



November 22, 2017

To whom it may concern,

On behalf of the Center for Data Innovation, it is our pleasure to submit these comments to the European Commission in response to its recent impact assessment on “fairness in platform-to-business relations,” a study to investigate practices by online platforms—digital services that cater to two-sided markets—in their relations with other businesses.<sup>1</sup> The nonprofit, nonpartisan Center for Data Innovation is the leading think tank studying the intersection of data, technology, and public policy. With staff in Washington and Brussels, the Center promotes pragmatic policies designed to maximize the benefits of data-driven innovation in the public and private sectors.

Online platforms drastically reduce the costs of market entry for businesses and enable entirely new business models. However, their success at creating competition and innovation is a function of their flexibility in designing the rules and terms of their services. Policymakers should continue to allow platforms to set their terms of service because these businesses are best positioned to optimize their platforms for both consumers and producers.

The impact assessment suggests new regulation to address disputes between platforms and businesses. But proper enforcement of existing law is sufficient. Just as shopping centers can set and change their policies about who can sell what and how, platforms should be allowed to do the same. And just as shopping centers have an incentive to treat their tenants fairly, so too do platforms have it in their interests to behave fairly, lest they lose the supply side of their platform to competitors, and the demand side along with it. The impact assessment also cites data access as a possible cause for regulation. Industry-specific rules and anti-trust enforcement will work better than comprehensive rules governing data access, because the latter would fail to account for the nuances of platform-to-business relationships in the multitude of different scenarios, and harm consumer choice and competition between platforms.

Yours faithfully,

Daniel Castro  
Director  
Center for Data Innovation  
[dcastro@datainnovation.org](mailto:dcastro@datainnovation.org)

Nicholas Wallace  
Senior Policy Analyst  
Center for Data Innovation  
[nwallace@datainnovation.org](mailto:nwallace@datainnovation.org)



## PLATFORMS BOOST COMPETITION AND INNOVATION

Online platforms are online businesses that facilitate commercial interactions between at least two different groups—with one typically being suppliers and the other consumers. Airbnb, Amazon, BlaBlaCar, Deliveroo, Facebook, Google, TaskRabbit, Uber, and Xing are all platforms, but they have different business models and they interact with end-users and other businesses in different ways. Consequently, each platform has created different rules to optimize these interactions.

Online platforms have enabled wider producer and consumer choice, greater competition, and the evolution of entirely new-data driven business models by lowering market entry costs for businesses and providing a means of more easily finding and delivering goods and services to customers. Part of their ability to do this stems from the flexibility they have in how their platforms function and who operates on them.

For example, Amazon can open its service to third-party sellers precisely because such competition is more of a benefit than a threat to its business model, as it helps the firm to attract more customers who may go on to buy items directly from Amazon, even if the company is now only a middleman for a significant share of transactions. It is comparable to a supermarket whose own-brand products compete with those of a third party, which they have no obligation to stock on their shelves, but do anyway because doing so makes their store more attractive to shoppers (although platforms give suppliers more opportunity to transact directly with customers than supermarkets do, in addition to facilitating payments). This provides customers with greater choice, and provides businesses with an additional route to market with lower costs, including lower fulfillment costs.

Attempts to have policymakers set rules for platforms are misguided. For example, some businesses dislike that platforms do not always give them access to their customers' details, thus making it harder for them to do direct marketing or move their customer base to another platform.<sup>2</sup> This is not something that policymakers need to address. Regulating access to customer data would put some companies' concerns ahead of consumer choice, because it would limit competition between different kinds of platforms. A platform that gives sellers full access to buyers' contact information, such as Amazon Marketplace or eBay, might attract more sellers, and the wider choice of goods and services may in turn attract more buyers. Conversely, a platform that chooses to act as a trusted broker, sharing only the information necessary to enable



transactions, such as Uber or Airbnb, may attract more buyers and, in turn, sellers keen to access a larger market. Both consumers and producers should be free to choose between the alternatives, rather than have regulators attempt to select the best model, as they are best suited to determine which type of platform works best for them.

Platforms also provide data that supports other businesses. For example, online mapping platforms allow bricks-and-mortar companies to ensure potential customers can find them, but data from these services are also widely used by a diverse array of apps that incorporate geolocation tools, from delivering food to hunting Pokémon. Similarly, social media platforms like Facebook and LinkedIn can serve as identification and authentication tools for third-party services, offloading some of the security burden that would otherwise fall on those companies. These benefits are especially useful to small businesses who typically lack the necessary resources and expertise to do this on their own. Indeed, platforms play a key role in bringing needed efficiencies and economies of scale to markets, something the EU economy, with its sub-optimal large number of small, inefficient firms, urgently needs.

## **THE EU SHOULD RELY ON EXISTING LAW TO LIMIT UNFAIR BEHAVIOR**

Two-sided markets are not new (consider shopping centers or airports), nor are competitive supplier-seller relationships (such as those in supermarkets), therefore neither is the awareness of a need for laws to punish unfair and anti-competitive behavior within them. These laws already exist. Companies that breach contracts, mislead their suppliers, or mistreat their workers risk prosecution under the applicable laws.

