



**Computer & Communications
Industry Association**
Tech Advocacy Since 1972

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CCIA¹ Input for the Konkurrensverket Market Study of Digital Platforms

Introduction

CCIA welcomes this opportunity to contribute to the market study of digital platforms opened by the Swedish Competition Authority. Competition policy has stood at the centre of our trade association's work for more than 45 years and we look forward to sharing our industry's experience and perspective in this contribution.

As the Swedish Competition Authority recognised when announcing the launch of this study, “[d]igital platforms have had transformative effects on the entire economy. Innovative business models and technical solutions have increased efficiency in many markets, for example by facilitating for buyers and sellers to meet in new ways.”² Digital media platforms have created a space for individuals to broadcast their audio and video content creations to the world. Digital marketplace platforms allow small and medium sized enterprises to reach consumers and meet demand far beyond their geographic footprint. Social media platforms dramatically lower the cost for advertisers to reach their audience and avoid advertising wastage. Studies suggest that the consumer benefit of free online services is worth thousands of euros per person, per year.³ While CCIA is an advocate for strong antitrust enforcement to ensure markets remain open and competitive, it is also wary of protectionist measures or undue regulatory burdens that would discourage innovation, investment, research, development and competition on the merits.

The following provides our perspective on the state of competition regarding digital platforms in Sweden and what the market study should pay attention to.

¹ The Computer & Communications Industry Association (CCIA) is a non-profit membership organisation that represents the interests of a wide range of companies in the Internet, technology and telecoms industries. We advocate for open markets, open networks and full, fair, and open competition. Our full membership can be viewed here: <http://www.ccianet.org/about/members/>

² <http://www.konkurrensverket.se/en/Competition/--ovrigt--/market-study-of-digital-platforms/>

³ See, e.g. Brynjolfsson, et al., *Using massive online choice experiments to measure changes in well-being* (Apr. 2019), available at: <https://www.pnas.org/content/116/15/7250>

1. Existing Competition Laws are Fit for Purpose

CCIA believes that EU and national competition authorities can apply the existing antitrust framework to a large and diverse set of businesses, including both single-sided and multi-sided business models. In doing so, competition authorities should take into account real-world business realities and apply sound economic analysis to its enforcement actions. It is fundamentally important to have a clear understanding of the underlying business models of these complex services. Competition law *itself* does certainly not have to be adjusted for online players.⁴ It has deliberately been constructed in a flexible manner to be able to deal with a broad range of companies and their business practices, including so-called “digital platforms”.

2. Market Definition Must Better Account for Dynamic Competition

The antitrust framework requires the definition of markets to assess competitive effects and determine whether an antitrust violation has taken place or not. Competition authorities should be careful with defining markets too narrowly, and should account for the competitive constraint imposed by those outside artificially narrow market definitions. Online advertising is a good example where online players, at *the very least*, stand in fierce competition to each other. While they compete to attract ‘eyeballs’ and consequently advertisers, many think of these companies as operating in their own silos unconstrained by their competitors who target the very same advertising income (e.g. social media platforms vs. audio or video media platforms). Given the dynamic nature of competition and the ability of platform operators to add new features (e.g. commenting, private messaging, and other social-graph related features), analysing effects only on a narrowly defined product market risks assessment errors.⁵

3. Competition Authorities Must Better Understand ‘Platforms’, Multi-sided Business Models and Network Effects

The term ‘platform’ is frequently used in reference to certain Internet-based business models, but usually without any definitional rigor. In lieu of these terms, the concept of ‘two-sided’ or ‘multi-sided’ markets is better substituted for ‘platforms’ when considering competition policy matters.⁶ From an economic perspective, these business models, including certain online

