COMMENTS OF THE AMERICAN BAR ASSOCIATION’S SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW ON THE EUROPEAN COMMISSION’S PUBLIC INCEPTION IMPACT ASSESSMENT ON FAIRNESS IN PLATFORM-TO-BUSINESS RELATIONS

January 9, 2018

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. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors and therefore do not state the views or policy of the American Bar Association.

The Sections welcome the opportunity to participate in the European Commission’s (“Commission’s”) public inception impact assessment on fairness in platform-to-business relations (“p2b Assessment”), which was published on October 25, 2017.1

The following comments (“Comments”) reflect the experience and expertise of the Sections’ members with competition law in the United States and other jurisdictions, including the European Union (“EU”). The Sections are available to provide additional comments or to participate in any further consultations with the Commission as appropriate.

A. Introductory Comments

The Sections agree with the Commission that “[o]nline platforms drive innovation and growth in the digital economy. They play an important role in the development of the online world and opening new market opportunities, notably for SMEs. […] Online platforms offer major new efficiencies in accessing global consumer markets.” The Sections recognize, however, that some competitors have expressed concern regarding the operation of some platforms in the EU.

The Sections also recognize that diverging member state initiatives to regulate online platform conduct could be problematic. Therefore the Sections support efforts to consider carefully whether a consistent, EU-wide approach might provide a more effective way to address any concerns relating to the operation of online platforms. As outlined below, however, the Sections have concerns regarding the potential chilling effects of cross-sector, ex ante regulation, particularly taking account of the availability of existing antitrust and other enforcement tools to address the concerns raised.

B. Existing tools to address anticompetitive conduct

As the Commission recognizes “the (EU) competition rules … prohibit, inter alia, abusive behavior by platforms that are found to be dominant on the relevant markets(s) where they operate.”2 As the Commission notes, online platforms are in their essence a “gateway to markets” for businesses with goods to sell. As a general matter, online platforms are not situated differently from other avenues to market—such as traditional wholesalers—merely because they involve software and the internet. And as such, online platforms remain equally

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2 p2b Assessment at 4.
subject to the well-established competition laws. Indeed, if anything, the online nature of the service increases transparency into some aspects of platform operators’ practices (for example, because some terms and conditions and whether certain products are delisted are available online), and in turn, increases the ability of market participants and competition authorities to detect anticompetitive behavior in a timely manner.

The Sections note that the rise of online commerce has expanded, rather than limited, businesses’ choices in how to distribute their products, such as using traditional wholesalers or designing a company website for direct online sales. New online platforms continue to emerge and evolve. In fact, integrated platforms promote competition and consumer choice by allowing third parties to offer their products and services to consumers on their platform since this practice offers businesses a route to market that they likely would not otherwise have and gives consumers access to resellers that they may not otherwise be aware of. In addition, such strategies do not limit the ability to pursue other distribution strategies in parallel. Imposing significant burdens on integrated platforms could lead them to limit or terminate third-party access to their platforms through lawful means and thus reduce competition rather than expand it. Ex ante, inflexible regulations may chill innovation and may not be able to keep up with rapidly changing market conditions. Compelling a firm that has gained market power through innovation and competition to deal with its rival, for example, “is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.”

In contrast, fact-specific case-by-case competition law enforcement has proven to be a better instrument to address perceived harms. The Sections urge the Commission to carefully consider existing competition law enforcement in evaluating the extent to which specific regulation of online platforms may be warranted. The competition laws were consciously designed to be flexible and to preserve an open marketplace, rather than to quash negotiating leverage that comes from the interplay of supply and demand forces and is rarely enduring in market economies.

Under U.S. law, as a general matter, Section 2 of the Sherman Act “does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal” even when a business has monopoly or market power. Similarly, the EU has generally acknowledged, in its case law on abuse of dominance under Article 102, that a seller has the right to decide whether to do business with particular firms and on what terms, unless a refusal to deal has a demonstrated adverse effect on competition. The fact that businesses using an online platform are dissatisfied with the terms offered by the platform does not mean that competition has been adversely affected or that an abuse of dominance has occurred. Indeed, if customers of online platforms are dissatisfied, this creates market opportunities for

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competing online platforms and the incentive for new collaborations or innovation by new entrants.

The Commission notes that online platforms may not share access to contact information and other data and information about customers, which may impede the ability of businesses that use online platforms to interact with their customers.\(^7\) While customer data is an important input for businesses, it is often replicable or substitutable, because one firm’s collection of data on customers does not preclude another firm from collecting the same or similar data on customers from other sources. The Sections respectfully submit that the possession of data advantages could be a potential source of market power only if, at the very least, the data were necessary to compete, served as an effective barrier to entry, and comparable data were not replicable or accessible by other companies in a timely manner.

