

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Implications of E-commerce for Competition Policy - Note by BEUC

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More documents related to this discussion can be found at www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm

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1. Introduction.

1. E-commerce is growing fast in Europe and across the world. It has been estimated that by 2020 global e-commerce will reach \$ 4 trillion in sales¹. This growth is explained by the take-up by consumers: In 2017 an estimate of 70% of internet users between the age of 16 and 54 years old have bought products online for private use².

2. While it promises clear benefits for consumers (e.g. more convenience, wider choices and cheaper prices) and firms (e.g. reduction of operational costs, wider customer reach-out), e-commerce also brought new challenges³ alongside the increasingly important role of platform companies. In the web 1.0, companies embraced the opportunities of the World Wide Web to directly reach consumers through online shops. In the web 2.0 these same companies rely much more on intermediaries whose marketplaces allow consumers to find multiple offers from the different providers through the same infrastructure.

3. The main role of online platforms in the web 2.0 has been to connect downstream consumers with upstream firms in a vertical relationship. Some platforms that facilitate these relationships have grown considerably in the last decade.

4. For example, Amazon has a market share of 20% of total online sales in the EU, with national market penetrations of 40% in Germany and 27% in the UK⁴, and could be the first company in history to break the \$1 trillion market capitalisation mark very soon⁵. Google, on the other hand, has a market share in general search of over 90% in most EEA countries⁶. In France, the majority of revenue in the online advertising market is generated by Google and Facebook, which has resulted from the accumulation of several competitive advantages⁷.

5. The fast growth of these and other firms would not be problem provided that their growth is the result of fair competition and the respect of the relevant legislation such as consumer and data protection laws. Unfortunately, in Europe many of these firms have been found in breach of EU laws distorting competition and harming consumers⁸.

6. Further to this, new technologies such as monitoring mechanisms of online prices and automatised decision-making processes are likely to impact e-commerce markets by challenging traditional consumption models e.g. in the way consumers make transactional decisions.

7. This contribution aims at outlining the challenges the web 2.0 and the emergence of platforms pose to a competitive e-commerce ecosystem and what the policy response could be to protect the interests of European consumers.

2. Competition challenges in e-commerce.

8. Competitive online markets are essential for consumer welfare. However, the deployment of certain practices could restrict competition, negatively affecting consumers. Below we identify four situations in which consumers risk losing out as a result of anti-competitive behaviour.

2.1. Gatekeeping and interdependence.

9. Many firms, especially SMEs, depend on the infrastructure of intermediary platforms to reach consumers and, vice-versa, consumers rely on these platforms to find and purchase goods and access digital services. This has created a situation of interdependence between firms, platforms and consumers in which the intermediary in a two-sided market is in a position to influence the transactional process i.e. the interaction between consumers and firms offering their products on the platform.

10. Against this background, online platforms - irrespective of whether they are in a dominant position⁹ or not - can become de facto gatekeepers of information, choice and prices, gradually restricting the ability of consumers to freely choose between a wide array of innovative options.

11. Some platforms have the ability to restrict the information that consumers can get about services offered through them. For example, consumers are not aware that subscribing to the popular music service Spotify via Apple's AppStore is more expensive than subscribing on Spotify's website or through Android's Play Store. This happens because Apple applies a 30% surcharge on all Spotify subscriptions, allegedly to create an anti-competitive advantage to push consumers to Apple's own music service.¹⁰ Apple limits the information consumers get through its popular AppStore by not allowing Spotify to inform its customers about the different prices. In practice, Apple abuses its gatekeeping position through its control of the AppStore to create an (anti-) competitive advantage in favour of one of its vertically-integrated services (Apple Music) over its main rival (Spotify), directly harming consumers.

12. Similarly, social networks and search engines also define what appears on consumers' screens. Motivated by political¹¹ or commercial reasons, these gatekeepers can influence consumers by strategically showing specific content and information. But this targeting of content and information is not necessarily done by an editor as we would expect on a journal or magazine or is the result of neutral automated processes. It is done by algorithms designed to maximise the value of consumer data for advertising purposes¹².

