the FTC to shift from this traditional consumer welfare standard to an approach that duly considers quality, choice, innovation, and the respect of consumers' human rights in both the short and long term.

Question #2: Whether and, if so, how antitrust law should take into account additional public policy concerns such as income or wealth distribution, the bargaining power of large entities, or labor and employment considerations.

The human rights dimension shall be included in the assessment of conducts and of their effects

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 digital companies, in particular, have started to examine the human rights impact of their activities but there still 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.^{vi}

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 FTC. In support of these arguments, we refer to the UN Guiding Principles on Business and Human Rights (the Guiding Principles),^{vii} 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.^{viii}

Media plurality and consumer rights have to be protected against concentration, especially in social media markets

In recent years, there has been a significant increase in market concentration over 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 a 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, a lack of flexibility and rising barriers for new entries to the market.

Digital market concentration may lead to the establishment of gatekeepers. 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 may 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 an "economic" gatekeeper, but also as a "human rights" gatekeeper, with particular impact on the rights to freedom of expression and privacy. This does not only manifest itself in a company's ability to dictate standard ToS for its users, but it also raises concerns over governments that are able to pressure these gatekeepers into changing their ToS or implementing ToS in ways which are not compliant with human rights.

Social media platforms represent one of the main channels which people 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 individuals to exercise their freedom of expression.

Moreover, at a community level, social media platforms with market dominance can exert decisive influence on public debate^{ix}, 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 US in the wake of the EU General Data Protection Regulation^x, such as with the standardisation of data portability requirements, substantial work still remains to be done.

Recommendations:

Against this background, ARTICLE 19:

- Calls the FTC to include a human rights dimension in its assessments of competitive restraints and their effects on consumers;
- Asks the FTC 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;
- Urges the FTC 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 the FTC 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, the FTC 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.

Question #4: What are the highest priority reforms that would improve U.S. antitrust enforcement policy.

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. In absence of that bargaining power, suppliers can impose their own terms and conditions without running the risk of losing customers.

In multi-sided markets that 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, with 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 FTC should enhance policies that support consumers' empowerment, in order to guarantee that the latter maintain the necessary bargaining power towards suppliers. The current companies' approach, which ask consumers' 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.^{xi}

Recommendations:

Against this background, ARTICLE 19:

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

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, only a handful of companies worldwide currently have access to this amount of data. In other words, data is a new infrastructure for data-driven innovation, and control over data might lead to market power.

Moreover, data can be collected in different ways, some of which are less or not at all compliant with the guarantee of individuals' rights to privacy and data protection.

A specific challenge which a number competition enforcers around the world face in their assessments of the advertisement sector is how best to deal with personal data assets. ARTICLE 19 finds that while some regulatory frameworks, such as the EU's^{xii}, include an assumption that personal data "belongs to" an individual, this assumption is weak. It is therefore clear that massive accumulations of data are more often considered assets and

resources as such^{xiii}.

Recommendations:

Against this background, ARTICLE 19:

- Urges the FTC 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 case of anticompetitive conducts and in merger cases;
- Calls on the FTC to establish effective remedies to anti-competitive data concentration^{xiv}.

Question #5: Are there material differences between antitrust/competition policy and law in the United States as compared to the rest of the world? What are the long term effects of such differences on U.S. companies and U.S. consumers?

The focus of ARTICLE 19's answer is on the exploitation of consumers. As the FCC knows, the EU competition rules, and in particular, Article 102 of the Treaty on the Functioning of the European Union (TFEU), prohibits abusive behaviours by companies in a dominant position. The provision forbids exclusionary abuses, which comprise of all practices that a dominant undertaking may use to obstruct others, restrict their options, establish entry barriers and therefore remove or weaken the potential competition. It also forbids exploitative abuses, which directly and indirectly consist of imposing unfair purchase or selling prices or other unfair trading conditions. In this case, the abusive conduct can exploit suppliers or 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 such unfair trading conditions as lead to a reduction in choice or quality of products available to consumers.

