Let the Fastest Runners Sprint:

Comment of the Global Antitrust Institute on the European Commission's Calls for Contributions on Competition in Virtual Worlds and Generative AI

INTRODUCTION

The Global Antitrust Institute ("GAI") submits this Comment to the European Commission ("EC") in response to its Calls for Contributions regarding competition in virtual worlds and generative artificial intelligence (collectively "AI").[1] This Comment is based on our extensive experience and expertise in competition law and economics.[2] As an organization committed to promoting sound economic analysis as the foundation of antitrust enforcement and competition policy, the Global Antitrust Institute commends the EC for inviting public submissions regarding competition in these new and rapidly changing sectors.

In April 2021, the European Parliament and the Council reached a political agreement on the AI Act, which is intended to create a comprehensive legal framework to foster responsible innovation in AI and to deploy AI systems throughout Europe while safeguarding "fundamental rights."[3] AI is expected to grow both in scope of application and in the sophistication and

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[1] *Competition in Virtual Worlds and Generative AI: Calls For Contributions*, EUR. COMM'N (Jan. 9, 2024), https://competition-policy.ec.europa.eu/document/download/e727c66a-af77-4014-962a-7c9a36800e2f_en?filename=20240109_call-for-contributions_virtual-worlds_and_generative-AI.pdf (hereinafter *Calls for Contributions*); European Commission Press Release IP/24/85, Commission Launches Calls for Contribution on Competition in Virtual Worlds and Generative AI (Jan. 9, 2024).

[2] The Global Antitrust Institute (GAI), a division of the Antonin Scalia Law School at George Mason University, is a leading international platform for economic research and education that focuses on the legal and economic analysis of key antitrust issues confronting competition agencies and courts around the world. Professor of Law Douglas H. Ginsburg is a Senior Judge, U.S. Court of Appeals for the District of Columbia Circuit, Chairman of 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. Professor Bruce H. Kobayashi is the Paige V. and Henry N. Butler Chair in Law and Economics, Co-Founder of GAI and former Director of the Bureau of Economics, Federal Trade Commission (FTC). Adjunct Professor Abbott B. Lipsky, Jr. is Director of the Competition Advocacy Program for the GAI, former Acting Director of the FTC's Bureau of Competition and former Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice. Dr. Alexander Raskovich, the GAI's Director of Research, formerly served for more than three decades as a research economist in the Antitrust Division of the U.S. Department of Justice. Associate Professor John M. Yun previously served as Acting Deputy Assistant Director in the Bureau of Economics at the FTC. The GAI gratefully acknowledges the substantial contributions of Scalia Law students Kendall Alford, Anthony Cirri, Lillian Clark, Megan Dill, Jaehee Jung, Andrea Peabody, and Ethan Yang.

[3] European Commission Press Release IP/23/6473, Commission Welcomes Political Agreement on Artificial Intelligence Act (Dec. 9, 2023).

strength of its capabilities, which may affect how firms compete in a variety of industries. The Calls for Contributions solicit public input regarding "specific information and views in relation to competition aspects" of AI.[4]

This Comment suggests consideration of two related issues. First, as with any policy initiative, any change in competition rules applicable to AI should be objectively justified based on rigorous economic analysis including balanced assessment of relevant evidence. This is especially important since AI is at an embryonic stage, is very rapidly changing and evolving, and may have important effects on a wide variety of industries and activities. Competition initiatives should be carefully considered in light of their potential for fundamental long-run economic effects.

Second, there is compelling historical evidence that prescription of limitations on competitive conduct in young and dynamic sectors can stifle innovation and reduce economic performance. Experience illustrates how efforts to set and administer such limits are often diverted by unforeseen developments in technology or competitive dynamics, resulting in reduced competition and less innovation. Those most directly affected by such limits (competitors, suppliers, customers) often have strong incentives to preserve existing competitive patterns. This can make it extremely difficult to rectify initial policy errors or implement changes suggested by new developments.

Accordingly, the GAI respectfully suggests that until a balanced assessment and careful economic analysis of the AI sector can be completed and subjected to public review, the Commission should continue to rely on its established mechanisms for enforcement of EU competition rules. The Commission's press release issued in connection with these Calls for Contributions states that it "may hold a workshop" on the issues raised in the second quarter of 2024. The GAI strongly encourages the Commission to consider whether a more extended and in-depth process might be appropriate prior to considering adoption of any rules of such potentially far-reaching import.

