

Infocommunications Media Development Authority (IMDA)
Convergence of Competition Code for the Media and Telecommunications Markets,
Comment of the Global Antitrust Institute,
Antonin Scalia Law School, George Mason University

May 15, 2019

This Comment is submitted to the Infocommunications Media Development Authority (IMDA) for consideration in relation to its *Convergence of Competition Code for the Media and Telecommunications Markets* (February 20, 2019)—hereinafter “the Report.” We submit this Comment based upon our extensive experience and expertise in antitrust law and economics.¹ As an organization committed to promoting sound economic analysis as the foundation of antitrust enforcement and competition policy, the Global Antitrust Institute (“GAI”) commends the IMDA for inviting discussion in regard to the important topics covered in the Report.

¹ The Global Antitrust Institute (GAI), a division of the Antonin Scalia Law School at George Mason University (Scalia Law), is a leading international platform for economic education and research that focuses upon the legal and economic analysis of key antitrust issues confronting competition agencies and courts around the world. University Professor Joshua D. Wright, Ph.D. (economics), is the Executive Director of the GAI and a former U.S. Federal Trade Commissioner. John M. Yun, Ph.D. (economics), is the Director of Economic Education, Associate Professor of Law at Scalia Law, and former Acting Deputy Assistant Director in the Bureau of Economics, Antitrust Division, at the U.S. Federal Trade Commission. Professor of Law Douglas H. Ginsburg is a Senior Judge, United States Court of Appeals for the District of Columbia Circuit, Chairman of the GAI’s International Board of Advisors, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice. Tad Lipsky is the Director of GAI’s Competition Advocacy Program, Adjunct Professor at Scalia Law, a former Deputy Assistant Attorney General for Antitrust and a former Acting Director, Bureau of Competition, U.S. Federal Trade Commission. The GAI gratefully acknowledges substantial assistance in the preparation of this Comment provided by Scalia Law students Jay Kaplan, Tyler Phelps, Jake Philipoom, Nathan Detwiler, Evan Moore, and Victoria Randazzo.

In this Comment, we address Part XII: Competition in a Digital Economy, where the IMDA engages in an important discussion regarding the role of competition policy in the digital economy. It is absolutely critical to get competition policy right in this key sector given that innovation drives most of the growth in a modern economy. We proceed by addressing each key paragraph of Part XII.

Concentration Levels

In paragraph 12.5, the Report states there is “increasing concentration of profits and resources in the hands of fewer firms.” As support for this proposition, it cites a United Nations Conference on Trade and Development (UNCTAD) policy brief, which builds on an earlier UNCTAD study.² However, UNCTAD’s assertions about increasing concentration are not based on metrics relevant to the competitive assessment of well-defined markets. The UNCTAD study uses data from the Thomson Reuters Worldscope database to show that “surplus profits,” defined as profits above the median for a firm’s sector, increased as a share of total profits between 2000 and 2015. The assertion that this data trend challenges the applicability or relevance of

² UNCTAD, *Corporate Rent-Seeking, Market Power, and Inequality: Time for a Multilateral Trust Buster?* (UNCTAD Policy Brief No. 66, 2018); UNCTAD, *BEYOND AUSTERITY: TOWARDS A GLOBAL NEW DEAL* (2017); UNCTAD, *Annex to Chapter VI of Beyond Austerity: Towards a Global New Deal* (2017), https://unctad.org/en/PublicationChapters/tdr2017ch6_annex_en.pdf.

“existing competition policy” is far beyond any responsible interpretation of the evidence.

First, the benchmark used to define surplus profits is based on industry classifications too broad to provide meaningful guidance for competition authorities. The Thomson Reuters database divides the world economy into ten sectors, including, for example, “energy,” “consumer cyclicals,” and “technology.”³ Aggregate measures such as this completely obscure market-level information necessary to guide antitrust policy. An antitrust relevant “market,” unlike the broad sectors in the Thomson Reuters database, is composed only of firms that impose significant competitive pressure upon one another.⁴ Data on broad sectors of the economy illuminates very little about the effectiveness of competition policy in maintaining the competitiveness of actual markets.

