



August 20, 2018

Office of the Secretary
Federal Trade Commission

Re: Competition and Consumer Protection in the 21st Century Hearings, Project
Number P181201

I write on behalf of Spotify USA Inc. to commend the Commission on its decision to initiate a comprehensive review of “Competition and Consumer Protection in the 21st Century.”

Spotify is a 21st century business.

Enabled by dramatic advances in technology that were in their infancy when the FTC undertook its 1995 study of “Global Competition and Innovation,” Spotify today is the world’s most popular music streaming service with a community of 180 million active users, including 83 million subscribers, across 65 markets. Spotify’s service contains more than 35 million songs and more than 2 billion playlists.

We therefore strongly agree with the Commission’s conclusion that the time is right to consider whether evolving business practices and new technologies “might require adjustments to competition and consumer protection law, enforcement priorities, and policy.”¹

Each of the eleven topics identified by the Commission encompasses substantial developments that should be assessed for their potential impact on competition and consumer protection.

However, topic #3—which focuses on the impact of “platform” businesses—raises particularly important issues regarding antitrust policy and enforcement.

The Commission cites the “identification and measurement of market power and entry barriers, and the evaluation of collusive, exclusionary, or predatory conduct . . . in markets featuring ‘platform’ businesses.” And it asks “whether the platform business model has unique implications for antitrust and consumer protection law enforcement and policy.”²

¹ Federal Trade Commission, *Hearings on Competition and Consumer Protection in the 21st Century*, 83 Fed Reg. 38307, 38307 (Aug. 6, 2018).

² *Id.* at 38308.



Much attention has been focused on competition among platforms, and the extent to which a dominant platform can use its market power to prevent the growth of competing platforms.

But an equally—and perhaps even more important—issue is the extent to which a platform can “leverage its platform dominance to establish a position in a separate or ancillary market.”³ When the platform enters into “direct competition with the firms using its infrastructure,” a “core conflict of interest” can arise, “incentivizing a platform to privilege its own goods and services over those offered by third parties.”⁴ Academic analysts have recognized that significant anticompetitive consequences can result from such platform behavior.⁵

Indeed, Assistant Attorney General Delrahim recently emphasized the need for “fresh thinking on how our legal tools apply to new digital platforms,” stating that antitrust enforcers must be “open and receptive to empirical evidence that companies in digital markets may be engaging in predatory pricing or other exclusionary conduct to drive out competition and cause long-run harm to consumers.”⁶ As he put it: “there may be an antitrust violation where a business practice makes no economic sense other than to harm competition and subsequently recoup short-term losses. To channel Sherlock Holmes, if

³ Lina M. Khan, *What Makes Tech Platforms So Powerful?* in University of Chicago Booth School of Business, *Digital Platforms and Concentration* at 15 (2018), <https://promarket.org/wp-content/uploads/2018/04/Digital-Platforms-and-Concentration.pdf>.

⁴ *Id.*

⁵ *E.g.*, Benjamin Edelman & Damien Geradin, *Android and Competition Law: Exploring and Assessing Google’s Practices in Mobile* (2017), https://www.hbs.edu/faculty/Publication%20Files-/17-018_b0371672-7aa4-452a-8497-1cccebd9657a.pdf; Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 *Yale Law Journal* 710 (2017), https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyeh.pdf.

A recent European Commission study of interactions between platforms and the small and medium sized businesses dependent on platforms to reach their customers—conducted to inform the Commission’s competition analysis—found that “some of the platforms’ practices may have a significant (distortive) impact on the competition between the companies and innovation.” European Commission, *Business-to-Business relations in the online platform environment* 71 (2017), <https://publications.europa.eu/en/-/publication-detail/-/publication/04c75b09-4b2b-11e7-aea8-01aa75ed71a1/language-en>.

⁶ Assistant Attorney General Makan Delrahim, *Don’t Stop Believin’: Antitrust Enforcement in the Digital Era* (April 2018), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university-chicagos>



you rule out all pro-competitive justifications through a careful empirical analysis, all that's left may be anticompetitive action.”⁷

The Commission's review will provide an essential foundation for that analysis.

Spotify looks forward to participating in that review, because our company is in the precise situation that these antitrust analysts have identified: a business that serves its customers in substantial measure through platforms that also are competitors in the music streaming business.

For example, many Spotify users stream music to their Apple mobile devices using a Spotify app. But Apple owns a competing music streaming service that also enables music streaming through Apple devices. Whether Apple imposes conditions for approval of Spotify's iOS mobile app that are more expensive, or otherwise more onerous, than the conditions applied to Apple's own music streaming service can have a very substantial effect on competition between the companies in the music streaming market.

Another highly relevant inquiry is whether a platform operator imposes different and more onerous conditions for approval of apps providing services with which the platform operator competes than it imposes for approval of apps with which it does not compete. In Assistant Attorney General Delrahim's words, if there is no pro-competitive justification for such a distinction, “all that's left” may be the conclusion that the more onerous requirements constitute “anticompetitive action.”

Further, the Commission's analysis in the platform context should not be limited to app approval or its equivalent. Intelligent Voice Assistants (“IVAs”), such as Apple's Siri, enable users to interact with devices using the ordinary human voice. IVAs provide unprecedented simplicity in accessing and operating platform devices—through their integration into the platform (Siri, for example, is part of Apple's iOS). But that simplicity typically requires a reduction in the number of options presented to a user seeking to complete a particular task. There is a risk, therefore, that IVAs can be used to steer users to the platform owner's apps and services, rather than competing products offered by third parties via the platform.

When the Commission issues its request for comments with respect to the hearing session addressing the platform business-related issues, Spotify looks forward to submitting additional comments and otherwise assisting the Commission with its review.

⁷ *Id.*



The Commission's initial request for comments raises an important, related issue: the timeliness and efficacy of the Commission's enforcement activity. Thus, in topic 11, the Commission asks

“(a) whether the agency’s investigative process can be improved without diminishing the ability of the Commission to identify and prosecute prohibited conduct; (b) the extent to which the Commission’s Part 3 process facilitates timely and efficient administrative litigation; (c) the efficacy of the Commission’s current use of its remedial authority.”⁸

Digital markets today are extremely fast moving, due to continuing innovation in technology and business models, and because communication via social media and otherwise provides for broad, rapid dissemination of information to customers. That is particularly true for businesses that use platforms to reach their customers: the platform can immediately offer its own competing service to a significant element, and perhaps all, of business's customer base because those consumers also are the platform's customers; and the platform can change the third-party business's relationship with its customers, or effectively preclude the third-party from innovating, through its decisions to approve or disapprove apps.

Antitrust enforcement therefore must be much more timely for the Commission to fulfill its mission of protecting competition and consumers in these markets. Quick and effective methods for identifying and redressing anticompetitive conduct – particularly exclusionary and/or predatory activity by a monopolist implemented through the leveraging of market power based on control of a platform – is an essential component of 21st century antitrust enforcement.

We therefore urge the Commission to consider during its review how to expedite enforcement activities in the context of digital markets, and look forward to providing additional comments on this topic.

Again, we applaud the Commission's decision to initiate this review and look forward to participating fully in the upcoming proceedings.

⁸ *Hearings on Competition and Consumer Protection in the 21st Century*, 83 Fed Reg. at 38310.



Sincerely, .

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