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LAW FOR A DYNAMIC FUTURE

Comments of

TechFreedom

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In the Matter of

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INTRODUCTION

TechFreedom¹ welcomes the opportunity to participate in the public consultation process on the Competition and Markets Authority's (the "CMA") *Draft Digital Markets Competition Regime Guidance* (the "Guidance Document").

The proposed Guidance Document purports to "set[] out how the CMA will approach its functions under the digital markets competition regime" and is intended to "cover[] both substantive and procedural matters." We focus our recommendations on the Guidance Document's (i) failure to define market power, a necessary but not sufficient condition for the CMA to find that a firm has "strategic market status"; (ii) failure to provide the analytic framework the CMA will use in determining whether to impose a conduct requirement ("CR") on a firm designated as having strategic market status, and (iii) failure to provide the analytic framework the CMA will use in determining whether the conduct of a firm designated as having strategic market status, or any agreements between such a firm and any other firm, requires a pro-competition intervention.

We recommend that the CMA first find an overall anticompetitive effect or impact from the conduct of a firm with strategic market status (or conditions in the market in which the firm operates), before it considers imposing a conduct requirement or adopting a pro-competitive intervention to accomplish the objectives—fair dealing, open choices, and trust and transparency—of the Digital Markets, Competition and Consumers Act (the "Act"). A definition of market power and the identification of an analytic framework is necessary to identify and distinguish conduct with overall procompetitive or anticompetitive effects (or a market operating, or failing to operate, competitively).

The CMA should engage in a competitive effects analysis to first evaluate whether a firm designated as having strategic market status should be subject to conduct requirements (or whether a market in which it operates should be subject to a pro-competitive intervention); the Guidance Document should set forth that analytic framework.

¹ Founded in 2010, TechFreedom is a nonprofit, nonpartisan think tank based in the United States dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

I. Overview of Digital Market Platforms and Characteristics of Multi-Sided Markets

Many firms operate with a digital component. For example, many formerly brick-and-mortar retail firms now offer an online ordering and service component. The digital markets of significant interest to regulators and enforcers are often characterized as multi-sided or platform markets. Multi-sided markets are found in a variety of industries and are not a function of digitalization.² Somewhat informally, firms characterized as *digital market platforms* can be defined as software-based businesses that provide services to multiple participants (consumers or other businesses) and often operate in multiple markets, both digital and non-digital.

Firms operating digital market platforms may do business in several related markets, often adjacent to the core platform business and often markets that are complementary to the core platform business. Digital market platforms serve one or more distinct customer or user groups and allow for interaction between customers or customer groups. An important function of platforms is to attract both groups of customers—customers on each side of the platform—in sufficient numbers or in a suitable balance to capture the value of positive (direct or indirect) network effects and to minimize negative network effects. Some—but not all—platforms operate “multi-sided transaction platforms” that facilitate transactions or other types of interactions between distinct groups of users. Some multi-sided transaction platforms offer multi-sided marketplaces. In some or all of their offerings, platforms may compete with non-platform firms. In many cases, other firms build their business “on top” of a platform’s software.

Owners or operators of digital market platforms may be vertically integrated in input (upstream) and/or output (downstream) markets and provide platform services to itself as well as to others. Thus, a digital market platform may also compete directly with its own customers by offering the same or similar products or services on its platform as its customers. The owner or operator of a digital market platform that also serves as a multi-sided marketplace may integrate and sometimes also be a “user”—typically a seller or content supplier—on one side of the platform, in addition to operating the platform itself.

² For example, previous ad-supported businesses—such as commercial radio, over-the-air television services, and newspapers are multi-sided markets, with listeners, viewers, and readers on one side, and advertisers on another. Analysis of ad-supported markets in competition matters has not generally focused on effects on the quality of the “free” or “zero-price” side of such markets but has focused on the price effects on the advertising side of the business.

Two common features of multi-sided digital market platforms are relevant to inquiries into whether a firm operating a digital market platform has market power or will obtain, strengthen, or entrench its market power through its unilateral conduct or through agreements with other firms (or through merger).

The first feature is “multi-homing,” which occurs when a platform user connects to multiple digital market platforms simultaneously or in relatively quick succession. For example, a consumer is multi-homing if she uses multiple ride-sharing apps in deciding whether to book a ride. Multi-homing can occur on only one side of a platform or can occur on more than one side of the platform. In the ride-sharing example, if both riders and drivers use multiple platforms, then both sides are multi-homing, whereas if drivers tend to use a single platform, then only riders are multi-homing. Firms operating digital market platforms may have an incentive to limit multi-homing, either through conduct that limits the ability of rivals to compete or through acquisition of competing platforms.

The second feature is “switching costs”: the cost digital market platform users must bear in switching from one platform to another. Switching costs are lower when platforms are interoperable. All else equal, lower switching costs imply that a firm operating a platform has less ability to exercise market power or to obtain, strengthen, or entrench market power. Firms with market power may have an incentive to increase switching costs; however, firms with (or without) market power may benefit from lessening switching costs, as it may lead to greater acceptance or use of a service, either market-wide or with respect to a specific firm. Thus, it should not be assumed that a digital market platform provider has an incentive to increase the cost or decrease the ease of its customers’ ability to switch to or from another service.

