U.S. CHAMBER OF COMMERCE

Comments on the European Commission's Consultation on the Digital Services Act

September 2020

The U.S. Chamber of Commerce welcomes the opportunity to provide the European Commission with comments on its proposed Digital Services Act.

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.

Many of the provisions of the original e-Commerce Directive have been very successful and proven their worth many times over. For example, the country of origin principle provides digital services providers a clear sense of the rules that govern them and should be maintained. It is a cornerstone of the EU's digital single market and provides a pathway to growth and scale for innovative start-ups along with providing much needed regulatory stability to foreign investors. At the same time, this principle should be better supported so that disparate local and national regulations (e.g., on transportation, logistics, or food delivery) are streamlined to encourage innovation.

Further, in light of the effective coordination between companies and policymakers—and the recent implementation of ambitious new legislation like the Platform to Business Regulation, which only took effect in July— the need for new regulation under the Digital Services Act must be carefully assessed.

With regards to the Digital Services Act, we propose that the following principles be taken into account as new policy measures are considered:

1. Focus any regulatory attention at specific actions and perceived market failures, rather than at specific actors;
2. Clearly and narrowly define the scope of the policies to avoid one-sized-fits-all approaches;
3. Work with stakeholders to identify actionable and proportionate policy changes (if needed) that encourage innovation rather than punishing success;
4. Ensure that any proposals regarding content moderation are clearly focused on targeting what is deemed illegal and that compliance requirements are reasonable and scalable.
5. Ensure any requirements used to define "gatekeepers" are non-discriminatory regarding the national origin of those companies and agnostic to different business model approaches;
6. Recognize the role competition enforcement already plays in addressing anti-competitive conduct in the market;
7. Collaborate with likeminded international partners on policy approaches to maintain Europe's attractiveness to foreign investors and encourage the growth of the domestic digital economy.

Online Content Moderation

The Chamber believes in an open internet and the economic benefits that the internet has created. For democracies, an open internet is an expression of societies' values and a premium is placed on the fundamental right of expression. An open

internet also can attract illegal commerce (illicit trade), including unauthorized use of content protected by intellectual property rights, as well as expressions of views that can be perceived as or even widely agreed to be harmful.

Content moderation debates are closely linked to social networks, which are ever evolving platforms that routinely incorporate new technologies and innovations. The DSA consultation introduces a variety of approaches related to, *inter alia*: processes to sanction infringing users; reporting requirements; automated systems for detecting problematic content; and tools to tackle fake accounts. If addressed collaboratively, new solutions for addressing harmful content can contribute to development of new technologies and applications and improve the overall success of the internet. This can only be achieved by clearly articulating ways for companies, governments and other stakeholders to create robust public-private sector dialogues to achieve the intended objectives without inhibiting the growth of the digital economy. To facilitate such a dialogue, EU regulators must deepen their understanding of capabilities and limitations in technology and content moderation, and also develop an appreciation for unintended consequences that can arise from rigid approaches.

With respect to content moderation that relates to intellectual property (IP) specifically, the Chamber recognizes that Europe has made considerable efforts to update and harmonize its IP framework. Despite numerous voluntary initiatives, there remains more to do on digital enforcement of IP rights in Europe.[3] In order to improve enforcement, we would encourage continued efforts to enable the permanent removal of illegal and infringing content, often generated by repeat offenders. However, it is unclear whether the DSA is the most appropriate legislative/regulatory vehicle to address these issues.

The Chamber has long held that combatting illegal online commercial activity and protecting intellectual property are critical. The Chamber also believes there are other legal frameworks outside the potential scope of the DSA that are better suited to address these concerns. To the degree the DSA contemplates establishing a regulatory framework for content moderation to govern expressions not covered by other legal constructs, it is important that such a framework clearly delineates when expressions become "unlawful," and provides for compliance frameworks that are reasonable and scalable given the vast nature of the internet. Such differentiation is crucial to avoid creating disproportionate burdens for many businesses, particularly those that provide internet infrastructure and cloud services that may not be

[3] https://www.uschamber.com/report/2020-international-ip-index

principally consumer facing. One-size-fits-all rules for online intermediaries could lead to a chilling effect on innovation and damage the broader data economy in the EU.

Addressing Possible ex-ante Rules for "Gatekeeper" Platforms

The premise of the Commission's Digital Services Act consultation makes clear that the EU aims to generate responses that would justify action against "gatekeeper" platforms. The Commission has also launched a parallel consultation to examine whether a "new" competition enforcement tool is needed to address the very same "concerns." This portion of our response to the DSA consultation will coincide with our response to the competition consultation.

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.

Contractors and the Gig Economy

Online platforms provide an unparalleled level of flexibility for the self-employed individuals that use their services. Surveys have consistently shown that the overwhelming majority of people engaging in some sort of platform work would prefer to remain self-employed rather than be classified as employees. This offers

them flexible schedules and the opportunity to work with several competing platforms at once, making the most out of their time. The ability to provide services through online platforms also provides a reliable source of income for those between jobs—especially important during economic downturns. The DSA is not the appropriate vehicle for contemplating questions related to labor policy.

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.

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