COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST ON THE DUTCH MINISTRY OF ECONOMIC AND CLIMATE AFFAIRS CONSULTATION ON ONLINE PLATFORMS AND COMPETITION LAW

February 5, 2019

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The Section welcomes the opportunity to provide input to the Dutch Ministry of Economic and Climate Affairs’ ("Ministry") consultation on online platforms and competition law, and more specifically on the question whether the current competition rules suffice and/or additional regulation is required to deal with the new challenges online platforms bring. These comments are submitted in response to the request of the Ministry for public comments (the "Consultation") and follow the format as published online by the Ministry.1 The Section also takes note of the Ministry’s discussion note on future suitability of competition policy in relation to online platforms (the “Discussion Note”) published with the Consultation. The Section commends the Ministry for seeking input from the public on these important issues.

Executive Summary

The following comments reflect the experience and expertise of the members of the Section with competition law in the United States and other jurisdictions. The Section is available to provide additional comments or to engage in any further consultation with the Ministry as appropriate. Overall, the Section would like to highlight two global themes:

1. The competition issues raised by online platforms and discussed in the Discussion Note, such as assessing competitive effects in two- (or multi-) sided networks, network effects, and economies of scale, are not especially new and not limited to online platforms. The Section submits that the principles of competition law are sufficiently flexible to deal with competition issues raised by digital platforms, and that regulatory initiatives to address these issues in the context of a particular business model would be inappropriate.

2. The use of existing competition law tools is preferable to regulatory intervention to address potential concerns about the competitive behavior and effects of online platforms. Regulation is not appropriate unless and until harm has been identified that exceeds the benefits of the conduct being regulated. In addition, regulations should apply no more broadly than needed to address the underlying concern. In the absence of such circumstances, regulation could burden competition and chill innovation, producing a less efficient economy and reducing consumer welfare.

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1 See Dutch Ministry of Economic and Climate Affairs, Discussion paper on competition law and online platforms (Dec. 19, 2018), available at www.internetconsultatie.nl/mededinging_platforms.
Question 1 of 11

To what extent do you believe that the principles of competition law are sufficiently flexible to be able to deal with the new challenges posed by digitisation?

As a threshold matter, the Section notes that the “challenges posed by digitisation” is a topic that goes far beyond the challenges posed by online platforms (which is already a very broad topic). A number of leading antitrust authorities, including the U.S. Federal Trade Commission and the European Commission, have recently launched multi-month studies in which they have identified a number of distinct questions in relation to the competition policy implications of the digital economy.2 The Section urges caution in evaluating any comments and (especially) policy recommendations the Ministry may receive and encourage the Ministry not to act precipitously, without further study of the issues.

For present purposes, the Section limits its comments to the challenges posed by alleged anticompetitive conduct of online platforms. The Section submits that the principles of competition law are sufficiently flexible to deal with challenges posed by online platforms that relate to maintaining competitive markets. Other challenges that may be posed by online platforms are outside the scope of competition policy.

More specifically, addressing any competitive issues associated with online platforms through existing competition law tools ensures that any intervention is made on a case-by-case basis after thorough examination of relevant facts and circumstances and with full respect for interested parties’ rights of defense. As the Ministry recognizes, Articles 101 and 102 TFEU and its Dutch equivalents (Articles 6 and 24 Dutch Competition Act) already prohibit anticompetitive conduct by online platforms, regardless of whether these are committed by single undertakings or by associations of undertakings. For example, European authorities have used competition law to address allegedly harmful behavior of, and the contractual terms used by, online platforms and search engines. Cases have been brought against, for example, Amazon, Google, Expedia and Booking.com.

The Section is also concerned about potential negative and unintended effects of focusing on a particular business model, i.e. online platforms, rather than on particular business practices. Restrictions on online platforms by definition could create a bias in favor of first party retailers (both online and offline). Imposing costs on online platforms, but not on traditional distribution channels, could tend to distort competition and disadvantage online platforms, as different rules would apply when goods flow from the same supplier to the same customer depending on whether the customer purchases using an online platform or a first party retailer, regardless of the relative efficiencies of the different channels.

