The views stated in this submission are presented on behalf of the Sections of Antitrust Law and International Law (“Sections”) of the American Bar Association (“ABA”) only. They have not been approved by the ABA House of Delegates or the ABA Board of Governors of the ABA and therefore should not be construed as representing the policy of the ABA.

The Sections welcome the opportunity to provide input to the Israel Antitrust Authority’s (“IAA”) consultation about how competition policy can best serve Israeli consumers and markets in view of the ongoing digitization of the economy (“Consultation”). These comments are submitted in response to the request of the IAA for public comment. The Sections commend the IAA for seeking input from the public on these important issues.

The following comments reflect the experience and expertise of the members of the Sections with competition and consumer protection law in the United States and other jurisdictions. The Sections are available to provide additional comments or to participate in any further consultations with the IAA as appropriate.

Question #1: Do you believe that increased scrutiny of mergers and acquisitions by large technology firms will have an effect on competition? Will it have an effect on incentives to invest in the tech sector? If so, what will the effect be?

In the Consultation, the IAA states that antitrust review of transactions involving technology companies might miss combinations that although they do not increase concentration today, “could alter the future because of the growth potential of the companies involved.” According to the IAA, “merger enforcement usually focuses mainly on the firms’ current market positions, typically measured by share of sales.” The Sections respectfully submit that there is no need for a special rule for mergers involving technology firms. The same fact-based economic scrutiny that is used for analyzing transactions in other sectors of the economy is sufficiently flexible to identify transactions that are likely to significantly harm competition in the technology sector as well.

2 Id. at 5.
3 Id.
Although the quantification of current and historic market shares (and the proper definition of relevant markets) are necessary for analyzing the likely competitive effects of a merger under United States law,⁴ the U.S. antitrust authorities’ practice is to “apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns.”⁵ As stated in the U.S. Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines*, “merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”⁶ The classic U.S. case in which past shares were not an adequate predictor of the future is *U.S. v. General Dynamics*.⁷ Both General Dynamics and the company it acquired, United Electric Coal Companies, had high shares of current coal sales. The Supreme Court found, however, that because United Electric had limited uncommitted coal reserves, its past sales were not an accurate predictor of its future competitive significance. Based on that forward-looking analysis, the Court allowed General Dynamics’ acquisition to proceed. The U.S. antitrust authorities therefore consider a wide variety of evidence beyond historic market shares in evaluating the potential competitive effect of a transaction, including the existence of substantial head-to-head competition, the disruptive role of a merging party, the views of industry participants, and what is found in ordinary course business documents as well as data, and econometric analyses.⁸

Although merger analysis is necessarily predictive, there also must be limits on speculation about future developments. In the *Horizontal Merger Guidelines*, for example, the U.S. antitrust agencies acknowledge that there are limits on their ability to reliably predict the future: “The Agencies may project historical market shares into the foreseeable future when this can be done reliably.”⁹ As former FTC Commissioner Joshua D. Wright wrote, “predictions about the evolutions of a market [are] based upon a fact-intensive analysis rather than relying upon a general presumption that economic theory teaches that an increase in market concentration implies a reduced incentive to invest in innovation.”¹⁰

The technology industry is no exception. If anything, it is a good example of how difficult it is to predict future developments accurately. Accordingly, the Sections urge the IAA to proceed cautiously when analyzing nascent markets and the effects of recent or potential entry. Facts

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⁵ Id. at § 1.
⁶ Id.
⁸ Horizontal Merger Guidelines, §§ 2, 4.
⁹ Horizontal Merger Guidelines, § 5.2 (emphasis added).
specific to each merger investigation should guide any analysis, and antitrust policymakers should consider the relative risks and costs associated with Type I (“false positive”) and Type II (“false negative”) enforcement errors, given the well-established link between innovation and economic growth.\textsuperscript{11} In their treatise on U.S. antitrust law, Areeda and Hovenkamp advised: “In the long run, technological progress contributes far more to consumer welfare than does the elimination of allocative inefficiencies.”\textsuperscript{12} The Sections respectfully submit that, as with mergers and acquisitions in other parts of the economy, a decision to block a transaction involving technology firms should be grounded in careful economic analysis of the totality of the facts, showing that a transaction is likely to substantially lessen competition in the foreseeable future.\textsuperscript{13}