Second, and more fundamentally, the UNCTAD study is plagued by endogeneity and identification problems. Changes in surplus profits measured against the median for a broad sector could be driven by any number of phenomena. They could, for instance, reflect compositional shifts in the world economy toward more services, innovation-oriented firms, and intellectual property-intensive activities with

³ *Thomson Reuters Business Classification Quick Guide*, THOMSON REUTERS (2012), <https://www.thomsonreuters.com/content/dam/openweb/documents/pdf/financial/trbc-quick-guide.pdf>.

⁴ See Joshua D. Wright, Elyse Dorsey, Jan Rybnicek & Jonathan Klick, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. STATE L.J. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249524.

greater margins. The changes could alternatively reflect increases in product quality or risk-taking by firms.

Finally, there is no evidence that the trend detailed in the UNCTAD study is attributable to “existing competition policy,” or that a shift in competition policy could reverse it. Competition authorities should continue to look to consumer welfare effects to guide enforcement decisions.

Digital Platforms

In paragraph 12.6, the Report states correctly that competition analysis involving digital platforms must consider “dynamics across multiple sides of a market.” The Report is further correct to note that price may not be an informative signal of a multi-sided market’s competitiveness. However, contrary to the Report’s suggestion, output is a reliable indicator of competitive effects in multi-sided markets just as it is in one-sided markets.

Metrics that are best adapted for competitive analysis are always subject to refinement based on the specific case at hand. This was recognized in the antitrust analysis of multi-sided markets that arose long before the advent of the internet. Advertiser-supported media (newspapers, print magazines, over-the-air radio and television broadcasting) are one example; another is three- or four-party payment systems, including credit-card networks. A 2018 U.S. Supreme Court case, *Ohio v.*

American Express Co.,⁵ specifically addressed the matter and correctly described how competitive assessment should take these multi-sided platform characteristics into account. But the correct analysis had been described in a federal appellate case as early as 1986.⁶

Platforms, also known as multi-sided markets, are defined by “cross-group effects,” which occur when the size and intensity of participation on one side of the platform affects welfare on another side. Because of this inherent feature of multi-sided markets, competition authorities must explicitly consider cross-group effects in their analysis, and include all sides when defining markets. As the U.S. Supreme Court recognized in *American Express*, output is a more reliable indicator of consumer welfare in the platform context than is price. Due to the presence of cross-group effects, the platform may need to subsidize the participation of one group by raising prices to another group. Prices might appear simultaneously as predatory on one side (the side receiving the “subsidy”) and supra-competitive on the other side (the side doing the subsidizing); in the clearest of such cases, the price on the subsidized side is zero. Output levels, by contrast, are likely to be identical or highly correlated across all sides.⁷

⁵ 138 S. Ct. 2274 (2018).

⁶ See *National Bancard Corp. (NaBANCO) v. VISA U.S.A.*, 779 F.3d 592, 602 (11th Cir. 1986) (discussing the “mutually dependent relationship” of parties on opposite sides of the VISA credit-card platform).

⁷ See Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 645 (2006).

For this reason, the effect on output should be the primary focus in the analysis of competitive effects involving digital platforms.

Differentiated Pricing

Paragraph 12.7 of the Report discusses digital platforms' use of differentiated pricing. Economic analysis suggests that regulations that restrict a firms' ability to use "big data" to tailor consumer prices are likely to reduce welfare. In fact, differentiated pricing often increases welfare by reducing asymmetric information and giving disadvantaged consumers access to goods and services at prices they can afford.⁸ Further, differentiated pricing can spur competition by making additional entry into the market possible, and by allowing firms to target discounts at rival consumers.