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 concern trading conditions. In other words, what may constitute an abuse is the ToS that the dominant player imposes on its customers.

In the European Union, courts have provided an interpretation of the concept of "fairness" of trading conditions by reference to the minimum balance that, according to the courts, must exist between the rights, interests and obligations of the contracting parties that have agreed to trade under those conditions. A condition going beyond what is "absolutely necessary" for the achievement of the 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. From this perspective, the test of "fairness" of trading conditions applicable in EU competition law is essentially a test of "indispensability" or "proportionality" of those conditions^{xv}.

As ARTICLE 19 mentioned earlier, in many digital markets consumers seem to have lost or have experience a significant reduction of their bargaining power towards suppliers. As a consequence of this, 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 be 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^{xvi}.

ARTICLE 19 suggests that if the FTC wants to avoid that US consumers receive a substantially lower level of protection against dominant platforms than their EU counterparts, it shall include in its focus of attention the likely exploitative behaviours those platforms could put in place against consumers.

Recommendations:

Against this background, ARTICLE 19:

- Urges the FTC to rethink its priorities while dealing with dominant players in digital markets. In particular, the FTC shall dedicate more attention to conducts that exploit consumers, 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 the FCT 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.

ⁱ European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009), 2009/C 45/02, paras. 5 and 19; European Commission, Guidelines on Vertical Restraints (2010), SEC(2010) 411, paras. 97 and 101; European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011), 2011/C 11/01, paras. 2, 3, 27 and 28.

ⁱⁱ CJEU (Grand Chamber), Case C-209/10 of 27 March 2012 (Post Danmark I), para. 22; CJEU (Grand Chamber), C-413/14 P of 6 September 2017 (Intel), para. 134.

ⁱⁱⁱ Court of Justice of First Instance (Grand Chamber), Case T-201/04 of 17 September 2007 (Microsoft), paras. 650-651; CJEU (Second Chamber), Case C-280/08 P of 14 October 2010 (Deutsche Telekom), para. 175, and the case cited in it; CJEU (First Chamber), Case C-52/09 of 17 February 2011 (Telia Sonera), para. 28; and CJEU (Second Chamber), Case C-23/14 of 6 October 2015 (Post Danmark II), para. 29.

^{iv} CJEU (First Chamber), Case C-202/07 P of 2 April 2009 (France Télékom), para. 112; CJEU (Second Chamber), Case C-280/08 P of 14 October 2010 (Deutsche Telekom), para. 182.

^v Autorité de la Concurrence and Bundeskartellamt, Competition Law and Data (10 May 2016), pp. 24-25. Available at: <http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf>.

^{vi} 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.

^{vii} 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.

^{viii} 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.

^{ix} The challenge was identified already in 1993, by Jean Tirole and Jean-Jacques Laffont, in their book A Theory of Procurement and Regulation (MIT Press, 1993). Chapter 13 covers regulatory capture as functions

of information asymmetry between regulators and companies (which extends to the asymmetry that exists between companies and individuals, companies and journalists, etc.).

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

^{xi} On this topic see, *inter alia*, ARTICLE 19, Side-stepping rights: Regulating speech by contract, 2018 Policy Brief; 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.

^{xii} See Regulation (EU) 2016/679, cit.

^{xiii} See, among others, World Economic Forum, Personal Data: The Emergence of a New Asset Class, 17 February 2011.