13. Additionally, platforms that act as gatekeepers while offering vertically integrated services to consumers might not allow other competitors to reach consumers on an equal footing. Google has been a paradigmatic example, exercising this type of control through its search engine. For example, companies like Yelp and Kelkoo¹³ have faced significant difficulties to reach consumers in the local search¹⁴ and shopping markets because Google down-ranks the competitors of its vertically-integrated services in the results of its popular search engine or by simply excluding them from the results shown to consumers with its algorithms.¹⁵ As a result, not only companies but also consumers are affected, getting a reduced amount of options without even realising¹⁶.

2.2. Price manipulation.

14. In a market economy, prices are theoretically set by the interaction between demand and supply forces. However, that equilibrium can be affected by multiple factors. In an ever more interdependent e-commerce market, platforms can deploy practices that impact how prices are set.

2.2.1. Parity clauses.

15. Platforms like Booking.com and Amazon were able to always offer cheaper prices for hotels and e-books through the imposition of parity clauses (often referred as “most-favoured-nation clauses” (MFNs)). These contractual clauses are often used in vertical relationships between suppliers and platforms to reduce the risks of free riding on the platforms’ investments in promoting the suppliers’ products.

16. Parity clauses can have different scopes according to the obligations imposed on suppliers: First, ‘narrow’ parity clauses generally link the price and terms offered by the online platform to those available directly on the upstream supplier’s website in order to guarantee that the latter will not be less attractive than the offers available on the platform. Secondly, ‘wide’ parity clauses have the same effect as the previous one but in addition they seek to guarantee that the prices available on other platforms, including competitors, would not be lower than those advertised on the platform. These practices have both online and off-line effects by impeding firms to compete on the basis of prices outside the platforms’ marketplaces.

17. In 2015, Booking.com made commitments to narrow the scope of its parity clauses – commitments which were initially accepted by the French, Swedish and Italian competition authorities who investigated these clauses.¹⁷ Under these commitments, Booking.com agreed to abandon its wide parity clauses (which established price, availability and booking conditions’ parity with respect to other Online Travel Agencies – OTAs¹⁸) and replace them with narrow clauses, establishing a direct linear link to govern price and term parity with each hotel’s own direct website.

18. An investigation by the German competition authority (Bundeskartellamt) reached a decision concerning the use of wide parity clauses by the hotel portal HRS.¹⁹ The MFNs covered parity not only in price, but also in room availability, booking conditions and mobile applications. The Bundeskartellamt noted that HRS had strictly monitored hotels’ adherence to the terms of these clauses and threatened to terminate contractual relations with hotels that failed to apply the parity. The Bundeskartellamt subsequently held that the wide MFNs at issue were set to directly restrict the price-setting freedom of hotels on the other sales channels.²⁰ This decision was confirmed in January 2015 by the Düsseldorf Higher Regional Court condemning the restrictive effect that parity clauses had on the hotel companies’ freedom to act.²¹

19. Most recently, the European Commission’s decision²² accepting the commitments of Amazon on the e-books case noted that “[i]n the absence of the Business Model Parity Clauses, E-book Retailers appeared **open to innovating in order to launch alternative business models to distribute e-books in novel manners which are appealing for consumers**. E-book Retailers consider business models as an additional way to differentiate themselves from competitors and under certain circumstances can count on the support of E-book Suppliers to achieve a critical mass of titles to be sold through those alternative business models.” (highlighted is mine). Thus, consumers are being prevented from a wider variety of e-books services as a result of the scheme implemented by Amazon to consolidate its position in the eBooks market²³.

20. These examples show that by imposing terms that are favorable exclusively to them, platforms can impact the development of competing services, to the detriment of innovation and ultimately hindering consumer choice.

2.2.2. Automatised price co-ordination.

21. Another problematic practice in the field of pricing relates to the automatisation and price adjustments based on tracking of users and competitors' prices and algorithms.