⁴ By way of example, the Belgian, Dutch and Luxembourg competition authorities’ paper discussing new enforcement tools nevertheless emphasizes that on substance, such instruments should be “*closely following the interpretation of dominance and abuse in the context of Article 102 TFEU*” because “[s]taying close to well-established terminology and case law of EU competition law reduces the risk of lengthy legal procedures that the introduction of new concepts will involve. Additionally, it increases legal certainty and predictability.” Joint memorandum of the Belgian, Dutch and Luxembourg competition authorities on challenges faced by competition authorities in a digital world (Oct. 2019), available at: https://www.belgiancompetition.be/sites/default/files/content/download/files/bma_acm_cdclcl.joint_morandum_191002.pdf

⁵ Indeed, this is one of the Cr mer report’s criticisms of the OFT’s *Facebook/Instagram* decision. See Cr mer et. al, *Competition policy for the digital era* (May 2019), pg. 118, available at: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

⁶ Daniel O’Connor & Matthew Schruers, *Against Platform Regulation*, Presentation Draft, Oxford Internet Institute Conference on Internet, Policy, and Politics (Oct. 2016) pgs. 3-8, available at: <http://blogs.oii.ox.ac.uk/ipp-conference/sites/ipp/files/documents/OConnor-Schruers%2520-%2520Against%2520Platform%2520Regulation.pdf>.

marketplaces, stock exchanges, dating websites, messaging platforms, and payment networks, enable two or more distinct sets of users to interact with each other, realizing gains from such interactions.⁷ What characterizes these business models is that there is interdependency of demand between them. In other words, the demand for the platform's services by each set of users depends on the demand for the platform's services by at least one other set of users.⁸ Whenever competition enforcers or regulators deal with companies based on these business models, this interdependency of demand needs to be taken into account. In practical terms, it is insufficient to look at effects of a given practice or conduct on only one side of the market. A competitive assessment should always include all affected sides, as well as the impact of actual or potential platform-to-platform competition. The need for such a holistic approach was confirmed by the Court of Justice of the EU (CJEU) in *Cartes Bancaires*.⁹

In particular, it is critical to understand the role of network effects in the competition analysis of markets involving digital platforms. As with all other economic concepts, it is difficult to describe the role of network effects in the competitive analysis in a general manner. As *ex post* competition enforcement is based on a case-by-case approach, the role of network effects must be assessed in each individual case.¹⁰

Network effects are present when the value of adopting a service to an incremental user is larger when more users have already adopted.¹¹ Importantly, this dynamic is likely to produce consumer benefits as the value and usefulness of the network increases in parallel with the number of network participants. Network growth creates, therefore, pro-competitive benefits that are reaped by consumers. However, reflecting the multi-sided nature of most digital platforms, there can also be cross-platform network effects¹² where the number of users on one side of the platform increases the value to the other side. For example, in an online marketplace, the supply side of the platform benefits from increased users on the demand side, and the demand side benefits from increased competition on the supply side. This emphasises the need for competition authorities to take a holistic and case-by-case approach to the assessment of network effects.

Bearing the above in mind, the evaluation of network effects in competition analyses should also be accompanied by an analysis concerning the extent to which 'single-homing' and 'multi-

⁷ See, e.g., David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, Oxford Handbook of International Antitrust Economics 404, 404-405 (Roger D. Blair & D. Daniel Sokol, eds., 2015).

⁸ See, e.g., Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. Competition L. & Econ. 293, 296-97 (2014). For example, an assessment of the competitive realities facing a website serving advertisements must take into account the interests of both advertisers and site visitors who experience the advertising.

⁹ Case C-67/13 P *Cartes Bancaires v European Commission*. Judgement from 11 September 2014, available at: <http://curia.europa.eu/juris/liste.jsf?num=C-67/13&language=EN>

¹⁰ See, e.g. the CMA's in-depth discussion of network effects in the recent *Just Eat/Hungryhouse* merger inquiry, available at: <https://www.gov.uk/cma-cases/just-eat-hungryhouse-merger-inquiry#final-report>

¹¹ See, e.g. Hal R. Varian, *Use and Abuse of Network Effects* (Sept. 17, 2017), available at <https://ssrn.com/abstract=3215488>.

