



Article 19 response to the Israel Antitrust Authority invitation  
to submit comments towards an inquiry  
into competition issues in the digital economy

October 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.

While thanking the Israel Antitrust Authority (IAA) for the welcomed invitation to submit comments, ARTICLE 19 contributes to the inquiry suggesting which role competition law and policy shall have in shaping the contours of the above mentioned business actors' responsibilities.

**Question #1: Do you believe that increased scrutiny of mergers and acquisitions by large technology firms will have an effect on competition? Will it have an effect on incentives to invest in the tech sector? If so, what will the effect be?**

In the first part of its paper, IAA suggests a working definition of digital economy that explicitly excludes telecommunications service providers and the manufacturers and sellers of IT hardware and software. Considering the phenomena of market convergence and vertical integration that strongly characterise the sector, ARTICLE 19 calls on the IAA to reconsider its choice. To do otherwise would make more difficult to understand and properly assess the pro or anti-competitiveness of certain conducts.

Concerning mergers, ARTICLE 19 believes the key point to be not the intensity of scrutiny, but rather the parameters to be used for the latter. In particular, ARTICLE 19 claims that, in order to identify which mergers have anti-competitive effect, a wider view of consumer welfare has to be adopted, that 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 brought about by the merger. Therefore, the assessment of the concentration shall take into account its impact on the mentioned parameters as well.

Traditionally, competition authorities 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 be performed.

Furthermore, in a number of digital markets, the commercial terms used for the provisions of the service (that is the Terms of Services, or ToS) can strongly affect users' human rights, such as privacy and freedom of expression<sup>i</sup>. The greatest example is social media market. The way Facebook provides its service has a substantial impact on the user's privacy (because Facebook requires the user to provide access to an extensive amount of her or his personal data), as well as on the user's freedom of expression (because the algorithm Facebook adopts determines what the user is going to see based on parameters that in no way respect or guarantee pluralism and diversity). ARTICLE 19 argues that when a merger concerns one of these markets, its impact on the protection of consumers' human rights has to receive utmost consideration. An efficient way to ensure this goal could be the introduction of a public interest test in the assessment process, such as the one used in many jurisdictions to assess mergers in media markets.

#### **Recommendations:**

Against this background, ARTICLE 19:

- Suggests the IAA to reconsider its working definition of the digital economy in order to include telecoms service providers, manufacturers and sellers of software and hardware;
- Urges the IAA to attribute utmost relevance to quality, choice and innovation as parameters to assess the impact of mergers;
- Calls the IAA to consider the impact on consumers' human rights of mergers concerning product/service markets where the way the service is provided has an influence on such rights. The introduction of a public interest test could represent a valid instrument to reach this aim.

**Question #2 – Should competition authorities, and the IAA in particular, consider unique characteristics of the digital economy when defining markets and evaluating market power? If so, how would you suggest doing so?**

ARTICLE 19 calls the IAA to look at market power in a way that includes in the analysis not only the company's capability to raise prices without losing consumers, but also its capability to lower quality without losing consumers, or the capability to impose unfair trading clauses without losing consumers. In other words, market power has to be assessed considering not only price, but also other parameters of competition, such as quality, innovation and choice.

In social media markets, it is all the more important to do so as a decrease in quality, as well as the imposition of unfair trading clauses, is due to have a direct and substantial impact on consumers' human rights. By way of example, a decrease in quality of Twitter, Facebook or Youtube's ToS, will directly affect users' freedom of expression and access to information, because it affects the type and quality of information they have access to, more often see, share with others.

Moreover, ARTICLE 19 believes that in social media markets, which are characterised by the existence of a tipping point, the assessment of the "potential competition" concept remains problematic, as it is difficult to identify the right standard.

Finally, ARTICLE 19 expresses its concerns about the anti-competitive leverage that companies with large datasets exert on secondary markets. Such leverage not only allows companies to extend their position of market power to those markets as well, but can also create substantial barriers for new competitors that do not have access to such wide-ranging data<sup>ii</sup>.

#### **Recommendations:**

All this considered, ARTICLE 19:

- Urges the IAA to assess market power not only with reference to price, but also to other essential parameters of competition such as quality, choice and innovation;
- Calls the IAA to pay specific attention to unfair trading clauses that stem from market power in social media platforms, as they can have a substantial negative impact on consumers' human rights, and in particular on freedom of expression;
- Suggests the IAA to rethink about the parameters for the assessment of potential competition in markets characterised by tipping;
- Calls the IAA to consider the control of large data set as a proxy for market power and to adopt adequate measures to avoid these data sets to be used for anti-competitive leverage in secondary markets.