There are three varieties of differentiated pricing: first-, second-, and third-degree. First-degree differentiated pricing, often referred to as "perfect" differentiated pricing, involves a firm charging each consumer his or her exact willingness to pay. First-degree differentiation unambiguously increases total welfare because it expands output; consumers whose willingness to pay falls below the uniform price, but above the marginal cost of production, are able to participate in the market at a lower price.⁹

⁸ See James C. Cooper, *Separation, Pooling, and Predictive Privacy Harms from Big Data: Confusing Benefits for Costs?* 15-32 (Geo. Mason L. & Econ., Res. Paper No. 15-32, 2015).

⁹ First-degree differential pricing is welfare-reducing only if the welfare gains from increased output are less than the informational and implementation costs associated with differential pricing. See, e.g., Jack Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561 (1971).

However, given the large data demands of first-degree differentiated pricing, firms have often relied on less refined indicators. Second-degree differentiated pricing allows consumers to self-select based on non-linear pricing schemes or product attributes. Third-degree differentiated pricing involves segmenting markets by using observable characteristics, such as age, income, or the purchase of complementary goods, as a proxy for willingness to pay.

While the welfare effects of second- and third-degree differentiated pricing are theoretically indeterminate, empirical evidence suggests their use is often welfare-enhancing.¹⁰ One need only consider “senior citizen” discounts to see that. Further, U.S. antitrust authorities have taken the position that differentiated pricing is unlikely to threaten consumer welfare, as neither the FTC nor the DOJ has challenged differentiated pricing in decades.

When deciding whether to regulate the ability of firms to use consumer data to determine different prices for different groups of potential buyers, it is useful to consider three points. As firms move away from using proxies for willingness to pay (third-degree) and towards more finely targeted pricing (first-degree), first-degree

¹⁰ See, e.g., Igal Hendel & Aviv Nevo, *Intertemporal Differential Pricing in Storable Goods Markets*, 103 AM. ECON. REV. 2722 (2013); Phillip Leslie, *Differential Pricing in Broadway Theatre*, 35 RAND J. ECON. 520 (2004); Andrew Cohen, *Package Size and Differential Pricing in the Paper Towel Market*, 26 INT. J. INDUS. ORG. 502 (2008).

differentiated pricing unambiguously expands the number of consumers who can participate in the market.

Second, there are likely to be improvements in income distribution from more granular dynamic pricing. If a firm can segment markets, optimal pricing requires that consumers with the most elastic demand be offered the lowest prices. A firm that segments its market by income will charge higher prices to richer consumers and lower prices to poorer consumers because price elasticity of demand is a negative function of income.¹¹

Finally, bear in mind that firms that use differentiated pricing are competing for consumers. To the extent that big data allows firms to target their rivals' consumers, it helps intensify competition by allowing firms in a market to compete for *each* consumer. Thus, differentiated pricing can lead to lower prices for *all* consumers.¹² To limit the ability of firms to tailor prices to consumer demand would, therefore, deprive consumers of the benefits of more robust competition.

¹¹ More precisely, demand is more elastic the greater the proportion that a consumer's income is devoted to the particular good in question. For instance, studies show that the poor respond to excise taxes on cigarettes and alcohol by curtailing their consumption more than do the rich. See, e.g., Michael Grossman, Frank J. Chaloupka & Richard Anderson, *A Survey of Economic Models of Addictive Behavior*, 28 J. DRUG ISSUES 631, 635 (1998).

¹² See Lars A. Stole, *Differential Pricing & Competition*, in 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 2221 (2007); Kenneth S. Corts, *Third Degree Differential Pricing in Oligopoly: All-Out Competition and Strategic Commitment*, 29 RAND J. ECON. 306 (1998); Jacques-Francois Thisse & Xavier Vives, *On the Strategic Choice of Spatial Price Policy*, 78 AM. ECON. REV. 122 (1988). See also James C. Cooper et al., *Does Differential Pricing Intensify Competition? Implications for Antitrust*, 72 ANTITRUST L.J. 327 (2005).