¹² These are sometimes called indirect network effects, or indirect network externalities in the economic literature.

homing' are present in a given market.¹³ For example, Professors Haucap and Heimeshoff acknowledge that:

“In two-sided markets increasing concentration will be driven by indirect network effects, but capacity limits, product differentiation and the potential for multi-homing (i.e., the parallel usage of different platforms) will decrease concentration levels. How easy it is for consumers to multi-home depends, among other things, on (a) switching costs (if they exist) between platforms and (b) whether usage-based tariffs or positive flat rates are charged on the platform.”¹⁴

Multi-homing refers to those instances where customers use more than one platform or service, whereas single-homing refers to those instances where customers choose to use only one platform for a particular service. Compared to previous physical networks, many of today's online platforms may be more susceptible to disruption from new entrants thanks to lower barriers to entry, low switching costs, the prevalence of free-to-the-user business models, and multi-homing. Economist David Evans rightly states that:

“Online platforms are more susceptible to attack by entrants than network industries of a century ago. Network effects and sunk costs made the natural monopolies around the turn of 20th century difficult to challenge. Rivals had to sink massive amounts of capital into duplicating physical networks such as railroad tracks and telephone lines. Using multiple networks, or switching between them, was expensive for customers, even if a second network was available. However, online platforms can leverage the Internet to provide wired and wireless connections globally. People find it generally easy, and often costless, to use multiple online platforms, and many often do. The ease and prevalence of multihoming have enabled new firms, as well as cross-platform entrants, to attract significant numbers of users and secure critical mass necessary for growth. Incumbent platforms then face serious competitive pressure from new entrants—startups or other online platforms—because their network effects are reversible.”¹⁵

In sum, the presence of network effects merits closer analysis, but in doing so competition authorities should carefully account for market factors that limit their prevalence such as low switching costs, low barriers to entry, and user multi-homing. In addition, network effects cannot be seen as a long-lasting moat. They are reversible, i.e. just like they have worked in favor of a company, they can start working against it as competitors benefit from the same effects and users can leave a platform *en masse* when they feel they are no longer getting a good deal. This creates a window for competitors with a unique value proposition (e.g.

¹³ See Jean-Charles Rochet & Jean Tirole, *Two Sided Markets: A Progress Report*, 37 RAND J. ECON 646 (2006); Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990 (2003).

¹⁴ Justus Haucap & Ulrich Heimeshoff, *Google, Facebook, Amazon, EBay: Is The Internet Driving Competition Or Market Monopolization?*, Düsseldorf Institute for Competition Economics (Jan. 2013).

¹⁵ David Evans, *Why The Dynamics Of Competition For Online Platforms Leads To Sleepless Nights, But Not Sleepy Monopolies* (2017), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009438.

Snapchat's disappearing messages, or TikTok's content creation tools), and means that digital platform operators are always sensitive to the competitive constraint of potential entry. A case-by-case analysis that takes into account evidence, economic analysis, and that is specific to the facts remains key to safeguarding consumer welfare.

4. Data is Only One Factor in the Competitive Process

In recent years some have made the argument that the mere accumulation of data by consumer-facing technology companies raises antitrust concerns. Based on the notion of an endless, positive feedback loop, the argument states that the more data is collected, the better companies' products become which in turn attracts more users who allow for even greater data collection. The end result of this process is a supposedly insurmountable data advantage keeping companies immune from competition. It is true that data may well enable a company to improve its products *if* it invests in the tools, know-how and processes that would allow it to derive meaningful insights from that data. That, however, can hardly be a competition concern. After all, more competitive companies finding new ways to better meet the demands of consumers is precisely what competition policy aims to encourage.

