



September 28, 2018

Margrethe Vestager
European Commission
Rue de la Loi / Wetstraat 200
1049 Brussels

Re: Shaping competition policy in the era of digitisation

Dear Commissioner Vestager,

On behalf of the Center for Data Innovation (datainnovation.org), we are pleased to submit comments in response to the call for contributions for future challenges of digitisation for competition policy.¹

The Center for Data Innovation is the leading think tank studying the intersection of data, technology, and public policy. With staff in Washington, D.C., and Brussels, the Center formulates and promotes pragmatic public policies designed to maximize the benefits of data-driven innovation in the public and private sectors. It educates policymakers and the public about the opportunities and challenges associated with data, as well as technology trends such as predictive analytics, open data, cloud computing, and the Internet of Things. The Center is a non-profit, non-partisan research institute affiliated with the Information Technology and Innovation Foundation.

In these comments, we argue that the collection of large amounts of data alone does not present a threat to competition and shifts in competition policy that would treat it as such would negatively impact data-driven innovation. Moreover, large companies, particularly those offering online platforms, enable many innovations to scale and offer consumers important benefits.

¹ "Shaping competition policy in the era of digitisation," European Commission, n.d.
<http://ec.europa.eu/competition/scp19/> (accessed September 21, 2018).



COMPETITION, DATA, PRIVACY, AND AI

As the costs of data collection, storage, and processing decrease, a growing number of companies are using ever larger amounts of data to provide goods and services. However, some observers argue that, in the case of companies aggregating large amounts of data, competition policy should be extended to incorporate concerns about the collection and use of data beyond clear examples of anticompetitive behavior.² The general argument is that the mere act of collecting large amounts of data, such as the vast quantities of personal data collected by social-networking platforms, search engines, and e-commerce sites, gives companies an unfair competitive advantage and that competition policy needs to incorporate this analysis.³

Regulators should not adopt this line of reasoning. While it is true that data can be used in anticompetitive ways, existing competition policy can handle such abuses. In fact, when analyzing allegations of such behavior, it is often helpful to imagine whether regulators would object if the activity under scrutiny involved some critical input other than data. This helps clarify whether the threat to competition is truly due to control of an important resource or to ungrounded fears about the uniqueness of data.

In some cases, data use—rather than data collection—should trigger competition concerns.⁴ However, when it comes to competition policy, regulators should focus on anti-competitive behavior and not on structural issues, such as how much data a company holds. Extending competition review

² See Maurice E. Stucke and Allen P. Grunes, *Big Data and Competition Policy* (New York: Oxford University Press, 2016).

³ Margrethe Vestager, “Big Data and Competition” (speech before the EDPS-BEUC Conference on Big Data, Brussels, September 29, 2016), http://ec.europa.eu/commission/2014-2019/vestager/announcements/big-data-and-competition_en; European Commission, “Online Platforms and the Digital Single Market Opportunities and Challenges for Europe” (communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, May 25, 2016 COM(2016) 288), 13, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016DC0288>. See also UK Competition and Markets Authority (CMA), “Online Platforms and the EU Digital Single Market” (written evidence, (OPL0055), CMA, London, October 23, 2015), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internalmarket-subcommittee/online-platforms-and-the-eu-digital-single-market/written/23391.html>. Organization for Economic Co-operation and Development (OECD), Committee for Information, Computer and Communications Policy, “Exploring Data-Driven Innovation as a New Source of Growth: Mapping the Policy Issues Raised by ‘Big Data,’” (Paris: OECD, Directorate for Science, Technology and Industry, June 18, 2013), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP\(2012\)9/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP(2012)9/FINAL&docLanguage=En).

⁴ Daniel Castro, “Blocked: Why Some Companies Restrict Data Access to Reduce Competition and How Open APIs Can Help,” Center for Data Innovation, November 6, 2017, <http://www2.datainnovation.org/2017-open-apis.pdf>.



to examine the level of data companies hold will send a signal to companies that they should not do the hard work of collecting data, most of which is used to expand social and economic welfare.

The collection of large amounts of data does not by itself represent a threat to competition. Although use of data might in specific circumstances justify regulatory intervention, in most cases the acquisition and use of data does not reduce competition, and existing competition policy gives regulators all the flexibility they need to protect markets and consumers. On the contrary, large amounts of data, including personal information, are increasingly a vital input for some of the economy's most important innovations, especially artificial intelligence and its many applications in health care, financial services, education, and public safety. Moreover, data is non-rivalrous: Multiple companies can collect, share, and use the same data simultaneously. That goes for consumers, too: When consumers "pay with data" to access a website, they still have the same amount of data after the transaction as before, allowing them to share the same data with multiple companies.