22. According to the European Commission's final report on the e-commerce sector inquiry, an automatised adjustment of prices is a growing tendency among retailers. The report notes that: "*A majority of retailers track the online prices of competitors. Two thirds of them use automatic software programmes that adjust their own prices based on the observed prices of competitors. (...) The availability of real-time pricing information may also trigger automatised price coordination.*"²⁴

23. These practices create the risk of prices being set based on artificial market dynamics in which prices are decided according to the data generated by consumers when searching for products and services. If unchecked, these practices can be directly harmful to consumers, and disruptive to the overall competitiveness of online markets. The challenge that competition authorities face in this field concern the fact that price adjustments as a result of market monitoring are not necessarily anti-competitive²⁵ but could distort competition in detriment of consumer prices.

2.2.3. Loss of interface and imposition of default options on consumers.

24. The imposition of default options on consumers has been an issue of concern of competition authorities²⁶. However, such cases arose in an environment where consumers had an interface where, at least in theory, they were able to compare offers. With the introduction of interface-less technologies such as digital butlers or assistants, consumers would have to rely on pre-programmed options to access products and services without having to look at a screen.

25. These devices run on algorithms that are programmed to direct consumers to certain products, services, retailers or information. In an Internet of Things (IoT) context, a producer of smart fridges could for instance conclude an agreement with a specific retail so that the fridge would order by default a particular brand of orange juice when the owner of the fridge runs out of it, or a digital assistant could be programmed to play music from one specific streaming music provider. These default options mean that choices are imposed on consumers making it difficult to opt-out.

26. Some argue that consumer simply have to change the default option. However, this does not happen in the majority of cases, in the same way as consumers did not switch from Microsoft's default browser from their PCs²⁷ or do not uninstall Google's apps from their Android phones to use competing services. Therefore, consumer choice ends up being manipulated by default options from which it is very difficult for consumers to get out from not only due to the behavioral aspects of consumption but especially due to the way these products are designed.

2.2.4. Automatic Decision Making (ADM) and consumers' purchasing process.

27. Default options will become even more problematic in ADM processes. While ADM can reduce search costs for consumers e.g. an algorithm that is able to compare multiple offers at the same time, these processes can limit considerably the consumers' autonomy to make consumption decisions. And, this introduces new challenges as it changes the consumption paradigms²⁸. For example, consumer law seeks to protect consumers against practices which are "likely to materially distort the economic behaviour"²⁹ of consumers. If the consumer trusts his or her transactional decisions to

ADM process, how will such distortion be materialised in the consumer's economic behavior? This has implications not only for consumer protection but also for competition policy. ADM is also likely to impact the behaviour demand forces. This is because the algorithm's choice may not always reflect consumers' preferences³⁰ or purchasing power. This lack of control will be exacerbated by the use of default options: consumers might end up accepting ADM applied to certain services and products as a default without actually checking whether an optional choice was available.

28. Furthermore, consumption predictions made by ADM processes depend on the data that consumers provide or generate as an input. Leaving aside privacy considerations, this situation also raises concerns from a competition perspective because firms holding large datasets - coincidentally those that are in a gate-keeping position - have an advantage over other firms that could develop new technologies. Thus, it is necessary to consider whether competition authorities and regulators should look at means to facilitate the access to data that is necessary (e.g. upon a market-failure assessment) for the development of innovative consumer products and to prevent lock-in effects³¹.

3. Policy response.

29. The evolving economic landscape in e-commerce paints an uncertain future regarding the existence of competitive pressure, the ability of markets to self-correct and the prospect of disruptive innovation. For public policy, new competition dynamics in the digital economy call for the use of the normative scope of competition enforcement and its ability to protect consumers effectively. New market realities and business strategies - like those we exposed in the previous section - raise questions as to the optimal use of competition law, its effectiveness, and more broadly, its goals.