Measuring Quality Changes

In paragraph 12.8, the Report notes the challenges associated with assessing competition based solely on price and quantity, as well as the difficulty of defining relevant markets and assessing market power. The Report states that new tools and frameworks will likely be required as dimensions of competition may increasingly shift away from price and output to dimensions of quality. The report calls for a different kind of analysis but does not identify any empirical evidence in support of new tools and frameworks. Additionally, the Report suggests applying the Small but Significant Non-Transitory Decline in Quality (SSNDQ) to define relevant markets where the Small but Significant Non-Transitory Increase in Price (SSNIP) does not provide an accurate market definition but does not go into what this change may look like in the real world.

The Report expresses concern over the ability of contemporary antitrust analysis to properly evaluate competition on quality. However, standard microeconomic models used in antitrust analyses already incorporate nonprice dimensions of competition through consumers' revealed preferences and quality-adjusted prices.¹³ Modern antitrust analysis is well-equipped to account for the tradeoffs consumers face

¹³ See, e.g., Andrew Stewart Wise & Kiran Duwadi, *Competition Between Cable Television and Direct Broadcast Satellite: The Importance of Switching Costs and Regional Sports Networks*, 1 J. COMPETITION L. & ECON. 679 (2005) (using quality-adjusted prices to analyze consumer switching from cable television to satellite television); Daniel P. Kessler, *Can Ranking Hospitals on the Basis of Patients' Travel Distances Improve Quality of Care?* (Nat'l Bureau of Econ. Research, Working Paper No. 11419, 2005), <http://www.nber.org/papersw11419.pdf>.

between price and quality.¹⁴ Adopting a new framework to account for nonprice dimensions of competition is unnecessary when the current framework can and does account for such competition already.

Although competition analysis should be open to new methodologies, new tools and frameworks should be subject to the same intellectual rigor as other forms of economic analysis. For instance, it remains to be demonstrated that a “Small but Significant Non-Transitory Decline in Quality” test can be defined and implemented for antitrust decision making at a tolerable administrative cost. Until such a showing is made, the current framework is more than adequate to address these concerns.

Predatory Innovation

In paragraph 12.9, the Report states that a broader view of investment is required because not all investment is “good.” The Report notes a concern that firms offering free digital services to users may be engaging in predatory innovation and suggests that frameworks to assess dynamic competition as well as static effects may be required in the digital economy. The Report therefore calls for expanding current antitrust analysis beyond its purportedly “sole focus” on consumer welfare.

¹⁴ See generally Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 *FORDHAM L. REV.* 2405 (2013).

Economic scholarship dating from the early 1980's expresses deep skepticism that "predatory innovation" can be defined or identified in a way that would be helpful in competition-law analysis. There is a broad and long-standing consensus that innovation is responsible for the majority of the substantial increases in global living standards that have occurred over the last several centuries.¹⁵ Thus, any attempt to bring investments in innovation within the sphere of conduct subject to antitrust challenge faces an extraordinary burden of showing that doing so would not have a "chilling effect" on the form of competitive conduct having the greatest positive economic impact.

Additionally, the stakes are much higher in cases involving innovation because of the value of new products.¹⁶ Regulators would be wise to tread carefully when looking to regulate innovation as any missteps would be magnified. An antitrust framework that discourages investment and innovation will have a negative effect on the economy if not undertaken in a prudent manner.

The suggestion that competition analysis focus on elements other than "consumer welfare" is also ill-advised. The incorporation of non-economic goals in competition analysis—such as preservation of "market structure"—has a variety of

¹⁵ Robert Solow won the Nobel Prize in economics for demonstrating that gains in wealth are due primarily to innovation—not to marginal improvements in the efficiency of what already exists. See Press Release, The Royal Swedish Academy of Sciences (Oct. 21, 1987), http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1987/press.html.

¹⁶ See Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google*, 34 HARV. J.L. & PUB. POL'Y 1, 13 (2011).

serious defects: (1) the difficulty of designing acceptable metrics for such other goals, (2) the unsuitability of competition-law or other regulatory institutions to assess these other goals given the absence of any experience or training, and (3) the inherently subjective trade-offs between economic and “other” objectives, which may seriously degrade the accountability of competition decision making. Departure from economic analysis in competition cases poses a grave risk to the efficacy of competition-rule enforcement institutions.

