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ITI– The Information Technology Industry Council

ITI views on Competition policy in the era of digitisation

ITI appreciates the opportunity to contribute to the reflection launched by the European Commission on competition policy in the era of digitisation. We welcome the fact that this discussion is taking place in parallel with a similar initiative by the Federal Trade Commission (FTC) in the United States, covering a very similar set of issues. We encourage both authorities to continue their dialogue and foster a consistent approach to these issues globally.

ITI is the global voice of the tech sector. We advocate for public policies that advance innovation, open markets, and enable the transformational economic, societal, and commercial opportunities that our companies are creating. As such, our organisation strongly supports free and undistorted competition as a key factor to promote innovation and consumer welfare.

The European Commission is rightly focusing on key challenges and implications in a context where markets in Europe and globally are going through significant changes and continuing technological developments. Since the economy has become more innovation-based, it is crucial that regulatory agencies focus on the complementarities between fostering competition, benefitting consumers and incentivising innovation.

Today, Europe is a leader in several segments of the digital economy, such as app development, where revenues account for just under a third of the global market. Six EU Member States rank among the top 20 countries in the world with most app developers. It's estimated that every app developer job in the EU creates an additional 1.31 non-technical and indirect jobs, on average. Other rapidly growing segments in the digital sphere include cybersecurity and software development. The diversity of the European single market allows for different regions to claim expertise in unique technologies. Northern Europe, for example, has developed a niche as a hotbed for blockchain technology advancement.

Additionally, analysis of consumer trends show that the increased usage of mobile devices has brought significant changes to the way that people shop, share information, and communicate, allowing consumers to have more personalized and accessible experiences because of new technologies. By the end of 2016, there were over 450 million unique mobile subscribers in Europe, accounting for 84% of the population. This growth is enabled by growing mobile coverage, increasingly reliable data connections and improved mobile-device functionality. The app and mobile economy generated approximately €75 billion of revenues in the five biggest EU countries, a figure expected to grow by 25% annually.

COMPETITION, DATA, PRIVACY, AND ARTIFICIAL INTELLIGENCE

- **Competition issues in a world of ubiquitous data**

In light of the importance of the digital economy for the future of Europe, and the rapid technological and market developments we are witnessing, the questions the European Commission is asking are particularly relevant.

As the OECD also recognized, big data generates substantial innovations and efficiency gains, many of which are passed on to consumers, who are offered new products and services often free of charge. In addition, controlling large datasets does not necessarily lead to market power, as most digital markets are characterised by vigorous dynamic competition. ([OECD “Big Data: Bringing Competition Policy to the Digital Era” executive summary, 2017](#)).

Policy makers should carefully consider the potential unintended consequences of an excessively strict approach, which might prevent companies from finding innovative solutions or applying best practices. They should also **avoid creating new rules for every new innovative product** or business model. Every case must be assessed on its own merits.

The value of data depends on its commercial use and generally does not present special competition-related features, as in itself it neither constitutes a barrier to entry, nor by default grants a competitive advantage in the market. In fact, holding a certain amount of data can often lead to a competitive advantage if a business is also able to analyse and extract value from it, which is often passed on to consumers through new applications. Moreover, the amount of data is infinite, and data is non-rivalrous in that it can be simultaneously collected and use by multiple firms, and consumers can use or share their data multiple times. When acting as an antitrust enforcer, we recommend the Commission therefore assess **data** under the existing competition framework **as any other asset** that companies compete with in the market.

As with many other assets, data could potentially be used in anticompetitive ways: large network effects can potentially diminish consumer choice and effective competition. This could be reinforced by lack of interoperability and the possibility to exert filtering power, which grows with size. ITI believes that competition policy can currently deal with these situations, and the existing European legal framework gives competition and data protection regulators abundant tools to protect markets and consumers when needed. At the same time, intervention should focus on a company’s **conduct** and not on structural issues as such, like the size of a company or the amount of data it holds or collects. In most cases the acquisition and use of data does not represent a threat to

competition – and large amounts of data, including personal information, are increasingly a vital input for some of the economy’s most important innovations, in healthcare, safety, transport and environmental protection just to name a few.

While the EU competition framework has broadly proven that most issues can be solved with adequate application of existing rules, we believe that **interoperability, transparency, non-discrimination** and consumer **choice** should increasingly be the paramount principles to focus on for the future.

Given the significant intersections between competition and other policies in a global economy that is increasingly digitalised, any future developments of competition law should include a dialogue and reflection on how best to **avoid inconsistent approaches** and align the objectives of competition authorities and consumer and data protection agencies, maintaining a focus on the consumer/user welfare.