30. In the European Union, there is a large set of rules (e.g. consumer protection, data protection and competition laws) that apply to firms operating in online markets. Some of the challenges that we mentioned can be addressed by means of effective enforcement of these laws while others would require regulatory intervention to either adapt the existing rules (e.g. Commission's proposal for a New Consumer Deal³²) or introduce new rules that address behaviour that cannot be tackled by means of enforcement or which require an *erga-omnes* approach (e.g. Commission proposal for a platform to business regulation³³).

31. Thus, competition law enforcement is one tool to ensure that firms do not distort competition, but it has its limits. This requires to also look at situations that require the intervention of the legislation to address markets' structural problems such as the asymmetry of information and bargaining power of market players.

3.1. Enforcement of EU competition law.

32. The European Courts have long held that competition law "is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure".³⁴

33. In *T-Mobile*, the CJEU elaborated that European competition law "is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such".³⁵ The Court added that a "concerted practice may be regarded as having an anti-competitive object even though there is no direct connection between that practice and consumer prices".

Similarly, in her opinion in this case, Advocate General *Kokott* noted that the protection of the structure of the market indirectly also protects consumers “[b]ecause where competition as such is damaged, disadvantages for consumers are also to be feared.”³⁶

34. Consideration for the “weakening of the structure of competition”³⁷ is not unique to Article 102 TFEU. In *GlaxoSmithKline Services Unlimited v Commission*,³⁸ the Court of Justice held that Article 101 TFEU “aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such.”³⁹ The protection of an ‘effective competition structure’ provides for a wider prism than that reflected by the consumer welfare benchmark. It draws attention to the competitive process *as such* and has led to the condemnation of conducts that impair genuinely undistorted competition.⁴⁰

35. The current competition framework is capable to address many of these concerns: Article 101 can be used to tackle a wide range of contractual arrangements that lead to a disruption of competition in online markets. Similarly, Article 102 is broad enough to encompass almost all behaviours that could concern a dominant firm.

36. For example, contractual practices between firms which are likely to frustrate the realisation of the Union’s objectives such as market integration⁴¹ can be tackled under 101 TFEU. Similarly, setting prices by means of algorithms designed to monitor and adjust prices could be considered as a cartel if these technologies are used to implement an agreement between firms. The recent Google decision from the Europe Commission is a good example of the application of 102 TFEU to the impact of the abuse of dominance of firms in one market (general search) on another market (comparison sites). This is an important precedent because when it comes to digital markets, the cross-market impact of anti-competitive behaviours are more prominent than in off-line markets.

37. However, there are situations in which ex-ante regulation should be preferable to ex-post investigations. Particularly when it comes to platforms that facilitate and have the power to influence the relationship between firms and consumers is it necessary to look at more efficient means to guarantee a fair treatment of those firms by the platforms to keep markets competitive.

3.2. A case for regulation.

38. Competition law enforcement is an important and strong tool to prevent firms from distorting markets in detriment of consumers, but it has its limits. There are situations that need to be addressed by means of legislation that applies to an entire sector of the economy and to all market players.

39. An example of this type of market legislation includes the European Commission’s proposal for a regulation “on promoting fairness and transparency for businesses users of online intermediation services”⁴². This proposal aims at increasing the transparency of online platforms regarding ranking and treatment of firms that rely on intermediation services to reach consumers. Although this is an instrument aimed at protecting business users of platforms, consumers should also benefit by the eventual creation of more competitive market places.

