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Competition Issues in the Digital Economy

Contribution by Article 19

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**ARTICLE 19 written contribution for
Agenda Item 3 (a) (1): competition issues in the digital economy**

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 sector 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 written contribution explores the role that competition policy shall have in shaping the contours of these responsibilities.

This document is submitted by ARTICLE 19 as part of the United Nations Conference on Trade and Development 18th Session of Inter-Governmental Group of Experts on Competition Law and Policy (UNCTAD-IGE), taking place on 10 – 12 July 2019. In particular, this contribution is made for the Agenda Item 3 (a) (1): competition issues in the digital economy, and addresses the following challenges, providing suggestions on how to overtake them:

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

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 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.ⁱ

ARTICLE 19 believes that competition policy, which applies horizontally to all sectors and markets, also embraces the approach which is based on protection of human rights. In support of these arguments, we refer to the UN Guiding Principles on Business and Human Rights (the Guiding Principles),ⁱⁱ 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.ⁱⁱⁱ

Recommendations:

Against this background, ARTICLE 19 calls competition authorities:

- To include a human rights dimension in their assessments of competitive restraints and their effects on consumers;
- To ensure that their efforts to uphold competition rules are compliant with the international framework on business and human rights;
- To direct their 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.

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 competition enforcers to shift from their traditional consumer welfare standard, to an approach that duly considers, in addition, choice, innovation, and the respect of consumers' human rights in the short, as well as in the long term.

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. Extreme returns to scale, network externalities and economies of scope have made digital markets prone to market tipping^{iv}.

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.

Digital market concentration may lead to the establishment of gatekeepers. Incumbents often exploit their market powers towards both competitors and consumers.

With regards to the competitors, incumbents often limit openness and interoperability, adopt self-preferencing practices and are adverse to data portability policies. A common example concerns the terms of services (ToS) and policies associated with a particularly dominant app for distribution of other apps^v. In these cases, the ToS and policies

may themselves act as competitive restraint on downstream markets, and they impact the fundamental rights to do business and to express oneself. In addition, distinguished scholars have noted that, through this and similar practices, incumbents aim to impede disintermediation by a partner or complement, and to maintain complete control over the user relationship^{vi}.

With regards to consumers, incumbents often require consumers to agree on terms and conditions that are unclear, difficult to understand and subject to continuous changes. Furthermore, incumbents are able to exploit consumers' behavioural biases with framing, nudging and defaults that can direct the consumers' choice to what it is more profitable for the platform.

ARTICLE 19 is particularly concerned by the fact that if a platform 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 platforms' 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 rights^{vii}.

Social media platforms represent one of the main channels on 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 people 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, such as standardisation of data portability requirements, are following in the wake of the European Union recent General Data Protection Regulation^{viii}, which is acting as standard setter for data protection for numerous digital companies, substantial work remains to be done.

An instrument that can be used to limit market concentration is merger control. The number of acquisitions performed by big tech in the past decade is impressive. Many of these aim to eliminate potential rivals and to reinforce bottlenecks. To properly assess mergers and identify potential anti-competitive effects, a wider view of consumer welfare has to be adopted, which includes not only prices, but also other essential factors like quality, choice and innovation. An assessment made only on the probability of an increase/decrease in prices will not reflect the anti or pro-competitive effect of the change in the market structure.

Traditionally, competition enforcers have focused their assessment on prices because it is a rather simple parameter to be used. Nevertheless, the mere fact that an empirical estimation of quality or innovation is more challenging shall in no circumstance constitute an excuse not to undertake such estimation. It might require a different exercise, and the exploration of a larger range of economic theories by competition enforcers, but it is in no way impossible to perform.

Furthermore, the thresholds traditionally used by competition enforcers, which are based on the parties' turnover, are not sufficient to catch the cases with relevance. A number of States have introduced thresholds based on the value of the transaction^{ix}, which appear to be a better indicator.

Concerning the substantive assessment, ARTICLE 19 joins the call of distinguished actors for a closer look at transactions involving platforms with bottleneck powers^x. Mergers between dominant firms and uniquely likely future competitors should be presumed to be unlawful unless the defendant is able to demonstrate that pro-competitive effects will overtake anti-competitive ones.