II. Potential Competitive Benefits Associated with Operation of Digital Market Platforms

Digital market platforms create economic benefits by reducing transaction costs—by facilitating transactions between actual and potential trading partners. In some cases, firms operating digital market platforms, by creating a market, enable transactions to occur that otherwise would not have occurred. In other cases, firms operating digital market platforms have disrupted existing marketplaces by enabling the sale of goods, services, and content at lower prices and/or higher quality or in a more innovative way. Such platforms may also allow customers to find goods, services, and content they would not otherwise have been able to find. The popularity of many large—as measured by users, trading parties, revenue—digital market platforms is likely related to these benefits.

Vertical integration—which can occur via entry, merger, or contract—may appear to be restrictive, but also can offer procompetitive benefits. Practices or transactions that facilitate vertical integration can *improve* competition by, for example, reducing transaction costs, eliminating double marginalization, and otherwise aligning companies’ incentives in a way that benefits consumers.

Digital platform markets often have or create and benefit from economies of scale. Such markets may be most efficiently organized with just a few large operators. Acquisitions of competing platforms or assets used to create, operate, or expand platforms, entering into exclusive contracts with users or suppliers, and other actions that increase the volume of business flowing through a platform may allow the platform to benefit from scale economies and become a lower cost or otherwise more efficient competitor. This is competition on the merits; increasing scale or increasing scope of products or services provided by entering into exclusive agreements, other contractual arrangements, or through merger should not be evaluated solely as the creation of barriers to entry or distribution for other firms.

Increased efficiency, increased output, and increases in the variety of output may be associated with exclusive agreements, other contractual arrangements, standardization of product characteristics (through standard-setting activities) or a merger. Such developments are consumer welfare enhancing. Efficiencies associated with multi-product firms (including platforms) are not anticompetitive. Where increased scale and increased scope of product or service offerings are procompetitive or welfare enhancing, non-multi-product firms can enter into contractual arrangements to offer multi-product packages, or to better use joint production capacity, for example to better compete with an vertically integrated or multi-product firm.

Firms that operate digital market platforms may enter into agreements, including mergers or acquisitions, or adopt policies that may be viewed as discriminatory or exclusionary, but that generate efficiencies and benefit platform users or are otherwise procompetitive. For instance, certain limitations on access by third parties may enable the platform to better satisfy its users’ preferences. Some conduct, agreements, or policies may benefit one set of users—by reducing transaction costs, reducing double marginalization, or by otherwise enabling firms to offer goods or services that are cheaper, more valuable, or brought to market faster than would otherwise be possible—but potentially disfavor other users. Accordingly, contracts, conduct, or policies that produce anticompetitive effects in one market (or one side of a multi-sided market) may nevertheless be justified on the grounds that they are procompetitive in another market (or the other side of a multi-sided market) because they provide greater efficiency or enhance consumer appeal. This is competition on the merits, and not exclusionary, anticompetitive or predatory behavior.

Certain unilateral conduct of a digital market platform operator is very unlikely to harm competition and is very likely to produce efficiencies or enhance consumer welfare: (1) vertical integration by entry; (2) improved product designs; and (3) above-cost price reductions.

Agreements between firms for exclusive or priority/favored relationships, or a firm's unilateral decision not to deal with certain firms (or to deal on specific terms), may have mixed effects. Those agreements (or unilateral policies) can exclude or discriminate against the disfavored firms, but they also have the potential to create efficiencies, such as allowing firms to streamline production, inventory management, or distribution, or create innovative products in ways that would have been difficult to achieve without the agreement and favored relationship.

III. Potential Competitive Harms Associated with the Operation of Digital Market Platforms

A firm operating a digital market platform can harm competition in the digital platform market or in adjacent markets, including markets in which firms operate upstream or downstream. It can do so in the same ways that any business can harm competition: by entering into anticompetitive agreements; by exercising its market power in ways that are anticompetitive; by monopolizing or attempting to monopolize (including by acquiring nascent or potential competitors; or by undertaking acquisitions that eliminate or lessen competition.

A firm operating a digital market platform that also serves as a multi-sided marketplace may integrate and sometimes be a “user”—typically a seller or content supplier—on one side of the platform, in addition to operating the platform itself. Such integration, on its own, typically does not necessarily harm competition and may be procompetitive because, through that integration or entry, the platform provider offers a new competitive alternative to third-party sellers or content providers using the platform.

