



## CCIA Submission to the Competition Commission of South Africa

5 October 2020

### I. Introduction

The Computer & Communications Industry Association (CCIA) welcomes the opportunity to submit comments to the Competition Commission (“Commission”) on its Report on Competition in the Digital Economy (“Report”).<sup>1</sup>

CCIA represents large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services<sup>2</sup>. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. CCIA remains committed to protecting and advancing the interests of our members, the industry as a whole, as well as society’s need to benefit from the positive contributions that the digital economy can make.

CCIA’s Members are leading innovators of what some refer to as the ‘digital economy’. Many operate as digital intermediaries, efficiently connecting disparate sources of supply and demand and disintermediating traditional gatekeepers who have been slow to embrace digital distribution

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<sup>1</sup> Competition Commission of South Africa “Competition in the Digital Economy” (7 September 2020), available at:

[http://www.compcom.co.za/wp-content/uploads/2020/09/Competition-in-the-digital-economy\\_7-September-2020.pdf](http://www.compcom.co.za/wp-content/uploads/2020/09/Competition-in-the-digital-economy_7-September-2020.pdf)

<sup>2</sup> A complete list of CCIA’s members can be found here: <http://www.ccianet.org/about/members/>.



models. Due to the disruption that digital technologies have caused, some legacy incumbents have voiced concerns about increasing competitive pressure, and asked competition authorities to protect them against digital disruption by condemning conduct that is actually pro-competitive, innovative and beneficial to consumers.

In order for innovation in the technology market to continue driving the global economy, both competition policy and sound antitrust enforcement must play a crucial role in ensuring that competition exists across markets. Competition authorities should continue to enforce antitrust laws based on sound economic analysis that focuses on potential harm to competition and consumer welfare. It is difficult, if not impossible, to reconcile economic analysis with public interest considerations other than harm to competition and consumer welfare within the antitrust framework. Factoring other public interest concerns into the antitrust analysis could result in inconsistent application of competition norms and political intervention in the antitrust decision-making process.

The following provides our perspective on the main points that the Commission should consider in the enforcement of competition laws and in the design of a new regulatory framework for digital intermediaries.

## **II. Merger Control**

The Report considers that there may have been under enforcement in the area of merger control.<sup>3</sup> In particular, the Report highlights that the Commission should extend its jurisdiction to mergers between large international companies,<sup>4</sup> and impose a duty on large tech companies “to inform

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<sup>3</sup> Report, pg. 6.

<sup>4</sup> Report, pg. 28.



the Commission of all small domestic acquisitions, including investments in start-ups and global acquisitions of targets with some presence locally.”<sup>5</sup>

With regards to the lowering of thresholds for mergers and acquisitions, CCIA notes that the local presence test in South Africa’s merger control regime already requires only that the target firm generate annual turnover in, into or from South Africa, or that the asset value of the target firm in South Africa, is ZAR100 million. CCIA suggests that the Commission consider whether further lowering this threshold would result in triggering notification obligations for a large number of unproblematic transactions, and the associated administrative costs and burdens on business that such expanded scope of notification would entail.

With regards to the substantive assessment of mergers in the digital context, CCIA submits that the Report should carefully assess the multi-sided nature of digital markets and the benefits that aggregation brings to South African consumers and companies.

Multi-sided firms create value by bringing market participants together. They help reduce practical barriers and transaction costs. But because many multi-sided firms work by facilitating interactions among diverse customer sets, the demand for the services that such a firm offers to each of its “sides” depends on the demand for the services it offers to its other sides. This interrelated demand has significant consequences for antitrust analysis. It may lead multi-sided firms to set prices in ways that bear little resemblance to pricing by single-sided firms. And it means that seemingly small changes in demand on any side of the market could be amplified by corresponding changes on the other sides.

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<sup>5</sup> Report, pg. 33.



Consequently, any competition rules must account for the dynamics of multi-sided digital services. Without careful attention to the range of dynamics that multi-sided firms face in their operations, competition authorities could inadvertently discourage innovation.