Recommendations:

ARTICLE 19 recommends competition authorities:

- 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;

- 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, competition authorities 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.

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 competition authorities 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

ARTICLE 19 calls competition authorities:

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

More attention has to be dedicated to exploitative abuses

The direct harm to consumers is the main characteristic of an exploitative abuse, which can be typically 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.

"Fairness" in trading conditions usually refers 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, fairness can be shaped with reference to an indispensability test, linked to a sort of equity test.

As 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 users' freedom of expression, or because they collect from users an amount of data that is disproportionate and not necessary with respect to the service the company offers. ToS can also be unfair because they exploit consumers' behavioural biases, through nudges, dark patterns and default setting.

Recommendations:

Against this background, ARTICLE 19 recommends competition authorities:

- 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;
- To direct their 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.

Internet infrastructure competition has to be preserved to guarantee consumer 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.

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, especially in Europe and the United States, consolidation has led to a few mobile network operators (MNOs) wielding vast market power^{xii}. Nevertheless, it remains doubtful that having less than four (4) operators on the market commonly results in efficiencies.

Nevertheless, rarely, if ever, has 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 calls competition authorities:

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

Emerging technologies raise challenges related to big data

ARTICLE 19 acknowledged 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 amount of data. However, currently, only a handful of companies worldwide have access to this amount 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 privacy and data protection rules applicable in the relevant territory.

One particular challenge, which competition authorities face especially in the assessments of the advertisement sector, is how to deal with personal data assets. We find that while there is a debate leading to the assumption that personal data "belongs to" an individual as such, from a regulatory perspective such assumption is yet weak, and it is clear that massive accumulations of data are more often considered assets and resources as such.

Recommendations:

Against this background, ARTICLE 19 calls competition enforcers:

- 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 of abuse of dominant position and in merger cases;
- To establish effective remedies to anti-competitive data concentration.

- i 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.
- ii 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.
- iii 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.
- iv These important features of digital markets have been recently highlighted by distinguished experts with different background. See, in particular: George J. Stigler Center for the Study of the Economy and the State, Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee, Report, Draft 15 May 2019, available at: <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure---report-as-of-15-may-2019.pdf?la=en&hash=B2F11FB118904F2AD701B78FA24F08CFF1C0F58F>; Cremer J., Montjoye Y.A., Schweitzer H., Competition policy for the digital era, Final Report, 2019, ISBN 978-92-76-01946-6, doi:10.2763/407537, available at: <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>
- v In various jurisdictions around the world, competition enforcers are investigating these practices. See, among others: Lapowsky I. Spotify’s Apple Complaint Cuts to a Core Antitrust Issue, Wired, 2019, available at: <https://www.wired.com/story/spotify-apple-complaint-warren-antitrust-issue/>; European Commission, Case AT.40099 – Google Android, Decision of 18 July 2018; Karla A. Exclusive: India orders anti-trust probe of Google for alleged Android abuse – sources, Reuters, 2019, available at: <https://www.reuters.com/article/us-google-india-antitrust-exclusive/exclusive-india-orders-anti-trust-probe-of-google-for-alleged-android-abuse-sources-idUSKCN1SG17O>.
- vi See: Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee, cit.
- vii 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>
- viii Regulation (EU) 2016/679, OJ L 119, 04 May 2016.
- ix In the European Union, Germany and Austria have taken the lead in that regard. See: Federal Competition Authority and Federal Cartel Office, Joint Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification of Concentrations, 2017, available at https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Leitfaden/20180709_Leitfaden_Transaktionsschwellen_final.pdf
- x See: Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee, cit.; Cremer J., Montjoye Y.A., Schweitzer H., Competition policy for the digital era, cit.
- xi 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.
- xii In the European Union, the European Commission has recently cleared 4 to 3 mergers in the following countries: Austria (case M.6497 Hutchinson 3G Austria/Orange); Belgium (case M.7637 Liberty Global/BASE); The Netherlands (case M.7978 Liberty Global/Vodafone/Dutch JV); Ireland (M.6992 Hutchinson 3G UK/Telefonica Ireland); Germany (case M.7018 Telefonica Deutschland/E-Plus) and Italy (case M.7758 Hutchinson 3G Italy/Wind/JV).