ARTICLE 19's response to CMA's call for information: Digital Markets Taskforce

July 2020

Submission

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.

Nowadays, digital technologies are an important means of seeking, receiving, and imparting information and exercising the right to freedom of expression. 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.

With this submission, ARTICLE 19 aims to contribute to the work of the Digital Markets Taskforce by suggesting that competition law and policy, as well as pro-competitive *ex ante* regulation, shall have a role in shaping the contours of digital platforms responsibilities. We appreciate the Competition and Markets Authority's (CMA) invitation to submit comments to this call and hope they will be reflected in the recommendations of the CMA Taskforce to the Government.

ARTICLE 19's comments

Preliminary remarks: The impact of digital platforms is not only economic

The CMA's call for information aims to collect evidence and input on 'what intervention, if any, is necessary to protect and promote competition and innovation in digital markets and to address the anti-competitive effects that can arise from the exercise of market power in those markets'. ARTICLE 19 welcomes the initiative and urges CMA not to limit its attention to economic elements, but to include in its assessment how the use (and misuse) of market power affects consumers' human rights.[1]

The behaviours of the major digital platforms have an ever-increasing impact on tens of millions of UK users' rights to privacy, data protection, freedom of expression and information, non-discrimination, to mention a few.[2] As rightly recognised by CMA, winner takes all dynamics are problematic because of the lack of competitive pressure they lead to, as well as because of wider societal consequences, such as the ability for disinformation and fake news to proliferate[3]. Those consequences are becoming and must remain in the attention of those who shape and enforce competition and pro-competitive regulation. Indeed, the latter shall contribute, and never conflict, to the achievement of the societal values that shall drive market, economic and technological developments in the country.

As recognised by the CMA, any pro-competition approach will need to interact with existing pro-competitive and consumer measures as well as existing and proposed interventions, which seek to further wider policy objectives[4]. This cannot be read but as a strong call to avoid silos, and widen the analytical framework that grounds and guides competition and pro-competitive regulatory enforcement. In particular, the Taskforce should recognise broader policy issues can be exacerbated by market dynamics and digital platforms' business models. Rather, the Taskforce should call governments and enforcers to use an adequate analytical framework to weight up remedies and choose ones that achieve not only competition objectives, but also wider public policy objectives.

Recommendations:

- The CMA should include a human rights dimension in its assessment of anti-competitive effects that can arise from the exercise of market power in those markets.
- The Government and the CMA should adopt an analytical framework to weigh up remedies and chose those that achieve not only competition objectives, but also wider public policy objectives.

[1] To a certain extent, the CMA has already recognized this approach in its Report of July 2020, where it states: 'competition concerns can also lead to and exacerbate a range of broader online harms… For example, a thriving and competitive market for independent news and journalism is essential for an effective democracy: if the sustainability of authoritative journalism is undermined, this is likely to worsen concerns around fake news and misleading information. More generally, if users are to be truly empowered to keep themselves and their children safe online, adequate choice over platforms and other digital providers is indispensable." See: CMA, Online Platforms and Digital Advertising, Market Study Final Report, July 2020, p. 71.

[2] ARTICLE 19 has repeatedly argued that competition law and policy needs to consider human rights. See, in particular, ARTICLE 19, Submission to DG COMP, September 2018; ARTICLE 19, Submission to Israel Antitrust Authority, October 2018; ARTICLE 19, Submission to Federal Trade Commission, November 2018.

[3] See CMA Call for information, para 1.13.

[4] See CMA Call for information, para 1.20.

I. Scope of a new approach

1. What are the appropriate criteria to use when assessing whether a firm has Strategic Market Status (SMS) and why?

The assessment of market power should include the assessment of the capacity to dictate quality parameters on the market. In highly concentrated markets, the quality standards adopted by the gatekeeper and/or by unavoidable trading partners become the quality standards of the entire market. In light of this, we believe that a criterion to use when assessing whether a firm holds Strategic Market Status is to look at whether the firm is able to set quality standards in the market. We call on the Taskforce to include in the concept of quality the impact that the product or service has on consumers' fundamental rights, and in particular on the rights to freedom of expression, privacy, data protection and non-discrimination.