**Question #2: Should competition authorities, and the IAA in particular, consider unique characteristics of the digital economy when defining markets and evaluating market power? If so, how would you suggest doing so?**

The Sections believe that the well-established approach to defining markets – i.e., assessing demand substitutability and other elements in the context of the “hypothetical monopolist” test – applies equally to technology industries as to all other industries. In technology industries as in others, the market definition and evaluation of market power should be based on careful application of sound economic analysis to the specific facts of each case.

The Sections further note that conditions in some technology industries may make it difficult for an industry participant to achieve durable market power. When customers have the ability to use multiple products or services (i.e., “multi-homing”), barriers to entry may be low. Demand-side substitution can be very flexible in some cases and innovation can quickly disrupt the current market and displace established firms.\textsuperscript{14} As a result, high static market shares in technology industries may not always indicate durable market power. When supported by the evidence gathered in the investigation, such considerations should be incorporated into the assessment of market power in technology industries.

On the other hand, some technology industries are more susceptible than others to a finding of durable market power. Some markets, such as the operating systems market at issue in the *Microsoft* case, may demonstrate significant entry barriers, lock-in effects and first-mover

\textsuperscript{11} Id. at 166.
\textsuperscript{12} Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, at § 407(a) (2D Ed. 1995).
\textsuperscript{13} Some argue that “successfully challenging business or product innovations is likely to dampen innovation across the economy, whereas Type 2 errors are at least mitigated in part by entry and other competition.” Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. of Competition Law & Econ. 153, at 167 (2010). *See also*, e.g., Frank H. Easterbrook, *Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984) (“the economic system corrects monopoly more readily than it corrects judicial errors”).
\textsuperscript{14} “Rapid technological change leads to markets in which firms compete through innovation for temporary market dominance, from which they may be displaced by the next wave of product enhancements.” U.S. v. *Microsoft*, 253 F.3d 35, 49 (D.C Cir. 2001).
advantages that can facilitate the maintenance of market power. Further, simply being in a dynamic industry does not necessarily mean that market power is ephemeral. For example, in the Bazaarvoice case, which involved a merger of online product review platforms, the court wrote that the case “inescapably adds fuel to the debate over the proper role of antitrust law in rapidly changing high-tech markets . . . . As the Court has set forth in detail, while Bazaarvoice indisputably operates in a dynamic and evolving field, it did not present evidence that the evolving nature of the market itself precludes the merger's likely anticompetitive effects.”\footnote{U.S. v. Bazaarvoice, Inc., No. 13-cv-00133-WHO, 2014 U.S. Dist. LEXIS 3284, at *260-61 (N.D. Cal. 2014).}

Given this, the Sections believe it is important that competition authorities continue to base market definitions and assessments of market power in technology industries on sound economic analysis of the particular facts of the case, and refrain from adopting presumptions that may be unwarranted.\footnote{A recent U.S. Supreme Court case involving a two-sided platform (credit-card system) underscores the need for rigorous and thorough analysis of market definition and market power issues, including careful consideration of the specific characteristics of the products and firms involved in any particular case. See Ohio v. American Express Co., 138 S. Ct. 2274 (2018).} For example, there should be no presumption that “big data”\footnote{The term “big data” is often used to refer to a confluence of factors, including the nearly ubiquitous collection of consumer data from a variety of sources, the plummeting cost of data storage, and powerful new capabilities to analyze data to draw connections and make inferences and predictions. In these comments, the term is used to refer to aggregations of data that share the following characteristics: (i) volume – big data represents a vast quantity of data that can be gathered and analyzed; (ii) velocity - big data represents data that can be accumulated, analyzed, and used quickly; and (iii) variety – big data represents a breadth of data that can be analyzed effectively. FTC, Big Data: A Tool for Inclusion or Exclusion? (2016), at 1-2, available at https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusionunderstanding-issues/160106big-data-rpt.pdf.} leads to market power. As described further in the response to Question #4 below, data are generally replicable, and one firm’s collection of data may not preclude another’s collection of identical or substitutable data. Moreover, the data itself may not constitute a properly defined market, but instead may constitute only one of many inputs that affect the quality of a product or service.

