

**COMMENTS OF THE AMERICAN BAR ASSOCIATION’S SECTION OF  
ANTITRUST LAW ON THE EUROPEAN COMMISSION’S REQUEST FOR INPUT  
ON THE EVOLUTION OF COMPETITION POLICY IN LIGHT OF THE  
DIGITIZATION OF THE ECONOMY**

December 18, 2018

*The views stated in this submission are presented on behalf of the Section of Antitrust Law (“Section”) 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 Section welcomes the opportunity to provide input to the Commission’s assessment of how competition policy can best serve European consumers in view of the ongoing digitization of the economy. These comments are submitted in response to the request of the European Commission (“Commission”) for public comment.<sup>1</sup> The Section commends the Commission for seeking input from stakeholders on these important issues.

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

**I. Panel I**

***COMPETITION, DATA, PRIVACY, AND AI.*** *In a world of ubiquitous data, thanks to, for example, 5G, the Internet of Things and connected cars, where would we have data bottlenecks—or, conversely, data access, data sharing or data pooling—causing competition issues? In which ways should privacy concerns serve as an element of the competition assessment? Since data is the raw material of artificial intelligence, how do we ensure that AI technology is as competitive as possible?*

**A. Data “Bottlenecks”**

At this time, the Section submits that there is insufficient evidence from which to conclude that the ubiquity of data resulting from 5G, the Internet of Things (IOT) and connected cars is likely to lead to the creation of data “bottlenecks” or competition issues. The French and German competition authorities noted in their May 2016 joint report on “big data” that whether there is a competitive advantage associated with access to a large volume of data will depend on the specific market at issue and particular set of facts. Therefore, it will be important to analyze data-related questions on a case-by-case basis and to focus enforcement on credible evidence that a transaction or particular competitive practices have harmed or likely would harm competition on the merits.<sup>2</sup>

It is also important to understand what is meant by a “data bottleneck.” The term “bottleneck” is typically employed in competition analysis to refer to a situation where one firm controls access to an input necessary for its competitors to compete. In the U.S. antitrust

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<sup>1</sup> <http://ec.europa.eu/competition/scp19/>.

<sup>2</sup> Autorité de la Concurrence & Bundeskartellamt, Competition Law & Data (May 10, 2016), available at <http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf>.

case involving the former Bell System, for example, the government alleged that the defendant's exclusive control of facilities used to provide interconnections to the local telephone service market allowed the Bell System to restrict competition in the distinct market for the provision of long-distance telephone service.<sup>3</sup> Similarly, whether control of a particular type of data allows exclusion of competition will depend on the specific markets at issue. Moreover, the applicability of "bottleneck" theories to platforms and other activities exhibiting strong network effects and/or potential two-sided market characteristics (e.g., electronic credit and payment systems) may raise issues distinct from those that typically arise in the "classic" bottleneck scenario. In the Section's experience, insufficient work has been done to link concerns about the aggregation of data with competitive harms in non-data markets.

Even where data is transacted from one firm to another,<sup>4</sup> the potential for competitive harm may vary depending on the use that customers make of the data, on the one hand, and what an allegedly injured party needs the data for, which may be entirely different. Nor is the paradigm of data collected on platforms (implicating potential multi-sided platform markets)<sup>5</sup> the only relevant paradigm. While such platforms may be one source for the collection of consumer data, there are many possible sources, and consumer data<sup>6</sup> is only a subset of the universe of business data. For example, governments provide a wide variety of data (for their own purposes or under compulsion of law or regulation) to the public free of charge.<sup>7</sup> For a variety of data, there may be so many existing and emerging sources that it may be difficult to calculate competitively meaningful market shares, to the extent that market shares provide meaningful insight into competitive issues in the relevant market.

It is also unclear whether the scope of competitive harm should be assessed on local, regional or even global levels. On the one hand, a market may be global, since data can be collected, stored and used in multiple jurisdictions. On the other hand, certain data may be subject to data localization and cross-border transfer restrictions.<sup>8</sup> The competitive significance of the challenged conduct therefore turns on the relevant facts of the case, *i.e.*, how the data is collected, how it is used, and what, if any, barriers to entry are raised as a result.