According to the impact assessments, some business complain that limitations to the jurisdiction of European courts are sometimes an obstacle to redress for unfair practices.<sup>3</sup> But many of the major U.S.-based online platforms are answerable to commercial lawsuits in the European Union because they have registered seats in EU member states. Foreign platforms that do not have an EU base tend to have fairly small commercial footprints in the EU, if any at all, which tremendously weakens their capacity to do any real harm to European businesses in the first place. On the rare occasion that one among this small segment of online platforms does manage to cause harm in Europe with unfair businesses practices, then if that platform is domiciled in the United States—which, as the impact assessment points out, most are—there is still recourse to another mature body of commercial law.

The impact assessment also highlights a concern among some businesses that platforms could deter lawsuits with the threat of commercial retaliation.<sup>4</sup> The Commission has not yet discovered



evidence of this occurring, but if it did, regulators could take enforcement actions for attempts to suppress illegal behavior.

## **THE EU SHOULD USE INDUSTRY-SPECIFIC RULES AND EX-POST ANTI-TRUST INVESTIGATIONS TO ADDRESS ANTI-COMPETITIVE DATA-BLOCKING**

The impact assessment suggests comprehensive regulation of platform-to-business relationships as one option for resolving businesses' concerns about access to data.<sup>5</sup> But existing competition law and industry-specific rules are far better for distinguishing between anticompetitive data-blocking and the legitimate control of access to data, because they preserve regulators' ability to account for the myriad complex circumstances in which such behavior can occur.

While anti-trust concerns about companies possessing large quantities of data are overblown—not least because similar data is often available from other sources—some companies do have privileged access to particular types of data, often because of government regulations.<sup>6</sup> When such companies unfairly block competitors' access to that data without a good reason, policymakers should intervene.<sup>7</sup> But that intervention need not always be regulatory, much less broad regulation that covers many sectors.

Instead, policymakers should judge cases on their own merits. Platforms can legitimately prevent or charge for access to some kinds of data, such as analytics of aggregate user behavior for marketing purposes. Such practices are only unfair when they involve abuse of market power in order to stifle competition, which is already illegal under existing law. The commissioner for competition has the power to punish platforms if anti-competitive behavior is proven, and this power does not exclude anti-competitive data-blocking.

Where the Commission identifies persistent data-sharing disputes without compelling evidence of illegal behavior, it should convene dialogue among businesses leaders to encourage them to negotiate industry-specific guidelines that address the specific scenarios that give rise to problems, rather than impose broad regulations on businesses' access to platform data in general. This approach will avoid the distortions far-reaching regulation would create, and address many disputes between platforms and businesses without the need for action by policymakers.

Where this approach fails to resolve disputes, policymakers may then consider regulations that target specific industries. A recent report by the Center for Data Innovation found that



incumbents in several U.S. markets, such as real estate, financial services, and aviation, block access to data in a way that limits competition and hurts consumers.<sup>8</sup> When this occurs, policymakers should intervene, such as occurred in banking with the second Payment Services Directive (PSD2). This reasonable piece of regulation will boost competition in financial services by making it easier for banking customers to share their data with third party service providers using open application programming interfaces (APIs).

## CONCLUSION

Online platforms create competition by reducing costs for businesses and allowing customers to choose between different options and scrutinize prices to a degree that was not possible in pre-Internet markets. While the kind of competition platforms enable is unique, many of their other economic characteristics—such as catering to two sided markets, the fact other businesses rely on platforms as routes to market, the fact platforms often compete with those same businesses, and the fact platforms control large quantities of valuable data, occur in various sectors, as the above comments illustrate.

It is for these reasons, as well as the great diversity of platforms' business models, that broad regulations on platform-to-business relations would be ill-advised, because they risk imposing restrictions on business models they are not suited to, which would stifle competition and innovation at the expense of consumers. Policymakers should apply the tools they already have at their disposal for promoting fairness and enforcing the law, and limit regulatory interventions to specific, clearly-defined sectors where they will work as intended, without creating harmful distortions.

---

<sup>1</sup> "Inception Impact Assessment: Fairness in platform-to-business relations" Ares(2017)5222469, (European Commission—DG Connect, October 25, 2017), [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5222469\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5222469_en).

<sup>2</sup> Ibid, page 2.

<sup>3</sup> Ibid, page 2.

<sup>4</sup> Ibid, page 2.

<sup>5</sup> Ibid, page 4.

<sup>6</sup> Joe Kennedy, *The Myth of the Data Monopoly: Why Antitrust Concerns About Data Are Overblown* (Information Technology and Innovation Foundation, March 6, 2017), <https://itif.org/publications/2017/03/06/myth-data-monopoly-why-antitrust-concerns-about-data-are-overblown>.



---

<sup>7</sup> Daniel Castro and Michael Steinberg, *Blocked: Why Some Companies Restrict Data Access to Reduce Competition and How Open APIs Can Help* (Center for Data Innovation, November 6, 2017) <https://www.datainnovation.org/2017/11/blocked-why-some-companies-restrict-data-access-to-reduce-competition-and-how-open-apis-can-help/>.

<sup>8</sup> Ibid.