In addition, although online platforms are a relatively new phenomenon, it is not clear that the antitrust issues they raise are new. Question 1 does not identify the challenges that the Ministry has in mind, but the Discussion Note mentions the possibility that online platforms may gain market power as a result of network effects, information advantages and economies of scale.

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The Discussion Note further observes that online platforms could use algorithms to implement cartels; that the use of algorithms could contribute to tacit collusion; and that future algorithms could engage in cartel behavior without human intervention.

Antitrust authorities have decades of experience in applying competition law principles in markets characterized by network effects and assessing the role of information (and other) advantages, including economies of scale, in assessing competitors’ market power. The Section respectfully submits that these issues are not new from a competition law perspective, or unique to online platforms.

The Section also notes that the implementation of cartels through pricing algorithms is not a unique issue for online platforms. Recently, the European Commission fined four consumer electronics manufacturers for fixing online resale prices in 2018, but the use of pricing algorithms in these cases did not raise any novel issues. In any case, the role of pricing algorithms may be more of a concern in relation to sellers that use online platforms rather than online platforms themselves. The Section thus submits that the current rules thus far appear perfectly suitable for assessing conduct involving pricing algorithms.

The issue of tacit collusion is also well known and not limited to online platforms. A number of commentators have speculated that the use of algorithms could make tacit collusion more likely. However, there is no consensus among antitrust authorities or otherwise that such concerns warrant a change in approach to tacit collusion. Again, such concerns in any event relate more to sellers that utilize online platforms rather than to the platforms themselves.

As regards the possibility that future pricing algorithms may engage in cartel behavior without direct human intervention, the Section notes that such concerns are presently speculative. If such issues do arise, it is possible that existing competition law tools will again be sufficiently flexible to deal with them. As Director-General Laitenberger of the European Commission has noted, “companies cannot hide behind algorithms.” The Section also notes the considerable work being done in other areas to ensure the ethical development of algorithms.

Use of Competition Law is Preferable to Ex Ante Regulation

The Section submits that the use of existing competition law tools is preferable to regulatory intervention to address potential concerns about the competitive behavior and effects of online platforms. In general, the Section believes that regulation is not appropriate unless and until actual harm to competition has been identified and that the harm to competition exceeds the benefits of the conduct being regulated. Put another way, any proposal for regulation should assess whether the benefits of the regulation exceed the costs of that regulation. In addition,

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8 See Executive Order 13563, “Improving Regulations and Regulatory Review,” 76 Fed. Reg. 3821, January 21, 2011 (the regulatory system “must take into account benefits and costs, both quantitative and qualitative”); id.
regulations should apply no more broadly than needed to address the underlying concern. In the absence of such circumstances, regulation could reduce competition and chill innovation, producing a less efficient economy and reducing consumer welfare. In general, the economic literature on regulation has focused on three primary sources of market imperfections: externalities, asymmetric information, and monopolization.\(^9\)

The Section believes that regulatory initiatives applying to online platforms as a whole would be inappropriate absent a showing of market failure or of widespread abuses that merit regulatory intervention. Otherwise, regulation may defeat or distort the ability of the market to allocate risks, rewards, and resources. In addition, regulation could have the unintended effect of discouraging innovation and diminishing inter-platform competition.

Online platforms play a role in a wide range of different markets, often in conjunction with offline markets. The relation between online and traditional markets varies from market to market, and is subject to rapid change. In such a diverse and rapidly evolving area, it is particularly important that any intervention be based on careful factual analysis on a case-by-case basis; not simply on theory or assumptions related to a few unique companies. Antitrust enforcement to address concerns about misconduct by platforms is also likely to better serve consumer welfare as compared to ex ante regulation, since such regulation risks sacrificing the efficiencies and other benefits of platforms by imposing potentially rigid rules that lack the flexibility of existing competition (and consumer protection) laws. An important economic feature of these complexities and interdependencies is that even relatively small changes can hinder the efficient operation of platforms and negatively affect innovation.