However, the existence of large proprietary databases is not necessarily indicative of dominance. Even if a platform is considered dominant, it does not necessarily follow that the platform should be required to give competitors access to its data. Indeed, decades of antitrust enforcement involving the “essential facilities” doctrine has shown that true essential facilities are rare and that access to such facilities should be required only in exceptional circumstances. Hence, the Sections note that competition law enforcement institutions are well-advised to adopt a degree of caution in evaluating claims that any particular resource or asset held by a firm is an “essential input,” or that a mandatory sharing or access regime is justified. For one thing, inputs are rarely truly essential, and those advocating forced sharing often underestimate the ability of determined rivals to create competing assets and technologies that benefit consumers.

Aside from practices that may constitute an abuse of dominance – where standards are arguably less settled – the Sections note that existing law addresses other potentially problematic practices. In particular, price parity agreements, in which a platform requires that a reseller offers the platform the best prices or best terms it is offering in any (online) forum or platform, have already been subject to enforcement actions. The UK and German competition authorities, the Office of Fair Trading (“OFT”) and the Bundeskartellamt (“BKartA”) respectively, investigated the use of these clauses by Amazon and in 2013, after a year-long investigation by these competition authorities, Amazon agreed to remove the clauses. Both competition authorities agreed to drop their investigations once Amazon had demonstrated that it had taken steps to remove price parity clauses and that resellers has been informed of this.\(^8\)

Similarly, cases were brought against online hotel booking platforms including Expedia, Booking.com and HRS amongst others, *inter alia*, for requiring hotels to make their “best rates” available on the hotel booking platform. For example, the OFT, followed by its

\(^7\) Inception Impact Assessment at 2.

successor agency, the Competition and Markets Authority (“CMA”), conducted an investigation into Booking.com and Expedia, which concluded in 2015, when the travel companies removed rate parity clauses from contracts with certain hotels.9 The BKartA also investigated Booking.com and HRS and in two decisions, prohibited Booking.com10 and HRS11 from using price parity clauses in its contracts. It also continues to investigate Expedia for pursuing the same practices.

To take another example, the various credit card cases relating to competition issues arising out of interchange fees for payments using debit or credit cards culminated in 2015 with EU-wide legislation capping interchange fees precisely because of the inconsistent and fragmented outcomes at member state level. As the Commission is aware, the French Competition Authority investigated the fees, ordering MasterCard and Visa to reduce them by just 48% and 44%, respectively,12 while Spain introduced a variety of fee caps.13 The EU legislation provided a uniform, sector-specific solution, allowing national competition authorities, such as the CMA,14 to end their investigations.

In addition, some Member States have national laws regarding unfair competition or consumer protection laws that may apply to activities of online platforms bearing in mind, for example, that some resellers on platforms are individuals selling personal belongings. Hence, the Sections recommend that the Commission carefully assess if proposing new regulation would “solve” perceived problems, or instead unduly complicate competition enforcement involving online platforms.

C. Proposals

As an initial matter, the Sections recommend that the Commission carefully consider the potential adverse implications of imposing cross-sector, ex ante regulation of online platforms. An ex ante system of regulation for dynamic online platform markets may harm competition and consumers by chilling procompetitive and otherwise beneficial conduct. Any legal framework that seeks to maximize consumer welfare must include an assessment of: (1) the probability that its application will result in errors, either false positives in which arrangements that benefit consumers are prohibited, or false negatives in which arrangements that harm consumers are allowed; and (2) the administrative costs of implementing the system. A framework that focuses upon minimizing the social costs of false positives, false positives in which arrangements that benefit consumers are prohibited, or false negatives in which arrangements that harm consumers are allowed; and (2) the administrative costs of implementing the system.

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9 The official statement can be found at https://www.gov.uk/government/news/cma-closes-hotel-online-booking-investigation.
11 The BKartA’s press release can be found at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_01_2015_hrs.html.
13 Sancho Guibert, Assistant General Counsel, EMEA Cards, Citibank, Spain, Multilateral Interchange Fees Capping a Good Idea?, International In-house Counsel Journal, Vol 7, No. 28, Summer 2014, 1.
negatives, and administrative costs is most likely to generate the greatest benefit for consumers.