40. Consumer protection laws can play an important role by protecting consumers’ freedom of choice. For example, marketing laws should specifically address practices that aim at misleading consumers about the nature of the offers displayed in an e-commerce platform. The recent European Commission proposal for a New Consumer Deal

introduces a new unfair commercial practice in the annex of the Unfair Commercial Practices Directive concerning the “[use of] editorial content in the media, or providing information to a consumer’s online search query, to promote a product where a trader has paid for the promotion without making that clear in the content or search results or by images or sounds clearly identifiable by the consumer (advertorial; paid placement or paid inclusion)”. This measure protects consumers against offers that are placed as a result of a payment for inclusion and not because of merit or relevance (e.g. in the listing of offers and retailers in an online marketplace).⁴³

41. With the emerge of ADM, a question that deserves consideration is whether the legislator should limit the use of default options in e-commerce. Consumers are likely to rely on these technologies for reducing search costs and facilitating the purchasing process of goods and services. However, firms could abuse that trust to exploit consumers biases with the aim of promoting their own vertically integrated services by the imposition of default options from which consumers are highly unlikely to opt-out.

42. There are already examples of this type of intervention in the field of consumer law and data protection laws. For example, the Consumer Rights Directive⁴⁴ sanctions the so-called pre-ticked boxes⁴⁵ in which traders seek to obtain payments for additional services from consumers by using default options⁴⁶. Similarly, the General Data Protection Regulation⁴⁷ establishes a principle of data protection by default to ensure that, by default, only personal data which are necessary for each specific purpose of the processing are processed⁴⁸.

43. Inspiration could be drawn from these instruments when it comes to the use of default options by firms providing marketplaces and technologies that allow consumers to access different products and services. For example, it could be established that when a firm offers vertically integrated services competing with other firms, the use of default options should be limited by allowing the consumer to decide among different options when configuring the service by the first time.

4. Conclusions.

44. E-commerce provides opportunities for firms to reach consumers across national markets and consumers have the possibility to access a wide range of products and prices from different providers. These opportunities should not be undermined by practices aiming at creating an anti-competitive advantage for firms that due to their intermediation position are able to exclude competitors of their vertically integrated products. In some cases, competition law enforcement can tackle such behaviours but in others, regulatory intervention might be needed. In particular, new developments such as ADM combined with the use of default options require special attention as these tools can be used as a means to exploit consumers’ biases leading to the exclusion of competitors and therefore a reduction of consumer choice.

5. About BEUC

45. BEUC acts as the umbrella group in Brussels for its members, 43 independent national consumer organisations from 31 European countries (EU, EEA and applicant countries). Our main task is to represent them at European level and defend the interests of all Europe’s consumers.

46. BEUC investigates EU decisions and developments likely to affect consumers, with a special focus on financial services, food, digital rights, consumer rights, enforcement & redress, sustainability, health, safety, energy and trade.

¹ Worldwide Retail and Ecommerce Sales: eMarketer’s Estimates for 2016-2021.

² Eurostat (2017), “E-commerce statistics for individuals”, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics_for_individuals (accessed on 12 May 2018).

³ Hunter J. and Riefa C. (2017), “The Challenge of Protecting Consumers in Global Markets”, study commissioned by BEUC and vzbv, available at http://www.beuc.eu/publications/beuc-x-2017-122_the_challenge_of_protecting_eu_consumers_in_global_online_markets.pdf (accessed on 12 May 2018).

⁴ JRC (2017), “Platform to business relations in online platform ecosystem”, JRC Digital Economy Working Paper 07, p. 4, available at <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc109186.pdf> (accessed on 12 May 2018).

⁵ Bloomberg (2018), “Amazon Regains No. 2 Title as One Analyst Eyes \$1 Trillion Value” available at <https://www.bloomberg.com/news/articles/2018-04-26/amazon-eyes-second-biggest-market-cap-surg-ing-past-microsoft> (accessed on 12 May 2018).

⁶ European Commission decision of 27 June 2017 in Google Search (Shopping), Case AT.39740, para. 280.

⁷ Autorité de la Concurrence (2018), Opinion no. 18-A-03 of 6 March 2018 on data processing in the online advertising sector, available at http://www.autoritedelaconcurrence.fr/doc/avis18a03_en_.pdf (accessed on 12 May 2018).

⁸ European Commission (2016), “Results of the public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy”, available at <https://ec.europa.eu/digital-single-market/en/news/results-public-consultation-regulatory-environment-platforms-online-intermediaries-data-and> (accessed on 12 May 2018).