However, in some circumstances, a firm that both operates the platform and competes in an adjacent market may have the incentive and ability to exclude a competitor from that adjacent market, in full or in part, sufficient to harm competition.³ Thus, when a firm

³ See, e.g., Thomas G. Krattenmaker and Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale Law Journal 209 (1986); Steven C. Salop and David T. Scheffman, *Raising Rivals' Costs*, 73 Amer. Econ. Rev. 267 (1983); and Susan Athey and Fiona Scott Morton, *Platform Annexation*, 84 Antitrust Law Journal 677 (2022). See also the theories of harm regarding mergers of firms offering complementary products in the 2020 DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION VERTICAL MERGER

operating a digital market platform combines with or agrees to an exclusive relationship with a firm operating on the platform, it may change the incentives and sometimes the ability of the operator of the digital market platform to engage in exclusionary conduct. But entry by a platform operator into an adjacent market, without more, should not be viewed as anticompetitive. Theories of predatory entry—entry that is not economically rational in the short-term but may result in long-term exclusion—should be viewed skeptically, absent evidence that exclusion in and over the long term is credible.

Different theories of harm often require analysis of the competitive conditions in multiple relevant markets. A firm operating a digital market platform may harm competition in the core platform market by engaging in anticompetitive conduct that may either (a) limit the ability of a rival platform to compete, or (b) prevent a firm in an adjacent market from growing or achieving scale, if the firm in the adjacent market is or may in the future become a competitive threat in the core platform market. An investigation of this theory of harm arising from an exclusive agreement (or merger) would typically require analyzing current and/or anticipated future competitive conditions in the core platform market.

A firm operating a platform may also harm competition in an adjacent market directly: for example, by refusing to deal with new, nascent, or established competitors in that market in anticipation of future entry into that adjacent market, or, if it is a current participant in the adjacent market, for the purpose of foreclosing other firms from distribution or other access points to the market. An investigation of this theory of harm would typically require analyzing current and/or future competitive conditions in the adjacent market, which may differ from competitive conditions in the core platform market.

If the firm operating the platform is vertically integrated—if the firm acts as a seller or content provider on the platform it operates—a rival may be a customer of the platform rather than the operator of a separate, competing platform. In this context, an evaluation of the conduct of the firm operating the digital market platform should assess whether harm to an unintegrated rival is connected to harm to competition, and therefore whether and how the conduct affects consumer welfare. Harm may be shown by evidence that the firm operating the platform has raised its unintegrated rival's costs with the effect that competition in the market in which the unintegrated rival competes is reduced, or through some other coherent economic theory of harm. Vertical agreements, relationships with horizontal competitors who are users of the platform, and mergers of firms operating in a

GUIDELINES and the Federal Trade Commission's COMMENTARY ON VERTICAL MERGER ENFORCEMENT (DECEMBER 2020).

non-horizontal relationship can raise concerns because of the platform provider’s access to confidential data of horizontal competitors, but these are not exclusive to firms operating in the digital sector and are often dealt with through a firewall and limits on access to such information.⁴

Tying and bundling arrangements are not likely to have anticompetitive effects unless a firm has market power in one of the products or services. Neither are unique concerns in digital markets, and, consistent with our recommendation to adopt both a definition of market power and a market power principle, neither tying nor bundling should be considered likely to have anticompetitive effects unless a firm has market power in the tying product, or one or more of the bundled products. This is a necessary but not sufficient requirement to a finding of harm. Tying and bundling are also potentially efficiency-enhancing and should not be presumed to harm competition or to decrease consumer welfare, even if undertaken by a firm designated to have strategic market status.

Similarly, the CMA should not presume that technologically tying is anticompetitive; this is a product design decision that likely takes account of consumer preferences for ease of use and adaptability. For many users of a digital market platform with multiple functions and multiple ways to access those functions and applications, standard default choices or incorporation of functions into the core product may be and is likely beneficial and consumer welfare enhancing. Such “tying”—the incorporation of features into the core product—limits or eliminates the need for a consumer to incorporate what are otherwise disparate product features into an overall product, such as a mobile phone with applications.

IV. The Necessity of Market Power to Harm Competition

Market power is necessary for a firm’s individual conduct to limit competition, by, for example, unilaterally restricting output. While evidence of market power may be direct or indirect, it is well accepted that a firm’s size or a firm’s number of customers is not, without more, a strong proxy for market power, and that market structure is not a strong proxy for intensity of competition.

A firm is generally considered to have market power when it can profitably raise price above what would occur in a competitive market by restricting output or innovation below competitive levels. The ability to diminish quality without an offsetting competitive response

⁴ See, e.g., Federal Trade Commission, Commentary on Vertical Merger Enforcement (2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commissions-commentary-vertical-merger-enforcement/p180101verticalmergercommentary_1.pdf.

may also be a sign of market power; however, quality characteristics or preferences of consumers are idiosyncratic.⁵ Thus, a much more searching inquiry is needed in identifying whether market power is associated with changes in non-price interactions between platform operators and users of the platform.

The draft Guidance Document incorporates a market power requirement: it is necessary but not sufficient that a firm have “substantial and entrenched market power” to be designated as having strategic market status. But the Guidance Document fails to propose a definition of “market power.” This omission significantly limits the document’s utility as a guidance, because, as the Guidance Document notes, “substantial and entrenched market power is a distinct legal concept from that of dominance” and thus case law on dominance may not be relevant when evaluating whether a firm has market power.