In fast-moving technology markets data as such has never given and will never give an online company an *insurmountable* competitive advantage. Apart from data often being available in the marketplace, that is primarily because of its key economic characteristics: it is non-rivalrous, subject to diminishing returns¹⁶, and its value depreciates over time considerably. As economists Catherine Tucker and Anja Lambrecht note:

“Our analysis suggests that big data is not inimitable or rare, that substitutes exist, and that by itself big data is unlikely to be valuable. There are many alternative sources of data available to firms, reflecting the extent to which customers leave multiple digital footprints on the internet. In order to extract value from big data, firms need to have the right managerial toolkit. The history of the digital economy offers many examples, like Airbnb, Uber and Tinder, where a simple insight into customer needs allowed entry into markets where incumbents already had access to big data. Therefore, to build sustainable competitive advantage in the new data-rich environment, rather than simply amassing big data, firms need to focus on developing both the tools and organizational competence to allow them to use big data to provide value to consumers in previously impossible ways.”¹⁷

It is worth to highlight two aspects raised by the economists. First, rather than facing a 'data bottleneck', companies are faced with a 'talent bottleneck'. The key to gaining a competitive edge is not data as such but the willingness to invest in the resources and people necessary to analyse and monetize data. In other words, human talent is the main ingredient to successfully compete in technology markets. Second, there is no evidence that data has

¹⁶ For an interesting study showing how growing datasets are subject to diminishing returns, see *Stanford Dogs Dataset*, available at: <http://vision.stanford.edu/aditya86/ImageNetDogs/>.

¹⁷ Anja Lambrecht & Catherine Tucker, *Can Big Data Protect a Firm from Competition* (Dec. 2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705530.

served as an insurmountable barrier to entry, nor that access to data guarantees success.¹⁸ The most obvious answer to the question how small competitors can compete with bigger, more data-heavy companies is to come up with a better, more innovative, or just different way of meeting consumer demand.¹⁹ Dating app Tinder is a good example of how a company could successfully break into a market that until then used to be extremely data-heavy involving pages of personal data input and compatibility assessments. For Tinder, just like for many other innovators, data collection was the *result* of success rather than the cause of it.

Until now the existing EU competition law framework seems to have largely accommodated the points raised above. Commissioner Vestager has acknowledged that the accumulation of data does not automatically equal market power.²⁰ This approach is also reflected in the Commission's merger decisions. During the *Microsoft/LinkedIn*²¹ merger some argued that LinkedIn might have unique data that companies were not able to replicate. The Commission rightly dismissed this argument and pointed to other data sources readily available to competing companies. We welcome this approach and call for continued, evidence-based enforcement that takes into account the fiercely competitive online environment and the investments that technology companies have undertaken to collect, store, analyse and make use of data.

5. Theories of Harm Must Be Based on Actual Evidence of Net-Negative Effects

There is currently an ongoing discussion of potentially anticompetitive 'leveraging' in digital markets. It is important to make sure leveraging does not become a catch-all theory of harm that would prevent companies that are allegedly dominant in one market from effectively expanding and improving their products to provide a better user experience. There is a fine line between accusations of abusive leveraging and an "efficiency offense" that penalises genuine product improvement and competitive entry. If competition authorities developed a too wide view of 'leveraging', they would effectively lock companies into one tightly defined market unable to innovate or meet changing consumer preferences. The competitive process (and ultimately consumer welfare) is not served by preventing companies from improving their products, or by indirectly subsidising companies that have failed to innovate. Product development, expansion, and improvement are key characteristics of companies competing on the merits when taking a holistic view of competitive dynamics as described above.²²

¹⁸ See also David S. Evans & Richard Schmalensee, *Network Effects: March to the Evidence, Not to the Slogans*, Antitrust Chronicle (Aug. 2017), pg. 9, available at: <http://mitsloan.mit.edu/shared/ods/documents/?DocumentID=4243>.

¹⁹ See also, D. Daniel Sokol & Jingyuan (Mary) Ma, *Understanding Online Markets and Antitrust Analysis*, 15 NW. J. TECH. & INTELL. PROP. 43 (2017), available at: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1267&context=njtip>.