Also, it is unlikely that the development of new regulations will be able to keep pace with the development of new technologies and market practices. Innovations in the digital sector have been transformative in a wide variety of industries over the last several decades; the obvious and profound consumer benefits of such innovations should caution against implementing pervasive regulatory regimes, whose effects would be difficult to predict, to address perceived competition issues that could be better addressed by evaluating and taking action against specific anticompetitive conduct using existing competition and consumer protection laws and investigative tools.

**Question 2 of 11**

**Are there any new challenges to competition law that have not been discussed here?**

The Section interprets this question as asking about “new challenges to competition law” in relation to the assessment of conduct by online platforms that have not otherwise been discussed in the Discussion Note (since no competition law challenges are discussed in the Consultation). The nature of the Consultation does not permit a complete discussion of all issues that have been raised in relation to online platforms. The Section refers the Ministry to comments submitted in response to a number of other consultations.\(^{10}\)


\(^{10}\) See, e.g., Comments of the American Bar Association’s Sections of Antitrust Law and International Law on the European Commission’s Proposal for a Regulation Promoting Fairness and Transparency for Business Users of Online Intermediation Services (June 25, 2018), available at...
The Section would, however, like to point out that online platforms typically involve two-sided or multi-sided markets. The analysis of competition in such markets poses a number of challenges for competition law, as well as for policy-makers in other areas, since traditional competition law tools (e.g., for market definition and market power analysis) can be more difficult to apply in such markets. As the Dutch Authority for Consumers & Markets (“ACM”) acknowledged in its article “Big Platforms, Big Problems?”¹¹, defining the relevant market can be more difficult in multi-sided markets. For example, the SSNIP-test might be less helpful to determine whether products compete. However, alternative tests may be, and can be, employed within the existing competition rules. The Section believes no additional regulation is required to deal with these challenges, but that competition authorities should assess competitive restraints on a case-by-case basis within the current framework.

Specifically in relation to online platforms, the interrelationship among the various groups—with each other and with the platform—often result in platform-specific investments and prompt platforms to balance the needs of the various groups when making pricing and design decisions. A challenge for online platforms is that increasing benefits to one group of participants may decrease benefits or increase costs to other participants. Therefore, to be successful, online platforms must appeal to each group of participants with an optimal mix of prices and terms. Successful online platforms would offer a competitive mix of prices and terms to each group of participants. The fact that some providers may offer less generous terms of access than others does not necessarily imply a market failure or uncompetitive market. Instead, it could be part of a competitive dynamic in which providers compete by offering differentiated services to each group of platform participants.

**Question 3 of 11**

**What do competition regulators need to be able to enforce online?**

The Section notes that competition authorities have a wide range of tools to ensure that they are able appropriately to enforce the competition rules. In Europe, the adoption of Directive 2019/1 will help to ensure that Member State competition authorities can be effective enforcers.¹² The Section submits that the same tools competition authorities use in other sectors of the economy apply to competition law enforcement against online platforms.

More generally in relation to fast-developing digital markets, the Section agrees that competition authorities need to invest in understanding the functioning and evolution of digital markets. Identifying the real problems in these markets and determining what conduct may lead to a violation of competition law requires in-depth knowledge of how these markets

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work. The Section applauds the ACM for making this one of its priorities. Indeed, in 2017, the ACM published the results of an important study of online video platforms.

In addition, competition regulators and authorities should focus on international and national cooperation with other competition regulators and authorities. As the Ministry rightly pointed out, given the cross-border nature of the Internet, the behavior of market parties is not just a matter for national competition authorities. Similarly, any regulatory initiatives that may be considered appropriate may need to be undertaken at the international level to avoid market fragmentation and barriers to entry and to maintain a level playing field.