Some of the platforms that collect large amounts of consumer data are natural monopolies for their particular application: they gain significant market share because of economies of scale and scope, and what economists call "network effects." By providing platforms for users around the world to connect, their very size generates enormous economic benefits for society and consumers. These platforms serve two-sided markets, and many of these businesses, especially those provided free services, face competition on the advertising side. Effective competition policy analysis requires accurate market definition, and the relevant market for the vast majority of online platforms that provide their services for free is the advertising market, not the social network market, the search market, email services market, etc.

Moreover, the market for privacy is also imperfect. Therefore, regulators should not expect it to solve all the privacy preferences of all users, since those preferences are so diverse. But this does not mean that decisions on antitrust issues should be driven by privacy concerns or that privacy laws are inadequate. Some companies have stricter privacy policies than others. But many consumers have a lax attitude toward privacy; they may say they want more of it when surveyed, but they voluntarily share a lot of personal information online and generally do not support services that have even minimal costs, even when the selling point of these services is better privacy practices.⁵ So there is no evidence that any lack of competition in providing services that feature greater privacy

⁵ Alan McQuinn and Daniel Castro, "Why Stronger Privacy Regulations Do Not Spur Increased Internet Use," Information Technology and Innovation Foundation, July 2018, <http://www2.itif.org/2018-trust-privacy.pdf>.



protections is because of entry barriers rather than a lack of consumer demand. Some consumers say they value privacy when surveyed, but the way they “vote with their clicks” suggests that they are generally satisfied with their current choices. Therefore, regulators should apply traditional competition analysis to the competitive aspects of a problem and use data protection laws to address privacy concerns. Moreover, the General Data Protection Regulation (GDPR) establishes a common set of data protection rules for firms, regardless of their size or focus.

Some policymakers want to regulate data access because of competition concerns. However, 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. Some companies do have privileged access to particular types of data, often because of government regulations. When such companies unfairly block competitors’ access to that data without a good reason, policymakers should intervene, but they should avoid broad regulation and instead use industry-specific rules. This type of intervention may be especially useful for increasing market price and quality transparency, such as when government regulators have required airlines to disclose fees or on-time arrival information, universities to reveal graduation and loan repayment rates, or hospitals to share pricing for medical services.

Similarly, the Payment Services Directive (PSD2) was a helpful policy to make banking data more accessible and to increase competition. However, the United Kingdom’s Open Banking Standard demonstrates that this approach could be taken further by requiring banks to make their data available in a standardized format, which PSD2 does not require, thereby making this data easier for third parties to access and use to develop further innovations for consumers. In the case of both PSD2 and the UK’s Open Banking Standard, the overriding goal was to ensure consumers could share their personal financial data with third-parties and increase market transparency about bank fees; it was not to force companies to turn over their own proprietary data.

Policymakers are rightly focused on promoting the adoption and use of artificial intelligence, and many recognize that widespread availability of data is necessary for many AI applications, particularly those that use machine learning. France’s national AI strategy calls for legislation to mandate repurposing both public and private sector data, including personal data, to enable public-interest



uses of AI by government or others, depending on the sensitivity of the data.⁶ They intend to have repurposed data held by private companies made publicly available, shared with other companies, or processed securely by the public sector, depending on the extent to which sharing the data presents privacy risks or undermines competition. France’s strategy suggests that the government would not require companies to share data publicly when doing so would impact legitimate business interests, nor would it require that any personal data be made public. Instead, if wider data sharing would do unreasonable damage to a company’s commercial interests, the strategy only calls for giving public authorities access to the data. But where there is little threat to legitimate business interests, companies could be required to share the data more widely, to maximize reuse. To the extent such a policy should be implemented—there are risks that the government may overestimate what data should be shared and underestimate the risks of sharing it—the purpose should not be to spur competition.

Policymakers should also facilitate the voluntary sharing of data to promote innovation and other societal benefits. Often, the public and private sectors hold valuable sensitive data but lack mechanisms to securely and efficiently share this data with one another and academia. The United Kingdom is developing a program of data trusts to facilitate the voluntary sharing of data that would not otherwise be made publicly available due to its proprietary or sensitive nature but that has high value for AI applications.

DIGITAL PLATFORMS' MARKET POWER

There is a well-established literature on the nature and role of market platforms. The consensus is that market platforms can offer both sellers and buyers tremendous benefits, largely by reducing the transaction costs of finding other parties to interact with.⁷ In many cases a combination of efficiencies of scale and network effects push platform markets toward concentration. But that does not mean these markets will lack competition or innovation. In fact, the presence of even large platforms can increase both competition and innovation at the level that matters most; the case of

⁶ Nick Wallace, “Countries Can Learn from France’s Plan for Public Interest Data and AI,” Center for Data Innovation, August 14, 2018, <https://www.datainnovation.org/2018/08/countries-can-learn-from-frances-plan-for-public-interest-data-and-ai/>.