The Guidance Document should incorporate a definition of market power to better identify when a firm may be designated as having strategic market status and should identify a market power principle that identifies unilateral and joint conduct that may warrant either imposing a conduct requirement, adopting a pro-competition intervention with respect to a firm with strategic market status, or both. The document could, for example, specify the following:

- Market Power is the ability of a firm, or firms acting in agreement, to exclude another firm from a market, including through predation, for a non-transitory period of time, where the effect of that exclusion is a non-transitory increase in price (or non-transitory decrease in non-price attributes, including innovation) of a product or service, as compared to a market where the firm has not been excluded, and where the firm can recover its costs of exclusion or predation, after a rival’s exclusion or exit.
- Firms designated as having strategic market status should not be permitted to engage in conduct, unilaterally or through agreement, that creates, enhances, entrenches or maintains its market power or that facilitates its exercise, through acts or agreements that exclude firms from a market, including through predation, without an offsetting competitive benefit.

⁵ For example, while one person might perceive an increase in advertisements on an otherwise free service to be a diminution in the quality experience of a service, because advertisements are a source of information, another person might consider an increase in advertisements as an increase in access to information. Similarly, while some view the collection of more personalized data as a diminution in quality, or a higher price for the provision of zero-(monetary) price services, another person may appreciate the benefits of greater collection of personal data, as it may lead to an improved advertising experience—the receipt of more advertisements for products or services that person desires.

- A firm designated as having strategic market status *may* create, enhance, or entrench market power if, through its acts or agreements, creates, enhances, or maintains the ability of a firm to exclude, in part or in full, actual or potential rivals or trading partners from one or more relevant markets; however, under certain conditions, acting on an incentive to exclude one or more rivals is consistent with pro-competitive effects, and the welfare effect may be positive.
- Conduct illegally or unjustifiably creates, enhances, entrenches, or maintains market power if it is likely to have the effect of allowing one or more firms to raise or slow a decrease in price (adjusted for quality), reduce output, diminish or slow innovation, or otherwise harm customers at any level of distribution *as a result of diminished competitive constraints or incentives without any offsetting efficiency benefit or rationale.*

Evidence of market power may be direct or indirect and is often identified using the indirect method of calculating market shares. The draft Guidance Document correctly recognizes the difficulty of calculating revenue-based market shares for free or zero-price services. Alternative measures, however, may not, in any case or in all cases, serve as a reliable estimate, even indirect, of a firm's market power, especially in the case of multi-homing. We thus believe the evaluation of specific metrics of market power must be done on a case-by-case approach. Alternatives to output, sales, or capacity measures of market power should not be adopted without specific application to a particular matter.

V. Special Factors in Competitive Effects Analysis of Digital Platform Markets

Each platform business is unique, as are the markets in which such businesses compete. Nevertheless, some factors are present in many platform markets, whether digital or not, and these factors may be relevant to the competitive impact of unilateral or joint conduct by a firm designated as having strategic market status. Such factors are not uniquely relevant to firms operating platforms, and these factors may be associated with increased competition and consumer welfare, and not merely impediments to future entry or negative effects on consumer welfare.

A. Considerations in Markets Involving Data

Although the use of data to make competitive decisions is not unique to firms operating digital market platforms, firms that operate such platforms often have access to very large data sets. The competitive significance of data may vary significantly from one case to another in light of the nature of the relevant market or markets; the nature of relevant business models in those markets; and the source, content, nature, breadth, utility, and availability of competitively significant data.

Consistent with the foregoing, the utility and competitive significance of data may vary by market, time, and characteristics specific to the data. Different data may have different and varied characteristics. Some data may be ubiquitous, easily replicable, readily substitutable, or of limited or transitory value. Other data may provide significant and hard-to-replicate competitive advantages for the firms that own or control it. A need for data may impede expansion or entry of an actual or potential competitor, particularly when there are few or no commercially available alternatives to the data, and when access to such data is competitively important in some way. Alternatively, access to data may allow a platform operator to enter new markets, and entry should be viewed as pro-competitive, even where it displaces rivals.

Data may be competitively significant for one or more reasons, including its nature (e.g., historical, real-time, etc.), breadth and depth (e.g., varied, voluminous, etc.), utility (e.g., basis for better analytics or new products and services, etc.), and availability (e.g., costly, time-intensive, and hard-to-replicate alternatives, etc.). The process by which a firm operating a platform collects, uses, and shares data may also inform the analysis of its conduct. However, the analysis of competitive effects of its conduct must consider whether the relevant data is easily replicable and/or whether rivals or entrants can compete effectively without the data, or with smaller sets of data.

In markets where data or data-derived products and services are a key differentiator, a firm's access to a distinctive or competitively significant data set (or to large amounts of competitively significant data) may allow it to protect its position in a market. Evidence that a firm operating a platform selectively denies rivals' access to data to deny those rivals efficient distribution channels or sufficient sales to operate at sufficient scale is relevant to competitive effects analysis. Agreements that prohibit customers or trading partners from sharing data are similarly relevant. They are not determinative of competitive effects, however, and may be justified for reasons related to information security, device security, and privacy.