Question 4 of 11

To what extent is it plausible that the dynamics of online platform markets have created sustainable dominant positions?

The Section believes that the presence of sustainable dominant positions can be determined only on the basis of a case-specific economic analysis. As noted in the response to Question 2, online platforms are typically active in two-sided or multi-sided markets in which traditional approaches to defining markets – i.e., assessing demand substitutability and other elements in the context of the “hypothetical monopolist” test – may be difficult to apply. These challenges, however, have been addressed in a wide range of markets over decades and are not limited to online platforms.

As noted in the response to Question 1, a number of factors mentioned in the Discussion Note – network effects, economies of scale, etc. – are also not unique to online platforms. These factors are typically taken into account by competition authorities in assessing whether a particular undertaking has market power. The Section notes, however, that other characteristics of online platforms not mentioned in the Discussion Note may make achieving a sustainable dominant position in online platform markets particularly difficult. For example, customers’ ability to use multiple products or services (i.e., “multi-homing”), may lower barriers to entry. Demand-side substitution can be unusually easy, and established firms can quickly be displaced by innovation. As a result, high market shares in online platform markets may not indicate durable market power.

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 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. In a U.S. example, 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

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15 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).
evidence that the evolving nature of the market itself precludes the merger's likely anticompetitive effects.\(^\text{16}\)

Given this, the Section believes it is important that competition authorities continue to base market definitions and assessments of market power in relation to online platforms (as with other technology industries) on sound economic analysis of the particular facts of the case, and refrain from adopting broad presumptions that may be unwarranted.\(^\text{17}\) For as the ACM has acknowledged, there should be no presumption that “big data”\(^\text{18}\) leads to market power.\(^\text{19}\) 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. Also, large platforms such as Google, Facebook and Amazon, do not "monopolize" data, even if they have amassed large amounts of data. Indeed, due to the unique features of data, mere data, on its own, may not be a “monopolizable” asset because it is not necessarily either an exhaustible or an exclusive, non-replicable, resource.\(^\text{20}\) 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.

The Section respectfully submits that well-established approaches to defining markets remain largely applicable to online platforms (and to other technology industries), and the presence of durable market power can be determined only by a case specific economic analysis and factual assessment.

**Question 5 of 11**

**What is the role of the government when it is not certain whether sustainable positions of power actually exist? Should pro-competitive measures be taken or is a different approach more sensible?**

The Section presumes that this question relates to sustainable dominant positions in online platform markets, but believe ex ante measures should be avoided particularly where it is uncertain whether a sustainable dominant position even exists. The Section reiterates that traditional tools to identify dominant positions can be applied in online platform and other digital markets as well as in other markets. But the identification of market power is not in itself a reason to intervene; for sound reasons, market power as such is not prohibited in U.S., EU or Dutch competition law. Measures that seek to avoid the creation of market power by legitimate means would be inappropriate and would be likely to distort and discourage

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\(^{17}\) 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).

\(^{18}\) 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.

\(^{19}\) See ACM, *Large Platforms, Big Issues*? (Sept. 2016), in which the ACM concludes that data ‘can’ provide market power, but whether it actually does depends on the circumstances.

competition. Such measures would likely chill innovation, producing a less efficient economy and reducing consumer welfare. Similarly, applying broad measures to address concerns with a small number of leading online platforms could harm relatively small online platforms and new entrants, inadvertently enhancing the market power of those large platforms. Any increased costs and complexity in managing online platforms will tend to increase entry barriers and entrench incumbents, who can absorb regulatory compliance costs more effectively than new entrants.

Question 6 of 11

Which market condition(s) are sufficient signals that it is necessary to intervene with ex ante measures?