Recommendation:

- When assessing the existence of Strategic Market Status, the enforcers should check if the firm is able to set quality standards in the market.

• What evidence could be used when assessing whether the criteria have been met?

To assess the quality parameters of a product or a service, competition enforcers could rely on a consistent and well-structured co-operation with other authorities, which have the relevant expertise and skills to perform such an analysis. Those authorities could be called to provide assistance, for example in the form of opinions on the specific quality parameter of their concern (for example, privacy, non-discrimination etc.), which the competition enforcer should be obliged to take into due account in its overall assessment of the existence of the SMS.

The procedural rules that are necessary to establish this cooperation need to guarantee a smooth, fast, and efficient process, in order not to delay competition enforcement.

Recommendations:

- In its assessment, the CMA should rely on the assistance and advice of authorities and bodies with the relevant expertise.
- The procedural rules that establish this cooperation need to guarantee a smooth, fast and efficient process, in order not to delay competition enforcement.

2. What implications should follow when a firm is designated as having SMS? For example:

• Should a SMS designation enable remedies beyond a code of conduct to be deployed?

• Should SMS status apply to the corporate group as a whole?

• Should the implications of SMS status be confined to a subset of a firm's activities (in line with the market study's recommendation regarding core and adjacent markets)?

Recommendation:

- The focus of regulation should be the service, not the company.

3. What should be the scope of a new pro-competition approach, in terms of the activities covered?

Digital platforms are an increasingly important means of expression, and for users to seek, receive, and impart information. However, what matters for this objective to be achieved is not only the content layer, but also the logical and physical layers behind. Therefore, we are strongly convinced that the pro-competitive approach should encompass each layer of the digital infrastructure.

This is why we support and encourage pro-competitive measures that go in the direction of decentralisation and more competition at each layer, among others through instruments like vertical and functional separation, fair, reasonable and non-discriminatory access to competitors, and interoperability.

Recommendation:

- The pro-competition approach should cover the entire infrastructure, not only the content layer.

4. What future developments in digital technology or markets are most relevant for the Taskforce's work? Can you provide evidence as to the possible implications of the COVID-19 pandemic for digital markets both in the short and long term?

ARTICLE 19 is concerned that part of the strategy to respond to the pandemic is increasingly relying on digital instruments and services, and it will result in even further establishment of surveillance infrastructure. Part of it already exists, part will likely be set in the coming months and possibly years. We are also concerned that questionable narratives about the pandemic and how to fight it will lead to increased acceptance of invasive data collection and data sharing practices by private and public actors, which will violate people's data protection rights. Finally, we fear that the economic crisis that COVID-19 inevitably triggered worldwide will encourage, and will be used to justify, centralising pushes in a number of markets.

The Taskforce, in cooperation with other relevant institutions, has a role to play to make sure that the surveillance infrastructure built in response to the pandemic will not be permanent, and as soon as the emergency is over this surveillance apparatus will be dismantled; that the centralising pushes at different market layers are resisted; that markets remain open to competition and innovation; and that consumers' rights are not unnecessarily and disproportionately sacrificed for the achievement of public security, public health or other similar public objectives.

Recommendations:

The Taskforce, in cooperation with other relevant institutions, should make sure that:

- The surveillance infrastructure built in response to the pandemic will not be permanent;
- The centralising pushes at the different market layers are resisted, and markets remain open to competition and innovation;
- Consumers' rights are not unnecessarily and disproportionately sacrificed for the achievement of public security, public health or other similar public objectives.

II. Remedies for addressing harm

8. What remedies are required to address the sources of market power held by digital platforms?

ARTICLE 19 is aware of the fact that a variety of remedies could be considered for this purpose. However, here we draw the attention on a specific remedy that we believe could help to solve the problems created by social media platforms' market power and could do so by addressing its source.

Nowadays, content curation on social media raises numerous challenges that policy makers, regulators and platforms are struggling to address. The proposal we put forward has its roots in the assumption that high concentration in social media markets[5], coupled with consistent barriers to entry for competitors, plays a fundamental role in the challenges we need to address. Therefore, our proposal aims to fix challenges with content curation by diminishing concentration of power in the market and by lowering barriers to entry for alternative curation services.