While many have suggested that there is no basis for concerns that the well-accepted tools of competition analysis will fail to provide useful conclusions when applied to cases involving data, that position is not unanimous. Although traditional competition law tools can be difficult to apply to competitive factors that are difficult to quantify, this phenomenon is not

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<sup>3</sup> The specific case was settled by consent decree, resulting in the separation and divestiture of the local telephone facilities to seven new, independent entities. *United States v. Western Electric Co.*, 552 F. Supp. 131 (D.D.C. 1983), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983).

<sup>4</sup> We are unaware of any current market for full data sets such as contemplated here.

<sup>5</sup> Typically a platform for search or social media, for example, would involve: (i) consumers of the platform's content, (ii) the content providers, (iii) advertising firms and (iv) platform operators.

<sup>6</sup> Consumer data is commonly defined as information related to an individual acting in their personal, family or household capacity.

<sup>7</sup> *See, e.g.*, Federal Register, Request for Comments on the Cross-Agency Priority Goal: Leveraging Data as a Strategic Asset, Docket ID USBC-2018-0011, <https://www.federalregister.gov/documents/2018/06/27/2018-13768/request-for-comments-on-the-cross-agency-priority-goal-leveraging-data-as-a-strategic-asset>. There are also Freedom of Information Act requests, Company registries, etc.

<sup>8</sup> *See, e.g.*, Russia, Federal Law No. 242-FZ of July 21, 2014 on Amending Some Legislative Acts of the Russian Federation in as Much as It Concerns Updating the Procedure for Personal Data Processing in Information-Telecommunication Networks, <https://pd.rkn.gov.ru/authority/p146/p191/> (official translation in English); *Cyber Security Law of the People's Republic of China* (Article 37) and draft *Measures for Security Assessment of Personal Information and Important Data Cross-Border Transfer*, and *Information Security Technology – Guidelines for Data Cross-Border Transfer Security Assessment*.

limited to digital markets. That said, the Section suggests careful study of this issue to determine whether alternative tests may be employed, particularly where data is the currency by which services and products are purchased by consumers.

The Section notes that it is incorrect to presume that the aggregation of data creates entry barriers: many types of useful data are readily available and not subject to the control of any particular source. Moreover, a well-recognized characteristic of most data is minimal cost of reproduction and/or sharing, although proprietary technology can be used to artificially raise barriers to sharing data. Nonetheless, in many circumstances, multiple entities can collect and use the same data without raising foreclosure concerns. Moreover, the shelf-life for data may be short. Even if a company currently has the largest dataset, much of that data may become obsolete relatively quickly. The degree to which data is within the control of a single or limited group of entities, and, if so, whether it is capable of easy replication, is inevitably a question of fact that seems addressable through existing modes of analysis. The Section suggests that an analysis of network effects is therefore needed to assess whether a potential competitor can effectively compete with a platform simply by purchasing data from a third party, as that data may grow stale unless continually refreshed.

Finally, as to personal data,<sup>9</sup> the right of data portability provided under Article 20 of the EU General Data Protection Regulation (“GDPR”), and other national and local laws,<sup>10</sup> allows customers to retain greater control over their data and firms can dynamically bid for access. This could undermine any data bottleneck as to the personal data subset of data needed for artificial intelligence or machine learning (collectively, AI) applications.

There are many other questions that are relevant to a meaningful competition analysis of alleged data bottlenecks:

- Even where data are necessary to the emerging applications referenced in the question, there may be unforeseeable developments, including new technologies, that would tend to minimize such data requirements. In the AI field, for example, there are specific efforts underway to reduce the data requirements for AI applications.<sup>11</sup>
- Even if it were possible to measure relevant market shares in a well-defined relevant market and to conclude that significant market concentration exists at a specific point in time, such concentration may be attributable to control of data, control of technology (including particular algorithms, for example), or control of a supply of software developers, or perhaps to the interaction of all three elements—data, technology and specialized labor.

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<sup>9</sup> As defined in Article 4(1) of the EU General Data Protection Regulation (GDPR): “(1) ‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.”

<sup>10</sup> E.g., California’s Consumer Privacy Act of 2018, Cal. Civ. Code §§ 1798.100-1798.198.

