

“Shaping competition policy in the era of digitisation”

GSMA Response to DG Competition Call for Contributions

1. Introduction

The GSMA considers that the global economy is undergoing a major transformation and that the progressive take-up of new, disruptive technologies and business models are changing both the nature of products and services and the way people interact with them. This transformation is changing the way companies compete. As a result, competition in digital markets presents features that differentiate it from competition in traditional markets:

- Economies of scale and strong direct and/or indirect network effects dominate, often leading to “winner takes all” market outcomes, with one multi-sided platform having built entrenched dominant position;
- Central role of platforms, induced and enhanced by the multi-sided nature of most digital markets and their related properties, and the possibility for platforms to leverage and exploit the differences between the needs and preferences of different groups of users;
- The productive use, by these platforms, of data gathering and data analysis on a large scale, to create and strengthen their market power, which has the potential to cause anticompetitive effects, especially in markets where data and data analytics are crucial to the quality of the services offered to one or more groups of customers;
- Stronger and growing interactions between data protection rules and competition law enforcement especially as: (i) data protection standards become a parameter of competition and (ii) the exclusive control of both data sources and data analytics becomes a potential “bottleneck”.

These digital markets characteristics do challenge existing policies and call for reviewing the competition framework to ensure that an efficient competition policy is applied to the digital ecosystem. Below, we present our high-level views in response to the call for contributions’ key points. We also enclose in appendix to this document the Executive Summary of the recently published GSMA study on the Data Value Chain¹, which we think is relevant for the discussion of the key issues of this call for contributions.

In order to ensure that EU competition law regime plays its part in achieving these goals, the GSMA’s recommendations would be as follows:

- DG Comp should initiate a sector inquiry to assess platform-related competition concerns and should be as rigorous in its approach to digital markets as it is in all other areas;
- DG COMP should proactively collect data on an ongoing basis to enable it to identify and respond to potential competition concerns quickly. This data collection should be an ongoing requirement given the speed of change in digital markets to ensure that the digital sector becomes truly competitive and that Europe continues to benefit fully from further innovation and investment in this area;

¹ https://www.gsma.com/publicpolicy/wp-content/uploads/2018/06/GSMA_Data_Value_Chain_June_2018.pdf

- EU and national competition authorities should take a more proactive and dynamic approach to competition analysis. Competition authorities must analyse a wide range of evidence and factors into their analysis, including all aspects of platform business models and the impact of advertising, data and network effects;
- EU and national competition authorities should make greater use of interim measures to speed up ex post enforcement, thereby reducing the risk of irreversible harm/foreclosure.

2. Platforms market power

The trend for the global leading platforms to emerge and permanently dominate the digital economy appears to be the first and main point of reflection. A recent study by the GSMA provides some useful insights to understand the dynamics of the data economy. First, the study shows that in any traditional value chain, different companies would typically specialise in a limited set of activities and then trade inputs and outputs with other companies, with value created at each step of the transformation of raw intermediate inputs into final goods and services. However, the study shows that in the data economy companies organise themselves along certain lines in order to maximise their commercial potential. The following features are typically observed:

- **Vertical integration:** The nature of data results in a tightly integrated value chain where the organisation that collects the data is very likely to **keep control and ownership of data** through the steps to develop the output themselves
- **Platformisation:** A common feature of many internet and data-driven businesses is that they are platforms. There is no agreement about what constitutes a platform but there is a reasonable consensus that **platforms are digital infrastructures that enable two or more groups to interact**. They therefore act as intermediaries that bring together different groups of agents over the data value chain: customers, advertisers, service providers, producers, suppliers, and physical objects. This role as intermediaries shifts the allocation of value to the platforms from the product and services providers.
- **Multiple services and conglomerate effects:** A different form of integration occurs when companies expand and operate in adjacent, neighbouring or even unrelated areas, either investing in R&D, launching new services themselves (according to a multiplatform model) or acquiring other companies to gain control over their technologies and skills (conglomerates).

As a consequence of the vertical integration and the need to collect large amounts of data in order to be able to find or build the subset of data that can be commercialised or further processed, many data-driven businesses build on and benefit from significant scale and network effects that create “winner takes all” conditions, and at the same time generally provide efficiencies. This is especially true of services brought in by multi-sided online platforms, which seek to bring together the largest communities of users in the case of social media or buyers and sellers for transaction-based platforms, for the benefit of users. Integrated businesses and digital platforms are often the most practical and commercially efficient way of providing such services that consumers clearly benefit from.