Although hosting and curation activities are currently provided as a bundle by the vast majority of social media platforms, this does not need to be the case, and it is not something irreversible. The bundle has a strategic economic value, and it contributes to lock in users and to raise barriers to entry to the market for potential competitors. In other words, by offering both services together, dominant social media platforms manage to protect themselves from competitive pressure and deprive users from alternatives; they are able to hold their gatekeeping position safely.

This scenario is undesirable from a number of perspectives, and has an impact on competition, innovation, users' rights and, to a certain extent, also broader public objectives such as media plurality and diversity. As mentioned, it also results in a number of market failures such as excessive concentration in the market, barriers to entry, and other externalities created by the dominant platforms' behaviors that are not internalised and thus fall on individual users and on society, who pay the costs.

ARTICLE 19 calls for an ex ante remedy to address this situation: oblige platforms with SMS to **unbundle hosting and content curation activities**, and allow third parties to offer content curation to the platforms' users. In other words, what we envisage is that a user that creates or has a profile on Facebook should be asked by the platform whether they want the content curation service to be provided by Facebook itself, or by other players to be freely selected. The option to stay with the dominant platform should be presented as opt-in, rather than opt-out, as this default is more pro-competitive and reduces switching costs (and therefore also avoid that platforms undermine the effects of the unbundling by making the switching hard for users and by nudging them towards a locked-in situation).

Hence, ARTICLE 19 calls for a form of functional separation, not a structural one. In addition, the platform that provides the hosting should remain free to offer content curation too. What changes is that the platform should keep the two services separate and provide competitors the possibility to offer the curation service on its platform; the platform must also allow users to freely choose among service providers.

The unbundling remedy should be designed to address the contractual layer (contractual agreements between the platforms with SMS and the alternative players that provide content curation services to the platforms' users) and the technical layer (how to make this technically possible while ensuring data protection, consumer protection and security).

[5] The high level of concentration in digital platforms markets has been identified by, among others, by the CMA Study (cit.), as well as by Furman review. See Furman et al., Unlocking Digital Competition (2019).

- For the contractual layer, we suggest that platforms provide access to competitors based on fair, reasonable, transparent and non-discriminatory grounds. We also suggest platforms with SMS should not be allowed to change the access conditions unilaterally in a way that nullifies competitors' efforts and investments.

- For the technical layer, we believe the more efficient solution to be that platforms with SMS should open a curation Application Programming Interface (API) to potential competitors. As such, the efficacy of the unbundling remedy is based on the adoption of interoperability solutions, whose details should be defined by the regulator, guided by independent experts with the relevant knowledge and in cooperation with the platform in order to deal with the substantial information asymmetries in the market. Indeed, as explained by distinguished academic experts, various types of interoperability exist, and each of them could best fit different situations and needs[6].

ARTICLE 19 sees the unbundling as a highly pro-competition remedy: it opens the market for content curation and relies on competition among players to deliver more choices and better-quality services to users. Therefore, the unbundling is also capable of addressing the market failures mentioned above. Furthermore, the remedy we suggest is not a novelty in the history of economic regulation; on the contrary, it has been often used in network industries, and especially in the telecom sector. Finally, the unbundling is less invasive or paternalistic than other current proposals to address challenges related to content curation, because it interferes only limitedly on digital platforms' freedom of economic activities and it empowers users to make their own choices, rather than imposing strict standards on the market.

Recommendations:
- Firms with SMS should unbundle hosting and content curation and provide competitors with the possibility to provide content curation on their platforms based on fair, reasonable, transparent and non-discriminatory grounds.
- Users should be free to select the content curation provider of their choice.

9. Are tools required to tackle competition problems which relate to a wider group of platforms, including those that have not been found to have SMS?

ARTICLE 19 believes **interoperability** would drastically reduce the imbalance of power between platforms and users and be instrumental to the achievement of various additional public policy objectives.

