U.S. CHAMBER OF COMMERCE

Comments on the European Commission's Consultation on a Possible New Competition Tool

September 2020

The U.S. Chamber of Commerce welcomes the opportunity to provide the European Commission with comments on its proposed new competition tool.

The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation, representing the interests of more than three million enterprises of all sizes and sectors. The Chamber is a longtime advocate for strong commercial ties between the United States and the European Union. According to a recent Chamber study jointly commissioned with AmCham EU, the U.S. and EU are jointly responsible for more than one-third of global gross domestic product, and transatlantic trade and investment supports 16 million jobs on both sides of the Atlantic.[1] The Chamber is also a leading business voice on digital economy policy, including on issues of data privacy, cross-border data flows, cybersecurity, digital trade, artificial intelligence, and e-commerce. In the U.S. and globally, we support sound policy frameworks that promote data protection, support economic growth, and foster innovation.[2]

Introduction

As the Commission considers updates and revisions to its digital regulatory framework, the Chamber recognizes and appreciates policymakers' emphasis on deepening and strengthening the fundamentals of the European digital economy. In light of the COVID-19 pandemic and ensuing economic lockdowns, digital services have proven even more essential than before to the continuity of business, policymaking, communication, and commerce. It is essential that Europe's approach to digital policy be done in a way that unleashes the full potential of Europe's digital economy, not as a tool for industrial policy to target certain firms or build national champions.

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1 U.S. Chamber of Commerce & AmCham EU, The Transatlantic Economy 2020.
2 U.S. Chamber of Commerce, Data Privacy.

Central to informing and shaping the Commission's digital regulatory plans are parallel consultations regarding an ex-ante regulatory approach to "gatekeepers" as part of the Digital Services Act (DSA) and consideration as to whether there is a need for new measures in the EU's competition toolkit. That Chamber is filing comments to both consultations. These comments largely mirror what we have filed as part of the DSA consultation, but our DSA consultation addressed other issues, such as content moderation, that are not tied the DSA consideration of an ex-ante tool.

Addressing Possible ex-ante Rules for "Gatekeeper" Platforms

Targeting so-called gatekeeper platforms, without providing clear guidance as to how the term "gatekeeper" will ultimately be defined is the first of many problems with both of these consultations. It seems that the Commission considers gatekeepers to somehow be major inhibitors of competition and innovation, without concrete evidence of market failure. This assumption is counter-intuitive since, by any definition, a "gatekeeper" would have to have been itself a major innovator to achieve the relative level of success that it has earned in the market. Further, it is a core tenet of competition that a competitor generally has the right to set the terms by which it deals with rivals.

Further, platforms are not "gatekeepers" but serve as "bridge builders," since the platforms they operate are often the easiest and most direct ways for other innovative companies of all sizes—regardless of national origin—to connect with clients, customers, and new markets, be they across town or across continents. European companies are major beneficiaries of the tremendous market access these platforms facilitate. It is also worth noting that Europe is the world's leading exporter of services globally. Putting up new roadblocks to the operations of major platforms in Europe would disincentivize their continued investments across the EU.

Recent comments from some prominent EU officials raise concerns about efforts to specifically target American firms with proposed "gatekeeper" regulations. It is reasonable to expect that any overt discrimination would create friction in an already at times strained U.S.-EU relationship. In short, the proposed DSA, and indeed any proposal for competition law reform in Europe must: avoid industrial policy motivation; not result in discriminatory treatment that gives rise to national treatment violations; and be rooted in sound, transparent, and justifiable grounds.

Further, if, the Commission were to adopt an arbitrary measure—such as the number of users or the geographic coverage within the EU, for example—as a threshold to impose burdensome new regulations on firms, there will be myriad unintended consequences. First, such an approach would punish innovation as

companies endeavor to stay beneath any threshold in order to avoid new compliance costs. Secondly, it is not clear that such an approach would conform with the good regulatory practices principles the EU has long espoused. Most importantly, an arbitrary measure that screens out virtually all but a few foreign companies would face a very high bar for justification that such an approach does not violate the EU's core trade obligations. A far better approach would be to identify specific market failures and design regulatory responses to account for them.

If the Commission ultimately decides to pursue implementing an ex ante regulatory instrument, it should identify platforms based on qualitative rather than quantitative data, such as: the impossibility, or at least the difficulty, for users to multi-home (to use different platforms for similar purposes). As long as consumers can multi-home, it is unlikely any platform will hold sufficient "gatekeeping" power. When users multi-home, there is no risk of anticompetitive foreclosure of competitors because the consumer can use other sites and platforms to obtain similar services.