The Sections respectfully submit that well-established approaches to defining markets remain largely applicable to technology industries, and the presence of durable market power can be determined only by a case specific economic analysis based on sound factual assessment.

Question #3: Do you believe that increased enforcement of behavioral remedies, such as unbundling applications and operating systems, duties to provide data and so forth, would be beneficial to competition? Could such measures aid early-stage firms – and firms in general – in innovative market segments? Is the threat of market foreclosure currently a bar to the development of innovative products and services in the tech sector?

The Sections submit that it is difficult to generalize about competition issues arising from behavioral remedies such as unbundling of applications and operating systems and duties to provide data. The competition implications of these practices vary widely depending on factors

such as the nature of the conduct and products at issue, the data and products being shared, and the parties having access to such data and products. On the one hand, access to data, in theory, could facilitate entry; however, it could also make entry less likely. For instance, there may be less incentive to develop a collection of data if it is likely that the collection will be subject to forced sharing. Moreover, antitrust mandates for mandatory data sharing pose well-recognized risks to a vigorous competitive process and to competition law enforcement. As explained by the US Supreme Court, requiring a firm to supply its rival can actually reduce competition by “lessen[ing] the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.”

Enforced sharing also requires the enforcer or court “to act as central planners, identifying the proper price, quantity, and other terms of dealing role for which they are ill-suited.” And, finally, compelling competitors to negotiate access to each other’s inputs “may facilitate the supreme evil of antitrust: collusion.” Other forms of alleged “leveraging,” like so-called technological ties, often represent an efficient form of product integration or product enhancement that benefits consumers and is procompetitive.

The Sections respectfully submit that these considerations are not materially reduced (and may in fact be enhanced) by the digitization of the economy. In particular, the Sections strongly caution against any presumption that the digitization of the economy should lead to an expansion of the circumstances in which behavioral remedies such as unbundling of applications and operating systems and sharing of data are mandated as part of a remedy. Such novel and potentially far-reaching enforcement approaches should continue to be considered only case-by-case and applied only when clearly justified following the most objective and rigorous analysis. In analyzing technology markets, enforcers should focus on whether the deal creates or enhances entry barriers or otherwise enhances consumer lock-in. To the extent remedies are required to offset anticompetitive effects, those remedies should be narrowly tailored to redressing the perceived harm.

Question #4: Do you consider access to data a competition concern for the technological sector? What, if any, measures, would you suggest competition authorities, and the IAA in particular, should consider in dealing with possible market foreclosure due to the competitive advantage of such data?

Data has always been an important input factor for companies, both in technology-based industries and in more traditional sectors. As with any input factor, access can be a concern in certain situations. For the reasons explained below, the Sections are of the view that, in general, traditional

19 Id.
20 Id.
21 Id.
analytical approaches are adequate to assess the aggregation and supply of data in the modern economy, and no new presumptions or standards are needed specifically for analyzing the competitive effects of access to data in the technological sector. At the same time, that analysis should take into account unique aspects of some data-based markets, such as the fact that consumers may pay for a firm’s services by creating and providing rights to the use of their personal data or other non-quantifiable assets, rather than with currency. To the extent that traditional tools rely primarily on an analysis of monetary costs and prices, those tools must be adapted to analyze these so-called “free” services.