Indeed, interoperability would (re)empower Internet users to interact across digital silos and allow them to choose their own online community and appropriate guidelines. An interoperability requirement would ensure that citizens do not sign up to dominant platforms just because there is no other way to communicate with their friends and participate in the social life of their local community, e.g. students at a university. It would also directly strengthen healthy competition among platforms and could even create whole new markets of online services built on top of existing platforms, such as third-party client apps or content moderation plug-ins."[7]

[6] See, in particular, Ian Brown, Interoperability as a tool for competition regulation, preprint of 31 July 2020.

[7] See EDRi, Platform Regulation Done Right, 9 April 2020, p.22.

In other words, interoperability would be a strong facilitator of competition on the merits, rather than on the size of the installed base. In addition, it would provide users with real choices about which service they prefer. This, in turn, will encourage market entry and competition among providers.[8]

In online media markets, interoperability can contribute to reducing the gatekeeping power of platforms with SMS and it can positively impact the type and variety of information that users consume.

Interoperability could also play a role in addressing content moderation issues; in fact, it can enable 'a parallel route by which some of these issues can be addressed - giving users greater choice of different content moderation regimes, even on the same platform'[9]. As explained by academic experts, Mastodon illustrates this possibility, as each of its 'instances' can choose its own moderation rules, with software tools available to ease the work of instance moderators. While the decentralised structure of Mastodon enables community autonomy, more research is needed to assess how this federation model impacts on phenomena like hate speech or disinformation[10].

Overall, to impose interoperability requirements on digital platforms would reflect a long-term vision of the internet as a free, open and decentralised environment, to the benefit of the entire society.

Recommendations:

- Interoperability should be used to drastically reduce the imbalance of power between platforms and users.
- The Government should support more research, and a multi-stakeholder dialogue to identify the right type of interoperability needed in each market.

III. Procedure and structure of a new pro-competition approach

12. What are the key areas of interaction between any new pro-competitive approach and existing and proposed regulatory regimes (such as online harms, data protection and privacy); and how can we best ensure complementarity (both at the initial design and implementation stage, and in the longer term)?

As mentioned throughout this document, we believe that the assessment of digital platforms' behaviours should include their impact on consumers' fundamental rights. Therefore, we consider that any new pro-competitive approach and existing and proposed rules should be designed, interpreted and applied looking at their interactions with regulatory regimes that protect consumers' human rights, and in particular privacy, data protection, freedom of expression and non-discrimination.

ARTICLE 19 has repeatedly advocated for stronger cooperation between competition authorities and other regulators and bodies that have specific knowledge and powers with regard to the various public interest objectives and human rights affected by digital platforms' behaviours and business models[11].

The cooperation we suggest should be bidirectional. Indeed, we are convinced that competition authorities possess unique knowledge and expertise on competition and, more broadly, economic concepts that could inform the action of other regulators and bodies dealing with digital markets.

[8] See Stigler Committee on Digital Platforms, Final Report, September 2019, p.118.
[9] See Ian Brown, *op. cit.*
[10] *Ibid*.
[11] See, among others, ARTICLE 19, Submission to the BEREC public consultation on Work Programme 2021-2025, April 2020.

However, we believe that this exchange and assistance should be reciprocal, and that competition authorities should also inform their action taking advantage of the knowledge and expertise of those other regulators and bodies. In other words, economic and competition principles and concepts have a role to play in informing the enforcement of various regulations and in shaping a number of policies. But the opposite is also true: non-economic principles and concepts, such as the protection of end users' fundamental rights, have to be taken into account while shaping and enforcing economic and pro-competitive regulation and intervention in digital markets.

From a procedural aspect, we are convinced that it is important to build on existing expertise and complement it with consistent and well-structured cooperation among relevant authorities and bodies. Apart from informal exchanges, we suggest setting up formal consultation procedures, such as the issuing of joint opinions and advice. In addition, we support performing regularly joint studies and market inquiries, as the joint effort allows regulators to identify and assess challenges from a variety of perspectives and find solutions that can achieve various objectives simultaneously.

Recommendations:

- Any new pro-competitive approach, and existing and proposed rules, should be designed, interpreted, and applied looking at their interactions with regulatory regimes that protect consumers' human rights.
- To this end, the CMA should cooperate with relevant authorities and bodies, such as the Information Commissioner's Office. This cooperation should be bidirectional and include consultation procedures as well as the regular performance of joint studies and market enquiries.