The US experience has shown that attempts to legislate commercial practices in a particular sector can lead to serious practical difficulties.\(^{(15)}\) For example, historically, the U.S. relied on “a variety of federal regulatory schemes in particular sectors,” particularly in those industries characterized by significant declines in average costs (also known as “natural monopolies”).\(^{(16)}\) As noted by one former Antitrust Division official, “[a]fter long experience with these regulatory approaches ... [the United States] discovered that some sectors that we had considered to be natural monopolies and therefore appropriate subjects for regulation rather than competition have turned out, either because of better economic understanding or technological changes, not to be natural monopolies” and that “[t]hese sectors are now understood to be suitable for market-based competition.”\(^{(17)}\) In light of this learning, the United States pursued a policy of deregulation across a significant number of industries (such as trucking, shipping, and telecommunications) beginning in the early 1980s.\(^{(18)}\)

The use of ex ante cross-sector regulation can be particularly problematic in the context of technology markets. In light of the wide variety of operators and products involved across platforms, it is not obvious which practices should be treated as “unfair” or “anticompetitive” and inflexible condemnation of broad categories of conduct does not adequately account for “circumstances, details, and logic of the restraint.”\(^{(19)}\)

If the Commission does decide to proceed with any such measure, the Sections respectfully recommend considering whether and how existing statutory frameworks already address such practices. Should the Commission decide to proceed with legislative measures to address the use of certain practices by online platforms, the Sections recommend building sufficient flexibility into such measures to minimize any unintended restriction of harmless or beneficial forms of competition.

The Sections recommend that any regulatory intervention be based on a comprehensive understanding of platforms’ business models and their competitive landscape.

\(^{(15)}\) The Section has looked closely at efforts to favor regulation over several decades, and our experience has led to a longstanding Section policy in favor of free markets and against regulation except in the most unusual circumstances. See, e.g., Comments on the Railroad Antitrust Enforcement Act (2008), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_hr1650_s772.authcheckdam.pdf; Comments to the Antitrust Modernization Commission Regarding the McCarran-Ferguson Act (2006), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_amc-mccarranferguson.authcheckdam.pdf. See also, Antitrust Modernization Comm’n, Report and Recommendations, 335 (2007) available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf. (This Commission was appointed by the President and the leadership of the Senate and House of Representatives to examine all antitrust laws.) The Section was not addressing EC member state uniformity issues at these times.


\(^{(17)}\) Id.

\(^{(18)}\) Id.

\(^{(19)}\) California Dental Ass’n v. F.T.C., 526 U.S. 756, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999).
Digital platforms generate value by exploiting the opportunities created by large-scale interconnectivity, the processing of vast amounts of data streams, and the resulting technology-based reductions in transaction costs. These same factors produce large scale and scope economies with the result that platforms can grow to be very large and branch out into diverse complementary services. Competition among platforms is often not head to head. Rather, successful platforms tend to differentiate in their core strengths and develop complementary activities that may overlap with other platforms’ core service. The lack of closely symmetric competitors does not necessarily indicate the absence of competitive pressure and the development of new services by large platforms should not automatically be considered evidence of anticompetitive conduct (e.g., monopoly leveraging).

Although large platforms can grow to be very significant providers of a service, they do not necessarily achieve long term dominance, nor do they meet the criteria that define natural monopolies. There may be no economic or technological factors that assure their long-term stability. Rather, the heterogeneity of their users and the low barriers to entry faced by technologically competent differentiated players expose many of them to competitive threats.

Similarly, concerns that large proprietary databases may amount to a barrier to entry need to be approached cautiously. The Commission should consider the platform’s need to earn appropriate returns in the face of competing imitations of the service it provides. Forcing access to a dataset without understanding the role of data in value appropriation runs the risk of hurting innovation by reducing the incentives to invest.

The Sections recommend that the Commission consider the value generation and appropriation mechanisms of platforms in connection with the benefits they provide. Moreover, to the extent that the Commission believes that the existing competition laws are not sufficient to address concerns with the online platforms, the Sections respectfully suggest that the Commission carefully avoid the loss of any efficiencies that a platform gains by also offering its own products through the platform.

Regulatory interventions placing blanket obligations on platforms run the risk of disrupting and adversely affecting business models that deliver such efficiencies to consumers. At a minimum, the Sections suggest that a case-by-case intervention would be more effective – i.e., the approach that is taken under existing competition and consumer protection law enforcement procedures.

Finally, the Sections recommend that any new regulatory initiative should be clear as to the current gap in existing regulations that it is seeking to address. For example, the Sections recommend that the Commission take care to define the scope of the “platforms” that it wishes to cover, given the wide variety of “platforms” that currently exist, those that are emerging, and those that may be developed in the future. Similarly, initiatives aimed at potentially abusive conduct by dominant platforms should not be extended to conduct by non-dominant platforms. The Sections believe that precisely identifying the market failure to be addressed within a given market is an important first step for regulatory intervention, which can vary across sectors (particularly technology markets, which tend to be more dynamic).
D. Conclusion

The Sections appreciate the opportunity to provide comments on the Commission’s p2b Assessment. The Sections would be pleased to respond to any questions the Commission may have regarding these comments, or to provide any additional comments or information that may be of assistance to the Commission.