As mentioned in the Consultation, data is becoming an increasingly important input factor for the success of firms in the technology sector. This is especially true of so-called “big data,” or large and ever-increasing complex data sets. The largest technology platforms, such as Google, Facebook and Amazon, have collected and maintain very large amounts of data that cover a significant period of time. The Sections respectfully submit that the issues presented by the aggregation of data by these platforms are complex and should be addressed on a case-by-case basis focusing enforcement on credible evidence that a transaction or conduct has or likely would harm competition on the merits. The Sections note that these platforms do not necessarily “monopolize” data, even if they have amassed large amounts of data. Due to the unique features of data discussed below, in at least some cases, data may not be a monopolizable asset – that is, an asset over which the exercise of market power is possible.

Data isn’t necessarily either an exhaustible or an exclusive, non-replicable, resource. In contrast to traditional (physical) resources, one firm’s possession of a data set does not preclude competitors from generating the very same or a similar data set. Data generated by a given platform may often be acquired independently from various alternate avenues, including by purchase from data brokers; development of a new application; government databases; or the aggregation of various distinct data sets. Platforms also compete both with each other in accumulating data and on secondary data markets.

Data markets are characteristically dynamic. Many data sets have a very short shelf-life, meaning that a firm that holds a significant data set at a given point in time may not enjoy any long-term advantage over competitors. This is due both to the fact that big data often needs to be constantly updated (this is known as the “velocity” of data), and because new technologies employ constantly updated

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evolving types of data. Often, the value of data is less in its possession, and more in the tools that the firm develops to analyze and apply the data. Moreover, data per se is not protected by intellectual property laws. Thus, although a firm’s analytics may be legally protected, the actual data produced by a firm does not enjoy the legally-sanctioned exclusivity and control enabled by intellectual property systems (such as patents and trade secrets) that may apply in traditional knowledge-based sectors, such as pharmaceuticals.

In light of the foregoing, competition authorities should carefully assess what, if any, competitive advantages a firm may enjoy by the mere possession of a data set, and whether the mere possession of that data will harm consumer welfare and the competitive process. As is the case generally, the focus should be on competitive effects, such as the creation and strengthening of barriers to competition and market foreclosure due to predatory and exclusionary conduct. In addition, enforcers should be cautious in responding to claims that any particular data held by a firm is an “essential” input or facility and demands for mandatory sharing or access. As the U.S. Supreme Court has observed, care must be taken to ensure that any such remedy does not lead to worse competitive outcomes, whether due to a chilling effect on incentives to innovate or due to the increased risk of collusion that information sharing presents.

Treating the mere possession of data (without more) as a barrier to competition could have a significant chilling effect on innovation. This is especially true for multi-sided network platforms (such as social media), where, as the Consultation notes, the product offered to consumers is not clearly distinguishable from the data collected (and where the consumer often, in effect, pays for the service with personal data, access, or other not readily quantifiable consideration). Limiting such a firm’s ability to control the data it collects through the platform may harm competitors’ incentives to develop big data independently and everyone’s incentives to improve analytics that may otherwise have considerable pro-consumer benefits (e.g., so-called “smart medicine”).

In sum, the Sections are of the opinion that access to data is not, in itself, a unique antitrust phenomenon that would justify new analytical approaches by competition authorities. Existing competition tools are generally sufficient to address the likely limited scenarios in which big data presents a legitimate threat to competition and consumer welfare. The various avenues available to attain and utilize data sets, as well as the difficulties surrounding the assessment of the competitive value of a given data set, make it inadvisable to adopt presumptions or other approaches that treat data differently than other important input factors.

26 Platforms typically contractually protect their data and have sought to enforce their rights against researchers and journalists who have “scraped” data subject to these protections.
28 Consultation at 12 (“In certain cases, such as social networks, the datasets created are so close to the service provided to the end-user so as to be virtually indistinguishable.”).
Conclusion

The Sections appreciate the opportunity to provide input on the important issues raised by the Consultation. The Sections would be pleased to respond to any questions the IAA may have regarding these comments, or to provide any additional comments or information that may be of assistance to the IAA.