⁹ This is when a company has a market share of 50% or more: Judgement of 3 July 1991, C-27/76, *AKZO Chemie BV v Commission of the European Communities*, EU:C:1991:286, para. 60; Judgment of the Court of First Instance of 30 January 2007, T-340/03, *France Télécom SA v Commission of the European Communities*, EU:T:2007:22, para. 100; Judgment of the General Court of 29 March 2012, T-336/07, *Telefónica, SA and Telefónica de España, SA v European Commission*, EU:T:2012:172, para. 150.

¹⁰ *The Verge* (2015), “Rival music services say Apple’s App Store pricing is anticompetitive”, available at <https://www.theverge.com/2015/5/6/8558647/apple-ftc-spotify-app-store-antitrust> (accessed on 12 May 2018).

¹¹ *Washington Post* (2013), “Could Google tilt a close election?”, available at https://www.washingtonpost.com/opinions/could-google-tilt-a-close-election/2013/03/29/8d7f4e6-9587-11e2-b6f0-a5150a247b6a_story.html (accessed on 12 May 2018).

¹² This was put in evidence by a recent article by the *Australian* that revealed that Facebook was able to identify when young people felt vulnerable, which was a good time to advertise certain products. Thus, a teenager who feels insecure could be served while flipping the pictures of his or her Facebook friends with personalised advertising of products tailored to exploit that situation of vulnerability. Facebook is therefore controlling the information—in this case in the form of advertising—displayed on the users account to maximise its revenues from advertisers. Although this might not raise competition concerns, this could lead, at least in Europe, to infringements of both consumer and data protection laws.

- ¹³ Politico (2017), “Kelkoo CEO: Google is ‘screwing’ entire online shopping industry”, available at <https://www.politico.eu/pro/kelkoo-ceo-google-is-screwing-entire-online-shopping-industry/> (behind paywall)
- ¹⁴ *Forbes* (2016), Why Is Yelp Fighting With Google? CEO Jeremy Stoppelman Explains, available at <https://www.forbes.com/sites/quora/2016/02/23/why-is-yelp-fighting-with-google-ceo-jeremy-stoppelman-explains/#3e94e2467865> (accessed on 12 May 2018).
- ¹⁵ *The Register* (2019), When algorithms attack, does Google hear you scream?, available at https://www.theregister.co.uk/2009/11/19/google_hand_of_god (accessed on 12 May 2018).
- ¹⁶ BEUC (2017), “How Google is eroding consumers’ freedom to choose”, available at <http://www.beuc.eu/blog/how-google-is-eroding-consumers-freedom-to-choose/> (accessed on 12 May 2018).
- ¹⁷ The authorities were appointed by the ECN to jointly lead the European national proceedings regarding MFNs. On the investigation, see: Navarro Varona E. and Hernandez Canales A. (2015), “Online Hotel Booking”, CPI Antitrust Chronicle May 2015 (1).
- ¹⁸ Booking.com (2015), “Booking.com Announces Support of New Commitments in Europe”, available at <http://news.booking.com/bookingcom-announces-support-of-new-commitments-in-europe/> (accessed on 12 May 2018).
- ¹⁹ Bundeskartellamt (2013), decision of 20 December 2013 in *HRS-Hotel Reservation Service*, B9 - 66/10, available at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Kartellverbot/B9-66-10.pdf;jsessionid=9BE25EB94E65170764A6BA609635D89A.1_cid378?_blob=publicationFile&v=3 (accessed on 12 May 2018).
- ²⁰ Ibid. point 49.
- ²¹ Higher Regional Court of Düsseldorf, decision of 09 January 2015, *Kart 1/14 (V)*, point 83, VI.
- ²² European Commission decision of 04 May 2017 in E-book MFNs and related matters (Amazon), AT.40153.
- ²³ BEUC (2017), Commitments offered by Amazon in e-book investigation (AT.40153), available at http://www.beuc.eu/publications/beuc-x-2017-016_are_commitments_offered_by_amazon_in_e-book_investigation.pdf (accessed on 12 May 2018).
- ²⁴ European Commission (2017), Final Report on the E-commerce Sector Inquiry, para. 13, available at http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf (accessed on 12 May 2018).
- ²⁵ OECD (2017), “Algorithms and collusion. Competition policy in the digital age”, available at <http://www.oecd.org/daf/competition/Algorithms-and-collusion-competition-policy-in-the-digital-age.pdf> (accessed on 12 May 2018).
- ²⁶ European Commission Decision of 16 December 2009 in Microsoft (tying), COMP/C-3/39.53
- ²⁷ Ibid. para. 48.
- ²⁸ BEUC (2018), “Artificial Intelligence and Consumers”, upcoming paper.
- ²⁹ Article 5(3) Unfair Commercial Practices Directive.
- ³⁰ Gal M. and Elkin-Koren N. (2017), “Algorithmic Consumers”, *Harvard Journal of Law and Technology*, Volume 30, Nro. 2, p. 15.
- ³¹ See: Drexel J. (2018), “Data Access and Control in the Era of Connected Devices”, upcoming study commissioned by BEUC.