**Question #3: Do you believe that increased enforcement of behavioural remedies, such as unbundling applications and operating systems, duties to provide data and so forth, would be beneficial to competition? Could such measures aid early-stage firms – and firms in general- in innovative market segments? Is the threat of market foreclosure currently a bar to the development of innovative products and services in the tech sector?**

ARTICLE 19 recognises that recent theoretical advances in the study of vertical integration gives cause for competition authorities to broaden their application of behavioural remedies, subject to the usual rigorous considerations of anti-trust enforcement<sup>iii</sup>.

In this regard, we call attention to the European Commission's decisions in the Facebook / WhatsApp case<sup>iv</sup>, and in the most recent Google Android case<sup>v</sup>. While it is clear that these decisions present supervisory challenges for the European Commission, and it remains to be seen whether a pro-competitive effect occurs in spite of the strong vertical synergies and network effects, we do not believe that competition authorities should back down from developing these strategies further.

**Question #4: Do you consider access to data a competition concern for the technological sector? What, if any, measures, would you suggest competition authorities, and the IAA in particular, should consider in dealing with possible market foreclosure due to the competitive advantage of such 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 rely on statistical methods such as machine-learning, a prerequisite to compete in the field is access to large amounts of data. However, currently access to the largest and most diverse datasets are in the hands of only a few companies worldwide. In other words, as the capacity to generate and store large datasets is a crucial part of the new infrastructure for data-driven innovation, 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<sup>vi</sup>.

One particular challenge, which competition enforcers face also in their assessments of the advertising sector, is how to deal with personal data assets. ARTICLE 19 finds that while there is a weak assumption under, for example, 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 the IAA to carefully assess, on a case-by-case basis, the availability and the value of data assets, in order to timely 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 anti-competitive conducts by one or more companies, and in merger cases;
- Calls on IAA to establish effective remedies to anti-competitive data concentration<sup>vii</sup>.

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<sup>i</sup> 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>.

<sup>ii</sup> Concerns about data as a source of market power have been raised by a number of scholars and competition authorities around the world. See, among others, Ezrachi and Stucke, e-Distortions: How data-polies are dissipating the internet potential, in Digital Platforms and Concentrations, ProMarket Production, 2018, available at: <https://promarket.org/wp-content/uploads/2018/04/Digital-Platforms-and-Concentration.pdf>; Autorité de la Concurrence and Bundeskartellamt, Competition Law and Data, 2016, available at: [https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2); European Data Protection Board, Statement of the EDPB on the data protection impacts of economic concentration, August 2018, available at: [https://edpb.europa.eu/our-work-tools/our-documents/other/edpb-statement-economic-concentration-27082018\\_en](https://edpb.europa.eu/our-work-tools/our-documents/other/edpb-statement-economic-concentration-27082018_en)

<sup>iii</sup> Consider, for instance Wu Tim, The Master Switch: The Rise and Fall of Information Empires, Knopf, New York, 2010, and the body of work developed by, among others, Patrick Rey at Toulouse School of Economics: <https://www.tse-fr.eu/people/patrick-rey?tab=publications>

<sup>iv</sup> European Commission, Case COMP/C-3/37.792 Microsoft, Case No COMP/M.7217 - Facebook/Whatsapp

<sup>v</sup> European Commission, Case AT.40099 – Google Android. While the decision remains to be made public, Google's proposed remedies have been publicised in the press: [https://www.theregister.co.uk/2018/10/17/google\\_android\\_licencing\\_eu/](https://www.theregister.co.uk/2018/10/17/google_android_licencing_eu/) It is notable that the remedies proposed by Google are likely to create a short-term discontentedness with downstream market actors who no longer enjoy free access to Google's APIs, but may in the long-term enable the form of price-competition between developer tools that competition authorities are more accustomed to dealing with.

<sup>vi</sup> In the European Union, for example, while gathering and processing data, companies shall respect the provisions of Directive 2002/58/EC, OJ L 201, 12 July 2002, and Regulation (EU) 2016/679, OJ L 119, 04 May 2016.

<sup>vii</sup> Both scholars and enforcers are starting to deal with the identification of the right remedy to avoid anti-competitive data concentration. 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](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

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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](http://europa.eu/rapid/press-release_IP-17-1369_en.htm).