There may be a relevant market for certain types of data or for access to certain types of data. Agreements or policies that allow a firm to limit access to such data can be anticompetitive. But the analysis of the competitive effects of an agreement or policy must consider how important such data is as an input and whether it can be replicated or purchased from a third party, and, of course, whether limiting access to such data is sufficiently costly to the firm (such as in lost revenue associated with the refusal to share such data) that it is not profitable.

A platform owner that also operates business units that compete with other users of the platform may, by virtue of owning the platform, obtain *competitively sensitive information* from these users. The access and use of such information by a platform owner's business units that compete with other users, including any related agreements providing for the transmission of such data by platform users, may result in reduced competition that harms consumers. However, access to non-competitively sensitive information, and the use of that information, may be procompetitive; for example, it may support entry into the relevant market by the platform operator. This can be welfare-enhancing, even if it allows the platform operator to take sales from the user of the platform.

There may also be scale and scope efficiencies associated with the use, collection, and maintenance of data. The combination of data sets, through agreement or merger, can be complementary and, for example, may lead to better responses to search queries, better personalization of experiences, including but not limited to advertising, and to the identification of patterns or common characteristics of certain outcomes (such as disease treatment or disease identification).

B. Network Effects & Multi-Sidedness

The presence of direct⁶ and indirect⁷ network effects may make it difficult for a new entrant offering a competitively superior product to enter, expand, and successfully provide a competitive alternative to an incumbent platform. However, network effects are not merely an impediment to future entry. Network effects may expand the adoption, utility, or use of a digital market platform; thus, firms designated as having strategic market status should not be placed under conduct requirements or subjected to allegedly pro-competitive interventions merely because of the presence of or strengthening of network effects.

The existence, scope, and strength of direct and indirect network effects are factual questions relevant to a competitive effects analysis. Network effects exist on a continuum: at one endpoint on the continuum any indirect network and feedback effects are strong, and at the other endpoint the effects are weak. The strength and degree of direct or indirect network effects may be different on different sides of a firm's platform, and the network effects may be positive or negative.

⁶ Direct network effects exist when a single user's desire to use a network is a function of the number or identity of users *from the same set of users* who also use the network.

⁷ Indirect network effects are a feature of multi-sided platforms. Such effects exist when the demand for the network for a user from one set of users is a function of the number and identity of users *from a different set of users* who also use the network.

An evaluation of the competitive effects of enhanced scale and scope should be mindful that the degree and nature of network effects can change, sometimes rapidly, in response to a new technology or business model.

Strong indirect network effects may make it more likely that an incumbent digital market platform operator can unilaterally engage in anticompetitive or exclusionary conduct. In these circumstances, a new entrant platform must attract sufficient customers on both sides of the platform to create value, and indirect network effects operating across customer groups can make entry more challenging. But users of multi-sided platforms can benefit from the positive feedback effects of larger digital market platforms. Indirect network effects can sometimes be self-reinforcing. If indirect network effects are positive in multiple directions, then these effects can build upon one another. Using the example of a computer operating system, more consumers lead to more software applications, and more software applications lead to more consumers, yielding a “virtuous cycle” of growth for the platform. Feedback effects can also be negative, in that losing users on either side can lead to a “vicious cycle,” whereby the platform’s scale decreases quickly.

The nature of competition may be different on each side of a multi-sided platform. In evaluating whether a conduct requirement or pro-competitive intervention is necessary, the CMA should consider whether competition on one side of the platform makes it less likely that a platform can engage in anticompetitive or exclusionary conduct on other sides of the platform. In assessing conduct directed only or primarily on one side of the platform, the CMA should consider the degree of competition on other sides of the platform, and any other competitive constraints on the platform.

C. Non-Price Competition, Including Innovation Competition

Anticompetitive effects may be associated with price or non-price effects, or both. Non-price effects include, among other things, effects on output, quality, variety, and innovation. A violation of law may be based on actual or anticipated price effects only, actual or anticipated non-price effects only, or both.

Effects on non-price competition may be especially in platform markets because price effects may be difficult to detect or measure. Firms operating a digital market platform may provide a product or service to one set of users at a nominal price of zero, which does not change over time. In this context, in detecting whether such users have been harmed, it may be appropriate to focus the competitive effects analysis on non-price effects. Even when a product or service is provided for a nominal price of zero, effects on competition and welfare may manifest, in whole or in part, in changes in output, variety, the rate of innovation, and/or quality (including terms of service to users and businesses, or privacy and data security

practices). It may be appropriate to challenge practices or transactions that harm consumers solely through such non-price effects.

However, the measurement of non-price effects can be difficult and lead to ambiguous or unclear results. For example, while one person might perceive an increase in advertisements on an otherwise free service to be a diminution in the quality experience of a service, because advertisements are a source of information another person might consider an increase in advertisements as an increase in access to information. Similarly, while some view the collection of more personalized data as a diminution in quality, or a higher price for the provision of zero-price services, another person may appreciate the benefits of greater collection of personal data, as it may lead to an improved advertising experience—the receipt of more advertisements for products or services that person desires. Thus, a much more searching and complex inquiry is needed in assuming market power is associated with changes in non-price interactions between platform operators and users of the platform.