⁷ Joseph V. Kennedy, “Why Internet Platforms Don’t Need Special Regulation,” (Information Technology and Innovation Foundation, October 2015), <https://itif.org/publications/2015/10/19/why-internet-platforms-don't-need-special-regulation>.



an individual customer seeking the best supplier. In cases where lack of competition due to anti-competitive conduct is a concern, normal antitrust principles and remedies still hold. But regulators need to carefully study the effect of both alleged anticompetitive behavior and proposed remedies on all sides of the platform before reaching conclusions on the best policy response.

Today, most discussion of antitrust issues and platform markets seems to focus on the largest Internet companies (Apple, Amazon, Facebook, Google, and Microsoft), but both medium and smaller Internet platforms play important roles in helping match suppliers and customers for a wide range of goods and services. However, platform businesses were and are important parts of the traditional economy. They include shopping malls, job placement services, and newspaper classified ads. If software and Internet companies present unique antitrust concerns, it is largely because of the growing value of e-commerce in the economy and the rapidly changing nature of both the technology and, as a result, the business models firms pursue.

PRESERVING DIGITAL INNOVATION THROUGH COMPETITION POLICY

Acquisitions are one way that investors can monetize successful startups and be compensated for their risk. Policies that limit acquisitions may therefore lower the supply of innovations. If policymakers make initial public offerings (IPOs) easier, smaller firms will have less pressure to sell and be more likely to grow independently. But even with reforms to IPO laws, many small companies will prefer to be acquired because being acquired by a larger company often provides smaller firms the resources they need to take an innovation to scale. For example, consider Google's acquisition of start-up mapping company Keyhole in 2004. Google's strong financial backing, coupled with a willingness of the Google founders to think boldly, let Keyhole—what became Google Maps—become orders of magnitude larger than anything the Keyhole founders imagined, and drop the price to free.⁸

Larger firms provide greater efficiency from economies of scale. Innovations are spread across more products, boosting overall R&D efficiency, and their products have access to larger distribution networks.⁹ For example, the Coca-Cola Company's acquisition of the specialty organic drinks

⁸ Robert D. Atkinson, "Review of Never Lost Again: The Google Mapping Revolution That Sparked New Industries and Augmented Our Reality," *New York Journal of Books*, June 2018, <https://www.nyjournalofbooks.com/book-review/never-lost-again>.

⁹ Wesley M. Cohen and Steven Klepper, "A Reprise of Size and R & D," *Economic Journal* 106, no. 437 (July 1996): 948, <http://www.jstor.org/stable/2235365>.



company Honest Tea vastly expanded the distribution of Honest Tea and gave its investors a profitable exit. Online platforms, which benefit from network effects, may be especially suited to help new technologies scale.

The regulatory environment for emerging technologies can have a significant impact on their development. To promote innovation, regulators should encourage the growth of new technologies, even if they raise complicated policy issues or challenge the current regulatory framework. Doing so requires regulators to develop and maintain a deep understanding of these technologies, including their potential future benefits.

When evaluating mergers involving nascent technology, regulators should ask the following questions:

1. **Does the acquired firm desire to remain independent but is being pressured to sell by targeted competition?** If owners of a small company genuinely believe that the acquisition represents their best opportunity for expanding a technology's use and maximizing the firm's value, regulators should be cautious about opposing it. On the other hand, if the firm has been the target of a focused effort to pressure owners to sell, regulators should take a closer look.
2. **Does the acquired firm have the resources to grow without being acquired?** IPO reforms may be able to give firms a viable alternative to an acquisition without requiring a change in merger law. But unless nascent technology has an outlet to grow, it cannot have a large impact on markets and benefit consumers and economic growth.
3. **Is the acquirer likely to use the new technology to enter a new market or stifle it in existing markets?** Mergers are more problematical if the acquisition of new technology enhances a company's presence in an existing, relatively mature market as opposed to boosting its competitiveness in a new market. Technology that lets a large company expand into new markets raises fewer problems because the company does not have a dominant position to protect and likely faces a number of challengers.
4. **To what degree must users of the new technology also use the acquirer's existing products in order to benefit from them?** In the latter case, the potential for an anticompetitive effect is greater. In the former case, the acquiring firm's profits will depend on ensuring that the technology delivers significant benefits to consumers.



Determining the value of nascent technology is extremely difficult. One reason is that success can depend on the company's business model and competency even more than on the specific technology. Many companies have had great technology but lacked the insight and leadership to develop and market it. Regulators should engage in discussions with all parties, including those both supportive and opposed to a merger, to increase their understanding of the significance and likely future of new technology. Interviews with professional investors can also provide independent views about future outcomes.