Artificial Intelligence

In paragraph 12.10, the Report notes its concern with data network effects as data has become a key factor of production with the increasing use of Artificial Intelligence. The Report is concerned that this has the effect of establishing a first mover advantage in technology platform markets that makes it harder for new entrants. The Report suggests a greater emphasis on early regulatory intervention, a willingness to tolerate false positives, and a more pro-active and adaptive approach to antitrust enforcement in this area to combat the possible anticompetitive effects.

While it is true that firms today have more data than ever before and many sophisticated ways to use it, big data benefits consumers. For example, it enables firms

to improve products and lower costs.¹⁷ Rather than categorize data as a barrier to entry, it should be considered as one potential factor when examining entry. While costs of gathering data can be high, it is important to note that gathering data is an investment. Investments in data can create a competitive distance between firms but that distance should be encouraged and not penalized under antitrust laws as these investments pay off in improved product quality and lower prices.

Additionally, just because an incumbent firm has a large volume of data does not mean that a new entrant needs the same quantity or quality of data to compete.¹⁸ Entrants have the option to compete on other dimensions without having the same amount of data. Or they can buy data from data brokers, just as they buy other capital goods in order to enter the market.

Although it may be that data, machine learning, and artificial intelligence (AI) are increasingly significant in a variety of markets, whether the associated changes in competitive dynamics justify “early regulatory intervention, a willingness to tolerate false positives” or “a more pro-active and adaptive approach to antitrust enforcement” requires more detailed and rigorous analysis than any provided in the Report. As such,

¹⁷ See, e.g., D. Daniel Sokol & Roisin Comerford, *Antitrust and Regulating Big Data*, 23 GEO. MASON L. REV. 1129, 1133-40 (2016).

¹⁸ See Darren S. Tucker & Hill B. Wellford, *Big Mistakes Regarding Big Data*, ANTITRUST SOURCE, Dec. 2014, at 1, 7 (“The fact that some established online firms collect a large volume of data from their customers or other sources does not mean that new entrants must have the same quantity or type of data in order to enter and compete effectively ... [L]ack of asset equivalence should not be a sufficient basis to define a barrier to entry.”).

a change in the regulatory approach towards data should not be undertaken until more research on the subject has been done.

Algorithmic Collusion

In paragraph 12.11, the Report points to several potential ways using algorithms can facilitate collusion: (1) increasing price uniformity; (2) increasing the predictability of rivals' behavior; (3) delegating pricing decisions that have the same effect as conscious parallelism; and (4) potentially making it more difficult to determine intent to collude. Although no attention is paid in the Report to the actual likelihood of these harms occurring, or to a specific framework for analyzing the harms, the implication is that the increasing adoption of AI will make algorithmic collusion more widespread.

Yet, the Report offers no theoretical examples of what would constitute an anticompetitive collection of rival firms' data and references no economic literature related to AI. Nor does the Report cite any empirical data to substantiate its concerns about AI and the potential increase in algorithmic collusion. To the extent that price-setting algorithms can be modeled based on government-imposed price posting, as in Germany, Chile, and Australia, the evidence shows that "algorithms were not determinatively, and perhaps not even significantly causal of tacit collusion."¹⁹ The

¹⁹ Ashwin Ittoo & Nicolas Petit, *Algorithmic Pricing Agents and Tacit Collusion: A Technological Perspective*, INDUS. ORG.: REG., ANTITRUST, & PRIVATIZATION, at 2-3 (2017), <https://ssrn.com/abstract=3046405>.

authors conclude that “it remains to be seen” whether future, more advanced algorithms will be able to replicate tacit collusion by humans.²⁰