With regard to effects on output, harm to competition may occur even when market-wide output is increasing over time (or when nominal price is declining or unchanging). The relevant comparison is between the actual or anticipated effects of the challenged conduct and actual or anticipated scenarios where the conduct has not occurred or does not occur. Such actual or anticipated scenarios where the challenged conduct does not occur may also involve market-wide output increasing.

A competitive effects analysis should consider how a challenged practice or transaction affects or may affect innovation, compared to an alternative in which the practice or transaction did not occur. Markets in which platform businesses compete—when competitively healthy—may be characterized by intense innovation. Accordingly, effects on innovation may be, and in some instances must be, a significant focus in matters involving technology platforms.

Anticompetitive effects on innovation could take the form of a reduced incentive to continue existing product development efforts or reduced incentives to develop new products. A competitive effects analysis should also consider whether the practice or transaction enables or may enable innovation to occur that would otherwise not take place. Agreements with other firms that exclude or prioritize certain relationships may combine complementary assets and increase spending on research, or, more importantly, improve innovative efforts and outcomes.

Both incumbents and entrants, and likewise both large firms and small firms, may engage in innovation that increases welfare. As in the analysis of effects on other factors relevant to competition, the focus should be on both firm-specific and market-wide effects on

innovation. Effects on individual firms' incentives and abilities to innovate are a part of market-wide effects.

The analysis of effects on innovation may include both quantitative and qualitative evidence. Reliable quantitative evidence regarding how a business practice affects innovation may not be available or be of limited utility. Quantitative evidence should not be necessary to determine that conduct or market conditions may affect innovation.

D. Monetizing Platforms and Business Models

Firms operating platforms may use different business models and may monetize their products and services in various ways. This may include earning revenue through the sale of advertising, or by charging fees to users on one or more sides of the platform for access to the platform. Some platforms may use a mix of strategies to earn revenue, including charging fees to users and selling advertising opportunities.

Firms operating platforms can experiment with different approaches to earn revenue. They may change their approaches over time for various reasons, such as responding to new competitive conditions and expanding their product or service offerings. Innovation in business models may be as valuable as innovation in technology, but just as it may benefit consumers, it may also harm them. It may be appropriate to investigate such changes to determine whether they reflect or are part of a firm's effort to impair the competitive process. For example, it may be appropriate to investigate whether a firm's change to its approach to earning revenue is a mechanism through which the platform can raise the cost of using a competitor's platform.

VI. The Guidance Document Should Identify CMA's Analytic Framework for Determining When to Impose a Conduct Requirement or Adopt a Pro-Competitive Intervention

Firms designated as having strategic market significance may engage in conduct or enter into agreements that may have either or both of procompetitive and anticompetitive effects. CMA, in evaluating whether intervention is necessary to meet the fair dealing, open choices, and trust and transparency objectives of the Digital Markets, Competition and Consumers Act should identify and articulate the analysis it will use to determine if a conduct requirement or pro-competitive intervention is appropriate. The CMA should strive to minimize the sum of Type 1 errors (too aggressive imposition of requirements or intervention) and Type 2 errors (too lax imposition).

CMA's analysis to determine whether conduct under review is, on balance, anticompetitive should follow a structured but flexible framework. CMA should impose an intervention only where the firm designated as having strategic market significance is engaged in conduct or has entered into agreements with demonstrable anticompetitive harms not outweighed by specific, cognizable, and verifiable procompetitive benefits. Only where the CMA can identify an overall anticompetitive effect in the market under review should it impose or adopt an intervention in support of the fair dealing, open choices, and trust and transparency objectives of the Act.

When balancing anticompetitive harms and procompetitive benefits, the CMA should consider whether the firm designated as having strategic market significance could achieve similar benefits through reasonable, less restrictive, or less exclusionary alternatives. In evaluating whether any anticompetitive harms outweigh any procompetitive benefits, the focus must be on the state of competition with, as compared to without, the practice under review.

The framework for an initial competitive effects analysis to determine whether intervention in a digital market is appropriate to achieve the Act's objectives should consist of the steps set forth below. We assume that the CMA has already properly identified the firm under evaluation as one with strategic market significance, although consideration of whether a firm's market power is entrenched or durable may also be part of the competitive effects analysis.

1. The CMA must identify a plausible basis for believing the conduct or practice(s) under review has, or is likely to have, an anticompetitive effect in the market, sufficient to warrant intervention. It should identify the significance, magnitude, and likelihood of that effect.
 - Conduct or agreements that may be benign or procompetitive when engaged in by a firm—even a firm operating a platform—that does not possess significant market power, may have an anticompetitive effect when engaged in by a platform with substantial and entrenched market power.⁸

⁸ Issues that can arise in cases featuring digital platforms that may inform an analysis of relevant markets and market power include (i) whether, and to what extent, firms that offer goods and/or services for sale through brick-and-mortar outlets compete with firms that offer goods and/or services for sale online; (ii) whether a single platform's marketplace can constitute a relevant market; and; (iii) whether platform users face unreasonably high costs to switch to a competing platform, effectively locking them in to use the dominant platform.