Again, the Section presumes that this question relates to market conditions in online platform markets. As discussed above, the Section believes that regulation is not appropriate unless and until harm has been identified that exceeds the benefits of the conduct being regulated. Again, the Section strongly advises against trying to identify one-size-fits-all market conditions that trigger intervention in any circumstances, and particularly by ex ante measures. As noted, intervention to ensure competitive markets should be undertaken on a case-by-case, evidence-based approach. Antitrust authorities can and do intervene ex post where they identify an abuse of a dominant position, in online platform markets as in other markets. Intervention ex ante is likely to be inappropriate and counterproductive, because such intervention, by definition, does not allow for a case-by-case analysis.

More specifically, the Discussion Note mentions the possibility that users may become “trapped” in an ecosystem of services. The Section notes that such “lock-in” is not unique to online platforms and has been addressed in many antitrust cases over decades. The existence and competitive impact of such lock-in varies from market to market, and the Section cautions against adopting simplistic assumptions, particularly in relation to ex ante measures. Indeed, “lock-in” is not by itself an antitrust violation under U.S. law because Sherman Act Section 2 requires a showing of both monopoly power and anticompetitive conduct. The existence of “lock-in” may be evidence of market power in some cases. Lock-in, however, may arise in markets characterized by network externalities, switching costs or other sources that cannot be attributed to any abusive or unlawful behavior by the firm that is advantaged by the “lock-in.”

More generally, dominance or the possession of monopoly power is not an abuse in itself, and the Section urges the Ministry and the ACM to continue focusing enforcement efforts on case-by-case analysis of particular forms of conduct that substantially restrict competition, even by companies that are rendered dominant by virtue of network externalities, switching costs, or other attributes of specific products, services and/or technologies. Similarly, the Section urges to proceed cautiously regarding any measures that would lead to the imposition of mandatory access or sharing obligations, as will be discussed in more detail below.

Question 7 of 11

To what extent is the imposition of an obligation to share (certain) data on dominant platforms a promising way to drive competition in online markets?

The Section submits that imposing an obligation on a dominant platform to share certain data with competitors should be an appropriate remedy to a specific abuse only in exceptional circumstances, provided that the long-established criteria set out in the case law of the European Courts and the decisional practice of the European Commission and other
authorities are met. The Section advises against the imposition of such an obligation in a particular market or to digital platforms on an ex ante basis without a careful, fact-based analysis of conditions in that market. It is difficult, in the abstract, to generalize about the significance of data to different online platforms or to the ability of other online platforms to compete with them. As the response to Question 8 indicates, moreover, such obligations have the potential to raise significant legal issues of their own.

The Section further notes that while access to data of dominant online platforms could, in theory, facilitate entry by new online platforms, an obligation to share such data also could impede the development of such markets. For instance, given the significant investment many firms make in collecting data, and the importance of such data to their competitiveness, a requirement to share such data with competitors could create a significant disincentive to continuing innovation.

As explained by the U.S. 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.”21 Enforced sharing also requires the enforcer or court “to act as central planners, identifying the proper price, quantity, and other terms of dealing for which they are ill-suited.”22 And, finally, compelling competitors to negotiate access to each other’s inputs “may facilitate the supreme evil of antitrust: collusion.”23 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.24 To the extent mandated sharing pursuant to antitrust remedies relates to personal data, such remedies could also raise significant privacy concerns. The Section submits, therefore, that there is a significant risk that an overbroad or insufficiently planned intervention could itself impose significant or even prohibitive costs or other risks to the competitive process. Indeed, one significant criterion for antitrust intervention based on a specific theory of harm must be that feasible remedies for that harm exist, and that those remedies do not pose their own prohibitive costs or other risks to the competitive process.

Therefore, 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 we noted above, data is often not “monopolizable” and 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 often may 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 with each other in accumulating data and on secondary data markets.25

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 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 typically protected by intellectual

22 Id.
23 Id.
24 Id.
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.

Also, with the new data portability right as laid down in Article 20 of the GDPR, consumers already have the right to transfer data from one platform to another, as a result of which a lock-in situation is less likely.