[4] *Calls for Contributions*, *supra* note 1, at 2.

I. THE NOVEL AND HIGHLY DYNAMIC CHARACTER OF AI COUNSELS AGAINST PREMATURE ADOPTION OF NEW RESTRICTIONS ON COMPETITIVE CONDUCT

AI is new and dynamic. It is evolving rapidly in ways that make it very difficult to predict future developments, but its ultimate effects could be profound. To impose rules of business organization or competitive conduct at such an early-stage risks stunting innovation, limiting growth of the sector, and reducing the benefits that it might create. The Calls for Contributions are a step in the right direction to learn more about AI and the industries that may develop around the technology. However, a serious and objective fact-finding inquiry should not become a quest to arrive at any fixed judgments regarding the sector, or to justify presumptions of anticompetitive effects or impose preconceived restrictive rules.

It is rarely possible to anticipate how innovation will develop in a new industry, and AI is no exception. Although AI is at the forefront of innovative technology, claims that it will develop and evolve like other more-established industries based on digital technology rest inevitably upon unverified assumptions. The recent emergence of the current leading AI product, ChatGPT, is a testament to the potential for disruption of the sector from unexpected sources. The GAI submits that to help ensure that innovation and economic growth based on AI are not arrested prematurely and restrained into the future, the Commission should continue to investigate potential instances of anticompetitive conduct applying existing tools of competition enforcement, and to pursue remedies where justified. If the competition laws cannot be applied to prevent or remedy anticompetitive conduct involving these emerging markets and technologies, then the problem perhaps lies in the competition rules themselves. If the point is ever reached where competition enforcement under existing rules proves inadequate to address any anticompetitive conduct, then it would be appropriate to consider amendments to the competition rules that respond to any shortcomings identified – rather than imposing ad hoc regulations on emerging markets in order to offer some type of regulatory band-aid.

Any enforcement action may create error costs: the false positives of mistakenly deterring conduct that is procompetitive and the false negatives of failing to deter conduct that is anticompetitive. These error costs likely tend to fall as an oversight agency gains experience in a particular sector. Guided by such experience, an agency should strive to minimize both types of

error to the extent practical. The expenditure of investigative resources to better understand the competitive consequences of conduct in a particular case tends to lower the potential error costs of an enforcement decision not only in that instance but also in future cases as the agency learns about the sector. The tradeoff between economizing on investigative resources through a blanket prohibition on certain conduct, on the one hand, and lowering the error costs of enforcement on the other, favors investment in learning through investigation until and unless sufficient evidence has been gathered to conclude that a blanket prohibition would not entail substantial false positive error costs. This is especially important given the nascent and rapidly evolving character of the AI sector, as well as the broad scope for growth and its potential for widespread impact far into the future.

EXPERIENCE SUGGESTS THAT PLACING LEGAL LIMITS ON COMPETITIVE CONDUCT IN EMERGING, TECHNICALLY DYNAMIC SECTORS MAY BE COUNTERPRODUCTIVE AND DIFFICULT TO RECTIFY

By itemizing a range of possible competitive issues in AI, and by soliciting views regarding "the need to adapt EU antitrust investigation tools and practices," the Calls for Contributions suggest that novel presumptive or ex-ante rules of competition may be considered in order to mitigate any competition concerns that might arise in these new sectors. This suggestion has a certain superficial logic, as setting bright-line rules at this time would discourage harmful conduct before it occurs and provide clear guidance to relevant market actors. But such an approach presupposes some of the conduct in question that is permissible under existing competition rules would nevertheless be harmful. There is an extensive historical record, however, demonstrating that *ex ante* regulation of competitive conduct in a particular sector frequently (if not characteristically) discourages competition and innovation compared to enforcement of sound competition rules.