- Anticompetitive effects may be identified as price effects, non-price effects, or both. Non-price effects include, among other things, effects on output, quality, variety, and innovation.
 - Potential harm to rivals must be connected to harm to competitive conditions, to find a practice has an anticompetitive effect.⁹ Conduct by a platform that may harm a rival or a third party (or a group of similarly situated rivals or third parties) should be considered insufficient *by itself* to support an intervention.
2. If the CMA makes the requisite showing of anticompetitive harm—either actual harm or likely harm to competition—the firm designated as having strategic market significance may rebut this showing by establishing that its existing or threatened market power is not durable or entrenched.
 - Ease of entry, a showing that entry is likely and of sufficient scale and to occur in a timely manner, or ease of significant or material expansion by another firm into the market should be sufficient to show that existing market power is neither durable nor entrenched.
 3. Alternatively, the firm may identify efficiencies or procompetitive benefits associated with the conduct or agreements under review. The firm should have the burden of showing the significance, magnitude, and likelihood of the procompetitive effect.
 - Whether such a justification is convincing will depend upon facts specific to the conduct or agreement(s) under review.
 - Efficiency claims should be evaluated to confirm they are not speculative, conduct-specific (or agreement-specific), and sufficiently significant to, for example, lower the firm’s cost structure, increase output, or support innovation in products, delivery of products, manufacturing, or distribution. A lower cost structure, increased output, increased quality, and increased innovation (including speed of achievement), are all enhancements to competition on the merits.
 - An evaluation of whether restrictions on access to a platform or another asset is anticompetitive should consider whether forced sharing of the asset (or wider access to the asset) may diminish the value of the asset to other users or affect the incentive to innovate or invest in assets or facilities.

⁹ Harm to a competitor can be associated with harm to competition, particularly in concentrated markets with few rivals. For example, if the conduct at issue effectively raises the rival’s costs, thereby enabling the platform profitably to raise price and/or reduce quality compared to an alternative in which the conduct did not occur, it may be anticompetitive. Harm to rivals also can be the product of competition on the merits. For example, a linear, non-predatory price reduction that has the effect of transferring sales from a rival to the price cutter may harm the rival but is consistent with competition on the merits. Competition on the merits—even when practiced by a firm with market power—can harm rivals without harming the competitive process.

- The identification of efficiencies or other procompetitive benefits may not be sufficient to rebut a claim (and proof) of an anticompetitive effect, but even in the presence of significant and entrenched market power, significant cognizable efficiencies may rebut a presumption of anticompetitive effects from exclusionary or predatory conduct. Other factors, such as ease of entry, can be sufficient to rebut any presumption of anticompetitive harm.
 - Procompetitive justifications must be related to the conduct under review, in addition to being verifiable and cognizable. The general economic benefits the platform has created should not typically be relevant to the determination of whether the overall effect of the conduct under review is anticompetitive.
4. If market power is entrenched, and there is a plausible basis and credible evidence for both the harm alleged and for non-pretextual procompetitive justifications, the firm must show that there is no reasonable and practical alternative to obtain the benefits associated with the conduct.
 5. If the firm makes such a showing, the CMA must determine, and be prepared to prove that, on balance—on “net”—the conduct under review (individually or collectively) is anticompetitive, if it wants to consider the imposition of a conduct remedy or pro-competitive intervention.
 - The CMA should compare the likelihood and magnitude of anticompetitive effect with the likelihood, magnitude, and sufficiency of pro-competitive benefits (including efficiencies) associated with conduct under review to determine the likely or actual overall effect of the conduct. As the measurement of actual or likely harm increases, the required offsetting benefits should also increase.
 - In analyzing harms and benefits, it is necessary to consider the scope and strength of the evidence of actual or likely effects. Mere assertions of potential effects or a business justification are insufficient. However, neither the CMA nor the platform operator must identify and weigh each anticompetitive and procompetitive effect with specificity and precision. Such analysis will not be possible or efficient in an investigation. But the burden should be symmetrical; neither party should have a lower or higher burden of persuasion. The burden of production of relevant evidence should fall on the party most likely to have information relevant to the inquiry.
 6. Where the imposition of a conduct requirement is necessary to meet the fair dealing, open choice, and trust and transparency objectives of the Act, the conduct requirement should be designed to: (i) address the competitive harm from the exclusionary or predatory conduct or anticompetitive transaction; (ii) fit the facts of the case and characteristics of the market, which requires a close and logical nexus between the theory of harm and the remedy; (iii) focus on preferred and time-tested approaches,

though novel remedies may be appropriate in some contexts; and (iv) preserve efficiencies to the extent such efficiencies are consistent with effective relief. The party proposing the conduct requirement should have the burden of showing the remedy meets these criteria.