Buyers and sellers often transact directly. Sometimes, though, without some intermediary, buyers and sellers may connect inefficiently or not at all. Economists have developed the concept of “multisided firms” as a way to describe business models designed to solve these problems, whether they are familiar examples such as newspapers or shopping malls, or innovative new services like dating websites.<sup>6</sup> Multi-sided firms reduce or eliminate the practical barriers, or transaction costs, that would prevent a stamp seller in one place from connecting with a stamp collector in another.<sup>7</sup> In doing so, they create value “that would not exist (or would be much smaller) in [their] absence.”<sup>8</sup>

Companies at the leading edge of technological innovation, including many of CCIA’s members, have harnessed technologies to serve multiple, interrelated sets of customers and offer valuable products and services to businesses and consumers alike. There is a wide range of business models that could be thought of as “multi-sided,” from Internet search engines, to video game platforms, to shopping malls—each with its own economic dynamics.

Because many multi-sided firms generate value by facilitating transactions among their various customer sets, the demand for the services that a multi-sided firm offers to any one “side” depends not only on the characteristics of those services, but also on demand for the services

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<sup>6</sup> See, e.g., David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, in 1 Oxford Handbook of International Antitrust Economics 404, 404–05 (Roger D. Blair & D. Daniel Sokol, eds., 2015).

<sup>7</sup> See *id.*

<sup>8</sup> *Id.* at 409.



offered to the other sides.<sup>9</sup> Thus, such firms must not only cater to the individual needs of their various customers, but also manage the interrelationships between those needs. And this is the most important feature of platform services, that needs to be taken into account from a competition perspective.

### III. The Role of Data as a Dimension of Competition

In recent years some have made the argument that the mere accumulation of data by consumer-facing technology companies raises antitrust concerns. Based on the notion of an endless, positive feedback loop, the argument states that the more data is collected, the better companies' products become which in turn attracts more users who allow for even greater data collection. The end result of this process is a supposedly insurmountable data advantage keeping companies immune from competition.<sup>10</sup>

However, intervention in data-driven markets without evidence of harm to competition could harm consumers and deter innovation, especially when based on a misunderstanding or incorrect understanding of the role data plays in these markets. Therefore, understanding the nature of data usage in Internet and technology services is crucial. The following provides CCIA's views on this topic and the reasons why we believe data should be analyzed as any other asset when enforcing the antitrust laws.

a) *Data is an asset like any other*

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<sup>9</sup> See, e.g., Lapo Filistrucchi et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. Competition L. & Econ. 293, 296–97 (2014).

<sup>10</sup> Report, pg. 39 “The large endowments of data accumulated by incumbents contribute to these outcomes, as it provides incumbents with a competitive advantage that is unlikely to be matched by challengers.”



Competition systems based on the consumer welfare standard rely on evidence-based analyses, and such same standards should continue to be applied to data-driven markets. The value of data depends on its commercial utility, and does not present special characteristics as a dimension of competition. Authorities should therefore assess data as any other non-rivalrous asset that companies use to compete in the market under the existing competition framework. Indeed, many of this data is widely available, both to companies that attract users, and from third-party data brokers.<sup>11</sup>

Data itself should not be seen as a barrier to entry, or to automatically grant a competitive advantage in the market. Data is characterized by the so-called “Four Vs”, namely:

- **Volume:** The amount of data available, which is infinite and non-rivalrous.
- **Velocity:** The speed of data generation, which requires business to update datasets quickly
- **Variety:** The diverse forms of data that are available to companies.
- **Veracity:** The trustworthiness of data.<sup>12</sup>

The mere accumulation of data, in and of itself, is useless and not of importance to compete effectively. In addition to the Four Vs, data must be analyzed before it becomes useful. As such, the value of data only appears once companies have processed such data. As economists Anja Lambrecht and Catherine Tucker note:

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<sup>11</sup> See e.g. Federal Trade Commission, “Data Brokers: A Call for Transparency and Accountability” (2014), available at <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>

<sup>12</sup> See IBM, The Four V’s of Big Data - Infographic, available at <http://www.ibmdatahub.com/infographic/four-vs-big-data> (last visited July 20, 2018).