Despite increasing use of AI, there have yet to be any real-world examples of AI-induced tacit collusion.²¹ Though some academics have designed algorithmic models that achieve tacit collusion,²² there are obstacles which suggest that at least some of the models are potentially impractical.²³ For instance, some theories rely on a duopoly prisoner’s dilemma model that assumes no entry and no changes to market conditions.²⁴ Additionally, a colluding algorithm would need to overcome incentives to cheat and would need to be able to detect and punish a cheating rival, or else a collusive equilibrium cannot be reached.²⁵ The IMDA’s Report highlights concern for algorithmic tacit collusion without acknowledging that it is no more than a theoretical issue at present. Thus, it is questionable whether the use of algorithms justifies a different approach to antitrust enforcement.

²⁰ *Id.* at 13.

²¹ See Ai Deng, *What Do We Know About Algorithmic Tacit Collusion?*, 33 ANTITRUST 88, 88 (2018). The closest case appears to be *United States v. David Topkins* (2015), where algorithms were used to facilitate a pre-planned human agreement. See Press Release, U.S. Dep’t of Justice, *Former E-Commerce Executive Charged with Price Fixing in the Antitrust Division’s First Online Marketing Prosecution* (Apr. 6, 2015), <https://www.justice.gov/opa/pr/former-e-commerce-executive-charged-price-fixing-antitrust-divisions-first-online-marketplace>.

²² See, e.g., Jacob W. Crandall et al., *Cooperating with Machines*, NATURE COMM’NS (Jan. 16, 2018); Maurice E. Stucke & Ariel Ezrachi, *How Pricing Bots Could Form Cartels and Make Things More Expensive*, HARV. BUS. REV. (Oct. 27, 2016); Ludo Waltman & Uzay Kaymak, *Q-learning agents in a Cournot oligopoly model*, 32 J. ECON. DYNAMICS AND CONTROL 3275 (2008).

²³ See Deng, *supra* note 21, at 88-90.

²⁴ See *id.* at 89.

²⁵ See *id.* at 92.

Data Rights

In paragraph 12.12, the Report vaguely recognizes the benefits of “freer data flows on innovation” and imposing a “Duty of Care” for AI development. The Report acknowledges that these policies would “extend beyond competition concerns” and, indeed, “might be at tension with improving competitiveness.” Regardless, the IMDA points to the importance of such complementary policies.

While it is possible that there are many policy considerations associated with AI, they should be dealt with through appropriate regulatory institutions based on rigorous analysis of the efficacy of potential solutions. To identify a problem and immediately conclude that new regulatory interventions are required is to fall into the classic “nirvana fallacy.”²⁶ There may be defects in the world as it exists, but there will be new defects in the world as altered by regulatory institutions, which have their own fallibilities.

Historically, economic regulatory interventions into major sectors have been substantially dismantled as experience improved our understanding of their effects. In the U.S. since the 1970s, key transportation industries saw massive improvements

²⁶ See generally, Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. AND ECON. 1, 1-2 (1969).

arising from deregulation.²⁷ Similar results took place in other industries such as the generation and distribution of energy, and telecommunications, where the original regulatory approaches were substantially if not completely dismantled as policy understandings improved over time.²⁸

In antitrust, there has long been a “tradition of inhospitality to new business models.”²⁹ For example, the rise of franchises initially prompted heavy-handed enforcement that has been dramatically reduced as knowledge has improved and contract law increasingly provides remedies.³⁰ Not every problem has a regulatory answer, and particular care should be taken to avoid degrading well-functioning competition rules by mixing in alternative and speculative regulatory objectives.

Updating Competition Policy Frameworks

Paragraph 12.14 highlights that both the U.K. and U.S. competition authorities have announced initiatives to study the digital economy. While these and other international antitrust enforcement authorities are indeed examining the digital economy, the IMDA mistakenly implies that because U.S. and U.K. competition

²⁷ See generally, Nancy L. Rose, *After Airline Deregulation and Alfred E. Kahn*, 102 AM. ECON. REV. 376 (2012) (describing successful airline deregulation); Clifford Winston, *Economic Deregulation: Days of Reckoning for Microeconomists*, 31 J. ECON. LIT. 1263 (1993) (describing successful deregulation in the railroad, airline, trucking, natural gas, cable television, brokerage, and telecommunication industries.).