- **Privacy and competition**

A primary recommendation in relation to the potential interaction between privacy and competition is to ensure that the boundaries between the two remain clear, with antitrust regulators applying competition analysis to handle competition concerns, and data protection authorities using privacy laws to deal with privacy issues. This will help ensure that both the objectives of ensuring consumer welfare and protecting individuals’ privacy are met, and avoid running the risk of assessing data protection through the prism of market power or similar competition law constructs that are extraneous to privacy.

Customers’ trust in market rules and in market participants is crucial. From a business perspective, ensuring consumers’ access to and control over their own personal data is essential to encourage them to trust companies to use that data, leading to increasing consumer welfare in the form of better quality, more relevant and innovative products and services, often at lower prices or free of charge.

Privacy and security attributes are increasingly becoming a source of competition in their own right, with increasing awareness amongst consumers of privacy and cybersecurity issues. While this may not be the single decisive factor for consumers’ choices, who generally tend to favour free-of-charge applications made available to them in exchange for access to personal data, online companies are increasingly competing based on their privacy features, with the largest companies paving the way in developing transparency and risk management lifecycle programs to support smaller entities in their compliance with privacy obligations. This competition in providing services that feature greater privacy protections should be further encouraged by raising awareness amongst consumers and ensuring the cost to consumers of choosing more privacy and security protective services and

products is minimal. The key element of this is **interoperability** between services, and ensuring users are provided with the possibility to more easily switch across competing applications, bringing their data along, while ensuring that this does not lead to additional security risks.

- **Competitiveness and antitrust considerations in AI technologies**

The keys to adoption of AI are **transparency and trust**. Artificial Intelligence technologies can bring great benefits to consumers and society as a whole —augmenting human capability and enabling advances in education, healthcare, transportation, sustainability, as well as many economic efficiencies in these and other areas.

While AI systems are creating new ways to generate economic value, if this happens in an insufficiently competitive environment, the value favors only certain incumbent entities, and there is a risk of exacerbating existing wage, income, and wealth gaps. ITI supports **diversification and broadening of access** to the resources necessary for AI development and use. This should not be addressed primarily through competition policy, but rather through making computing resources available, and focusing on education and training, including opportunities to participate in the development of these technologies.

Big data and artificial intelligence technologies are also rapidly changing the way strategic market decisions are made. An issue which is often referred to by policymakers and practitioners is the potential for market distortion of **pricing algorithms**. The fact that pricing algorithms are used or not should not change an antitrust enforcement agency’s conclusion in relation to certain conduct. Still, increasing use of these algorithms raises enforcement questions as it might facilitate collusion, or make detection of collusive behavior more difficult.

The uncertainty surrounding AI technologies and the applicable rules may lead to concerns among those businesses considering the use of pricing algorithms. This would not be a desirable outcome, since there do not seem to be default antitrust concerns that would justify sacrificing the potential economic efficiency brought about by AI. We therefore encourage the Commission to evaluate existing policy tools and use caution before taking measures that may inadvertently or unnecessarily decrease competition instead of fostering it.

As applications of AI technologies vary widely, policy intervention can inadvertently reduce the number of technologies created and offered in the marketplace, particularly by startups and smaller businesses. We encourage policymakers to recognize the importance of **sector-specific approaches** as needed; one regulatory approach will not fit all AI applications. We stand ready to work with policymakers and regulators to address legitimate concerns where they occur.

COMPETITION POLICY AND DIGITAL PLATFORMS

There is no common and clear-cut understanding of the concept of digital platforms. The notion is currently used to indicate different models, such as search engines, social networks, marketplaces, cloud services providers, and operating systems, among others. It is also a concept that can take a very different meaning in B2B applications. These differences in business model and user interaction are critically important in understanding and assessing potentially non-competitive behaviour and resolving any potential market issues. As business models and applications change rapidly, it is important to avoid creating artificial boundaries, stifling innovation, and potentially undermining the development of new growth-enhancing business models. We appreciate the European Commission's reflection aimed at identifying the best approach of competition policy in relation to platforms without rushing into proposing legislation.

Platforms operate in multi-sided markets, but with different degrees of control over users' interactions; in some cases, their service is provided for free, or not against monetary compensation; some of them integrate different layers turning them into platforms of platforms – all these elements lead to differentiating market dynamics. Any policy discussion on the role of platforms in the market should reflect these nuances, the specific context in which the rules will apply and recognize the considerable benefit in the growth of free of charge services available to consumers.

As the European Commission stressed in its May 2016 Communication on platforms (COM 2016/288), they play a prominent role in the creation of digital value that underpins future European prosperity, presenting major innovation opportunities for European start-ups, SMEs and large businesses.