*“Our analysis suggests that big data is not inimitable or rare, that substitutes exist, and that by itself big data is unlikely to be valuable. There are many alternative sources of data available to firms, reflecting the extent to which customers leave multiple digital footprints on the internet. In order to extract value from big data, firms need to have the right managerial toolkit. The history of the digital economy offers many examples, like Airbnb, Uber and Tinder, where a simple insight into customer needs allowed entry into markets where incumbents already had access to big data. Therefore, to build sustainable competitive advantage in the new data-rich environment, rather than simply amassing big data, firms need to focus on developing both the tools and organizational competence to allow them to use big data to provide value to consumers in previously impossible ways.”<sup>13</sup>*

The authors further conclude that the tools used to analyze the data and ‘provide value to consumers’ confer a ‘sustainable advantage’ to companies rather than the mere possession of data.<sup>14</sup>

The key to gaining a competitive edge is not data, but rather, the capacity to analyze and monetize data. In other words, human capacity and better products such as improved algorithms, rather than data or scarcity thereof, is what is necessary to compete in data-driven markets. As detailed in the Lambrecht paper, rather than facing a ‘data bottleneck’, companies are faced with a ‘talent bottleneck’. The key to gaining a competitive edge is not data as such but the willingness to invest in the resources and people necessary to analyse and monetize data. In other

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<sup>13</sup> Anja Lambrecht & Catherine Tucker, *Can Big Data Protect a Firm from Competition* (Dec. 18, 2015), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2705530](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705530).

<sup>14</sup> Id.



words, human talent is the main ingredient to successfully compete in technology markets. Second, there is no evidence that data has served as an insurmountable barrier to entry, nor that access to data guarantees success.

*b) Data to expand market power*

The key element is to better understand whether incumbents that have accumulated data over the years may expand or maintain market power by the mere possession of historic data. Like any other factor of production, there is empirical evidence to prove that there are diminishing returns to the mere accumulation of data.

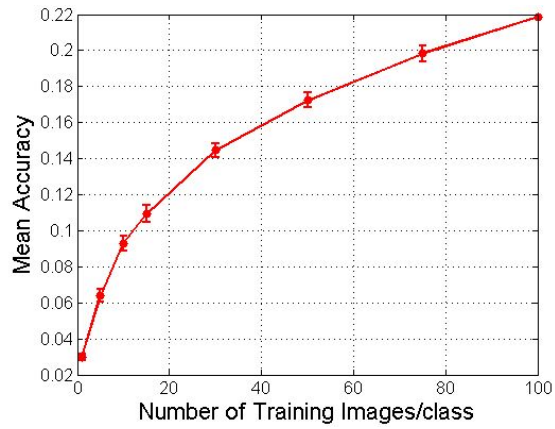
Stanford University conducted a study to analyze whether increased accumulation of data improves the outcomes of the analysis performed on such data. The Stanford Dogs Dataset contains images of 120 breeds of dogs from around the world.<sup>15</sup> This dataset was constructed for the purpose of fine-grained image categorization. Researchers used this dataset for classifying breeds of dogs in images, and calculated the mean accuracy for identification as the number of images in the dataset increased. The results showed that additional access to data provided diminishing returns to the accuracy of classification results (see chart below).<sup>16</sup> In short, a growing dataset provided diminishing returns as it grew.

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<sup>15</sup> Stanford Dogs Dataset, available at <http://vision.stanford.edu/aditya86/ImageNetDogs/>.

<sup>16</sup> *Id.*





Similarly, economists David Evans and Richard Schmalensee found that across technology companies, data did not grant incumbents the power to restrict competition. Their research highlighted that:

*“A number of previously dominant companies all had user data — so-called “attention platforms” such as AOL, Friendster, Myspace, Orkut, Yahoo!, Blackberry in mobile, as well as numerous search engines including AltaVista, Infoseek, and Lycos. This data did not give the incumbents the power to stifle competition in their respective markets, nor is there any evidence that data increased the network effects for these firms in a way that gave them a substantial lead over challengers.”<sup>17</sup>*

University of Florida Professor Daniel Sokol and Central University of Finance and Economics School of Law (China) Professor Jingyuan (Mary) Ma conclude that little, if any, user data is required as a starting point for most online services. They noted that:

<sup>17</sup> David S. Evans & Richard Schmalensee, *Network Effects: March to the Evidence, Not to the Slogans*, Antitrust Chronicle (Aug. 2017) at 9, available at <http://mitsloan.mit.edu/shared/ods/documents/?DocumentID=4243>.



*“The data requirements of new competitors are far more modest and qualitatively different than those of more established markets. Little, if any, user data is required as a starting point for most online services. Instead, firms may enter with innovative new products that skillfully address customer needs, and quickly collect data from users, which can then be used towards further product improvement and success.”<sup>18</sup>*

This research shows why the accumulation of data alone is not a tool for companies to shut out competitors, and is unlikely to lead to decreased competition in the relevant market.