7. Pro-competitive interventions should preserve or restore competition and prevent or correct the exercise of substantial and entrenched market power that has resulted in harm to competition, as necessary to achieve the objectives of the Act. To the greatest extent possible, pro-competitive interventions should preserve efficiencies associated with the conduct or market facts that triggered the intervention, where such intervention is consistent with effective relief.
8. Appropriate conduct requirements and interventions may include (i) divestiture or separation; (ii) a prohibition on, or pre-consummation notice of, mergers or acquisitions; (iii) compulsory licensing, including the licensing of data sets or intellectual property; (iv) interoperability requirements; (v) non-discrimination requirements; (vi) corrective actions; (vii) fencing-in; and (viii) where allowable, monetary equitable remedies.

VII. Additional Principles of a Competitive Effects Analysis of Digital Platform Markets

The analytic focus of a competitive effects analysis must be on the actual or reasonably likely effects of the conduct under review, not its label. Although characterizing a platform as an “essential facility” or conduct as “an exclusive deal,” a “refusal to deal,” a “product design decision,” or “self-preferencing” may be helpful in identifying relevant prior agency law or whether the conduct is commonly engaged in by market participants without market power, such labeling should not be the focus of the inquiry.

The analytic framework should consider effects on each class of platform participants that are proximately affected by the conduct under consideration, including in markets upstream or downstream, or operating in a complementary relationship to the relevant market, and with respect to both inputs and intermediate and final products or services. As part of this analysis, the CMA should consider the nature of the relationship and interaction among the different sides (or different sets of users) of the platform, if a firm is operating a multi-sided platform business.

The analysis of the potential anti- and pro-competitive effects of the conduct under review should include, where possible, both short-term and long-term effects. A firm’s effort to prevent a nascent technology or nascent competitor from maturing into a viable competitive alternative to an existing platform or platform market constitutes a valid theory of harm even if the process of maturation may take some time or is uncertain. Similarly, the fact that any benefits associated with the conduct may not accrue in the near term should not

preclude a determination that such benefits are procompetitive or welfare enhancing. Competitive conditions in a market or industry may change over time. Meaningful competitive constraints may emerge in a platform market that currently lacks such constraints; and conversely, the existence of meaningful competition today does not necessarily mean that such competition will, or is likely to, persist in the future. Such facts, if available, are germane to the evaluation of the proposed conduct or the effect of current and foreseeable industry conditions. The evidentiary standard required to show anti- or pro-competitive effects should be symmetrical.

Nascent or potential competition may be important in platform markets, or, more generally, in dynamic markets—markets characterized by rapid change or its potential. Accordingly, the CMA may act to protect future competition. However CMA must also recognize that competition law should not condemn competition on the merits even when that competition harms a nascent or potential competitor. That the competitive impact of future competitors, or existing competitors in future markets, is difficult to establish with certainty should not forestall action, but action should be grounded in credible and non-speculative measurements of harm.

Evaluating whether conduct, or current and foreseeable future market conditions, harms competition by limiting future entry should not require a showing that a new entrant would offer a competitively superior alternative to an incumbent provider. The focus of the analysis should be on whether a firm designated as having strategic market status may be likely to, and has the incentive and ability to, engage in conduct that harms competition, such as by foreclosing a probable new entrant from key distribution channels or key customers such that the probable entrant's costs are raised and the incumbent faces less disciplining competition to the detriment of consumers.

A firm operating a platform may take actions to prevent or limit its rivals' ability to capture the benefits of direct or indirect network effects. If this is a harm to competition and not just a competitor, CMA's analytic framework for evaluating competitive effects should allow the evaluation and weighing of that harm against any direct or indirect network efficiencies gained from the conduct. Efficiencies or other economic benefits that are inextricably linked to the conduct under review should be evaluated together in analyzing the competitive effects of conduct. Similarly, conduct that deprives rivals of platform participants on one side of the market but increases the number (or quality) of platform participants on the other side of the market (even if to the benefit of another firm, or the platform operator), should be evaluated together with respect to benefits and harms.

The ability to self-preference is a function of being vertically integrated. Vertical integration can be, and is often, efficient. The Guidance Document should be clear that self-preferencing in the absence of market power is not likely to harm competition, and that self-preferencing, even when accompanied by market power is not necessarily anticompetitive. Self-preferencing may support entry into new markets, and thus the evaluation of competitive conditions, and efforts to accomplish the objective of the Act—fair dealing, open choices, and trust and transparency—should not discourage entry by penalizing self-preferencing.

CONCLUSION

CMA’s draft Guidance Document fails to identify and articulate the analytic framework it will use to determine whether it will impose conduct requirements on a firm designated as having strategic market status, or adopt pro-competitive interventions in a market where such a firm operates. The draft Guidance Document also fails to provide a definition of market power, or principles governing the application of the market power requirement to a finding of significant and entrenched market power. Both are significant limitations of the document and should be corrected in support of economically rational and consistent enforcement of the powers and requirements of the Digital Markets, Competition and Consumers Act.

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Respectfully submitted,

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