²⁰ Commissioner Vestager, *Competition in a big data world* (Jan. 2016), available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-big-data-world_en

²¹ Case M.8124 *Microsoft/LinkedIn*. Commission decision (Dec. 2016), available at: http://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf

²² See e.g. *Verband v Google*, 408 HKO 36/13 (4 April 2013), unofficial translation available here: https://www.taylorwessing.com/fileadmin/files/docs/pdf-german/Google_Weather_InBox_-_Court_Order_2013-04-04_Unofficial_Translation.pdf (stating that "[t]he prohibition of the abuse of a dominant position does not have as its objective to preserve outdated business models that cannot withstand change" in relation to Google's introduction of weather related information on its search engine results page); *Streetmap.EU Ltd v Google Inc. & Ors* [2016] EWHC 253 (Ch) (12 February

On a more general level, digital players have always operated and will continue to operate in a highly dynamic and competitive environment. This is because the online market environment is characterized by very low barriers to entry. Very often the capital costs of starting and scaling a business will be much lower than in the offline world. Decreasing prices for cloud storage and cloud computing, worldwide reach, and widely accessible data analytics tools make it relatively easy to start a business online.²³ In addition to this, consumers are in no way prevented from switching to other online services. In fact, industry-led initiatives like the Data Transfer Project (DTP) make it even easier for consumers to switch to another online provider.²⁴

While it's true that these market dynamics allow companies to grow very quickly, it's the very same dynamics that continue to place competitive pressure on them. The dynamics that helped companies grow fast could just as fast turn against them if they stopped innovating and serving consumer needs. We would therefore ask that, as part of its market study, the Swedish Competition Authority investigate whether there is any actual evidence of competitive harm or reduction in consumer welfare in the markets concerned.

6. Privacy Objectives are not for Competition Enforcers

Privacy can be a parameter of competition if users demand it and competitors respond by offering e.g. different privacy settings and features. In this situation, competition authorities should continue to treat privacy as a relevant dimension of quality competition in their assessment alongside other potential factors of competition (such as price, choice, etc.). However, just because privacy can be a parameter of competition does not mean that it should be *the aim* of competition enforcement. A clear separation between competition law enforcement and privacy policy objectives should be maintained.

In the EU there are strong legal frameworks for both the protection of competition and the protection of personal data and privacy. Competition law and enforcement serve to protect the competitive process while privacy laws protect individual privacy rights. When enforcing competition rules, authorities should continue to be guided by the question whether a given transaction or conduct reduces the degree of competition in the market. Non-competition considerations like the protection of privacy should not guide antitrust enforcement. The European Commission upheld this approach in the *Facebook/WhatsApp* merger decision by stating that “[a]ny privacy-related concerns flowing from the increased concentration of data

2016), available here: <http://www.bailii.org/ew/cases/EWHC/Ch/2016/253.html>, (rejecting claims that Google's introduction of map thumbnails was anticompetitive as against online maps providers on the grounds that “*the whole thrust of Google's initiative was to improve its general search engine.*” at para. 79).

²³ It is therefore concerning that several Swedish authorities want to limit the availability of cloud services suppliers in Sweden. This would limit choice, increase prices and harm competitiveness. Further background available at: <https://synchlaw.se/wp-content/uploads/2019/06/Synch-Memorandum-The-Cloud-Act-190614-v3.0.pdf>

²⁴ Data Transfer Project - Overview and Fundamentals (Jul. 2018), available at: <https://datatransferproject.dev/dtp-overview.pdf>

[...] do not fall within the scope of the EU competition law rules but within the scope of EU data protection rules”.²⁵

Back in 2003 the OECD cautioned against using competition enforcement for objectives other than economic efficiency and consumer welfare by stating that the “inclusion of multiple objectives [...] increases the risks of conflicts and inconsistent application of competition policy. The interests of different stakeholders may severely constrain the independence of competition policy authorities, lead to political intervention and compromise and, adversely affect one of the major benefits of the competitive process namely, economic efficiency”.²⁶ The UNCTAD secretariat made similar observations in a study dating back to 1995.²⁷

CCIA fully supports this approach. Just like competition authorities do not use competition rules to enforce e.g. environmental laws, they should equally not use them to enforce privacy law. Adding consumer protection-related privacy concerns into the competition assessment will lead to a much more subjective competition enforcement that would be much less grounded in economic efficiency considerations. For example, it is not clear how a competition authority would balance economic efficiency considerations ‘against’ privacy rights. Even if we discount the practical difficulties, such a balancing exercise should probably not be made in the first place. CCIA would further caution against such an approach in light of Europe’s leading role in setting competition law norms worldwide, and the significant enforcement powers that competition authorities are entrusted with. If such an approach were followed in jurisdictions with a less straight-forward approach to the rule-of-law, Swedish companies would face increased uncertainty, cost and vulnerability to political interference and retaliation.