#### **IV. The Intersection between Privacy & Competition**

The Report stresses that competition law and data protection pursue the same aim,<sup>19</sup> and that “to better achieve the common goals and avoid inconsistent approaches, it is recommended strong cooperation and strong dialogue between these institutions.<sup>20</sup> In this respect CCIA cautions against the pursuit of privacy or other unrelated goals through competition policy.

Privacy can be a parameter of competition if users demand it and competitors respond by offering e.g. different privacy settings and features. In fact, as a result of competition many digital services offer a wide variety of privacy settings, including the ability to opt-out of unnecessary data gathering. In circumstances such as these, competition authorities should

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<sup>18</sup> D. Daniel Sokol & Jingyuan (Mary) Ma, *Understanding Online Markets and Antitrust Analysis*, 15 Nw. J. Tech. & Intell. Prop. 43 (2017), available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1267&context=njtip>.

<sup>19</sup> Report, pg. 48.

<sup>20</sup> Report, pgs. 49, 50.



continue to treat privacy as a relevant dimension of quality competition in their assessment alongside other potential factors of competition (such as price, variety, etc.). However, just because privacy can be a parameter of competition does not mean that it should be *the aim* of competition enforcement. A clear separation between competition law enforcement and privacy policy objectives should be maintained.

Competition law and enforcement serve to protect the competitive process while privacy laws protect individual privacy rights. When enforcing competition rules, authorities should continue to be guided by the question whether a given transaction or conduct reduces the degree of competition in the market. Non-competition considerations like the protection of privacy should not guide antitrust enforcement.

Back in 2003 the OECD cautioned against using competition enforcement for objectives other than economic efficiency and consumer welfare by stating that the “inclusion of multiple objectives [...] increases the risks of conflicts and inconsistent application of competition policy. The interests of different stakeholders may severely constrain the independence of competition policy authorities, lead to political intervention and compromise and, adversely affect one of the major benefits of the competitive process namely, economic efficiency”.<sup>21</sup> The UNCTAD secretariat made similar observations in a study dating back to 1995.<sup>22</sup>

CCIA fully supports this approach. Just like competition authorities do not use competition rules to enforce e.g. environmental laws, they should equally not use them to enforce privacy law. Adding consumer protection-related privacy concerns into the competition assessment will lead

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<sup>21</sup> OECD Global Forum on Competition, *The Objectives of Competition Law and Policy* (2003), pgs. 2-3, available at: <http://www.oecd.org/daf/competition/2486329.pdf>

<sup>22</sup> UNCTAD Secretariat, *The basic objectives and main provisions of competition laws and policies* (1995), available at: [https://unctad.org/en/Docs/poitd\\_15.en.pdf](https://unctad.org/en/Docs/poitd_15.en.pdf)



to a much more subjective competition enforcement that would be much less grounded in economic efficiency considerations. For example, it is not clear how a competition authority would balance economic efficiency considerations ‘against’ privacy rights. Even if we discount the practical difficulties, such a balancing exercise should probably not be made in the first place. CCIA would further caution against such an approach in light of the significant enforcement powers that competition authorities are entrusted with. If such an approach were followed in other international jurisdictions, South African companies would face increased uncertainty, cost and vulnerability to political interference and retaliation.

In sum, antitrust and privacy actions in data-driven markets should be economically informed, so as to ensure that consumers benefit from those actions. Understanding the economic role that data plays and how it is used by companies is thus fundamental for authorities. For this reason, any action related to data-driven enterprises would benefit from expert analysis, in order to avoid consumer harm and other unintended consequences.

## **V. Conclusions**

While the emergence of new business models may present new challenges for competition enforcers, there is no need to change competition rules for digital service providers. Competition authorities’ enforcement practice should be guided by economic analysis on a case-by-case basis and with a clear identification of consumer harm.

In this respect, CCIA encourages the Commission to pay attention to the consumer surplus that users derive from digital services, actual consumer preferences with regards to privacy, the tremendous investments in human talent, research and development that digital technology



companies are engaged in, the existence of dynamic competition, and the degree of competition as between digital service providers and legacy incumbents.