In light of the foregoing, the ACM and other 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.

The Section respectfully caution against any presumption that the digitization of the economy somehow threatens competition or justifies expanding the use of behavioral remedies such as sharing of data that to date have been required only in very exceptional circumstances. Such novel and potentially far-reaching enforcement approaches should continue to be considered only case-by-case and applied only when clearly justified following objective and rigorous analysis. In analyzing technology markets, enforcers should focus on whether a party is engaging in conduct that harms competition. To the extent measures are required to offset anticompetitive effects, those measures should be narrowly tailored to redressing that harm on the basis of a case-by-case assessment.

**Question 8 of 11**

*Can a right to data portability of ratings and reviews for business users promote competition in online markets?*

The Section respectfully submits that this question about data portability of ratings and reviews for business users implicates a number of important legal areas whose relevance may not be immediately obvious. Accordingly, the Section urges caution in the Ministry’s interpretation of responses to this question.

More specifically, the question does not identify the authors of the relevant ratings/reviews; how they relate to the “business users” or what goods/services these businesses are using; or the “online markets” in which competition is to be promoted. All of these terms are very general and could apply to a wide variety of business actors and markets.

The Section infers that the question relates to a paradigm in which an online platform acts as an intermediary between businesses offering goods or services to consumers, who are invited to leave ratings/reviews based on their experiences with those businesses. Examples could include ratings/reviews of hotels or restaurants on a platform like TripAdvisor or Booking.com. Such online platforms are indeed important, but they represent only part of the wide range of online markets in which user feedback may be relevant. The Section respectfully suggests that any proposals based on the results of the consultation be limited to the relevant

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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.
types of business actors and markets to avoid such proposals being applied overly broadly, in
which case they could have unintended consequences.

Underlying the question seems to be an assumption that the emergence of competition for the
platform/intermediary collecting the ratings/reviews could be facilitated if business users
could “port” their ratings/reviews to a new platform. This is a questionable assumption,
considering the logistics of individual business users porting ratings/reviews of their
goods/services to multiple potential platforms; the possibility for such platforms to generate
new ratings/reviews without the need to port those on other platforms; the possibility for
consumers to post ratings/reviews on multiple platforms; and the declining value of older
ratings/reviews that might be ported relative to new ratings/reviews.

Even in circumstances where that assumption is valid, however, implementing the proposal
would raise issues under several legal regimes, including contract, intellectual property, data
protection and consumer protection laws. For example, businesses listed on a
platform/intermediary and the consumers leaving ratings/reviews have contractual privity
with the platform/intermediary but not with one another. If such a portability right were
introduced, it is not clear how the respective rights of the business user and the consumer
ing the platform/intermediary author would be established. Depending on the consumer’s agreement with the
platform/intermediary, he/she may have intellectual property rights in relation to his/her
ing the platform/intermediary reviews. Again, it is not clear how such rights would be affected by a new portability
right for business users. In addition, consumer ratings/reviews may involve personal data in
which the consumer has rights under EU data protection laws, including the right to consent
to processing of data, the right to require corrections or deletions and the right to be forgotten.
It is not clear how these rights would be affected by a potential portability right on behalf of
business users. Moreover, business users wishing to port ratings/reviews from one
platform/intermediary to another may have an incentive to be selective, for example only
porting favorable ratings/reviews. Any such selectivity could raise consumer protection
concerns by misleading users of the transferee platform/intermediary.

In sum, the Section respectfully submits that the assumptions underlying the question may
require further examination, and proposals intended to facilitate competition in markets for
platform/intermediary services would raise a number of difficult issues that may not be
apparent to all respondents.