^{xiv} Both scholars and enforcers in different areas of the world are starting to deal with the identification of the right remedy to avoid anti-competitive data concentration. In the EU, among the former, Patrick Ray and others argue that in case of vertical mergers, where both parties have a data set, the acquisition should be blocked when the activities of the merging entities are both dependent on big data advertising revenues (see: Marie-Laure Allain, Claire Chambolle and Patrick Rey, “Vertical Integration as a Source of Hold-up”, Toulouse School of Economics Working Paper, N. TSE-525, 2014, available at: https://www.tse-fr.eu/sites/default/files/medias/doc/wp/io/wp_tse_525.pdf). Among the latter, the European Commission, in the Facebook and WhatsApp merger (Case M.7217) sought insurance, from the acquiring party, of the fact that it was not possible to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts; in other words, that it was not possible to merge the data sets the two companies had respectively at their disposal. However, the guarantee provided by Facebook resulted to be misleading, and the European Commission imposed a fine of 100 million Euro on Facebook for this reason. See European Commission - Press release: Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover, 18 May 2017, available at: http://europa.eu/rapid/press-release_IP-17-1369_en.htm.

^{xv} The origins of the European understanding of “fairness” of trading conditions can be traced back to two important decisions produced by the European Commission in 1971 and 1972, usually referred to as the GEMA I decisions: Decision 71/224/CEE of 2 June 1971; and Decision 72/268/CEE of 6 July 1972. The underlying facts of the two decisions were almost identical: the German copyright collecting society, GEMA, which at the time occupied a quasi-monopolistic position in the relevant market, contractually required all of its members to assign to it, for a minimum duration of six years, any form of copyright that they held, or may hold, on any existing, or future, musical works of their creation. The Commission considered that this requirement, although clearly intended to generate economies of scale in the administration of copyright, was “unnecessary” and “unjustified”, and thus constituted an abuse of GEMA's dominant position in the market. Building upon these two precedents, the Court of Justice of the European Union developed, in its 1974 SABAM decision, the test of “fairness” of trading conditions that would define EU competition law for all the years to follow until today. According to this test, any condition failing to pursue a legitimate objective or going beyond what was “absolutely necessary” to achieve said objective would be deemed to be unfair and thus abusive: CJEU, Case 127/73 of 27 March 1974. The SABAM case concerned the prohibition imposed by the French collecting society, SABAM, on their members, preventing them from licensing their works to third parties. Because the case had only been remitted as a preliminary reference, the Court did not have the chance to make a final determination as to the fairness of the disputed conditions. The Court however stated, as a general proposition of law, that the conditions would be unfair, and thus abusive, if they restricted the right of copyright holders to freely exploit their works beyond what was “absolutely necessary” to ensure the sustainable functioning of collecting societies. The SABAM test of fairness has been subsequently endorsed and applied by the European Commission in its 1982 GEMA II decision and, more recently, its 2001 Grüne Punkt decision: Decision 82/204 of 4 December 1981; and Decision 2001/463/EC of 20 April 2001, respectively. In the Grüne Punkt decision, the Commission emphatically reaffirmed that, under EU competition law, “[u]nfair commercial terms exist where an undertaking in a dominant position fails to comply with the principle of proportionality” [112].

^{xvi} For an extensive analysis of how ToS impact privacy and freedom of expression, see: ARTICLE 19, Side-stepping rights: Regulating speech by contract, Policy Brief 2018, available at: <https://www.article19.org/wp-content/uploads/2018/06/Regulating-speech-by-contract-WEB-v2.pdf>. See also: ARTICLE 19, Facebook Community Standards: Analysis against international standards on freedom of expression, Legal Analysis 2018, available at: <https://www.article19.org/wp-content/uploads/2018/07/Facebook-Community-Standards-August-2018-1-1.pdf>; ARTICLE 19, Twitter Rules: Analysis against international standards on freedom of expression, Legal Analysis 2018, available at: <https://www.article19.org/wp-content/uploads/2018/09/Twitter-Rules-and-Policies-August-2018-.pdf>; ARTICLE 19, YouTube Community Guidelines: Analysis against international standards on freedom of expression, Legal Analysis 2018, available at: <https://www.article19.org/wp-content/uploads/2018/09/YouTube-Community-Guidelines-August-2018.pdf>.