The Commission has accumulated decades of enforcement experience since implementation of the relevant Treaty articles (now Articles 101 and 102 TFEU). As the Commission rightly notes, AI is an emerging and rapidly evolving field of technology. These characteristics suggest it may be more advantageous to develop solutions tailored to AI's specific competition concerns, as revealed through case-by-case investigation and analysis to target and

remedy any problems. In a rapidly evolving field, quick resort to presumptions or to prescription of rules *ex ante* may lead to unexpected and/or ineffective results if AI were to evolve in unanticipated ways, as seems possible if not likely.[5]

Thus, under these conditions, and compared to *ex-post* mechanisms to address anticompetitive conduct, *ex-ante* regulation can be less precise, create perverse incentives for market actors, and reduce innovation. U.S. experience with sectoral economic regulation provides a number of important and well-recognized examples. Such *ex ante* regulation was imposed on a wide variety of basic U.S. industries beginning in the late 19th century. In 1887, Congress created the first independent federal administrative agency, the Interstate Commerce Commission (ICC), and invested it with extensive authority to enforce *ex ante* restrictions on competitive conduct in the railroad sector.[6] Ultimately, the direct and indirect effects of ICC regulation proved to be anticompetitive, suppressing price competition and imposing other substantial marketplace restrictions.[7] By the 1970's, a broad consensus had emerged in favor of substantial reduction of ICC-type regulation.[8] In 1976 the first of a series of deregulatory initiatives was enacted[9] and in 1995 the ICC was abolished and the other regimes modeled on it were substantially abandoned as well.

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[5] Use of ex-ante rules or presumptions of illegality tend to work best when economic evidence tells us that the conduct at issue rarely yields any consumer benefits and is likely to cause competitive harm. *See, e.g.*, WRIGHT ET AL., *Presumptions in Merger Review: Global Antitrust Institute Comment on the DOJ-FTC Request for Information on Merger Enforcement* (Geo. Mason L. & Econ. Rsch. Paper No. 22–15, Apr. 21, 2022), https://ssrn.com/abstract=4089943; Bruce H. Kobayashi & Joshua D. Wright, *Antitrust and Ex-Ante Sector Regulation, in* THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY (Joshua D. Wright & Douglas H. Ginsburg eds., 2020).

[6] The ICC controlled entry and exit of railroads on specific routes, and required prior approval for changes in rates, terms and other conditions of service, as well as consolidations and agreements. Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path From Regulation to Deregulation of America's Infrastructure*, 95 MARQUETTE L. REV. 1151, 1170–71 (2012). This style of regulation became the dominant model for federal and state regulation of a broad variety of other basic economic sectors. ICC authority was gradually extended to motor carriers, inland waterway transportation, petroleum pipelines and, for a brief time, telephone, telegraph and "wireless" (i.e., radio) communication, as well as aviation. New agencies such as the Federal Radio Commission (later the Federal Communications Commission), U.S. Shipping Board (later Federal Maritime Commission), Federal Power Commission (later the Federal Energy Regulatory Commission) and the Civil Aeronautics Authority (later the Civil Aeronautics Board) were created along the same lines to regulate the competitive aspects of telecommunications, ocean shipping, energy and commercial aviation sectors, respectively. Both the structure of these agencies and the substance of their authority were modeled on the ICC.

[7] *Id.* at 1179.

[8] *See generally*, ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (1988) (description and analysis of the failures of *ex ante* sectoral economic regulation in a variety of U.S. industries).

[9] Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. §§ 801–856.

Skepticism regarding ex-ante regulation does not mean that competition concerns that might arise across the potential myriad of industries and uses for AI should be left unchecked. On the contrary, competitive concerns can and should be addressed using case-by-case enforcement. This approach allows prevention and/or remedy of objectively identified anticompetitive conduct while minimizing suppression of competitively benign or neutral conduct.

CONCLUSION

The Commission is justified in examining innovative and dynamic sectors in order to anticipate material competition issues. Given the alternatives available to address such issues, the GAI respectfully suggests that the Commission continue its serious study of AI developments and maintain a "watching brief," while resisting the temptation to predetermine rules for competition at such an early stage in the development of AI. The generality of the EU competition rules has allowed them to be adapted to emerging sectors and evolving business methods in the past. The historical record provides little basis to hope – let alone assume – that any form of prematurely determined competitive limitations will be successful in preventing anticompetitive behavior without imposing excessive error costs. Innovation can be discouraged by excessive, premature or overbearing government involvement in competitive conduct, and as illustrated by U.S. experience with a wide variety of innovative sectors that were subjected to ex-ante economic regulation, errors of administration are both commonplace and extremely difficult to rectify.