Data-driven businesses tend therefore to become multi-sided, multi-product platforms (i.e. multiplatform) and build on direct and indirect network effects and large amounts of data while they keep growing. This means that the very effects that generate benefits for consumers might lead to, among

others, concentrated markets and winner takes all conditions that could raise anticompetitive effects. In order not to break the efficiencies generated from that model, while being able to tackle potential competition issues, the competition authorities need to check whether their regular concepts and tools need to be reviewed.

3. Competition, Data, privacy and artificial intelligence

Data and competition issues

The Commission's Call for Contributions asks whether *"In a world of ubiquitous data, thanks to, for example, 5G, the Internet of Things and connected cars, (...) would we have **data bottlenecks** – or, conversely, data access, data sharing or data pooling – causing competition issues?"*

The question refers to the mobile ecosystem and in particular to 5G, IoT and connected cars. These new network and services will not be the source of future bottlenecks: the problematic areas and practices relate to other players in the ecosystem, as the mobile ecosystem is already under existing regulatory oversight, which makes it highly unlikely that the big challenges to competition policy in digital markets will arise from mobile services.

The question fails to mention the global leading platforms and their market power, including their role, in some cases, as "gatekeepers". As recalled above, online data-driven markets have a strong tendency towards "winner-takes-all" conditions, and often result in the creation of bottlenecks, gatekeepers, and dominant positions. This is confirmed by recent decisions of the European Commission (Google Search², Google Android³, Amazon investigation). These precedents also support the finding of our study that once their dominance is established in one market, global platforms have an incentive to leverage their core market dominant positions to other markets to obtain unique advantages, sometimes by preventing competition and innovation by other players.

The dynamic nature of mobile markets seems incompatible with the creation of dominant positions, let alone of bottlenecks. If "data bottlenecks causing competition harm" arise in the digital markets, it will likely be caused by other players than mobile operators.

The mobile industry is strongly convinced that "data bottlenecks causing competition issues" will certainly not arise from the provision of 5G or IoT services nor in the connected cars environment.

Privacy concerns and competition assessments

The Commission then asks, *"In which ways should privacy concerns serve as an element of the competition assessment?"* To answer this question, we need first to underline that privacy concerns can serve as an element of the competition assessment through two main mechanisms: data as a factor of production; and data protection standards as a competitive parameter.

² European Commission Case 39740 Google Search (Shopping).

http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740

³ European Commission Case 40099 Google Android

http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40099

Data as a factor of production

As regards data as a factor of production, we would like to recall further insights from the recent GSMA study on the Data Value Chain⁴. The study underlines how:

- The global volume of data is increasing exponentially and the data-fuelled digital revolution is transforming the world's economies and societies
- Many organisations, regardless of industry focus, now consider data to be a vital strategic asset and a crucial source of innovation, productivity and economic growth
- Data is a new form of asset, where the combination of individual information pieces increases data's intrinsic value by delivering new insights and correlations; therefore, being able to collect and exploit large volumes of data in an efficient manner has become an important source of value.

The study indicates, crucially, that because of the key dynamics of the data economy, the stable dominant strategy for data-driven large platforms is to extract maximum data and maximum value from the data.

In this context, the advent of 5G, and the IoT (including connected cars), will provide for even more data to be collected in a variety of formats from new multiple sources, different from those (social networks, search engines, online intermediation platforms, etc.) on which the existing data-driven businesses have so far relied. Accordingly, the advent and take-up of 5G and, particularly, IoT will be a huge opportunity for the emergence of new, competitive data-driven business models and players.

However, should the existing dominant platforms manage to extend their influence and control over these new data sources, telcos will be confined to a minor role in the acquisition and management of these data. If this occurs, potential competition coming from telcos would be impeded, and we could see the strengthening of the existing dominant positions putting full value creation and social benefit at risk in the whole digital ecosystem.

To ensure that future opportunities remain open to new potential competitors using data as a factor of production, it is paramount that all players have equal opportunities – a **level playing field between platforms and traditional telcos on data collection and use** could provide a new source of competition for the dominant global platforms.

In this regard, as the GSMA has already indicated to DG Competition in previous submissions, it is essential to achieve a greater alignment between the General Data Protection Regulation (GDPR) and sector specific rules applied to electronic communications services (existing ePrivacy Directive and, most of all, the proposed ePrivacy).