7. Competition Policy vs. Regulation

As discussed extensively above, many companies operating in the digital economy are based on complex multi-sided business models. Each ‘side’ consists of a different constituency that will have individual needs and interests. ‘Platforms’ provide the place for interaction between these sides and are hence at the centre of *moderating and balancing* these various interests. Needless to say, they do so while also trying to safeguard their competitive positioning as against competing platforms and potential entrants. Just because a given user group is not happy with certain policies or decisions does not mean that there is harm to the competitive process, or that any negative effect on that sub-group of users is not justified by the platform’s pursuit of legitimate objectives such as the improvement of services to a different set of users, or increases to its competitiveness as against other platforms operating in the market and potential market entrants.

With respect to the interplay between competition and regulatory policies, the European Commission has shown that it is able to take regulatory steps where it perceives a market failure. In particular, EU Regulation 2019/1150 on platform-to-business relations (“P2B

²⁵ Commission decision in Case M.7217 *Facebook/WhatsApp* (2014), para. 164, available at: http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf

²⁶ OECD Global Forum on Competition, *The Objectives of Competition Law and Policy* (2003), pgs. 2-3, available at: <http://www.oecd.org/daf/competition/2486329.pdf>

²⁷ UNCTAD Secretariat, *The basic objectives and main provisions of competition laws and policies* (1995), available at: https://unctad.org/en/Docs/poitd_15.en.pdf

Regulation”),²⁸ which entered into force in July 2019, is a comprehensive set of rules creating a fair, transparent and predictable business environment for smaller businesses and traders making use of digital platforms.

While the P2B Regulation imposes new transparency obligations and establishes new redress mechanisms, it does *not* attempt to regulate business practices. CCIA welcomes this approach which should be instructive for other regulatory authorities.

Competitive and innovative businesses are faced with massive fines based on novel theories of harm sometimes absent evidence that the conduct in question caused an anticompetitive effect. The chilling effect of this kind of enforcement is compounded where, when viewed holistically, the conduct is objectively justified and pro-competitive. Competition authorities should instead identify actual market failures and encourage regulatory intervention accordingly. In particular, competition authorities should make efforts to ensure that such regulatory intervention facilitates competition on the merits and encourages innovation and investment rather than (1) subsidise or protect incumbent industries suffering from their own unwillingness to adapt to technological disruption, or (2) give competitors a free ride on the pro-competitive investments of private companies. A regulatory approach informed by competition policy and practice would provide the business community legal certainty and competitors a level playing field.

Final Comments on the Functioning of Competition on Digital Platforms in Sweden

The current antitrust framework has proven to have the necessary tools and to be flexible enough to ensure effective competition in the market. While the emergence of new business models may present new challenges for antitrust enforcers, there is no need to change competition rules for digital platforms. Competition authorities' enforcement practice should be guided by economic analysis on a case-by-case basis and with a clear identification of consumer harm.

In this respect, CCIA encourages the Swedish Competition Authority to pay attention to the value that consumers derive from free services, actual consumer preferences with regards to privacy, the tremendous investments in human talent, research and development that digital platforms are engaged in, and competitive dynamics as between digital platforms (especially where they are not considered to be part of the same properly defined relevant product market). The Swedish Competition Authority should also scrutinise carefully submissions made by industry representatives that resist adapting to technological change.

Respectfully submitted,
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²⁸ See details available here: <https://ec.europa.eu/digital-single-market/en/business-business-trading-practices>