<sup>11</sup> See Alastair Sharp, *Google’s Hinton outlines new AI advance that requires less data*, Reuters, Technology News (Nov. 2, 2017), <https://www.reuters.com/article/us-alphabet-artificialintelligence/googles-hinton-outlines-new-ai-advance-that-requires-less-data-idUSKBN1D231G>; Tom Simonite, *Algorithms That Learn with Less Data Could Expand AI’s Power: Geometric Intelligence says its learning algorithms can pick up new skills faster than those behind the recent flurry of investment in AI*, MIT Technology Review (May 24, 2016), <https://www.technologyreview.com/s/601551/algorithms-that-learn-with-less-data-could-expand-ais-power/>.

- Any bottleneck so created might be transient in a dynamic technology market premised on the emergence of new disruptive technologies.
- Economies of scale and network effects may be relevant, if these effects exist. In this regard, please see the discussion in relation to Panel 3.

The Section respectfully submits that consideration of the risk that potential data bottlenecks may give rise to antitrust concerns should also take account of the risks to dynamic competition inherent in the types of antitrust remedies available to address such concerns. Legally mandated data access, data sharing or data pooling involves significant administrative costs. 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. This disincentive to innovate must therefore be balanced with whatever pro-competitive forces may be created through enforced sharing of data unrelated to sharing mandated by or desirable for cybersecurity and privacy protections. To the extent mandated sharing pursuant to antitrust remedies relates to personal data, such remedies could also raise significant privacy concerns. 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.

Finally, it is important to have flexible policy frameworks that promote competition while facilitating innovation, by not discouraging or otherwise impeding further development of new technologies. Innovations related to the information sector have been transformative in a wide variety of major industries over the last several decades; despite potential antitrust concerns, the obvious and profound consumer benefits of such innovations should caution against application of legal tools whose costs and ultimate benefits may be difficult to predict. The Section respectfully submits that enforcement should be based on careful factual analysis and not simply on theory.

#### B. Data Access/Sharing/Pooling

The Section submits that it is difficult to generalize about competition issues arising from data pooling/sharing, because the competition implications of these practices vary widely depending on the nature of the data being shared and the parties that have access to such data. These issues are well discussed in the Commission's guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements.<sup>12</sup> The Section respectfully submits that the Horizontal Cooperation Guidelines are adequate to address any issues raised by digitization of the economy. In particular, the Section cautions against any presumption that the digitization of the economy should lead to an expansion of the circumstances in which sharing data could be mandated as part of a remedy for an abuse of a dominant position. Such novel and potentially far-reaching enforcement approaches should continue to be considered only case-by-case and applied only when clearly justified following an objective and rigorous analysis.

#### C. Privacy Concerns and Competition Policy

The digitization of the economy has already led, and will continue to lead, to the collection of vast amounts of personal data. Although privacy protections can be relevant to

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<sup>12</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN).

assessing a firm's competitiveness as an element of product or service quality, the Section respectfully submits that privacy concerns as such are more directly addressed in most cases under privacy and/or consumer protection laws, which directly concern the rights of individuals in a commercial context. The Section does not perceive any need to fashion novel theories of competition law infringement in order to protect data privacy. Indeed, to seek to do so may force competition agencies into new and unintended roles for which they were not designed and for which they seem ill-suited – certainly in contrast to privacy and/or consumer protection agencies.<sup>13</sup> For example, agreements among competitors to standardize privacy protections may constitute a violation of Section 101, while the acquisition of a competitor that adopted a maverick pro-consumer privacy policy may violate the EU Merger Regulation.

#### D. AI Technology and Competitiveness

AI, which is actually a suite of emerging technologies rather than a specific and well-defined technology, has numerous beneficial business and legal applications, even at this early stage, including Anti-Money Laundering (AML) compliance, as noted by the UK's Financial Conduct Authority in its 2017 *Report on New Technologies and Anti-Money Laundering*.<sup>14</sup> AI is foundational to many products and services that are used by consumers and businesses every day. AI development is, however, at an early stage. The AI sector is highly competitive, with many of the largest global technology companies, as well as numerous startup companies, competing aggressively to develop new AI technologies and applications. As with any industry, competition law enforcement will play an important role in ensuring that the AI sector continues to be competitive. The Section respectfully submits, however, that while the AI sector has unique characteristics that may require consideration of new regulation as the technology continues to evolve, it should not necessitate a change in the Commission's antitrust enforcement of existing laws and regulations. The Section recommends against developing new sector-specific policies for AI because a well-intentioned effort to increase competition further may actually chill it, to the detriment of European consumers and businesses, especially small and emerging businesses.<sup>15</sup>

In summary, the Section respectfully submits that antitrust enforcers already have sufficient powers to deal with data bottlenecks, data access/sharing/pooling and AI and associated challenges that may arise.