More generally, as discussed in response to Question 7, the Section notes again that antitrust
authorities have extensive experience with circumstances in which an actual or potential
competitor claims to need access to “essential facilities” of another business actor and have
developed a number of tests and conditions for applying such remedies. The Section submits
that such cases continue to be best addressed by antitrust authorities, who can and will adapt
their analyses to new market conditions and technological developments on a case-by-case
basis.

**Question 9 of 11**

**When and for which services is it desirable to require high interoperability in order to avoid switching costs?**

The Section respectfully submits that this question about interoperability and switching costs
is overbroad. For example, interoperability is a concept that applies to a wide range of goods
and services, not only online services or platforms. Similarly, switching costs can vary
significantly depending on the nature of the relevant services and users (e.g., business users vs
consumers). Accordingly, the Section urges caution in the Ministry’s interpretation of
responses to this question and recommend that any proposals that may emerge following the consultation be careful to specify the intended scope, so as to avoid unintended consequences.

The Section infers from the context of the consultation that the question concerns the interoperability of services offered by online platforms to avoid (or reduce) switching costs faced by consumers using those platforms. The Section also infers that the question assumes that switching costs harm consumers and that such costs can be avoided (or at least reduced) by encouraging or mandating interoperability. The Section agrees that interoperability between different online tools can benefit consumers by reducing switching costs, thereby facilitating competition between providers of online services but note that the benefits are likely to vary significantly from market to market and that interoperability may impose costs as well.

The Section also notes that the importance of switching costs and the benefits of interoperability vary depending on the nature of the service, and that there are different ways of promoting interoperability. It is also important to note that achieving interoperability often involves some form of cooperation among competitors, which raises its own concerns in terms of the risk of reducing competition. Different companies may also choose different competitive strategies in relation to their openness to third-party services; one company may seek to promote a “walled garden” approach to encourage customer loyalty, while another may emphasize its products’ ability to operate with third-party products and services. Both approaches can be legitimate competitive strategies, and any regulatory policy intended to favour one or the other should be treated with caution.

In online markets as in other markets, the publication of industry standards can be an effective way to facilitate interoperability. Again, however, the development of such standards may involve cooperation among competitors and the sharing of confidential information. Such standards may also require the licensing of intellectual property rights. The European Commission’s Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements recognise that “[s]tandards . . . normally increase competition and lower output and sales costs, benefiting economies as a whole,” but also caution that standard-setting can “also give rise to restrictive effects on competition by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development.” The particular issues associated with intellectual property rights are discussed in Paragraphs 267 et seq. of the Commission’s guidelines.

The Section supports the Commission’s guidance on antitrust issues raised by standardization and recommend that any policy recommendations developed based on the consultation to enhance interoperability take this guidance into account.

**Question 10 of 11**

**What other policy options are promising to keep online markets competitive?**

Given the diversity of online markets, and the rapid pace at which they are evolving, the Section believes it is not appropriate to generalize about policy options to further promote competition across all such markets. In general, however, the Section supports investments in industrial policy initiatives in areas such as machine learning and blockchain, training more data specialists and encouraging Dutch firms’ adoption of e-commerce. In cooperation with regional authorities such as the EU, moreover, the Section supports action to protect online markets against barriers to trade.
Question 11 of 11

Given the cross-border nature of the internet, what is the best level of action to deal with platforms and competition challenges (national, European, international) and why?

The Section agrees with the Ministry that the Internet is cross-border by nature. The Section submits that in view of the fact that large online platforms operate at a global level, it would be optimal to deal with competition challenges of platforms at a global level. Given the lack of an international framework, however, the European level would probably be the next best level to deal with the challenges. In any case, intervention on a national basis is suboptimal if there is a desire to prevent market fragmentation and maintain a level playing field.

Conclusion

The Section appreciates the opportunity to provide input on the important issues raised by the Internet consultation of the Ministry. The Section would be pleased to respond to any questions the Ministry may have regarding these comments, or to provide any additional comments or information that may be of assistance to the Ministry.