Regulators can also look to see whether similar technologies are being developed elsewhere. The existence of similar technology is a sign that its introduction will be broad based rather than limited to one company. This raises fewer antitrust concerns since customers will have more sources to benefit from the technology. It also indicates that the technology is likely to have a significant impact on the market.

Other signs regarding the degree of competitive threat are the amount of patent protection (more protection means that other sources for the technology may not be quickly available) and the internal resources of the owner of the technology. Regulators also need to look at regulatory barriers to nascent technology, which can often be a significant barrier to innovation.

Antitrust law should focus on consumer benefit, innovation, and economic efficiency. Using the consumer welfare test, regulators should have to explain by a preponderance of the evidence why a proposed merger will either 1) eliminate a potential challenger who is both likely to become a significant competitor and develop and scale the technology in question as well or better than the combined firm; or 2) give the buyer a significant technological advantage in a market where there is little competition and where this reduced competition is likely to be used to reduce consumer welfare. This latter point requires accurate market definition. For example, in the case of most free online services, the relevant market for most firms is advertising. These two factors would establish a rebuttable presumption that the merger should not go forward. The company should then get a chance to rebut the government's case.

The main standard should be consumer welfare (or more broadly, innovation and economic efficiency). There is currently an active debate about whether antitrust law should also try to accomplish other objectives such as privacy and job protection and whether regulators should oppose consolidation even when it presents no harm to consumers. The policies of the last 30 years have resulted in a consensus about the proper role of antitrust policy in the economy. Debate will continue about exactly how to apply the consumer welfare standard and how to resolve difficult



cases, but regulators should not throw out these accomplishments by introducing more uncertainty into how the law will be applied.

In particular, competition policy should not include job loss and privacy issues. For the former, one major goal of competition is productivity growth. Mergers that result in greater productivity clearly boost economic growth and consumer welfare. Restricting business behavior, including mergers, because it might lead to job loss is to turn competition policy into a tool to restrict economic growth. For the latter, privacy deserves no consideration in competition policy, including merger review. Data privacy is already enforced by the relevant data protection authorities. Moreover, if two firms with different privacy policies merge, the merged firm cannot apply the more permissive policy to all the data in the now combined firm, unless its policies already allow such a change or it obtains affirmative permission from its customers.

Regulators should also ask whether acquiring firms continuously invest in new technologies. Do they spend a high portion of value added on research and development (both with and without mergers)? Companies that focus heavily on innovation are unlikely to relapse into a stagnant defense of their existing market share. They are also more likely to maximize the social value of a nascent technology whether it is developed internally or is acquired through a merger. Another important variable is the degree to which the industry is susceptible to Schumpeterian competition. Is the potential for disruptive technological change high? If it is, companies that do not continuously seek to increase consumer value through innovation are likely to lose market share. Similarly, regulators should ask about the overall pace of technology in the industry. If it is high, then the impact of specific deals is likely to be less. The presence of constant innovation is usually more important than the level of short-term competition.

Data should be looked at in antitrust cases because, as with technology, an experienced workforce, physical capital, and access to suppliers, data increasingly represents an important input for many firms. But before concluding that data gives a company an unfair competitive advantage, regulators should consider that:

1. The volume of data is often less important than the algorithms or business practices that derive value from it. As with nascent technologies, the mere possession of good data does not automatically result in market power or high profits. The data has to be used in a way that confers real value to users.



2. Data is often available to any party that wants to buy it. The key constraint is translating the data into a competitive product.
3. Data often has a short shelf-life. Any market advantage it provides is temporary. Thus, companies that do not continuously offer the best services at the best prices will gradually lose market share.
4. Large volumes of data are often vital to the network effects and efficiencies of scale that maximize consumer value. The tendency of many markets, including those dominated by platforms, is toward concentration. This is not due to anticompetitive actions, but rather diminishing costs and increasing value as products capture a larger market share. Consumers are usually the main beneficiaries of this scale.
5. Data is nonrivalous. Sharing it with one party does not preclude a consumer from sharing it with others. And one party's use of data seldom infringes on another party's use of the same data.
6. Forced data sharing may impact the incentives firms have to invest in collecting and curating data.

CONCLUSION

There are many important issues to consider in competition policy in the digital era to ensure that consumers continue to benefit from data-driven innovations. But overall, existing EU competition law not only allows adequate oversight, but that EU competition regulators should be extremely cautious about taking actions to intervene in markets that are generally very successful at promoting innovation and maximizing consumer welfare. Thank you for engaging on this important topic.

Sincerely,

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