²⁸ *Id.*

²⁹ Joshua D. Wright & Douglas H. Ginsburg, *Patent Assertion Entities and Antitrust: A Competition Cure for a Litigation Disease?*, 79 ANTITRUST L.J. 501, 519, 521-22 (2014).

³⁰ *Id.*

agencies are studying the digital economy, they are *likely* to change their approach or update their policy frameworks. The Report incorrectly suggests that the FTC hearings are “on changes required to the role of the FTC, competition policy or antitrust law,” while the Competition & Markets Authority (“CMA”) panel is meant to “steer its approach.”

In fact, there is no clear indication that the FTC Hearings will result in any significant changes. The FTC announced 14 hearings on a wide variety of topics but has not raised any particular expectations about the output of the hearings.³¹ In fact, the hearings are modeled on the agency’s 1995 Global Competition and Innovation Hearings, which resulted in two staff reports but did not directly relate to any new rules or guidelines.³² Past inquiries have not always led to changes in enforcement or policy. For example, the FTC’s investigation of patent assertion entities led to a report which largely suggested that the concerns raised are not ripe for redress by antitrust law.³³ The FTC will likely arrive at a similar conclusion regarding the digital economy.

³¹ See Press Release, *FTC Announces Hearings on Competition and Consumer Protection in the 21st Century* (June 20 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

³² See *id.*; FED. TRADE COMM’N, *ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE* (1996), https://www.ftc.gov/system/files/documents/reports/anticipating-21st-century-competition-policy-new-high-tech-global-marketplace/gc_v1.pdf; FED. TRADE COMM’N, *ANTICIPATING THE 21ST CENTURY: CONSUMER PROTECTION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE* (1996), https://www.ftc.gov/system/files/documents/reports/anticipating-21st-century-competition-policy-new-high-tech-global-marketplace/gc_v2.pdf.

³³ See FED. TRADE COMM’N, *PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY* (2016), https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf.

Therefore, the recent hearings should not be used as evidence of an agency updating its policy framework in response to the digital economy.

The CMA's response to the Digital Competition Expert Panel recommendations, released in March 2019 after the IMDA's Report, indicates minimal changes to the agency's overall approach. Regarding *ex ante* regulation of digital markets, the CMA states that the agency is "not designed to provide the powers or capability to perform an ongoing role where it acts as a dynamic counterparty to market participants, adjusting solutions in response to innovations and market dynamics."³⁴ The CMA noted that despite difficulty in assessing non-price effects in digital merger cases, "addressing these challenges does not require fundamental changes."³⁵ The CMA went on to welcome changes to appeal procedures and increased retrospective analysis of unpursued antitrust cases; regarding algorithms, however, the CMA suggested more information gathering was needed before expanding the current functions of its Data, Technology, and Analytics division.³⁶

³⁴ See Letter from Andrea Coscelli, Chief Executive, Competition & Markets Authority, to Alex Chisholm, Permanent Secretary, Department for Business, Energy and Industrial Strategy & Charles Roxburgh, Second Permanent Secretary, Her Majesty's Treasury, at 3 (Mar. 21, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788480/CMA_letter_to_BEIS_-_DCEP_report_and_recommendations__Redacted.pdf. If these changes are to be implemented, states the CMA, then "new regulatory functions will likely need to be established."

³⁵ *Id.* at 4.

³⁶ *Id.* at 7.

Conclusion

Competition in digital platform markets will be critical for driving innovation and economic growth in the coming years. The GAI applauds the IMDA for inviting discussion on this important topic. We suggest the IMDA consider the points made in this comment, and adhere to an economically sound, evidence-based approach grounded in consumer welfare as it guides the development of the digital economy going forward.