Platforms play a beneficial role as engines of the digital marketplace, not least by facilitating information and communication and helping match offer and demand in the Digital Single Market and globally. Platforms make it easier for consumers to buy online, compare products and their prices, learn from other consumers' experiences. In e-commerce, they are one of **the main channels for cross-border transactions**, allowing SMEs to compete beyond their national market and grow more, or more rapidly, than they would without an online intermediary. Consumers greatly benefit from the resulting increase in competition, variety and offer. Also, emerging concerns are being addressed by recent EU initiatives like the geoblocking regulation, the New Deal for Consumers and the platform to business proposal.

Today, most discussion of antitrust issues and platforms seems to focus on large companies. While efficiencies of scale and network effects may push toward concentration, this is not always the necessary outcome and careful analysis of the network effects as applied to different markets is needed – they will not necessarily be less competitive or less innovative. Market definitions should

better reflect the competitive dynamics in the sectors (for example competition between online and offline operators in a certain market). Also, these markets are increasingly competitive and innovative, as medium and smaller Internet platforms continue to play important roles in helping match suppliers and customers for a wide range of goods and services. In addition, the presence of large platforms can increase competition by making it easier for users to reach a vast range of suppliers and find the best offers.

Platforms of all sizes can have a significant influence in the consumer marketplace, and the competition between them and between third parties on their platforms drives further benefits for consumers. For example, some consumers may **switch** platforms frequently in search of the best price, while others may use only one platform in order to simplify their digital experience (i.e. where a website may already have their payment or shipping information stored, a preferred interface, or their travel preferences recorded).

In some cases, a platform's value to each individual user grows with the number of other users, and its size brings considerable benefits. Proposals to artificially constrain the **size of networks** might increase competition while reducing consumer welfare. Moreover, users may even benefit from concentration, as it enables them to rely on one (or few) platform(s) for each specific service or activity, be it shopping, social interaction, transportation or accommodation among others. This should not necessarily lead to competition concerns – when a new, more innovative and competitive alternative will come along, it will supplant the current incumbent platforms as users will migrate towards it for either one or all aspects of a given service.

Network effects may however disincentivise switching between platforms, thereby possibly diminishing choice and effective competition. This could be reinforced in some cases by lack of interoperability or gatekeeper applications. Bundling between operating systems and applications could on the one hand limit choice, while on the other benefit consumers, for instance by offering mobile devices working right out of the box. These effects should be considered, but only in combination with other indicators like market behaviour and a company's conduct.

Platforms can also **extend into other markets** with their own applications that compete with other providers, sometimes leveraging their pre-existing position from one market to another. While this should be closely monitored, it could have pro-competitive effects: by reducing entry barriers and making it easier for small suppliers to reach new customers, platforms increase competitive pressure on traditional industries like transport, communications, or tourism, to the benefit of consumers. Regulators should in these cases **focus on consumer welfare**, not on protecting competitors. Platforms that provide more choice and lower prices usually lead to some disruption on more traditional competitors in the market. Any potential intervention should take into account the specific characteristics of the market and respond only to inappropriate behaviour by platform or non-platform actors equally.

Proportionate instruments that ensure a consistent policy approach and fair competition should be considered wherever necessary. Consideration of issues related to switching, access to data and portability would necessarily have to **focus on the specific platform and data concerned**, and the available alternatives. It would be difficult to enact a one-size-fits-all approach to these issues across all types of platforms.

This is particularly the case when looking at **data portability** as way to address lock-in effects and switching barriers. Portability should apply to the data preventing customers from switching. Portability requirements that are reasonable in a B2C context can be problematic – for example affecting IP and trade secrets – in a B2B environment. Additional issues would arise when considering the need to identify rigid standards to technically allow data portability, which would affect the development of new ways to handle data, ultimately affecting innovation.

Platforms in conclusion play a unique role in the marketplace by bringing large groups of users together and reducing transaction costs, thereby facilitating economic activity. Regulators need to consider the role that specific platforms play in the markets they operate, the value they create, their relationship to customers and competitors, and the possible alternatives. While competition rules and principles can and must apply in cases of anti-competitive behavior, authorities and policy-makers need to carefully assess the effect of an alleged anticompetitive conduct and the proposed measures before deciding on the best policy approach, which should ensure that markets remain open to innovative challengers, and always keep consumer welfare and economic efficiency in mind as the final objectives.

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Contact

Guido Lobrano | Senior Director of Global Policy for Europe
ITI – The Information Technology Industry Council | Brussels, 168 Avenue de Cortenbergh
0032 (0)2 380 7764 | globrano@itic.org
EU Transparency Register: 061601915428-87