## II. Panel 2

***DIGITAL PLATFORMS' MARKET POWER.*** *The interests of platforms are not always aligned with the interests of their users, which can, as a result of platforms' market power, give rise in particular to: a) leveraging concerns (digital platforms leveraging their positions from one market to another); and b) lock-in concerns (network externalities, switching costs, better service due to accessibility of data making it difficult for users to migrate to other platforms, and allowing platforms to "exploit" their user bases). What should/can competition policy do to address these concerns and how?*

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<sup>13</sup> See *Facebook/Whatsapp*, Case No. M.7217, at para. 164 (2014); *In Asnef-Equifax*, Case No. C-238/05, ECLI:EU\_C:2006:734, at para. 63 (2006).

<sup>14</sup> <https://www.fca.org.uk/publication/research/new-technologies-in-aml-final-report.pdf>.

<sup>15</sup> The Section notes that the use of algorithms, and by extension AI, can raise interesting questions of liability that have been discussed elsewhere, but this issue appears to be outside the scope of the Commission's question about maintaining the competitiveness of the AI sector.

The Section agrees that monopoly power in one market can sometimes be misused to restrict competition in a distinct market, and that lock-in can in some circumstances be used by a firm with market power to exclude competition. As with other forms of unilateral conduct, however, it has proven difficult to distinguish between lawful competition based on the competitive advantages obtained by firms through investment in innovation and other productive assets (tangible and intangible), and unilateral conduct that restricts competition on the merits. The Section therefore urges caution and scrupulous attention to the facts and circumstances of each particular case in order to avoid premature or enforcement efforts that may discourage innovation and other economically desirable conduct.

A. Monopoly leveraging

U.S. antitrust law does not recognize a standalone offense of monopoly leveraging. Unlike EU law, U.S. law does not recognize exploitative abuses of monopoly power. Thus, absent an anticompetitive agreement, the unilateral use of monopoly power in one market to gain an advantage in a second market is unlawful only if the conduct maintains or poses a dangerous probability of creating monopoly power in the second market.

Even where there is a risk of creating or maintaining a monopoly in that second market, the U.S. Supreme Court has adopted a cautious approach to any liability theory that would point toward resource-sharing or mandatory-access remedies (which would include, for example, network-sharing, network-access, data-sharing or data-access requirements). In *Verizon Communications v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004), the plaintiff alleged that Verizon used its monopoly position in the wholesale telephone service market to gain a competitive advantage in the downstream retail local telephone service market, specifically providing access to wholesale services in a discriminatory fashion tending to limit entry to the retail market. While acknowledging that a refusal to deal may give rise to monopolization liability, the Court expressed skepticism regarding mandatory access or sharing remedies:

Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage 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. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing - a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, 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.<sup>16</sup>

Other forms of alleged “leveraging,” like so-called technological ties, can represent an efficient form of product integration or product enhancement that benefits consumers and is therefore procompetitive. Accordingly, the Section recommends that the Commission

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<sup>16</sup> *Trinko*, 540 U.S. at 407-408.

maintain a case-by-case approach to allegations of leveraging, limit enforcement to exclusionary conduct that creates dominance (or a dangerous probability thereof) in the “leveraged” market, and to carefully examine remedies requiring mandatory sharing or access to networks, data, or other valuable competitive resources where, absent exceptional circumstances, the costs involved and risks to innovation may not justify such relief absent unusually strong evidence of pro-competitive benefit.