³² European Commission (2018), “A New Deal for Consumers: Commission strengthens EU consumer rights and enforcement”, IP/18/3041, available at http://europa.eu/rapid/press-release_IP-18-3041_en.htm (accessed on 12 May 2018).

³³ European Commission proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238 final, 26.4.2018.

³⁴ Judgement of 21 February 1973, C-6-72, *Europemballage Corporation and Continental Can Company Inc. v Commission*, EU:C:1973:22, para. 26; Judgement of 15 March 2017, C-95/04, *British Airways Plc v Commission* Court of Justice, EU:C:2007:166, para 106; Judgment of the Court of First Instance of 30 January 2007, T-340/03, *France Télécom SA v Commission of the European Communities*, EU:T:2007:22, para. 266; Judgment of 17 February 2011, C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, para. 24; Judgment of 16 September 2008, joined Cases C-468 to 478/06, *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEEVE*, EU:C:2008:504, para. 68; and Judgment of 14 October 2010, C-280/08, *Deutsche Telekom AG v European Commission*, EU:C:2010:603, para. 176.

³⁵ Judgment of 4 June 2009, C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:343, para. 38.

³⁶ Opinion of Advocate General Kokott of 19 February 2009, C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:110, para. 71.

³⁷ Judgment of 6 October 2015, C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651, paras. 72-73.

³⁸ Judgment of 6 October 2009, C-501/06, *GlaxoSmithKline Services Unlimited and others v Commission and others*, EU:C:2009:610

³⁹ *Ibid.* para 63.

⁴⁰ In the context of Article 102 TFEU, note the special responsibility on dominant undertakings repeatedly recalled by the CJEU: See Judgment of 2 April 2009, C-202/07 P, *France Télécom SA v Commission of the European Communities*, EU:C:2009:214, para.105; Judgment of 17 February 2011, C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83, para. 24.

⁴¹ See for example: European Commission cross-border pay-tv investigation AT.40023.

⁴² European Commission proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238 final, 26.4.2018.

⁴³ BEUC (2018), “Plugging the Gap in Consumer Rights. What a New Deal For Consumers Should Look Like in 2018”, available at <http://www.beuc.eu/publications/beuc-x-2018-023_what_a_new_deal_for_consumers_should_look_like_in_2018.pdf> (accessed on 12 May 2018).

⁴⁴ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (*OJ L 304, 22.11.2011, p. 64–88*)

⁴⁵ Article 22.

⁴⁶ “Before the consumer is bound by the contract or offer, the trader shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader’s main contractual obligation. *If the trader has not obtained the consumer’s express consent but has*

inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.” (highlighted is mine).

⁴⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (*OJ L 119, 4.5.2016, p. 1–88*)

⁴⁸ Article 25.