In particular, the ePR proposal **breaks with the balanced approach between innovation and consumer protection** achieved in the GDPR. As *lex specialis*, ePR is expected to complement and particularise GDPR and not to add unnecessary duplications or, even worse, contradictions between both instruments. However, the opposite is the case as far as **location data** is concerned, and this **prevents the creation of a level playing field between all industry sectors** in the provision of Big Data and data-driven services. This inconsistent data protection regime needs to be re-balanced for

⁴ https://www.gsma.com/publicpolicy/wp-content/uploads/2018/06/GSMA_Data_Value_Chain_June_2018.pdf

the sake of the competitiveness of the European industry. Indeed, such asymmetry might also deprive the European digital ecosystem and the European economy of valuable services and their related economic and social benefits.

Therefore, a stronger alignment between GDPR and ePR is indispensable to provide for the necessary flexibility for European telecom operators to be able to innovate in data-driven services while ensuring a high level of privacy protection. If alignment does not happen by introducing substantial changes in the proposed ePR (Article 6), such as the concepts of legitimate interest and compatible further processing, European telecom companies will not be able to launch a myriad of new services with high societal benefits as mentioned above. The following paragraphs will try to explain the reasons why the mobile industry is convinced that the current ePR proposal will fail to create a real level playing field.

The ePR extends the principle of confidentiality of electronic communications to all electronic communications services' ("ECS") providers, including OTT players offering interpersonal communication services, which is a positive step for better privacy protection and towards a level playing field. This level playing field objective however falls short due to the fact that, in ePR, stricter rules are imposed on telecom operators than **on other players not providing "interpersonal communications services" but still processing data about the private life of citizens. This implies a clear disadvantage for telecom operators in the provision of data-driven services.**

The legal bases under which ECS covered by ePR are able to process electronic communications metadata, including location data, have a much narrower scope than those applicable to services falling under GDPR, even though processing of such data may not present risks to confidentiality of communications.

In particular, under GDPR the legal basis of Legitimate Interest and the principle of "Compatible further processing, (with a.o. pseudonymisation as an enabling safeguard)" provide for more flexibility for location data processing and a well understood Risk Based Approach, allowing a case-specific assessment of the risks posed for the individual and the necessary mitigating safeguards.

However, under ePR certain location analyses could still be made by app providers working with GPS location data while the same analyses will not be possible for telecom operators using network generated location data and this notwithstanding the fact that in-app GPS location data is much more accurate than network generated location data.

This is a striking example of how failure to create a genuine and effective level playing field can impair greater competition in data-driven markets with tech giants and results in the strengthening of existing dominant operators and/or in facilitating the extension of existing market power to new data-driven markets and data sources.

Data protection and privacy as a competitive parameter

In markets where services are traded at zero monetary price and in which the compensation received by service providers consists in access to the users' data (personal information), protection standards can become a competitive parameter, as differentiated data protection conditions can become a way for service providers to compete on quality.

There are such cases in Europe, and recent European case law from the European Commission, the Court of Justice and national competition authorities goes in that direction. For example, in the Microsoft/LinkedIn merger decision⁵, the Commission clearly acknowledged the potential interactions between the two set of rules by stating that: *“Privacy related concerns (...) can be taken into account in the competition assessment to the extent that consumers see it as a significant factor of quality, and the merging parties compete with each other on this factor.”*⁶

In conclusion, we think there is scope in Europe for privacy to be considered in competition assessments, both in terms of market foreclosure and of data exploitation through privacy degradation.

Artificial Intelligence (“AI”)

The way platforms operate, the data-driven business models they employ, and the tendency for markets powered by data to tip towards few, global leading platforms has key implications for the future development of AI.

We are already seeing how the first mass market applications for AI, are controlled by few global ecosystems centred on the existing internet giants. The lack of new competitors, and a narrower base of innovative companies and business models, could also impair the development of AI in Europe – making AI a *de facto* extension of the existing dominance over personal data enjoyed by some of the global platforms.

To avoid that scenario, and ensure that AI fosters competition, innovation, economic growth, and social welfare, competition policy in the coming years can play a very important role. Firstly, by ensuring the raw ingredients data and talent, will not fall short, and are globally competitive. Second, by ensuring certain types of algorithms and AI do not suffer from anticompetitive or exploitative bias.

Third, by ensuring new competitors powered by new data sources will be able to challenge the existing dominant platforms. This will create a more balanced competitive environment around data and AI.

///END///

⁵ European Commission Case M.8124 Microsoft/LinkedIn

http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8124

⁶ The Commission’s investigation revealed that, today, in Germany and Austria, the professional platform XING seems to offer a greater degree of privacy protection than LinkedIn. In its assessment, the EC provided three examples of how XING gives users more control over their privacy to illustrate its point. European Commission, DG Competition, Case M.8124 – Microsoft / LinkedIn, http://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf