ARTICLE 19 contribution to the DG COMP call for evidence on Article 102 TFEU Guidelines

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ARTICLE 19 is an independent human rights organisation that works around the world to protect and promote the right to freedom of expression and the right to freedom of information. We have extensive expertise in competition and market regulation and we are well aware that the guarantee of freedom of expression and media pluralism in both online and offline markets is strongly interlinked with how markets are regulated and how power dynamics are shaped therein. As such, we have repeatedly called for pro-competitive approaches, including in our previous submissions to the European Commission.

ARTICLE 19 welcomes the call for evidence issued by the European Commission in order to seek feedback on the adoption of Guidelines on exclusionary abuses of dominance, and it is grateful for the opportunity to submit a contribution. We make our recommendations below.

1. Focus on exploitative abuses

Since 2008, the European Commission focused its attention on exclusionary abuses under Article 102 of the Treaty of Functioning of the European Union (TFEU). It must be noted, though, that there is nothing in the Treaties that justifies this choice. There is no justification in the 2008 Guidance paper[1] either: indeed, the Commission simply affirmed that this is what it was going to do (see, for example, § 7).

However, by studying the *travaux préparatoires* of the Rome Treaty, scholars have concluded that the initial intention of the EU founding fathers was to sanction primarily exploitative conducts, rather than exclusionary practices[2], via Article 102 TFEU. Nevertheless, due to the high burden of proof and concerns over the risk of market regulation, the Commission has seldom investigated this type of abuse under Art. 102 TFEU[3].

[1] 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/C 45/02), OJ C 45/7.
[2] Akman P. (2009), Searching for the Long-Lost Soul of Article 82 EC, 29(2) Oxford Journal of Legal Studies, pp 267-303.
[3] Since 2008, the European Commission has adopted only one decision on exploitative abuse, Aspen – Pharma (Case AT.40394 – Aspen, decision of 10 February 2021). For an analysis of the topic, see also: Chalmers D., Davis G., Monti G., (2014). European Union Law, 3rd edition, Cambridge University Press, § 1035-1036. More specifically

Interestingly though, in the same Guidance paper, the European Commission also claimed that the exclusionary abuses that matter the most were '*those types of conducts that are more harmful to consumers*'[4]. Based on this approach, it is difficult to justify the narrow focus taken in 2008, and the exclusion of exploitative behaviours against consumers from the enforcement priorities. It is even more difficult to justify this approach at present, and for the years to come. In fact, in the past 15 years in numerous markets, *in primis* digital ones, we have witnessed an ever-increasing exploitative approach by dominant players, who consistently put in place behaviours that exploit consumers and impose unfair conditions on them[5].

The underenforcement of Article 102 TFEU with regards to exploitative abuses is evident: since the issuing of the Guidance paper, the European Commission ran only one case on exploitation[6]. To put an end on this underenforcement would not only be in line with the adequate enforcement of the Treaty rules, but also more consistent with the European Commission's current overall competition policy approach. In particular, it would better reflect the policy priorities identified in the 'Making Markets Work for People' initiative: clearly, to achieve this goal it is key to contrast all those dominant companies' behaviours that, rather than serving people, exploit them[7].

Our recommendations

We strongly recommend the European Commission to include exploitative abuses in its enforcement priorities with regards to Article 102 TFEU and to amend the Guidance paper accordingly.

This inclusion would:

- Make the enforcement of competition rules better fit to address current challenges, especially in digital and data-driven markets.
- Remedy the negative impact of a decade-long underenforcement.
- Be more in line with the Commission's current competition policy approach.

2. Tying and bundling: consumers' oriented approach

As recalled by a variety of experts[8], tying and bundling are common practices among dominant players and can have significant impact on competition in the market as well as on consumers' rights.

In many digital markets, a variety of services are offered as a bundle. Bundles bring various advantages from a business perspective: they shield the provider from competition, they raise high barriers to entry for competitors (both at horizontal and vertical level), and they have the potential to lock in consumers and to make switching more difficult, if not impossible. As such, these practices have played a key role in the establishment of the closed digital ecosystems that dominate the current environment. A further

on exploitative abuses in digital markets: Botta, M. Wiedemann K. (2019). EU Competition Law Enforcement vis-à-vis Exploitative Conducts in the Data Economy Exploring the Terra Incognita, Max Planck Institute for Innovation and Competition Research Paper No. 18-08.

[4] Commission Guidance paper (2009/C 45/02), cit. § 5.

[5] This trend has been highlighted by a number of experts and scholars. See, among others: Stigler Committee of Digital Platforms, Final Report, 2019, available at: https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf; Moore M. and Tambini D. (eds), (2018). Digital Dominance: The Power of Google, Amazon, Facebook, and Apple, Oxford University Press; Mazzucato, M., Entsminger, J. and Kattel, R. (2020). Public value and platform governance. UCL Institute for Innovation and Public Purpose, Working Paper Series (IIPP WP 2020-11). Available at: https://www.ucl.ac.uk/bartlett/public-purpose/wp2020-11.

[6] Case AT.40394 – Aspen, cit.