On the contrary, we consider that the following criteria are not relevant to defining a gatekeeper:

- A wide geographic coverage across the EU market: platforms can serve as gatekeepers in a national or local market due to cultural preferences or language; and
- Leveraging assets for entering new areas of activity: to enter into a new market by developing innovative products and services is pure market-based competition on the merits. Furthermore, this practice is not exclusive to online platforms.

Competition Policy

The Commission is simultaneously considering an expanded competition policy toolkit in order to address the same set of "concerns" through ex-ante regulation. The Chamber has repeatedly raised concerns about the EU's approach to competition enforcement and the open-ended nature of its law. The Chamber is concerned that the proposed changes to the EU competition law framework will only exacerbate these concerns. Despite explicitly embracing a "more economic" approach in its enforcement over a decade ago, the Chamber feels that European competition enforcement continues to place insufficient reliance on robust economic analysis. For example, European competition law can impose a special responsibility on dominant firms even where that dominance has been achieved in the market as a result of merit-based competition. In short, the Chamber is concerned that there is a tendency under existing EU competition law to place the protection of competitors above that of the

competitive process (and ultimately consumer welfare) at the expense of innovative and success earned in the market.

Europe's existing competition toolkit is arguably stronger than such measures elsewhere in the world, save for those countries that have explicitly embedded industrial policy motivations into their antitrust laws. For this reason, it is nearly impossible to imagine why one would need to further strengthen EU competition law and its corresponding enforcement powers, other than to further a political agenda. The existing EU competition toolkit is sufficiently robust to address myriad theories of harm that are enforceable under a European view of antitrust, including any potentially problematic conduct by large digital players. There is no shortage of prominent cases in which the Commission has targeted digital companies for perceived antitrust violations, and any discussion should not be over the reach of the law, but over the appropriate and ultimately effective behavioral remedies.

If, the Commission is concerned that it will not be able to intervene sufficiently swiftly to effectively protect competition, the *Broadcom* case shows that the existing toolbox enables the Commission to intervene quickly through the use of interim measures. Additionally, the consideration of a new competition tool appears to target exclusively—or to a very substantial extent—single firm conduct, but without providing the substantive and procedural safeguards enshrined in Article 102 TFEU by empowering the Commission to impose remedies without having to find any infringement. Beyond serious due process concerns with such an approach, it also could create a perverse incentive to bring cases under the new competition tool, instead of Article 102 TFEU.

In short, Europe's competition toolkit already holds immense power to direct outcomes in the market. Its focus is more targeted than any sweeping ex-ante regulation (assuming one could be drafted to steer clear of trade violations) and is directed at a firm to address an anti-competitive concern, not to govern an entire industry or sector. By contrast, ex-ante regulatory measures can often chill both innovation and competition in the market.

Promoting Coordination, not Confrontation

Representing companies that are heavily invested in Europe, and for whom the EU represents a major market, the Chamber shares the Commission's goals of advancing the European digital economy, building digital skills, and deepening Europe's market for digital services. Our member companies are invested in these broad goals because they thrive as the EU's economy thrives. At the same time, some policymakers have openly described Europe's ambitions in terms of "technological

sovereignty," and this is cause for concern. While our member companies understand that there is an ambition for Europe to drive further European innovation, implicit in these comments is an apparent desire to target large U.S. technology companies. This perspective is particularly problematic, coming at a time when we face growing challenges from other market players who do not share our values. The EU and the U.S. have an opportunity to instead work collaboratively to address these issues and to foster growth for the broader transatlantic digital economy.

We welcome a strategy designed to strengthen Europe's digital market, but caution against a protectionist approach focused on advancing national champions or discriminating against others based on the location of their headquarters. Europe's future competitiveness depends on maintaining its commitment to openness—rather than raising artificial barriers against select companies, or by punishing success.

Given the need for investment and capacity building to create opportunity and jobs, we encourage the EU to pursue a policy of "technological resilience." Such an approach would emphasize cooperation with like-minded partners, including the private sector, on measures that promote traditional European and American values such as support for open markets, respect for the rule of law, data protection and privacy, and ensuring individual rights are protected.

Conclusion

The U.S. business community is proud of its longstanding and significant contributions to the transatlantic commercial relationship and to Europe's thriving digital economy, and companies are eager to help Europe strengthen its digital economy still further. The Chamber appreciates the opportunity to share these comments, and we look forward to continuing our constructive engagement with the Commission to drive that future success.

Contact:

Garrett Workman
Senior Director of European Affairs
gworkman@uschamber.com
+1 202-503-7522
EU Transparency Register: 483024821178-51