#### B. Lock-in Concerns

Similarly, “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.<sup>17</sup> 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.” Dominance or the possession of monopoly power is not an abuse in itself, and the Section urges the Commission to continue focusing enforcement efforts on case-by-case analysis of particular forms of conduct that substantially restrict competition, even by firms that are rendered dominant by virtue of network externalities, switching costs, or other attributes of specific products, services and/or technologies. Similarly, for the same reasons as those identified in the preceding discussion of “leverage,” the Section urges the Commission to proceed cautiously regarding any enforcement actions that would lead to the imposition of mandatory access or sharing obligations.

### III. **Panel 3**

#### ***PRESERVING DIGITAL INNOVATION THROUGH COMPETITION POLICY.***

*Do network effects, economies of scale and “copycat” products impede innovation? In digital merger cases, is there scope to apply theories of harm based on a loss of innovation and/or loss of “potential competition” more often? Would a focus on innovation require updating our analytical tools?*

#### A. Network Effects, Economies of Scale, and “Copycat” Products

The competitive significance of network effects or economies of scale has long been recognized in EU competition law. As is well known, they can deliver significant benefits to consumers in the form of improving quality, user experience, and efficiency. By definition, the value to a consumer of a good or service with positive network effects increases with each additional user. However, network effects can also increase the costs of switching, leading to consumer lock-in and the creation of monopoly power. In certain cases, significant network effects may therefore allow platforms to foreclose competition, resulting in anticompetitive impact. The implications of network effects for innovation are similarly varied. Network effects, for example, could work to facilitate entry and speed adoption of a new platform or technology that benefits from network effects, spurring innovation, while possibly disincentivizing entry or innovation by potential competitors outside the network.

With these countervailing potential outcomes, the implications of network effects—including for innovation—should be analyzed on a fact-specific, case-by-case basis. The

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<sup>17</sup> See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

Section believes that the Commission's existing legal framework and enforcement tools are sufficient to address such issues.

Similarly, the Section submits that the analysis of the competitive impact of the digitization of the economy in relation to "copycat" products is in its infancy. The concept of copycat products is not clearly defined in antitrust law, and the Section notes that the question of how closely an undertaking may mimic the products of a competitor has historically been addressed by applicable intellectual property law, rather than competition law. Competition law should not be used as an implicit mechanism to alter intellectual property law regimes that are perceived to inhibit competitive activity without sufficient countervailing benefit.

#### B. Loss of Innovation and Potential Competition in Merger Review

The Section notes that the potential significance of a possible loss of innovation or potential competition in merger review has long been recognized in the Commission's guidelines and practice.<sup>18</sup> Although the digitization of the economy has driven and will continue to drive innovation and new entry in a wide range of markets, the Section respectfully submits that the digitization of the economy does not give rise to any new or unique concerns in relation to loss of innovation- or potential competition-based theories of harm. Indeed, the most prominent case in which the Commission has developed these theories of harm, *Dow/DuPont*, did not concern digital markets.<sup>19</sup> The Section respectfully cautions against developing different theories or standards of harm for particular sectors of the economy, as future developments may reveal that the concerns were misplaced. Worse, sector-specific theories of harm may inadvertently chill competition by deterring procompetitive transactions.<sup>20</sup>

That said, the Section respectfully submits that further guidance on how the Commission intends to apply innovation- and potential competition-based theories of harm would be helpful. The Section notes that the Commission developed a number of new concepts and tools in *Dow/DuPont*. While each case must be evaluated on a fact-specific, case-by-case basis, it would be helpful to understand whether and, if so, how the Commission intends to apply those tools in other sectors, including in markets where innovation may be less susceptible to measurement based on patents.

#### IV. **Conclusion**

The Section appreciates the opportunity to provide input on the important issues related to the implications for EU competition policy of the ongoing digitization of the economy. The Section 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.

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<sup>18</sup> See, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2004.031.01.0005.01.ENG&toc=OJ:C:2004:031:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2004.031.01.0005.01.ENG&toc=OJ:C:2004:031:TOC).

<sup>19</sup> See, e.g., Case M.7932 – Dow/DuPont, [http://ec.europa.eu/competition/mergers/cases/decisions/m7932\\_13668\\_3.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m7932_13668_3.pdf).

<sup>20</sup> The application of such theories may also raise distracting ancillary and likely unproductive issues of whether particular activity fall within one sector or another subject to different sector-specific theories.