[7] For a more elaborated discussion on why it is key for the European Commission to focus on exploitative abuses, please refer to the parallel submission to this call for evidence made by a number of civil society organisations, including ARTICLE 19 (available here: https://www.balancedeconomy.net/wp-content/uploads/2023/04/Joint-civil-society-submission-TFEU-Article-102-.pdf)

[8] See, among others Cremer, J., de Montjoye, Y. A., & Schweitzer, H. (2019). Competition Policy for the Digital Era; Australian Competition and Consumer Commission, (2019). Digital Platforms Inquiry, Final Report, (in particular chapters 3, 6 and 7).

confirmation of these practices' relevance for fairness and contestability of markets is given by the attention dedicated to them by the Digital Markets Act[9].

Tying and bundling impact consumers directly and thus are relevant not only from an exclusionary perspective. They limit consumers' freedom of choice, a fundamental pillar of open and competitive markets. Moreover, they can constitute unfair terms and conditions under Article 102 TFEU.

The 2008 Guidance paper explains that the European Commission will normally act when tying or bundling is put in place by a dominant undertaking if two more conditions are fulfilled: (i) the tying and tied products are distinct products, and (ii) the tying practice is likely to lead to anti-competitive foreclosure[10].

With regards to the first condition, the Commission declares:

'*Evidence that two products are distinct could include direct evidence that, when given a choice, customers purchase the tying and the tied products separately from different sources of supply, or indirect evidence, such as the presence on the market of undertakings specialised in the manufacture or sale of the tied product without the tying product [...] or of each of the products bundled by the dominant undertaking […]*'.[11]

In many instances tying or bundling are a business strategy only, which means that from a technical perspective the tied or bundled services can be offered separately. However, when it comes to the 'distinct' criteria used in the Guidance, we note that with regards to numerous digital services there is no market for the stand-alone service: the relevant services have been offered as a bundle from the very beginning to avoid competition and make competitors' entrance in the market extremely difficult or impossible.

Thus, it would be counter-productive and not reflective of reality to assess the effects of a bundle based on whether '*when given a choice, customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier*', because most likely customers have never been given the choice in the first place, and/or the bundling or tying behaviour has made impossible the appearance of a stand-alone market for such services. Therefore, the Commission should focus instead on the exploitative element of limiting or eliminating the consumers' freedom to choose and on the foreclosure effect for actual or potential competitors.

Furthermore, it must be noted that the anti-competitive effect for consumers of tying or bundling behaviours can concern parameters other than pricing. For example, it can concern the quality of the service to be assessed based on, among others, how privacy or free expression friendly the service is. Indeed, many digital services interfere with consumers' right to privacy, data protection or freedom of expression. In an open, fair and competitive market, providers would have incentives to improve their services based on these parameters too, and consumers would have alternatives to choose from. In a scenario where a dominant player abuses its power by imposing tying or bundling, the latter does not suffer competitive pressure and it has no incentives to improve the quality of its services; rather, it might be able to lower the quality of the product without losing consumers, who are locked in by the tying or bundling. The Commission should take these elements into utmost account when making its assessment of these conducts, and swiftly act against them.

A concrete example is the recommender systems used by social media to curate content on their platforms. The vast majority of social media platforms provide hosting and curation activities as a 'bundle'. This means that two services – hosting a users' profile on the platform (with pictures, videos, and a variety of content that one can upload) and content curation – are offered together as one. The bundle has a strategic economic value for the platform, because curation is extremely more monetizable than hosting. It also contributes to locking in users who do not and cannot look for the content-curation services outside the platform. By offering both services together, large social media platforms manage

[9] See, for example, Articles 5(7), 5(8), 6(3), 6(6)

[10] Guidance paper, cit. § 50.

[11] Ibid. § 51.

to both protect themselves from competitive pressure and deprive users of alternatives; they are able to hold their gatekeeping position safely.

This bundle has a clear foreclosure effect on competitors, who don't have access to the platforms' users and cannot provide their services on the platform. It has also a significant exploitative effect on consumers, who are left with no option about the recommender systems they want to use, and with no negotiating power with the social media platforms. The exploitation concerns parameters other than price, and in particular data protection and freedom of expression. In fact, the curation of the content is based on the heavy tracking of consumers' behaviours on the platform, and it's optimised for engagement or similar parameters to the detriment of consumers' exposure diversity as well as their cognitive autonomy.

As explained in our Taming Big Tech policy, ARTICLE 19 believes this kind of bundle should constitute a priority for the European Commission[12].

Our recommendations

We recommend the European Commission:

- To dedicate utmost attention to tying and bundling practices in digital markets and their exploitative effects towards consumers.
- To take into due account that the condition of 'distinct products' might not fit in the assessment of many bundles in the digital environment, where the creation of a market for the separate services has been impeded from the origin by the dominant players' behaviour and where consumers have been never offered any choice.
- To include, in the assessment of these conducts, the analysis of the exploitative effects they can have on consumers with regards not only to price but also, and more importantly, to quality parameters such as the level of guarantee of data protection, and of the rights to privacy and free expression.

[12] For more details, please see: ARTICLE 19, Taming Big Tech. A pro-competitive solution to protect free expression. (2021). Available at https://www.article19.org/wp-content/uploads/2023/02/Taming-big-tech-UPDATE-Jan2023-P05.pdf.